THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Newsletter

July — December 2021

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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.

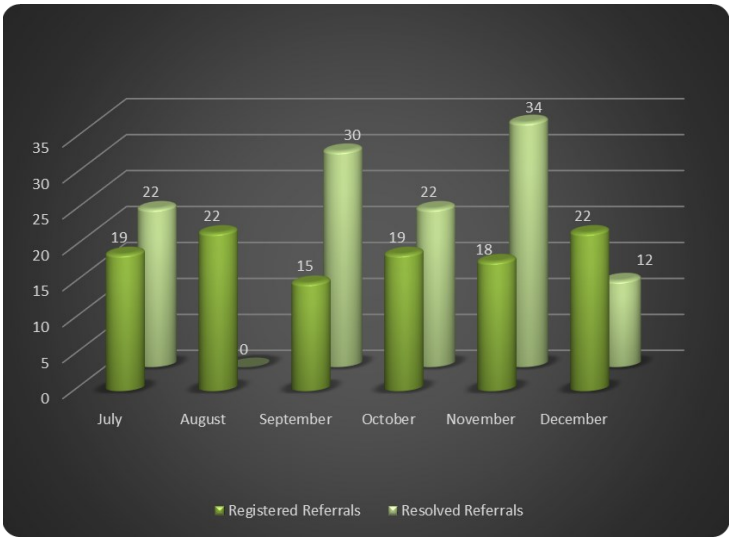
Pursuant to the abovementioned Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution 3 (three) international judges were appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights.

** Following the end of the term of the President of the Constitutional Court and the resignation of a judge in June, the Court is currently composed of 7 (seven) judges.*

Status of cases

During the six-month period: 1 July – 31 December 2021, the Court has received 115 Referrals and has processed a total of 270 Referrals/Cases.
A total of 120 Referrals were decided or 44.44% of all available cases. During this period, 115 decisions were published on the Court's webpage.

The dynamics of received referrals by month (1 July - 31 December 2021)



The following are 12 judgments that the Court rendered during the six month period, 1 July - 31 December 2021:

- Judgment in Case KI 175/19, submitted by: Ismajl Zogaj. The filed referral requested the constitutional review of Notification [KMLC. No. 129/2019] of the State Prosecutor of 13 August 2019, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo, of 24 May 2019 and Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva, of 2 February 2018 .
- Judgment in Case KI 01/20, submitted by: Momir Marinković. The filed referral requested the constitutional review of the Judgment [AC-I-17-0074-A123] of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 8 October 2019.
- Judgment in Case KI 82/21, submitted by: Municipality of Gjakova. The filed referral requested the constitutional review of Judgment [UPP-APP. no. 1/2020] of the Supreme Court of the Republic of Kosovo, of 28 October 2020.
- Judgment in Case KO 61/21, submitted by: Slavko Simić and 10 other deputies of the Assembly of the Republic of Kosovo. The filed referral requested the constitutional review of the Decision [No. 08/V-005] of the Assembly of the Republic of Kosovo, of 22 March 2021, on the Election of the Government of the Republic of Kosovo.
- Judgment in Case KI 100/21, submitted by: Moni Commerce L.L.C. The filed referral requested the constitutional review of the Decision [ARJ-UZVP-no. 72/2020] of the Supreme Court of the Republic of Kosovo, of 28 October 2020.
- Judgment in Case KI 01/21, submitted by: Ajshe Aliu. The filed referral requested the constitutional review of the Judgment [ARJ-UZVP. No. 37/2020] of the Supreme Court of the Republic of Kosovo, of 11 June 2020.
- Judgment in Case KI 189/20, submitted by: IPKO Telecommunications L.L.C. The filed referral requested the constitutional review of the Judgment [ARJ-UZPV. No. 17/2020] of the Supreme Court of the Republic of Kosovo, of 20 January 2020.
- Judgment in Case KI 54/21, submitted by: Kamber Hoxha. The filed referral requested the constitutional review of the Decision [Rev. no. 393/2020] of the Supreme Court of the Republic of Kosovo, of 1 February 2021 .
- Judgment in Case KI 143/20, submitted by: Avdyl Bajgora. The filed referral requested the constitutional review of the Decision [Rev. 558/2020] of the Supreme Court of the Republic of Kosovo, of 22 February 2020.
- Judgment in Case KI 84/21, submitted by: Kosovo Telecom J.S.C. The filed referral requested the constitutional review of the Decision [CML. No. 12/20] of the Supreme Court of the Republic of Kosovo, of 20 January 2021.
- Judgment in Case KO 127/21, submitted by: Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo. The filed referral requested the constitutional review of the the Decision [No. 08-V-029] of the Assembly of the Republic of Kosovo, of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo.
- Judgment in Case KI 120/19, submitted by: Mursel Gashi. The filed referral requested

the constitutional review of Decision [AC-I-17-0568] of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 14 March 2019.

Types of alleged violations

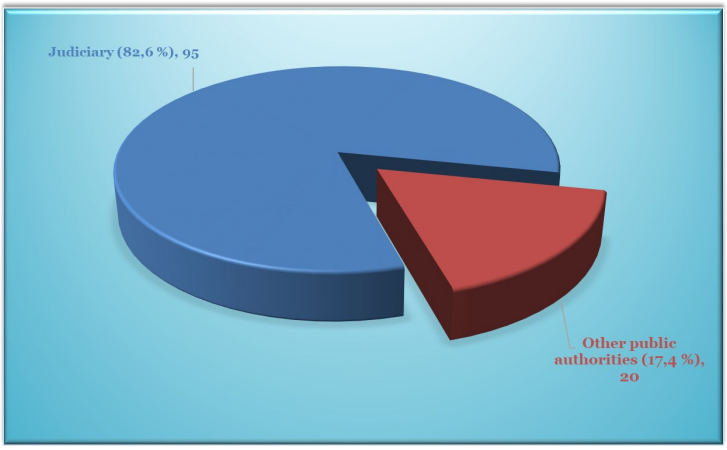
The types of alleged violations in the 115 referrals received during the six-month period, 1 July - 31 December 2021, are the following:

- Article 2 [Sovereignty], 1 case or 0,5%;
- Article 3 [Equality Before the Law], 1 case or 0,5%;
- Article 4 [Form of Government and Separation of Power], 1 case or 0,5%;
- Article 7 [Values], 2 cases or 1,7%;
- Article 12 [Local Government], 2 cases or 3,3%;
- Article 16 [Supremacy of the Constitution], 1 case or 0,5%;
- Article 21 [General Principles], 5 cases or 2,6%;
- Article 22 [Direct Applicability of International Agreements and Instruments], 6 cases or 3,1%;
- Article 23 [Human Dignity], 4 cases or 2,1%;
- Article 24 [Equality Before the Law], 19 cases or 9,8%;
- Article 26 [Right to Personal Integrity], 2 cases or 1%;
- Article 29 [Right to Liberty and Security], 1 case or 0,5%;
- Article 30 [Rights of the Accused], 1 case or 0,5%;
- Article 31 [Right to Fair and Impartial Trial], 63 cases or 32,6 %;
- Article 32 [Right to Legal Remedies], 11 cases or 5,7%;
- Article 33 [The Principle of Legality and Proportionality in Criminal Cases], 1 case or 0,5%;
- Article 34 [Right Not to be Tried Twice for the Same Criminal Act], 1 case or 0,5%;
- Article 35 [Freedom of Movement], 1 case or 0,5%;
- Article 41 [Right of Access to Public Documents], 1 case or 0,5%;
- Article 45 [Freedom of Election and Participation], 3 cases or 1,6%;
- Article 46 [Protection of Property], 19 cases or 9,8%;
- Article 47 [Right to Education], 1 case or 0,5%;
- Article 48 [Freedom of Art and Science], 1 case or 0,5%;
- Article 49 [Right to Work and Exercise Profession], 7 cases or 3,6%;
- Article 50 [Rights of Children], 1 case or 0,5%;
- Article 53 [Interpretation of Human Rights Provisions], 5 cases or 2,6%;
- Article 54 [Judicial Protection of Rights], 14 cases or 17,3%;
- Article 55 [Limitations on Fundamental Rights and Freedoms], 4 cases or 2,1%;
- Article 65 [Competencies of the Assembly], 1 case or 0,5%;
- Article 101 [Civil Service], 2 cases or 0,1%;
- Other violations, 8 cases or 4,1%;

Alleged violators of rights

- 95 Referrals or 82,6 % of Referrals refers to violations allegedly committed by court's decisions;
- 20 Referrals or 17,4 % of Referrals refers to decisions of other public authorities;

Alleged violators of rights
(1 July - 31 December 2021)



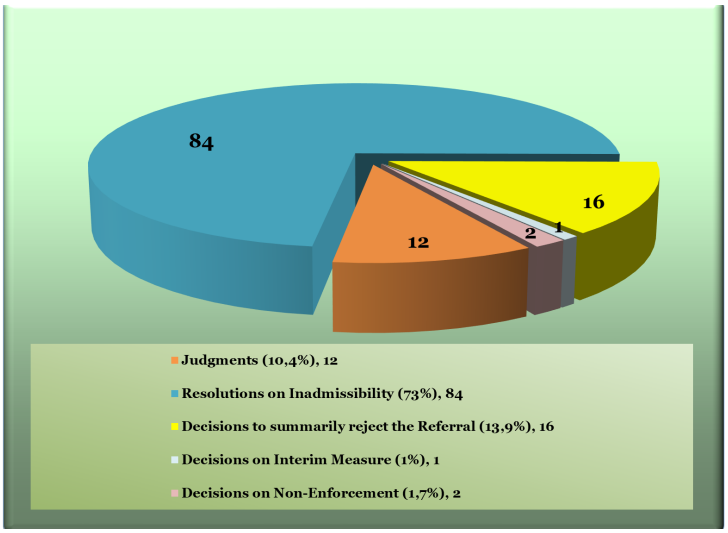
Sessions and Review Panels

During the six-month period: 1 July - 31 December 2021, the Constitutional Court held 28 plenary sessions and 150 Review Panels, in which the cases were resolved by decisions, resolutions and judgments.
During this period, the Constitutional Court has published 115 decisions.

The structure of the published decisions is the following:

- 12 Judgments (10,4%);
- 84 Resolutions on Inadmissibility (73%);
- 16 Decisions to summarily reject the Referral (13,9%);
- 1 Decision on Interim Measure (1%);
- 2 Decisions on Non-Enforcement (1,7%);

Structure of decisions
(1 July - 31 December 2021)

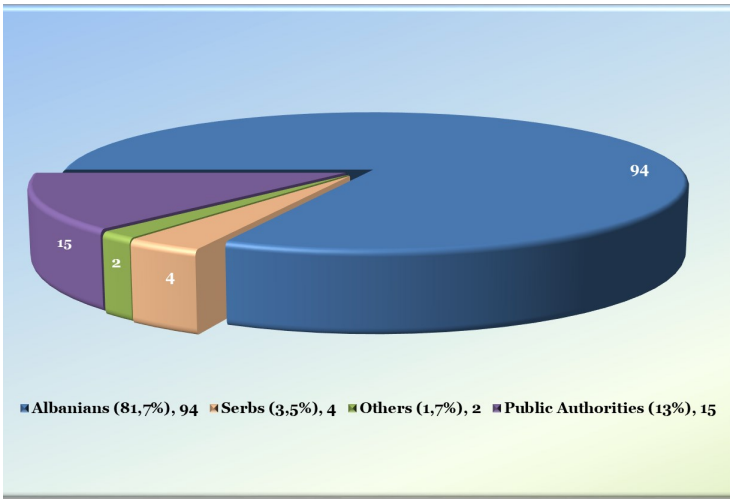


Access to the Court

The access of individuals to the Court is the following:

- 94 Referrals were filed by Albanians, or 81,7%;
- 4 Referrals were filed by Serbs, or 3,5%;
- 2 Referrals were filed by other communities, or 1,7%;
- 15 Referrals were filed by other public authorities, or 13%;

Ethnic structure of the Applicants
(1 July - 31 December 2021)



2 July 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Ombudsperson of the Republic of Turkey, Mr. Şeref Malkoç, accompanied by the Ambassador of Turkey to Kosovo, Mr. Çağrı Sakar.
After thanking him for the visit, President Caka – Nimani initially informed Mr. Malkoç about the work of the Court so far, the nature of the referrals submitted by individuals, the process of receiving referrals and reviewing cases in pandemic situation, as well as about the implementation of Court decisions by state authorities. She further emphasized the important role that the Constitutional Court of Kosovo has played in its decision-making over the years, especially in the protection of constitutionality in the country and the promotion of human rights, as well as the excellent cooperation relations with many counterpart courts in the region and beyond, including the Constitutional Court of Turkey.
For his part, after wishing success to Mrs. Caka – Nimani in her new position as President of the Constitutional Court, Mr. Malkoç expressed the will for the exchange of mutual experiences and for close institutional cooperation in the field of protection of human rights.

5 July 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Head of the EU Office in Kosovo/EU Special Representative, Mr. Thomas Szunyog.

The topic of joint discussion was, among others, the role and decision-making of the Constitutional Court in the democratic development processes of the country, the importance of implementing court decisions at every level, as well as the need to adopt the experience and best practices of the European countries in the field of constitutional judiciary.
President Caka – Nimani used the opportunity to express her gratitude and appreciation to Mr. Szunyog for the continuous support that the European institutions have given to the Constitutional Court of Kosovo over the years, in consolidating its professional and infrastructural capacities through the implementation of joint projects.
After congratulating Mrs. Caka – Nimani for her election as head of the Constitutional Court, Mr. Szunyog confirmed that providing assistance to Kosovo institutions in the field of rule of law remains a priority for the European Union.

8 July 2021

Following the meetings with local institutional leaders and international representatives after taking office as President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani met today with the President of the Assembly of the Republic of Kosovo, Mr. Glauk Konjufca.

Among other things, in the meeting were discussed the continuation of good institutional cooperation between the Constitutional Court and the Assembly of

Kosovo, the challenges in the work of the Constitutional Court, as well as the advancement of the legal framework for further consolidation of the constitutional judiciary in the Republic of Kosovo.
The two presidents underlined the importance of respecting the separation of powers, further emphasizing the necessity of institutional cooperation in protection of constitutionality and strengthening the rule of law in the country.

12 July 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, hosted today in a meeting the Ambassador of the United States of America to Kosovo, Mr. Philip S. Kosnett.
After thanking him for the visit, President Caka-Nimani notified Ambassador Kosnett on the work of the Court so far as well as her priorities during her three-year mandate as the head of the Constitutional Court.
She expressed gratitude for the support that the US Government has provided to the Constitutional Court through various projects for its institutional consolidation since its establishment and stressed the need for this support to continue in the future.
After wishing success to Mrs. Caka – Nimani as President of the Court, Ambassador Kosnett has pledged to continue the support of the United States for the Constitutional Court and other institutions in the country, in order to strengthen the independent judiciary and the rule of law in the Republic of Kosovo.

14 July 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the President of the Supreme Court of the Republic of Kosovo, Mr. Enver Peci.
During the meeting, President Caka-Nimani and President Peci discussed, among other things, the possibilities of intensifying cooperation between the institutions they lead, the common challenges in efforts to improve communication with the public, as

well as the possibilities of increasing transparency in the work of both courts.

15 July 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani received in a meeting the Chair of the Kosovo Judicial Council, Mr. Albert Zogaj.
After mutual wish for success in fulfilling their duties in their new positions, President Caka-Nimani and Chair Zogaj focused the discussion on the challenges of the Kosovo judicial system, as well as the objectives of primary importance for strengthening and well-functioning of justice system.

Both parties agreed on the need to further cultivate good relations of cooperation between the Constitutional Court and the Kosovo Judicial Council, as well as the possibilities of conducting joint professional activities with courts of other levels in the country.

4 August 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Ambassador of the

Netherlands to Kosovo, Mrs. Carin Lobbezoo.
The current challenges in the work of the Court and the priorities in the work during the three-year mandate of the President Caka – Nimani, were just some of the topics that were addressed in the joint meeting. President Caka-Nimani further discussed the Court's continued commitment to advancing and consolidating its case law, as well as raising the standards of adjudication and the quality of its decisions.
Ambassador Lobbezoo wished success to President Caka-Nimani in fulfilling her duties as the head of the Constitutional Court and emphasized that strengthening the rule of law in Kosovo is also in the interest of the Government of the Netherlands.

13 August 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Ambassador of the Republic of Albania to Kosovo, Mr. Qemal Minxhozi.

After welcoming him, President Caka-Nimani notified Ambassador Minxhozi about the work of the Court so far, the efforts being made to increase efficiency at work and the latest developments in the constitutional judiciary of Kosovo. She assessed the mutual relations with the Constitutional Court of Albania as excellent and confirmed the bilateral readiness to intesify cooperation through joint projects.
Ambassador Minxhozi expressed his congratulations to Mrs. Caka – Nimani for assuming the office of President of the Constitutional Court and stressed that he will always remain committed to deepening cooperation between the institutions of the Republic of Kosovo and the Republic of Albania.

17 August 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, hosted in a meeting the Ambassador of the United Kingdom to Kosovo, Mr. Nicholas Abbott.
In the meeting, they discussed, among others, about the work and functioning of the Court after the departure of two constitutional judges in June this year, as well as the importance of preserving its functional independence, as a necessary precondition for the protection of constitutionality in the country.

President Caka – Nimani also highlighted the importance of increasing transparency at work, advancing professional capacity and better communication of the Court with the public, on which occasion she expressed her gratitude for the assistance that the Government of the United Kingdom has provided to the Constitutional Court of Kosovo in this regard.
Ambassador Abbott, after wishing President Caka – Nimani success in fulfilling her obligations in her new position, underlined the importance of preserving the institutional integrity of the Constitutional Court and committed to continue the support in the future as well.

13 September 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Head of the Council of

Europe Office in Prishtina, Mr. Frank Power.
The continuation of the support that the Council of Europe Office in Pristina has provided to the Constitutional Court so far, especially in professional training regarding the implementation of the European Convention on Human Rights and the approximation of case law of the Court with that of the European Court of Human Rights were discussed among other things in the joint meeting.
President Caka – Nimani and Mr. Power also exchanged views on the objectives of primary importance for strengthening the independent judiciary in the country, emphasizing the importance of improving communication with the public and increasing transparency at work.

30 September 2021

At the invitation of the Constitutional Court of the Republic of Albania, a delegation of the Constitutional Court of the Republic of Kosovo, led by the President of the Court, Mrs. Gresa Caka – Nimani, is paying a two-day official visit to Albania.

During her stay in Tirana, President Caka – Nimani and her Albanian counterpart, Mrs. Vitore Tusha, signed yesterday in a solemn ceremony the Memorandum of Cooperation between the Constitutional Court of Kosovo and the Constitutional Court of Albania, in order to continue the cooperation of the two courts for a new five-year period, in areas of mutual interest. The Memorandum of Cooperation envisages, among other things, the development of bilateral cooperation programs in order to adopt the best European practices of constitutional law and of the European Court of Human Rights, to strengthen the professional capacities of judges and support staff, increase the quality of decisions and improve communication with the public.
With the support of the German foundation "Hans Siedel Stiftung", following the visit to Albania, the judges of the two constitutional courts today participated in the roundtable on the topic: "Disputes of competencies between governments, as well as between central government and local government – respective practices according to constitutional jurisprudence".

25 October 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka-Nimani, received in an introductory meeting the new Director of the USAID Mission in Kosovo, Ms. Zeinah Salahi.
During the meeting, President Caka – Nimani briefly informed Ms. Salahi about the priorities in her mandate as President of the Constitutional Court, the challenges faced in the work so far and the efforts that are being made to advance the professional and infrastructural capacities of the Court, with the assistance of the international donors as well.
After expressing her gratitude to the USAID Mission in Kosovo for the support provided to the Constitutional Court over the years, President Caka-Nimani made a more detailed presentation on the projects included in the new Strategic Plan of the Court, with particular emphasis on the consolidation of the case law and the quality of decisions according to the European standards, advancing the electronic case management system and improvement of communication with the

public. Ms. Salahi, for her part, pledged to continue USAID support for the Constitutional Court, as well as other institutions in the country, in order to strengthen the rule of law and protect human rights.

9 November 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the Ambassador of France in Kosovo, Mrs. Marie-Christine Butel.

The work of the Constitutional Court so far, the current challenges in its functioning and the priorities in the work over the next year, were among the topics discussed at the joint meeting. President Caka-Nimani further briefed Ambassador Butel on the good relations of cooperation between the Constitutional Court and counterpart courts in the region and beyond, as well as on the Court's efforts for membership in various international organizations and initiatives.

Ambassador Butel confirmed on her part the commitment of the French Government to continue to support the institutions of Kosovo in their efforts to strengthen the rule of law and achieve international standards in the field of human rights.

20 November 2021

The President of the Constitutional Court of the Republic of Kosovo, Ms. Gresa Caka – Nimani, has spent several days in an official visit to the United States.

On Friday, November 19, 2021, President Caka-Nimani met with the U.S. Department of Justice's Deputy Assistant Attorney General and Counselor for International Affairs Mr. Bruce C. Swartz, in Washington, DC. After expressing her gratitude for the continuous assistance that the United States has provided to Kosovo and its institutional development over the years, particularly in the area of rule of law, President Caka-Nimani informed Mr. Swartz with respect to the achievements and the challenges pertaining to the constitutional justice.

Both sides further exchanged their views on the most effective mechanisms for strengthening the rule of law in the Republic of Kosovo and the importance of consolidating the rule of law in any democratic country.

During her visit in Washington, President Caka-Nimani also met with senior officials in the State Department and the United States Agency for International Development as well as the U.S. representatives in the Venice Commission.

President Caka-Nimani began her visit to the United States last week participating in the International

Conference on "Inalienable Rights and the Traditions of Constitutionalism", organized by the Kellog Institute for International Studies at the University Notre Dame, which was attended by judges and presidents of constitutional and supreme courts of states around the World, as well as prominent international academics and human rights experts. Being one of the main conference panel members, President Caka – Nimani, made a detailed presentation pertaining to Kosovo's constitutional tradition and protection of human rights and fundamental freedoms in accordance with the principles embodied in the Universal Declaration of Human Rights and the European Convention on Human Rights.

At the invitation of the Faculty of Law within the University of Notre Dame, President Caka-Nimani also gave a lecture on the history and the constitutional tradition of the Constitutional Court of Kosovo.

9 November 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, participated in the roundtable with the topic: "Women in Commercial Justice", organized by the American Chamber of Commerce in Kosovo, in cooperation with the USAID Commercial Justice Program, at "Hotel International Prishtina" in Prishtina.

In her speech before the audience composed of women representatives of the justice system in the Republic of Kosovo, as well as in the field of business, President Caka – Nimani, among other things, said that the full integration of women in public life and in the private sector continues to be challenged with structural, social, economic and cultural barriers.

President Caka – Nimani further stressed that, "it *is no coincidence that the drafters of the Constitution have regulated equality before the law at the preamble level*", qualifying gender equality as a fundamental value and as an essential precondition for the sustainable and democratic development of society.

She considered the enforcement of final court decisions as extremely important for commercial justice, as well as the improvement of the mechanisms through which women will have easier access to justice, as well as greater participation in decision-making.

1 December 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting a delegation composed of the Ombudsperson of Kosovo, Mr. Naim Qelaj, the Ombudsperson of Albania, Ms. Erinda Ballanca, the Ombudsperson of North Macedonia, Mr. Naser Zyberi, and the Commissioner of Albania for Protection from Discrimination, Mr. Robert Gajda.

After informing the guests about the consolidation of the case law of the Constitutional Court of Kosovo in line with international standards for the protection of human rights, President Caka – Nimani noted the importance of the stability of the case law of courts in the delivery of justice to citizens, respecting the principle of legal certainty.

During the meeting, all parties confirmed the noble mission of the constitutional courts and of the ombudsperson institutions in ensuring the democratic functioning of the state mechanisms for the protection of human rights, in which case they exchanged mutual experience regarding constitutional complaints and problems which the citizens of different categories in their countries face with.

At the meeting the reform and strengthening of the state legal framework regarding human rights, as well as the continuous information of citizens regarding their guaranteed rights and freedoms were also assessed as of special importance.

7 December 2021

A delegation of the Constitutional Court of the Republic of Kosovo, headed by the President of the Court, Mrs. Gresa Caka – Nimani, stayed in Skopje for

an official visit to the Constitutional Court of North Macedonia. During her stay in the Macedonian capital, President Caka – Nimani and her counterpart, Mrs. Dobrila Kacarska, discussed together with the judges of both courts the modalities of further intensification of institutional cooperation in areas of mutual interest.

Both sides agreed on the next steps to be taken towards deepening cooperation, with a special focus on the exchange of experiences towards advancing the relevant case law.

Following the visit, judges from both courts participated in the joint workshop on the protection of the constitutional freedoms and rights in the Constitutional Court of Kosovo and the Constitutional Court of North Macedonia, with special reference to the implementation of case law of the European Court of Human Rights.

15 December 2021

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting a delegation from the Republic of Albania composed of the Rector of the University of Tirana, Prof. Dr. Artan Hoxha and the High Inspector of Justice in the Republic of Albania, Mr. Artur Metani, accompanied by the Dean of the Faculty of Law at the University of Prishtina "Hasan Prishtina", Prof. Dr. Avni Puka.

The importance of continuous communication between the academic and institutional spectrum, the unification of the language standard used in drafting legal documents and the need for ongoing reforms in the legal framework of both countries, were among the topics discussed at the joint meeting.

President Caka – Nimani further informed the guests from Tirana about the excellent relations of cooperation with the regional constitutional courts, especially with the Constitutional Court of Albania.

Rector Hoxha stressed the importance of organizing the institutional practice of the new generations of lawyers in the field of constitutional law and the need for more investment in this regard by the governments of both countries, while Inspector Metani underlined the importance of strengthening independent state mechanisms to ensure the integrity of judges and prosecutors.

Judgment

KO 61/21

Applicant

Slavko Simić and 10 other deputies of the Assembly of the Republic of Kosovo

Request for constitutional review of Decision [No. 08/V-005] of the Assembly of the Republic of Kosovo of 22 March 2021 on the Election of the Government of the Republic of Kosovo

In Referral KO61/21, the subject matter of review was the constitutional review of the Decision [no. 08/V-005] of the Assembly of the Republic of Kosovo, of 22 March 2021, on the election of the Government of the Republic of Kosovo.
The Applicants before the Court alleged that the Decision on the election of the Government is not in compliance with Article 96 [Ministries and Representation of Communities] of the Constitution, because the Minister of Local Government Administration was not elected after consulting a majority of deputies representing non-majority communities in the Assembly of Kosovo.
The main issue in this case relates to the manner in which the ministers representing the non-majority communities in the Government are appointed. Before the Court, the manner of appointing one (1) Minister who is mandatorily appointed by the Serb community was not challenged; or one (1) Minister who is mandatorily appointed by other non-majority communities, but the appointment of the "third" Minister in the Government by non-majority communities, which is a constitutional obligation in case the Government consists of more than twelve (12) Ministers. In this regard, the Applicants alleged that the appointment of the "third" Minister in the Government requires consultation/approval by a majority of all deputies representing non-majority communities in the Assembly, namely by at least eleven (11) out of twenty (20) deputies representing the non-majority communities.
The Constitutional Court stated that, for the purposes of the constitutionality of the composition of the Government, based on Article 96 of the Constitution, the Government should have at least one (1) Minister from the Serb community and one (1) Minister from other non-majority communities. The manner of election of these Ministers varies depending on whether the candidate nominated for Minister is a deputy of the Assembly or not. In order to appoint a candidate for Minister from among the deputies of the Assembly, consultation with parties, coalitions or groups representing non-majority communities in Kosovo is necessary. Whereas, for the appointment of a candidate for Minister outside the ranks of the deputies of the Assembly, the formal approval of the majority of the deputies of the Assembly, who belong to parties, coalitions, civic initiatives and independent candidates, who have declared that they represent the community in question is necessary.
The Constitutional Court also stated that the Constitution stipulates that if the composition of a Government has more than twelve (12) Ministers, the Government must also have a third Minister, "*representing a Kosovo non- majority Community*". The Court further emphasized that, with regard to the third Minister, the Constitution provides for the discretion of the candidate for Prime Minister regarding the ranks of the respective communities, from which a third Minister may be elected, without necessarily stipulating that this Minister should be proposed/approved from the deputies representing the Serb community or from the deputies representing other non-majority communities, but requesting that the same procedure be followed, namely consultation/ approval of the "*community in question*", depending on whether the respective candidate is a deputy of the Assembly or not.
In the circumstances of the present case, the Court noted that the "third" minister from the non-majority communities, namely the Minister of Local Government Administration, was a deputy of the Assembly elected in the elections of 14 February 2021, declaring that he represents one of the other non-majority communities in the Assembly within the meaning of Article 64 [Structure of the Assembly] of the Constitution and who is proposed for this position in consultation with the deputies representing other non-majority communities in the Assembly. Considering that the respective candidate was an elected member of the Assembly, formal approval by the community in question is not a constitutional obligation, while before the Court there was no claim that the deputies representing other non-majority communities were not consulted in the proposal of this candidate for Minister, despite the fact that the Court had enabled them to submit their comments on the Referral submitted by the Applicants.
The Court finally clarified that based on Article 96 of the Constitution, the consultation or the approval of the deputies representing the "*community in question*" is mandatory, namely the deputies representing the Serb community or representing other non-majority communities, depending on whether the respective candidate is a deputy of the

Assembly or not, and not the majority of all deputies representing non-majority communities.
In the circumstances of the present case, the candidate nominated for Minister was a member of the Assembly and consequently his formal approval was not a constitutional obligation, while before the Court there was no claim that the obligation to consult the "*community in question*" had not been exhausted. Therefore, the Court found that the challenged Decision of the Assembly of Kosovo on the election of the Government was not rendered in contradiction with paragraphs 3 and 5 of Article 96 of the Constitution.

Judgment

KI 01/21

Applicant

Ajshe Aliu

Request for constitutional review of the Judgment [ARJ-UZVP. No. 37/2020] of the Supreme Court of Kosovo, of 11 June 2020

The circumstances of the respective case were related to the alleged right of a biological mother to notify/ contact her child given up for adoption and who has already reached the age of majority, in the specifics clarified in the published Judgment. The issues involved in the Referral relate, among other things, to the right for private life, and the relevant principles and exceptions, as guaranteed by the respective articles of the Constitution and the European Convention on Human Rights, and the relevant case law of the Court and of the European Court of Human Rights.
More specifically, it is noted from the case file that the Applicant, on 1 March 2016, submitted a request at the Centre for Social Work within the Municipality of Prishtina, by which she had requested that her biological adult child, whom she had given up for adoption in 1989, to be notified of: (i) the existence of his biological mother; and (ii) her interest in notifying him. The Centre for Social Work responded by stating that (i) there is no legal basis to notify her biological child in relation to his/her adoption; and that (ii) pursuant to paragraph 2 of Article 194 (Principles) of the Family Law of Kosovo, at full age the adoptee has the right of access to all information concerning his adoption and shall on request be provided with personal information about his biological parents.
As a result of the Applicant's request for reconsideration of the response of the Centre for Social Work, the finding of the latter was also confirmed by the Complaints Commission within the Social and Family Policies Department in the Ministry of Labour and Social Welfare. Consequently, the Applicant filed a statement of claim with the Basic Court in Prishtina requesting, among other things, that the Social and Family Policy Department be obliged to inform her biological child about his/her adoption. The Basic Court rejected the Applicant's claim as ungrounded, confirming the above findings of the Centre for Social Work and of the Complaints Commission within the Ministry of Labour and Social Welfare, and finding that based on the legal provisions in force, the Centre for Social Work it is not obliged to inform the child with regard to his/her adoption and that only the adult adoptee has the right to access such data upon his/her request. Subsequently, the Applicant filed an appeal against this Judgment of the Basic Court, with the Court of Appeals, and the latter rejected her appeal as ungrounded, confirming the finding of the first instance court. As a result of the Applicant's request for extraordinary revision of the Judgment of the Court of Appeals filed with the Supreme Court, the latter by the Judgment of 11 June 2020, also rejected the respective request of the Applicant as ungrounded. The Supreme Court by the challenged Judgment has upheld the findings of the Basic Court and of the Court of Appeals, and has concluded that the facts and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child, unless it is required for special reasons and for reasons of public interest.
The Applicant challenged before the Court the abovementioned findings of the Supreme Court, including also those of the first and second instance courts. The essence of the Applicant's allegation before the Court was that the regular courts have violated her right for private life, guaranteed by Article 8 (Right to respect for private and family life) of the European Convention on Human Rights, by not to approving her request for notifying her biological child with regard to the existence of his/her biological mother and the Applicant's interest in notifying him/her. As a result of the same, she had also alleged: (i) violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights due to the non-reasoning of the court decision; and (iii) violation of Article 7 of the Convention on the Rights of the Child.
In assessing the Applicant's allegations, the Court focused on the guarantees enshrined in Article 36 (Right to Privacy) of the Constitution in conjunction

with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights, and in this context, first elaborated the general principles deriving from the case law of the Court and of the European Court of Human Rights, and then, applied the same in the circumstances of the present case.

The Court noted that the Applicant's request, by which she had expressed her interest in notifying her child given up for adoption in 1989, contains elements that belong to an important part of her identity as biological mother and which affect her right for private life in terms of the notion of "her private life" guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with paragraph 1 of Article 8 of the European Convention on Human Rights. Having said that, given that this allegation affects her right for private life, the Court recalled that, according to its case law and that of the European Court of Human Rights, during the review of cases to find whether in a particular case there was a restriction and violation of human rights and freedoms guaranteed by the Convention, applies the same concepts, respectively if the respective restriction or intervention: (i) is "in accordance with the law" or "prescribed by law"; (ii) has "pursued a legitimate aim"; and (iii) is "necessary in a democratic society."

In this context, the Court in the circumstances of the present case, held that the decisions of the regular courts, by which the Applicant's specific request was rejected: (i) were based on law; (ii) had pursued a legitimate aim – the protection of the rights and freedoms of the adopted child and his/her adoptive family; and (iii) had pursued a fair balance between the interests of the adopted child, already of adult age, and the respect of his/her right for private and family life within his/her adoptive family.

Consequently, the Court held that the challenged Judgment of the Supreme Court does not involve violation of her right for private life guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with paragraph 1 of Article 8 of the European Convention on Human Rights. Whereas, concerning the allegation of violation of the right to fair and impartial trial, as a result of the lack of reasoned court decision, the Court, applying the general principles established with the case law of the Court and that of the European Court of Human Rights, recalling that on the basis of the same and as far as it is relevant to the circumstances of the present case, the extent to which the obligation to give reasons applies, may vary depending on the nature of the decision and should be determined in the light of the circumstances of the present case, found that in the Applicant's circumstances, the challenged Judgment of the Supreme Court meets the criteria and standard for a reasoned court decision, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention.

Finally, based on the circumstances of the present case and based on the explanations given in the published Judgment, the Court found that the challenged Judgment of the Supreme Court is in accordance with (i) Article 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights; and also (ii) Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights.

Judgment

KI 84/21

Applicant

Kosovo Telecom J.S.C.

Request for constitutional review of Decision [CML. No. 12/20] of the Supreme Court of Kosovo, of 20 January 2021

The circumstances of the this case relate to the Support Services Agreement of the Virtual Mobile Network Operator (Agreement), concluded between the Applicant, namely Kosovo Telecom and "Dardafon" Company, regarding the provision of mobile telephony services. The abovementioned agreement resulted in a dispute between the parties and as a result, the "Dardafon" company initiated three (3) different proceedings, as follows: (i) the proceedings before the Arbitration Tribunal at the International Chamber of Commerce (ICC) regarding the settlement of the dispute from the above-mentioned Agreement, which resulted in the issuance of a Decision by which, among other things, the Applicant was obliged to pay a certain amount of money to the company "Dardafon" due to non-compliance with the Agreement; (ii) the proceedings concerning the recognition of the ICC Arbitral Tribunal Decision, which resulted in the recognition of this Decision by the Basic Court, which was also confirmed by the Court of Appeals and consequently became final; and (iii) the proceedings relating to the enforcement of the Decision of the ICC Arbitral Tribunal. The subject matter of the case before the Court relates only to the third procedure,

namely the procedure related to the enforcement of the Decision of the ICC Arbitration Tribunal. The dispute in the enforcement procedure started after the Applicant filed an objection with the Basic Court in Prishtina against the Enforcement Order issued by the Private Enforcement Agent at the request of the company "Dardafon". Between the parties in the proceedings conducted before the Basic Court was disputed, among others, the total amount of the main debt, namely the amount which would be subject to the enforcement. Therefore, the Basic Court rendered a Conclusion by which it obliged the company "Dardafon", within three (3) days, to specify the proposal for enforcement regarding the total amount of the main debt. In response to the abovementioned Conclusion, the company "Dardafon" submitted to the Basic Court the completion of the proposal for enforcement and an own expertise. These documents were submitted by the Court to the Applicant, who received them on 6 July 2020, while his response to the Court was submitted the next day, namely, on 7 July.

However, on 6 July 2020, the Basic Court rendered its decision, by which rejected as ungrounded the Applicant's objection regarding the amount of 24,684,003.15 euro, while it had partially approved as grounded the objection regarding the amount of 315,99.85 euro. Against this Decision, the Applicant filed an appeal with the Court of Appeals alleging that the Basic Court, among other things, did not take into account his submission at all, because the Decision of the Basic Court was rendered one day earlier, on 6 July 2020, without waiting and without reviewing the Applicant's response to the specification of the enforcement proposal of the company "Dardafon" and other documents, including expertise, in violation of his rights guaranteed by law and in violation of the principle of "equality of arms" guaranteed by the Constitution. The Court of Appeals rejected as ungrounded the Applicant's appeal, not addressing the allegation regarding the inability of the Applicant to declare the specification of the enforcement proposal of the company "Dardafon". The State Prosecutor's Office filed a request for protection of legality with the Supreme Court. The latter also rejected the request as ungrounded.

The Applicant before the Constitutional Court, inter alia, alleged that the decisions of the regular courts in the enforcement proceedings were rendered in violation of the principle of "equality of arms" guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights because (i) the Basic Court denied the Applicant the right to present his opinion regarding the specification of the debt of the company "Dardafon" and additional documents and evidence, including expertise, because the Decision of the Basic Court was rendered on the day when the Applicant received the relevant documents and the court did not wait even one day for the Applicant's response; and (ii) the Court of Appeals did not address at all the Applicant's allegation of a violation of the principle of "equality of arms".

In examining the Applicant's allegations, the Court first elaborated on the principles of its case law and the European Court of Human Rights regarding the principle of "equality of arms" and then applied them to the circumstances of the present case. The Court, inter alia, recalled that, according to the principle of "equality of arms", it is inadmissible for a party to the proceedings to submit remarks or comments before the regular courts, which aim at influencing the decision-making of the court, without the knowledge of the other party or without giving the other party the opportunity to respond to them. The Court also noted that, the procedural flaws in the first instance could be remedied through an appeal, provided that the institution deciding on the respective appeal has "full jurisdiction" for the case before it.

The Court, after analyzing the case file and as explained in detail in the published Judgment, found that: (i) in violation of the principle of "equality of arms", the Basic Court denied the Applicant the right to state his opinion on the submission of the company "Dardafon" regarding the specification of the proposal for enforcement and additional documents and evidence, since the Decision of the Basic Court was rendered on the same date when the Applicant received the documents and without waiting for his response; and (ii) the Supreme Court, and in particular the Court of Appeals, which although had "full jurisdiction" to decide the case, including the competence to remedy the shortcomings of the proceedings before the Basic Court, failed to address the latter, and consequently not remedying the violation of the principle of "equality of arms".

Therefore and based on the explanations given in the published Judgment, the Court found that the challenged Decision of the Supreme Court and the Decision of the Court of Appeals were rendered contrary to the procedural guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, remanding it to the Court of Appeals, given that the latter, as explained in the Judgment, has "full jurisdiction" to address the procedural shortcomings which resulted in challenging the Decision of the Basic Court.

Judgment

KO 127/21

Applicant

Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo

Request for constitutional review of Decision [No. 08-V-029] of the Assembly of the Republic of Kosovo of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo

In the circumstances of this case, the Court has assessed the constitutionality of the Decision [No. 08-V-029] of 30 June 2021, of the Assembly of the Republic of Kosovo, by which five (5) members of the Independent Oversight Board for the Civil Service of Kosovo have been dismissed. The Referral for constitutional review of this act has been submitted to the Court by eleven (11) deputies of the Assembly, based on the authorizations defined by paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution. In assessing the constitutionality of the challenged Decision of the Assembly, the Court unanimously decided that (i) the Referral is admissible; (ii) Decision [no. 08/V-029] of 30 June 2021 of the Assembly is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution; (iii) to repeal the abovementioned Decision; (iv) to repeal the Interim Measure determined by the Court Decision of 21 October 2021; and (v) to reject the request for a hearing.

The Court recalled that on 30 June 2021, based on the recommendation of the Assembly's Committee on Public Administration, the Assembly voted for the dismissal of five (5) members of the Independent Oversight Board. Challenging the constitutionality of this act, the Applicants alleged before the Court that the challenged Decision of the Assembly infringes the independence of the Board guaranteed by Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution, emphasizing that the Board, as an independent constitutional body, cannot be subject to interference by the Assembly and that for the collective dismissal of members of the Independent Oversight Board, none of the legal criteria set out by the Law on the Independent Oversight Board for the Civil Service of Kosovo have been met.

The counter-arguments submitted to the Court by the respective deputy of the Parliamentary Group of Lëvizja Vetëvendosje!, in essence, emphasize that the Assembly in issuing the challenged Decision has acted in accordance with its oversight function, whilst the case raised before the Court does not involve constitutional matters, because the Constitution does not determine the procedure for the election and dismissal of members of the Independent Oversight Board.

In assessing the relevant arguments and counter-arguments and the circumstances of the case, the Court (i) initially elaborated on the status of the Independent Oversight Board for the Civil Service and its members, with reference to the Constitution, applicable laws and in the case law of the Court; (ii) elaborated on the competence of the Assembly and the relevant restrictions on the exercise of the oversight function of the Independent Oversight Board; and finally (iii) applied these principles in assessing the constitutionality of the challenged Decision of the Assembly.

With regard to the institutional independence of the Independent Oversight Board, the Court, *inter alia*, noted that (i) the Independent Oversight Board is an institution established by Article 101 of the Constitution; (ii) the Constitution has defined to the Board the status of an *"independent"* institution in the exercise of its constitutional function, respectively, to *"ensure the respect of the rules and principles governing the civil service"*; (iii) based on the consolidated case law of the Court, it was determined that the Independent Oversight Board enjoys the prerogatives of a *"tribunal"* in terms of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights and that the decisions of the Independent Oversight Board are *"final, binding and enforceable"*; and (iv) the control of the legality of the decisions of the Independent Oversight Board is done by the initiation of an administrative dispute in the competent court, consequently, they are subject to the control of the judicial power.

With regard to the independence of the members of the Independent Oversight Board, the Court noted that (i) the independence of the Independent Oversight Board in exercising its constitutional function to *"ensure the respect of the rules and principles governing the civil service"* also implies the independence of its members in decision-making; and (ii) for the same purpose, the Assembly itself, by the Law on the Independent Oversight Board for the Civil Service, has determined the immunity of members of the Independent Oversight Board from prosecution, civil lawsuit or dismissal *"regarding the decision-making within the constitutional and legal functions of the Board"*; respectively, for the point of views expressed, the manner of voting or the decisions

taken during their work as members of the Independent Oversight Board. With regard to the competence of the Assembly to oversee the Independent Oversight Board, the Court noted that (i) the competence of the Assembly to oversee the work of the Government and other public institutions, which, in accordance with the Constitution and laws, report to the Assembly is defined in paragraph 9 of Article 65 [Competencies of the Assembly] of the Constitution; and (ii) in the case of the Independent Oversight Board, this competence of the Assembly is further detailed in the Law on the Independent Oversight Board for the Civil Service and includes, inter alia, also the authorization of the Assembly to terminate the mandate of the members of the Board in the circumstances set forth in Article 15 (Termination of the Board's member mandate) of this Law. However, the Court further noted that, the exercise of the competence to terminate the mandate precludes the termination of the same due to the "decision-making" of the members of the Independent Oversight Board, because such circumstances, (i) would infringe the institutional independence of the Board and its members, as it is defined by paragraph 2 of Article 101 of the Constitution; and (ii) would be contrary to the Assembly's own determination that Board members enjoy immunity from dismissal for decision-making, as defined by the relevant provisions of the Law on the Independent Oversight Board for the Civil Service.

In assessing the constitutionality of the challenged Decision of the Assembly, the Court recalled that the same is referred to items 1.3 and 1.1 of paragraph 1 of Article 15 of the Law on the Independent Oversight Board for the Civil Service. The first, namely item 1.3 of Article 15 of this Law, defines the possibility of termination of the mandate "in case of exercising duties that are not in accordance with his function". However, the challenged decision of the Assembly does not contain any fact/reasoning as to how five (5) members of the Independent Oversight Board collectively may have exercised their duties of member of Independent Oversight Board in incompatibility with their function. Whereas, the second, respectively item 1.1 of Article 15 of the Law on the Independent Oversight Board for the Civil Service, determines the possibility of termination of the mandate for "violation of this law's provisions". In the context of the latter, the challenged decision of the Assembly states that, "it is assessed that the Board has acted in violation of Article 12 of the Law on the IOBCSK, because it has not implemented the applicable laws during decision-making."

The Court emphasized that the challenged decision of the Assembly does not refer to any fact/reasoning in support of the alleged violation of this provision by five (5) members of the Independent Oversight Board collectively, except for emphasizing the "decision-making" of the members of the Independent Oversight Board. This moreover results from the fact that the challenged Decision was preceded by a series of actions and questions of the relevant Committee of the Assembly addressed to the Independent Oversight Board regarding the decision-making in respective cases. In this context, the Court reiterated that (i) the Assembly has the constitutional competence to oversee the Independent Oversight Board, including the possibility of terminating the mandate of its members in the cases provided for in the Law on the Independent Board for the Civil Service; but that (ii) members of the Independent Oversight Board may not be dismissed solely due to their "decision-making" because pertinent to the same, they have constitutional and legal independence as well as immunity from dismissal, as defined in the law itself adopted by the Assembly. Moreover, based on the same law, the legality of the decisions of the Independent Oversight Board is subject to the control of the judicial power and not the legislative one.

In this context, the Court noted that the Assembly by dismissing (5) five members of the Independent Oversight Board collectively, and without elaborating on any fact based on law, but only on the grounds that the Independent Oversight Board "has not implemented the applicable laws during decision-making", respectively due to their decision-making in respective cases, for which the members of the Independent Oversight Board enjoy independence and immunity from dismissal and which decision-making, moreover, is subject to the control of the judicial power and not the legislative one, has exceeded the limits of the competence to oversee the work of public institutions, defined by paragraph 9 of Article 65 of the Constitution, in violation of the guarantees regarding the independence of the Independent Oversight Board in exercising its function defined by paragraph 2 of Article 101 of the Constitution. In this context, the Court noted that in exercising its constitutional competence to oversee the Independent Oversight Board, the Assembly also has the obligation to preserve the independence of the Board, which itself has attributed to it by the adoption of the Constitution and the Law on the Independent Oversight Board for the Civil Service.

Consequently and finally, the Court found that Decision [no. 08/V-029] of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo.

ECtHR – Important decisions (1 July – 31 December 2021)

* Clear violations in stripping of contact rights from parent undergoing gender reassignment (06/07/2021)

In its Chamber judgment in the case of **A.M. and Others v. Russia** (*application no. 47220/19*) 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, and a **violation of Article 14 (prohibition of discrimination)** taken in conjunction Article 8.
The case concerned a court decision to end A.M.'s contact rights with her children because she had been undergoing gender transition at that time. The Court found in particular that there had been no evidence of any potential damage to the children from the transition, and that the domestic courts had not examined the particular circumstances of the family. Furthermore, it found that the decision had been clearly based on the applicant's gender identity and had thus been biased.

* Difference in entitlement to parental leave was gender discrimination (06/07/2021)

In its Chamber judgment in the case of **Gruba and Others v. Russia** (*application nos. 66180/09, 30771/11, 50089/11 and 22165/12*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 14 (prohibition of discrimination)** taken **in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights for all four applications, and a **violation of Article 6 § 1 (right to a fair hearing)** of the Convention in respect of application no. 22165/12 (Mr Morozov). The case concerned the difference in entitlement to parental leave between policemen and policewomen. The Court found that the difference in treatment between policemen and policewomen as regards entitlement to parental leave had not been justified. The authorities had failed to balance the legitimate aim of operational effectiveness of the police and the applicants' rights not to be discriminated against on grounds of gender. The Court concluded that this difference in treatment had amounted to gender discrimination.

* Russia failed to justify the lack of any opportunity for same-sex couples to have their relationship formally acknowledged (13/07/2021)

In its Chamber judgment in the case of **Fedotova and Others v. Russia** (*applications nos. 40792/10, 30538/14 and 43439/14*) 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 the refusal to register the notice of marriage of the applicants, who are same-sex couples. The Court found that Russia had an obligation to ensure respect for the applicants' private and family life by providing a legal framework allowing them to have their relationships acknowledged and protected under domestic law. The lack of any opportunity for same-sex couples to have their relationships formally acknowledged created a conflict between the social reality of the applicants and the law. The Court dismissed the Government's argument that the interests of the community as a whole could justify the lack of opportunity for same-sex couples to formalise their relationships. It concluded that, in denying access to formal acknowledgment of their status for same-sex couples, the Russian authorities had gone beyond the discretion (margin of appreciation) enjoyed by them. The Court stated that the choice of the most appropriate form of registration of same-sex unions remained at the discretion of the respondent State.

* Removal of a Turkish journalist to Turkey, without examining his asylum request and the risk of ill-treatment, breaches the Convention (20/07/2021)

In its Chamber judgment in the case of **D. v. Bulgaria** (*application no. 29447/17*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 3 prohibition of inhuman and degrading treatment)** and a **violation of Article 13 (right to an effective remedy)** of the European Convention on Human Rights.
The case concerned the arrest at the border between Bulgaria and Romania of a Turkish journalist claiming to be fleeing from a risk of political persecution in his own country, and his immediate removal to Turkey. The events occurred three months after the 2016 attempted coup in Turkey. Before the Court, the applicant complained that the Bulgarian authorities had refused to initiate asylum proceedings and had returned him to Turkey, thus exposing him to a real risk of ill-treatment. The Court held in particular that despite the fact that the applicant had expressed fears that he might face ill-treatment in the event of being returned to Turkey, the Bulgarian authorities had not examined his application for international protection.

* Circumstances surrounding a visit to a crime scene by the president of the Assize Court gave rise to doubts about his impartiality (31/08/2021)

In its Chamber judgment in the case of **Karrar v. Belgium** (*application no. 61344/16*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 6 (right to a fair trial)** of the European Convention on Human Rights. The case concerned criminal proceedings instituted against

Mr Karrar, following which he was convicted of the murder of his two children and sentenced to life imprisonment. Before the Court, the applicant complained of the lack of impartiality of the president of the Assize Court, particularly in connection with a meeting between the president and the children's mother in the week before the trial. The Court found that the conduct of the president of the Assize Court could have prompted objectively justified doubts as to his objective impartiality, thereby calling into question the impartiality of the Assize Court itself in determining the criminal charge against Mr Karrar. It also held that the finding of a violation would in itself constitute sufficient just satisfaction for the nonpecuniary damage sustained by Mr Karrar.

*** Conviction of an imam on the grounds of his Facebook posts was in breach of the Convention (31/08/2021)**

In its Chamber judgment in the case of **Üçdağ v. Turkey** (*application no. 23314/19*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 6 § 1 (right of access to a tribunal)** and a **violation of Article 10 (freedom of expression)** of the European Convention on Human Rights. The case concerned Mr Üçdağ's criminal conviction for disseminating propaganda in favour of a terrorist organisation on account of two posts published on his Facebook account, as well as the rejection of his individual application to the Constitutional Court as being out of time. At the relevant time, Mr Üçdağ was a public official working as an imam at a local mosque. The impugned posts had included two photographs (of individuals in uniform similar to that of PKK members and of a crowd demonstrating in a public street in front of a fire), originally shared by two other Facebook users. The Court considered that the domestic courts' decisions failed to provide an adequate explanation of the reasons why the impugned contents had to be interpreted as condoning, praising and encouraging the methods [using] coercion, violence or threats implemented by the PKK in the context of their publication. It held that by convicting Mr Üçdağ on charges of propaganda in favour of a terrorist organisation for having posted controversial contents on his Facebook account, the domestic authorities had failed to conduct an appropriate balancing exercise, in line with the criteria set out in its case-law, between the applicant's right to freedom of expression and the legitimate aims pursued. The Court also ruled that the Constitutional Court's very strict interpretation of the time-limit on lodging an individual application had disproportionately interfered with the applicant's right to an assessment of the merits of his individual application.

*** Marginalisation of the applicant association in political debates on State-run television breached its freedom of expression (31/08/2021)**

In its Chamber judgment in the case of **Associazione Politica Nazionale Lista Marco Pannella v. Italy** (*application no. 66984/14*) the European Court of Human Rights held, by a majority, that there had been: a **violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.
The case concerned a complaint by the applicant association, an Italian political association which was represented in Parliament, that it had not been invited to take part in political debates scheduled during three major current-affairs programmes broadcast by the State broadcasting corporation RAI. The applicant association had complained to the Communications Regulatory Authority (AGCOM) of an imbalance to its disadvantage on certain television programmes. On two occasions, no further action had been taken on its complaint. Only after the association had applied a second time to a court, alleging a breach of the res judicata principle, had AGCOM finally ordered RAI to redress the imbalance that had harmed the applicant association's interests. It was therefore clear that the applicant association had been absent from three very popular television programmes – which had become the leading means of presenting political debate and disseminating political ideas and opinions in the media – and had found itself, if not excluded from, at least highly marginalised in media coverage of political debate. Accordingly, there had been a violation of Article 10 of the Convention.

*** Conviction of man for giving his three-year-old nephew a T-shirt, worn at nursery school, with the slogans "I am a bomb" and "Jihad, born on 11 September": no violation of Article 10 of the Convention (02/09/2021)**

In its Chamber judgment in the case of **Z.B. v. France** (*application no. 46883/15*) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights The case concerned the conviction of Z.B. for glorification of wilful killing on account of slogans ("*I am a bomb*" and "*Jihad, born on 11 September*") on a T-shirt he had given his nephew as a present for his third birthday. The boy had then worn the T-shirt to nursery school. Before the domestic courts and the European Court the applicant had claimed that the slogans were supposed to be humorous in tone. The Court reiterated that humorous speech or forms of expression used for humorous effect were protected by Article 10 of the Convention provided that they remained within the limits permitted under that provision. The right to humour was not unlimited and anyone relying on the right to freedom of expression had to assume "duties and responsibilities". The Court emphasised that it could not ignore the importance and weight of the general context in this case. Even though over 11 years had elapsed since the events of 11 September 2001, by the time of the facts of the present case, it was nevertheless noteworthy that shortly before there had

been other terrorist attacks, which had notably caused the death of three children in a school.
The Court also stated that the fact that the applicant had no links with a terrorist group and had not espoused a terrorist ideology could not detract from the significance of the offending message. In the specific circumstances of the case, the Court – which noted that the three-year-old, as the unwitting bearer of the message, had been instrumentalised – found that the reasons given by the domestic courts to convict the applicant, relying on the need to prevent glorification of mass violence, appeared both "relevant" and "sufficient" to justify the interference in question. It further noted that the sanction imposed on the applicant (fine and suspended prison sentence) had not been disproportionate to the legitimate aim pursued. The impugned interference could thus be regarded as necessary in a democratic society and there had been no violation of Article 10 of the Convention.

*** Discrimination in custody case based on mother's relationship with another woman (16/09/2021)**

In its Chamber judgment in the case of **X. v. Poland** (*application no. 20741/10*) the European Court of Human Rights held, by six votes to one, that there had been: a **violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.
The case concerned proceedings the applicant brought to contest the removal of her youngest child from her custody after her former husband obtained a change in the custody arrangements ordered in the divorce judgment. She alleged that the courts had acted in his favour because of her relationship with another woman. Relying on Article 14 taken in conjunction with Article 8, the applicant complained that the domestic courts had refused to grant her custody of her child on the grounds of her sexual orientation. The Court found that the applicant's sexual orientation and relationship with another woman had been consistently at the centre of deliberations and present at every stage of the judicial proceedings. It concluded that there had been a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child. That difference had been based on her sexual orientation and therefore amounted to discrimination.

*** Dismissal of civil action on grounds of Vatican's jurisdictional immunity did not violate Convention (12/10/2021)**

In its Chamber judgment in the case of **J.C. and Others v. Belgium** (*application no. 11625/17*) the European Court of Human Rights held, by a majority (six votes to one), that there had been: **no violation of Article 6 § 1 (right of access to a court)** of the European Convention on Human Rights. The case raised the question of the immunity of the Holy See from the jurisdiction of domestic courts. It concerned in particular an action for compensation brought by 24 applicants against the Holy See and against a number of leaders of the Catholic Church of Belgium and Catholic associations, claiming that damage had been caused by the structurally deficient manner in which the State had dealt with the problem of sexual abuse in the Church. As the Belgian courts had found that they did not have jurisdiction in respect of the Holy See, the applicants argued that they had been deprived of access to a court and relied on Article 6 § 1 before the European Court of Human Rights. The Court found that the dismissal of the proceedings by the Belgian courts in declining jurisdiction to hear the tort case brought by the applicants against the Holy See had not departed from the generally recognised principles of international law in matters of State immunity, and the restriction on the right of access to a court could not therefore be regarded as disproportionate to the legitimate aims pursued.

*** Overlong proceedings in two different cases (12/10/2021)**

In its Chamber judgment in the case of **Bara and Kola v. Albania** (*application no. 43391/18 and 17766/19*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 6 § 1 (right to a trial within a reasonable time)** of the European Convention on Human Rights, and a **violation of Article 13 (right to an effective remedy)** concerning the first applicant only.
The case concerned proceedings before the domestic courts at a time when judicial reforms had been taking place. An election to the post of rector of a university had been at issue in Mr Bara's case, while Mr Kola's had concerned his trial for murder. The Court found in particular that, even taking into account the judicial reforms taking place in Albania at the time, the domestic courts had failed to deal with the applicants' cases with sufficient expedition, meaning that the proceedings had not taken place within a reasonable time. In addition it found that that the new remedy under the Code of Civil Procedure enacted in 2017 had not helped with expediting proceedings, leaving the first applicant with no remedy available to deal with the violation of his rights under Article 6 § 1. However, the Court stated that the new remedy is in principle compatible with Article 13 and must therefore be exhausted before bringing similar complaints to the Court.

*** Affording increased protection to the head of State by means of a special law on insult is incompatible with the Convention (19/10/2021)**

In its Chamber judgment in the case of **Vedat Şorli v. Turkey** (*application no. 42048/19*) 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 sentencing of the applicant to a term of imprisonment – with delivery of the judgement suspended for five years – for insulting the President of the Republic, on account of two posts which he shared on his Facebook account. The content comprised, among other things, a caricature and a photograph of the President of the Republic accompanied by satirical and critical comments concerning him. The judgment convicting the applicant was based on Article 299 of the Criminal Code, which afforded a higher level of protection to the President of the Republic than to other persons. The Court found in particular as follows.
- There had been no justification in the present case for Mr Şorli's placement in police custody and in pre-trial detention or for the imposition of a criminal sanction, despite the fact that delivery of the judgment imposing a prison term had been suspended. Such a sanction, by its very nature, inevitably had a chilling effect on the willingness of the person concerned to express his or her views on matters of public interest, especially in view of the effects of conviction.
- The criminal proceedings complained of, instituted under Article 299 of the Criminal Code, had been incompatible with freedom of expression. Affording increased protection by means of a special law on insult would not, as a rule, be in keeping with the spirit of the Convention, and a State's interest in protecting the reputation of its head of State could not serve as justification for affording the head of State privileged status or special protection vis-à-vis the right to convey information and opinions concerning him.
- These findings implied that the violation of Mr Şorli's rights under Article 10 of the Convention
stemmed from a problem with the drafting and application of Article 299 of the Criminal Code. In the Court's view, bringing the relevant domestic law into line with Article 10 of the Convention would constitute an appropriate form of redress making it possible to put an end to the violation found.

*** Automatic imposition of surname order, paternal followed by maternal, when parents disagree, is discriminatory (26/10/2021)**

In its Chamber judgment in the case of **León Madrid v. Spain** (*application no. 30306/13*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights. The case concerned the applicant's request to reverse the order of the surnames under which her minor daughter (born in 2005) was registered. At the relevant time Spanish law provided that in the event of disagreement between the parents, the child would bear the father's surname followed by that of the mother. The applicant argued that this regulation was discriminatory. The automatic nature of the application of the law at the relevant time—which had prevented the domestic courts from taking account of the particular circumstances of the case at hand – could not, in the Court's view, be validly justified under the Convention. While the rule that the paternal surname should come first, in cases where the parents disagreed, could prove necessary in practice and was not necessarily incompatible with the Convention, the inability to obtain a derogation had been excessively stringent and discriminatory against women. In addition, while placing the paternal surname first could serve the purpose of legal certainty, the same purpose could be served by having the maternal surname in that position. The reasons given by the Government had not therefore been sufficiently objective and reasonable in order to justify the difference in treatment imposed on the applicant.

*** Life sentences with only possibility of release on parole after 40 years' imprisonment are incompatible with the Convention (28/10/2021)**

In its Chamber judgment in the case of **Bancsók and László Magyar (no. 2) v. Hungary** (*application nos. 52374/15 and 53364/15*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights. The case concerned the imposition of life sentences with eligibility for release on parole only after 40 years of imprisonment. The Court found that such sentences did not, in effect, offer any real prospect of release, and were thus not compatible with the Convention.

*** Poland must take rapid action to resolve the lack of independence of the National Council of the Judiciary (08/11/2021)**

In its Chamber judgment in the case of **Dolińska-Ficek and Ozimek v. Poland** (*application nos. 49868/19 and 57511/19*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights. The case concerned complaints brought by two judges that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had decided on cases concerning them, had not been a "tribunal established by law" and had lacked impartiality and independence. They complained in particular that the Chamber of Extraordinary Review and Public Affairs, one of two newly created chambers of the Supreme Court, had been composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary ("the NCJ"), the constitutional organ in Poland which safeguards the independence of courts and judges and which has been the subject of controversy since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the Sejm (the lower house of Parliament).

The case is one of 57 applications against Poland, lodged in 2018-2021, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017*. The Court emphasised that its task was not to assess the legitimacy of the reorganisation of the Polish judiciary as a whole, but to determine whether, and if so how, the changes had affected Ms Dolińska-Ficek's and Mr Ozimek's rights under Article 6 § 1 of the Convention. The Court found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had examined the applicants' cases. The Chamber of Extraordinary Review and Public Affairs was not therefore an "independent and impartial tribunal established by law" within the meaning of the European Convention. The judgment resembles closely that of **Reczkowicz v. Poland** (*no. 43447/19*) of July 2021. However, an additional manifest breach of domestic law was found in this judgment because, "in blatant defiance of the rule of law", the President of Poland carried out judicial appointments despite a final court order staying the implementation of the NCJ's resolution recommending judges to the Chamber of Extraordinary Review and Public Affairs.
As the violation of the applicants' rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way, a rapid remedial action on the part of the Polish State is required. When the Court finds a breach of the Convention, the State has a legal obligation under Article 46 of the Convention to select, subject to supervision by the Committee of Ministers, the general and/or individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the situation. It therefore falls upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

* Life sentences with only possibility of release on parole after 40 years' imprisonment are incompatible with the Convention (28/10/2021)

In its Chamber judgment in the case of **Baljak and Others v. Croatia** (*application no. 41295/19*) the European Court of Human Rights held, unanimously, that there had been: a **violation of Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights. The case concerned the domestic courts' dismissal of the applicants' claim for damages against the State on the grounds that they had failed to prove that the State was responsible for the death of their relative, despite the fact that he had been detained by Croatian soldiers and taken to an unknown location, with his body being found years later in a mass grave with a gunshot wound to the head. The Court found in particular that the conclusion reached by the domestic courts when dismissing the claim was manifestly unreasonable. The domestic courts had imposed an unattainable standard of proof on the applicants, which was particularly unacceptable in view of the seriousness of the acts concerned. The Court further considered that the applicants' complaint concerning the domestic courts' order for them to pay the costs of the State's representation in the civil proceedings was premature, and rejected it as inadmissible.

* No breach of the Convention in case against an editor for the right to be forgotten (25/11/2021)

In its Chamber judgment in the case of **Biancardi v. Italy** (*application no. 77419/16*) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights. The case concerned the "right to be forgotten".
The applicant, a former editor-in-chief of an online newspaper, was found liable in civil proceedings for having kept on his newspaper's website an article reporting on a fight in a restaurant, giving details on the related criminal proceedings. The courts noted in particular that the applicant had failed to de-index the tags to the article, meaning that anyone could type into a search engine the name of the restaurant or its owner and have access to sensitive information on the criminal proceedings, despite the owner's request to have the article removed. The Court shared the Government's point of view that not only Internet search engine providers could be obliged to de-index material but also administrators of newspaper or journalistic archives accessible through the Internet, such as the applicant. It also agreed with the domestic courts' rulings that the prolonged and easy access to information on the criminal proceedings concerning the restaurant owner had breached his right to reputation. The applicant's right to impart information under the Convention had not therefore been breached, and all the more so given that he had not actually been required to remove the article from the Internet. This was the first case in which the Court had examined whether a journalist's civil liability for not de-indexing information published on the Internet had been compatible with Article 10 of the Convention.

* Der Standard should not have been forced to reveal online commenters' personal information (07/12/2021)

In its Chamber judgment in the case of **Standard Verlagsgesellschaft mbH v. Austria (no. 3)**

(*application no. 39378/15*) 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 court orders for the applicant media company to reveal the sign-up information of registered users who had posted comments on its website, derStandard.at, the website of the newspaper Der Standard. This had followed comments allegedly linking politicians to, among other things, corruption or neo-Nazis, which the applicant company had removed, albeit refusing to reveal the information of the commenters. The Court found in particular that user data did not enjoy the protection of "journalistic sources", and there was no absolute right to online anonymity. However, the domestic courts had not even balanced the interests of the plaintiffs with the interests of the applicant company in keeping its users anonymous so as to help promote the free exchange of ideas and information as covered by Article 10. The court orders had thus not been necessary in a democratic society.

(*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 1 937 m^2 and is used by 65 employees.

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