THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Newsletter

January — June 2022

CONTENT:

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.

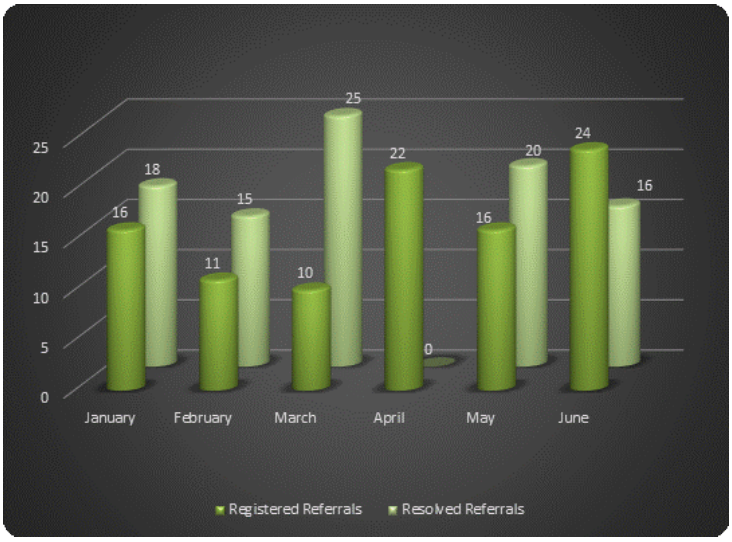
Pursuant to the abovementioned Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution 3 (three) international judges were appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights.

** 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 January – 30 June 2022, the Court has received 99 Referrals and has processed a total of 244 Referrals/Cases.
A total of 94 Referrals were decided or 38.52% of all available cases. During this period, 87 decisions were published on the Court's webpage.

The dynamics of received referrals by month (1 January - 30 June 2022)



The following are 12 judgments that the Court rendered during the six month period, 1 January - 30 June 2022:

- Judgment in Case KI 113/21, submitted by: Bukurije Haxhimurati. The filed referral requested the constitutional review of Judgment of the Supreme Court of the Republic of Kosovo [Pml. No. 29/2021] of 13 April 2021.
- Judgment in Case KO 93/21, submitted by: Blerta Deliu Kodra and 12 other deputies of the Assembly of the Republic of Kosovo. The filed referral requested the constitutional review of Recommendation [No. 08-R-01] of the Assembly of the Republic of Kosovo of 6 May 2021.
- Judgment in Case KI 75/21, submitted by: "Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi & Co. Kosovë LLC" and "Building Construction LLC". The filed referral requested the constitutional review of Judgment of Supreme Court of the Republic of Kosovo [ARJ-UZVP. No. 44/2020] of 23 July 2020.
- Judgment in Case KI 49/20, submitted by: Shehide Muhadri. The filed referral requested the constitutional review of Judgment of the Court of Appeals of the Republic of Kosovo [Ac. No. 530/2016], of 10 December 2019.
- Judgment in Case KI 182/20, submitted by: Sedat Kovaçi, Servet Ergin, Ilirjana Kovaçi and Sabrije Zhubi. The filed referral requested the constitutional review of Decision of the Supreme Court of the Republic of Kosovo [Rev. 54/2020] of 6 July 2020.
- Judgment in Case KI 156/20, submitted by: Raiffeisen Bank Kosovo J.S.C. The filed referral requested the constitutional review of Decision [Ac. No. 5514/18] of the Court of Appeals of the Republic of Kosovo of 13 May 2019 and Decision [Cml. No. 8/2019] of the Supreme Court of the Republic of Kosovo of 17 June 2020.
- Judgment in Case KI 44/21, submitted by: Besa Sopi. The filed referral requested the constitutional review of Judgment [AC-I-20-0091] of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, of 21 January 2021.
- Judgment in Case KO 145/21, submitted by: Municipality of Kamenica. The filed referral requested the constitutional review of Decision [No. 01B/24] of the Ministry of Education, Science, Technology and Innovation, of 23 April 2021.
- Judgment in Case KI 78/21, submitted by: Raiffeisen Bank Kosovo J.S.C. The filed referral requested the constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo [Rev. No. 257/2019] of 2 June 2020.
- Judgment in Case KI 133/20, submitted by: Raiffeisen Bank Kosovo J.S.C. The filed referral requested the constitutional review of item II of the Judgment of the Supreme Court of the Republic of Kosovo [Rev. No. 12/2020] of 19 February 2020.
- Judgment in Case KI 155/21, submitted by: Muhamet Ademi. The filed referral requested the constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo [Rev. no. 387/2020] of 13 January 2021.
- Judgment in Case KI 196/21, submitted by: Gëzim Shtufi. The filed referral requested the constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo [PML. No. 310/2021] of 14 September 2021.

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

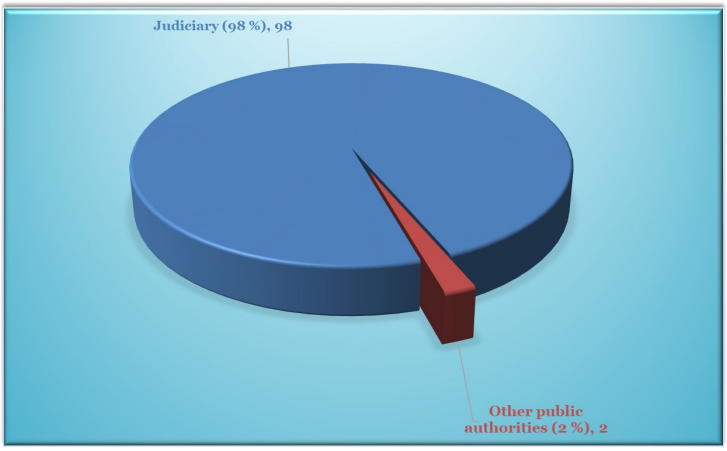
The types of alleged violations in the 99 referrals received during the six-month period, 1 January - 30 June 2022, are the following:

- Article 3 [Equality Before the Law], 1 case or 0,4%;
- Article 5 [Languages], 1 case or 0,4%;
- Article 7 [Values], 1 case or 0,4%;
- Article 10 [Economy], 1 case or 0,4%;
- Article 13 [Capital City], 1 case or 0,4%;
- Article 21 [General Principles], 3 cases or 1,3%;
- Article 22 [Direct Applicability of International Agreements and Instruments], 5 cases or 2,2%;
- Article 23 [Human Dignity], 1 case or 0,4%;
- Article 24 [Equality Before the Law], 22 cases or 9,6%;
- Article 29 [Right to Liberty and Security], 7 cases or 3,1%;
- Article 30 [Rights of the Accused], 6 cases or 2,6%;
- Article 31 [Right to Fair and Impartial Trial], 79 cases or 34,6 %;
- Article 32 [Right to Legal Remedies], 15 cases or 6,6%;
- Article 33 [The Principle of Legality and Proportionality in Criminal Cases], 1 case or 0,4%;
- Article 34 [Right Not to be Tried Twice for the Same Criminal Act], 3 cases or 1,3%;
- Article 37 [Right to Marriage and Family], 2 cases or 0,9%;
- Article 45 [Freedom of Election and Participation], 1 case or 0,4%;
- Article 46 [Protection of Property], 14 cases or 6,1%;
- Article 49 [Right to Work and Exercise Profession], 9 cases or 3,9%;
- Article 50 [Rights of Children], 1 case or 0,4%;
- Article 53 [Interpretation of Human Rights Provisions], 10 cases or 4,4%;
- Article 54 [Judicial Protection of Rights], 26 cases or 11,4%;
- Article 55 [Limitations on Fundamental Rights and Freedoms], 2 cases or 0,9%;
- Article 63 [General Principles], 1 case or 0,4%;
- Article 65 [Competencies of the Assembly], 1 case or 0,4%;
- Article 102 [General Principles of the Judicial System], 7 cases or 3,1%;
- Article 119 [General Principles], 1 case or 0,4%;
- Article 121 [Property], 1 case or 0,4%;

Alleged violators of rights

- 97 Referrals or 98% of Referrals refers to violations allegedly committed by court's decisions;
- 2 Referrals or 2% of Referrals refers to decisions of other public authorities;

Alleged violators of rights
(1 January - 30 June 2022)



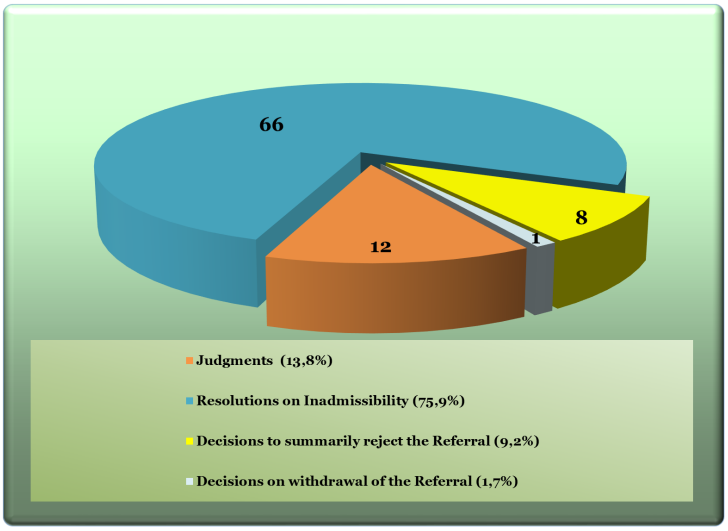
Sessions and Review Panels

During the six-month period: 1 January - 30 June 2022, the Constitutional Court held 15 plenary sessions and 97 Review Panels, in which the cases were resolved by decisions, resolutions and judgments.
During this period, the Constitutional Court has published 87 decisions.

The structure of the published decisions is the following:

- 12 Judgments (13,8%);
- 66 Resolutions on Inadmissibility (75,9%);
- 8 Decisions to summarily reject the Referral (9,2%);
- 1 Decision on withdrawal of the Referral (1,7%);

Structure of decisions
(1 January - 30 June 2022)

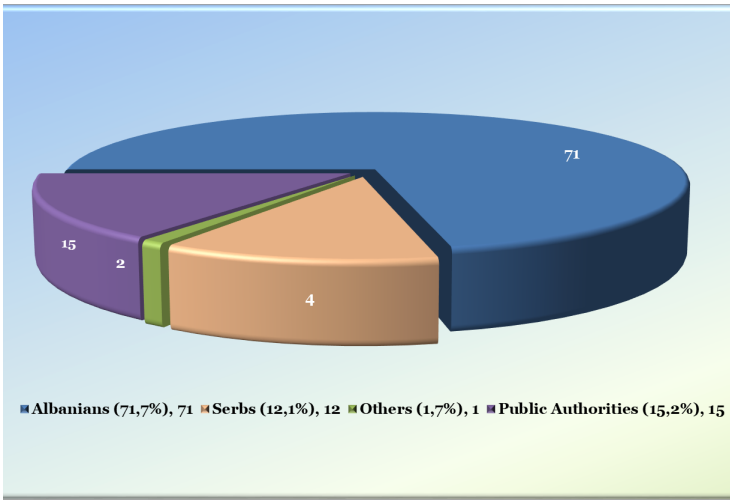


Access to the Court

The access of individuals to the Court is the following:

- 71 Referrals were filed by Albanians, or 71,7%;
- 12 Referrals were filed by Serbs, or 12,1%;
- 1 Referral was filed by other communities, or 1%;
- 15 Referrals were filed by other public authorities, or 15,2%;

Ethnic structure of the Applicants
(1 January - 30 June 2022)



17 January 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in an introductory meeting the new Ambassador of Italy to Kosovo, Mr. Antonello De Riu.

After welcoming and wishing him success in his new duty, President Caka-Nimani made a brief elaboration on the work of the Court so far, the current challenges in its functioning, the ongoing efforts to build the professional capacity of the staff and consolidation of the case law.

President Caka-Nimani further emphasized the good relations of cooperation between the Constitutional Court of Kosovo and the Constitutional Court of Italy, as well as the efforts of the Court for membership in various international organizations and initiatives.

Ambassador De Riu expressed his commitment to further strengthen the relations of close cooperation between Kosovo and Italy, especially in the field of the rule of law.

21 January 2022

In the Constitutional Court of the Republic of Kosovo a workshop regarding the role and competencies of the Constitutional Court, as well as its relationship with regular courts and other institutions in the country, was held.

The workshop was organized at the initiative of the Academy of Justice of Kosovo and in cooperation with the Constitutional Court, in the framework of the initial training program for newly appointed judges. During the workshop, the judge of the Constitutional Court, Mr. Nexhmi Rexhepi, informed the new judges more closely about the role, function and jurisdiction of the Constitutional Court in the legal system of the Republic of Kosovo, as well as about the relations with the regular judiciary and the procedures for review of cases by the constitutional judges. Judge Rexhepi also informed the newly appointed judges about the possibilities offered by incidental control, namely the right enjoyed by the regular courts to address the Constitutional Court with requests related to the constitutional compatibility of a law that may have been challenged during the court proceedings.

During the workshop, the manner of submitting referrals to the Constitutional Court, the authorized parties, the time limit for reviewing cases, as well as the relations of professional cooperation of the Court with the Venice Commission and the European Court of Human Rights were discussed.

15 February 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the new Ambassador of the United States of America to Kosovo, Mr. Jeffrey M. Hovenier. After wishing Ambassador Hovenier success in his new position, President Caka-Nimani made a brief presentation on the work of the Constitutional Court so far and priorities for the future, underlining the firm commitment to the advancement of constitutional justice in the Republic of Kosovo.

President Caka-Nimani further discussed the good institutional relations with the counterpart courts in the region and beyond, emphasizing the close cooperation with the Supreme Court of the United States. She took the opportunity to express her gratitude for the continuous assistance that the US Government has provided to the Constitutional Court through various projects to build and advance professional and infrastructural capacities.

Ambassador Hovenier, after thanking President Caka-Nimani for the hospitality, expressed his happiness that he will serve again in Kosovo and pledged to be committed to further strengthening good relations between Kosovo and the United States.

18 February 2022

President of the Constitutional Court of the Republic of Kosovo, Ms. Gresa Caka-Nimani and Her Excellency, Ms. Marie-Christine Butel, French Ambassador to Kosovo, have signed together with Alliance Française de Pristina a Memorandum allowing Court judges and officials to attend French classes. During the signing ceremony at the Court, President Caka-Nimani thanked Her Excellency, Ms. Butel for her continued support, highlighting the responsiveness of Alliance Française in designing a language training offer coherent with the needs of the Constitutional Court. Reinforcing the professional and linguistic capacities of its judges is a priority for the Court, and this contributes to reinforcing rule of law in Kosovo through ever stronger ties between France and Kosovo.

Her Excellency Ambassador Butel expressed her satisfaction at the signature of the Memorandum, as it will no doubt contribute to supporting the Court in its efforts to strengthen its institutions. This French-language training will give Court judges new tools in their growing relations with their French counterparts.

This fully justified the participation of Alliance Française President, Ms. Dafina Bytyqi, together with Alliance Française's director, Ms. Anne – Sophie Veyrier, in this Memorandum as well as in its signing ceremony.

11 March 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting a delegation from the Assembly of the Republic of Albania, composed of members of the Committee on Legal Affairs, Public Administration and Human Rights. Initially, President Caka-Nimani notified the delegation from Albania about the composition and organizational structure of the Court, the way of functioning and the work so far, as well as the challenges that this institution currently faces. During the conversation, President Caka – Nimani emphasized the extremely good cooperation relations with the Constitutional Court of Albania and the support that this court has provided to the Constitutional Court of Kosovo, especially in the first years after its establishment.

Following the meeting, both sides discussed and exchanged views on the best ways to improve and advance the legislation on constitutional adjudication in the respective countries.

15 March 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received in a meeting the non-resident ambassador of Canada to Kosovo, Mr. Alan Bowman. After thanking him for the visit, President Caka-Nimani notified Ambassador Bowman about the Court's work to date, with efforts to consolidate its case law based on international human rights standards and increase of transparency to the public. President Caka-Nimani also discussed the good relations of cooperation with counterpart courts in the region and worldwide, including the Supreme Court of Canada.

Ambassador Bowman, who serves as resident ambassador in Zagreb, Croatia, praised the progress made in Kosovo in the field of human rights protection and rule of law, and expressed commitment to deepen cooperation between the institutions of Kosovo and Canada.

1 April 2022

Students of "Ethics Club" of the Faculty of Law of the University of Prishtina "Hasan Prishtina" stayed for a visit at the Constitutional Court. They were received in a meeting by Judge Selvete Gërxhaliu-Krasniqi, who informed the students briefly on the role and function of the Constitutional Court, on its international composition in the first years of functioning, as well as on the jurisdiction it has in treating various

constitutional matters raised before it. The authorized parties to file constitutional complaints, the right of the regular judiciary to refer requests through the incidental control mechanism and the Court's decision making based on the case-law of the European Court of Human Rights were also topics of Judge Gërxhaliu-Krasniqi's presentation.

The future lawyers meanwhile expressed their interest to be informed in more detail about the selection process and the mandate of the constitutional judges, as well as on the difficulties that the judges face in their work during the review of cases.

3 April 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, paid a two-day visit to Budva, Montenegro, on 1 and 2 April 2022, with the invitation to participate in the first Gender Equality Forum for the Western Balkans. Organized by the AIRE Center for the Western Balkans and with the support of the Government of the United Kingdom, the Forum enabled the exchange of professional discussions between the presidents and judges of the constitutional courts and supreme courts of the region and Europe, on the key principles derived from the case law of the European Court of Human Rights (ECtHR) regarding gender equality. During her stay in Budva, President Caka – Nimani also held separate meetings with the President and Deputy President of the ECtHR, Mr. Robert Spano and Ms. Síofra O'Leary, as well as with judges and former judges of this European court.

6 April 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani received in a meeting the master's level students of the Faculty of Law of the University of Prishtina "Hasan Prishtina", accompanied by university professor Visar Morina. The jurisdiction of the Constitutional Court, the mechanisms of constitutional control, sources of law and methods of interpretation, the relationship between the Constitution of the country and international instruments, as well as the application of the case law of the European Court of Human Rights in the Court's decision-making, were just some of the topics on which President Caka – Nimani focused her presentation before the students.

The students, in their turn, expressed their interest to be informed in more detail about the impact of the Venice Commission reports on the decisions of the Court, the mandate of the judges and the impact of their absence in the decision-making process, the assessment procedures of constitutional amendments, and on the manner of the functioning of the "Amicus Curiae" mechanism.

7 April 2022

A group of law students, accompanied by project manager of the Kosovo Law Institute (KLI), Mr. Yll Zekaj, visited the Constitutional Court. They were hosted by the President of the Constitutional Court, Mrs. Gresa Caka – Nimani and the Chief Legal Advisor of the Court, Mr. Jeton Bytyqi. In the meeting with students, President Caka – Nimani made a brief presentation about the organizational structure of the Court, authorized parties to file referrals, registration procedures and case review deadlines, as well as the process of preparing preliminary reports by advisors and judges.

The future lawyers, meanwhile, were interested in being informed in more details about the control mechanisms of the implementation of the Court's

decisions and the deadlines set to file referrals disputing various constitutional matters.

12 April 2022

Judges and officials of the Constitutional Court of the Republic of Kosovo, led by the President, Mrs. Gresa Caka – Nimani, participated in the project launch conference of the Council of Europe Office in Prishtina, "Council of Europe Office with project support for the Constitutional Court", which was held at the "Swiss Diamond Hotel" in Prishtina. In an occasional address, the participants in this conference were addressed by President Caka – Nimani, Head of the Council of Europe Office in Prishtina, Mr. Frank Power, Ambassador of Italy in Kosovo, Mr. Antonello De Riu, Deputy Chief of Mission of the Norwegian Embassy in Kosovo, Mrs. Jenny Stenberg Sørvold and Mr. Christophe Poirel, Director of General Directorate for Human Rights and Rule of Law in the Council of Europe.

After expressing her gratitude for the support that the Office of the Council of Europe in Prishtina has provided to the Constitutional Court over the years, President Caka – Nimani, among other things, emphasized the importance of this project for further consolidation of the case law of the Constitutional Court. based on the case law of the European Court of Human Rights (ECtHR), on the research practices and work process of the Constitutional Court following the example of the ECtHR, as well as on the implementation of the European Convention on Human Rights in the Republic of Kosovo.The conference continued with the presentations of the Deputy President of the Constitutional Court, Mr. Bajram Ljatifi, President of the Supreme Court of Kosovo, Mr. Enver Peci, former President of the Court of Appeals of Kosovo, Mr. Hasan Shala, Judge of the Supreme Court of Slovenia and former President of the Consultative Council of European Judges, Mrs. Nina Betetto, as well as other human rights experts from the Council of Europe.

14 April 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani, received the Head of EULEX Kosovo, Mr. Lars – Gunnar Wigemark, in a meeting. After briefing Mr. Wigemark about the work of the institution she heads and the efforts for an increased efficiency in handling cases and an improved communication with the public, President Caka – Nimani expressed her gratitude for the support provided by EULEX Mission to the Constitutional Court in the first decade of the functioning of the Court by means of financially supporting its international judges and advisors.

From his side, Mr. Wigemark confirmed that the support from EULEX Mission to the Constitutional Court, hence the rule of law in Kosovo, will be present also in the future.

26 April 2022

A delegation of the Constitutional Court of the Republic of Kosovo composed of the President of the Court, Mrs. Gresa Caka-Nimani and the Deputy President of the Court, Mr. Bajram Ljatifi is paying an official visit to Ankara at the invitation of the Constitutional Court of the Republic of Turkey.

President Caka-Nimani and Deputy President Ljatifi are staying in the Turkish capital with the invitation to attend the celebration ceremony of the 60th anniversary of the establishment of the Constitutional Court of Turkey, as well as the two-day International Symposium organized on this occasion, on the topic: "Interpretation of the Constitution in the Protection of Fundamental Rights and Freedoms". During their stay in Ankara, President Caka-Nimani and Deputy President Ljatifi held separate meetings with the President of the Constitutional Court of Turkey, Mr. Zühtü Arslan and the Deputy President of this court, Mr. Kadir Özkaya, where the topic of joint discussion was the relations between the two constitutional courts, as well as the possibilities for further deepening of mutual cooperation.

28 April 2022

Students of the "Sami Frashëri" gymnasium in Prishtina visited the Constitutional Court, where they were hosted by the Director of Communication and Information Office, Mr. Veton Dula.

History of the establishment and organizational structure of the Court, the international and current composition of constitutional judges, the manner of filing the referrals and the types of decisions rendered by this Court, as well as the relationship with courts of other instances in the country and its relations with the Venice Commission, were among the topics addressed by Mr. Dula in his presentation held in front of the high school students of Prishtina. Possibilities of processing cases within a shorter time limit, the parties authorized to submit referrals, the criteria for the selection of constitutional judges and the right to appeal the decisions of the Constitutional Court, were just some of the issues for which the students of "Sami Frashëri" gymnasium expressed interest in being informed more.

10 May 2022

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka – Nimani received in a meeting the Ambassador of the Federal Republic of Germany to Kosovo, Mr. Jörn Rohde. The work of the Constitutional Court so far, the efforts

to increase transparency in the work and to consolidate the case law in line with the standards of the European constitutional judiciary, were among the topics discussed at the joint meeting. President Caka – Nimani took the opportunity to express her gratitude for the continuous support that the German Government has provided to the Constitutional Court since its establishment, through various projects implemented with the support of the German Agency for International Cooperation "GIZ" and the German Foundation for International Legal Cooperation "IRZ".

Ambassador Rohde confirmed the commitment of the German Government to support Kosovo institutions in efforts to strengthen the rule of law in the country.

18 May 2022

Judges of the Constitutional Courts of the Republic of Kosovo and the Republic of Albania, together with judges of the Supreme Court of the Republic of Kosovo and the High Court of the Republic of Albania, discussed for two consecutive days and exchanged their professional views regarding the role and separation of competencies between the jurisdiction of the constitutional courts and regular courts in respective countries. The President of the Constitutional Court of the Republic of Kosovo, Mrs. Gresa Caka-Nimani, in her opening remarks emphasized the importance of professional cooperation and mutual exchange of experiences

between Kosovo courts and their counterparts from Albania. Meanwhile, the President of the Constitutional Court of the Republic of Albania, Mrs. Vitore Tusha, in her introductory speech stressed the importance of preserving the independence of the constitutional jurisdiction and the independence of the judiciary in both countries.

After the introductory presentations of the Deputy President of the High Court of Albania, Mr. Sokol Sadushi and the Deputy President of the Supreme Court of Kosovo, Mrs. Mejreme Mema, the conference continued with discussions of judges of four courts on different theories of constitutional interpretation, the principle of subsidiarity and the need to interpret laws and the Constitution in the spirit of the European Convention on Human Rights and the case law of the European Court of Human Rights.

In the first conference of this format, organized by the Constitutional Court of Kosovo with the support of the German Foundation for International Legal Cooperation "IRZ", the topic of discussion and comparative treatment was the divergence of the case law of regular courts, interpretation and manifestly arbitrary application of applicable law, and the consolidation of domestic jurisprudence in line with the decisions of the European Court of Human Rights.

During the two-day conference, the judges of the highest level courts of the Republic of Kosovo and the Republic of Albania, had the opportunity to be informed more closely about the best German practices regarding the interpretation of the Constitution and the verification of the constitutionality of laws and acts, which were discussed in detail at the conference by the former judge of the Federal Constitutional Court of Germany, Prof. Dr. Reinhard Gaier.

7 June 2022

In a workshop organized with the support of the Council of Europe Office in Pristina, on the topic: "Electoral Disputes and the European Convention on Human Rights", Judges and Legal Advisors of the Constitutional Court had the opportunity to get more closely acquainted with the relevant standards set in the European Convention on Human Rights (ECHR) related to electoral disputes and relevant caselaw of the European Court of Human Rights.

The right to vote and to stand as a candidate at elections, administration of elections and post-electoral disputes from a comparative point of view, as well as the practical application of Article 3 of Protocol 1 of the ECHR in cases of electoral disputes, were among the main topics on which international experts from the OSCE's Office of Democratic Institution and Human Rights (ODIHR), the European Court of Human Rights and the Venice Commission expressed their views. The two-day workshop, held on 6 and 7 June 2022, at Venus Hotel in Prishtina, also provided a good opportunity for all participants to analyse the landmark cases of the Constitutional Court of Kosovo in terms of disputes arose in different stages of frequent electoral processes.

Judgment

KO 93/21

Applicant

Blerta Deliu - Kodra and 12 other deputies of the Assembly of the Republic of Kosovo

Request for constitutional review of Recommendations No. 08-R-01 of the Assembly of the Republic of Kosovo of 6 May 2021

The Court initially clarifies that the subject of the constitutional review in this case, is only the constitutionality of the contested Act of the Assembly of 6 May 2021, through which (i) KOSTT is authorized to cover electricity deviations in four (4) municipalities of the Republic of Kosovo, using revenues from its own budget, funds which will be subsequently compensated "from dividends or any other possible mechanism"; and (ii) the Government of Kosovo is obliged to ensure, within a period of six (6) months and according to the rules and applicable laws, in cooperation with the responsible parties, the entire process of including in the electricity billing system, the consumers in the four (4) respective municipalities. The Court, in this context, also notes that the following have not been contested through this referral: (i) laws, decisions and other acts of public authorities, which were issued before the adoption of the contested Act of the Assembly and which constitute the legal basis for the exercise of competencies of the Assembly as well as the legal authorizations of other state authorities in relation to the Public Enterprise KOSTT; nor (ii) the decisions of regular courts, as a result of proceedings conducted based on the lawsuit of the Ombudsperson pertaining to the Decision of the Board of the Energy Regulatory Office of 6 February 2012 and repealed on 13 April 2017, through which, in order to cover the losses/ deviations in the energy network in the four (4) respective municipalities, the additional amount of of 3.5% was billed to electricity consumers in other municipalities of the Republic of Kosovo.

The Court further clarifies that, based on the documents received from the interested parties, the electricity losses as a result of non-billing/ non-payment of electricity for electricity consumers in the four (4) municipalities of the Republic of Kosovo, are recorded "as a deviation of Kosovo from the Continental European system". After the repeal of the abovementioned decision of ERO and until April 2021, these losses, namely the deviations in the electricity system of the Republic of Kosovo, were covered by the Budget of the Republic of Kosovo. In order to balance the electricity system and cover the relevant deviations for the upcoming period, as provided in the applicable laws of the Republic of Kosovo and especially as a result of the implementation of the Connection Agreement with ENTSO-E, namely the European Network of Transmission System Operators for Electricity, as a body of the Regional Group of Continental Europe, the Public Enterprise KOSTT, requested from the Assembly of Kosovo, namely the Functional Committee on Economy, Industry, Entrepreneurship and Trade, among others, to provide financial support to cover the losses in the four (4) municipalities of the Republic of Kosovo, for the period April – December 2021.

In this regard, the Court, based on documents submitted by KOSTT and ERO, notes that the implementation of the KOSTT Connection Agreement with ENTSO-E began on 14 December 2020. The Connection Agreement with ENTSO-E was preceded by the ratification in the Assembly of the International Agreement between the Republic of Kosovo and the Republic of Albania on 30 March 2017, which enabled the formation of a joint regulatory block, known as the Regulatory Block-AK. The latter and the above-mentioned Agreement with ENTSO-E, enabled the Republic of Kosovo (i) to gain energy independence from the regulatory block Serbia, Montenegro, North Macedonia; (ii) to operate as an independent regulatory zone within the AK-Block, within the synchronous zone of the Continental Europe; and (iii) to gain recognition on the energy maps of Europe, whereby the sovereignty of the independent regulatory zone in the continental European electricity system is recognized. In return, Kosovo institutions committed, inter alia, (i) to guarantee the balancing of the electricity system within its regulatory zone by addressing, as a consequence, the respective losses/deviations;

whereas, in case of breach of the obligations arising from this Agreement, the Republic of Kosovo would face: (i) financial consequences; and (ii) reconsideration of the KOSTT status within ENTSO-E.

Consequently, on 6 May 2021, based on the recommendation of the Assembly Committee on Economy, Industry, Entrepreneurship and Trade, at the request of KOSTT "for securing financial means to cover losses", the Assembly, beyond the specific reporting requirements for KOSTT, decided to (i) "authorize KOSTT to cover electricity deviations in four municipalities of the country (North Mitrovica, Leposavic, Zubin Potok and Zvecan), according to the solution presented and approved by the functional committee, using the revenues from the own budget, funds which will be compensated by dividends or any other possible mechanism"; and (ii) "oblige the Government of Kosovo, within six (6) months, to ensure the entire process of including in the billing system according to the rules and laws in force, in cooperation with the parties responsible for customer billing in four municipalities of the Republic of Kosovo (North Mitrovica, Leposaviq, Zubin Potok, and Zvecan) with electricity".

Allegations of the parties

Thirteen (13) deputies of the Assembly of the Republic of Kosovo have contested the constitutionality of this Act of the Assembly. The Applicants first allege that despite the fact that the contested Act of the Assembly is entitled Recommendations, the latter is a decision of the Assembly with legal consequences and, consequently, must be subject to constitutional control as defined in paragraph 5 of Article 113 of the Constitution. Secondly, the Applicants allege that the contested Act of the Assembly was issued in violation of the Constitution, as a result of both the procedure followed and its substance. Pertaining to the procedure, the Applicants, in essence, allege that the contested Act of the Assembly, is contrary to paragraph 5 of Article 65 of the Constitution, because it was issued without a legal basis, stating, inter alia, that such a decision could have been taken only through the Law on Budget or its amendment/ supplementation. Whereas, pertaining to the substance of the contested Act of the Assembly, the Applicants state that the latter is contrary to Articles 3 and 24 of the Constitution in conjunction with Article 14 (Prohibition of Discrimination) of the European Convention on Human Rights and Article 1 (General Prohibition of Discrimination) of Protocol no. 12 to this Convention, because in discrimination of electricity consumers who do not live in the four (4) above-mentioned municipalities, the contested Act of the Assembly has authorized the covering of electricity deviations for electricity consumers living in the four (4) respective municipalities of the Republic of Kosovo. The Applicants, in fact, do not contest the obligation of the Public Enterprise KOSTT to cover electricity deviations in these four (4) municipalities until such time that they are included in the electricity billing system according to applicable laws in the Republic of Kosovo. However, they contest the procedure through which the contested Act was issued, alleging at the same time, that the coverage of these deviations in electricity in the respective municipalities, constitutes discrimination within the meaning of Article 24 of the Constitution in conjunction with the relevant articles of the European Convention on Human Rights.

Comments and responses to the Court were also submitted by (i) the Parliamentary Group of Vetëvendosje Movement; (ii) Ministry of Economy; (iii) ERO; and (iv) KOSTT. Responses to the Court have also been submitted by the relevant Committees of the Assembly, namely the Committee on Legislation; the Functional Committee on Economy; the Committee on Budget, Labor and Transfers, as well as the Committee for Oversight of Public Finances. In essence, the respective comments submitted to the Court, allege that the contested Act of the Assembly (i) is a Recommendation and not a decision of the Assembly, and consequently it cannot be subject to constitutional control and, therefore, the Applicants' referral must be declared inadmissible for review on merits by the Court; (ii) the contested Act of the Assembly was issued based on paragraph 2 of Article 13 (Corporate governing, competencies, reporting) of Law no. 05/L-085 on Electricity, based on which the Assembly is the sole shareholder of the Public Enterprise KOSTT; (iii) KOSTT obligation to cover electricity deviations in the four (4) municipalities of the Republic of Kosovo is established in Article 16 (Tasks and responsibilities of the Transmission System Operator) of the Law on Electricity and by Article 5 (Compensation for the losses in the North of Kosovo) of the KOSTT License, respectively, [ZRRE/Li_15/17, 13 April 2017], and moreover, in accordance with the obligations undertaken by the ENTSO-E Connection Agreement; and that (iv) the contested Act of the Assembly is in the public interest because it concerns energy sovereignty of Kosovo under the obligations arising

from the ENTSO-E Connection Agreement.

Admissibility of the Referral

In reviewing the constitutionality of the contested Act of the Assembly, the Court initially assessed the Applicants' allegations and the relevant responses of the interested parties, regarding the nature of the contested Act. The Court, in this regard, found that the contested Act of the Assembly falls within the scope of the "decision of the Assembly" as provided by paragraph 5 of Article 113 of the Constitution and accordingly, the Referral is admissible for review on merits. This, inter alia, and based also on the explanations given in this Judgment, because (i) the relevant decision of the Assembly was adopted by a majority vote of the deputies of the Assembly; and (ii) has legal effects for KOSTT and the Government of the Republic of Kosovo. Moreover, the Court, through its already consolidated case-law, has emphasized that the decision-making of public authorities would remain outside the constitutional control, if the Court was to take into account only the formal designation/ terminology assigned to the relevant act by the public authorities.

In reviewing the merits of the case, the Court focused on reviewing the constitutionality of the procedure and the substance of the contested Act of the Assembly, namely whether by issuing this Act, the Assembly (i) acted in (non)compliance with its decision-making competence, defined by the Constitution and the law; and (ii) limited the fundamental rights and freedoms of electricity consumers not living in the four (4) municipalities of the Republic of Kosovo, contrary to the guarantees of Article 24 of the Constitution in conjunction with Article 14 of the European Convention on Human Rights and Article 1 of Protocol no. 12 of this Convention.

Constitutionality of the proceedings

Pertaining to the constitutionality of the procedure followed, the Court initially elaborated (i) the competencies and responsibilities of the Public Enterprise KOSTT; (ii) the KOSTT obligation to balance the energy system and cover electricity deviations; (iii) the rights and obligations of KOSTT in relation to the Connection Agreement with ENTSO-E; (iv) the constitutional and legal competencies of the Assembly to adopt the Law on Budget and responsibilities related to public finances; and (v) the procedure followed in the Assembly and the relevant competence to issue the contested Act, and the Court, concluded that the procedure followed in issuing the contested Act of the Assembly is in accordance with Article 65 of the Constitution.

In support to this conclusion, the Court noted that (i) based on paragraph 1 of Article 65 of the Constitution, the Assembly adopts laws, resolutions and acts; (ii) based on paragraph 14 of Article 65 of the Constitution, the Assembly decides "in regard to general interest issues as set forth by law"; (iii) in exercising its competencies as defined by law, namely based on paragraph 2 of Article 13 of the Law on Electricity, the Assembly of the Republic of Kosovo, exercises the rights of the KOSTT shareholder; (iv) on the other hand, based on paragraph 1 of Article 13 of the Law on Electricity, KOSTT functions as a Publicly Owned Enterprise in accordance with Law no. 03/ L-087 on Publicly Owned Enterprises and relevant legislation in force; (v) based on Article 4 (Organisation; Shares) of the Law No. 03/L-087 on Publicly Owned Enterprises, the latter are organized as joint stock companies under the applicable law on business organizations; and that (vi) based on Article 151 (Procedures for Authorizing Dividends) of the Law No. 06/L-016 on Business Organizations, among others, the decision on the authorization and payment of dividends can be made by the shareholders.

Based on the above, the Court clarified that in issuing the contested Act, the Assembly, among others, has authorized KOSTT to cover electricity deviations in the four (4) municipalities "using revenues from its own budget, funds which will be compensated by dividends or any other possible mechanism" and that it issued this decision (i) exercising its competence as a shareholder of the Public Enterprise KOSTT; and (ii) in the exercise of the shareholder's competence, made a decision pertaining to the KOSTT dividend; whereas, the exercise of this competence was not related to paragraph 5 of Article 65 of the Constitution pertaining to the budget of the Republic of Kosovo, as also maintained before the Court by the relevant Committees of the Assembly, namely the Committee on Budget, Labor and Transfers and Committee for Oversight of Public Finance; but (ii) the exercise of this competence derives from paragraphs 1 and 14 of Article 65 of the Constitution, based on which the Assembly issues acts pertaining to general interest issues as set forth by law.

The constitutionality of the substance

Pertaining to the constitutional review of the substance of the contested Act of the Assembly, the Court first elaborated the general principles

regarding the guarantees of Article 24 of the Constitution, Article 14 of the European Convention on Human Rights and Article 1 of Protocol no. 12 of this Convention, noting that Article 24 of the Constitution in conjunction with Article 1 of Protocol no. 12 of the European Convention on Human Rights, extends the protection against discrimination also in relation to any right provided by law. The Court then elaborated the general principles based on its case-law and that of the European Court of Human Rights, clarifying that in order to determine whether an act may have resulted in discrimination contrary to the guarantees provided through these Articles, it must first assess whether the respective act has treated differently "persons in analogous or relatively similar situations", and if this is the case, to assess whether this difference in treatment (a) is prescribed by law; (b) pursues a legitimate aim; and (c) is proportionate, namely, whether there is a relationship of proportionality between the limitation of the right and the purpose to be be achieved.

In the above context, the Court initially found that in the circumstances of the present case, within the meaning of the legal provisions pertaining to electricity consumers in the Republic of Kosovo, the electricity consumers in all municipalities are in "analogous or relatively similar situations". While, in assessing the difference in treatment, the Court emphasized that as a result of the non-billing/ non-payment of electricity by electricity consumers in the four (4) municipalities of the Republic of Kosovo, the electricity consumption in these four (4) municipalities, was recorded as a deviation. For this purpose, KOSTT has requested the allocation of financial means in order to procure electricity to cover deviations in the four (4) municipalities of the Republic of Kosovo. Furthermore, based on the contested Act of the Assembly, it results that as a consequence of the authorization given to KOSTT by the Assembly to cover the deviations due to the non-billing/non-payment of electricity by the consumers of four (4) municipalities of the Republic of Kosovo and until the beginning of the implementation of a electricity billing system that includes the consumers of these four (4) municipalities, the latter enjoy a different treatment from consumers of other municipalities of the Republic of Kosovo. Consequently, the Court found that the contested Act of the Assembly results into a difference in treatment between the consumers living in and those not living in the four (4) municipalities of the Republic of Kosovo. The Court noted, however, that the difference in treatment between consumers in "analogous or relatively similar situations", based on the case-law of the European Court of Human Rights, results in discrimination contrary to the guarantees of Article 24 of the Constitution in conjunction with Article 1 of Protocol no. 12 of the European Convention on Human Rights, only if the relevant act of public authority lacks "an objective and reasonable justification". Therefore, the assessment whether the difference in treatment is (a) prescribed by law; (b) pursues a legitimate aim; and (c) is proportionate, is necessary.

First, the Court found that the difference in the treatment of electricity consumers in the four (4) municipalities of the Republic of Kosovo, is "prescribed by law". This because (i) based on Article 16 (Tasks and responsibilities of the Transmission System Operator) of the Law on Electricity, KOSTT has the obligation to balance the electricity system in accordance with the transmission network code and market rules; (ii) based on Article 19 (Procurement of Electricity and Capacities from the Transmission System Operator) of the Law on Electricity, among others, KOSTT has the obligation to cover losses in the transmission network through the procurement of electricity; and (iii) based on Article 28 (Responsibilities and Rights of the Distribution System Operation) of the Law on Electricity, among others, KOSTT has the responsibility to provide electricity to cover losses in the distribution network. Whereas, based on Article 10 (Transmission System Operator) of the Law on Electricity, the transmission system operator owns the transmission system and is responsible for the operation of this system in line with the license issued by the regulatory authority. Based on the KOSTT License, namely Article 5 (Compensation for the losses in the North of Kosovo), the possibility of KOSTT to "provide electricity to compensate for losses arising from energy used, but not paid, by consumers in the north part of Kosovo" is expressly provided.

Second, the Court found that the difference in the treatment of electricity consumers in the four (4) municipalities of the Republic of Kosovo, pursues a "legitimate aim". This is because, the contested Act of the Assembly aims at: (i) ensuring the exercise of sovereignty in the electro-energetic system with all the rights and obligations as defined by the Connection Agreement with ENTSO-E; (ii) preserving the energy independence of the Republic of Kosovo; (iii) protecting the public interest in guaranteeing the

supply of electricity throughout the territory of the Republic of Kosovo; (iv) maintaining and strengthening the status of KOSTT in the respective international mechanism, namely the Connection Agreement with ENTOS-E, which has enabled this enterprise to operate as an Independent Regulatory Zone within the AK-Block with the Republic of Albania, within the synchronous zone of Continental Europe; (v) preventing the financial consequences by ENTSO-E, as a result of non-fulfilment of the commitment for balancing within the energy network system or avoiding the deviations in the energy system by KOSTT; and (vi) maintaining the KOSTT status in this mechanism and its equal member status with all other transmission system operators within the ENTSO-E.

Third, the Court found that the difference in the treatment of electricity consumers in the four (4) municipalities of the Republic of Kosovo, through the contested Act of the Assembly, is "proportionate", namely the contested Act of the Assembly, reflects a reasonable relationship of proportionality between the measure taken and the respective aim pursued. This is because, the contested Act of the Assembly (i) in its point 4, has authorized the Public Enterprise KOSTT to cover the deviations in electricity in the four (4) municipalities of the Republic of Kosovo; while (ii) in its point 5, has obliged the Government to "within the timeline of six (6) months to ensure the entire system of inclusion in the billing system, based on rules and laws in force, in cooperation with the responsible parties, for billing of the consumers" in the four (4) municipalities of the Republic of Kosovo. Therefore, the Court, emphasized that the contested Act of the Assembly, namely the authorization provided to KOSTT to cover losses in electricity, is of a temporary character and it aims at extending the electricity billing system to the consumers in four (4) municipalities of the Republic of Kosovo.

Consequently, and finally, the Court found that the issuance of the contested Act of the Assembly, has resulted in a difference in treatment of electricity consumers who do not live in the four (4) municipalities of the Republic of Kosovo, nevertheless, this difference in treatment contains an "objective and reasonable justification" and, consequently, does not result into discrimination because (a) it is prescribed by law; (b) has pursued a legitimate aim; and (c) is proportionate, and therefore, was not issued in non-compliance with Articles 24 and 55 of the Constitution in conjunction with Article 1 of Protocol No. 12 to the European Convention on Human Rights.

Judgment

KO 145/21

Applicant

Municipality of Kamenica

Request for constitutional review of the Decision No. 01B/24 of the Ministry of Education, Science, Technology and Innovation, of 23 April 2021

The circumstances of this case are related to the reorganization of schools in the Municipality of Kamenica in 2019, a reorganization which was initiated through the relevant decisions of the Mayor of the Municipality, inter alia, with the justification of the decrease in the number of students in some schools and lack of genuine infrastructure of the educational institutions. Initially, the Ministry of Local Government Administration ascertained that the relevant decisions were issued in accordance with applicable laws, namely the own competencies of the municipalities and MESTI inspected the implementation of these decisions. However, some parents of the affected students refused the implementation of these decisions and challenged them through administrative conflict, requesting the issuance of interim measures in order to suspend the implementation of the decisions of the Municipality. The Supreme Court, based on the case file, rejected to suspend the implementation of the relevant decisions. Considering that a number of students did not attend classes according to the decisions of the Municipality, in 2021 MESTI formed a committee to assess the non-attendance of classes by 441 students, which, among other things, recommended that in order to address the situation, MESTI and the Municipality should: (i) take harmonized action; and (ii) establish a working group to analyze the situation in schools. However, MESTI issued the challenged Decision, based on which it organized the "accelerated alternative education for 441 students of the

Municipality of Kamenica". This Decision was challenged by the Municipality of Kamenica before the Court, claiming that by it, MESTI had interfered with own competencies of the Municipality, and consequently, infringed upon municipal responsibilities in violation of constitutional guarantees.

Applicant's allegations and counter-arguments of MESTI and the Ministry of Local Government Administration

The Applicant alleges that the challenged Decision of the MESTI violated its municipal responsibilities in violation of Articles 12, 123 and 124 of the Constitution in conjunction with Article 2 (Constitutional Basis and Law on Local Self-Government) and Article 4 (Scope of Local Self-Government) of the European Charter of Local Self-Government, stating, in essence, that: (i) The challenged decision was rendered in violation of Article 12 of the Constitution in conjunction with paragraph (h) of Article 17 (Own Competences) of Law No. 03/L-040 on Local Self-Government, because based on this provision the municipality has full and exclusive competence to provide public preschool, primary and secondary education, including registration and licensing of educational institutions; (ii) based on applicable laws, the MESTI has no competence to organize alternative or supplementary teaching and may only request the municipality to organize this type of classes; and (iii) MESTI has no competence to determine the locations of educational institutions nor to oblige the municipality to hold alternative teaching in unlicensed educational institutions which no longer exist as school facilities. MESTI counter-arguments, among others, emphasize that in issuing the challenged Decision, it was based on Government Regulation No. 02/2021, on the Areas of Administrative Responsibility of the Office of the Prime Minister and the Ministries and considers that it is the obligation of the state, in accordance with international principles for the protection of human rights, to ensure the implementation of the fundamental right to education, namely ensuring access to educational institutions. The Ministry of Local Government Administration, through the comments submitted to the Court, supports the arguments of MESTI.

Admissibility of the Referral

After submitting the request for constitutional review of the challenged Decision by the Mayor of the Municipality of Kamenica, Mr. Qëndron Kastrati, on 17 October 2021, namely 14 November 2021, after the second round of local elections in the Republic of Kosovo, Mr. Kadri Rahimaj was elected Mayor of the Municipality of Kamenica. The latter, through his representative, on 5 January 2022, submitted to the Court a request for withdrawal of case KO145/21, reasoning that there is no legal interest in its review. The Court, based on Rule 35 (Withdrawal, Dismissal and Rejection of Referrals) of the Rules of Procedure, according to which, notwithstanding the request for withdrawal, the Court may determine to decide on the initial referral, first assessed the request of the new Mayor of the Municipality, but decided to reject the latter, given the public interest for the continuation of the decision on merits in the case, emphasizing the importance of clarifying the allegations of violation of constitutional principles related to local self-government.

Merits

In addressing the Applicant's allegations, the Court first examined the general principles regarding local self-government established in the Constitution, the European Charter of Local Self-Government, the relevant Venice Commission Opinions on the principles of local government and the applicable laws specifying the competences of the Municipality and MESTI in the field of education, namely the Law on Local Self-Government, Law No. 04/L-032 on Pre-University Education and Law No. 03/L-068 on Education in Municipalities of the Republic of Kosovo.

The Court, based on Articles 12, 123 and 124 of the Constitution, namely, among others, stated that: (i) the basic territorial units of local self-government in the Republic of Kosovo are municipalities; (ii) the organization and competencies of the local self-government units are regulated by law and the establishment of municipalities, the borders, the competencies and the manner of their organization and functioning are regulated by law; (iii) the municipalities have their own competencies, expanded and delegated in accordance with the law; and (iv) the administrative review of municipal acts by the central authorities in the area of their competencies, is limited to ensuring compliance with the Constitution and the law. Furthermore, based on these constitutional articles, the Court emphasized that the activity of local self-government bodies is based on the Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The latter, inter alia, and insofar as it is relevant to the circumstances of the present case, stipulates that:

(i) local authorities, within the limits of the law, will have full discretion to exercise their initiative in relation to any matter which is not excluded from their competence and has not been assigned to any other authority; (ii) the competencies conferred on local authorities should normally be full and exclusive and that they may not be undermined or limited by another authority, central or regional, except as provided by law; and (iii) any administrative control over local authorities may be exercised only in accordance with the forms and in the cases provided for by the Constitution or by law.

Local self-government is of such importance in the constitutional order that the Constitution: (i) has defined these guarantees, inter alia in its Basic Provisions of the Constitution; (ii) has determined the observance of the European Charter of Local Self-Government; and (iii) in order to ensure the protection of these guarantees, in its Article 113, it has given municipalities direct access to the Constitutional Court, in the capacity of authorized parties, to challenge the constitutionality of laws or acts of the Government which infringe upon municipal responsibilities or diminish the revenues of the municipality, in case the relevant municipality is affected by that law or act. In compliance with the abovementioned guarantees of the Constitution and the European Charter of Local Self-Government and their reference to the obligation to implement these guarantees also through the applicable laws, the Court also recalled that pursuant to Article 17 of the Law on Local Self-Government, municipalities have "full and exclusive" powers in providing public pre-school, primary and secondary education, including the registration and licensing of educational institutions, employment, payment salaries and training instructors and education administrators. On the other hand, MESTI, based on the Law on Pre-University Education and the Law on Municipal Education, among others, has the main responsibility for planning, setting standards and quality assurance of the pre-university education system and the responsibility to promote and improve the quality and efficiency of education and training through education inspection, monitoring and evaluation in order to increase the quality and oversee the implementation of applicable legislation. In the context of the reports of the relevant inspectors, as defined in Article 8 (Inspection of education) of the Law on Pre-University Education, and insofar as relevant to the circumstances of the case, MESTI may request the implementation of additional or alternative teaching, if shortcomings are observed in implementing the curriculum in a municipality.

In this context, the Court emphasized that: (i) the provision of public preschool, primary and secondary education, based on the Law on Local Self-Government, is own competence of the Municipality and that these competencies are full and exclusive; and (ii) in its inspection role, as established in the Law on Pre-University Education, the MESTI "may require the implementation of additional or alternative classes" if deficiencies are observed in the implementation of the curriculum. In the circumstances of this case, the relevant report of the MESTI committee of 14 April 2021, among other things, recommended the undertaking of harmonized actions between the Ministry, the Municipality and the parents "to enable the immediate return of students to school". However, referring to the abovementioned Regulation of the Government, MESTI issued the challenged Decision, by which, among other things, organized accelerated alternative education for the Municipality of Kamenica, deciding to organize classes in five (5) respective schools of the Municipality of Kamenica, the schools that the Applicant had previously reorganized through decisions, as part of his reform.

After analyzing the constitutional principles, those of the European Charter of Local Self-Government and applicable laws and according to the explanations given in the published Judgment, the Court, inter alia, stated that in organizing the accelerated alternative education and determining the organization of education in relevant school facilities in the Municipality of Kamenica, MESTI through the challenged Decision has exceeded its competence and violated municipal responsibilities, namely interfered with the own competencies of the Municipality of Kamenica regarding the provision of public primary and secondary education in violation of constitutional and legal guarantees. The Court emphasized the importance of respecting the constitutional principles regarding local self-government and the obligation of the central power to exercise any administrative control over local authorities only according to the forms and in the cases foreseen by the Constitution or the applicable law.

Judgment

KI 113/21

Applicant

Bukurije Haxhimurati

Request for constitutional review of Judgment of the Supreme Court of the Republic of Kosovo [Pml. No. 29/2021] of 13 April 2021

The circumstances of the present case are related to the sentence of the Applicant for the criminal offense of "exercising influence", since the latter, according to the decisions of the regular courts, had received a certain amount of money to influence the decision-making of official persons, in order to mitigate or release from the sentence a person who was convicted for a criminal offense. With regard to finding the Applicant guilty, the regular courts administered a number of pieces of evidence, including: (i) reading the testimony of witness "C"; (ii) transcripts of meetings held between the Applicant and witness "C"; (iii) testimony of other witnesses and other material evidence; (iv) interception reports; and (v) a number of SMS text messages, which were retroactively taken by the order of the Basic Court in Prishtina.

During the proceedings before the regular courts, the Applicant challenged, inter alia, the evidence examined against her, including (i) the order of the Basic Court authorizing the receipt of SMSs retroactively; and (ii) reading the testimony of witness "C" given during the investigation phase, as the latter was declared a protected witness and therefore did not testify at the main hearing, but his statement was read. The Court of Appeals and the Supreme Court, respectively, rejected these allegations, upholding the Applicant's conviction. The Applicant alleged before the Court that her right to privacy guaranteed by 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 had been violated, as well as the right to fair and impartial trial 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 of Human Rights because, inter alia: (i) The judgment of the Basic Court in relation to her conviction was based on evidence which was unlawful, namely, the SMSs retroactively taken, and (ii) during the main hearing she was not allowed to cross-examine the witness "C".

In assessing the Applicant's allegations, the Court, based on the cas law of the European Court of Human Rights, initially stated that the interception of telephones and SMS was considered an "interference" with the right to "private life" and "correspondence". However, according to the European Court of Human Rights, such an "interference" is justified if it is (i) "provided by law"; (ii) pursues a "legitimate aim"; and (iii) if it is "proportionate". In applying these principles in the circumstances of the present case, the Court found that the issuance of SMS retroactively, namely the order of a court that retroactively authorizes covert and technical measures of surveillance and investigation, was contrary to the provisions of the Criminal Procedure Code, since such an order is valid only from the "date of issuance" of the relevant court decision and not retroactively. Consequently, the Court found that the "relevant interference" with the Applicant's private life was not "provided by law", namely it was contrary to the applicable law, and consequently, it was no longer necessary to assess whether in the circumstances of the present case, there may have been a "legitimate aim" or "proportionality". Therefore, based on the case law of the European Court of Human Rights, the Court found that, in the circumstances of the present case, the decisions of the regular courts had resulted in a violation of the Applicant's right to privacy, contrary to the guarantees of the Article 36 of the Constitution in conjunction with Article 8 of the European Convention on Human Rights.

However, in dealing with the Applicant's allegations of violation of the right to a fair and impartial trial, the Court emphasized that the finding of a violation of the right to privacy does not necessarily result in a violation of the right to a fair and impartial trial. Based on the case law of the European Court of Human Rights, in order to reach such a finding, the Court must assess whether the relevant evidence was

"single" and/or "decisive" in determining guilt, namely to sentence of the Applicant by the regular courts. In the circumstances of the present case, the Court found that the interceptions/retroactive reading based on an unlawful decision of the Basic Court, were not "decisive" for the conviction of the Applicant. This is because the judgments of the regular courts were based, inter alia, also in the transcripts of the meetings held between the Applicant and witness "C"; the testimonies of other witnesses; interceptions based on the orders of the respective court which were not challenged by the Applicant and other material evidence. Furthermore, with regard to the testimony of witness "C", the Court also noted that, based on the case file (i) the Applicant and her defense counsels were invited during the examination of witness "C" at one stage of the proceedings, but refused to attend; and that (ii) the testimony of witness "C", read at the main hearing, was not the "single" and/or "decisive" evidence for finding the Applicant guilty.

Therefore and based on the explanations given in the published Judgment, the Court found that the challenged Judgment of the Supreme Court did not violate the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, therefore the latter, as to the sentence of the Applicant, remains in force. Whereas, regarding the finding of a violation of the Applicant's right to privacy in violation of the guarantees established in Article 36 of the Constitution in conjunction with Article 8 of the European Convention on Human Rights, given that the Constitutional Court does not have the competence to award compensation based on its case law, the latter clarified that the Applicant can use the legal remedies available under the legislation in force, for the further exercise of her rights, including the right to seek compensation for material damage as a result of violation of the right to privacy guaranteed by Article 36 of the Constitution and Article 8 of the ECHR.

ECtHR – Important decisions (1 January – 30 June 2022)

* No violation in conviction for war crimes on the basis of command responsibility (20/01/2022)

In its Chamber judgment in the case of **Milanković v. Croatia** (*application no. 33351/20*) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 7 (no punishment without law)** of the European Convention on Human Rights. The case concerned the applicant's conviction for war crimes, perpetrated by the police units under his command, against the Serbian civilian population and a prisoner of war, on the territory of Croatia between mid-August 1991 and mid-June 1992. The applicant complained that, in convicting him of those crimes, the domestic courts had applied a protocol applicable only to international armed conflicts, whereas the events had taken place before Croatian independence and thus during a non-international armed conflict. The Court concluded that the applicant's conviction for war crimes on the basis of his command responsibility had, at the time of the events, a sufficiently clear legal basis in international law also covering non-international armed conflict, and that he should have known that his failure to prevent them from being committed by the police units under his command would make him criminally liable. It was irrelevant whether those crimes had been committed before or after Croatian independence.

* Denial of access to classified presidential records did not breach the Convention (03/02/2022)

In its Chamber judgment in the case of **Šeks v. Croatia** (*application no. 39325/20*) 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 a retired politician's complaint that his request for access to classified presidential records in order to carry out research for a book had been denied on national security grounds. The Court noted in particular that the President's decision refusing to declassify some of the requested documents had been based on an opinion of a specialised body dealing with national security issues and had ultimately been reviewed and upheld by the Information Commissioner, the High Administrative Court and the Constitutional Court. Moreover, the applicant's request to access documents had for the most part been granted. It concluded that the interference with the applicant's freedom of access to information had been necessary and proportionate to the important aim of national security and that the subsequent independent domestic review of his request had provided him with sufficient procedural safeguards and remained within the State's wide discretion to decide on such matters.

* Systemic dysfunction in judicial appointments procedure in Poland (03/02/2022)

In its Chamber judgment in the case of **Advance Pharma sp. zo. ov. Poland** (*application no. 1469/20*) 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 a complaint brought by the applicant company that the Civil Chamber of the Supreme Court, which had decided on a case concerning it, had not been a "tribunal established by law" and had lacked impartiality and independence. It complained in particular that the Civil Chamber 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 94 currently pending applications against Poland, mostly lodged in 2018-2022, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017*. To date, the Court has delivered four judgments, three of which are final. As in previous cases, 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 the applicant company's rights under Article 6 § 1 of the Convention. The Court found that the procedure for appointing judges to the Civil Chamber of the Supreme Court 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 Civil Chamber of the Supreme Court, which had examined the applicant company's case. The Civil Chamber 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 22 July 2021 and Dolińska-Ficek and Ozimek v. Poland (nos. 49868/19 and 57511/19) of 8 November 2021 regarding the other Chambers of the Supreme Court. As in the latter case, an additional manifest breach of domestic law was also found in this judgment because the President of Poland had carried out judicial appointments despite a final court order staying the implementation of the NCJ's resolutions recommending judges to the Supreme Court. The Court found that the violation of the applicant company's 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. It was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might lead to further aggravation of the rule of law crisis in Poland. Therefore, rapid action on the part of the Polish State to remedy this is required. It 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.

*** Television interview of minor without parental consent: violation (01/03/2022)**

In its Chamber judgment in the case of **I.V.Ț. v. Romania** (*application no. 35582/15*) 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)**. The case concerned a television interview a minor, without parental consent or adequate measures to protect her identity. The interview, which concerned the death of a schoolmate, had resulted in her being bullied and had caused her emotional stress. The Court found in particular that the domestic appellate courts had only superficially balanced the question of the applicant's right to private life and the broadcaster's right to free expression, in particular that she had been a minor and had been interviewed without parental consent.

*** Judge reprimanded for sharing press article on Facebook: violation of freedom of expression (01/03/2022)**

In its Chamber judgment in the case of **Kozan v. Turkey** (*application no. 16695/19*) 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, and a **violation of Article 13 (right to an effective remedy)** taken together with Article 10. The case concerned a disciplinary sanction (reprimand) imposed on Mr Kozan, a serving judge, for having shared in May 2015, in a private Facebook group, a press article headed "Judicial rehabilitation for closing the 17 December investigation, dismissal for conducting the investigation", without posting any comment himself. The Court found that the press article in question was part of a debate of particular interest for members of the judiciary, since it concerned the impartiality and independence of judges vis-à-vis the executive with respect to events surrounding proceedings for suspected corruption dating from the period 17-25 December 2013 and the government's opposition to those proceedings. The fact that a judge had shared with his colleagues certain views in the press about the independence of the justice system, and had allowed them to comment in response, had necessarily fallen within his freedom to impart or receive information in a crucial area for his professional life. The Court also observed that the Council of Judges and Prosecutors had not appropriately weighed in the balance the applicant's freedom of expression on the one hand and his duty of discretion as judge on the other. It further reiterated that the Council was a non-judicial organ and that the proceedings before its Chamber and Plenary Assembly did not afford the safeguards of judicial review. Moreover, no judicial remedy had been available to the applicant in respect of the measure taken against him by the Council. The disciplinary sanction imposed on him had not met any pressing social need and, consequently, had not constituted a measure that was "necessary in a democratic society".

*** Premature ending of mandate for a member of the Polish National Council of the Judiciary: violation of the Convention (15/03/2022)**

In its Grand Chamber judgment in the case of **Grzęda v. Poland** (*application no. 43572/18*) the European Court of Human Rights held, by 16 votes to 1, that there had been: a **violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights.
Mr Grzęda is a judge. The case concerned his removal from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision. His removal had taken place in the context of judicial reforms in Poland. The Court found in particular that the lack of judicial review had breached Mr Grzęda's right access to a court. It held that the successive judicial reforms, including that of the NCJ that had affected Mr Grzęda, had been aimed at weakening judicial independence. That aim had been achieved by the judiciary's being exposed to interference by the executive and legislature. This was the first time that the Grand Chamber of the Court had examined these issues. There are approximately 93 pending applications before the Court concerning the reorganisation of the courts in Poland.

*** Former Kaupþing Bank executive's trial for fraud unfair owing to use of transcript of his questioning while still a witness (15/03/2022)**

In its Chamber judgment in the case of **Bjarki H. Diego v. Iceland** (*application no. 30965/17*) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights in respect of the requirement of an independent and impartial tribunal, and a violation **of Article 6 §§ 1 and 3 (a) and (c) (right to be informed promptly of accusation/right to legal assistance of own choosing)**. The case concerned the trial of Mr Diego – a former Kaupþing

bank official – for fraud by abuse of position following the 2008 financial crisis. He had been questioned without being informed of his status as a suspect. Details of one of the judge's (V.M.M.) shareholdings in Kaupþing were revealed only following the final judgment in his case. The Court found that Justice V.M.M.'s losses in Kaupþing had been minimal and certainly not at a level to call into question his impartiality. However, the Court did find that the Icelandic authorities had been negligent with regards to the investigation against Mr Diego. In particular, the prosecutor had interviewed Mr Diego as a witness in the case, despite his effectively having been treated as a suspect at the time, his phone having been tapped as a result, and the transcript of that interview subsequently being introduced as evidence before court. The Government were unable to show that this had not undermined the fairness of the trial.

*** General anti-COVID measures prohibiting public events for a lengthy period were in breach of the Convention (15/03/2022)**

In the case of **Communaute genevoise d'action syndicale (CGAS) v. Switzerland** (*application no. 21881/20*) the applicant association complained of being deprived of the right to organise and participate in public events following the adoption of government measures to tackle COVID-19. In its Chamber judgment the European Court of Human Rights held, by a majority (4 votes to 3), that there had been a **violation of Article 11 (freedom of assembly and association)** of the European Convention on Human Rights. The Court, while by no means disregarding the threat posed by COVID-19 to society and to public health, nevertheless held, in the light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. The Court further observed that the domestic courts had not conducted an effective review of the measures at issue during the relevant period. The respondent State had thus overstepped the margin of appreciation afforded to it in the present case. Consequently, the interference had not been necessary in a democratic society within the meaning of Article 11 of the Convention.

*** No violation in Grand Chamber case concerning withdrawal of Moldovan television station's licence (05/04/2022)**

In its Grand Chamber judgment in the case of **NIT S.R.L. v. the Republic of Moldova** (*application no. 28470/12*) the European Court of Human Rights held, by 14 votes to 3, that there had been: **no violation of Article 10 (freedom of expression)** of the European Convention on Human Rights and, by 15 votes to 2, that there had been: **no violation of Article 1 of Protocol No. 1 (protection of property)**.
The case concerned the applicant company's allegation that its television channel was shut down for being overly critical of the Government and, in particular, whether domestic law could impose an obligation of neutrality and impartiality in the news bulletins of television stations broadcasting on national public networks. The Court recalled that the internal pluralism policy chosen by the Moldovan authorities and embodied in the Audiovisual Code 2006 had received a positive assessment by Council of Europe experts. While the policy chosen by the national authorities could be viewed as rather strict, the case related to a period before Moldova transitioned to terrestrial digital television, when the number of national frequencies was very limited and when the authorities had to put in place broadcasting legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. With that in mind, the Court was satisfied that the reasons behind the decision to restrict the applicant company's freedom of expression had been relevant and sufficient and that the domestic authorities had balanced the need to protect pluralism and the rights of others, on the one hand, and the need to protect the applicant company's right to freedom of expression on the other. In addition, even though its loss of licence had eventually led to the demise of its analogue television network, the applicant company could have reapplied for a broadcasting licence after a year. The Court was satisfied that the respondent State had struck a fair balance between the general interest of the community and the property rights of the television station. In its judgment, the Court developed its case-law on pluralism in the media and clarified the interrelationship between the internal and external aspects of media pluralism, the scope of the margin of appreciation afforded to States, and the level of scrutiny applicable to restrictions in this area. It also outlined the factors for assessing a regulatory framework and its application.

*** Expelling to Pakistan a national of that country who had converted to Christianity in Switzerland was liable to infringe his Convention rights (26/04/2022)**

The case of **M.A.M. v. Switzerland** (*application no. 29836/20*) concerned the applicant's possible expulsion to Pakistan. M.A.M. is a Pakistani national who had converted from Islam to Christianity while in Switzerland, where he had arrived in 2015 and where his asylum request had been rejected. In its Chamber judgment the European Court of Human Rights held, unanimously, that if the decision to expel the applicant to Pakistan were to be executed there would be a **violation of Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment)** of the European Convention on Human Rights, in the absence of an assessment of the

risk to which the applicant was exposed on account of the overall situation of Christian converts in Pakistan and of his own personal situation. The Court ruled that the assessment by the Swiss authorities of the risk facing the applicant on account of his conversion to Christianity if he were expelled to Pakistan had been insufficient to uphold the rejection of his asylum request, also given that he had not been represented by a lawyer at any stage in the national proceedings. It further found that the applicant had demonstrated that his asylum request, which had been based on his religious conversion, should have been examined in greater detail by the national authorities, which should, in particular, have taken into consideration any possible developments in the overall situation of Christian converts in Pakistan and the specific circumstances of the applicant's case. The Court also decided, pursuant to Rule 39 of its Rules of Court (interim measures), that it was desirable in the interests of the proper conduct of the proceedings, that the applicant should not be expelled until the judgment had become final2 or until further notice.

* Violation of freedom of expression of a local politician convicted for publishing political satire cartoons on his blog (07/06/2022)

In its Chamber judgment in the case of Patrício **Monteiro Telo de Abreu v. Portugal** (*application no. 42713/15*) 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 the applicant's conviction and his sentencing to payment of a fine and damages for aggravated defamation of a municipal councillor (Ms E.G.) on account of the publication on a blog administered by him of three cartoons drawn by an artist. The Court held that the domestic courts had not taken sufficient account of the context in which the applicant had published the cartoons on his blog. They had not carried out a thorough balancing exercise between the rights at stake. Furthermore, they had not taken into consideration the characteristics of political satire emerging from the Court's case-law or made any reference to the Court's case-law on freedom of expression. The Court held that the reasons given by the domestic courts to justify the applicant's conviction could not be regarded as relevant and sufficient. In its view, imposing criminal sanctions for conduct such as that of the applicant in the present case was liable to have a chilling effect on satirical forms of expression concerning political issues. The applicant's conviction had thus not been necessary in a democratic society.

* No violation of former Prime Minister of Lithuania's rights in disclosure of secretly recorded telephone conversation (14/06/2022)

In its Chamber judgment in the case of **Algirdas Butkevičius v. Lithuania** (application *no. 70489/17*) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights. The case concerned a telephone conversation between Mr Butkevičius and a mayor that was secretly recorded during a pre-trial investigation into possible corruption in connection with territorial planning and was made public at a hearing of the Seimas's (the Lithuanian Parliament's) Anti-Corruption Commission. At the time, Mr Butkevičius was the Prime Minister of Lithuania. The Court found that, even if Mr Butkevičius's reputation had been affected by the disclosure of his telephone conversation, there was no evidence that it had been affected to such an extent that it could count as a disproportionate interference with his rights guaranteed by Article 8 of the Convention.

* Polish authorities attempted to silence well-known judge (16/06/2022)

In its Chamber judgment in the case of **Żurek v. Poland** (*application no. 39650/18*) the European Court of Human Rights held: by, six votes to one, that there had been a **violation of Article 6 § 1 (right of access to court)** of the European Convention on Human Rights, and unanimously, that there had been a **violation of Article 10 (freedom of expression)**. Mr Żurek is a judge. He was also spokesperson for the National Council of the Judiciary (NCJ), the constitutional body in Poland which safeguards the independence of courts and judges. In that capacity, he has been one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new Government which came to power in 2015. The case concerned his removal from the NCJ before his term had ended, and his complaint that there had been no legal avenue to contest the loss of his seat. It also concerned his allegation of a campaign to silence him. Following the same reasoning as in the recent Grand Chamber case Grzęda v. Poland (no. 43572/18), the Court found that the lack of judicial review of the decision to remove Mr Żurek from the NCJ had breached his right of access to a court. The Court also found that the accumulation of measures taken against Mr Żurek – including his dismissal as spokesperson of a regional court, the audit of his financial declarations and the inspection of his judicial work – had been aimed at intimidating him because of the views that he had expressed in defence of the rule of law and judicial independence. In finding these violations, the Court emphasised the overall context of successive judicial reforms, which had resulted in the weakening of judicial independence and what has widely been described as the rule-of-law crisis in Poland.

* Italian authorities' inaction on serious domestic violence allegations violated the Convention (16/06/2022)

In the case of **De Giorgi v. Italy** (*application no. 23735/19*) the applicant complained that despite the filing of several criminal complaints the Italian authorities had failed to afford her protection and assistance after she suffered domestic violence at the hands of her husband, from whom she had been separated since 2013. In its Chamber judgment in the case, the European Court of Human Rights held, unanimously, that there had been: a violation of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights. The Court found that the Italian authorities had not conducted an assessment of the risk of ill-treatment focused specifically on the context of domestic violence and in particular the situation of the applicant and her children, an assessment which would have warranted concrete preventive measures to protect them from such risk. The authorities had therefore breached their duty to protect the applicant and her children from the husband's acts of domestic violence. The Court determined that the Italian authorities had taken no action in response to the serious risk of ill-treatment faced by the applicant and her children and had, by their failure to act, created a situation of impunity, with the husband yet to be tried for the injuries inflicted on the applicant in the assault of 20 November 2015 and the investigation into the applicant's other complaints remaining pending since 2016. The Court also held that the State had breached its duty to investigate the ill-treatment of the applicant and her children, and that the manner in which the domestic authorities had conducted the criminal prosecution in the case also qualified as judicial inaction and could not be regarded as meeting the requirements of Article 3 of the Convention.

* Court finds violation of Article 10 on account of severity of Jean-Marc Rouillan's prison sentence for radio remarks, without calling into question principle behind penalty imposed for complicity in public defence of terrorism (23/06/2022)

In its Chamber judgment in the case of **Rouillan v. France** (*application no. 28000/19*) 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 on account of the severity of the criminal penalty imposed. The case concerned the sentencing of Jean-Marc Rouillan, formerly a member of the terrorist group Action directe, to a term of 18 months' imprisonment including a suspended portion of 10 months with probation, upon his conviction as an accessory to the offence of publicly defending acts of terrorism for remarks he had made on a radio show in 2016 and which had subsequently been published on a media website. The Court took the view that the applicant's conviction and sentencing as an accessory to the offence of defending acts of terrorism had amounted to an interference with his right to freedom of expression. It recognised that the interference had been prescribed by law and had pursued the legitimate aim of preventing disorder and crime. Turning to whether the interference was necessary in a democratic society within the meaning of Article 10 § 2, the Court accepted, first, that the remarks in issue fell to be regarded as an indirect incitement to terrorist violence and saw no reasonable basis on which to depart from the meaning and scope attached to them by a decision of the Criminal Court, whose duly stated reasons had been adopted by the Court of Appeal and the Court of Cassation. The Court further stated that it saw no reasonable ground, in this case, on which to depart from the domestic courts' assessment regarding the principle behind the penalty. It held in this regard that their reasoning as to why the penalty imposed on the applicant had been warranted – based on the need to combat defence of terrorism and on consideration of the offender's personal characteristics – appeared both "relevant" and "sufficient" to justify the interference at issue, which fell to be regarded as responding, in principle, to a pressing social need. However, after reiterating that the authorities were required, in matters of freedom of expression, to exercise restraint in the use of criminal proceedings and especially in the impositionof a sentence of imprisonment, the Court held that, in the particular circumstances of the case, the reasons relied on by the domestic courts in the balancing exercise which had been theirs to perform were not sufficient to enable it to regard the 18-month prison sentence passed on the applicant – the suspension of 10 months notwithstanding – as proportionate to the legitimate aim pursued. The Court thus concluded that there had been a violation of Article 10 of the Convention on account of the severity of the criminal penalty imposed on the applicant.

(*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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