



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 4 February 2019
Ref. no.:AGJ 1322/19

[This translation is unofficial and serves for informational purposes only.]

JUDGMENT

in

Case No. KI48/18

Applicant

Arban Abrashi and the Democratic League of Kosovo

**Constitutional review
of Decision AA. No. 52/2017 of the Supreme Court of the Republic of
Kosovo of 25 November 2017 and Judgment A.A. U.ZH. No. 62/2017 of
the Supreme Court of the Republic of Kosovo of
7 December 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge and
Nexhmi Rexhepi, Judge

Applicants

1. The Referral was submitted by Mr. Arban Abrashi, a candidate for Mayor of the Municipality of Prishtina in the local elections of 2017 (hereinafter: the first Applicant), as well as by the political entity the Democratic League of Kosovo (LDK) (hereinafter: the second Applicant).

2. The first Applicant and the second Applicant (hereinafter when the Court refers to them jointly: the Applicants) are represented by Mr. Durim Berisha.

Challenged decision

3. The Applicants challenge Decision [AA. No. 52/2017] of 25 November 2017, and Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).
4. By Decision [AA. No. 52/2017] of 25 November 2017 of the Supreme Court (hereinafter: First Decision of the Supreme Court) the appeal of the political entity VETËVENDOSJE! Movement was approved as grounded and Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) was modified, in which the party to the proceedings was only the political entity LDK, namely the second Applicant; whereas, Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court (hereinafter: Second Decision of the Supreme Court) rejected as ungrounded the appeal of both Applicants filed against Decision [ZL. An. 1125/2017] of 1 December 2017 of the ECAP.

Subject matter

5. The subject matter is the constitutional review of the aforementioned decisions, which, allegedly violate the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

6. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
7. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

8. On 29 March 2018, the Applicants submitted the Referral to the Court.

9. On 30 March 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.
10. On 4 April 2018, the Court notified the representative of the Applicants about the registration of the Referral and requested him to clarify whether he represents the second Applicant too in the proceedings before the Court, as he submitted the power of attorney only for the first Applicant. In case of a positive reply, the Court invited him to submit a power of attorney indicating this. The Court also requested the representative of the Applicants to submit to the Court the copy of Decision [AA. No. 52/2017] of 25 November 2017 of the Supreme Court. For further clarifications and the requested additional documentation, the Court set to the Applicants a deadline of fourteen (14) days from the date of receipt of the notification letter.
11. On 10 April 2018, the Post of Kosovo returned the envelope to the Court and notified it that the submission of the notice of 4 April 2018 failed, as the address given by the Applicants in the referral form submitted to the Court was incomplete.
12. On 13 April 2018, the Applicants' representative contacted the Court by electronic mail and requested that all communications and documents regarding Referral KI48/18 be sent by electronic mail. Based on this request, on the same date, the Court sent a copy of the notification of 4 April 2018.
13. On 13 April 2018, the Applicants' representative submitted a copy of the requested Decision.
14. On 23 April 2018, the Applicants' representative submitted the power of attorney for representing the second Applicant in the proceedings before the Court.
15. On 27 April 2018, the Court sent a copy of the Referral to the Supreme Court and the ECAP. On the same date, the Court notified Mr. Shpend Ahmeti, the Mayor of the Municipality of Prishtina and the candidate of VETËVENDOSJE! Movement for the Mayor of the Municipality of Prishtina, in the local elections of 2017, in a capacity of an interested party, about the registration of the Referral and invited him to submit his comments, if any, within fourteen (14) days from the day of receipt of the notification.
16. On 11 May 2018, within the time limit set by the Court, Mr. Shpend Ahmeti submitted his comments to the Court.
17. On 14 May 2018, the Court notified the Applicants about the receipt of comments by Mr. Shpend Ahmeti and sent a copy of them.
18. On 31 May 2018, the Court received additional comments from the Applicants regarding the comments submitted by Mr. Shpend Ahmeti.

19. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.
20. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
21. On 14 September 2018, the Court notified Mr. Shpend Ahmeti about the receipt of the additional comments from the Applicants and sent a copy of them.
22. On 14 September 2018, the Court notified VETËVENDOSJE! Movement, in the capacity of the interested party, about the registration of the Referral and also sent a copy of the Referral together with a copy of the comments submitted by the Applicants and by Mr. Shpend Ahmeti. The Court invited it to submit its comments, if any, within fourteen (14) days from the day of receipt of the notification letter. VETËVENDOSJE! Movement did not submit comments to the Court.
23. On 26 October 2018, as the mandate of the abovementioned four judges was terminated as a Judges of the Court, the President of the Court, based on the Law and the Rules of Procedure, appointed the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
24. On 20 December 2018, Judge Bajram Ljatifi requested from the President of the Court to be excluded from the review of the Referral No. KI48/18, because he was previously a part of the decision-making process for the same request regarding the proceedings conducted before the Central Election Commission (hereinafter: the CEC).
25. On 21 December 2018, the President, in accordance with Article 18.1 (1.3) of the Law and Rule (9) of the Rules of Procedure, rendered the decision by which the request for the recusal from the review and decision-making process regarding case KI48/18 was approved.
26. On 22 January 2019, the Applicants filed a request for holding a hearing.
27. On 23 January 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.
28. On the same date, the Court voted unanimously that the Referral is admissible, and that the challenged decisions of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017 and Judgment [A.A. UZH. No. 62/2017] of 7 December 2017 are compatible with Article 54 [Judicial Protection of Rights] and 32 [Right to Legal Remedies] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 45 [Freedom of Election

and Participation] of the Constitution in conjunction with Article 3 (Right to free elections) of Protocol No. 1 to the ECHR.

29. On the same date, the Court unanimously voted to reject the request of the Applicants for a hearing.

Summary of facts

30. On 22 October 2017, the first round of local elections in the Republic of Kosovo was held. The first Applicant, Mr. Arban Abrashi, was the LDK candidate for Mayor of the Municipality of Prishtina. The second Applicant, LDK, was a political entity competing in the Municipality of Prishtina through its candidate, Mr. Arban Abrashi.
31. The final results of the first round of the elections determined that the competition for the Mayor of the Municipality of Prishtina would be decided based on the result of the second round of elections (run-off), which would take place between the two candidates with the majority of votes in the first round, namely between the first Applicant, Mr. Arban Abrashi and Mr. Shpend Ahmeti, a candidate of VETËVENDOSJE! Movement for the Mayor of the Municipality of Prishtina.
32. On 19 November 2017, the second round of local elections was held, where the two aforementioned candidates competed for the Mayor of the Municipality of Prishtina.
33. According to the preliminary results announced by the CEC, Mr. Shpend Ahmeti won 41,401 votes, whereas Mr. Arban Abrashi 41.164 votes. Preliminary results announced by the CEC, at this stage of the proceedings, did not include the conditional votes, by mail votes and the votes of persons with special needs. The difference in votes at this stage of the election procedure was a total of 237 more votes for Mr. Shpend Ahmeti.

Procedure after the announcement of the Preliminary Results of the second round (run-off) of the 2017 local elections for the Mayor of the Municipality of Prishtina

34. On 20 November 2017, the second Applicant filed an appeal with the ECAP. By this appeal, the second Applicant requested the verification of all ballot papers which were classified as invalid ballots, according to the case file, 610, and as blank ballot papers, according to the case file, 473. The second Applicant, by this appeal, alleged that the commissioners of VETËVENDOSJE! Movement, knowing the narrow result between the candidates, declared a considerable number of ballot papers as invalid or blank, and according to the claim, “*despite the fact that in those ballot papers it could be clearly noted the expressed will of the voter*”.
35. On 21 November 2017, the ECAP found that the aforementioned appeal of the second Applicant was a general appeal and as such could not be proceeded further for review. Consequently, the ECAP requested the second Applicant to complete the appeal so as to accurately specify the polling centers and the

polling stations where allegedly the ballot papers were declared invalid and blank.

36. On the same date, on 21 November 2017, the second Applicant completed the appeal upon the ECAP request.
37. On 22 November 2017, the ECAP by Decision [ZL. A. No. 1102/2017] approved as grounded, the appeal of the second Applicant. Based on this appeal, the ECAP ordered the CEC to recount/reassess ballot papers (i) declared as invalid; (ii) unfilled by the voters, consequently blank; as well as (iii) in the polling stations specified in the respective Decision. The ECAP requested the CEC that the assessment of the ballot papers declared as invalid as well as of those considered blank, be made in accordance with the Training Manual on voting procedures and counting in polling station, as well as in the presence of the accredited observers, including those of LDK and of VETËVENDOSJE! Movement. Finally, the ECAP ordered that the result deriving from the recounting and reassessment is included in the final result to be announced by the CEC. This Decision, the ECAP reasoned by being based on the “*the large number of invalid and blank ballots*” and “*narrow result between the two candidates*”.
38. Within 24-hour deadline, VETËVENDOSJE! Movement filed an appeal with the Supreme Court and requested that the above-mentioned ECAP Decision be annulled and that the ECAP and the CEC be ordered to continue counting the conditional and by mail votes for the candidates for the Mayor of the Municipality of Prishtina. Within the same deadline, the ECAP filed a response to the appeal of VETËVENDOSJE! Movement and requested that the appeal of the latter be rejected as ungrounded and the challenged decision of the ECAP be upheld by the Supreme Court.
39. On 25 November 2017, the Supreme Court rendered its first Decision [AA. No. 52/2017] which approved as grounded the appeal of VETËVENDOSJE! Movement, and modified Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the ECAP, so that the Appeal of the second Applicant was rejected as ungrounded. The Supreme Court reasoned that the challenged decision of the ECAP was not based on convincing evidence and that the appealing allegations of the second Applicant were not proven. In addition, the Supreme Court considered that the ECAP did not base its assessment on the Law No. 03/L-073 on General Elections (hereinafter: the LGE) together with the Law No. 03/L-256 on Amending and Supplementing the LGE (hereinafter: Law on Amending and Supplementing the LGE), as no legal provision foresees that due to “*narrow result between the candidates*” and due to “*non-compliance of invalid or unfilled ballot papers*” the recounting should take place. According to the reasoning of the Supreme Court, it is the right of each voter to participate in the elections and to vote and that the used and unfilled ballot papers in its nature cannot be taken as a basis to go in recounting. In addition, the Supreme Court reiterates that in the Municipality of Prishtina, by local and international observers no violation was reported and no objection in the voting book was reported, and accordingly in these elections it was assessed that there were no irregularities that “*would violate the election process*”.

40. On 29 November 2017, the CEC, after the end of the procedures for challenging the preliminary results before the ECAP and the Supreme Court, announced the final results of the elections for the second round for the Mayor of the Municipality of Prishtina. According to those results, the first Applicant, Mr. Arban Abrashi, received in total 41,897 votes, namely 49.78% of votes, whereas, Mr. Shpend Ahmeti received in total 42,262 votes, namely 50.22% of votes. The difference in votes in this final phase of the election procedure when the CEC counted all votes, including conditional votes, by mail votes and votes of persons with special needs, was a total of 365 more votes in favor of Mr. Shpend Ahmeti. Based on these results, Mr. Shpend Ahmeti was declared the winner of the competition for the Mayor of the Municipality of Prishtina.

Procedure after the announcement of the Final Results of the second round of 2017 local elections for the Mayor of the Municipality of Prishtina

41. On 30 November 2017, one day after the final results were announced by the CEC, the Applicants filed an appeal with the ECAP against the CEC decision of 29 November 2017, challenging final elections results for the Mayor of the Municipality of Prishtina. The Applicants claimed (i) a violation of the LGE and election rules, and (ii) violation of Article 45 [Freedom of Election and Participation] of the Constitution. According to the Applicants, their rights were violated as VETËVENDOSJE! Movement using different ways had influenced the free will of citizens, among other things, including (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms. The Applicants also alleged irregularities regarding invalid ballots, blank ballots and the absence of ballots on some conditional ballots and as a result could have been used for the carrying out of the so-called practice of the “*Bulgarian train*”.
42. Through this appeal, the Applicants requested the ECAP to order (i) a full recount of votes in the Municipality of Prishtina; (ii) the evaluation of the ballots declared invalid, blank and spoiled; and (iii) checking the envelopes of conditional ballot papers that have not been confirmed, and according to the allegation, consequently have not been opened at all. Further on, the Applicants requested the ECAP that, in case that even after the recount the alleged violations cannot be avoided, the new voting for the Mayor of the Municipality of Prishtina be ordered.
43. On 1 December 2017, the ECAP by Decision [ZL. Ano. 1125/2017] responded to the Applicants’ complaint. The ECAP divided the assessment of the complaint into two separate items, which pronounced in two items of its enacting clause. In item I of the enacting clause, the ECAP rejected as inadmissible the Applicants’ appeal for the part related to the alleged irregularities on the voting day for the second round of the local elections, namely on 19 November 2017. For the phase after the announcement of the final results, the ECAP considered these allegations as inadmissible. In item II of the enacting clause, the ECAP rejected as ungrounded the Applicants’ appeal, for the part relating to the final results announced by the CEC on 29 November 2017. The ECAP reasoned the division of its Decision in two aspects of the assessment of admissibility

pointing out that the LGE and the Election Rules stipulate that each stage of the electoral process has certain legal deadlines for filing complaints and appeals with the ECAP related to the specific stage of the electoral process being conducted. In this regard, the ECAP emphasized that in the present case, the electoral process is in the phase “*after announcement of the final results*” by the CEC, and therefore only appeals on CEC decisions related to the same phase are admissible.

44. Accordingly, and in particular as regards item I of the enacting clause, the ECAP reasoned that the complaints of the Applicants related to the election day, namely the alleged irregularities of 19 November 2017, which according to the Applicants relate to (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms, are out of time and inadmissible at this phase of the electoral process. This is because, according to the ECAP reasoning, based on Article 13 of the Law on Amending and Supplementing the LGE in relation to paragraph 1 of Article 119 of the LGE, the deadline for filing a complaint regarding the allegations of those irregularities was 24 hours from the closure of the voting centers, namely until 20 November 2017, at 19:00 hrs. In addition, the ECAP clarified that the allegations related to the irregularities on the voting day were already decided by the Supreme Court by the Decision [AA. No. 52/2017] of 25 November 2017.
45. With regard to item II of the enacting clause, the ECAP considered that the Applicants’ appeal was ungrounded, as they failed to substantiate their allegations indicated in the appeal regarding the discrepancies of the final results.
46. The ECAP emphasized that the Applicants, as evidence, attached a list of 31 polling stations where in each of them, according to the Applicants, were declared 5 to 9 invalid ballots. According to the decision, for the purpose of investigating and verifying the Applicants’ allegations in respect of the discrepancies of the final results, namely, irregularities regarding the invalid ballot papers, blank ballot papers, and the absence of envelopes containing the conditional votes, and which could have resulted in the irregularities of the chain character known as the “*Bulgarian train*”, the ECAP, based on Rule 14 of Regulation No. 02/2015 on ECAP Rules and Procedures (hereinafter: Rule No. 02/2015), engaged investigative teams consisting of 8 judges and 10 officials of secretariat. This investigating team, according to the ECAP reasoning, examined and reevaluated invalid votes in all 31 polling stations specified by the Applicants and found that 4 out of 183 invalid ballots were actually valid. As a result, the ECAP reasoned that in addition to the changes in 4 votes which were declared as valid by the investigative team and which were included in the final election results, the ECAP teams did not find any other irregularities in the 31 polling stations that were the subject of the investigation, according to the Applicants’ request. The ECAP further noted that, in addition to the reassessment of invalid ballots, the ECAC investigative teams have also counted the regular ballots, a recount that has resulted to be compatible with the final results announced by the CEC.

47. The ECAP also referred to the response to CEC to the complaint of the Applicants through which the CEC emphasized that there is no legal basis for the Applicants' allegations that the invalid and blank ballot papers may be considered as an evidence for recount. According to the CEC, this is because the members of the Polling Station Council sign the Final Result Forms (FRF) and the Candidate Result Forms (CRF) after the end of voting and counting, and this means that at the moment of signing the above mentioned forms, the Polling Station Council agrees to conclude the process.
48. On 5 December 2017, the Applicants filed an appeal with the Supreme Court against the Decision [ZL. A. no. 1125/2017] of 1 December 2017 of the ECAP. In their appeal, the Applicants' raised three categories of issues, namely the appealing allegations against the ECAP Decision. The first category of the allegations of the Applicants concerned the fact that, according to them, the ECAP had not assessed at all their claim as to the allegedly unlawful influence on the will of the voters exercised by VETËVENDOSJE! Movement through, among other things, the transport of voters, telephone calls and sending sms. The Applicants challenge the fact that the ECAP declared this appeal as inadmissible based on the LGE provisions, reasoning that appeals relating to the voting day should be filed within 24 hours, but the Applicants claim that the event was made known one hour after the deadline within which they could file appeal regarding the issues pertaining to the voting day. The second category of the allegations of the Applicants concerned invalid ballot papers, on which, according to them, the ECAP had not decided at all. According to the Applicants, considering that the ECAP investigation resulted in the valid announcement of a number (4) of ballot papers which had been declared invalid previously, it was important for the process and the accuracy of the final results that all ballots be reevaluated. The third category of the Applicants' allegations concerned the opening of the envelopes of conditional votes, on which, according to the claim, the ECAP had not decided that they should be opened and checked - despite the fact that, according to them, their request for an explanation of the absence of ballot papers was completely lawful and reasonable considering the danger posed by the practice known as the "*Bulgarian train*". The Applicants also alleged violations of their rights guaranteed by Article 45 of the Constitution, namely the right to be elected and to elect.
49. The Applicants requested the Supreme Court: (i) to approve their appeal as grounded and to modify the challenged ECAP decision, so that their request for recount of all ballot papers and reevaluation of invalid ballot papers be approved; and (ii) to declare unlawful the transportation of citizens which, according to the Applicants, had general impact on the irregularity of the electoral process and on the final results for the Mayor of the Municipality of Prishtina.
50. On 7 December 2017, the Supreme Court issued its second Decision [A.A. U.ZH. No. 62/2017], which rejected as ungrounded the Applicant's appeal and upheld Decision [A. ZL. No. 1125/2017] of 1 December 2017 of the ECAP. In this respect, as regards item I of the enacting clause of the challenged ECAP Decision, the Supreme Court considered that the ECAP had correctly decided

when dismissing the Applicants' appeal as inadmissible. This is because, according to the Supreme Court, the deadline for complaining against irregularities related to the voting day had expired. As a consequence, the Supreme Court concluded that the ECAP had correctly decided when it rejected as inadmissible the Applicants' appeal, as based on Article 13 of the Law on Amending and Supplementing the LGE in conjunction with Article 119 of the LGE, the deadline for the appeal is 24 hours from the closure of the voting centers, and, therefore, the deadline for the appeal was 20 November 2017, at 19:00 hrs, whereas these allegations were filed after 10 days, namely on 30 November 2017. The Supreme Court in its reasoning emphasized that in this phase of the election process an appeal may be filed only with regard to CEC decisions, after the announcement of the final results.

51. In addition, as regards item II of the enacting clause of the challenged ECAP Decision, the Supreme Court held that the Applicants' allegations as to the final results are in contradiction with the factual situation determined by the ECAP. According to the Supreme Court, based on Article 14 of Rule No. 02/2015, the investigative team of ECAP had found that out of 31 ballot boxes in which 183 ballots were declared invalid, only 4 are valid, while others are invalid as initially announced by the polling station councils. The Supreme Court further noted that in addition to the 4 invalid votes, the ECAP investigating teams did not find any other irregularities in 31 polling stations that were the subject of the investigation. In addition, the Supreme Court stated that the ECAP had recounted all the regular ballot papers and verified the stamps on each ballot, concluding that the final result was in line with that announced by the CEC. According to the assessment of the Supreme Court, the challenged decision of the ECAP was clear and comprehensible and as such contained sufficient reasons for decisive facts and that the substantive law was correctly applied.
52. On 11 December 2017, the CEC certified the final results of the local elections for Mayor of the Municipality of Prishtina. On that occasion, Mr. Shpend Ahmeti was officially declared the Mayor of the Municipality of Prishtina.

Applicants' allegations

53. The Applicants initially allege that the Court should assess the constitutionality of the entire electoral process, assessing both the facts and the procedure conducted and not limited to the assessment of fundamental rights and freedoms. In support of this argument, the Applicants refer to the Opinion of the Venice Commission (CDL-PI (2017) 007 and the Decision of the Constitutional Court of Austria (E 17/2016 -20) of 1 July 2016.
54. The Applicants allege that Decision [AA. No. 52/2017] of 25 November 2017, consequently, the first Decision of the Supreme Court and Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court, therefore the second Decision of the Supreme Court, were rendered in violation of their rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution, and resulted in violation of the "*principle of the rule of law*" and "*the principle of constitutional democracy*" as fundamental principles of the Constitution.

55. More specifically, the Applicants allege that the Supreme Court, by its first and second Decision, violated their right to judicial protection of rights guaranteed by Article 54 of the Constitution, because through the challenged decisions of the Supreme Court, only the legality of ECAP decisions was assessed without addressing their constitutionality and consequently, resulted in a violation of the rights of the Applicants guaranteed by Article 45 of the Constitution.
56. The Court will further summarize the Applicants' allegations regarding Article 54 [Judicial Protection of Rights] and Article 45 [Freedom of Elections and Participation] of the Constitution.

Allegations of violation of Article 54 [Judicial Protection of Rights] of the Constitution

57. The Applicants allege that the regular courts serve as a pre-constitutional instance for the protection of human rights and freedoms and are obliged to guarantee the application of constitutional provisions when assessing the allegations. In this regard, the Applicants emphasize that the regular courts should take into account the principle “*in dubio pro libertate*”, according to which the fundamental rights and freedoms should be widely interpreted and in favor of the individual, who at all stages of the proceedings is in an unequal position with regard to the state institutions. In support of these allegations, the Applicants refer to a number of decisions of the Constitutional Court of Germany (BVerfGE 9, 237 § 242, 247, BVerfGE 8, 2010 § 216, BVerfGE 3, § 225 240, BVerfGE 63, 230 342, BVerfGE 6, 32 § 42) and the case of the European Court of Human Rights (hereinafter: the ECtHR) *Golder v. Great Britain*).
58. The Applicants specifically state that the Supreme Court, through two of its decisions, violated their fundamental rights and freedoms guaranteed by Articles 45 and 54 of the Constitution, because according to them, the latter: (i) assess only the legality and not the constitutionality of the respective allegations; and (ii) they are arbitrary.
59. As to the first category of allegations, the Applicants allege that the Supreme Court did not fulfill the constitutional obligation to assess allegations relating to the election rights, as an integral part of the fundamental rights and freedoms guaranteed by the Constitution, and are limited only to assessing the legality of the ECAP decisions. According to the allegation, limiting only to the assessment of legality, the Supreme Court, by its decisions, also violated the “*principle of constitutional supremacy*”.
60. However, as regards the second category of allegations, namely the arbitrariness of the challenged decisions, the Applicants build their allegations mainly based on the erroneous and arbitrary interpretation of the applicable law.
61. In this regard, the Applicants allege that (i) the reasoning of the Supreme Court in its first Decision [AA. No. 52/2017] that “*the law does not foresee the*

narrow result between the candidates as a condition for recount”, is unconstitutional because according to them “*no country counts conditions or cases when recount is ordered - because it - the confirmation of the electoral process is a right in itself*”; (ii) that the second Decision of the Supreme Court [A.A. U.ZH. No. 62/2017] has no legal basis. In this regard, the Applicants allege that the reasoning of the Supreme Court, which in the appeals procedure was limited only to the assessment of “*irregularities related to the data administration*”, is not based on the applicable law. In support of this allegation, the Applicants reason that the appealing allegations about the latter, namely “*the irregularities in the administration of the data in the CRC [Count and Results Center]*” are based only on the special procedure provided for in Article 105 of the LGE, whereas the Applicants have filed complaints pursuant to Article 119 of the LGE. In addition, the Applicants allege that Articles 118.4 and 119.1 of the LGE and respective amendments-supplementations, recognize the right to supplement the appeal submitted to ECAP with new evidence and facts. In this regard, the Applicants also refer to the Opinion [CDL-PI (2017) 007] of the Venice Commission, arguing that the admissibility criteria in such cases should be clearly specified in the law, in order to prevent the declaration of appeal as inadmissible; and finally under (iii) the findings of the Supreme Court are arbitrary because they hold that “*during the counting in some of the polling stations, the irregularities were noted, but were minimal and balanced, because both candidates were affected*”. In this regard, the Applicants allege that “*violation of constitutional rights exists or does not exist – it cannot be said to have been violated a little or a lot*”.

Allegations of violation of Article 45 [Freedom of Election and Participation] of the Constitution

62. The Applicants allege that by failing to provide judicial protection of fundamental rights of the Applicants, consequently, acting in violation of Article 54 of the Constitution, the decisions of the Supreme Court have also resulted in a violation of Article 45 of the Constitution. In this regard, the Applicants allege that three electoral principles embodied in Article 45 of the Constitution were violated, which, according to the Applicants, are also foreseen in paragraph 2 of Article 123 [General Principles] of the Constitution, and include the following: (i) the principle of the free vote/freedom of vote; (ii) the principle of equal vote and (iii) the principle of publicity (transparency). All of these principles, according to the Applicants, have been violated in their case by the Supreme Court, ECAP and CEC. More specifically:

Regarding the principle of free vote/freedom of vote

63. The Applicants allege that the principle of free vote must guarantee that (i) “*the election results should reflect the true will of the voters*”; (ii) “*the voter must be free of any state or non-state influence*”; (iii) “*the freedom of the voter to decide for whom he/she wants to vote for, should not be violated before he votes*”. In constructing the context of the “*principle of free vote*”, the Applicants refer to the Decision of the Constitutional Court of Austria VfSlg 2.037/ 950; and Decisions of the of the Federal Constitutional Court of Germany, BVerfGE 66, 369 e BVerfGE 9, 335.

64. The Applicants allege that during the proceedings before the regular courts they provided evidence on “*impact on Prishtina citizens by sending sms on behalf of NGOs, delivery of tickets for free transport and influence through activists*”, which, according to the allegation, result in violation of the “*principle of free vote/freedom of vote*”. According to the Applicants, the Supreme Court in its Second Decision [A.A. U.ZH. No. 62/2017] considered these allegations as new, avoiding reasoning about them and not as evidence that they had to administer. The Applicants claim that despite the fact that the ECAP considered their evidence as sufficient evidence to suspect on the regularity of the electoral process, the Supreme Court did not in any decision-making procedure deal with the assessment of these allegations. The Applicants again emphasize that by not addressing these allegations, they were denied the right to judicial protection of rights.

Regarding the principle of equal vote

65. The Applicants allege that the principle of equal vote must guarantee (i) strict and formal equality; (ii) equality of opportunities; (iii) “*not just equality of the weight of the vote, but also the equality of weight of the success of the vote*”; and (iii) not only “*the right to benefit the mandate, but also the right to protect the mandate from violations during the electoral process*”. In constructing the context of the “*principle of equal vote*”, the Applicants refer to the Decision of the Constitutional Court of Austria VfSlg 8.644/1979; Decisions of the Federal Constitutional Court of Germany, BVerfGE120, 82, BVerfGE 121, 266, BVerfGE 63, 230, BVerfGE 95, 408 and BVerfGE 151, 179, as well as Judgment of this Court in case KI34/17, paragraph 91.
66. The Applicants allege that the Supreme Court, ECAP and CEC have failed to guarantee an electoral process where “*the weight of the vote*” is equal. The Applicants reiterate that despite the fact that the Supreme Court in its second Decision [A.A. U.ZH. No. 62/2017] finds that “*the election process was damaged*” it did not consider it necessary to recount the boxes from all polling stations, which according to them, would be able to verify the result and possible omissions. According to the Applicants, their request for recount of ballot boxes at all polling stations was rejected in an unconstitutional way.

Regarding the principle of publicity (transparency)

67. The Applicants allege that this principle, despite the fact that it is not a constitutional written principle, is the result of the interaction of constitutional articles and, according to the Applicants, *inter alia*, means that (a) “*the voter has to comply with the effectiveness of the act of voting. He must be convinced that the ‘weight of his vote at all stages from casting the vote in the ballot box, administering the election material up to the publication of the results, has been consistent with the rules and election principles*”; and that (b) “*the participants in the electoral process, candidates or voters will have the opportunity, in case of doubts about the truthfulness of published results, to exercise legal remedies through which those doubts are clarified.*” In support

of these allegations, the Applicants refer to the decisions of the Federal Constitutional Court of Germany BVerfGE 123, 39 and BVerfGE 121, 266.

68. In addition, the Applicants refer to the Opinion (CLD-AD (2002) 23 rev), of the Venice Commission, emphasizing the obligation of the state to guarantee transparency of processes, including the right to recount votes in case of the appeal. According to the Applicants, the right to recount is, *inter alia*, stipulated by Articles 101 and 106 of the LGE, which have left the competence and the possibility to the CEC to order, *ex officio*, the recount or the repetition of vote before the publication of results.
69. In this regard, the Applicants allege that the reasoning of the Supreme Court, according to which “*the law nowhere foresees a recount in the event of a small difference between candidates*”, violates the right to confirm and verify the election results. Moreover, according to the Applicants, this reasoning does not take into account and does not assess the rights of the Applicants guaranteed by Article 45 of the Constitution. The Applicants allege that “*in the event of a narrow election result*”, the recount is a fundamental right which is initiated through the CEC or at the request of the party. In this regard, the Applicants refer to the Decision IC_275/2009 of 1 October 2009 of the Swiss Constitutional Court, according to which “*if there are doubts as to the regularity of the process, all ballot papers should be recounted in order to avoid any irregularity*”.
70. In this regard, the Applicants state that the ECAP and the Supreme Court “*have found that in the recount of the samples - conducted without the presence of the parties to the procedure - there were irregularities*”, but according to the Applicants, the ECAP and the Supreme Court, by its second Decision [A.A. U.ZH. No. 62/2017] “*considers the latter balanced between the two candidates in the competition*”. In this regard, the Applicants allege that “*there is no big or minor violation*” and that in case of finding any violation, the repetition of the second round of elections should be ordered. In support of this allegation, the Applicants refer to the Decision (EI4/2015-25) of the Constitutional Court of Austria.
71. The Applicants further allege that the Supreme Court, by its first Decision [AA. No. 52/17] annulled only the Decision of the ECAP [ZL. Ano. 1102/2017] of 22 November 2017, but not the CEC Decision [2343-2017] on the recount of all regular ballot papers in the polling stations established by the abovementioned Decision of ECAP.
72. The Applicants also reiterate the allegation that the Supreme Court, by its second Decision [A.A. U.ZH. No. 62/2017] and ECAP by Decision [ZL. A. no. 1125/2017] of 1 December 2017, in addressing their second appeal of 30 November 2017, did not address the Applicants' evidence as “*new and specific evidence*” and did not address their allegations of constitutional violation.
73. The Applicants allege that the principle of transparency has also been violated in case of “*destruction of election material*” by the CEC, and with this also their right to recount.

Applicants' specific requests

74. The Applicants emphasize that their purpose in seeking the assessment of the constitutionality of the challenged Decisions was to request the ordering of ballots recounts, as they had requested at all stages of the proceedings. However, the Applicants point out that such a request, became impossible in the meantime, given that *"the CEC destroyed of all election material"*. Noting that the act of *"destroying the election material"* has violated not only the principle of transparency, but also the right of the Applicants to recount, the only solution, according to the Applicants, remains *"the repetition of voting in the second round of elections"*.
75. In addition, the Applicants request the Court: (i) to declare the Referral admissible; (ii) to hold that there has been a violation of Article 54 of the Constitution; (iii) to hold that as a result of violation of Article 54 of the Constitution there has been a violation of Article 45 of the Constitution; (iv) to declare invalid Judgment [A.A. U.ZH. No. 62/2017] of the Supreme, and all decisions of the previous instances; (v) to declare invalid the electoral process (the run-off) for the Mayor of the Municipality of Prishtina, of 19 November 2017; and (vi) to order the CEC, that within 30 days from the receipt of the Judgment of the Constitutional Court, to organize the second round of elections for Mayor of the Municipality of Prishtina.

Comments submitted by the interested party, Mr. Shpend Ahmeti

76. In the capacity of the interested party, Mr. Shpend Ahmeti submitted comments regarding: (i) the admissibility of the Referral; (ii) the jurisdiction of the Constitutional Court to decide on the matter; and (iii) the merits of the Referral.
77. As to the admissibility of the Referral, Mr. Shpend Ahmeti claims that the Referral should be declared inadmissible because all legal remedies have not been exhausted. In this regard, as to the allegations of irregularities on the voting day, Mr. Shpend Ahmeti states that the Applicants have failed to exhaust legal remedies within the legal deadlines set by the Constitution, the Law and the Rules of Procedure of the Court.
78. Specifically, he argues that, pursuant to Article 36 of the LGE and Article 25.1 of Election Rule no. 9/2013, the Applicants, regarding their allegations of irregularities on the Election Day, should have had complained within 24 hours after closure of the polling stations, not after the announcement of the final results by the CEC.
79. In addition, Mr. Shpend Ahmeti argues that the request for repetition of the second round of elections has not been filed before the court instances. In the latter, the Applicants requested only the recount of votes. Mr. Shpend Ahmeti claims that the Applicant cannot ask the Court for the repetition of the second round of elections if he has not requested it from the other instances of the regular courts.

80. In addition, as to the admissibility of the Referral and the exhaustion of other legal remedies, Mr. Shpend Ahmeti claims that the Referral is also manifestly ill-founded and must be declared as such, because the Applicants are not subject to violations of fundamental rights and freedoms guaranteed by the Constitution or because they had failed to sufficiently reason such violations before the Court.
81. Regarding the jurisdiction of the Constitutional Court, Mr. Shpend Ahmeti alleges that the latter, based on Article 113.7 of the Constitution, does not have the jurisdiction to assess the constitutionality of the electoral process. This constitutional provision, according to Mr. Shpend Ahmeti, limits the Court regarding the referrals filed by the individuals “*only in the area of the protection of individual rights and freedoms guaranteed by the Constitution*”.
82. In addition, with regard to the issue of the jurisdiction of the Court, Mr. Shpend Ahmeti states that it is necessary to make “*the distinction between constitutional adjudication and adjudication by the authorities of the regular court system*”. In this regard, he emphasizes that the main allegation of the Applicants is related to the arguments of the absolute invalidity of the second Decision of the Supreme Court, respectively Judgment [A.A. U.ZH. No. 62/2017] and the silence of the opposing party [the Supreme Court] in relation to the Applicants’ submissions regarding alleged constitutional violations, namely violation of Article 45 of the Constitution. According to Mr. Shpend Ahmeti, while the Constitutional Court makes the constitutional review, the regular courts assess the legality when deciding on the concrete case. In this regard, Mr. Shpend Ahmeti states that the allegation of absolute invalidity of the second Decision of the Supreme Court is ungrounded in entirety in relation to the subject matter jurisdiction of the Supreme Court, as defined by the Constitution and the Law on Courts. In addition, Mr. Shpend Ahmeti, in the argument of the jurisdiction of the courts to assess the legality of the allegations, reiterates that the regular courts in case of suspicion of the constitutionality of the law they assess, may address the Constitutional Court through paragraph 8 of Article 113 of the Constitution.
83. With regard to the merits of the Referral, Mr. Shpend Ahmeti alleges that the Applicants’ allegations concerning the violation of Articles 45 and 54 of the Constitution are abstractly articulated and state that the law itself “*has accepted the relative factuality of the electoral process*” and that this aims at legal certainty. Therefore, for any (administrative or criminal) irregularity, sanctions for those responsible are foreseen. Mr. Shpend Ahmeti further claims that an insistence on reparation would violate the right of the majority of citizens who have expressed their political will.
84. More specifically with regard to Article 45 of the Constitution, Mr. Shpend Ahmeti claims that there has been no violation of this Article and that the Applicants have not specified violation of the rights guaranteed by this Article. According to him, such an “*unqualified allegation articulated in an abstract way*” cannot be subject of review by the Court. In the second round of elections for the Mayor of the Municipality of Prishtina, no case has been proven to violate the personal character of the vote, its equality, freedom of choice or its

secrecy. Mr. Shpend Ahmeti further emphasizes the fact that at the end of the electoral process, all forms have been signed by all members of the voting commissions, which according to him, is an evidence of fair and correct electoral process.

85. More specifically, as regards Article 54 of the Constitution, Mr. Shpend Ahmeti claims that there has been no violation of this article and that there is a misinterpretation regarding this provision, which, according to Mr. Shpend Ahmeti, the Applicants have given “*an extensively abstract meaning*”. According to Mr. Shpend Ahmeti, the judicial protection of rights guaranteed by the Constitution must be understood within the structural logic of the laws in force. In the present case, according to the comments, the specific provisions of the Law on Courts are important, which define the jurisdiction of the judicial authorities and the provisions of the LGE that define the subject matter jurisdiction for the appeals submitted to the Supreme Court as a judicial body that controls the legality of decisions issued by ECAP. Specifically, Mr. Shpend Ahmeti refers to Article 12 of the Law on Amending and Supplementing the LGE, which defines the jurisdiction of the Supreme Court in dealing with appeals.
86. With regard to the evidence submitted to the Court by the Applicants, namely the television reports, Mr. Shpend Ahmeti emphasizes that the Constitutional Court is not a court before which is administered the evidence that has already been administered by the regular courts. In addition, Mr. Shpend Ahmeti considers that the Applicants had the legal opportunity to submit all their allegations before the justice authorities (Police, Prosecution, courts) and these authorities could have decided on third-party violations. However, according to him, in any case cannot be ascertained that there has been a violation of fundamental rights and freedoms guaranteed by the Constitution based on television reports submitted as evidence by the Applicants. This, according to the comments, is not something that can be requested from the Constitutional Court which can only make a constitutional review and violation of fundamental rights and freedoms guaranteed by the Constitution.
87. Regarding the referral of the Applicants to the decision of the Constitutional Court of Austria (E I 4/2015 – 25), Mr. Shpend Ahmeti claims that comparison with this decision does not stand because the election result in Austria was canceled because there has been a violation of the Federal Election Law for the election of the President, where the votes were opened earlier by the non-competent person; the criterion of the impact of the violation regarding the result was based on 77,000 votes; and violations of procedures by lower instances have been found. In addition, he states that the entire decision of the Austrian Constitutional Court had to do with a situation entirely different from that reflected by the Applicants.
88. As to the final petition of the Applicants for repetition of the second round of elections, Mr. Shpend Ahmeti points out that if eventually the repetition of the runoff would be ordered, this would result in a violation of his rights guaranteed by Article 45 of the Constitution. This is because the Mayor of the Municipality of Prishtina was elected in a regular electoral process and the

repetition of the process after a few months following the elections would negatively affect the Mayor himself, by violating his rights guaranteed by Article 45 of the Constitution.

89. Mr. Shpend Ahmeti also emphasizes that the Applicants did not intend to count the votes, but to revote, because the Referral to the Constitutional Court was submitted only after the election material was destroyed by the CEC, and before this happened according to the comments, the Applicants had the opportunity to address the Court by requesting the interim measure and the preservation of the election material. In this regard, Mr. Shpend Ahmeti also emphasizes that “*if the violations of the electoral process actually existed, the Applicants had the opportunity to request from the Constitutional Court an interim measure, by which it would prohibit the destruction of the election material [...]*”.
90. Finally, Mr. Shpend Ahmeti requests the Court to declare the Applicants’ Referral as “*manifestly inadmissible*”, since, according to him, the Applicants’ submissions are manifestly ill-founded and are not reasoned *prima facie*.

Additional comments submitted by the Applicants

91. The Applicants, through the comments submitted in response to the comments filed by Mr. Shpend Ahmeti, (i) challenge his procedural capacity in the proceedings before the Court; (ii) present their disagreement with regard to his arguments in favor of the inadmissibility of the Referral; (iii) present their disagreement with regard to their arguments concerning the lack of jurisdiction of the Court to review the referral in question; and (iv) challenge his arguments against the violation alleged by the Applicants.
92. As to the first issue, namely the procedural legitimacy of Mr. Shpend Ahmeti in the proceedings, the Applicants state that VETËVENDOSJE! Movement is a procedural party before the Court and not Mr. Shpend Ahmeti, because VETËVENDOSJE! Movement was a party to proceedings before the regular courts. In addition, in this respect, the Applicants emphasize that Mr. Shpend Ahmeti, before the Court, must act as a natural person and not as a Mayor of the Municipality of Prishtina, under which name he has submitted his comments to the Court.
93. As to the arguments in favor of the inadmissibility of the Referral, the Applicants allege that Mr. Shpend Ahmeti's comments are “*distortion of the legal provisions and do not match with the Applicant's allegations*”. The Applicants specifically challenge the argument of Mr. Shpend Ahmeti that the Applicants did not exhaust legal remedies in their substantive sense, as before the regular courts the Applicants did not request the repetition of the second round of elections, which is the request before the Court, but only a recount of ballot papers.
94. With regard to the comments relating to the jurisdiction of the Court, the Applicants consider that the comments of Mr. Shpend Ahmeti offer irrelevant justification and are not connected to the allegations raised by the Applicants.

The allegations of the Municipality of Prishtina/Mr. Shpend Ahmeti that the Court has no jurisdiction to assess the constitutionality of the individual act, but only the constitutionality of the law, does not stand as Article 113.8 of the Constitution deals with the incidental control procedure that differs from the individual complaints procedure. According to them, Mr. Shpend Ahmeti failed to understand “*the individual complaint or election complaints and as a result, their argumentation is irrelevant to the issue at hand*”.

95. Finally, the Applicants challenge the arguments of Mr. Shpend Ahmeti, who claims that they have not substantiated violations of Articles 45 and 54 of the Constitution; whereas, as regards the referenced case of the Constitutional Court of Austria, the Applicants consider that Mr. Shpend Ahmeti has misunderstood the context in which this argument was presented.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 45

[Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.
2. The vote is personal, equal, free and secret.
3. State institutions support the possibility of every person to participate in public activities and everyone’s right to democratically influence decisions of public bodies.

[...]

Article 54

[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

Article 123

[General Principles]

[...]

2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.

[...]

Article 139
[Central Election Commission]

1. The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results.

[...]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 3 of Protocol no. 1 to the ECHR
(Right to free elections)

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 13
(Right to an effective remedy)

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[...]

LAW NO. 03/L-073 ON GENERAL ELECTIONS IN THE REPUBLIC OF KOSOVO AND LAW NO. 03/L-256 ON AMENDING AND SUPPLEMENTING THE LAW NO. 03/L-073 ON GENERAL ELECTIONS IN THE REPUBLIC OF KOSOVO

Article 103
[Storage of Ballots and Transportation of Election Material]

103.4 The CEC shall, by decision after the official certification of the results of the election, destroy specified election materials at an appropriate time within 60 days, except as directed by ECAC. [...]

Article 105
[Complaints Concerning the C&RC Process]

105.1 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24) hours of the occurrence of the alleged violation. (As amended by Law No.03/L-256, Article 4).

105.2 The submission of a complaint shall not interrupt or suspend the counting process.

105.3 All complaints to the ECAP shall be decided no later than seventy two (72) hours from receipt of the complaint in the ECAP central offices.(As amended by Law No.03/L-256, Article 5)

Article 106
[Election Results]

106.1 The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo. (As amended by Law No.03/L-256, Article 6)

106.2 Prior to certification of the election results, the CEC may order a recount of ballots in any polling station, or counting centre, or a repeat of the voting in a polling centre or municipality.

106.3 The results of an election are final and binding once they have been certified by the CEC. [...]

Article 117
[Procedures of ECAC]

117.1 The ECAC shall establish its own rules of procedure.

117.2 The ECAC shall, in adjudicating a complaint or appeal examine and investigate all relevant evidence, and grant a hearing if it deems it necessary.

117.3 Adjudication on appeals and complains by ECAC shall be based on clear and convincing evidence.

117.4 The ECAC may order a recount of the ballots in a polling station or polling centre and an examination of the balloting material as part of its investigation into a complaint or appeal.

Article 118
[Decisions]

118.2 The ECAP shall provide the legal and factual basis for its decision in writing. The ECAP shall provide copies of its written decisions to the parties involved in the matter within seventy two (72) hours of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAP shall provide copies of its written decisions to the parties involved in the matter within five (5) calendar days. (As amended by Law No.03/L-256, Article 12 paragraph 1).

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five

thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed. (As amended by Law No.03/L-256, Article 12 paragraph 2).

118.5 The ECAP decision is binding upon the CEC to implement, unless an appeal allowed by this law is timely filed and the Supreme Court determines otherwise. (As amended by Law No.03/L-256, Article 12 paragraph 3).

Article 119 [Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received. (As amended by Law No.03/L-256, Article 13).[...]

119.2 The Office may submit a complaint to the ECAC in respect of a Political Entity failing to comply with this law or CEC Rules affecting the electoral or the registration process.

119.3 The ECAC shall not consider a complaint concerning a decision of the CEC, but may consider an appeal from a decision of the CEC as specified under article 122 of this Law.

119.4 The ECAC may impose sanctions on a Political Entity for violation of this law or CEC rules committed by the members, supporters and candidates of the Entity. A Political Entity may submit evidence to the ECAC showing that it made reasonable efforts to prevent and discourage its members, supporters and candidates from violating this law or electoral rules. The ECAC shall consider such evidence in determining an appropriate sanction, if any, to be imposed on the Political Entity.

119.5 The ECAC may upon its own discretion consider matters otherwise within its jurisdiction, when strictly necessary to prevent serious injustice.

119.6 The provision of false information to the ECAC shall be a violation of this law that the ECAC may sanction under article 121 of this Law.

Article 120 [Remedies and Sanctions for Violations]

120.1 The ECAC may, if it determines that a violation of this law or CEC rules has occurred:

b) prior to certification of the election results and, in the sole discretion of ECAP, under exceptional circumstances to nullify the results of a specific polling station or polling center, and to order the CEC to repeat the voting in a

polling centre or polling station; if it considers that the final election results could be affected (As amended by Law No.03/L-256, Article 14).

Article 122
[Electoral Appeals]

122.1 1 A natural or legal person whose legal rights have been affected by any of the following decisions of the CEC may appeal that decision to the ECAP within twenty four (24) hours after the decision being appealed is announced by CEC and the appeal must be decided by ECAP within seventy two (72) hours after the appeal is made. (As amended by Law No.03/L-256, Article 15).

- a) the inclusion or exclusion of a person from participation in an out-of-Kosovo voting programme;
- b) the certification or refusal to certify a Political Entity or candidate to participate in an election;
- c) a candidate who after certification does not want to participate in an election;
- d) the accreditation or refusal to accredit an electoral observer;
- e) the imposition or an administrative fee on a Political Entity under article 42 of this law; and
- f) the refusal to register a Political Party within the Office.

122.2 The ECAC shall uphold an appeal from a decision of the CEC if it determines that the CEC decision was unreasonable having regard to all the circumstances.

122.3 The ECAC may, if it upholds an appeal from a decision of the CEC:

- a) direct the CEC to reconsider its decision; and
- b) direct the CEC to take remedial action.

RULES AND PROCEDURES No. 02/2015 of ECAP, of 4 December 2015

Article 2
[Definitions]

The terms used in this rule have this meaning:

[...]

2.1 “Complaint” – means a regular legal remedy submitted in writing by a person who has a legal interest or whose rights have been violated during the election process.

2.2 “Appeal” means a regular legal remedy against first instance decisions.

[...]

COMPLAINTS
Article 5
[Conditions for Filing Complaints]

[...]

5.3 Complaints regarding the electoral process for the polling day are submitted to the ECAP within twenty-four (24) hours from the moment of the closure of the voting center (Article 119.1 of LGE)

5.4 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24) hours of the moment of finding out from the complainant of the alleged violation, based on Article 105.1 of LGE.

5.4 For all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation.

[...]

APPEALS

Article 10

[Criteria for appeal]

[...]

10.5 With respect to the appeal of a CEC decision, the appeal must be filed within five (5) days after notification of the CEC decision. For all other appeals, unless otherwise specified, appeals must be filed within twenty four (24) hours from the receipt of the ECAP decision by the Applicant.

[...]

Article 14

[Procedure for Administration of Investigation of Election Material]

14.1 When ECAP accepts a complaint deemed to be regular and when such a complaint is suspected of fraudulent activity involving the election material, the decision-making panel will authorize a member of the panel as the main investigator and the legal officer in charge of the concrete case to conduct the investigations.

[...]

CEC ELECTION REGULATION NO. 06/2013 COUNT AND RESULTS CENTER of 2 July 2013

Article 8

Complaints regarding to process in CRC

8.1 Complaints about the conduct of the count in the CRC, under Article 105 of the Law on General Elections in the Republic of Kosovo and Article 26 of the Law on Local Elections in the Republic of Kosovo must be submitted in ECAP in writing within 24 hours of the occurrence of the alleged violation.

8.2 Submitting the complaint does not interfere or stop the counting process.

8.3 Pursuant to the provisions of Article 105.3 of the Law on General Elections in the Republic of Kosovo, and Article 26 of the Law on Local Elections in the Republic of Kosovo, for all the complaints ECAP will decide no later than 72 hours after receiving them in their headquarters.

Article 9
Election Results

[...]

9.3 In exceptional cases before certification of the results, the CEC can order a recount of ballots in any Polling Station, Polling Center, and Counting Center or repeat voting at a Polling Center or in a municipality .

[...]

9.5. Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to annul the results of a Polling Station or Polling Center, and order CEC to repeat the voting in a Polling Station or Polling Center, if it considers that they have impact in final results.

[...]

CEC ELECTION REGULATION Nr. 09/2013 VOTING, COUNTING AND MANAGEMENT OF POLLING CENTER

Article 25
Complaints

25.1 Complaints regarding the voting and counting in polling stations should be submitted to the EPAC within 24 hours of the close of polling stations and they will be settled by EPAC within 72 hours after the complaint is received, in accordance with Article 119.1 of the Law on General, Elections Article 28 of the Law on Local Elections and Procedural Rules of EPAC.

25.2 Submission of the complaint shall not terminate or suspend the counting process.

25.3 Any member of the PSC who complains about the results listed in PS may mark his dissenting opinion in the poll book and may file a complaint in EPAC.

Article 26
Repetition of voting

26.1. Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to nullify the results of a polling station or polling center and order CEC to repeat voting in a polling station or polling center, if it considers that is has impact in final results, in accordance with Article 120.1 (b) of the Law on General Elections and Article 28 of the Law on Local Elections. In this case, the same rules will apply for repetition of voting.

Assessment of the admissibility of the Referral

96. The Court first examines whether the Referral has met the admissibility criteria established in the Constitution and further specified in the Law and the Rules of Procedure.

97. In this regard, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case foreseen in Article 113, paragraph 7 of the Constitution; and Rule 39 [Admissibility Criteria] and Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure shall examine whether: (i) the Referral was filed by authorized parties; (ii) the decisions of public authorities are being challenged; (iii) all legal remedies have been exhausted; (iv) the rights and freedoms which have allegedly been violated are specified; (v) the time limits have been respected; (vi) the Referral is manifestly ill-founded; and (vii) there is an additional admissibility requirement, pursuant to Rule 39 (3) of the Rules of Procedure, which is not met.

Regarding authorized parties

98. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution which establish:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

99. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates:

4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

100. Finally, the Court also refers to paragraph (a) of paragraph (1) of Rule 39 [Admissibility Criteria], of the Rules of Procedure which establishes:

*(1) The Court may consider a referral as admissible if:
(a) the referral is filed by an authorized party,*

101. As to the fulfillment of these requirements, the Court first notes that in the present case there are two Applicants and each of them should be legitimated as an authorized party based on the relevant provisions cited above, as a precondition to review this Referral. As to the first Applicant, namely Mr. Arban Abrashi, the Court notes that he, in a capacity of an individual, respectively as a natural person, he is an authorized party to file a constitutional complaint with the Court. (See Constitutional Court: KI73/09 Applicant: *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/18 Applicant: *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant: *Shaip Surdulli*, Resolution on Inadmissibility of 15 May

2018). As to the second Applicant, namely the political entity LDK, the Court notes that in accordance with paragraph 4 of Article 21 of the Constitution, the second Applicant also has the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, to the extent applicable. (See case of the Constitutional Court, KI41/09 *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 21 January 2010; see also: case of ECtHR, *Party for a Democratic Society and Others v. Turkey*, No. 3840/10, Judgment of 12 January 2016).

102. In addition, and in this regard, the Court also notes that the ECtHR through its case-law has found that the right to be elected within the meaning of Article 3 of Protocol no. 1 of the ECHR, is the right that it is also guaranteed to political parties as legal persons and that they may complain irrespective of their candidates. (See, for example, case of ECtHR of the *Georgia Labor Party v. Georgia*, complaint no. 9103/04, Judgment of 8 July 2008, paragraphs 72-74 and other references mentioned in that decision). Consequently, the Court concludes that both Applicants are authorized parties.

Regarding the act of public authority

103. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and to Article 47 [Individual Requests] of the Law, which provide:

1. *Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority. [...]*

104. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides:

- (2) *A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge.*

105. In this regard, the Court notes that the Applicants challenge acts of a public authority, namely the first Decision [AA. No. 52/2017] of 25 November 2017 and the second Decision [A.A. U.ZH. No. 62/2017] of 7 December 2017] of the Supreme Court, as stipulated by paragraph 7 of Article 113 of the Constitution and relevant provisions of the Law and of the Rules of Procedure. Accordingly, the Court concludes that the Applicants challenge acts of a public authority.

Regarding the exhaustion of legal remedies

106. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above, and paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which foresee:

Article 47
[Individual Requests]

[...]

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Rule 39
[Admissibility Criteria]

1. The Court may consider a referral as admissible if:

[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

107. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust “*all legal remedies provided by law*”. This constitutional obligation is also defined by Article 47 of the Law and item (b) of paragraph (1) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.
108. In this regard, the Court must examine whether all legal remedies have been exhausted by the first Applicant, in the capacity of an individual as a natural person, and by the second Applicant, in the capacity of the political entity as a legal person. The criteria for assessing whether that obligation is fulfilled are well established in the case-law of the Court and in the case-law of the ECtHR in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.
109. In the circumstances of the present case, the Court recalls that in the first Decision of the Supreme Court, respectively Decision [AA. No. 52/2017], only the second Applicant, namely the LDK as a political entity, specifically, a legal person, was a party to the proceedings before the ECAP and the Supreme Court. The first Applicant was not a procedural party although the applicable law, namely through Article 119.1, foresees this opportunity for legal persons, i.e. candidates who have an interest in protecting their fundamental rights and freedoms. Consequently, the Court concludes that only the second Applicant has exhausted all legal remedies and the Court will review the constitutionality of the first Decision of the Supreme Court in relation to the rights and freedoms guaranteed by the Constitution belonging to the LDK as a political party and a legal person. (See, *mutatis mutandis*, political entities as Applicants before the ECtHR for electoral disputes, *Refah Partisi (Social Welfare Party) and Others v. Turkey*, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, See also the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia*, No. 55066/00 and 55638/00, Judgment

of 11 January 2007, where the Applicant was a political entity along with the candidate who competed under the sign of that same political entity).

110. In addition, with regard to the second and the last Decision of the Supreme Court, respectively Judgment [AA. U.ZH. No. 62/2017], the Court recalls that parties to the proceedings were both, the first and the second Applicant. Consequently, the Court finds that both Applicants have exhausted all legal remedies and the Court will review the constitutionality of the second Decision of the Supreme Court [AA. U.ZH. No. 62/2017] in relation to the rights and fundamental freedoms guaranteed by the Constitution that belong to the first Applicant as an individual, namely as a natural person, as well as the second Applicant as a political entity, namely a legal person.
111. Therefore, emphasizing that in the case under consideration the Applicants' allegations are identical, the Court notes that the second Applicant has exhausted all legal remedies to challenge before this Court the first Decision of the Supreme Court; whereas as far as the second Decision of the Supreme Court is concerned, both Applicants have exhausted all legal remedies.

Regarding the accuracy of the Referral and deadline

112. In addition, the Court also examines whether the Applicants have fulfilled other admissibility criteria, further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of Referral] and Article 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49
[Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision (...)

113. The Court recalls that the same requirements are further provided in items c and d of paragraph 1 of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.
114. As to the fulfillment of these requirements, the Court notes that the Applicants have clearly specified what fundamental rights and freedoms guaranteed by the Constitution have allegedly been violated and have specified the act of the public authority which they challenge in accordance with Article 48 of the Law and relevant provisions of the Rules of Procedure and have filed the Referral

within the deadline of four (4) months stipulated in Article 49 of the Law and the provisions of the Rules of Procedure.

Regarding other admissibility requirements

115. Finally and after considering the Applicants' constitutional complaint, the Court considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it inadmissible, as none of the requirements established in Rule 39 (3) of the Rules of Procedure is applicable in the present case. (See, *inter alia*, ECHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144, see also: the case of the Constitutional Court No. KO73/16, *Applicant: Ombudsperson*, Judgment of 8 December 2016, paragraph 49).

Conclusion regarding the admissibility of the Referral

116. The Court concludes that the Applicants are authorized parties; challenge decisions of public authorities; have exhausted legal remedies as specifically elaborated above; have specified the rights and freedoms that claim to have been violated; have submitted the referral within the deadline; the referral is not manifestly ill-founded; and there is no other admissibility requirement which is not fulfilled.

117. Therefore, the Court declares the Referral admissible.

Merits of the Referral

I. Introduction

118. The Court first recalls that the Applicants allege violation of their rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution.

119. In substance, the Applicants mainly allege that the Supreme Court, but also the ECAP, in the proceedings conducted for the review of their complaints and appeals, have failed to provide judicial protection of their rights guaranteed by Article 54 of the Constitution and, consequently, these public authorities have violated their rights to election and participation guaranteed by Article 45 of the Constitution.

120. In dealing with the allegations of the Applicants, the Court will first deal with issues relating to the jurisdiction of the Court with regard to election disputes. Subsequently, the Court will deal separately with all allegations of the Applicants starting with the category of allegations relating to the violation of the right to judicial protection of rights guaranteed by Article 54 of the Constitution, to continue with the category of the allegations related to violations of the rights of election and participation guaranteed by Article 45 of the Constitution.

121. The Court, beyond the application of constitutional guarantees related to the respective rights, in dealing with these allegations during the review of all allegations, will also apply: (i) the case-law of the ECtHR in interpreting Article 3 (Right to free election) of Protocol no. 1 to the ECHR in accordance with which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret fundamental rights and freedoms guaranteed by the Constitution; and (ii) the fundamental and common principles of European heritage for free and democratic elections, summarized in the Venice Commission Opinions, namely the Code of Good Practice in Electoral Matters and Explanatory Report, Opinion No. 190/2002, CDL-AD (2002) 023rev2-cor, adopted at the 51st plenary session by the Venice Commission of 5-6 July 2002 and subsequently approved by the Parliamentary Assembly of the Council of Europe in the first part of the 2003 session (hereinafter: Code of Good Practice and/or Explanatory Report).
122. The Court emphasizes that the Code of Good Practice is based on the underlying principles of European electoral heritage, which constitutes the basis of a good practice in electoral matters. Under this Code, the electoral heritage of Europe consists of five underlining principles and they are: (1) universal suffrage; (2) equal suffrage; (3) free suffrage; (4) secret suffrage; and (5) direct suffrage. Beyond these principles, the Code of Good Practice also sets three requirements, the fulfillment of which is a prerequisite for the proper implementation of the underlying principles of this Code and they are: (1) respect for fundamental rights; (2) the level of regulation and stability of the election law; and (3) procedural guarantees.
123. Beyond this, the Court will also apply in the circumstances of the present case, the Opinions and Reports adopted by the Venice Commission over the years regarding best practices for resolving election disputes, summarized in a separate document, namely the document of the Venice Commission, known as “*Summary of Reports and Opinions of the Venice Commission on Election Dispute Resolution*”, CDL-PI (2017) 007, dated 9 October 2017 (hereinafter: Report on Election Dispute Resolution) and the Venice Commission Report on the Cancellation of Election Results, CDL-AD (2009) 054, adopted by the Council for Democratic Elections at its 31st meeting and adopted by the Venice Commission at its 81st plenary meeting, on 11-12 December 2009 (hereinafter: Report on the Cancellation of the Election Results).

II. Jurisdiction of the Court

124. The Court recalls that the question of its jurisdiction in the assessment of the election disputes was raised by the Applicants, who allege that the Court should “*assess the constitutionality of the entire election process*”, assessing both the facts and the procedure conducted and not limited only “*in the nature of the protection of fundamental freedoms and rights*”. In support of this argument, the Applicants refer to the Opinion of the Venice Commission (CDL-PI (2017) 007) and Decision of the Constitutional Court of Austria (E 17/2016-20) of 1 July 2016. These allegations have been challenged through the comments submitted to the Court, by Mr. Shpend Ahmeti, who claims that

under Article 113.7 of the Constitution, the Court “*does not have the jurisdiction to assess the constitutionality of the election process*”.

125. In this regard, the Court recalls that its jurisdiction is clearly defined by Article 113 [Jurisdiction and the Authorized Parties] of the Constitution. This article contains the entire 10 items with their respective sub-items describing the parties authorized to submit referrals to the Court, as well as issues which they may submit to the Court. In addition to Article 113 of the Constitution, the latter also defines a jurisdictional competence of the Court specifically described in paragraph 4 of Article 62 [Representation in the Institutions of Local Government] of the Constitution. Therefore, the Court emphasizes that its sole jurisdiction derives from the aforementioned Articles of the Constitution, while no additional jurisdiction is assigned by law under paragraph 10 of Article 113 of the Constitution.
126. In this regard, the Court emphasizes that the Constitution of the Republic of Kosovo through paragraph (5) of item 3 of Article 113 explicitly defines the jurisdiction of the Court to assess whether the Constitution was violated during the election of the Assembly, if such a matter is raised by the Assembly Kosovo, the President of the Republic of Kosovo or the Government.
127. Beyond this provision, the Court emphasizes that it has no special jurisdiction to assess the constitutionality of an electoral process. Such jurisdiction is not established by the Constitution, either by law or by applicable election legislation, which could constitute additional jurisdiction based on paragraph 10 of Article 113 of the Constitution.
128. The jurisdiction of the Court to review election disputes, as is the present case under review, is limited to paragraph 7 of Article 113 of the Constitution. In this regard, the Court notes that complaints relating to election disputes may be considered by the Court after they have been filed by the authorized parties which challenge an act of a public authority which allegedly infringed the relevant fundamental individual rights and freedoms and after exhaustion of all legal remedies provided by law.
129. The Constitutional Court, in this respect, serves as the last instance which assesses the constitutionality of the decisions of the public authorities specialized for election complaints. According to the LGE, the ECAP serves as the first authority before which the first instance complaints can be filed, whereas the Supreme Court serves as the second instance for the latter. This institutional two-instance system of decision-making meets the institutional requirements that the bodies that decide on election disputes should have based on the criteria set out in the Code of Good Practice.
130. Accordingly, the jurisdiction of this Court, in the context of election disputes, beyond the issues falling within the scope of paragraph (5) of item 3 of Article 113 of the Constitution, is limited to assessing the constitutionality of the decisions of these public authorities, namely in assessing whether they have been subject to compliance with the fundamental rights and freedoms guaranteed by the Constitution and relevant international instruments set

forth in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, which the Court, based on Article 53 [Interpretation of Human Rights Provisions], interprets the alleged violation of these rights in accordance with the ECtHR decisions.

131. The Court also notes that the Opinion of the Venice Commission, to which the Applicants refer, namely the Code of Good Practice, does not support the arguments of the Applicants. In fact, in elaborating the international standards related to an “*effective complaint system*”, the Code of Good Practice establishes constitutional courts only as one of the options to deal with complaints related to election disputes. (See item 3.3., paragraph 93 of the Explanatory Report). According to the Code of Good Practice, the states are free to choose the mechanisms that review these complaints in accordance with the respective constitutions, insofar as they respect the general principles related to electoral rights. This is also in line with the ECtHR case-law in interpreting Article 3 of Protocol no. 1 to the ECHR.
132. For comparative issues, it is important to note that unlike the Constitution of the Republic of Kosovo, in all countries (Germany, Austria, Switzerland), which decisions the Applicants refer to the Court, have separate and specific jurisdiction to deal with the election disputes. (See Article 93 of the Basic Law of Germany, which defines the competence of the Federal Constitutional Court for electoral complaints, see Article 80 [Appeal to the Federal Supreme Court] of the Federal Law on Swiss Political Rights; and see Article 141 of the Constitution of Austria).

III. Assessment of the allegations of the Applicants

1. Applicants’ allegations of violation of the rights to judicial protection guaranteed by Article 54 of the Constitution

133. The Court recalls that the Applicants allege that the Supreme Court, by both of its decisions, violated their fundamental rights and freedoms guaranteed by Article 54 of the Constitution namely, because according to them, they are arbitrary. In this regard, their allegations may be categorized as follows: (i) “*confirmation of the election results*”; (ii) “*irregularities on the voting day and the deadline for filing it*”; and (iii) “*minimal and balanced irregularities*”. In addition, the Applicants allege that the Supreme Court, through its decisions, has made (iv) “*only the assessment of the legality rather than the constitutionality of the respective allegations*”. (See specific allegations raised by the Applicants in paragraphs 57-61). In dealing with each allegation, the Court will apply the constitutional guarantees, the relevant ECtHR case-law and the relevant principles of the Venice Commission. Furthermore, once all the specific allegations of the Applicants are reviewed, the Court will also assess (v) whether the proceedings followed in the circumstances of the present case, in their entirety, may have resulted in a violation of the general principles for protection of the judicial rights guaranteed by the Constitution of the Republic of Kosovo.

(i) Regarding the “confirmation of the election results”

134. The Court recalls that the Applicants allege that the reasoning of the Supreme Court in its first Decision, respectively Decision [AA. No. 52/2017] that “*the law does not foresee the narrow result between the candidates as a condition for recount*”, is unconstitutional because according to them “*no state counts conditions or cases when the recount is ordered - because it is the right in itself - for confirmation of the electoral process*”.
135. The Court initially notes that the European standards regarding the annulment of the election results stem from the guarantees of Article 3 of Protocol no.1 to the ECHR. According to the Venice Commission, the latter derive from paragraph b of Article 25 of the Covenant on Civil and Political Rights, which sets out the fundamental principles of the right to vote and to be elected. The Court recalls that both of these international instruments based on Article 22 of the Constitution are directly applicable in the legal order of Kosovo.
136. However, the right to cancel the results, which in principle but with exceptions, is applicable also in terms of active and passive rights, in practice are only applicable in the event of substantial violations of the election law. According to the Venice Commission, while the practice of cancellation of the election results varies widely within the states, in principle, the number of complaints against the election result is very high, and the cancellation of the election results is usually the last resort. (See section II, paragraph 5 of the Report on the Cancellation of Results). According to the latter, the cancellations of the election resulted have occurred very rarely in the last decades.
137. In almost all member states of the Venice Commission, the issue of cancellation of the election results is determined by general provisions. Practice varies from countries that have the criteria set out in the Constitution, laws, or are not defined in any. (See section III, item A, paragraph 8 of the Report on the Cancellation of Results). Moreover, there are member states of the Venice Commission which stipulate that all court disputes regarding the elections must be closed before the candidate takes over the office; and there are other countries that do not allow canceling the mandate after being sworn in for the office. (See Section IV, item C, paragraphs 70-75 of the Report on the Cancellation of Results).
138. A common denominator however is established by the Venice Commission as an integral part of an “*effective complaint system*”, which, according to the Code of Good Practice, the Explanatory Report and the Dispute Resolution Report establishes that “*The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned*”.
139. The ECtHR case-law regarding the assessment of the election disputes, which is consistently referred to the Code of Good Practice, pointing out that the existence of a national system for an “*effective complaint system*”, is one of the

fundamental guarantees of free and fair elections, reflects the same standard. It also contains the essential test set by the Venice Commission, namely, assessing whether “*the irregularities may have affected the final outcome*”, or even more specifically, there is “*a real impossibility to establish the wishes of the voters*”. (See ECtHR cases, *Kovach v. Ukraine* no. 39424/02, Judgment of 7 February 2008 and *Riza and Others v. Bulgaria*, 48555/10 and 48377/10, Judgment of 13 October 2015).

140. However, the ECtHR also notes that it is not the role of the courts to modify the expression of the will of people. (For more context regarding the latter, see the Decisions of the European Commission on Human Rights, *I.Z. v. Greece*, No. 18997/81, Decision of 28 February 1994, and *Babenko v. Ukraine* No. 43476/98, Decision of 4 May 1999). It maintains that the freedom enjoyed by decision-making authorities must be limited, with sufficient accuracy, by the provisions of domestic law. The procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision and to prevent any abuse of power by the relevant authority. (See cases of ECtHR, *Podkolzina v. Latvia*, No. 46726/99, Judgment of 9 April 2002, paragraph 35, *Kovach v. Ukraine*, cited above, paragraphs 54-55, *Kerimova v. Azerbaijan*, No. 20799/06 Judgment of 30 September 2010, paragraphs 44-45; *Riza and Others v. Bulgaria*, cited above, paragraph 143).
141. The ECtHR case-law put emphasis on some minimum safeguard measures against arbitrariness. (See ECtHR case, *Davydov and Others v. Russia*, no. 75947/11, Judgment of 30 May 2017, paragraph 288). In this dispute, when included in such a review, the ECtHR is bound to ascertain whether the decision taken by the internal authority was arbitrary or manifestly unreasonable. (See ECtHR cases, *Riza and Others v. Bulgaria*, cited above, paragraph 143; *Kerimli and Alibeyli v. Azerbaijan*, no. 18475/06 and 22444/06, Judgment of 10 January 2012, paragraphs 38-42, *Davydov and Others v. Russia*, cited above, paragraph 288).
142. Based on the abovementioned elaborations, the standards of the member states of the Venice Commission, as regards the cancellation of the election result and relevant case-law of the ECtHR, regarding the member states of the Council of Europe, the Court notes that the basic criteria that constitute the test whether the review of complaints for challenging the election results could result in the cancellation of the same, are divided into two categories: (i) “*the powers of the authority making the decision*”; and (ii) “*its discretion and the relevant limitations*”.
143. Regarding the first, the Court notes that according to the standards and the referred practice, the authorities that examine the election complaints should have (i) the possibility of the cancellation of the elections; (ii) this opportunity should be used or limited to sufficient accuracy in the provisions of the applicable law; (iii) their duty is not to change the will of the voters; and (iv) it should be limited in the sense of avoiding arbitrariness. Whereas, as regards the second, the Court notes that the discretion of the decision-making authorities should focus on the assessment (i) “*determination of the voter's wish is impossible*” or, (ii) “*such violations and irregularities may have*

influenced election result". The case-law of the European courts and the case-law of the ECtHR, as elaborated above, shows that this test has been interpreted in a conservative manner and that cases in which the courts have canceled election results are cases of substantial violations of law and that reflect apparent arbitrariness.

144. There is sufficient case-law to assess whether "*irregularities may have affected the outcome*". The European courts have found that "*the irregularities may have affected the election results*" when there has been: (i) a failure to meet the necessary requirement to participate in the elections; (ii) errors in voter registration or nomination of candidates; (iii) breach of campaign regulation; (iv) violation of legislation applicable to the voting process; (v) violation in counting or reporting; and (vi) violations in the allocation of mandates. (See Report on the Cancellation of Results, paragraph 79).
145. The above mentioned categories under (iv) and (v), "*violation of the applicable legislation during the voting process*" and "*violation during the counting and reporting process*", closely coincide with the circumstances of the present case, so the Court will also summarize the cases when the respective courts have found violations.
146. According to the Venice Commission, the European courts to which the latter refers, found that the "*the legislation applicable on the voting process has been violated*" only when: (i) the elections had not started for more than 6 hours from the time scheduled; (ii) public order was disturbed on election day; (iii) lack of ballot papers in the voting booth; (iv) some voters have voted several times or for others or their identity was not controlled; (v) there was a family voting; (vi) incapacity of the official representatives present at the polling stations; (vii) difference and discrepancy between the number of ballot papers in the polling box and the number of voters who signed the electoral register was evident; (viii) a sealed package of ballot papers has been opened by unauthorized civil servants; (ix) manipulation of votes of postal voting; (x) ballot papers have not been signed and stamped by the appropriate official; (xi) assistance provided by the personnel of a polling station to persons who were not in need of help; (xii) no documentation of the voting process; (xiii) voting after the polling stations were closed; (xiv) no legal termination of the electoral procedure by the election administration. Whereas, according to the same case-law, "*violations counting or reporting*" have been found when (i) advance voting (in those countries where it is allowed) have incorrectly been rejected by the electoral administration; (ii) ballot papers have been left unattended before counting; (iii) examination of ballot papers carried out by an unauthorized person; (iv) some votes were counted twice; (v) examination of validity of the ballot papers was carried out according to different criteria by the election administration; (vi) wrongful calculation of election result (vii) irregularities made in the election report which has not been signed by the members of the electoral board; (viii) documentation and ballot papers have been sent open to central electoral bodies; and (ix) falsification of results. (See Section V, paragraphs 76-80, of the Report on the Cancellation of Election Results). All these categories of cases in their entirety reflect substantive violations of law and electoral rules and evident arbitrariness.

147. In applying these principles in the circumstances of the present allegation, the Court recalls that the first Decision of the Supreme Court challenged by the Applicants through this allegation was brought as a result of the complaint of VETĚVENDOSJE! Movement in the Supreme Court against the Decision [ZL. A. No. 1102/2017] of 22 November 2017 of ECAP, which approved as grounded the appeal of the second Applicant in the ECAP against the CEC decision on the announcement of preliminary results. The ECAP decided and ordered the CEC to recount all ballot papers based on two main arguments: (i) “*the large number of invalid and blank ballot papers*” and (ii) the “*narrow result between the two candidates*”. The Supreme Court modified this ECAP Decision, reasoning mainly that the ECAP reasoning was not based on law, because according to the Supreme Court (i) “*the large number of invalid and blank ballot papers*” and nor (ii) the “*narrow result between the two candidates*” is not defined by law as a condition to decide on “recount” or “revote”.
148. In this regard, the Court notes that the general provisions of the LGE stipulate that “*the repetition of elections*” is one of the principles governing the procedure of counting the ballot papers. The LGE further specifies as a “*recount*” or “*revote*” option and this competence, according to the LGE, is left to: (i) the CEC, which may, based on paragraph 2 of Article 106, order the recount of votes at any polling station, counting center or even the repetition of voting at a polling station or in a municipality prior to certification of results; and (ii) the ECAP, which on the basis of paragraph 4 of Article 117 has the competence to order the recount of ballots at a polling station or polling centre as well as reviewing the voting material as part of the investigation of the complaint or appeal. This competence of the ECAP is further specified by Article 14 of the Law on Amending and Supplementing the LGE, namely item b of Article 120 of the LGE, according to which, the ECAP in “*exceptional cases*” and prior to certification of the election results, may cancel the election results at a polling station or a polling centre, ordering the CEC to repeat the same if it considers that the “*identified violations have an impact on the final results*”.
149. Accordingly, the Court notes that the possibility of “*recount*” and “*re-vote*” is clearly defined in the LGE and its relevant amendments and was further specified in the CEC and ECAP Regulations. While the LGE does not correctly count the criteria on which eventual violations during the electoral process would result in a recount or revote, the amendment and supplementation of the LGE set two conditions based on which the ECAP may decide to cancel the election result, and consequently order the repetition of the voting, namely: (i) “*extraordinary circumstances*” and (ii) “*whether the identified violations have an impact on the final outcome*”. The assessment of whether these two requirements are met is at the discretion of the CEC in the context of paragraph 2 of Article 106 of LGE in conjunction with Article 6 of the Law on Amending and Supplementing the LGE; ECAP in the context of paragraph 4 of Articles 117 of the LGE and Article 120 of the LGE in conjunction with Article 14 of the Law on Amending and Supplementing LGE, and the courts assessing the respective complaints.

150. In this regard, the Court notes that the standards embodied in the applicable electoral legislation, also with regard to the competencies of decision making authorities and of setting the boundaries of their discretion, are in the harmony with the practice of the Venice Commission member states and also the case-law of the ECtHR.
151. In this regard, the Court notes that the reasoning and conclusion of the Supreme Court that the two criteria based on which the ECAP had ordered the recount: (i) “*the large number of invalid and blank ballots*”, and (ii) the “*narrow result between the two candidates*”, were not grounds established in the law to order the recount or revote, was correct and based on the LGE and the respective amendments.
152. Therefore, the Court concludes that the first Decision [AA. No. 52/2017] of the Supreme Court of 25 November 2017 challenged by the Applicants, did not apply the law in a manifestly arbitrary manner and the latter did not violate the Applicants’ election rights. This is because: (i) the reviewing complaint authority in the circumstances of the present cases, the ECAP and the Supreme Court, considered that the “*the irregularities do not have influence on the final results*”; and that (ii) the circumstances of the specific case and the respective allegations do not constitute “*exceptional circumstances*”.
153. In addition, the Court notes that the circumstances of the present case and the allegations of the Applicants find no support in any of the cases of the ECtHR nor in the case-law of the member states of the Venice Commission, as elaborated above.
- (ii) *Regarding irregularities on the voting day and deadline for their submission*
154. The Court recalls that the Applicants allege that the second Decision [AA. U.ZH. No. 62/2017] of the Supreme Court has no legal basis. In this regard, the Applicants allege that the reasoning of the Supreme Court that in the appeals proceedings it is limited only to the assessment of “*the irregularities related to the data administration*”, does not have support in the applicable law. According to the Applicants, the issues related to the “*irregularities regarding the administration of CRC data*” are based only on the special procedure provided for in Article 105 of the LGE, whereas the Applicants filed appeals pursuant to Article 119 of the LGE. In addition, the Applicants allege that Articles 118.4 and 119.1 of the LGE and the respective amendments and supplements recognize the right to supplement the appeals submitted to the ECAP with new evidence and facts. In this regard, the Applicants also refer to the Reports of the Venice Commission on Dispute Resolution, arguing that the admissibility criteria in such cases, should be clearly specified in the law in order to prevent the declaration of complaints as inadmissible.
155. The Court notes that, in essence, this allegation of the Applicants concerns the declaration as out of time by the ECAP and the Supreme Court of the allegations of irregularities on the voting day, namely the allegations relating to (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending

sms by VETĚVENDOSJE! Movement, which were submitted to the ECAP after the announcement of the final results.

156. The context of this allegation raises four essential issues (i) the deadline for complaint; (ii) the requirements for filing a complaint; (iii) the possibility of filing new evidence; and (iv) the competences of the authorities that review the complaints. In this regard, the Court will again refer to the Code of Good Practice and respective Explanatory Report. The latter and to the extent relevant to the circumstances of the case, in the section addressing the “*effective complaints systems*”, addresses, *inter alia*: (i) time limits for complaints; (ii) access to legal remedies; and (iii) the powers of the appellate bodies. (See in more detail item 3.3, paragraphs 95, 96 and 97 of the Explanatory Report).
157. Regarding the first, namely the “*deadlines for complaints*”, the Explanatory Report stipulates that they should be short and that the appeal bodies should also decide as soon as possible. A deadline of 3 to 5 days for the first instance (also for the complaint and decision-making) is reasonable for decisions in election disputes according to the Explanatory Report. Time limits are further specified in the Report on the Cancellation of Election Results, stating that European practice recognizes deadlines of one (1) to five (5) days for complaints related to election disputes. According to the same report, it is permissible for constitutional courts to take more time for their decision-making. (See Report on the Cancellation of Results, paragraph 61). Regarding the second, namely “*the access to legal remedies*”, the Explanatory Report stipulates that the complaint procedure should be simple, it is necessary to avoid excessive formalization and to avoid decisions of inadmissibility, especially in politically sensitive cases. Specifically, the complaint procedures should be simple and that the responsibilities of the various bodies involved in this process be well defined. As for the third, namely, “*the powers of the complaint bodies*”, the Explanatory Report stipulates that the risk of the successive bodies refusing to make a decision on merits should be eliminated, which, according to the Venice Commission, may occur when there is more than one possibility in theory to file a complaint to certain bodies, or in cases where the jurisdiction of different courts, for example, regular courts and constitutional courts - are not clearly differentiated. (See part 3 item 3.3, paragraph 97 of the Explanatory Report).
158. In applying these principles in the circumstances of the present allegation, the Court recalls that the second Decision of the Supreme Court, namely Judgment [A.A. U.ZH. No. 62/2017] which the Applicant challenges through this allegation, was rendered as a result of the Applicants' appeal to the Supreme Court against Decision [A. ZL. No. 1125/2017] of 1 December 2017 of the ECAP after the announcement of the final results. The Supreme Court upheld the ECAP Decision which rejected the Applicants' allegations related to the announcement of the final result as ungrounded, while rejecting the category of the allegations relating to the announcement of the preliminary results, namely the irregularities on the election day, arguing that these allegations were out of time.

159. In this regard, the Court notes that the LGE and the relevant amendments stipulate that in principle the time limit of complaints before ECAP and of the ECAP in before the Supreme Court are 24 hours.
160. The Court notes that: (i) Article 13 of the Law on Amending and Supplementing in conjunction with paragraph 1 of Article 119 of the LGE also provides that appeals to ECAP must be filed within 24 hours of the closure of the polling stations; (ii) the ECAP decisions, in accordance with Article 12 of the Law on Amendment and Supplementation of the LGE in conjunction with paragraph 4 of Article 118 of the LGE are appealed also within 24 hours to the Supreme Court in cases where the fine involved is higher than € 5,000 and the case concerns a fundamental right. Based on the same Article, the ECAP may “*reconsider any of its decisions upon the presentation by an interested party of new evidence*”; and finally (iii) Article 4 of the Law on the Amendment and Supplementation of the LGE in conjunction with Article 105 of the LGE determines that for the complaints related to the counting administration procedure in the CRC the deadline is 24 hours from “*the occurrence of the alleged violation*”.
161. The Court also notes that the initiation of these complaints relates to two phases after the elections, the phase after the announcement of the preliminary results and after the announcement of the final results, namely, in accordance with the Code of Good Practice. (See section 3, item 3.3, paragraph 95 of the Explanatory Report).
162. In the context of this allegation, the Court notes that one day after the second round of elections and the announcement of preliminary results by the CEC, the second Applicant filed a complaint with the ECAP. The content of the complaint concerned mainly the challenging of the ballot papers declared invalid and blank. In this complaint, the Applicants had not raised any other allegations relating to the irregularities on the voting day, specifically (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms by VETĚVENDOSJE! Movement. The Applicants reason that these irregularities had not been known to them when the deadline for complaints was closed and that they had understood about them on 20 November 2017, after the expiry of the deadline for submission of the latter.
163. However, the Court notes that the following day, namely on 21 November 2017, the ECAP allowed the Applicants to supplement their request because they considered the latter to be generalized. According to the case file, the Applicants did not submit the aforementioned allegations related to the irregularities on the voting day, but supplemented the claim only in respect of allegations that relate mainly to invalid and blank ballot papers. The ECAP issued the decision the following day, namely on 22 November 2017, in favor of the Applicant ordering the recount of all ballots. This decision was appealed in the Supreme Court by VETĚVENDOSJE! Movement on 23 November 2017. According to the case file, the Applicants had not submitted these allegations in response to the appeal to the Supreme Court. The Supreme Court, rendered its first Decision on 25 November 2017 by approving the appeal of

VETËVENDOSJE! Movement and by annulling the ECAP decision. Upon completion of the procedure for challenging the preliminary results to the ECAP and the Supreme Court, on 29 November 2017, the CEC announced the final results of the second round of elections for the Mayor of the Municipality of Prishtina. On 30 November 2017, one day after the announcement of the final results by the CEC, the Applicants filed a complaint with the ECAP by challenging the final result of the elections, alleging, among other things, violations of the law and the Constitution, an allegation, which among others, was justified by the allegations of irregularities on the voting day. Consequently, the Court notes that these irregularities allegedly were understood on 20 November 2017, according to the allegation 1 hour after the deadline for complaints relating to the announcement of the preliminary results, for the first time filed with the ECAP on 30 November 2017, after the announcement of the final results, and 10 days after the closure of the voting centers.

164. In addition, the Court recalls that the Applicants also allege that their claims should not have been declared as out of time, because their appeals were not based on Article 105 of the LGE and the relevant amendments but on Articles 118 and 119 of the LGE and the relevant amendments. The Court first notes that: (i) the appeal of 20 September 2017 is based on Article 119 of the LGE and the relevant amendments; (ii) the appeal of 30 November 2017 is based on Articles 105 and 119 of the LGE and the relevant amendments; while, (iii) the appeal of 5 December 2017 was also based on Articles 105 and 119 of the LGE and relevant amendments. However, the fact that the Applicants allege to have filed appeals based on one article and not the other, does not change the situation in the circumstances of the present case.
165. This is because Article 13 of the Law on Amending and Supplementing the LGE, in conjunction with paragraph 1 of Article 119 stipulates that the time limit for filing an appeal to the ECAP is 24 hours from the moment of the closure of the polling center. In this context, Article 12 of the Law on Amending and Supplementing the LGE in conjunction with paragraph 4 of Article 118 of the LGE specifies that ECAP decisions may be appealed within 24 hours to the Supreme Court. The same article, and as noted above, established that the ECAP may “*reconsider any of its decisions upon the presentation by an interested party of new evidence*”. However, the Court notes that before the announcement of the final results, the Applicants did not use any of these options for filing the respective allegations.
166. The Court notes that the Applicants had ample opportunities to submit these claims before the ECAP and the Supreme Court prior to the announcement of the final results: (i) by supplementing the initial complaint, the opportunity given by ECAP on 21 November 2017; (ii) by responding to the complaint of VETËVENDOSJE! Movement in the Supreme Court before rendering the decision of the latter; (iii) at any time from the filing of the first complaint until the decision of the Supreme Court is rendered based on paragraph 2 of Article 12 of the Law on Supplementing and Amending Article 4 paragraph 118 of the LGE. The latter allow the ECAP to “*review any of the decisions taken after the presentation of new facts by the interested party*”. The Court notes that the

Venice Commission also recognizes the right to present evidence/facts after a complaint has been filed. (See section 6, paragraph 3.3, paragraph 65 item (a) of the Report on Dispute Resolution). In fact, these allegations of irregularities on the Election Day, which according to the case file, were submitted to the ECAP only after 10 days, after the first decision was rendered by the Supreme Court, and, accordingly, after all the deadlines for complaints and decision-making necessary for the announcement of the final results have expired.

167. Moreover, relevant to the circumstances of the present case, is the fact that the Explanatory Report also stipulates that it is important to avoid decisions on inadmissibility or to refuse to award decisions on merits, but the Explanatory Report relates the latter with the circumstances where there may be a conflict of jurisdiction over the election appeals or for other formal reasons on which the relevant courts may refuse to answer the merits. The Court notes, however, that the Code of Good Practice, the Explanatory Report, the Report on Dispute Resolution, and the Report on the Cancellation of Results, and in this view, also the case-law of the ECtHR, in the context of requests for lack of formalities or even requests for avoiding the decisions on inadmissibility, do not refer to non-compliance with deadlines for filing complaints related to election disputes. On the contrary, the latter emphasize the importance of short deadlines. Exception for this is the right to present evidence/facts after a complaint has been filed, and before the relevant final decision has been taken. (See section 6, item 3.3, paragraph 65 item (a) of the Report on Dispute Resolution). Appeals and evidence/facts submitted after the deadlines set by law do not fall into this category.
168. Therefore, the Court finds that the Second Decision [A.A. U.ZH. No. 62/2017] of the Supreme Court was not rendered in contravention of the law and has not interpreted the applicable election law in an arbitrary manner. Moreover, the Court notes that the circumstances of the present case and the allegations of the Applicants do not find support in any of the cases of the ECtHR, or in the case-law of the Venice Commission member states, as elaborated above.

(iii) Regarding “minimal and balanced irregularities”

169. The Court recalls that the Applicants allege that the findings of the Supreme Court are arbitrary because they conclude that “*during the counting in some polling stations, the irregularities were noted but were minimal and balanced, because the two candidates were affected*”. In this regard, the Applicants allege that “*violation of constitutional rights exists or does not exist- it cannot be said to have been violated little or much*”.
170. In addressing this allegation, the Court first notes that it does not find that the ECAP or the Supreme Court reached this conclusion or found that there were any irregularities which could be “*minimal and balanced*” - as claimed by the Applicants.
171. However, the Court notes that such an allegation may be related to the context of the second Decision of the ECAP, namely Decision [ZL. A. no. 1125/2017] of 1 December 2017, and the second Decision of the Supreme Court, namely

Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017, decisions which, *inter alia*, dealt with the findings of the ECAP investigative teams for addressing the Applicants' allegation regarding invalid and blank ballot papers.

172. In this regard, the Court recalls that the ECAP based on Article 14 of Regulation No. 02/2015, engaged investigative teams to review Applicants' allegations, namely, the irregularities of invalid ballots, blank ballots, and missing envelopes containing the conditional votes, which may have resulted in irregularities of a chain character known as the "*Bulgarian train*" in 31 polling stations that were challenged by the Applicants. The Court recalls that this investigating team, according to the reasoning of the ECAP and the Supreme Court, reviewed and re-evaluated invalid votes in all the polling stations specified by the Applicants and found that 4 of 183 ballots which had been declared invalid were in fact valid. This difference in the number of votes was included in the final results. The findings of the ECAP investigative teams had shown that from these 4 votes declared invalid initially, and which resulted valid, 2 had been in favor of the Applicants while 2 in favor of Mr. Shpend Ahmeti.
173. The ECAP and the Supreme Court found that such findings did not result in "*inability to determine the will of the voters*" and that the latter "*did not affect the final result*". As elaborated above, based on the ECtHR case-law and the principles of the Venice Commission summarized in the Code of Good Practice, the respective Explanatory Report and the Report on Dispute Resolution, the assessment of whether the irregularities have affected the final result belongs to the authorities which review the election appeals, and in the present case the ECAP and the Supreme Court.
174. In addition and beyond the reasoning and assessment of ECAP and the Supreme Court, the Court also refers to the Code of Good Practice, as far as the issue of invalid, blank or spoiled ballots is concerned. In addressing the issues related to "*counting*", the Code of Good Practice maintains that "*It is best to avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention*". (See item 3.2, paragraph 49 of the Explanatory Report).
175. The Court notes that this principle does not necessarily mean recounting or even cancelling the election results, namely the re-voting. Fulfillment of criteria that would result in the cancellation of the election results are elaborated in detail above. This principle in fact means that in the case of invalid, blank or spoiled votes, the practice of the member states of the Venice Commission stipulates that one additional effort should be made to reevaluate those ballot papers.
176. The Court finds that this effort has been made in the circumstances of the present case. As noted above, the ECAP investigative teams have not only counted all the ballots in the 31 polling stations challenged after the announcement of the final results in the ECAP by the Applicants, but have

reviewed and re-evaluated all the ballot papers declared invalid and blank, finding that the difference between invalid and valid votes is 4 votes out of 183.

177. In this regard, the Court also refers to the ECHR Guide on Article 3 of Protocol no.1 to the ECHR, according to which: “*A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. A mere mistake or irregularity at this technical stage would not, per se, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if (i) there is evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters’ intent; and (ii) where such complaints receive no effective examination at the domestic level.*” (See ECtHR Guide on Article 3 of Protocol no.1 to the ECHR, paragraph 96).

178. Accordingly, the Court does not find that the challenged decision of the Supreme Court was rendered contrary to the law, nor has it interpreted the election law in an arbitrary manner. In addition, the Court finds that the circumstances of this allegation find no support in any of the cases of the ECtHR and the case-law of the Venice Commission member states, as elaborated above.

(iv) Regarding the allegations related to the assessment of legality and constitutionality by the Supreme Court

179. The Court recalls that the Applicants allege that the Supreme Court has violated their right to judicial protection of rights guaranteed by Article 54 of the Constitution, because through challenged decisions only the legality of the ECAP decisions was assessed without addressing their constitutionality. This has resulted, according to them, in violation of the principle of the “*constitutional supremacy*”.

180. In essence, the Court notes that this allegation raises two essential issues: (i) the obligation of regular courts to assess, when making their decisions, the fundamental rights and freedoms guaranteed by the Constitution, beyond the rights and freedoms guaranteed by law; and (ii) the lack of reasoning of the challenged decisions of the Supreme Court regarding allegations of constitutional violation of the Applicants.

181. With regard to the first, the Court emphasizes that, beyond the Constitutional Court, it is also a duty of the regular courts to interpret the fundamental rights and freedoms guaranteed by the Constitution when assessing the alleged violations. This obligation derives from Article 21 [General Principles] of the Constitution, according to which, among other things, fundamental human freedoms are the basis of the legal order of the Republic of Kosovo. Within these rights are those guaranteed by international agreements and instruments included in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution; and (ii) Article 102 [General Principles of the Judicial System] of the Constitution, according to which the courts adjudicate

based on the Constitution and the law. Therefore, the rights guaranteed by the Constitution are protected by all judicial instances and the Constitutional Court, which based on Article 112 of the Constitution, is the final authority to assess the alleged violations by public authorities of fundamental rights and freedoms guaranteed by Constitution.

182. The above-mentioned constitutional Articles also guarantee the principle of “*constitutional supremacy*”, according to which the Constitution, in hierarchical terms, stands at the top of the pyramid and is the source of all laws and sub-legal acts in the Republic of Kosovo. In the latter, the “*supremacy*” of the Constitution is also ensured through the application of a mechanism for controlling the constitutionality of laws and verifying their compatibility with the Constitution, always in the manner provided by the Constitution.
183. However, in the context of the assessment of fundamental rights and freedoms, namely individual referrals, as is the case in the circumstances of the present case, the Court notes that the boundary between the jurisdiction of the Constitutional Court and the regular courts in assessing the constitutionality and legality is not always accurately defined. The Constitutional Court, but also the regular courts, are often in a position to interpret the law, the Constitution, but also the international instruments, as guaranteed by Article 22 of the Constitution. It is the principle of subsidiarity and the fourth instance doctrine, which, in principle, but depending on the particular circumstances of each case, make that distinction.
184. In light of the abovementioned explanations, and to assess whether the Supreme Court reviewed the substantive allegations of the Applicants, the Court refers to the second issue presented above, namely the alleged lack of reasoning of the challenged decisions of the Supreme Court regarding the Applicants’ allegations of constitutional violation.
185. In this regard, the Court should initially emphasize that the guarantees of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to fair trial) of the ECHR, in principle, on the basis of ECtHR case-law, are not applicable in the election disputes. (See *inter alia*, *Pierre-Bloch v. France*, Judgment of 21 October 1997, paragraph 50). This does not mean that the decisions related to electoral disputes should not be reasoned. On the contrary. However, the reasoning of a court decision in the election disputes must be put in the context of Article 3 of Protocol no.1 to the ECHR and the relevant ECtHR case-law. According to the ECtHR, the procedure for reviewing electoral disputes should include a “*sufficiently reasoned decision*” in order to “*prevent the abuse of power by the relevant decision-making authority*”. (See, *inter alia*, *Kerimova v. Azerbaijan*, cited above, paragraphs 44- 45; *Podkolzina v. Latvia*, cited above, paragraph 35, *Kovach v. Ukraine*, cited above, paragraphs 54-55). In addition, a reasoned decision in the election disputes is also required by the Opinions of the Venice Commission, specifically the Report on Dispute Resolution. (See item 11.2 of Section C item 1.6 of of the Report). The Court in this respect, also recalls that the time limits of decision-making in the election disputes are in principle very short, especially in the first and second instance.

186. Beyond the election disputes, the concept of “*sufficiency of reasoning*” even where desirable could be a wider and more detailed reasoning is a concept developed and also used by the ECtHR itself. (See case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber [GC] of 28 November 2017, paragraph 227 - although the circumstances of the case are not the same, the concept of “*sufficiency of reasoning*” stands. In this case of the Grand Chamber, the ECtHR in its reasoning stated the following: “*Whilst more detailed reasoning would have been desirable, the Court is satisfied that this [reasoning] was enough in the circumstances*”.
187. In order to accurately assess whether the Constitutional allegations of the Applicants at the Supreme Court have been dealt with and there was “*sufficient reasoning*” by the Supreme Court, in the circumstances of the present case, the Court will further accurately recall the relevant citations from the two appeals filed by the Applicants with the Supreme Court.
188. Firstly, as regards the first appeal filed with the Supreme Court against Decision [ZL. A. no. 1102/2017], of 22 November 2017 of the ECAP, namely the appeal of 30 November 2017, the Court recalls that the Applicants stated the following: “*The Constitution of the Republic of Kosovo in Article 45 [...] in its three paragraphs speaks about three constitutional rights of each citizen of Kosovo. The first has to do with the right to be elected and to elect, except in cases when this right is restricted by a court decision; The second right has to do with the right to guarantee the sanctity of vote as a personal, equal, free and confidential right. The third and the last one deals with the right of each citizen in Kosovo to be guaranteed by the state institutions that the realization of the right to election will be guaranteed in the way that everyone will have the right to influence in a democratic way in the decisions of public authorities*”. The Applicants further emphasized that: “*These election rights are enshrined in the respective laws of Kosovo, including the infrastructure for local elections. Therefore, by Law [LGE], which in Article 3 [Fundamental Principles] foresees many election principles and the election process in its entirety*”. According to the Applicants, “*The basic principles that should be respected by all in order to guarantee the election rights under the first paragraph of Article 45 of the Constitution are as follows: the elections are held based on the free, equal and secret suffrage under the rules of this law and CEC rules; eligible voters are equal in exercising their right to vote and cast an equal number of votes; every citizen has the right to be elected without discrimination; and the freedom and secrecy of vote is guaranteed*”. The Applicants also emphasized that “*Code is an applicable election regulation of CEC No. 11/2013 and of Article 45 of the Constitution and the [LGE] as above*. In the last part of this appeal, the Applicants stated that: “*The election right of the candidate [...] was violated by “Vetëvendosje” in the way that the latter took actions violating severely the basic constitutional and legal principles regarding the elections. Above all, the PRINCIPLE OF SECRECY AND THE RIGHT TO A FREE VOTE were violated, as two components, which in the constitutional democracies is known as HOLINESS OF THE VOTE*”.

189. Secondly, regarding the second appeal submitted to the Supreme Court against Decision [ZL. An. 1125/2017], of 1 December 2017 of the ECAP; namely the appeal of 5 December 2017, the Court recalls that the Applicants requested the annulment of the ECAP Decision for three reasons: *“I. Due to erroneous application of the provisions of the Law on General Elections and the Law on Local Elections by the ECAP; II. Due to incorrect assessment of evidence provided by the solidary appellants as above; and finally; III. Due to the violation of three constitutional rights of the voters for the Mayor of Prishtina guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution:- the right to be elected and elect;-the right to guarantee the holiness of vote and finally - the right of each citizen of Kosovo to be guaranteed by the state institutions that the realization of the election right will be guaranteed so that each citizen can influence democratically in the decisions of the public authorities but not on the day of election silence”*.
190. In this regard, the Court notes that the Applicants in their appeals submitted to the Supreme Court, referred to the violation of Article 45 of the Constitution by citing and summarizing the rights guaranteed by the three paragraphs of this Article, but the Applicants built the specific allegations of violation of fundamental rights and freedoms, through arguments and reasoning based on applicable election law and election rules.
191. The Court considers that all the substantive allegations of the Applicants, which were substantiated and reasoned, were dealt with and received a response from the Supreme Court. Furthermore, the Applicants do not refer to any specific allegation claiming to have not received a response from the Supreme Court.
192. In line with its case-law, the Court emphasizes that its already consolidated position that *“the mere mentioning of respective articles of the Constitution, without elaborating their alleged violation, is not sufficient to build a grounded allegation of constitutional violation”*, (see, *inter alia*, in this context, the case of the Constitutional Court, KI54/18, Applicant *Shaip Sylaj*, Resolution on Inadmissibility of 10 October 2018, paragraph 61 and the references to that paragraph) applies *mutatis mutandis* also to the submissions with allegation of constitutional violation that the parties file to the pre-constitutional bodies, in the present case in the ECAP and the Supreme Court. Even before the latter, just like in the proceedings before the Constitutional Court, the arguments elaborated on the allegations of constitutional violation must be presented, thus strengthening the stance that it is not enough to cite the relevant constitutional articles or the fundamental principles of a right.
193. Therefore, in the circumstances of the present case, the challenged decisions of the Supreme Court, which were rendered within the short time limit of 72 hours as foreseen by the law, are decisions which have *“sufficiently reasoned”* on the Applicants' allegations based on the applicable election law - which based on the hierarchy of norms is in compliance with the Constitution, as long as its constitutionality has not been challenged before the Constitutional Court based on the relevant constitutional provisions and unless it has been assessed and declared contrary to it.

(v) As to general principles in conjunction with Article 54 of the Constitution and whether the Applicants' allegations in their entirety may have resulted in the violation of the latter

194. After dealing with the specific allegations of the Applicants of violations of the rights guaranteed by Article 54 of the Constitution, the Court will also deal with and apply in the circumstances of the present case, the general principles of judicial protection of rights and the right to a legal remedy based on the case-law of the Court and of the ECtHR and the fundamental principles for an “*effective complaints system*”, as summarized by the relevant reports and opinions of the Venice Commission, to assess whether the appeal proceedings in their entirety in this election dispute, may have resulted in a violation of Article 54 of the Constitution.
195. In this regard, the Court notes that Article 54 of the Constitution consists of two rules but which must be read together and interdependently. The first rule is general and states that “*everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied*”. This rule in principle implies that judicial protection is a right guaranteed to each individual, natural or legal, to whom an existing right guaranteed by the Constitution or by law may have been “*violated*” or the right to acquire or enjoy any rights guaranteed by the Constitution or by law has been “*denied*”. The second rule of this article speaks and guarantees the right to “*effective legal remedies*” in cases when it is found that a right protected by the Constitution or by law has been violated.
196. Article 54 of the Constitution is also supplemented and should be closely read in conjunction with Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR and with the relevant case-law of the Court and the ECtHR, as will be explained in the following paragraphs.
197. The Court notes that Article 32 of the Constitution complements both aspects of Article 54 of the Constitution, guaranteeing the right to use legal remedies against the court decisions or administrative decisions which have violated the rights guaranteed, but by limiting that use in the manner prescribed by law. Whereas Article 13 of the ECHR guarantees the right to an “*effective remedy*” in the event of a violation of the rights guaranteed by ECHR, before a national body, or before a body foreseen by the domestic law.
198. Therefore, in principle and in its entirety, Article 54 of the Constitution on the judicial protection of rights, Article 32 of the Constitution on the right to a legal remedy and Article 13 of the ECHR for an effective remedy guarantee: (i) the right to judicial protection in case of violation or denial of a right guaranteed by the Constitution or by law; (ii) the right to use a legal remedy against judicial and administrative decisions that violate the rights guaranteed in the manner prescribed by law; (iii) the right to an effective legal remedy if it is established that a right has been violated; and (iv) the right to an effective remedy at national level if a right guaranteed by the ECHR has been violated.

199. To date, the Court has in some cases found a violation of Article 54 of the Constitution. In all those cases, the violation was found in conjunction with Article 32 of the Constitution, namely with Article 13 of the ECHR. Violations in those cases consisted in the failure/refusal of public authorities to enforce a final decision. More specifically, the case-law of the Court so far consists in finding constitutional violations that relate to the second rule of Article 54 of the Constitution. (See cases of Constitutional Court KI47/12, Applicant *Islam Thaçi*, Judgment of 11 July 2012, paragraphs 46 and 51; KI55/11, Applicant *Fatmir Pireci*, Judgment of 9 July 2012, paragraphs 43-47; KI129/11, Applicant *Viktor Marku*, Judgment of 11 July 2012, paragraphs 44-48; KI50/12, Applicant *Agush Llluni*, Judgment of 9 July 2012, paragraphs 39-45; KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 24 March 2014, paragraph 90; KI112/12 Applicant *Adem Meta*, Judgment of 5 July 2013, paras 54-55; KI80/12 Applicant *Sali Pepshi* Judgment of 5 July 2013, paras 49-50).
200. However, the essence of the rights guaranteed by Article 13 of the ECHR, and in the context of the constitutional order of the Republic of Kosovo, in conjunction with Articles 32 and 54 of the Constitution, is established through the ECtHR case-law, *inter alia*, through case *Klass and Others v. Germany* according to which: “Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (“redress”). Thus Article 13 must be interpreted as guaranteeing an “effective remedy before a national authority” to everyone who claims that his rights and freedoms under the Convention have been violated”. (See case of ECtHR *Klass and Others v. Germany*, No. 5029/71, Judgment of 6 September 1979, paragraph 64).
201. In this context, when the ECtHR examines whether a legal remedy provided by the relevant state is effective or not, it essentially answers the question as to whether such a legal remedy would, if used, include in itself the ability and capacity to prevent the alleged violation which has occurred or is continuing to occur, or for a violation which has already occurred, could the complainant find adequate remedy. This is the key question in which the ECtHR responds when deciding on the effectiveness of a legal remedy.
202. More specifically, from the case-law of the ECtHR derive the main requirements come regarding an effective legal remedy i.e.: (i) the essential requirements of an effective legal remedy; (ii) the institutional requirements for an effective legal remedy; and, (iii) the issue of the cumulative nature of the proceedings. Considering that the circumstances of the present case and the allegations of the Applicants relate mainly to alleged violations of judicial protection of rights and effectiveness of the legal remedy, the Court will elaborate these three criteria in more detail in the following by applying them to the circumstances of the present case.

203. With regard to the first issue, namely “*the essential requirements of an effective legal remedy*”, the ECtHR case-law indicates that to consider a legal remedy effective it should be (i) “*effective in practice and in law*”; (ii) the effectiveness should be such as to have the ability and capacity to prevent the occurrence of an alleged violation or continuation of that violation; or (iii) to be a legal remedy which may provide adequate correction for any violation that has occurred. (See case of ECtHR, *Kudla v. Poland*, cited above). There is no effective legal remedy ever if the scope of review by a court or public authority authorized to make such a review is so weak that it is impossible to properly address the key elements of whether there has been a violation of the ECHR or not. (See case of ECtHR, *Wainwright v. United Kingdom*, No. 12350/04, Judgment of 26 September 2006, paras 53-56).
204. In this respect, the Court notes that these criteria are met in the circumstances of the present case for the following reasons: (i) the legal remedy in the election disputes is defined by the LGE and the Law on respective Amendments and Supplements, namely Articles 105, 118 and 119 therein. Moreover, as elaborated above, beyond the appeals related to election disputes, the LGE and the relevant amendments also determine the possibility of recount and re-vote in “*extraordinary cases*” and “*if the identified violations have impact on the final result*” as it is defined by Articles 106, 117 and 120 of the LGE and its respective amendments. As elaborated above, the legal provisions that determine the possibility of cancellation of the election results are in harmony with the practice of the Venice Commission member states as summarized in the Code of Good Practice and Explanatory Report, Report on Dispute Resolution and Report on the Cancellation of Results. Moreover, the ECAP and the Supreme Court practice shows that these provisions are effective, if the ECAP and the Supreme Court finds the allegations of the Applicants as grounded. The recent cases of ECAP practice and the Supreme Court find this. The Court notes that in the last elections, the vote was repeated in the Partesh municipality, following the ECAP Decision which found the allegations in the appeal as grounded based on the police reports and Basic Prosecution files (see Decision [ZL. Ano. 560/2017] of 2 November 2017 of the ECAP) and in the Istog Municipality, following the ECAP Decision, which upheld the allegations as a result of the investigation of the election material. (See Decision [ZL. Ano. 1114/2017] of 27 November 2017 of the ECAP). In the same line of argument, the Court emphasizes that the legal remedy available in the election disputes as defined by the applicable election law; (ii) has the capacity to prevent the occurrence of an alleged violation or continuation of that violation; and (iii) provide adequate correction for any kind of violation that has occurred. The Court also recalls that the ECtHR has determined the instance when the legal remedy is ineffective. Case *Murray v. United Kingdom* clarifies this context. In this case, unlike the circumstances of the present case, the ECtHR, finding the weak power of the judicial review that the regular courts had by the “*Human Rights Act 1998*”, and has decided to find a violation of Article 13 of the ECHR precisely because of the poor prospect of success that the legal remedy has provided. (See case *Murray v. United Kingdom*, no. 14310/88, Judgment of 28 October 1994, paragraph 100; see also, *mutatis mutandis*, ECtHR case *Wainwright v. United Kingdom*, cited above, paragraphs 53-56).

205. As regards the second issue, namely (ii) “*institutional requirements*” for an effective legal remedy, the ECtHR case-law indicates that the authority referred to in Article 13 of the ECHR should not necessarily be a judicial authority. (See ECtHR case, *Chahal v. United Kingdom*, No. 22414/93, Judgment of 15 November 1996). But if it is not a judicial authority then it is necessary that the power and guarantees it offers be relevant to determine whether the legal remedy before that authority is effective or not. In this respect, the ECtHR examines the issue of independence of that public authority and the procedural guarantees it provides to determine the effectiveness of a legal remedy. (See ECHR case, *De Souza Ribeiro v. France*, No. 22689/07, Judgment of 13 December 2012).
206. In this regard, the Court notes that these criteria are also met because the decision-making authority in the election disputes in the Republic of Kosovo includes institutions with full institutional independence, including the CEC as the authority which independence is defined by Article 139 of the Constitution; the ECAP as a permanent and independent authority as foreseen by the LGE and the respective amendments and is the competent body to decide on election complaints and appeals relating to the electoral process and, finally, a judicial body, the Supreme Court which reviews ECAP decisions upon the complaints.
207. And finally, with regard to the third issue, namely, “*cumulative nature of the proceedings*”, the case-law of the ECtHR shows that the complete accumulation of redress procedures and channels in a legal system must be taken into account when deciding whether or not the Applicant had an effective legal remedy available or not. In this respect, the ECtHR has emphasized that even if any legal remedy itself cannot meet all of the requirements of Article 13 of the ECHR - the aggregate of legal remedies may meet such requirements. (See ECHR case, *Surmeli v. Germany*, No. 75529/01, Judgment of 8 June 2006, see also *Leander v. Sweden*, no. 9248/81, Judgment 26 March 1987).
208. In this respect, the Court, having in mind that it has already found that the two requirements of the first two criteria were met, also finds that the proceedings in its entirety has enabled and provided an effective legal remedy in addressing the Applicants' allegations. Consequently, the Court finds that the criteria for assessing the effectiveness of an effective legal remedy within the meaning of Article 13 of the ECHR in the circumstances of the present case , have been met.
209. In support of this conclusion, the Court also refers to the ECtHR case-law where it has found a violation of Article 3 of Protocol no.1 to the ECHR in conjunction with Article 13 of the ECHR, namely in cases where it has found a violation of the right to a legal remedy related to the election rights, cases that coincide with the allegations of the Applicants.
210. In case of *Petkov and Others v. Bulgaria* (see case of ECtHR, *Petkov and Others v. Bulgaria*, no. 77568/01, 178/02 and 505/02 Judgment of 11 July 2009), the Applicants alleged that they had been prevented from running for

parliamentary elections and that they did not have an effective remedy to challenge such prohibition. They were part of the list of the election candidates, but were removed from the list on suspicion of collaborating with former state security agencies in communist times in Bulgaria. Later on, Bulgaria's Supreme Administrative Court ordered all three new applicants to return to the candidate lists, however the decisions of that court were not implemented and parliamentary elections were held without the Applicants as candidates. The ECtHR found a violation of Article 3 of Protocol no.1 to the ECHR as it noted that (i) the election rules concerning de-registration were issued only 2 and a half months before the elections, which was not in compliance with the recommendations of the Venice Commission; (ii) the mechanism as such posed significant practical, legal and temporal difficulties; and (iii) the practical issues of this legal initiative were clarified by the CEC only 12 days before the elections although they could have been clarified much earlier. After noting these flaws, the ECtHR found a violation based on the failure of the Bulgarian authorities to pursue final decisions requiring re-placement of Applicants on the list of candidates. The violation of Article 13 in the circumstances of the present case was found for the reason that the ECtHR was not satisfied that the proceedings before the Constitutional Court of Bulgaria had the capacity to provide a sufficient correction to the Applicants.

211. In case *Grosaru v. Romania* (see ECtHR case *Grosaru v. Romania*, no. 78039/01, Judgment of 2 March 2010), the Applicant was a candidate from the ranks of the Italian minority in Romania who competed for a seat in the Assembly. He had won the highest number of votes at national level; while another candidate, also from the community of Italians of Rumania, had won the most votes in a certain zone (“*single constituency*”). The winner of the seat in the Assembly was declared the other candidate and not the Applicant. The problem that the ECtHR found in this case was related to the fact that the CEC equivalent in Romania declared the winner with an arbitrary application of the law because the law specifically did not state whether the winner should be declared the one who wins at the national or at the level of the electoral zone. Thus, the case concerned the lack of clarity of the electoral law with regard to national minorities and the lack of impartiality of the authorities that reviewed the Applicant's request which were considered as violations that infringed the essence of the right guaranteed by Article 3 of Protocol no.1 of the ECHR. Meanwhile, the violation of Article 13 was found precisely because no local court had ruled on the interpretation of that challenged legal provision filed by the Applicant. On one hand, the Supreme Court of Romania declared inadmissible the Applicant's application as it considered that the decisions of the CEC were final; and, on the other hand, the Constitutional Court of Romania had declared itself incompetent and without jurisdiction to decide on the election matters.
212. Finally, in the case *Paunović and Milovojević v. Serbia* (see ECtHR case *Paunović and Milovojević v. Serbia*, no. 41683/06, Judgment of 24 May 2016), at a certain time, the representative of their political party had submitted their resignations from the mandate of a deputy; the resignations which they had subsequently revoked. Despite the revocation of the resignation and the fact that the resignation was not handed over to them personally, their mandate as

a deputy was terminated. Therefore, the main issue before the ECtHR had to do with whether the mandate had been terminated in accordance with the applicable legal rules or not. The ECtHR found a violation of Article 3 of Protocol no.1 to the ECHR because the entire process of termination of the mandate of a deputy was made outside the legal framework and as such was unlawful. The ECtHR found that their mandate was terminated despite the fact that the Applicants had notified the Assembly in person that they did not want to submit their mandate and that their first request for resignation was considered withdrawn and invalid. Meanwhile, in relation to Article 13 of the ECHR, the ECtHR explained that the separate examination for this allegation was made only for post-election disputes which were not subject to review by local courts and not to those election disputes where the allegations of the Applicants were subject to judicial review by the local courts. Therefore, considering that in that case the Supreme Court and the Constitutional Court of Serbia did not consider the merits of the case at all, the ECtHR found a violation of Article 13 of the ECHR.

213. The Court notes that, while the factual circumstances of the cases in question do not correspond to the circumstances of the present case, they result in a common denominator of the cases in which the ECtHR has found a violation of Article 13 of the ECHR in relation to the election rights and that is the “*arbitrariness*”. In all three cases, the courts rejected to assess allegations of serious violation of the election law. In the present case, this Court has considered the merits of the Applicants’ allegations and maintains that in the circumstances of the present case there is no “*arbitrariness*” that could potentially lead to a violation of the Constitution and within the meaning of the ECtHR case-law.
214. Finally, the Court recalls that it will refer to the basic principles for a right to legal remedy in the electoral disputes as summarized by the Venice Commission, and specifically the rules determined for an “*effective complaints system*” as an essential part of the “*procedural guarantees*”, one of the requirements for implementation of five fundamental principles that are related to the democratic elections, summarized by the Code of Good Practice, respective Explanatory Report and the Report on Dispute Resolution.
215. According to the Venice Commission, there are nine (9) fundamental principles that constitute an “*effective complaint system*” in the election disputes. (See section 3.3 of the Code). In relation to the importance of the circumstances of the present case, the Court refers to the following principles: (i) the procedure should be simple and without formalities, particularly as regards the receipt of the complaint/appeal; (ii) the appeal procedures and, in particular, the competencies and responsibilities of different authorities should be clearly regulated by law in order to avoid conflicts of jurisdiction. Neither the complaining party nor the authorities should have the right to choose the appeal body; (iii) the appeal body should have the power to cancel the elections when the irregularities affect the final results. Elections can be canceled entirely or only results of an electoral zone or at a polling station. In case of cancellation, new elections should be organized in the respective area; (iv) the time limits for appeal and decision-making should be short (three to five days

for each first instance complaint); and (v) if the appeal body is a higher election commission, it should have *ex officio* the right to rectify or annul the decisions taken by the lower election commissions.

216. The Court recalls that throughout the reasoning of the Applicants' allegations, it has dealt with all these matters. And, it is relevant to reiterate that it has specifically explained that, while the principles of the Venice Commission recommend the avoidance of inadmissible claims, the latter was never decided in the context of missing the deadline to file complaints or even to submit evidence before the decision-making authorities prior to the rendering of the respective final decision.
217. Based on the foregoing and taking into account the allegations raised in the circumstances of the present case and the facts presented, the Court also by relying on the standards established in its case-law and the case-law of the ECtHR and the standards summarized by the Venice Commission, holds that: (i) the first instance Decision of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017 was not rendered in violation and is in compliance with the rights to judicial protection of rights guaranteed by Article 54, of the right to an effective legal remedy guaranteed by Article 32 of the Constitution, in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, of the political entity LDK, namely the second Applicant and that the (ii) second Decision of the Supreme Court, namely Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017 was not taken in violation of the rights guaranteed by Article 54 and the right to an effective legal remedy guaranteed by Article 32 of the Constitution in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, of Mr. Arban Abrashi and the political entity of LDK, namely the first and second Applicant.

2. As to the Applicants' allegations of violation of freedom of election and participation guaranteed by Article 45 of the Constitution

218. In dealing with these allegations of the Applicants, the Court will first summarize the general principles on freedom of election and participation guaranteed by Article 45 of the Constitution, and then will apply them in the circumstances of the present case. As to the first, the Court will elaborate: (i) the applicability of Article 3 of Protocol no. 1 to the ECHR in the circumstances of the present case; (ii) the guarantees of Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 to the ECHR; and (iii) the fundamental principles/framework of assessment of election disputes based on the case-law of the ECtHR and the Venice Commission. Subsequently, the Court, by applying these fundamental principles, will examine the Applicants' allegations of violation of: (i) "*equal vote*"; (ii) "*free vote*"; and (iii) "*principle of transparency*".

General principles

- (i) *Regarding the applicability of Article 3 of Protocol no.1 to the ECHR*

219. The rights guaranteed under Article 3 of Protocol no. 1 to the ECHR are essential for establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. (See, *mutatis mutandis*, the case of ECtHR, *Hirst v. United Kingdom* (no.2) [GC] No. 74025/01, Judgment of 6 October 2005, paragraph 58). However, these rights are not absolute. They have space for “*implicit restrictions*” and the Contracting States are given room for assessment in this sphere. (See cases of ECtHR *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52, *Matthews v. United Kingdom*, no.24883/94, Judgment of 18 February 1999, paragraph 63, *Labita v. Italy*, No. 26772/95, Judgment of 6 April 2000, paragraph 201 and *Podkolzina v. Latvia*, No. 46726/99, paragraph 33).
220. It is important to note that the guarantees of Article 3 of Protocol no. 1 to the ECHR differ from other rights guaranteed by the ECHR, and this is reflected in the wording of its own article which is focused on determining the obligation on the Contracting States to hold elections that ensure the free expression of the voters’ opinion and is not formulated in the light of a particular right or freedom. Consequently, the focus of Article 3 of Protocol no. 1 is on the obligation of the Contracting State and not on the rights and freedoms of natural or legal persons, even though they are not excluded, as the case-law of the ECtHR emphasizes. (See the case of ECtHR *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81 Judgment of 2 March 1987, paragraphs 46-51).
221. In this regard, the Court also emphasizes the fact that, according to ECtHR case-law, Article 3 of Protocol no.1 to the ECHR does not cover all categories of elections, and in principle its guarantees do not apply to local elections. (See case of ECtHR *Xuereb v. Malta*, no. 52492/99, Decision of 15 June 2000). This is because the text of Article 3 of Protocol no. 1 to the ECHR refers specifically to the “*legislature*”, namely “*free expression of the opinion of the people in the choice of the legislature*”. Therefore, in interpreting Article 3 of Protocol no.1 to the ECHR, the ECtHR, in principle, excluded from the scope of its control the presidential elections or referendums. However, according to the ECtHR the “*legislature*” should not be interpreted as the synonym of the “*parliamentary elections*”. The ECtHR has in fact insisted that this term be interpreted in the light of the constitutional structure of the respective state. (See *Mathews v. the United Kingdom*, cited above, paragraph 40). Through *Vito Sante Santoro v. Italy*, the ECtHR has acknowledged that the regional councils are part of the “*law-making body*” because they are “*competent to issue sub-legal acts and regulations within the territory they cover in a number of important areas in a democratic society [...]*”. (See case of ECtHR, *Vito Sante Santoro v. Italy*, No. 36681/97, Judgment of 1 July 2004, paragraph 52). However, according to ECtHR, the scope of Article 3 of Protocol no.1 to the ECHR does not cover the elections of “*local governments*” which lack sufficient lawmaking authority. (See cases of the European Commission on Human Rights: *X v. United Kingdom*, no. 7566/76, Decision of 11 December 1976, *Booth-Clibborn and Others v. United Kingdom*, No.11391/85, Decision of 5 July 1985, Case of ECtHR *Gorizdra v. Moldova* No. 53180/99, Decision of 2 July 2002).
222. Based on the principles outlined above, the Court notes that in the circumstances of the present case related to the election of the Mayor of the

Municipality, Article 3 of Protocol no. 1 to the ECHR in principle is not applicable. This is because, as noted above, according to the ECtHR case-law, the guarantees of Article 3 of Protocol no. 1 to the ECHR are in principle applicable to the elections related to a “*legislative body*” and that in principle, they are not applicable to the “*local governments*” elections that lack sufficient lawmaking authority.

223. Notwithstanding this, the Court considers that the principles derived from the case-law of the ECtHR in relation to Article 3 of Protocol no. 1 to the ECHR must be applied in the circumstances of the present case in terms of the definitions and guarantees related to the elections rights protected beyond the ECHR and Article 45 of the Constitution. However, the Court will not limit itself to the applicability of Article 3 of Protocol no.1, to the ECHR, and in fundamental principles built up by the ECtHR in terms of reviewing election disputes and moreover, it will also apply the basic principles of the Venice Commission to be elaborated in the next section of this Judgment.

(ii) Regarding the guarantees of Article 45 of the Constitution in conjunction with Article 3 of Protocol no.1 to the ECHR

224. The Court notes that Article 45 of the Constitution consists of 3 separate paragraphs and each of them has the relevant elements and rules. In support of the justification of the allegations in the circumstances of the present case, the Court will focus only on the first two paragraphs of Article 45 of the Constitution.
225. The first paragraph of Article 45 of the Constitution defines the right to vote (the active right of vote) and the right to be elected (passive right of vote). The first right, i.e. the one of active vote, belongs only to individuals, i.e. to natural persons, who are citizens of the Republic of Kosovo and who have reached the age of 18, even on the voting day and in the event that their right is not limited by a court decision. The other right, that of a passive vote, belongs to the candidates as individuals, namely as natural persons, who run in elections at the local or central level, as well as to political entities, namely legal persons competing in the elections at the local or central level . Also for the passive right of vote applies the condition that right of the latter to exercise this right is not limited by a court decision.
226. Meanwhile, the second paragraph of Article 45 of the Constitution guarantees that the vote is personal, equal, free and secret. The same guarantees are also defined in terms of local self-government, which according to Article 123 of the Constitution is exercised through representative authorities elected in general, equal, free and direct elections and by secret ballot. These constitutional guarantees are also further specified by the LGE, the Law on Amending and Supplementing the LGE and the Law No. 03/L-072 on Local Elections in the Republic of Kosovo (hereinafter: the Law on Local Elections). In addition, the latter are in harmony with the five fundamental principles of the European electoral heritage, summarized in the Code of Good Practice and respective Explanatory Report, which, as summarized above, include the universal vote, equal vote, free vote, secret vote, and direct vote.

227. In the interpretation of guarantees embodied in Article 45 of the Constitution, the Court refers to the ECtHR case-law, which has also interpreted Article 3 of Protocol no.1 to the ECHR as a guarantee of “*the active right of vote*” and “*the passive right of vote*”. Both provide substantial and procedural safeguards. However, the Court notes that, based on the case-law of the ECtHR, the passive rights have been equipped by less protection through the ECtHR case-law than active rights. (See ECHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, para. 105 -106). The ECtHR case-law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election. (See ECtHR cases, *Zdanoka v. Latvia* cited above, paragraph 115; *Melnitchenko v. Ukraine*, No. 17707/02, Judgment of 19 October 2004, paragraph 57).
228. Beyond the active and passive rights of vote, according to the most recent ECtHR case-law, Article 3 of Protocol no. 1 to the ECHR includes the “*post-election period*” or “*post-election rights*”. In that regard, the ECtHR has argued that the essence of free elections implies a number of electoral rights that encompass minimum standards governing the practices and institutions designed to administer voting, counting and determining the election result. (See ECtHR case, *Davydov and Others v. Russia*, No. 75947/11, Judgment of 30 May 2017, paragraphs 284-285).
229. In light of these rights, the ECtHR has, *inter alia*, reviewed cases involving the laws regulating voter registration issues as a prerequisite for the free exercise of the election rights (see ECtHR case, *Georgian Labor Party v. Georgia* No. 9103/04, Judgment of 8 July 2008); the obligation of the state to organize free elections includes the obligation to establish mechanisms that have the capacity to investigate the allegations of election irregularities and to improve and address the latter (see ECtHR case, *Namat Aliyev v. Azerbaijan* No. 18705/06 Judgment of 8 April 2010); or cases related to the need for a court hearing responsible for complaints and election disputes. The latter determined that the essence of an election right may be restricted, hence violated, if there is no sufficient guarantee for an effective and impartial appeal system. (See ECtHR case, *Grosaru v. Romania*, cited above).
- (iii) *Regarding the framework for assessment of election disputes based on the ECtHR practice and the Venice Commission*
230. In principle, the test that the ECtHR applies to assess whether Article 3 of Protocol no.1 has been violated was determined by *Mathieu-Mohin and Clerfayt v. Belgium* and according to which: “*the Court has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate*”. In particular, such restrictions should not impede the free expression of public opinion in the choice of the legislature”. (See ECtHR case, *Mathieu-Mohin and Clerfayt v. Belgium*, cited above, paragraph 52).

231. In this respect, the ECtHR case-law has built several other criteria based on which it examines the alleged violations of the election rights, including the fact that: a) “constraints on electoral rights must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through free vote”. (See *Hirst v. United Kingdom* (no 2) cited above, paragraph 162 and *Lykourazos v. Greece* no. 33554/03, Judgment of 15 June 2006, paragraph 52). In practice, according to the ECtHR, this means that it reviews relevant complaints in terms of lack of arbitrariness or of proportionality. (See case of ECtHR *Yumak and Sadak v. Turkey*, No. 10226/03, Judgment of 8 July 2008, paragraph 109).
232. In principle, in assessing compliance with Article 3 of Protocol no.1 to the ECHR, the ECtHR focuses mainly on two essential issues: a) whether there has been arbitrariness or lack of proportionality in the circumstances of the case concerned and whether the restrictions have infringed the free expression of the will of the voters. (See ECtHR cases, *Mathieu-Mohin and Clerfayt v. Belgium*, cited above, paragraph 52; *Ždanoka v. Latvia* [GC], cited above, paragraphs 103-104 and 115).
233. In this regard, in order to put even more in the practical context the ECtHR test in assessing arbitrariness and disproportionality in election disputes, the Court will refer to three ECtHR cases in which it found violation of Article 3 of Protocol no.1 in the context of the “post-election rights”.
234. In case of *Namat Aliyev v. Azerbaijan* (cited above), the Applicant competed for a seat in the Assembly of Azerbaijan. He complained that his right to run as a candidate in the free elections had been violated due to serious irregularities and violations of electoral law that occurred before and on the voting day. The created conditions, according to the Applicant, made it impossible to correctly determine the voter's opinion. The ECtHR held that the Applicant filed extremely serious allegations about the unlawful influence of the voting authorities on the voting process, influence on the free choice of voters, unauthorized ballot boxes, ill-treatment of observers and clear discrepancies indicating possible failure regarding what has happened to thousands of unused ballot papers. The court considered that such claims had the potential to impede the democratic nature of the elections. Furthermore, the ECtHR was also based on the official reports of observers who had provided the same facts as to serious irregularities as the Applicant himself. These were some of the reasons - the seriousness of which was sent in finding a violation of Article 3 of Protocol no.1 to the ECHR by the ECtHR.
235. In another case, namely, *the Georgian Labor Party v. Georgia* (cited above), the Applicant was the political entity the so-called “*Georgia Labor Party*”. This political entity complained, *inter alia*, of the fact that with the exclusion of votes from two districts a certain number of the population was deprived of their right to vote - which had affected their right to run in the elections. Regarding this case, the ECtHR examined a number of claims of this political entity while it found violation of Article 3 of Protocol no.1 for the fact that the Central Election Commission had taken a hasty decision to conclude elections

nationwide without any valid justification. Subsequently, the exclusion of the two districts from the local elections, namely the voters in the Khulo and Kobuleti districts, was considered to be an act that disregarded a number of essential prerequisites of the rule of law and as such resulted in *de facto* deprivation of the vote ("*de facto* disfranchisement") for a significant number of the population. As a result of the exclusion of these voters, the right of a political entity to stand for election was violated in a causal way, a right guaranteed by Article 3 of Protocol no.1 to the ECHR.

236. The Court notes that, while the circumstances of the cases in question do not coincide with the circumstances of the present case, they result in a common denominator of cases in which the ECtHR has found a violation of Article 3 of Protocol no.1 to the ECHR. These cases reflect obvious arbitrariness; lack of proportionality; the restrictions that have violated the free expression of the will of the voters and the inability to verify the will of the voters.
237. Further and beyond the case-law of the ECtHR, as previously stated in this Judgment, the Court will refer to the practice of the Venice Commission and, accordingly, to the Code of Good Practice, which is based on the underlining principles of European election heritage, which consists of five underlining principles and they are: (1) universal suffrage; (2) equal suffrage; (3) free suffrage; (4) secret suffrage; and (5) direct suffrage. The same are guaranteed also through Article 45 of the Constitution and applicable election laws.
238. Furthermore, the Court recalls that the Code of Good Practice highlights three conditions, the completion of which is a prerequisite for the proper implementation of these five principles of this Code and they are: (1) respect for fundamental rights; (2) the level of regulation and stability of the election law; and (3) procedural guarantees.
239. Concerning the first implementing condition, namely, respect for fundamental rights, the Code of Good Practice underlines that democratic elections are not possible without respect for human rights. In particular, respect for the right to freedom of expression, media, movement inside the country, assembly, association for political purposes, including the right to create political parties. Any restriction of these rights should be foreseen by law and be in the public interest in accordance with the principle of proportionality. In the part of the Explanatory Report, it is emphasized that the possible limitations of these rights should also be in accordance with the ECHR. (See part II of the Explanatory Report item 1).
240. Concerning the second implementing requirement, namely "*the level of regulation and the stability of the election law*", the Code of Good Practice underlines that, apart from rules on technical and similar details that may be included in the lower legal regulatory level (administrative acts, regulations), the election rules should have at least the level of a law. Issues that relate to the fundamental rights of the election law, in particular those with the election system/electoral system and electoral zones, should not be subject to legal amendments-supplementations one year before the elections. If such a thing is

necessary to occur, they must be foreseen by the Constitution or any other act that has a higher level than ordinary law. In the part of the Explanatory Report is stated that the stability of the law is a crucial issue for the credibility of the electoral process, which in itself is a vital process for consolidating a democracy of a country. (See Section II, item 2, paragraph 63 of the Explanatory Report).

241. And finally, with regard to the third condition, namely the “*procedural guarantees*”, the Code of Good Practices states that the organization of elections should be conducted by an independent body subject to observations by local and international observers and should provide an “*effective complaint system*”. The latter have been elaborated and applied in the circumstances of the present case in detail during the examination of the Applicants' allegations relating to alleged violations of the rights to judicial protection guaranteed by Article 54 of the Constitution.

Application of these principles in the circumstances of the present case

242. The Court recalls that the Applicants allege that the Supreme Court, through both of its decisions violated the fundamental rights and freedoms guaranteed by Article 45 of the Constitution. In this regard, their allegations may be categorized as follows: (i) “*violation of equal vote*”; (ii) “*violation of allegations vote*”; and (iii) “*violation of the principle of transparency*”. (See specific allegations raised by the Applicants in paragraphs 62-73 of this Judgment).
243. In this regard, the Court notes that the Applicants raise only 2 of the 5 underlining principles related to the quality of the vote, “*equal vote*” and “*free vote*”. The Applicants' allegations further fall within the scope of the third requirement, namely the “*procedural guarantees*”. Consequently, in the light of the basic principles of the Venice Commission, the Court will assess whether the general principles in relation to “*free vote*” and “*equal vote*” and respective “*procedural guarantees*” may have been violated. Whereas, in the context of the ECtHR case-law, the Court will examine the Applicants' allegations in terms of the “*post-election rights*” guaranteed by Article 3 of Protocol no. 1 to the ECHR, applying the ECtHR test in the election disputes, namely arbitrariness; lack of proportionality and whether the restrictions have violated the free expression of the will of voters. The Court will further deal with each Applicant's allegation individually.

(i) As to “equal vote”

244. The principle of “*equal vote*” according to the Code of Good Practice and relevant Explanatory Report means: (i) the right to equal vote - namely the right of each voter to have, in principle, a vote and in the electoral systems where voters are given the right for more than one vote, each voter must have the same number of votes; (ii) the equal power of the vote in the sense that according to the Code, the seats should be distributed equally between the electoral zones; (iii) equal opportunities – namely equal opportunity must be guaranteed to all parties and candidates, meaning that the state authorities must preserve their neutrality in all respects, particularly in terms of electoral

campaign, media coverage and political party and election campaigns funding; (iv) equality and national minorities – the parties of national minority should be allowed and that, in principle, the special rules guaranteeing seats reserved for minorities are not contrary to the principle of equal vote; and (v) gender equality in respect that the rules requiring a minimum percentage of candidates of each gender should not be considered to be in contravention of the principle of equal vote as long as they have a constitutional basis. (See section 2 of the Code of Good Practice and section 2 of the Explanatory Report).

245. The Court notes that the Applicants also refer to: (i) strict and formal equality; and (ii) equality of opportunities. In this regard, the Court notes that the Code of Good Practice and the relevant Explanatory Report deal with strict and proportional equality in the framework of equality of opportunities. (See section 2.3 of the Explanatory Report). According to them, and as elaborated above, the equality of opportunities according to the practice of the member states of the Venice Commission is built in the sense of the neutrality and impartiality of state authorities and the application of the same rules for everyone in the election processes. According to the Code, in this respect, there are two interpretations of equality: formal and proportional. The first one means that the political parties should be treated equally regardless of their power in parliament or between voters and that this also applies to the use of public mechanisms supporting the election campaigns; while the second, implies that the political parties should be treated in proportion to the number of votes. (See item 2.3 (b) of the Code of Good Practice).
246. In this regard, the Court recalls that the Applicants reason the violation of principle of “*equal vote*” with the fact that the Supreme Court, ECAP and CEC have failed to guarantee an electoral process where “*the weight of the vote*” is equal, because according to the allegation, the Supreme Court in its second Decision [A.A. U.ZH. No. 62/2017] found that “*the election process has been damaged*” but did not consider it necessary to recount the boxes from all polling stations. According to the Applicants, their request for recount of boxes at all polling stations was rejected in an unconstitutional way. (See in this context, the Applicants’ specific allegation in paragraph 61 and 66 of this Judgment).
247. The Court notes that these allegations have been raised in terms of alleged violations of the right to judicial protection of rights guaranteed by Article 54 of the Constitution and are addressed in detail in paragraphs 167-176 of this Judgment.
248. The Court notes that no other allegation or circumstance associated with it, of the Applicants, falls within the scope of the guarantees defined by the Venice Commission principle in the context of the “*equal vote*”, including the “*equality of opportunities*”. Whilst the Applicants refer to the latter, the Court recalls that equality of opportunities under the practice of the Venice Commission member states is built in the sense of the neutrality and impartiality of the state authorities and the application of the same rules for all

in the electoral process. The Applicants' allegations do not fall into this category.

249. In addition, the Court notes that the challenged decision of the Supreme Court, within the meaning of the ECHR case-law, does not reflect arbitrariness, lack of proportionality, and as is widely dealt within the context of the Applicants' allegations related to Article 54 of the Constitution, has also not been rendered in violation of free expression of the will of the voters.

(ii) *As to principle of "free vote"*

250. The principle of "free vote" according to the Code of Good Practice implies: (i) the freedom of the voter to form an opinion (see for more, section 2.3 of the Code of Good Practice and section 2.3 of the Explanatory Report); and (ii) the freedom of the voter to express opinion and respective opportunity to fight the election fraud. (See sections 3.1 and 3.2 of the Code of Good Practice). In the context of the specific allegation, only the second is relevant.
251. In this context, the Code of Good Practice in principle stipulates that the freedom of voters to express their will primarily requires accurate observation of the voting procedures. Moreover, according to the Code of Good Practice, voters (in their capacity as a voter and in their capacity as a candidate) are entitled to an accurate assessment of the voting results and the state is obliged to sanction any election fraud. The Code of Good Practice and the Explanatory Report set out a number of rules embodied in this principle, and the Court will refer only to those relevant to the circumstances of the present case, namely (i) "*voting procedure*". (See Code of Good Practice 3.2 (xi-xv) (see the Code of Good Practice, item 3.2 (i-xi)) and (ii) "*counting*". (See Code of Good Practice 3.2 (xii-xv)).
252. Regarding the "*voting procedure*", the Court notes that the Explanatory Report states, *inter alia*, that "*the voting procedure has a crucial role in the overall electoral process because electoral fraud is most likely to occur during the voting process*". (section 3.2.2, paragraph 32 of the Explanatory Report). As far as "*counting*" is concerned, *inter alia*, and as far as relevant to the circumstances of the present case, it is advisable to "*avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention*". (See item 3.2.2.4 paragraph 49 of the Explanatory Report).
253. In this context, the Court recalls that the Applicants reason violation of the principle of "*free vote*" through the evidence provided to the regular courts on "*the influence of Pristina citizens by sending SMS on behalf of NGOs*" offering coupons for free transport and influence through activists", which, according to the allegation, result in a violation of the "*principle of free vote/freedom of vote*". According to the Applicants, the Supreme Court in its second Decision, respectively Judgment [A.A.U.ZH. No. 62/2017] considered these allegations as new, avoiding the reasoning about them and not as evidence that they had to administer. (See in this context, the Applicants' specific allegation in paragraph 63 and 64 of this Judgment).

254. The Court notes that these allegations of the Applicant relate to “*procedural guarantees*” for the implementation of the “*free vote*” principle on election day, namely with irregularities on the election day and allegations related to invalid and blank ballots which have already been addressed in the context of allegations of violation of the right to judicial protection guaranteed by Article 54 of the Constitution, specifically in paragraphs 154-166 of this Judgment.
255. The Court also recalls that in elaborating the principles related to the “*free vote*”, the Code of Good Practice and the Explanatory Report specifically stipulate that it is advisable to “*avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter’s intention*”. The Court has also specifically addressed this issue in paragraphs 172-175 of this Judgment.
256. The Court further notes that no other allegation or circumstance associated with it, of the Applicants, falls within the scope of the guarantees defined by the two basic principles of the Venice Commission in the context of the “*free vote*”, namely freedom of voters to form an opinion or even the freedom of voters to express an opinion and to fight electoral fraud.
257. Moreover, the Court notes that the challenged decision of the Supreme Court, in the light of the case-law of the ECtHR, does not reflect arbitrariness, lack of proportionality, and as is widely dealt with in the context of the assessment of the Applicants' allegations relating to Article 54 of the Constitution, and has also not been rendered in violation of free expression of the will of the voters.

(iii) As to “principle of transparency”

258. The Court recalls that the Applicants also allege violation of the principle of transparency. In this respect, the Court notes that, in the context of the Code of Good Practice, the transparency is mainly used in the sense of financing election campaigns. However, the Code of Good Practice considers transparency important in at least three other aspects.
259. Firstly, transparency is considered important in terms of ballot counting - a process that should be in and of itself transparent. To ensure such transparency, the observers (local and international), the candidates' representatives and the media should be allowed to be present during the vote counting. Secondly, transparency is also important in terms of procedural protection so that the organization of elections should be done by an impartial body. Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the electoral process from the pre-election period to the end of the process of the election result. Thirdly, in order to be in compliance with the international standards, an election process should clearly provide voters, candidates and political entities with the right to transparent complaints procedures. (See Code of Good Practice 3.2 (xiii) page 9, item 3.1 paragraph 68, and Report on Election Dispute Resolution, item 6, paragraph 100). The latter are elaborated in more detail in the Report on Dispute Resolution. In this respect, the Venice

Commission recommends that proceedings before a judicial body that reviews complaints and appeals regarding the election rights should be public and the parties should have the right to present their case directly or through a legal representative. The minimum guarantees that must exist, according to the Venice Commission, is accordingly included the right to fair, impartial and public hearing of a complaint or appeal. The complaints and appeals system should be transparent and as such should include the publication of complaints, appeals, responses and decisions. (See Report on Dispute Resolution, item 6, paragraph 100).

260. The Court recalls that the Applicants allege that the Code of Good Practice obliges the state institutions to guarantee transparency of proceedings and the right to recount votes in the cases of appeals. This conclusion stands. The Court has elaborated throughout this Judgment the fundamental principles regarding the right to appeal in the election disputes as an essential part of “*effective complaints systems*” and “*procedural guarantees*”, the latter a fundamental condition for the implementation of the five principles pertaining to the quality of vote in democratic elections. As noted, the right to appeal in the election disputes and also the “*right of verification of the election result*”, including the possibility of annulment of the election results, are guaranteed by the Constitution of the Republic of Kosovo and the applicable election law, in the manner prescribed by law, and which, as elaborated, is also in line with the practice of the member states of the Venice Commission.
261. The Court specifically notes that as to the allegations of violation of the principle of transparency, the Applicants raise the following question: (i) violation of the right to “*recount and repeat the voting*”, which according to them is provided by Articles 101 and 106 of the LGE; (ii) the violation of the right to “*confirmation and verification of the election results*”, because according to the allegation “*in case of narrow election result*”, the recount is a fundamental right which is initiated through the CEC or at the request of the party”; (iii) the fact that although the ECAP and the Supreme Court “*find that there have been irregularities*”, they “*consider the latter balanced between the two candidates in the competition*”, resulting according to the allegation, in the arbitrary decisions of the ECAP and the Supreme Court; and that (iv) the ECAP and the Supreme Court did not address the Applicants’ evidence as “*new and specific evidence*” and did not address their allegations of constitutional violation. (See specifically these allegations in paragraphs 67-73 of this Judgment).
262. The Court notes that all these allegations have been raised even in the sense of alleged violations of the right to judicial protection of rights guaranteed by Article 54 of the Constitution and are addressed in detail in paragraphs 134-176 of this Judgment.
263. However, the Court notes that the Applicants in this context raise three new allegations which the Court will consider in the following: (i) the allegation that the ECAP made the assessment of the ballots at the disputed polling stations without the presence of the parties; (ii) the allegation that the Supreme Court by its first Decision [AA. No. 52/2017] has only repealed the Decision of the

ECAP [ZL. A. no. 1102/2017] of 22 November 2017 but not the CEC Decision [2343-2017] for the recount of all regular ballot papers in the polling stations established by abovementioned Decision; and (iii) the allegation that the principle of transparency has been violated even in the case of “*destruction of election material*” by the CEC, and in that case their right to recount.

264. As to the first, the Court recalls that the allegation has to do with the investigations conducted by ECAP as a result of the Applicants' complain of 30 November 2017, the ECAP based on: (i) paragraph 4 of Article 117 of the LGE, according to which the ECAP may order the review of the voting material as part of investigations related to complaints; (ii) Article 14 on Regulation No. 02/2015; and (iii) Regulation 04/2015 on investigation proceedings of elections material, with a view to verifying the Applicants' claims regarding the discrepancies of the final result, established the Investigative Team, according to the case file, consisting of 8 judges and 10 officers of the Secretariat. The Court notes that the election materials and the manner of investigation of each category of election material are correctly defined by the respective ECAP Regulations. These investigative teams after the completion of the investigations are obliged according to the respective rules to compile a minutes based on all electoral materials investigated. This material is then submitted to the ECAP for further consideration. The findings of the investigative teams on the basis of the aforementioned law may result in ECAP decision on the recount of ballots. The Decision [ZL. A. no. 1125/2017] of 1 December 2017 of ECAP reflects this procedure and concludes that after reviewing the material of the investigative teams, according to the ECAP, the final result announced by the CEC was confirmed. Consequently, the Court notes that the challenged procedure relates to the ECAP investigation procedure rather than to a recount or counting procedure, the principle of transparency guaranteed by Article 101 of the LGE.
265. Furthermore, the Applicant's allegations in this context do not fall within the scope of other constitutional guarantees, legal or those established by the Venice Commission relating to an “*effective complaint system*”, including the right to a transparent complaint procedure (see Report on Dispute Resolution item 2, paragraph 111); or even the publication of complaints, appeals, responses and decisions. (See Report on Dispute Resolution, item 6, paragraph 100). Finally, the Court also notes that this allegation was not filed by the Applicants with the Supreme Court and the latter was not given the opportunity to respond to that allegation.
266. Regarding the second, the Court recalls that the Supreme Court rendered its first Decision [AA. No. 52/2017] by which it approved the appeal of VETĚVENDOSJE! Movement as grounded and modified Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the ECAP, so that the appeal of the second applicant was rejected as ungrounded. The Court notes that the Supreme Court did not explicitly provide the annulment of the CEC Decision. However, the Court also notes that pursuant to paragraph 3 of Article 12 of the Law on Amendment and Supplementation of LGE in conjunction with paragraph 5 of Article 118 of LGE, the ECAP decision is mandatory to be implemented by the

CEC, unless the allowed appeal is filed within the prescribed time limit and the Supreme Court determines otherwise.

267. Thirdly and finally, with regard to the destruction of the election material and the respective violation of the principle of transparency, the Court notes that: (i) the Applicants do not challenge the respective CEC Decision on destruction of the election material. Therefore, the issues raised by this allegation do not meet the admissibility criteria set forth in paragraph 7 of Article 113 of the Constitution and Articles 47 and 48 of the Law; (ii) the issue of the destruction of the election material is determined by paragraph 4 of Article 103 of the LGE, according to which “*the CEC shall, by decision after the official certification of the results of the election, destroy specified election materials at an appropriate time within 60 days, except as directed by ECAC*”. The Court notes that the Applicants are not authorized parties to raise the issue of compliance of the laws with the Constitution before the Court; and (iii) from the case file it results that the Applicants have never requested the storage of election material in the CEC, ECAP or even in Constitutional Court based on Article 27 on Interim Measures of the Law.
268. Based on the foregoing and taking into account the allegations raised in the circumstances of the present case and the facts presented, the Court, also based on the standards established in its case-law and case-law of the ECtHR and the standards summarized by the Venice Commission, finds that: (i) the first Decision of the Supreme Court, namely the Decision [AA. No. 52/2017] of 25 November 2017 was not rendered in violation and is in compliance with the rights to freedom of election and participation guaranteed by Article 45 of the Constitution, in conjunction with the right to free elections guaranteed by Article 3 of Protocol No. 1 to the ECHR, of the political entity LDK, namely the second Applicant; and that (ii) the second Decision of the Supreme Court, namely Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 was not rendered in violation and is in compliance with the rights to freedom of election and participation guaranteed by Article 45 of the Constitution in conjunction with the right to free elections guaranteed by Article 3 of Protocol No. 1 to the ECHR, of Mr. Arban Abrashi and the political entity LDK, namely the first and second Applicant.

V. Request for hearing

269. The Court recalls that the Applicants also requested the Court to schedule a hearing.
270. In their justification of their request for a hearing, the Applicants stated that “*the principle of orality and publicity*” is one of the fundamental principles in the constitutional procedure and as such is guaranteed at all stages of the proceedings “*either before administrative bodies, regular courts or even before the Constitutional Court*”. Related to this, they noted that it can be noticed from the case file, that the Applicants “*have not been given the opportunity to submit their allegations in public hearing*” and that “*a situation has arisen in which it is indispensably required to present factual*

and legal aspects before the trial panel, as established in Rule 42 paragraph 2 of the Rules of Procedure of the Constitutional Court”.

271. In this regard, the Court recalls that under paragraph (2) of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, *“The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law”.*
272. The Court notes that the abovementioned rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration. (See the case of the Constitutional Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 – where it is stated that *“The Court considers that the documents contained in the Referral are sufficient to decide this case [...]”*).
273. In the present case, the Court does not consider that there is any ambiguity about *“facts or law”* and therefore, it does not consider necessary to hold a hearing. The documents contained in the Referral are sufficient to decide the merits of this case.
274. Therefore, the Court unanimously rejects the Applicants' request for a hearing as ungrounded.

IV. Other important issues

Regarding the status of foreign decisions and their role in decision-making

275. The Court notes that the Applicants support their allegations by referring to the various decisions of the foreign courts, in particular the decisions of the Federal Constitutional Court of Germany, the Constitutional Court of Austria and the Swiss Federal Supreme Court. The Court first marks the difference in the jurisdiction of the respective Constitutions with the Constitution of the Republic of Kosovo in dealing with the election disputes. In addition, the Court notes that the latter do not coincide with the factual or legal circumstances of the present case. The Court notes that the reasoning of other constitutional or international courts should be interpreted in the context of constitutional and legal guarantees and in the light of the factual circumstances in which they were rendered.
276. In this regard, the Court notes that, apart from the fact that the Applicants have emphasized and cited these decisions of foreign courts, they have not elaborated their factual and legal relation with the circumstances of the present case. In addition, only the decisions of the ECtHR have the status of the source of the law in the legal system of the Republic of Kosovo.

277. As regards the reports of the Venice Commission, in addition to those referred by the Applicants, the Court dealt with all relevant reports and opinions of the Venice Commission and applied them in the circumstances of the case.

V. Conclusions

278. The Court has assessed all the Applicants' allegations separately and in their entirety, applying into this assessment: (i) the constitutional guarantees pertaining to the challenged rights, Articles 54 and 45 of the Constitution, respectively; (ii) the underlying principles resulting from the European electoral heritage as summarized by the Venice Commission; and (iii) the case-law of the ECtHR, and decided that the Decision [AA. No. 52/2017] of 25 November 2017 and the Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court are in compliance with Articles 54 and 45 of the Constitution.

279. The Court has found that the challenged decisions of the Supreme Court have not violated the Applicants' rights for judicial protection of rights guaranteed by Article 54 of the Constitution and the right to a legal remedy guaranteed by Article 32 of the Constitution in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, because in the circumstances of the present case, the Supreme Court has correctly assessed the issues pertaining to: (i) confirmation/cancellation of the election results; (ii) declaring as out of time the Applicants' allegations pertaining to irregularities on the election day, and which were submitted to the ECAP for the first time after the announcement of the final election results; and (iii) invalid and blank ballots, after the ECAP investigated the election material in the contested polling stations and did not find that "*the final election results were affected*". In addition, the decisions of the Supreme Court were "*sufficiently reasoned*" pertaining to the Applicants' allegations and are in conformity with the standards established through the case-law of the ECtHR and the Venice Commission as to the reasoning of decisions in electoral disputes. The findings of the Supreme Court, are in compliance with the constitutional guarantees, the relevant case-law of the ECtHR and the basic principles of the Venice Commission as it pertains to "*an effective system of appeal*" as an integral part of the "*procedural guarantees*", which is a fundamental condition for the implementation of the five underlying principles pertaining to the qualities of the vote.

280. The Court has found that the challenged decisions of the Supreme Court have not violated the Applicants' rights pertaining to the freedom of election and participation guaranteed by Article 45 of the Constitution in conjunction with the right to free elections guaranteed by Article 3 of Protocol nr. 1 of the ECHR because, in the circumstances of the present case, these decisions have not been rendered in contradiction with: (i) any of the conditions for the implementation of the underlying principles on the qualities of the vote, as guaranteed by the Constitution, the election laws and the Code of Good Practice of the Venice Commission; (ii) any of the "*procedural guarantees*" for the implementation of the "*free suffrage*" and "*equal suffrage*" principles; (iii) the "*principle of transparency*" in electoral disputes as established by the

ECtHR case-law and the underlying principles of the Venice Commission; and (iv) the ECtHR case-law in the context of the “*post-electoral rights*”.

281. Based on the foregoing and taking into account the allegations raised and the facts presented, in the circumstances of the present case, the Court finds that: (i) the first Decision of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017, was not rendered in violation of the rights and fundamental freedoms of the political entity LDK, namely the second Applicant and is in compliance with the rights and fundamental freedoms guaranteed by Articles 45 and 54 of the Constitution; and that (ii) the second Decision of the Supreme Court, namely Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017, was not rendered in violation of the rights and fundamental freedoms of Mr. Arban Abrashi and of the political entity LDK, namely the first and second Applicant, and is in compliance with the rights and fundamental freedoms guaranteed by Articles 45 and 54 of the Constitution.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (a) of the Rules of Procedure, in its session held on 23 January 2019, unanimously

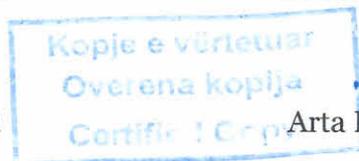
DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD, that the Judgment A.A. U.ZH. No. 62/2017 of 7 December 2017 of the Supreme Court of the Republic of Kosovo, is in compliance with Article 54 of the Constitution of the Republic of Kosovo in conjunction with Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the European Convention on Human Rights as well as in compliance with Article 45 of the Constitution of the Republic of Kosovo in conjunction with Article 3 of Protocol no. 1 to the European Convention on Human Rights;
- III. TO HOLD that the Decision AA. No. 52/2017 of 25 November 2017 of the Supreme Court of the Republic of Kosovo, is in compliance with Article 54 of the Constitution of the Republic of Kosovo in conjunction with Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the European Convention on Human Rights as well as in compliance with Article 45 of the Constitution of the Republic of Kosovo in conjunction with Article 3 of Protocol no. 1 of the European Convention on Human Rights;
- IV. TO REJECT the request for a hearing as ungrounded;
- V. TO NOTIFY this decision to the Parties;
- VI. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;
- VII. TO DECLARE this Decision effective immediately.

Judge Rapporteur

President of the Constitutional Court

Gresa Caka-Nimani



Arta Rama-Hajrizi

[This translation is unofficial and serves for informational purposes only.]