



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

Prishtina, on 7 shtator 2020
Ref. no.:AGJ1616/20

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JUDGMENT

in

Case No. KI27/20

Applicant

VETËVENDOSJE! Movement

**Constitutional review of
Judgment [A.A-U.ZH. No. 16/2019] of 10 October 2019
of the Supreme Court of the Republic of Kosovo**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy 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

Applicant

1. The Referral is submitted by the political entity VETËVENDOSJE! Movement, represented by Blerim Sallahu (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [A.A-U.ZH. No. 16/2019] of 10 October 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter of this Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of 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).

Proceedings before the Constitutional Court

5. On 4 February 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 6 February 2020, the Applicant submitted to the Court the power of attorney authorizing Blerim Sallahu from Prishtina to represent the Applicant before the Court.
7. On 11 February 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding) Bajram Ljatifi and Safet Hoxha.
8. On 20 February 2020, the Court notified the Applicant about the registration of the Referral, as well as sent a copy of the Referral to the Supreme Court and to the Election Complaints and Appeals Panel (hereinafter: ECAP).
9. On 10 June 2020, the Court requested the Applicant to submit to the Court the appeal he had submitted to the Supreme Court.
10. On 18 June 2020, the Court received from the Applicant the appeal requested on 10 June 2020.

11. On 22 July 2020, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral.
12. On the same date, the Court voted, unanimously, that the Referral is admissible; and by majority of votes, found that there has been no violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights, as well as Article 7 of the Universal Declaration of Human Rights.

Summary of facts

13. On 26 August 2019, the President of the Republic of Kosovo rendered Decree [no. 236/2019] on the appointment and announcement of early elections for the Assembly of the Republic of Kosovo, which were scheduled for 6 October 2019.
14. On 27 August 2019, the Central Election Commission (hereinafter: the CEC) rendered Decision [no. 824-2015] on Setting the Deadlines for Electoral Activities for the Early Elections for the Assembly of Kosovo. Point 1) of this Decision provided that *"The Election Campaign and the deadlines for election campaigns begin on 25 September and end on 4 October 2019"*.
15. On 5 October 2019, E.B filed a complaint with the ECAP against the Applicant alleging that on 4 October 2019 their candidate for deputy M.B. published/distributed a video recording on the social network Facebook, where, among other things, in the video recording i) the premises of the Kosovo Police building were used; and ii) his photo was used without his permission, desecrating, according to him, his name, dignity and position as director of the Kosovo Police. He claimed that these actions violated the rules of the CEC.
16. On 6 October 2019, the Applicant filed a response to the complaint of E.B. addressed to the ECAP stating that: (i) the complaint is inadmissible and ungrounded on the grounds that E.B, has no active legitimacy to file a complaint regarding the electoral process under Article 19 paragraph 1 of Law no. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: LGE); (ii) the published photo of the complainant E.B. was previously published on a page of the newspaper kallxo.com and was not used for the first time (iii) the complainant did not make a detailed description of the date, time and place of the alleged violation as provided by the election rules; and the publication of the video in question, was made on 19 September 2019, out of the campaign period, outside the election silence period and outside the Kosovo Police building, namely on the sidewalk and not in the Kosovo Police building.

17. On 6 October 2019, the ECAP by Decision [no. 233/2019], approved as grounded the complaint of the party E.B., and imposed on the Applicant the fine in the amount of 9,500.00 (nine thousand five hundred) Euros, due to: i) publication in the spot of the election campaign of the Kosovo Police building in Prishtina; and ii) the involvement of the private person E.B., without his permission in the electoral promotional activity in violation of Article 33 [Prohibited Actions by Political Entities] of the LGE. The ECAP in decision [no. 233/2019], regarding the allegations of the Applicant in response to the complaint reasoned as follows:
- (i) With respect to the Applicant's allegations that E.B. has no active legitimacy for filing a complaint, the Panel assessed that this allegation does not stand for the fact that the Law on General Elections, namely its Article 119, paragraph 1 stipulates that: "*A person who has a legal interest in a matter within the jurisdiction of ECAC, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAC*". That person in question has legitimacy in this matter to file a complaint relates to the fact that his photograph was used during the promotion of a political entity, and taking into account that the photograph in question is used in a negative connotation and without the consent of the same, in which case his dignity has been violated.
 - (ii) Regarding the complainant's allegations that Emin Beqiri's photograph had previously been published on a page of the newspaper kallxo.com, the Panel assessed that this did not constitute a justification for using the photographs mentioned by others without his permission. The photo in the media is used for the purpose of informing the public, which is the main task of the media about an event, while the use by the candidate for deputy, as in this case, was done during the promotion of the candidate M.F. in the election campaign.
 - (iii) With regard to the allegations of non-specification of the place, time and date when the violation occurred, the Panel considers that the time limit for the complainant starts from the moment when the complainant becomes aware of the violation committed, within the meaning of Article 5 paragraph 5 of the ECAP Rules and Procedures no. 02/2015, in this case the complainant found out about the violation on 04.10.2019. in the evening hours, from which it follows that this was during the election campaign.
18. In addition to the above, the ECAP also took into account the fact that the political entity in question was given the opportunity to respond to the complaint and correct the violation committed, however, in response to the complaint, the political entity in question stated that the procedure does not contain a violation according to the legal provisions of the legislation in force, without providing any evidence on their part that actions have been taken to avoid the violation, as required by Article 120, paragraph 1, point c) of the LGE, and these are actions that have affected the amount of the fine imposed, as in the enacting clause of this decision and within the meaning of Article 120, paragraph 1, point c) of the LGE.

19. On 9 October 2019, the Applicant filed an appeal with the Supreme Court against Decision [no. 233/2019] of 6 October 2019, where he challenged the legality of the decision in question alleging erroneous determination of factual situation and erroneous application of law, arguing, *inter alia*, that the published sport was done outside the election campaign and as a result the provisions of the LGE which are applied only during the election campaign are not applied, therefore, the action sanctioned by the ECAP was unlawful.
20. On 10 October 2019, the Supreme Court by Judgment [No. A.A-U.ZH. No. 16/2019] rejected as ungrounded the Applicant's appeal, stating that:

"Article 33.1 (b) of the LGE stipulates that a political entity, its supporters or candidates shall be prohibited from displaying notices, placards and posters, or otherwise placing their names or slogans related to the election campaign, in or on public buildings or structures, on or above public roads, on public road traffic signs, in or on premises or structures occupied or otherwise used by international organizations, or in private premises without permission of the owners or users.

Based on the abovementioned provisions, the Supreme Court found that the Applicant, the political entity (LVV), during the campaign, for electoral purposes, in violation of the law (Article 33 point b LGE), due to the publication of a video- spot, the public building of the Kosovo Police in Prishtina and the involvement of another person without his permission. The Supreme Court also found that the factual situation was correctly established and that the ECAP correctly established and implemented the law, approving as grounded the complaint of E.B. from Lipjan, imposing on the political entity (LVV) a fine in the amount of 9,500 euro, pursuant to Articles 33.1 (b) and 120.1 (c) of the LGE".

Applicant's allegations

21. The Applicant alleges before the Court that the Judgment [No. AA-U.ZH.no.16/2019] of 10 October 2019 of the Supreme Court, violates its fundamental rights and freedoms guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the ECHR- as well as Article 7 of the UDHR.
22. The Court notes that in essence the Applicant's allegations regarding the violations can be summarized as follows:
 - i. Applicant's allegations regarding the violation of freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.
 - ii. Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR.
 - iii. Allegations in relation to Article 7 [Values] of the Constitution.

- iv. Allegations relating to Articles 21 [General Principles], and 22 [Direct Applicability of International Agreements and Instruments], of the Constitution.

(i) Applicant's allegations regarding violation of freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR

23. With regard to the content of the video recording published by the Applicant's candidate, he refers to freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR, stating that the action of its candidate for deputy qualifies within the framework of freedom of expression.
24. The Applicant emphasizes that freedom of expression is a fundamental constitutional and international right, which protects not only information or ideas that are favorably preferred or considered non-offensive or indifferent, but also those that offend, shock or concern. The expression, protected by Article 10, is not limited to words, whether written or spoken, but also extends to drawings, images and actions intended to express an idea or present information. In this regard, the Applicant alleges that in its case it is also related to the dissemination of information, which also falls within the framework of freedom of expression. The Applicant therefore states that the freedom to provide information and ideas is of paramount importance to the political life and democratic structure of a country, and that free elections cannot be held democratically in the absence of this freedom.
25. The Applicant further, referring to Article 10 of the ECHR, states that this Article protects opinions, critics and speculations which may not be proved to be true. According to it, Article 10 of the ECHR also guarantees opinions expressed in exaggerated language in election campaigns, for purposes of public interest, public debates, where opinions and criticisms given to public authorities are expressed harshly. In relation to these allegations, it refers to several ECtHR cases such as: *Thorgeirson v. Iceland*, Judgment of 25 June 1992; *Dalban v. Romania*, Judgment of 28 September 1999; *Narodni List DD v. Croatia*, Judgment of 8 November 2018; as well as *Groppera Radio AG and others v. Switzerland*, Judgment of 28 March 1990, *Handyside v. the United Kingdom*, Judgment of 7 December 1976.
26. The Applicant alleges that the candidate for deputy M.B., on 19 September 2019, published a video spot outside the police building, in which two photos borrowed from the kallxo.com portal were displayed. With this, it claims that their candidate for deputy has only re-displayed information received from the portal in question, and that this according to it, constitutes the provision of information protected by freedom of expression defined by Article 40 of the Constitution paragraph 2 in conjunction with Article 10 paragraph 2 of the ECHR, and is in line with the decisions of the ECtHR. In this regard, the Applicant alleges that the decision of the ECAP and the Judgment of the Supreme Court violated the freedom of expression of their candidate for deputy, because the publication of the video in question was intended to inform about "corruption offenses and the failure of the justice system to prosecute and adjudicate criminal offenses of corruption committed by

certain police officers within the Kosovo Police” and that was out of the election campaign period. Video recording has also transmitted an issue of public interest. Consequently, this video recording is entirely qualified within the concept of freedom of expression.

(ii) Applicant’s allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR

27. The Applicant regarding the allegation of violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR states that the ECAP and the Supreme Court have issued arbitrary decisions in complete violation of substantive law, adding that *“in no other case except this case, the ECAP has not sanctioned political entities according to the LGE, for actions which were carried out and published outside the election campaign”*.
28. The Applicant further alleges that the assessment of the case, which took place outside the election campaign, was erroneously qualified under the framework of the electoral legislation, and that the ECAP decision and the Judgment of the Supreme Court *“constitutes legal inequality and discrimination due to political or other opinions represented by Vetëvendosje Movement”*. In this regard, he claims that they were not treated the same compared to other political entities, because other political entities were sanctioned only during the election campaign.
29. Regarding this allegation the Applicant mentions two other cases where ECAP has sanctioned political entities for publishing video recordings and photos, but only during the election campaign, specifically (i) ECAP Decision [A. No. 93/2019] of 27 September 2019 where the ECAP fined the Democratic Party of Kosovo (PDK) in the amount of 3,100 because a party candidate published a photo of the President of Shtime who was also a candidate for deputy from the PDK, which belongs to his party, in his office in the municipality, these actions sanctioned by the provision of Article 35.1 of the LGE and (ii) the Decision of the ECAP [Anr/108/2019] of 30 September 2019 by which the ECAP imposed a fine in the amount of 9500 euro on the political entity AAK-PSD because their candidate for Prime Minister had published on Facebook a video showing members of the Kosovo Police and had written *“2000 additional police officers until the end of the mandate”*, and by this, the election rule no. 13/2013 was amended and supplemented with the election rule no. 20/2019 has been violated. The Applicant also refers to the Decision of the ECAP [A. 181/2019] of 4 October 2019, which was rejected as ungrounded the complaint filed by the Emergency Management Agency against the Applicant as the complainant did not submit evidence and did not attach any evidence regarding the allegations of violation of election rules by the Applicant. Therefore, the Applicant alleges that they were treated differently in relatively similar situations.

(iii) Allegations related to Article 7 [Values] of the Constitution

30. The Applicant initially complains about the interpretation of the ECAP and the Supreme Court of the timely application of the election rules. It claims that *“the election campaign started on 25 September 2019, while the publication of the*

video recording on Facebook was made on 19 September 2019, thus, outside the election campaign” determined by the CEC Decision [no. 824-2919]. In this regard it adds that the Judgment of the Supreme Court is contrary to Article 7 of the Constitution specifically with the rule of law and legal certainty because the Supreme Court and the ECAP “have acted arbitrarily by issuing unconstitutional decisions for actions which are not foreseen and are not prohibited by law at the time of commission”.

31. This is because the ECAP starts to operate from the date of the beginning of the election campaign, on 25 September 2019, and any prohibited action of political entities or publication during this period is considered a violation of the LGE. This allegation is based by the Applicant based on Article 33 of the LGE which stipulates that *“During the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following [...]”*.
32. The Applicant further adds that if the video recordings of the candidates for deputies continue to remain on their social networks and are noticed by certain persons in the upcoming election campaign, even then they may be subject to similar sanctions. This allegation, the Applicant relates to the decision of the ECAP Anr: 181/2019, of 4 October 2019, in which the ECAP rejected a request of a complainant precisely because the complainant in that case did not specify the time when the spot in question was recorded and published. Therefore, in this case the ECAP assessed that a necessary condition to qualify a case whether it is an action committed or prohibited during the election campaign is the date of publication of the video recording and not the date of its observation.
33. The Applicant also refers to Rule no. 02/2015 of the Rules and Procedures, The Election Complaints and Appeals Panel (hereinafter: Rule no. 02/2015 of the ECAP), namely Article 5 paragraph 7 which sets out the formal criteria for which should be met in a complaint stating that a complaint should contain *“a detailed description including the date, time and place of the alleged violation”*. According to the Applicant, the person E.B. when submitting the complaint to the ECAP has not complied with Rule no. 02/2015 of the ECAP, but the ECAP *“has intentionally avoided the full application of Article 5 of this rule, by erroneously applying the paragraph, which as a result has produced violations of constitutional provisions, international acts and domestic laws”*. Thus, the Applicant states that *“the alleged date, time and violation as well as the viewing of the assumed action as prohibited by the LGE, must occur during the election campaign period, in order to fully respect the hierarchy of legal acts”* including Article 5 paragraph 5 of Rule No. 02.2015 of the ECAP which stipulates that *“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”*.

(iv) Allegations relating to Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution

34. The Applicant does not justify the manner in which the violation of Articles 21 and 22 of the Constitution occurred, he only states that “...*the content of the judgment under the sign A.A.-U.zh. No. 16/2019 of the Supreme Court contains the violation...*” and these two articles.
35. Finally, the Applicant requests the Court to declare the Referral admissible and to declare the Judgment [A.A-U.ZH. No. 16/2019] of the Supreme Court contrary to the Constitution.

Admissibility of the Referral

36. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.
37. In this respect, the Court refers to paragraphs 1 and 7, of Article 113 [Jurisdiction and Authorized Parties] 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.”

38. The Court refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states:

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

39. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47 [Individual Requests]

“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.

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

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...”.

40. The Court first notes that in accordance with paragraph 4 of Article 21 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (Constitutional Court of the Republic of Kosovo: Case No. KI41/09, Applicant: *AAB-RIINVEST University L.L.C.* against the Government of the Republic of Kosovo, Resolution on Inadmissibility of 3 February 2010, paragraph 14, *Party for Democratic Society and Others v. Turkey*, no. 3840/10, judgment of 12 January 2016).
41. Furthermore, and in this respect, the Court also notes that the ECtHR in its case law also provides guarantees to political parties as well as legal persons that they can appeal independently of their candidates (see, for example, *Labor Party of Georgia v. Georgia*, No. 9103/04, ECtHR, Judgment of 8 July 2008, paragraphs 72-74 and other references cited in that decision). Therefore, the Court concludes that the Applicant is an authorized party to file a Referral with the Constitutional Court.
42. With regard to the fulfillment of the other admissibility criteria set out in the Constitution and Law and elaborated above, the Court finds that the Applicant challenges an act of a public authority, namely Judgment [AA-U.ZH. No. 16/2019] of 10 October 2019 of the Supreme Court and has exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms claimed to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.
43. The Court finally concludes that this Referral is not manifestly ill-founded in accordance with Rule 39 (2) of the Rules of Procedure and is not inadmissible on any other ground as set out in the Rules of Procedure. Therefore, it is to be declared admissible.

Merits of the Referral

44. The Court recalls that the Applicant complaints to the Court regarding the challenged Judgment alleging a violation of his constitutional rights. Therefore, the Court will deal with the Applicant's allegations as follows:

- i. Applicant's allegations regarding the violation of freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.
 - ii. Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR.
 - iii. Allegations in relation to Article 7 [Values] of the Constitution.
 - iv. Allegations relating to Articles 21 [General Principles], and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution.
45. Therefore, the Court will analyze and examine in detail each of the Applicant's allegations and will respond to each of the Applicant's allegations individually.

(i) Applicant's allegations regarding the violation of freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR

46. The Court will first deal with the Applicant's allegations in so far as they relate to the freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.

General principles of freedom of expression including during the election campaign

47. In this regard, the Court refers to Article 40 [Freedom of Expression] of the Constitution, which stipulates:

"1. Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.

2. The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.

48. The Court further refers to Article 10 [Freedom of expression] of the ECHR, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

49. The Court first notes that Article 10 of the ECHR has been interpreted in detail through the case law of the ECtHR, in line with which the Court under Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, in interpreting the allegations of violation of Article 40 of the Constitution in conjunction with Article 10 of the ECHR, the Court will refer to the case law of the ECtHR.
50. In this regard, the ECtHR has reiterated that “*freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment*” (see the case of the ECtHR *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Case no. 39394/98, Judgment of 13 February 2004, paragraph 30; see also ECtHR case *Feldek v. Slovakia*, Case No. 29032/95; Judgment of 12 October 2001, paragraph 72). In this respect, the scope of freedom of expression has been widely interpreted by the ECtHR, to include not only the substance of information or ideas, but also the various ways in which they are manifested, transmitted and accepted (see, *mutatis mutandis*, the case of ECtHR *Sokolowski v. Poland*, application No. 75955/01, Judgment of 29 June 2005, paragraph 44).
51. The ECtHR has also emphasized that freedom of expression is not absolute in nature and as such may be restricted. As provided in paragraph 2 of Article 10 of the ECHR, this freedom is subject to exceptions or restrictions, which, however, must be clearly provided for, and the need for any restriction must be convincingly established. However, the ECtHR has clarified that despite the restrictions in paragraph 2 of Article 10 of the ECHR, freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. (see case of ECtHR *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Application no. 39394/98, Judgment of 13 February 2004, paragraph 30; see also the case of ECHR *Feldek v. Slovakia*, Judgment of 12 October 2001, para. 72 - 76).
52. Therefore, according to the ECtHR, the test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of by the Applicants corresponds to a “pressing social need”, whether it was necessary for the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. However, according to the ECtHR, this margin of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the ECtHR, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 of the ECHR. The ECtHR explained that its task in exercising its supervisory function is not to take the place of the national authorities, but, according to Article 10 of the ECHR rather to review in the light of the case as a whole, the decisions

they have taken pursuant to their power of appreciation. In so doing, the ECtHR has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts. (see, *mutatis mutandis*, the case of ECtHR *Feldek v. Slovakia*, cited above, paragraph 73; see also ECtHR *Vogt v. Germany*, application no. 17851/91, Judgment of 26 September 1995, paragraph 52).

53. The ECtHR also notes that general principles concerning freedom of expression under Article 10 of the ECHR also apply to freedom of political expression. In fact, the ECHR has given “special importance” to free political debate and political expression (see also the case of the ECHR *Féret v. Belgium*, Case No. 15615/07, Judgment of 10 December 2009, paragraph 63). The ECtHR also stated that there was little room under Article 10, paragraph 2 of the ECHR to restrict freedom of political expression (see ECtHR case *Perincek v. Switzerland*, Case No. 27510/08, Judgment of 15 October 2015, paragraph 197). In this context, the ECtHR has clarified that if allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see case of the ECtHR *Feldek v. Slovakia*, cited above, paragraph 83).
54. With regard to the Internet as a way of expressing and disseminating political views, the ECtHR has not set substantially different standards in Article 10 of the ECHR in relation to the general standards of freedom of expression set out above in accordance with the principle “what applies offline also applies online”. However, in the case of *Delphi AS v. Estonia*, the ECtHR noted that “*due to the special nature of the Internet, the “duties and responsibilities” given to news portals for the purposes of Article 10 of the ECHR may differ to some extent from those of traditional publishers in terms of third party content.*” (see the case of the ECtHR *Delfi AS v. Estonia*, Case no. 64569/09, Judgment of 16 June 2015, paragraph 113). This is because the risk that can be caused by the content of online communications regarding the enjoyment of other human rights is greater than in publications through other means.
55. In this respect, freedom of expression includes the publication of political statements, programs of political entities and photographs as well as the expression of political opinions including the posting of political content on the Internet (see, *mutatis mutandis*, the case of the ECHR *Mariya Alekhina and others v. Russia*, Application no. 38004/12, Judgment of 3 December 2018, paragraph 251).
56. Furthermore, the ECtHR, in the context of the elections, has emphasized that freedom of expression must be balanced with the principles of Article 3 (Right to Free Elections) of Protocol No. 1. 1 of the ECHR aimed at establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see the case of the ECtHR *Davydov and others v. Russia*, Application No. 75947/11, Judgment of 30 May 2017, paragraph 274).
57. The ECtHR emphasized that free elections and freedom of expression, in particular freedom of political debate, together form the basis of a democratic system. The two rights are inter-related and operate to strengthen each other:

for example, freedom of expression is one of the “conditions” necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. In the context of election debates, the unhindered exercise of freedom of speech by candidates has particular significance (see the case of the ECtHR *Orlovskaya Iskra v. Russia*, Application No. 42911/08, Judgment of 21 February 2017, paragraph 110).

58. In this context, the ECtHR reiterates that in certain circumstances, as explained above, the rights guaranteed by Article 10 and Article 3, Protocol No. 1 of the ECHR, may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the “*free expression of the opinion of the people in the choice of the legislature*” (see ECtHR case *Orlovskaya Iskra v. Russia*, cited above, paragraph 111).
59. In this respect, the ECHR has recognized states with a margin of free appreciation as to the electoral systems. Consequently setting the balance between the rights under Article 10 of the Convention and Article 3 of Protocol No. 1, the Contracting States have a margin of appreciation, as they do generally with regard to their electoral systems. More recently, in a case concerning advertisement of a political nature, the ECtHR stated that the political nature of the advertisements that were prohibited called for strict scrutiny and a correspondingly circumscribed national margin of appreciation with regard to the need for the restrictions (see case of ECtHR *Orlovskaya Iskra v. Russia*, cited above, paragraph 111).
60. The Court therefore notes, based also on the foregoing, that it is not for it to express its views on the proper method chosen by the legislature to regulate a particular area. Its task is to assess only whether the chosen method and the effects they contain are in conformity with the Constitution and the ECHR.
61. Consequently, the Court considers that, according to the case law of the ECtHR, freedom of expression, including freedom of political expression through the Internet, is guaranteed. However, restrictions on freedom of expression, in particular including freedom of expression during the electoral process, may be imposed by states which have a discretionary decision-making space, provided that the exceptions set out in paragraph 2 of Article 10 of the ECHR and paragraph 2 of Article 40 of the Constitution are met.
62. In this respect the restriction of freedom of expression, including during the election campaign, can be done if: 1) such a thing is prescribed by law, 2) there is objective and reasonable justification, in other words, if the prescribed measure pursues a legitimate aim, and 3) when there is a reasonable relationship of proportionality between the means used and the aim intended to be achieved. (see, *mutatis mutandis*, the case of the ECtHR *Mariya Alekhina and others v. Russia*, cited above, paragraph 199).

63. In the light of these criteria and the case law of the ECtHR in conjunction with Article 10 of the ECHR, in the present case the Court will analyze the following criteria which must be met cumulatively:

- 1) 1) If there is an interference/restriction on freedom of expression, and if so, then:
 - a. whether the restriction of rights, specifically the right to freedom of expression during the election campaign is provided by law;
 - b. whether there was a legitimate aim intended to be achieved by restriction; and
 - c. whether the interference "is necessary in a democratic society" or whether there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued.

Application of these standards in the present case

1) If there has been an interference with freedom of expression

64. The Court notes that the video recording in connection with which the Applicant was fined was distributed by the Applicant's candidate for deputy through his page of the social network Facebook. Given what was stated above in the general principles that freedom of expression includes the publication of political statements, programs of political entities and photographs including the posting of political content on the Internet, the prohibition of these actions constitutes an interference with the Applicant's right to freedom of expression which must be justified on the basis of the abovementioned criteria.
65. As to the inclusion of the photo of the person E.B. at the election spot neither the ECAP nor the Supreme Court had challenged the fact that his photograph had previously been distributed by kallxo.com, and that the Applicant was not the author of the photograph nor did he publish the photograph for the first time. However, as explained in the general principles above, freedom of expression applies not only to the content of information, but also to its dissemination, as any restriction on the latter necessarily interferes with the right to receive and disseminate information. (see, *mutatis mutandis*, ECtHR case *Magyar Kétfarkú Kutya Part v. Hungary*, Application no. 201/17 Judgment of 20 January 2020, paragraph 87).
66. Therefore, the publication of an election spot, including the distribution of a photo of a third party previously published by the media kallxo.com, may infringe on freedom of expression if the exceptions provided for in paragraph 2 of Article 10 of the ECHR, and paragraph 2 of Article 40 of the Constitution and Article 53 of the Constitution are not met. Restriction of freedom of expression in this case resulted in the imposition of a certain fine on the Applicant as the spot was distributed on social networks and did not directly restrict the publication of the spot in question or the request, to be removed from the social network. Therefore, the restriction was made by a decision of the ECAP which was also confirmed by the Supreme Court.

67. Consequently, the Court will further assess whether such a restriction imposed through the challenged decisions of the ECAP and the Supreme Court had legal basis, and, if so, whether there was a legitimate aim intended to be achieved by a restriction, as well as whether the interference “is necessary in a democratic society” or whether there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued.

a) *Whether the interference was prescribed by Law*

68. As regards the principle “prescribed by law”, the Court finds it necessary to clarify, first, the meaning of the term “law” from the point of view of limiting human rights. In this respect, the Court recalls that according to the case law of the ECtHR, the latter has always understood the term “law” in its “substantive” sense, not its “formal” one. In this regard, the term “law” includes laws enactments of lower ranking statutes, or sub-legal acts, and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament. In addition, according to the ECtHR “law” must be understood to include both statutory law and judge-made “law”. In sum, the term “law” is the provision in force as the competent courts have interpreted it (see, *mutatis mutandis*, ECtHR case *Gülciü v. Turkey*, Application no. 17526/10, Judgment of 19 January 2016, paragraph 104 and case *Leyla Şahin v. Turkey*, Application no. 44774/98, Judgment of 10 November 2005, paragraph 84).
69. The Court also recalls that according to the case law of the ECtHR, the expression “prescribed by law” included in paragraph 2 of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be foreseeable, accessible, there must be adequate safeguards against arbitrary interferences by public authorities and formulated with sufficient precision to enable a person to regulate his or her conduct in that law (see, *mutatis mutandis*, the case of ECHR *Magyar Kétfarkú Kutya Part v. Hungary*, cited above, paragraph 93 and 94).
70. In the context of the assessment of fundamental rights and freedoms, the Court notes that the boundary between the jurisdiction of the Constitutional Court and the regular courts in assessing constitutionality and legality is not always precisely defined. The Constitutional Court but also the regular courts are often in a position to interpret the law, the Constitution but also international instruments, such as those guaranteed by Article 22 of the Constitution. It is the principle of subsidiarity and the doctrine of the fourth degree, which in principle, but depending on the particular circumstances of each case, make this distinction.
71. In this regard, given the role of the Constitutional Court as well as the principle of subsidiarity, the Court will then consider the assessment of the ECAP and the Supreme Court, when assessing whether the Applicant’s actions violated the legal provisions and, in this case, whether these findings constitute constitutional violations according to the principles and standards elaborated above.

72. The Court recalls once again that the Applicant's candidate for deputy on 25 September 2019 published on the social network Facebook a video recorded in front of the Kosovo Police building, where, among other things, the photo of police officer E.B. was used. Following the appeal filed by E.B., the ECAP by Decision [no. 233/2019], imposed a fine in the amount of 9,500.00 (nine thousand five hundred) euro.
73. The Court recalls that the Applicant regarding this restriction alleges that the election legislation under which the Applicant was fined was not applicable at the time the video was published, arguing that the election rules apply only during the election campaign which began on 25 September 2019, while the publication of the video recording was made on 19 September 2019. Therefore, the sanctioning of this action was not provided by law at the time the action was taken and this constitutes a violation of freedom of expression and the principle of rule of law and legal certainty. Also, the Applicant alleges that the publication of the spot by its candidate for deputy is protected by freedom of expression and cannot be restricted by the ECAP.
74. The Court notes that the Applicant repeats before the Court the same arguments he had submitted in the proceedings before the ECAP and the Supreme Court, in particular as regards the determination of the factual situation and the applicability of the election law in the present case (see paragraphs 12, 13 and 14). .
75. The Court recalls that its decision, the ECAP based on the LGE and the sub-legal acts deriving from the latter, namely Article 33 paragraphs (b) and (l) and Article 119, paragraph 4 of the LGE which set out the following:

Article 33
Prohibited Actions by Political Entities

During the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following:

[...]

b) displaying notices, placards and posters, or otherwise placing their names or slogans related to the election campaign, in or on public buildings or structures, on or above public roads, on public road traffic signs, in or on premises or structures occupied or otherwise used by international organizations, or in private premises without permission of the owners or users;

[...]

l) using language, in oral or written form, which incites or provokes, or is likely to incite or provoke, another person to commit an act of violence against other persons or property, or which incites or is likely to incite hatred towards others, or publishing or using pictures, symbols or any other material that has or is likely to have such effects;

[...]

Article 119 [Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAC, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAC.

[...]

76. And Article 5 [Complaints] paragraph 5 of Rule No. 02/2015 of the ECAP which stipulates that:

Article 5 [Complaints]

[...]

5.5 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”.

77. Regarding the application of the abovementioned provisions, the Court recalls that the ECAP by Decision [no. 233/2019], approved as grounded the complaint of the party E.B., and imposed on the Applicant a fine in the amount of 9,500.00 (nine thousand five hundred) euro, due to: i) the publication in the spot of the election campaign of the Kosovo Police facility in Prishtina; and ii) the involvement of another person E.B., without his permission in the electoral promotional activity in violation of Article 33 [Prohibited Actions by Political Entities] of the LGE. As to the allegation of non-specification by E.B. of the place, date and time when the alleged violation occurred, an allegation which the Applicant raised before the Court, the ECAP reasoned that E.B. had become aware of the violation on 4 October 2019, and that the deadline for the Applicant starts from the moment when the complainant becomes aware of the violation, which in this case turns out to be within the election campaign.
78. Following the Applicant's appeal, the Supreme Court by Judgment [no. AA-U.ZH. no. 16/2019] rejected as ungrounded the Applicant's appeal, finding that the ECAP decision is clear and comprehensible and contained sufficient reasons for the decisive facts, which were also accepted by the Supreme Court, finding that the substantive law was also applied correctly. The Supreme Court confirmed once again that the Applicant during the campaign, for electoral purposes, in violation of the law (Article 33 point b of the LGE), published a video-spot, which showed the Kosovo Police building in Prishtina and included the other person without his permission.
79. Whereas, regarding the allegation that the video recording was published on 19 September 2019, while the election campaign started on 25 September 2019, therefore, the imposed fine was imposed in contradiction with the LGE which is applied only during the election campaign, considers that the Decision of the ECAP, also upheld by the Supreme Court, was based on Rule no. 02/2015 of the ECAP which stipulates that a complaint must be filed with the ECAP within twenty-four (24) hours of the alleged violation, interpreting this deadline to begin not at the moment when the television spot was published, but at the time the complainant became aware of the alleged violation, provided that this

was done within the election campaign, and this was the case with the distribution of the election spot of the Applicant's candidate for deputy.

80. The Court therefore agrees with the assessment of the ECAP and the Supreme Court that the restriction was provided by law, namely Article 33 paragraphs (b) and (l) and Article 119, paragraph 4 of the LGE as well as Article 5 [Complaints] paragraph 5 of Rule no. 02/2015 of the ECAP and sees no reason to deviate from this reasoning.

81. The Court also recalls Article 33 [Prohibited Actions by Political Entities] paragraph 1 that of the LGE which foresees that:

“during the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following [...]”.

82. Therefore the LGE has clearly stated that the actions prohibited by Article 33 of the LGE relate to the campaign period.

83. In this regard, the Court refers to Article 3 [Definitions] of the LGE which stipulates that:

“Campaign Period” shall mean the thirty (30) day period for election campaigning by Political Entities ending on the day immediately preceding the election day”.

84. According to the definition of “Election Period” set out in Article 3 [Definitions] of the LGE, for the purpose of the LGE, Article 33 [Prohibited Actions by Political Entities] of the LGE applies 30 days before the elections.

85. Therefore, the Court considers that regardless of and without prejudice to the date of the announcement of the elections by the President of the Republic and the date of the start of the election campaign according to point l) of Decision [no. 824-2015] for Setting the Deadlines of Electoral Activities for the Early Elections for the Assembly of Kosovo 2019 which stipulates that “The Election Campaign as well as the deadlines for election rallies begins on 25 September and ends on 4 October 2019”, 30 days before the elections of 6 October 2019, has been relevant to the implementation of Article 33 [Prohibited Actions by Political Entities] of the LGE.

86. Consequently, taking into account the fact that the general elections in Kosovo were held on 6 October 2019, whereas the Applicant states that the video recording was published on 19 September 2019, notwithstanding the fact that when the person E.B. had filed a complaint with the ECAP, the video recording publication was also distributed within the time period during which Article 33 [Prohibited Actions by Political Entities] of the LGE was applicable. Therefore, the Court cannot agree with the Applicant that at the time of publication, Article 33 of the LGE was not in force.

87. Therefore, the Court finds that the Applicant's allegation that the restriction of freedom of expression was not foreseen by law as the LGE was not applied at the time the election spot was published is ungrounded.

88. Furthermore, the Court finds that the legislation applied in the present case, was accessible and foreseeable for the Applicant all the more so given that the Applicant participated in the previous elections and was subject to the same electoral rules.
89. Therefore, in conclusion, the Court finds that the restriction of freedom of expression was "*prescribed by law*". The Court will further assess whether the restriction had a legitimate aim and whether the measure taken was proportionate.

b) Whether the restriction had a legitimate aim

90. With regard to the legitimate aim and the test of proportionality which must be met in order for a restriction to be justifiable, the Court notes that although the Applicant, in addition to arguments as to whether the measure provided for is not prescribed by law, does not specifically challenge, the Court will assess whether this measure - the restriction of freedom of expression - has a legitimate aim and whether it is disproportionate to achieving the legitimate aim pursued.
91. In this regard, the Court notes that according to the case law of the ECtHR, the prohibition of certain actions during the election campaign may have as its legitimate aim the protection of the reputation and rights of others as well as the public interest in ensuring the holding of free and fair parliamentary elections. (see, *mutatis mutandis*, ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008)
92. In the present case, the ECAP assessed that the election spot had been shot in front of the Kosovo Police building and included the photo of the other person E.B., without his permission in the election promotion activity, in which it violates the dignity of the person E.B.
93. The Court therefore considers that the restriction of freedom of expression in the present case has a legitimate aim - the protection of the reputation and rights of others, in this case the person E.B. as well as the public interest in ensuring that free and fair parliamentary elections are held.
94. Given that the restriction of freedom of expression was prescribed by law and has a legitimate aim, the Court will further assess whether the interference "is necessary in a democratic society", respectively whether it is proportionate to the legitimate aim pursued.

c) whether the interference "is necessary in a democratic society" or whether it is proportionate to the legitimate aim pursued

95. In order to assess this criterion, it is necessary to assess how the ECAP and the Supreme Court handled the Applicant's case and whether the measure provided by law has been proportionate to achieve the aim pursued.

96. As explained in the general principles above, freedom of expression is subject to exceptions which must be narrowly interpreted and the necessity for any restriction must be decided in a convincing manner. Where what is at stake is the limit of acceptable criticism in the context of public debate on a political question of general interest, the Court, as the final authority for the interpretation of constitutional rights, must be satisfied that the ECAP and the Supreme Court have applied standards that are compatible, and moreover, in the performance of this function are based on an acceptable assessment of the relevant facts. (see, *mutatis mutandis*, ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008, page 11).
97. The Court notes that when the ECAP fined the Applicant for the fact that the publication of the election campaign spot was made in front of the Kosovo Police building in Prishtina and the fact that the published spot of the election promotion activity included a photo of another person E.B., without his permission and where the ECAP considered that this had violated his dignity.
98. Furthermore, in determining the amount of the fine, the ECAP took into account the nature of the violation and the impact on the electoral process, the fact that the Applicant participated in previous elections and was informed about the election rules and the fact that the Applicant committed such violations even earlier.
99. The Court also notes that the fine imposed on the Applicant was based on Article 120 [Remedies and Sanctions for Violations] in point (c) stipulates that in the event of a violation of the LGE or election rules the ECAP may “impose a fine against on a Political Entity or observer organization of up to two hundred thousand euro (€ 200,000). However, in the present case, the Applicant was fined in the amount of € 9,500 which is very low compared to the amount that the ECAP is allowed to impose.
100. Therefore, in the light of these findings, it cannot be said that the ECAP and the Supreme Court have exceeded the margin of appreciation they enjoy in deciding whether the measure taken is “necessary in a democratic society” specifically if there is a reasonable relationship of proportionality between the measure taken and the aim pursued. (see, *mutatis mutandis*, ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008, page 12)
101. Therefore, the restriction of freedom of expression provided by law has been proportionate to achieving the legitimate aim of protecting the rights of others and ensuring a fair and just electoral process.
102. In conclusion, the Court finds that the Applicant’s freedom of expression has been restricted, however, the restriction was prescribed by law, has a legitimate aim and has met the criterion of proportionality.
103. Therefore, based on the above, the Court finds that the Applicant’s allegations that his right to freedom of expression has been violated, which is guaranteed by Articles 40 of the Constitution and Article 10 of the ECHR, are ungrounded.

(ii) Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR

104. Regarding the principle of non-discrimination, the Applicant complains that the ECAP rendered contradictory decisions, as in similar situations it has issued different decisions regarding the time of committing a prohibited electoral action as in the case of the Applicant took into account the time of filing the complaint by the person E.B. while in other cases the time when the election spot is published. In essence, the Applicant challenges the factual situation and the manner of interpretation of the factual situation by the ECAP.
105. With regard to the Applicant's allegation of a violation of equality before the law, the Court refers to its case law, which notes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, *mutatis mutandis* case of the Constitutional Court, KI157/18, Applicant *the Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2019, paragraph 33, see also ECtHR cases *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, paragraph 61).
106. The Court notes that the Applicant did not submit any *prima facie* evidence indicating by what identifiable characteristic or status they were discriminated against in the proceedings before the Supreme Court.
107. However, with regard to the allegation on the issue of conflicting decisions of the Supreme Court, the Court, referring to the case law of the ECtHR, recalls that the ECHR in principle associated the importance of the consistency of case law with the principle of the legal certainty and public confidence in the judicial system (See *mutatis mutandis*, *Brumărescu v. Romania*, application no. 28342/95, ECtHR Judgment of 28 October 1999, paragraph 61; see *Păduraru v. Romania*, application no. 1 December 2005; paragraph 98; *Ștefănică and Others v Romania*, application No. 38155/02, ECtHR Judgment of 2 November 2010, paragraph 38; *Balažoski and Others v. the former Yugoslav Republic of Macedonia*, application no. 45117/08 Judgment of the ECtHR of 25 April 2013, paragraph 29; *Nejdet Sahin and Perihan Sahin v. Turkey*, application No. 13279/05, Judgment of the ECtHR of 20 October 2011, paragraph 52; see also *Albu and Others v. Romania*, application no. 34796/09, Judgment of the ECtHR of 10 May 2012, paragraph 34).
108. However, the ECtHR, through its case law, has also maintained that the requirements of legal certainty and the protection of the legitimate confidence of the public, do not confer nor guarantee an acquired right to consistency of case-law. (see *Unedic v. France*, application no. 20153/04, ECtHR Judgment of 18 December 2008, paragraph 74; ECtHR Judgment of 20 October 2011, *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 58; *Albu and Others v. Romania*, cited above, paragraph 34 and see also Constitutional

Court Case, KII42/15, *Habib Makiqi*, Resolution on Inadmissibility of 27 October 2016, paragraph 38).

109. The ECtHR specifically stated that “it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts [...]” (See case *Ādamsons v. Latvia*, cited above, paragraph 118, and case *Nejdet Sahin and Perihan Şahin v. Turkey*, cited above, paragraph 50, and see also case of the Constitutional Court, KI29/17, *Adem Zhegrova*, Resolution on Inadmissibility, of 2 October 2017, paragraph 47).
110. However, the ECtHR has established in its case law the criteria for assessing the conditions in which contradictory decisions of the last instance courts are in contradiction with the principle of legal certainty. In this respect, the ECtHR emphasizes that it must be established: a) whether there are any profound differences in the case law of the domestic courts; b) whether domestic law provides for a mechanism to overcome those inconsistencies; and c) whether this mechanism has been implemented and if so, to what extent (See *mutatis mutandis* the case of ECtHR *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02, Judgment of 2 October 2009, paragraph 49-52; and see also case of the Constitutional Court, KI29/17, *Adem Zhegrova*, Resolution on Inadmissibility, of 2 October 2017, paragraph 51).
111. The Court notes that in the case law of the ECtHR, the criterion for the existence of “profound and long-standing differences” is fundamental in assessing the consistency of case law (See *mutatis mutandis* *Lupeni Greek Catholic Parish and others v. Rumania*, Judgment of 29 November 2016, paragraphs 116-135; *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02; cited above, paragraphs 49-52; *Nejdet Şahin and Perihan Şahin v. Turkey*, cited above, paragraph 53). In this context, the ECHR has also concluded that the effect of such a difference in relation to the number of other cases should be assessed (See *Abu et al. v. Romania*, Judgment of 10 June 2012, paragraph 38).
112. The Court underlines that it is not its duty to compare different decisions of the Supreme Court and that it fully respects the independence of the regular courts.
113. The Court recalls that in relation to this allegation the Applicant initially refers to the ECAP Decision [A. 181/2019] of 4 October 2019, rejecting as ungrounded the complaint filed by the Emergency Management Agency against the Applicant as the complainant did not submitted evidence and did not attach any evidence regarding the allegations of violation of election rules by the Applicant. ECAP more specifically reasoned that the complainant did not “specify the time when the video in question was shot and published”.
114. The Applicant also refers to the Decision of the ECAP [A. No. 93/2019], of 27 September 2019, where the ECAP approved as grounded the Applicant’s complaint against the Democratic Party of Kosovo, in which case the ECAP found that Applicant’s complaint of 26 September 2019 alleging that the Assembly member of the Municipality of Shtime from the Democratic Party of

Kosovo on 25 September 2019, had published on the social network Facebook a photo with the Mayor of Shtime as the candidate for deputy of this party for the elections of 6 October 2020, these actions are sanctioned by the provision of Article 35.1 of the LGE.

115. The Applicant also refers to the Decision of the ECAP [Anr. 108/2019], of 30 September 2019, by which the ECAP approved as grounded the complaint of the Applicant and a non-governmental organization against the AAK-PSD coalition submitted on 27 September 2019, after the AAK-PSD candidate for Prime Minister on 26 September 2019 through his Facebook account, had included members of the Kosovo Police in their sport where he had written "2000 additional police officers until the end of the mandate", where with this was violated the election rule no. 13/2013 amended and supplemented with the election rule no. 20/2019.
116. However, referring to its case law and that of the ECtHR, the Court considers that the cases submitted by the Applicant which they relate to their case are not the same as the present case.
117. Regarding the Decision of the ECAP [A. 181/2019] of 4 October 2019, the ECAP had not addressed at all the issue of the date of publication of the spot in relation to the date when the complainants had noticed such a thing as the complainants in that case had not attached to their complaint any evidence relating to their allegations.
118. While regarding the Decision of ECAP A. No. 93/2019, of 27 September 2019, and the Decision of ECAP Anr. 108/2019, of 30 September 2019, in both these cases the publication of the election spot was done after the 25th September 2019 - after the election campaign had officially started and complaints were filed the next day after the election spots were published on social networks. Therefore, the ECAP did not address the issue of publishing the election spot in relation to the date when the election spot was noticed by the complainant, as this was not an issue that was raised before them.
119. Regarding the specific case, the Applicant alleges that the election spot was published before 25 September 2019, while the ECAP found that it is by a person who has a legal interest (complainant) E.B. on 4 October 2019.
120. Therefore, the Court considers that the circumstances of the present case and the cases in respect of which the Applicant alleges that the ECAP has decided otherwise, are not the same.
121. Consequently, this makes it unnecessary to assess a) whether there are profound and long-lasting differences in the case law of the domestic courts; b) if the domestic law provides a mechanism for overcoming these inconsistencies; and, c) whether this mechanism has been implemented and if so, to what extent.
122. Furthermore, the Court notes that the decisions referred by the Applicant are ECAP decisions against which the parties to the proceedings had the right to appeal to the Supreme Court and which become final only if no appeal is filed

against them within the time limit or after being decided by the Supreme Court. The Applicant has not clarified and has not presented evidence proving that these ECAP decisions have been upheld as such by the Supreme Court.

123. Accordingly, the Court, referring to its case law and that of the ECtHR and the standards established by this practice, which principles this Court applies, finds it impossible to find that in the Applicant's case the criteria of the existence of conflicting decisions have been met.
124. Therefore, based on the above, the Court finds that the Applicant's allegations that his right to equality before the law has been violated are ungrounded, namely the right not to be discriminated, which is guaranteed by Article 24 of the Constitution, Article 14 of the ECHR, and Article 7 of the UDHR.

(iii) Allegations regarding Article 7 [Values] of the Constitution

125. The Court notes, first, that the Applicant tries to justify the violation of Article 7 [Values] of the Constitution by erroneous determination of factual situation and erroneous application of the substantive and procedural law, essentially repeating the allegations made in response to the complaint filed with the ECAP.
126. The Applicant links the erroneous determination of factual situation with the moment when the violation was committed, namely with the date on which the violation was committed, it further repeats the allegations regarding the formal criteria that the complaint must meet, and on this basis concludes that substantive and evaluative law has not been correctly applied.
127. With regard to these allegations of the Applicant which relate to the situation of erroneously determined factual situation and erroneous application of the substantive and procedural law, the Court notes that the ECAP substantially reasoned each of the Applicant's allegations and explained how it determined the factual situation and how it applied the substantive law and the procedural law, see paragraphs 12, 13 and 14.
128. The Court recalls that with regard to the Applicant's allegations of erroneous application and erroneous interpretation of the law, the Court reiterates in the first place, that it is not its duty to deal with errors of fact or erroneous application of the law allegedly committed by the regular courts, unless the errors and erroneous application of the law is such as to violate the rights and freedoms protected by the Constitution (*Garcia Ruiz v. Spain* [GC], no. 30544/96, 28 §, ECHR 1999-I).
129. The Court notes that all the responses of the ECAP and the Supreme Court are clear and reasoned, and that all of the Applicant's allegations, which were relevant to the resolution of the case, were duly heard and examined by the ECAP and the Supreme Court. The Court therefore concludes that the proceedings before the ECAP and the Supreme Court, viewed in their entirety, were fair (see: *mutatis mutandis*, ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96. paragraphs 29 and 30).

130. In addition, regarding Article 7 [Values] of the Constitution, the Court notes that it is a general principle that the articles of the Constitution which do not directly regulate the fundamental rights and freedoms have no independent effect, as their effect is valid in relation to "the enjoyment of the rights and freedoms" guaranteed by the provisions of Chapters II and III of the Constitution. Accordingly, these articles cannot independently be applied if the facts of the case do not fall within the scope of one or more of the provisions of the Constitution pertaining to the "enjoyment of the rights and freedoms". (see, case of the Court Kl136/16, Applicant: *Vllaznim Bytyqi*, Resolution on Inadmissibility, of 18 October 2017, paragraph 40).
131. In this regard, the Court notes that it has addressed allegations relating to matters of the rule of law and legal certainty concerning the freedom of expression.
132. Therefore, based on the foregoing, the Court finds that the Applicant's allegations that the erroneous determination of factual situation and erroneous interpretation of law violated the Applicant's right guaranteed by Article 7 [Values] of the Constitution are ungrounded.

(iv) Allegations regarding Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution

133. The Court recalls that the Applicant does not substantiate the violations of Articles 21 and 22 of the Constitution, but merely finds that "... *the content of the Judgment under the sign A. A. - U. ZH. no. 16/2019 of the Supreme Court contains a violation ...*" and these two articles.
134. With regard to Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the Court notes that these articles do not in themselves entail a fundamental right or freedom.
135. Article 21 in its content refers to the indivisible, inalienable and inviolable character of human rights; protection and guarantee of human rights; the obligation to respect human rights, also stipulating that the rights and freedoms guaranteed by the Constitution, are also valid for legal persons to the extent applicable.
136. While Article 22 of the Constitution defines the status of human rights and freedoms guaranteed by international agreements and instruments, referred to in Article 22, in the legal system of Kosovo, as rights guaranteed by the Constitution, are directly applicable in the Republic of Kosovo and have priority, in case of conflict, over the provisions of laws and other acts of public institutions.
137. Therefore, the abovementioned articles are not articles that can be interpreted independently of other constitutional provisions relevant to this case. However, in considering this case, the Court took into account the principles

set out in Article 21 of the Constitution but also the international agreements and instruments set out in Article 22 of the Constitution.

138. Therefore, based on the above, the Court finds that the Applicant did not reason or explain how the violations of Articles 21 and 22 of the Constitution occurred, therefore the allegations of the Applicant that the challenged Judgment violated the Applicant's right guaranteed by Article 21 [General Principles] and Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution are ungrounded.

Conclusion

139. The Court considers that the Applicant has not submitted any evidence showing that the proceedings before the regular courts, violated in any way, his constitutional rights, and accordingly concluded:

- (i) The Court finds that the Applicant's allegations that his right to freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR is violated are ungrounded;
- (ii) The Court finds that the Applicant's allegations that his right to equality before the law, namely his right not to be discriminated against has been violated, which is guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR are ungrounded;
- (iii) The Court finds that the Applicant's allegations that by erroneous determination of factual situation and erroneous interpretation of law his right guaranteed by Article 7 [Values] of the Constitution has been violated are ungrounded;
- (iv) The Court finds that the Applicant did not reason or explain how the violation of Articles 21 and 22 of the Constitution occurred and that the Applicant's allegations that the Applicant's right guaranteed by Article 21 and Article 22 of the Constitution has been violated by the challenged Judgment are ungrounded.

140. Therefore, and based on the above, the Court based on the specific characteristics of the case, the facts presented, the allegations raised by the Applicant, the reasoning of the Supreme Court, as well as based on the established standards and principles set out in its case law and that of the ECtHR, does not find that Judgment [AA-U.ZH. No. 16.2019] of 10 October 2019 of the Supreme Court violated Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights, as well as Article 7 of the Universal Declaration of Human Rights.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 46 and 48 of the Law and Rule 59 (1) of the Rules of Procedure, on 22 July 2020,

DECIDES

- I. TO DECLARE, unanimously, the Referral admissible;
- II. TO HOLD, with majority of votes, that there has been no violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights, as well as Article 7 of the Universal Declaration of Human Rights;
- III. TO NOTIFY this Judgment to the Parties;
- IV. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law;
- V. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Kopje e vërtetuar
Overena kopija
Certified Copy

Arta Rama-Hajrizi

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