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

Prishtina, on 29 March 2021
Ref. no.: AGJ 1739/21

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JUDGMENT

in

cases KI45/20 and KI46/20

Applicant

Tinka Kurti and Drita Millaku

Constitutional review of Decisions AA. No. 4/2020 of 19 February 2020 and AA. No. 3/2020, of 19 February 2020 of the Supreme Court 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

Applicants

1. Referral KI45/20 was submitted by Tinka Kurti, in a capacity of a candidate of the VETËVENDOSJE Movement! (hereinafter: LVV) for the elections of 6 October 2019, residing in the Municipality of Prishtina (hereinafter: the first Applicant).

2. Referral KI46/20 was submitted by Drita Millaku, in a capacity of LVV candidate for the elections of 6 October 2019, residing in the Municipality of Prizren (hereinafter: the second Applicant).

Challenged decisions

3. Applicant KI45/20 - Tinka Kurti challenges the Decision [AA . No. 4/2020] of 19 February 2020, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

4. Applicant KI46/20 - Drita Millaku challenges the Decision [AA. No. 3/2020] of 19 February 2020 of the Supreme Court.

Subject matter

5. The subject matter of the two Referrals in question is the constitutional review of the challenged decisions of the Supreme Court, which allegedly violate the Applicants' fundamental rights and freedoms guaranteed by Articles 7 [Values], 24 [Equality Before the Law] 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

6. The Referral is based on paragraphs 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

7. On 3 March 2020, the Applicants submitted their Referrals to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 May 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 19 May 2020, based on Rule 40 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI45/20 and KI46/20.

10. On 3 June 2020, the Court notified the Applicants about the registration and joinder of Referrals KI45/20 and KI46/20.

11. On 3 June 2020, the Court notified the Supreme Court about the registration and joinder of Referrals KI45/20 and KI46/20 and sent it a copy of the Referral.

12. On 3 July 2020, the Ombudsperson presented before the Court *"Legal Opinion of the Ombudsperson of the Republic of Kosovo in the capacity of a friend of the Court (Amicus Curiae) for the Constitutional Court of Kosovo, [A. No. 193/2020], Tinka Kurti regarding the referral for Decision AA. No. 4/2020 of Mrs. Tinka Kurti v. the Supreme Court of Kosovo"*.

13. On 14 January 2021, pursuant to paragraph (1) of Rule 55 [*Amicus Curiae*] of the Rules of Procedure, the Judge Rapporteur consulted the Review Panel regarding the approval of the Ombudsperson's request to appear as *Amicus Curiae* regarding case KI45/20.

14. On 15 January 2021, after consulting the Review Panel, the Judge Rapporteur approved the Ombudsperson's request to appear as *Amicus Curiae*, thus accepting the Legal Opinion submitted as an integral part of the case file. On the same date, the Judge Rapporteur notified all the judges of the Court about the decision to allow the participation of the Ombudsperson in his capacity as *Amicus Curiae* in Case KI45/20.

15. On 18 February 2021 as well as on 24 February 2021, the Review Panel considered the case and decided to postpone the case for review in one of the next sessions, with a request that it be completed.

16. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

17. On the same date, the Court unanimously decided that there has been a violation of Article 24 [Equality Before the Law] and Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol No. 1 of the ECHR. Consequently, the Court declared invalid the following: (i) Decisions [AA. No. 3/2020 and AA. No. 4/2020] of the Supreme Court of the Republic of Kosovo, of 19 February 2020; (ii) Decisions [Anr. 35/2020 and Anr. 36/2020] of the Election Complaints and Appeals Panel, of 13 February 2020; and item 5 of Decision [No. 102/A-2020] of the Central Election Commission, of 7 February 2020.

18. On 29 March 2021, the Court published the Judgment on this case.

Summary of facts

19. On 6 October 2019, the early elections were held for the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

20. On 27 November 2019, the Central Election Commission (hereinafter: the CEC) certified the final result of the early elections for the Assembly.

21. On 5 February 2020, the President of the Republic of Kosovo (hereinafter: the President), by the request [No. 102/2020], requested from the CEC the recommendation of the next eligible candidates, who follow according to the respective political entities for the replacement of the deputies of the Assembly, based on the certified results of the elections of 6 October 2019, as a number of deputies were elected to government positions, consequently, the latter had to be replaced.

22. On 7 February 2020, the CEC, by the Decision [No. Prot. 102/A-2020], sent to the President *"Recommendation for the next candidates for deputies of the Assembly of Kosovo",* on which occasion he recommended the next candidates for deputies of the Assembly in the list of the entity LVV, as follows: candidate Enver Haliti to replace the deputy Albin Kurti - because he was elected Prime Minister of the Republic of Kosovo; candidate Alban Hyseni to replace deputy Glauk Konjufca, because he was elected Minister of Foreign Affairs and Diaspora; candidate Arta Bajralia to replace deputy Albulena Haxhiu, because she was elected Minister of Justice; candidate Fitim Haziri to replace deputy Arben Vitia, because he was elected Minister of Health and; candidate Eman Rrahmani to replace deputy Haki Abazi, because he was elected the second Deputy Prime Minister [...].

23. According to the CEC, this replacement was made based on point a of paragraph 2 of Article 112 [Replacement of Assembly Members], of Law No. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: the Law on General Elections or the LGE), which stipulates that the deputy is replaced *"by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election".* Acting in this way, the replaced candidates from the list certified by the CEC, on 27 November 2019, for the elections of 6 October 2019, who became deputies were: Enver Haliti with ordinal number 71, with 7,777 votes; Alban Hyseni with ordinal number 57, with 7,767 votes; Arta Baraliu with ordinal number 69, with 7,674 votes; Fitim Haziri with ordinal number 94, with 7,542 votes; Eman Rrahmani with ordinal number 109, with 7,044 votes.

24. According to this legal interpretation of the above-mentioned provision made by the CEC, which stipulates that for the replacement comes "*the next eligible candidate of the same gender"*, the female candidate for replacement, Tinka Kurti, with ordinal number 30, with 7,655 votes and the other female candidate Drita Millaku, with ordinal number 36, with 7,063 votes, who in the list certified by the CEC on 27 November 2019, have more votes than the candidate Eman Rrahmani with ordinal number 109, with 7,044 votes.

25. On 11 February 2020, the Applicants (Tinka Kurti and Drita Millaku), candidates for deputies from the ranks of LVV, separately filed an appeal with the Election Complaints and Appeals Panel (hereinafter: ECAP), against the decision of the CEC [Prot. No. 102/A-2020 of 7 February 2020], emphasizing that the selection of candidates to replace the departed deputies is a completely erroneous, unconstitutional and unlawful legal interpretation.

26. On 13 February 2020, the ECAP by Decisions [Anr. 35/2020] and [Anr. 36/2020], rejected as ungrounded the appeals of the first Applicant (Tinka Kurti) and the second Applicant (Drita Millaku), with the following reasoning:

> *"The ECAP finds that the allegations submitted in the appeal are ungrounded, and as such I reject them due to the fact that the decision of the CEC, with Prot. No. 102/A-2020 of 07.02.2020, is fair and based on law, since the replacements for members of the Assembly of the Republic of Kosovo are made by taking into account the next candidate of the same gender and the same political entity, as it is acted in the present case as well. Therefore, any allegation in the complaint regarding violation of the law is ungrounded".*

27. Against the above-mentioned decisions of the ECAP, the Applicants filed the respective individual appeals with the Supreme Court, proposing that the decisions of the ECAP be modified, so that the CEC could reconsider the relevant decision regarding their non-appointment as deputies of the Assembly.

28. On 18 February 2020, the ECAP filed two responses with the Supreme Court to the appeal in which it rejected in its entirety the above-mentioned Applicants' appeals, proposing that they be rejected as ungrounded, and that the above-mentioned ECAP decisions be upheld as lawful.

29. On 19 February 2020, the Supreme Court rendered two decisions regarding the Applicants' appeals. By the Decision [AA. No. 4/2020] rejected as ungrounded the appeal of the first Applicant (Tinka Kurti) filed against the ECAP Decision [A. No. 35/2020] of 13 February 2020; meanwhile, by the Decision [AA. No. 3/2020] the appeal of the second Applicant (Drita Millaku) filed against the ECAP Decision [A. No. 36/2020] of 13 February 2020 was rejected as ungrounded.

30. Among other things, the Supreme Court, in the two above-mentioned Decisions which are identical in the reasoning part, stated the following:

> *"The Supreme Court fully accepts as grounded the legal position of the ECAP regarding the rejection of the appeal of* [Tinka Kurti/Drita Milakut] *as ungrounded, as a candidate for deputy from the political entity Vetevendosje Movement, since the challenged decision of the ECAP is entirely based on the provisions of the Law on General Elections in the Republic of Kosovo.*
>
> *However, the Supreme Court of Kosovo, once again reviewed all allegations of appeal filed against the ECAP decision claiming that the ECAP decision is completely erroneous, discriminatory, unlawful and unconstitutional, and found that such allegations are ungrounded, due to the fact that the challenged decision of the ECAP, even according to the conviction of the Supreme Court, is not erroneous, discriminatory, unlawful and unconstitutional, because in the above-mentioned legal provision under Article 112.2 item a , of the Law on General Elections in*

the Republic of Kosovo, in fact, the formula for replacing the deputies, whose mandate has ended with taking positions in the Government of the Republic of Kosovo, is provided, so in this provision is provided the clause respectively the way of replacement of these deputies with other deputies from the same political entity and the same gender, so this legal solution, and this formula provided by law, could not be avoided neither by the CEC, nor the ECAP, nor the Supreme Court of Kosovo for the time being. Otherwise, it is assumed that the laws are in accordance with the Constitution of the Republic of Kosovo, so it should be implemented as they are until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution, so it cannot be said that the legal solution provided by Article 112.2 item a of the Law on General Elections in the Republic of Kosovo is unconstitutional. According to this legal solution, so far, the deputies of the same gender have always been replaced, and not according to the number of votes regardless of gender, as the appellant claims, so this is a legal practice built by of the CEC, based on the Law on General Elections of the Republic of Kosovo, and accepted so far by all political entities and candidates for deputies in the Parliament of the Republic of Kosovo, so we cannot even talk about the decision of the CEC and the ECAP as a discriminatory, unlawful and unconstitutional decision".

31. Following the decision of the Supreme Court, the replacement of deputies for the Assembly was made based on the decision-making of the CEC and the ECAP, as confirmed by the Supreme Court.

32. By Referrals KI45/20 and KI46/20, the Applicants challenge before this Court the constitutionality of the abovementioned two Decisions of the Supreme Court.

Applicant's allegations

33. The Applicants allege that the Decisions of the Supreme Court [AA. No. 4/2020 and AA. No. 3/2020] of 19 February 2019, were issued in violation of their fundamental rights and freedoms guaranteed by Articles 7 [Values], 24 [Equality before the Law], 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

34. With regard to the allegation of violation of Article 24, in conjunction with Article 7 and Article 55 of the Constitution, the Applicants build the case on the allegation of gender discrimination of the candidates for deputies. They allege that the interpretation of Article 112.2 (a) of the Law on General Elections is contrary to (i) Law No. 05/L-020 on Gender Equality; and (ii) Law No. 05/L-021 on Protection from Discrimination, which are norms of a *lex specialis* nature in relation to gender equality and discrimination.

35. The Applicants state that the challenged decisions are unconstitutional because they violate the two main constitutional principles, the principle of non-discrimination and the principle of proportionality. Consequently, the Applicants state that the decision of the CEC clearly violates the principle of non-discrimination within the meaning of paragraph 2 of Article 24 of the Constitution, which stipulates that "*No one may be discriminated against on the grounds of [...] gender, [...] or other personal status*". According to the Applicants, we are dealing with a classic case of discrimination on the basis of gender, of candidates for deputies.

36. Interpretation of Article 112.2 (a) of the Law on General Elections, which stipulates that the next for replacement is "*next eligible candidate of the same-gender"*, is erroneous because it is only textual interpretation, reduced only to the circumstance of the cause *"of the same gender",* which necessarily bring certain consequences, which are expressed in the violation of the guaranteed constitutional right in accordance with Article 24.2 of the Constitution *"No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status"*. Such linguistic interpretation, as a way of narrow or restrictive interpretation, is completely wrong in this case, because it is in full contradiction with the spirit and purpose of law in the Republic of Kosovo and international norms regarding vote, democracy and gender equality.

37. The Applicants allege that the interpretation of the aforementioned provision of the Law on General Elections is contrary to (i) Law no. 05/L-020 on Gender Equality and (ii) Law 05/L-021 on the Protection from Discrimination, which are norms of a *lex specialis* nature, in relation to gender equality and discrimination.

38. With regard to the non-compliance of the abovementioned provision with (i) the Law on Gender Equality, according to the Applicants, the legislator has not only explicitly defined the measures for the prevention of gender discrimination, but with the request *'"for equal representation of women and men"* with a view to *"achieving gender equality",* at the same time it has defined just as clearly and without any ambiguity, specifying in a quantitative and legal way the special measures for the achievement of the major goal: *"minimum representation of fifty percent (50%) for each gender*", (Article 6, paragraph 8). Consequently, paragraph 2 of Article 5 [General Measures to Prevent Gender Discrimination and Ensure Gender Equality] provides that: *"Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed"*.

39. The Applicants also put emphasis on Article 6 [Other justified treatment] of the Law on the Protection from Discrimination, according to which no provision, criterion or practice *"is not deemed a discrimination a distinction in treatment [...]" if one "[...] is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means used and the targeted aim"*. In this regard, in order to achieve the major goal of gender equality, even

by justifying the different treatment that is not considered discrimination, Article 6 [Special measures] of the Law on Gender Equality, has defined *"temporary special measures "* which should be taken by public institutions *"in order to accelerate the realization of actual equality between women and men in areas where inequities exist"*. Consequently, such special measures may include *"quotas to achieve equal representation of women and men;"* (Article 6, paragraph 2, item 2.1.), which the legislator has expressly clearly codified as *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions [...]"* including their governing and decision-making bodies," (Article 6, paragraph 8) which is achieved when and only it is provided *"[...] minimum representation of fifty percent (50%) for each gender*".

40. According to the Applicants, the CEC Decision [No. 102/A-2020], of 7 February 2020, related to other challenged decisions, represents an erroneous interpretation of a legal norm, depriving it of its normative essence. They also point out that paragraph 1 of Article 27 (Gender Requirement), of the Law on General Elections, despite the language gaps, clearly states that: "*In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female*"; The quantified legal expression "[...] at least thirty (30%) percent represents a minimum limit of gender representation in public institutions (gender quotas), including the Assembly. This means the legal obligation that the minimum gender representation, whether of women or men, even in the Assembly, cannot be below thirty (30%) percent. So, clearly, 30% represents the minimum limit of gender representation, but not the highest limit of representation. Consequently, the decision of the CEC [No. 102/A-2020] of 7 February 2020, on the Recommendation for the replacement of deputies, in the present case of female deputies (Tinka Kurti and Drita Millaku), does exactly the opposite of the norm, interpreting it as the maximum limit of gender representation - women in the Assembly, and by eliminating in this case two women candidates with the largest number of votes in the list of candidates of LVV, in favor of "*the next eligible candidate of the same gender"*. Therefore, this is a discriminatory interpretation of a legal norm and at the same time an erroneous interpretation of the constitutional concept of discrimination.

41. The Applicants, referring to Article 53 of the Constitution, also refer to the case law of the European Court of Human Rights (hereinafter: the ECHR), citing the case of *Thimmenos v. Greece*, application no. 34369/97, of 6 April 2000, paragraph 44, where it states *"[t]he right [...] not to be discriminated... is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification"*.

42. The Applicants state that in order for such a justification to be *" objective and reasonable"*, it must meet two further requirements: (1) it must have a "*legitimate aim*" for the inequality in question and (2) it must have *"a reasonable relationship of proportionality between the means employed and the aim sought to be realized"* (see the case of the ECtHR: "*Case concerning certain aspects of the laws on the use of languages in education in Belgium v. Belgium*, Cases Nos. 63, 2126/64, Judgment of 23 July 1968, paragraph 10; see

also Case *X and Others v. Austria*, Application No. 19010/07, ECtHR, Judgment of 19 February 2013, paragraph 98).

43. Finally, the Applicants state that the constitutionality of its exceeding should be assessed according to certain analytical steps, where they propose to be assessed on the basis of the proportionality test of Article 55 defined in case KO131/12, Applicant *Dr. Shaip Muja and 11 deputies of the Assembly of the Republic of Kosovo*, Judgment of 15 April 2013, paragraph 127. The Applicants state that Article 55, paragraph 4 of the Constitution, stipulates that: *"In cases of limitations of human rights or the interpretation of those limitations; all public authorities [...] shall pay special attention to the [...] relation between the limitation and the purpose to be achieved "*. Also, paragraph 2 of Article 55 stipulates that: *"Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society"*.

44. Also, this decision of the CEC, and other challenged decisions, clearly violate the principle of proportionality within the meaning of paragraph 2 of Article 55 [Limitations on Fundamental Rights and Freedoms], of the Constitution, which clearly states that *"Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society"*. However, even in the event of any eventual restriction, "*only by law*" (ibid., paragraph 1), in the last instance, regardless of the circumstances, any *"limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right"* (ibid, paragraph 5). According to the Applicants, the CEC, by its Decision, in addition to having made a disproportionate restriction, without having any legitimate purpose for which the restriction was made, the restriction also denies the essence of the guaranteed right, the right to vote.

45. Finally, according to the Applicants, the only correct interpretation, in relation to Article 112 paragraph 2.a of the Law on General Elections, based on all constitutional, legal norms and international human rights instruments referred to in paragraphs above of this referral: *"next eligible candidate of the same gender"*, is only the candidate who belongs to the underrepresented gender according to the minimum gender quota of 30%. This is a constitutional and legal obligation for any state institution, including the Assembly. In this case, according to Article 112 paragraph 2 of the Law on General Elections, both genders have reached the legal quota of minimum representation of 30%. Therefore, the replacement in this case is done only according to the ranking in the list of candidates based on the votes received in the elections of 6 October 2019, certified on 27 November 2019 by the CEC. Therefore, in the waiting list of candidates for replacement from the list of the political entity Vetëvendosje Movement, according to the votes are Tinka Kurti with ordinal number 30, with 7,655 votes and Drita Millaku, with ordinal number 36, with 7,063 votes, before the candidate Eman Rrahmani with ordinal number 109, with 7,044 votes.

46. On the other hand, with regard to the allegation of violation of Article 7 of the Constitution, the Applicants build the case on the allegation that this decision of the CEC to replace the deputy/ies with the next candidate/s which has a defining basis the gender of the candidates, excluding namely restricting the right acquired through the free expression of political will – the vote, certain candidates in the waiting queue, is in complete contradiction, direct and undeniable with paragraph 2 of Article 7, of the Constitution, which guarantees that: *"The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life"*. This violation of one of the "*fundamental values for the democratic development of society*" is a serious violation of the Constitution.

47. With regard to the allegation of violation of Article 45 of the Constitution, the Applicants base their case on the allegation that the interpretation of paragraph 2 of Article 112 of Law no. 03/L-073 on General Elections, which stipulates that the next in line is the "*eligible candidate of the same gender*", is erroneous because by reducing the textual interpretation only in the context of the cause of "*same gender*", violates the constitutionally guaranteed right under paragraph 1 of Article 45 [Freedom of Election and Participation] which guarantees that: " *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"*. Such an interpretation of Article 112.2 (a) of the Law on General Elections is completely erroneous in this case, because it is completely contrary to the spirit and purpose of the guaranteed constitutional right of citizens in the Republic of Kosovo to enjoy "*the right to elect and be elected*", through the arbitrary distortion of the will expressed through the right to elect - vote, equally arbitrarily denying the citizen the right to be elected, without restricting this right by court decision. None of the decision-making instances in this case (Supreme Court, ECAP, CEC), has provided any judicial act that restricts this right to Tinka Kurti and Drita Millaku.

48. The Applicants also state that the challenged Decisions in the context of the interpretation of Article 112.2 (a) are also contrary to the position of the Supreme Court itself which in Decision [AA. no. 34/2017], of 17 November 2017 finds that: *"the compliance with gender quota entails representation of minimum 30% of females and since the representation is 50% in this specific case, it does not mean that it is in contradiction with LGE"*, (Case of the Court no. KI142/17, Applicant *Mentor Jashari*, Resolution on Inadmissibility of 10 April 2018, paragraph 38). The Applicants consider this interpretation of the Supreme Court to be a fair and sufficient legal justification.

49. Finally, the Applicants request the Court to repeal the challenged Decisions of the Supreme Court because they: (i) constitute a violation of paragraph 2 of Article 7 [Values] of the Constitution; (ii) violate the principle of proportionality within the meaning of Article 55 [Limitations on Fundamental Rights and Freedoms]; (iii) violate the principle of non-discrimination referred to in paragraph 2 of Article 24 [Equality Before the Law]; and (iv) were

rendered in violation of Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

Legal Opinion of the Ombudsperson in the capacity of a friend of the Court (Amicus Curiae) for the Constitutional Court of Kosovo, [A. No. 193/2020], Tinka Kurti regarding the referral for Decision AA. No. 4/2020 of Mrs. Tinka Kurti v. Supreme Court of Kosovo

50. The Ombudsperson submitted to the Court a Legal Opinion in his capacity as a friend of the Court (*Amicus Curiae*), who seeks to provide his views on the issues raised in Referral KI46/20 relating to equality and protection against discrimination in the event of the replacement of the next candidates for the deputies of the Assembly. As explained in the proceedings before the Court, this Legal Opinion was accepted by the Court and has become an integral part of the case file KI45/20 and KI46/20.

51. The Ombudsperson states that in accordance with paragraph 1 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution, paragraph 9 of Article 16 [Powers] of Law No. 05/L-019 on Ombudsperson, sub-paragraph 13, paragraph 2, of Article 9 [Ombudsperson] of Law No. 05/L-021 on the Protection from Discrimination and Article 13 [Ombudsperson] of Law No. 05/L-020 on Gender Equality, authorize the Ombudsperson to act as a friend of the Court.

52. The Ombudsperson considers that one of the examples of the application of the interpretative principles of the law has to do with the relationship between (i) No. 05/L-020 on Gender Equality and (ii) Law No. 03/L-073 on General Elections in the Republic of Kosovo, regarding their respective requests for gender representation among elected representatives.

53. In this regard, the Ombudsperson refers to paragraph 1 of Article 27 of (ii) the Law on General Elections which stipulates that: *"In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list"*. However, paragraphs 7 and 8 of Article 6 of the Law on Gender Equality present a stricter requirement: *"Legislative bodies (..) shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved."*; emphasizing that: *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies"*.

54. Furthermore, the Ombudsperson considers that according to the *lex specialis* principle, the stricter requirement of the Law on Gender Equality enjoys precedence over the less stringent one of the Law on General Elections. Also, the *lex posterior* principle is relevant in this case, as the Law on Gender Equality was adopted by the Assembly on 28 May 2015, while the Law on

General Elections was adopted on 5 June 2008. Based on this, we consider that the requirement set out in the Law on Gender Equality reflects more accurately the will of the people's representatives on this issue, and should therefore take precedence over the Law on General Elections.

55. According to the Ombudsperson, the provision defined in item a) of paragraph 2 of Article 112 of the Law on General Elections, implies that the replacement should be made only with the same-gender candidate, regardless of whether the other candidate of the other gender has the largest number of votes. Consequently, the Ombudsperson notes that this provision is not in accordance with the provision of Article 45 of the Constitution.

56. The first reason, according to the Ombudsperson, is that the replacement with the eligible candidate of the same gender violates the right of a person to be elected, because in the present case, the replacement of candidates under Article 112, paragraph 2 of the Law on elections resulted in winning the right of the candidate who has less votes than the candidates Tinka Kurti with 7655 votes and Drita Millaku with 7063 votes (consequently the candidate Eman Rrahmani has 611 votes less than Mrs. Tinka Kurti and 19 votes less see Mrs. Drita Millaku). Thus, according to this rule, the two female candidates (the Applicants) have not managed to gain the right to be elected a member of the Assembly of Kosovo, despite the fact that they have a larger number of votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections. The Ombudsperson considers that such a wording gives priority only to the gender of the candidate, which contradicts the rule according to which the candidate who has the largest number of votes, gains the right to become a member of the Assembly of Kosovo.

57. The second reason emphasized by the Ombudsperson is that the replacement of the eligible candidate according to the same gender violates the right to vote, as 611 votes of the candidate Tinka Kurti were not taken into account, which means that 611 votes of the citizens of Kosovo were not taken into account. Furthermore, the Ombudsperson notes that the next candidate according to the number of votes could not enjoy the right to become a member of the Assembly of Kosovo, although she has more votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections (Drita Millaku, 19 votes more than the candidate Eman Rrahmani).

58. The Ombudsperson emphasizes that the current content of Article 112, paragraph 2 of the Law on Elections may appear in principle as a guarantee of the existence of the less represented gender (gender quota). However, regarding the gender quota, the Ombudsperson considers that the quota is a legal guarantee, which cannot be questioned in any case, because regardless of the replacement of candidates, the condition must be met that at least 30 % of seats is provided to be allocated to under-represented gender candidates. The Ombudsperson bases this assessment on the provisions of the Law on Elections, namely Article 111 [Distribution of Seats], paragraph 6, according to which *"If, after the allocation of seats as set out in paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total seats for that Political Entity, the last*

elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%".

59. Furthermore, the Ombudsperson notes that in cases where the 30% quota has been met, then the ranking of candidates, including their replacement, should be done in accordance with Article 111 [Distribution of seats], paragraph 4, of the Law on Elections, according to which "*... The candidate lists shall then be reordered in descending order based on the number of votes received by each candidate*". Therefore, according to this definition, in the moments when the gender quota is met, the ranking and rearrangement of candidates (regardless of gender) should be done according to the number of votes they have won, and any other ranking results in violation of the constitutional right to elect, and to be elected.

60. Also, according to the Ombudsperson, there are discrepancies within the articles of the Law on Elections, namely, between Article 111, paragraph 4, Article 112, paragraph 2 (items a and b), and such discrepancies cause confusion to the implementing bodies of this law, which may result in the issuance of decisions that violate human rights.

61. The Ombudsperson considers that the Supreme Court when rendering Decision AA No. 4/2020 of 19 February 2020 used a narrow approach, focusing only on the application of Article 112, paragraph 2 (item a), disregarding the constitutional guarantees of equality before the law set out in Article 24 of the Constitution, and for freedom of election and participation, defined by Article 45 of the Constitution.

62. Finally, the Ombudsperson considers that the purpose of Article 112, paragraph 2 (item a) seems to be to maintain a 30% gender quota *status quo* for the minority gender in the Assembly, once it is achieved. This provision, given the 30% gender quota, is an obstacle to achieving equal representation of women and men, which according to the Law on Gender Equality: *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent* (50%) *for each gender, including their governing and decision-making bodies"* (Article 6, paragraph 2, sub-paragraph 8). Furthermore, the Ombudsperson considers that Article 112, paragraph 2 (item a) would only make sense if the gender quota is 50% for each gender.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to

property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

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 55 [Limitations on Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law..

2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.

3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.

4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the

purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Law No.03 / L-073 on General Elections in the Republic of Kosovo

Article 27
Gender Requirement

27.1 In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list.

27.2 This article has no application to lists consisting of one or two candidates.

Article 111
Distribution of seats

[...]

111.4 All votes received by the candidates appearing on the open list of each Political Entity shall be counted separately. A vote cast for a Political Entity shall be considered as a vote received by the candidate ranking first on the Poltical Entity's candidate list. The candidate lists shall then be reordered in descending order based on the number of votes received by each candidate.

111.5 The seats allocated to a Political Entity in paragraph 2 of this Article shall be distributed to the candidates on the Political Entity's candidate list as reordered in paragraph 4 of this Article, starting from the first candidate on the list in descending order, until the number of seats allocated to the Political Entity is exhausted. Additional seats allocated to Political Entities representing the Kosovo Serb community and other non majority communities as in paragraph 3 of this Article shall be distributed to the subsequent candidates on the Political Entity's candidate list reordered as in paragraph 4 of this Article.

111.6 If, after the allocation of seats as set out in paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total seats for that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%."

Article 112
Replacement of Assembly Members

112.1 Seats allocated in accordance with the present Law are held personally by the elected candidate and not by the Political Entity. A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of:

a)) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by the article 69.3 (6) of the Constitution;

b) the failure of the member to attend for six (6) consecutive months a session of the Assembly or the Committee(s) of which he or she is a member, unless convincing cause is shown as per Assembly Rules;

c) the member's forfeiture of his or her mandate under article 29 of this Law;

d) the death of the member;

e) mental or physical incapacity as determined by final Court decision; or

f) the resignation of the member.

112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:

a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election;

b) if there is no other eligible candidate of the same gender on the candidate list, by the next eligible candidate who won the highest number of votes from the candidate list;

Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo

Article 8

2. . Article 111 of the law in force paragraph 4. is reworded as following:

111.6 . If, after the allocation of seats to candidates on the list of a Political Entity, as set out in paragraph 5 of this Article, the candidates of the minority gender have not been allocated at least 30% of the total seats allocated to that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the minority gender on the reordered candidate list until the total number of seats allocated to the

minority gender is at least 30%. This paragraph does not apply to allocation of seats from a list consisting of one (1) or two (2) candidates.

Law No. 05/L -02 on Gender Equality

Article 5
General measures to prevent gender discrimination and ensure gender equality

[…]

2. Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed.

Article 6
Special measures

1. Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist.

2. Special measures could include:

2.1. quotas to achieve equal representation of women and men;

[…]

8. Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) *for each gender, including their governing and decision-making bodies.*

Article 13
Ombudsperson

Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson.

Law No. 05/L-021 on the Protection from Discrimination

Article 6
Other justified treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is

justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim.

Article 9
Ombudsperson

[…]

2. The Ombudsperson has the following competences:

2.13. Ombudsperson may be presented in the quality of a friend of the court (amicus curiae) in proceedings related to issues of equality and protection from discrimination;

Admissibility of the Referral

63. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure have been met.

64. 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.

65. In addition, the Court also examines whether the Applicants fulfilled the admissibility requirements as provided by the 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...".

66. With regard to the fulfillment of these criteria, the Court notes that the Applicants have fulfilled the criteria set out in paragraph 7 of Article 113 of the Constitution, as they are authorized parties, challenge acts of a public authority, namely the Decision [Aa. No. 4/2020] of 19 February 2020 of the Supreme Court and the Decision [Aa. No. 3/2020] of 19 February 2020 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicants also clarified the fundamental rights and freedoms that they claim to have been violated, in accordance with Article 48 of the Law, and submitted the Referral within the time limit set out in Article 49 of the Law.

67. Accordingly, based on the above, the Court declares the Referral admissible and will consider its merits in the following.

Merits of the Referral

68. The Court recalls that the Applicants allege that their rights protected by Articles 7 [Values], 24 [Equality Before the Law], 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

69. In sum, the Court recalls that the Applicants, in essence, allege that the decision-making of the CEC, the ECAP and of the Supreme Court is unconstitutional due to the fact that:

(i) the interpretation of Article 112.2 (a) of the Law on General Elections by the three previous institutions (CEC, ECAP and Supreme Court), clearly violates the principle of non-discrimination within the meaning of paragraph 2 of Article 24 of the Constitution and that an interpretation that it has been made to that legal provision is also contrary to the Constitution, Law No. 05/L-020 on Gender Equality and Law No. 05/L-021 on the Protection from Discrimination;
(ii) the challenged decisions according to the interpretation of Article 112.2 (a) of the Law on General Elections violate the principle of proportionality within the meaning of paragraph 2 of Article 55 of the Constitution, a restriction which denies the essence of a guaranteed

right; namely the right to be elected guaranteed by Article 45 of the Constitution;

(iii) the challenged decisions for the replacement of the deputy/ies with the next candidate/s which determining basis is the "*gender*" of the candidate/s, excluding the right gained through the free expression of the political will - vote, of certain candidates in a waiting row, is contrary to paragraph 2 of Article 7 of the Constitution and Article 45 of the Constitution.

70. In this regard, the Court notes that the substance of the case raised by the Applicants refers to the aspect of "*equality before the law*" and of "*the right to be elected*" in the process of implementing the Law on General Elections in the case of replacement of the deputies of the Assembly of the Republic of Kosovo.

71. It follows that the constitutional complaint in this case concerns the fact: Has Article 112.2 (a) of the Law on General Elections been applied by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, the values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR?

72. To give a concrete answer to this constitutional complaint, in the following Court will present (i) the general principles of the Constitution and the ECHR regarding equality before the law and the right to be elected; (ii) summaries of the opinions and reports of the Venice Commission on gender equality, in particular gender quotas as special measures to address the factual gender inequality in political representation; and, subsequently, will (iii) apply all of these principles to the circumstances of the present case in order to provide the final answer in the present case.

General principles deriving from the Constitution and the ECHR regarding equality before the law and the right to be elected

73. The Republic of Kosovo is determined for a constitutional order in which gender equality is one of the fundamental values. This value has a direct impact on the democratic development of society and the realization of equal opportunities for women and men in political, economic, social, cultural and other areas of social life (see Article 7 of the Constitution).

74. The need to create equal opportunities creates for the state positive obligations for the use of various instruments and measures, including legal norms, in order to eliminate *factual inequalities* between women and men. In the context of ensuring gender equality, the Law on General Elections defines the gender quota of under-represented gender representation in the 30% quota. The issue of under-represented gender in the applicable legislation is called "*minority gender*", without specifying which gender it is specifically, due to the fact that at different times the minority gender may be one or the other (read in this context Article 24 of the Constitution and Article 27 of the Law on General Elections).

75. According to the Constitution, it is expressly provided that the principles of equal protection do not prevent the imposition of necessary measures for the protection and advancement of the rights of individuals and groups who are in an unequal position (see Article 24.3 of the Constitution). Such special measures are instruments by which the state, namely the Republic of Kosovo, develops the policy of equal opportunities, as well as mitigates or eliminates *factual inequality*. Such measures can be implemented indefinitely, but only until the realization of the purpose for which they are set.

76. On the other hand, with regard to Article 45 of the Constitution, the Court notes that this constitutional norm guarantees the right to elect (the active aspect of the vote) as well as the right to be elected (the passive aspect of the vote) (see, for more on these two aspects, the cases of the Constitutional Court where various issues related to Article 45 of the Constitution have been addressed: KI01/18, with Applicants *Gani Dreshaj and the Alliance for the Future of Kosovo (AAK),* Judgment of 4 February 2019 ; KI48/18, Applicants *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019). More specifically, the passive aspect of the vote that is reflected in the right to be elected, represents a specific right relevant in the present case, it belongs to the candidates as individuals, namely as natural persons, who run in the elections, at local or central level, as well as political entities, respectively legal entities running in elections, at local or central level.

77. The rights guaranteed by Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR are fundamental rights towards establishing and maintaining the foundations of an effective and valid democracy governed by the rule of law. However, these rights are not absolute. Both the Constitution and the ECHR allow a space for "*implicit restrictions*" in which field the state has a wide margin of appreciation (see the case of the Constitutional Court, KI207/19, Applicant *NISMA Social Democratic, New Kosovo Alliance and the Justice Party*, Judgment of 10 December 2020, paragraphs 148-153, and references cited therein: the case of the ECHR, *Yumak and Sadak v. Turkey*, Judgment of 8 July 2008, paragraph 109 and references cited therein).

78. The ECtHR has clarified that as an article with special features, Article 3 of Protocol No. 1 of the ECHR does not contain a list of legitimate aims which would justify the restriction of the exercise of the right guaranteed by this article. It also does not refer to the "legitimate aims" which are exhaustively set out in Articles 8 to 11 of the ECHR. As a result, the ECtHR has emphasized that states are free to invoke their "*specific purposes*" when restricting the exercise of this right provided that such purposes are: (i) in accordance with the rule of law; and (ii) the general objectives of the Convention (see the case of Court KI207/19, cited above, paragraphs 148-153 and the references cited therein).

79. Furthermore, regarding the interpretation of the guarantees embodied in Articles 24 and 45 of the Constitution, the Court refers to the case law of the ECtHR (with particular emphasis on the case *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009), in the context of the application of the equivalent articles, namely Article 14 (Prohibition of

discrimination) in conjunction with Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

80. Article 14 of the ECHR complements the other essential provisions of the Convention and its Protocols. This article does not act independently as it has effect only in relation to the "enjoyment of rights and freedoms" protected by other provisions. Although the application of Article 14 does not presuppose a violation of those provisions - and to this extent is autonomous, there can be no room for its application unless the facts in question fall "*within the scope*" of one or more of the latter (see, cases of the ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 39; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, paragraph 71; *Petrovic v. Austria*, Judgment of 27 March 1998, paragraph 22; and *Sahin v. Germany*, Judgment of 8 July 2003, paragraph 85). The prohibition of discrimination in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee. This article also applies to those additional rights that fall within the general scope of each article of the ECHR, which the state has decided to provide voluntarily. This principle is well based on the case law of the ECtHR (see case *"case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), Judgment of 23 July 1968*,* paragraph 9*; Stec and Others v. The United Kingdom (December*), para. 40; and *EB v. France, Judgment of 22 January 2008,* paragraph 48).

81. According to the case law of the ECtHR, for the purposes of Article 14 of the Convention, the treatment is discriminatory if "*there is no objective and reasonable justification*", namely if it does not pursue a "*legitimate aim*" or if there is no "*reasonable relationship of proportionality between the means employed and the aim sought to be achieved*" (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 94, pp. 35-36, p. 72). The ECtHR noted that the Contracting States enjoy a certain margin of appreciation as to whether and to what extent differences in similar situations justify a different treatment (see ECtHR case *Willis v. the United Kingdom*, Judgment of 11 June 2002, paragraph 39).

82. The ECtHR has also emphasized that Article 14 of the Convention does not exist independently, but plays an important role in complementing the other provisions of the Convention and its Protocols, as it protects individuals, placed in similar situations, from any discrimination in enjoyment of the rights defined by other provisions. When there are allegations of a violation of an essential provision of the Convention on which it is based, both in itself and in relation to Article 14, and a particular violation of substantive Article has been found, it is not generally necessary for the Court to examine the case under Article 14 as well, although the position is different if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see ECtHR case: *Dudgeon v. the United Kingdom*, Judgment of 22 October 1981, Series A No. 45, p. 26, paragraph 67, and *Chassagnou and Others v. France*, No. 25088/94, Claim No. 28331/95 and application no. 28443/95, paragraph 89, ECHR 1999-III).

83. The ECtHR has often underlined that Article 14 merely complements the other essential provisions of the Convention and its Protocols (see the ECtHR cases: *Molla Sali v. Greece*, Application No. 20452/14, Judgment of 19 December 2018, paragraph 123 *Carson and Others v. the United Kingdom*, Application No. 42184/05, Judgment of 16 March 2010, paragraph 63; *EB v. France*, Application No. 43546/02, Judgment of 22 January 2008, paragraph 47; *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, paragraph 32). This means that Article 14 does not prohibit discrimination as such, but only discrimination in the enjoyment of "the rights and freedoms set forth in the Convention". In other words, the guarantee provided for in Article 14 does not exist independently (Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* ("Belgian language case"), applications no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, paragraph 9 in Part "Law"; *Carson and Others v. the United Kingdom* paragraph 63; *EB v. France*, cited above, paragraph 47) and that this article forms an integral part of each of the articles defining rights and freedoms (*Belgian language issue*, cited above, paragraph 9 of the "Law" section; *Marckx v. Belgium*, cited above, paragraph 32; *Inze v. Austria*, application no. 8695/79, Judgment of 28 October 1987, paragraph 36). In practice, the ECtHR always examines Article 14 in conjunction with another essential provision of the Convention.

84. Finally, not all differences in treatment - or failure to treat persons differently in relatively different situations - constitute discrimination, but only those without "*an objective and reasonable justification*" (see ECtHR cases: *Molla Sali v. Greece*, application no. 20452/14, Judgment of 19 December 2018, paragraph 135; *Fabris v. France*, application no. 16574/08, Judgment of 7 February 2013, paragraph 56; *D.H. and Others v. Czech Republic*, application no. 57325/00, Judgment of 13 November 2007, paragraph 175; *Hoogendijk v. the Netherlands*, application no. 58641/00, Decision on Inadmissibility of 1 June 2005).

85. In deciding the discrimination issues, the ECtHR applies the following test:

> 1. Has there been a difference in the treatment of persons in analogous or relatively similar situations - or a failure to treat persons in relatively different situations differently?
> 2. If so, is such a difference objectively justified - or the absence of such a change in treatment? In particular: a. Does it pursue a legitimate aim? b. Are the remedies used reasonably proportionate to the aim pursued?

Summary of Opinions and Reports of the Venice Commission for Gender Equality [CDL-PI(2016)007], OSCE/ODIHR and others

86. International practice shows that special measures imposed on different systems to address factual inequalities in gender representation - are legal arrangements that require a minimum percentage of minority gender representation. As such and in so far as they serve such a purpose, these special measures shall not be regarded as contrary to the principle of equal voting.

87. Some national legislations and practices of some European parties have gone a step further in introducing quotas with the aim of improving gender balance or, more directly, achieving equal representation of women and men in the elected body. While these practices are specific to countries and political parties, the introduction of gender equality measures is gradually becoming the dominant trend. Otherwise, persistent and recurring situations of gender unequal representation can in no way be considered evidence of good practice.

88. On this basis, gender quotas aim to improve gender balance in politics. Among other things, they specify the minimum percentages of women candidates for election, usually in the party lists. Furthermore, there may be provisions for the order of ranking in the list.

89. Gender quotas can be legally set ("*legal quota*" or "*mandatory quota*"), or they can be approved voluntarily by political parties ("*voluntary quota*" or "*party quota*"). Legal quotas are mandatory for all parties nominating candidates for parliament, while party quotas are only self-binding for the respective party. Both types of quotas can play an important role in the electoral process.

90. According to the Venice Commission and the Committee of Ministers of the Council of Europe, gender electoral quotas can be considered as "*an appropriate and legitimate measure to increase women's parliamentary representation*". The 2009 Declaration of the Committee of Ministers "Making Gender Equality a Reality" urges member states to allow positive actions or specific measures to be adopted in order to achieve balanced representation in political and public decision-making.

91. Similarly, in accordance with OSCE Decision no. 7/09 on the Participation of Women in Political and Public Life, the Council of Ministers calls on the participating States to *"Consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making"*, and *"Encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender-balanced representation in elected public offices at all levels of decision-making"*. Consequently, the Court notes that all such steps are considered good practice.

92. The Council of Europe and the OSCE recognize that legislative measures are effective mechanisms for promoting women's participation in political and public life. On the other hand, Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) makes it clear that "*adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination…"*. As such, and in light of the historical inequalities suffered by women across the OSCE region and globally, states may issue specific legal requirements or impose other measures aimed at ensuring equal participation of women in political life and as candidates.

93. The guidelines for the regulation of political parties acknowledge that *"the small number of women in politics remains a critical issue that undermines*

the full functioning of the democratic process". Therefore, *"electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation"*.

94. There are various socio-economic, cultural and political factors that may hinder women's access to the political arena. Structural barriers in society that limit women's political representation are not easy to remove and fundamental change requires a lot of time and effort. Thus, for example, changing the electoral system by introducing quota rules may provide a practical alternative to increase women's representation. The Venice Commission, in *its Code of Good Practice in Electoral Matters*, considered that legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered contrary to the principle of equal suffrage if they have a constitutional basis.

95. The analysis of electoral systems of gender quota and their implementation in Europe shows that one type of gender electoral quota for public elections is in use in 35 countries. Thirteen countries (Albania, Belgium, Bosnia and Herzegovina, France, Greece, Ireland, Montenegro, Poland, Portugal, Serbia, Slovenia, Spain and Northern Macedonia) have incorporated legal quotas that are mandatory for all political parties. Voluntary quotas of the parties have been implemented in 22 countries, meaning that at least one of the political parties represented in parliament has included gender electoral quotas in its statutes. In six countries, no gender quota is in use for national elections.

96. However, it should be noted that in the European experience, although gender quotas are an effective means of increasing the presence of women in political bodies, they do not automatically result in equal representation of women and men. Quotas should include rules regarding ranking and relevant sanctions for non-compliance. […]".

97. The Venice Commission and the OSCE/ODIHR have on several occasions stated that "*the small number of women in politics remains a critical issue that undermines the full functioning of democratic processes*". In accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Report on the Method of Nomination of Candidates within Political Parties considers electoral quotas as interim special measures that may act as an "*appropriate and legitimate measure to increase women's parliamentary representation"* It is up to each state to decide how to improve the gender equality. However, the Venice Commission considers that, if legal quotas are set, they "*should provide for at least 30 percent of women on the lists" of parties, while 40 or 50 are preferable*", in order to be effective.

98. In addition, the Court notes that the relevant parts of Resolution 1706 (2010) on increasing the representation of women in politics through the electoral system adopted by the Parliamentary Assembly on 27 January 2010, establish the following:

> *"4 […] Changing the electoral system to one more favourable to women's representation in politics, in particular by adopting gender quotas, can*

lead to more gender-balanced, and thus more legitimate, political and public decision making.

6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:

6.3. reforming their electoral system to one more favourable to women's representation in parliament:

6.3.1. in countries with a proportional representation list system, consider introducing a legal quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for a strict rank-order rule (for example, a "zipper" system of alternating male and female candidates), and effective sanctions (preferably not financial, but rather the non-acceptance of candidacies/candidate lists) for non-compliance […];"

99. The relevant parts *of Resolution 2111 (2016) on the impact assessment of measures to improve the political representation of women*, adopted by the Parliamentary Assembly on 21 April 2016, define as follows:

"2 Electoral quotas are the most effective means of achieving significant, rapid progress, provided that they are correctly designed and consistently implemented. Quotas should be adapted to the electoral system in force, set ambitious targets and be coupled with stringent sanctions for non-compliance".

100. The Preamble of *Recommendation Rec (2003) 3 on the balanced participation of women and men in political and public decision-making*, adopted by the Committee of Ministers on 12 March 2003, provides that:

"[…] balanced participation of women and men in political and public decision-making is a matter of the full enjoyment of human rights, of social justice and a necessary condition for the better functioning of a democratic society".

Application of the abovementioned Principles in the present case

101. The Court first recalls that the Applicants, in the elections of 6 October 2019, in the capacity of candidates for deputies from the ranks of the political entity LVV had achieved the following election result: the first Applicant, Mrs. Tinka Kurti - 7655 votes; and, the second Applicant, Mrs. Drita Millaku - 7063 votes. Meanwhile, on the other hand, the candidate Eman Rrahmani achieved an election result according to which he had won 611 votes less than the first Applicant and 19 votes less than the second Applicant.

102. On this basis, the Court notes that on the occasion of the formation of the Government of the Republic of Kosovo, the deputies of the political entity LVV, who were elected to government positions, vacated 5 positions of deputies. Therefore, the candidate Enver Haliti with 7,777 votes replaced the deputy Albin Kurti; candidate Alban Hyseni with 7,767 votes replaced the deputy Glauk Konjufca; candidate Arta Bajralia with 7,674 votes replaced the deputy Albulena Haxhiu; candidate Fitim Haziri with 7,542 votes replaced the deputy Arben Vitia; candidate Eman Rrahmani with 7,044 votes replaced the deputy Haki Abazi. Later, the candidate Taulant Kryeziu with 6968 votes replaced the deputy Shpejtim Bulliqi.

103. The abovementioned facts and the challenged decisions prove that all the replacements in the previous legislature of the Assembly were made on the basis of the replacement within the same gender (man-man and woman-woman), referring to the direct application of Article 112.2 (a) of the Law on General Elections. These replacements were made without taking into account the election result scored by the candidates for deputies after fulfilling the legal quota of 30% set out in Article 27 of the Law on General Elections.

104. In this respect, as defined above, the Court reiterates that the main aspect of this constitutional complaint concerns the fact that: *Has Article 112.2 (a) of the Law on General Elections been applied by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, the values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR?*

105. In this regard, the Court recalls that the above-mentioned replacements of former deputies with new deputies were necessary as a total of 6 LVV deputies were appointed to government or municipal positions. This necessity of replacing the deputies has automatically activated the legal provisions established in Article 112.2 (a) of the Law on General Elections.

106. This special article - which is a key article in this case - specifies the manner of replacement of deputies. Specifically, the article in question reads as follows:

> *"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*
>
> *a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; [...]."*

107. Following complaints by the two Applicants that they were being unfairly and discriminatory denied the right to be elected, the CEC, the ECAP and the Supreme Court had to interpret this specific article and apply it in the circumstances of the present case. The Applicants essentially alleged that despite the completion and exceeding of the quota of 30% by the female candidates for deputies from LVV - the replacements for deputies were made not based on the election result but based on gender. According to them, this has caused inequality in treatment and violation of their right to be elected.

108. The CEC implemented this article so that all replacements of deputies were recommended to be made with the next candidate of the same gender, regardless of whether the quota of 30% of the underrepresented gender was met or not. Thus, the CEC recommended that the candidate Eman Rrahmani with 7,044 votes becomes a deputy - surpassing the female candidate from line for the replacement, Tinka Kurti with 7,655 votes and the other female candidate Drita Millaku, with 7,063 votes. The two women candidates in question - the Applicants before this Court - had more votes than the male candidate, Eman Rrahmani. However, based on the CEC interpretation of Article 112.2 (a) of the Law on General Elections, the replacements were made only and exclusively within the same gender.

109. The ECAP further confirmed the way as to how the CEC interpreted Article 112.2 (a) of the Law on General Elections in the Applicants' circumstances. ECAP clarified that pursuant to the same article, the replacement was made in such a way that male deputies were replaced with the next male candidates, while female deputies were replaced with the next female candidates. Consequently, according to the ECAP, the CEC decision was "*fair and based on law, since the replacements for members of the Assembly of the Republic of Kosovo are made by taking into account the next candidate of the same gender and the same political entity, as it is acted in the present case"*.

110. This logic of interpretation and this rationale for implementation was also supported by the Supreme Court when it fully confirmed the legal decisions at the level of the ECAP and the CEC. According to the Supreme Court, Article 112.2 (a) of the Law on General Elections has provided for the manner of replacement of deputies so that the replacement is made with new deputies from the same political entity and according to the same gender. This way of replacement provided by law, according to the Supreme Court, could not be avoided by either the CEC, the ECAP or the Supreme Court because there is an assumption that the laws are in compliance with the Constitution and that they should be implemented as they are "*until by the Constitutional Court is found that a law or any of its legal provisions is contrary to the Constitution*". Therefore, according to the Supreme Court, the legal solution provided by Article 112.2 (a) of the Law on General Elections cannot be said to be unconstitutional.

111. However, the Constitutional Court does not agree that the interpretation of this Article by the CEC, the ECAP and the Supreme Court is an accurate and constitutional interpretation, for the reasons that will be extensively stated in the following reasoning of this Judgment.

112. As a preliminary issue it should be clarified that the Court is not assessing *in abstracto* whether or not Article 112.2 (a) of the Law on General Elections is in compliance with the Constitution. This is due to the fact that, neither before this Court nor before the previous public institutions that have addressed this issue, the Applicants have never alleged that the article in question is unconstitutional. On the contrary, they only claimed that this article was unconstitutionally implemented by the CEC, ECAP and the Supreme Court.

Consequently, the Court's assessment in this case is a concrete assessment which is limited to reviewing the constitutionality of the challenged decisions of the Supreme Court and whether these decisions are in compliance with Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR.

113. Having said that, the Court is of the opinion that both the CEC, but also the ECAP and the Supreme Court, have interpreted Article 112.2 (a) of the Law on General Elections in a rigid and textual manner and in isolation from all other legal norms provided by the Law on General Elections and the Law on Gender Equality as well as the principles, values and spirit of the letter of the Constitution. This type of interpretation has abstracted the context, purpose and reason for setting the 30% quota, as a special measure to help in achieving equal representation between the two genders in the Assembly of the Republic.

114. According to such an interpretation of the legal norm, the replacement of LVV deputies at that time was made by the next LVV candidates for deputies of the "*same gender*", so that male deputies were replaced by male deputies - without taking into account the effect of the election result achieved by women candidates for deputies after meeting the quota of 30% representation of the under-represented gender (in this case female gender).

115. The textual interpretation of the key concept of this case that the replacement be made exclusively and only by the same gender, regardless of the relevant factual circumstances in terms of the application of gender quotas and their purpose, has led to a decision where the CEC has avoided implementation of the result of the voting of candidates for deputies in favor of the *in blanco* application of Article 112.2 (a) of the Law on General Elections which provides that the replacement is made by the "*next eligible candidate of the same gender*". This interpretation of the CEC, subsequently approved by the ECAP and the Supreme Court, in practice has resulted in the winning of mandates by male candidates, despite the fact that female candidates (the Applicants) had won more votes in a situation **after meeting the legal quota of 30%** for representation of the minority gender.

116. The reasoning of the Supreme Court regarding the legal determination provided by Article 112.2 (a) of the Law on General Elections cannot be avoided either by the CEC, the ECAP or the Supreme Court. *"until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution"*- requires a separate answer for at least the following two reasons.

117. The first concerns the fact that this Court considers it extremely important to emphasize the competence and constitutional obligation of the regular courts and of all public authorities to decide cases before them not only on the basis of law but also on the basis of the Constitution. More specifically, the Court has already stated that based on Articles 102.3 and 112.1 of the Constitution, all regular courts, "*including the Supreme Court as the highest judicial instance at the level of the Republic, are obliged to interpret laws in accordance with the Constitution*". The Court further noted that: *"the Constitution recognizes the authority to interpret the Constitution as well as the authority to interpret*

laws in accordance with the Constitution to all courts and other public authorities in the Republic of Kosovo. However, the Constitutional Court is the only authority in the Republic of Kosovo with exclusive constitutional authority to repeal a law or legal norm as well as to make the final interpretation of the Constitution and the compatibility of laws with it" (see, more, regarding the competencies and obligations of the regular courts regarding the application of constitutional norms, the case of Court KI207/19, cited above, paragraphs 112-130).

118. The second concerns the fact that in this particular case the constitutionality of Article 112.2 (a) of the Law on General Elections was never subject to review. In this case, the issue coincides with the interpretation of this legal norm in relation to the general constitutional principles as well as in relation to other relevant legal norms from the Law on General Elections and the Law on Gender Equality that had to be taken into account to clearly define what is the correct way of replacing deputies in the phase after the fulfillment of the legal quota of 30%. In such circumstances, the task of the CEC, the ECAP and the Supreme Court was to take into account all legal and constitutional norms related to quotas and their purpose and not to make an interpretation based on a single article.

119. Interpretation of Article 112.2 (a) of the Law on General Elections according to the interpretation by the CEC, ECAP and the Supreme Court would only make sense in the situation where it may occur that gender-for-gender (woman-for-woman or man-for-man) non-replacement could risk not meeting the legal quota of 30% of under-represented gender representation. However, the interpretation of this article, as it is done, when it is known that in the elections of 6 October 2019 women candidates of the political entity LVV managed to get meritorious votes beyond the legal quota of 30%, is an erroneous interpretation of this norm and inconsistent with the very purpose of the legal quotas set forth in Article 27 of the Law on General Elections.

120. The Court notes that the interpretation of this legal norm in the manner set out in this Judgment may present situations where in the phase after meeting the 30% gender quota, the deputies of minority gender could be replaced by deputies of majority gender, based on the election results. For example, it may happen that a woman holding a government post will be replaced by a man who, in terms of the votes won after meeting the 30% quota, is in line as a candidate to become a deputy. But, the opposite can also happen, that a man who takes a government post will be replaced by a woman who, in terms of the votes won after meeting the 30% quota, is in the line as a candidate to become a deputy, as should have happened with the cases of the Applicants of this case. The only situation that can never happen based on the legislation in force and the final interpretation given by this Judgment is the risk of representation in the quota of 30%.

121. The purpose of setting quotas, as further analysis will show, is related to the need to advance gender equality within a society until factual equality is achieved when quotas become unnecessary. Article 112.2 (a) of the Law on General Elections exists for a single reason: to present the manner of

replacement of deputies - always preserving the purpose of legally binding representation of at least 30% of the minority gender. If, after meeting the 30% norm, the candidates from minority gender manage to become deputies on their own, achieving a better result than members of the majority gender, they should not be denied the right to be elected deputies to the Assembly.

122. In relation to the requirements deriving from Article 24 of the Constitution and Article 14 of the ECHR as well as Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR, the Court notes that the preliminary issue to be defined is whether there was a difference in treatment between the Applicants and the deputies of the Assembly who were elected from the list of replacing candidates for candidates for deputies.

123. While in the present case the difference in treatment is based on the gender of the candidates, the concept of reasonable and objective justification must be strictly interpreted. Having said that, it is also worth mentioning that Article 24 of the Constitution and Article 14 of the ECHR do not prohibit the different treatment of groups in order to correct "*factual inequality*" between them. In fact in certain cases failure to correct inequalities through different treatment may, without a reasonable and objective justification, constitute a violation of that article (see ECtHR cases: Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, cited above, paragraph 10; *Thlimmenos v. Greece*, Judgment of 6 April 2000, paragraph 44; and *D.H. and Others v. Czech Republic*, Judgment of 13 November 2007, paragraph 175; *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 44).

124. Returning to the present case, underlining the abovementioned results of the general elections for the Assembly, the Court notes that it is evident that within the political entity LVV, based on the election results of the general elections of 6 October 2019, it turns out that the latter as a political entity had won 29 seats of deputies. The Court also notes that all deputies were elected on the basis of the election result, where out of 29 deputies, 10 deputies were women, while 19 were male deputies. So, this result consists in the conclusion that women candidates within the political entity LVV, won over 34% of the seats of the political entity LVV. Consequently, the difference in treatment between the Applicants and the deputies of the Assembly who were elected from the list of replacing candidates for candidates for deputies, regarding the replacement of members of the Assembly, was *determined by law*, namely by Article 112.2 (a) (Replacement of Assembly Members) of the Law on General Elections.

125. The Court will further assess whether the challenged Decision meets the requirements for *pursuing a legitimate aim* and is in accordance with the *principle of proportionality*.

126. In the circumstances of the present case, the Court notes that based on the assessment of the CEC, the ECAP and the Supreme Court, in order for the candidate to be eligible to replace the deputies, the primary criterion was gender of the candidate, while the second criterion was the election result for candidates of the list of candidates of the political entity LVV. So, the election

result achieved by the candidates for deputies based on the first assessment is affirmed (as it is primary to replace deputies with candidates for deputies of the same gender), while the election result comes into play only in determining the ranking of candidates within the same gender.

127. On this basis, the Court notes that the concept of gender quota, as well as the promotion of gender equality, remains a key objective in the member states of the Council of Europe. Also, the institutions of this organization consider that the lack of gender equality in policy-making poses a threat to democratic legitimacy and a violation of gender equality (see paragraphs 86-100 of this Judgment which reflect these principles in more detail). A similar approach is contained in the Law on General Elections, which contains the obligation to represent the under-represented gender in the 30% gender quota (see Article 27 of the Law on General Elections).

128. The Court notes that the Law on General Elections contains the obligation of a gender quota as a form of representation in the Assembly, at *a minimum of 30% for the under-represented gender*. Thus, the allocation of seats works in such a way that after the allocation of seats for political entities, if the minority gender candidates are not allocated at least 30% of the total number of seats of the political entity, the last elected candidate of the majority gender, is replaced by another candidate of the opposite gender in the rearranged list of candidates, until the total number of seats allocated for the minority gender is at least 30% (see Article 111.6 of the Law on General Elections, based on the amendments made with the Law on Supplementing and Amending the LGE - these articles are quoted in the part of constitutional and legal provisions).

129. In the context of the gender quota set out in the Law on General Elections, the Court also recalls paragraph 3 of Article 24 of the Constitution which stipulates that:

> *Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

130. Therefore, similar to Article 24 of the Constitution, Article 14 of the ECHR also does not prohibit the member states the different treatment of groups in order to correct "*factual inequality*" between them. In fact in certain cases failure to correct inequalities through different treatment may, without a reasonable and objective justification, constitute a violation of that article (see ECtHR cases: Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, cited above, paragraph 10; *Thlimmenos v. Greece*, cited above, paragraph 44; and *D.H. and Others v. Czech Republic*, cited above, paragraph 175; *Sejdić and Finci v. Bosnia and Herzegovina*, cited above, paragraph 44).

131. The Court considers that the meaning of equality intended in the present case has another dimension, namely positive discrimination or the determination of a gender quota for the representation of women in the capacity of the

underrepresented gender, which is considered to be in line with the spirit of constitutional ideals and the constitutional identity of the Republic of Kosovo. Consequently, the constitutional principles of gender equality and non-discrimination remain crucial and that the issue of gender quotas, for historical and cultural reasons, as well as the elimination of *factual inequalities* between women and men, is in line with the spirit of the constitutional normative system. Finally, the concept of gender equality and non-discrimination is dynamic and evolves towards meeting the sublime ideal of equality in representation of women and men in the 50% to 50% ratio.

132. The Court therefore notes that the purpose of the Law on General Elections in the context of gender representation within the Assembly is to provide for representation of the underrepresented gender (minority gender), which may not be less than 30%. However, clearly, 30% represents the minimum limit of gender representation of the minority gender, but not the highest limit of representation of the underrepresented gender.

133. In the same spirit is Article 112 of the Law on General Elections, which serves to show the manner of replacement of deputies, in which case candidates of the same gender are replaced as a way to maintain the minimum threshold of representation of the underrepresented gender in the quota of 30%. However, in the case of the Applicants, it happened that in the case of the replacement of deputies as a result of the above circumstances (election of deputies in government positions), at the moment when they were replaced by candidates of the same gender, it resulted that deputies Fitim Haziri and Eman Rrahmani to have less votes than the Applicant Tinka Kurti, while in the case of the Applicant Drita Millaku, only the candidate Eman Rrahmani had less votes.

134. The Court considers that this measure set out in the Law on General Elections, namely the determination of the minimum representation of the minority gender to a minimum of 30%, as such is necessary in order to enable the representation of the under-represented gender in the Assembly, namely women. As such, this definition of the law on gender quotas, in principle, does not constitute a violation of the voting rights. However, in the circumstances of the present case, while the minimum quota of representation within the political entity LVV has been achieved entirely based on the election result of the elections of 6 October 2019, there is no need to apply a gender quota of 30%. Consequently, the female candidates within the political entity LVV had won 10 out of 29 seats, or over 34% of the seats within the total number 29. Therefore, as a result of the election result, the use of the gender quota has been consumed, as the legitimate aim for which it exists has already been met and exceeded through the election result.

135. Therefore, at the moment of replacement of the candidates for deputies, in which case Fitim Haziri and Eman Rrahmani were elected as deputies, based on the replacement of the same gender, it turned out that *the essence of the election result* for the Applicant Tinka Kurti was violated, while for the Applicant Drita Millaku, the essence of the election result was violated only in relation to the candidate Eman Rrahmani. Thus, such a measure (gender quota 30%) set to eliminate factual inequalities between women and men, in this case

has continued to be implemented, despite the fact that the goal for which it was set has already been achieved through the election result by the women candidates within the LVV.

136. This is due to the fact that once a minimum representation of 30% is ensured for the underrepresented gender, all future replacements must be made on the basis of the ranking of candidates for deputies, which is determined by the election result. On this basis, the gender quota is applied only until the goal for which it has been set is achieved, namely to ensure the mandatory minimum representation of the minority gender in the 30% quota.

137. At the moment when this minimum gender quota is achieved or exceeded through the election result of the candidates for deputies, the goal that is intended to be achieved through the norm remains without effect. If it were otherwise, the gender quota of 30% would mean that it stands to ensure a *status quo*, as it does not affirm representation beyond the 30% quota for the underrepresented gender, in cases when the deputies of the Assembly are replaced. Such an isolated and rigid interpretation of the legal norm that regulates the manner of replacement of deputies is contrary to the very *ratio legis* of the Law on General Elections, which aims to advance representation of women in the Assembly, as an underrepresented or minority gender in the current political and historical circumstances.

138. Therefore, on these premises, and as long as the minimum representation of 30% has been achieved, namely exceeded based on the election result of the elections of 6 October 2019, this ranking of candidates for deputies who replace deputies should consist, as in following: Applicant (1) Tinka Kurti has 7,655 votes, followed by (2) Fitim Haziri with 7,542 votes, followed by Applicant (3) Drita Millaku with 7,063 votes and (4) Eman Rrahmani with 7,044 votes.

139. Therefore, the Court considers that in the present case the Applicant Tinka Kurti has been discriminated against on the basis of gender, at the moment when despite fulfilling the minimum quota of 30% through the election result within the political entity LVV, at the moment when the opportunity of replacement of the deputies arose, the latter even though she had more votes than the candidates for deputies Fitim Haziri and Eman Rrahmani, was not enabled to be elected a deputy. Therefore, the Court finds that against the Applicant Tinka Kurti, by Decision [AA. No. 4/2020] of 19 February 2020, of the Supreme Court there has been a violation of Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

140. With regard to the Applicant Drita Millaku based on the same circumstances mentioned above, she was discriminated against on the basis of gender in relation to her right to be elected, when despite meeting the minimum quota of 30% through the election result within the political entity LVV, at the moment when the opportunity for future replacements of deputies was created, namely when the deputy Shpejtim Bulliqi resigned, in his place, based on the

determination for replacement within the same gender, on 18 December 2020, the deputy Taulant Kryeziu took over the deputy mandate with 6968 votes.

141. Therefore, the Court finds that against the Applicant Drita Millaku by Decision [AA. No. 3/2020] of 19 February 2020, of the Supreme Court there has been a violation of Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

142. Finally, the Court also clarifies the fact that although Article 6.8 of the Law on Gender Equality provides that: "*Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent* (50%) *for each gender, including their governing and decision-making bodies;*". The Assembly as a legislator has not formulated this percentage as a mandatory legal quota, but has formulated it more in the form of a constitutional, legal and factual ideal that the democratic society of the Republic of Kosovo must achieve and that only after its achievement true factual equality is ensured. Thus, the 50% regulated in Article 6.8 of the Law on Gender Equality is not a legal quota for mandatory representation as is the 30% regulated in Article 27 of the Law on General Elections which specifically presents the obligation: "*In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female [...]*".

143. Although the constitutional ideal and spirit of the Constitution reflected in Article 7 aim at achieving 50% to 50% de facto equality between the two genders, the Constitutional Court is aware that it is not within its competence to set new public policies, nor to assess whether a public policy to date is good or appropriate. It is also not up to the Court to re-establish new legal quotas or increase the percentage of legal gender representation quotas in favor of either gender. The legislators of the Republic of Kosovo are the ones who have set the 30% quota as the only applicable legal quota, which should be maintained in any circumstance until the competent authorities decide to make legal changes in this regard, if they deem it necessary. It is also the legislators who have set 50% as the constitutional ideal of equal gender representation, emphasizing that equal gender representation is achieved only when 50-50 representation is provided for each gender.

144. However, all these important discussions fall into the domain of public policy-making issues, a domain that belongs to the Government and the Assembly on how they consider it to be the best way to achieve the ideal of 50-50 representation. For example, the Venice Commission states that if states decide to adopt legal quotas, then they "*should provide for at least 30 percent of women on party lists, while 40 or 50 are preferable*" in order for quotas to be effective.

145. The Court also deems it necessary to emphasize the obligation of the CEC, as a permanent body that prepares, supervises, directs and verifies all actions related to the electoral process, including the process of electing deputies and their replacement take into account the fact that within each political entity, at the moment when through the election result is achieved or exceeded the

fulfillment of the gender quota in the amount of 30% of the under-represented gender, (as was the case where women candidates have won more that 34% of seats), then whenever the need arises to replace candidates for deputies of the Assembly, the election result is valid, if the latter does not question the minimum representation of 30%. So, at the moment when the minimum representation of 30% is met based on the election result, then the deputies are replaced by the candidates for deputies who are ranked higher through the election result, as long as the minimum representation of 30% is maintained or not violated.

146. Finally, based on the abovementioned analysis, the Court concludes that: Decision [AA. No. 4/2020] of 19 February 2020, of the Supreme Court; Decision [AA. No. 3/2020] of 19 February 2020, of the Supreme Court; Decision of the Election Complaints and Appeals Panel (ECAP), [Anr. 35/2020], of 13 February 2020; Decision of the Election Complaints and Appeals Panel, [Anr. 36/2020], of 13 February 2020; as well as item 5 of the Decision of the Central Election Commission (CEC), [No. 102 /A-2020], of 7 February 2020, are in violation of Articles 24 [Equality Before the Law] and 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

Effects of the Judgment of the Constitutional Court

147. As stated above, both the challenged decisions of the Supreme Court, but also the decisions of the ECAP and the CEC, are not in compliance with Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

148. From the practical point of view of the implementation of the decisions of the Constitutional Court, the latter reiterates the fact that in all cases when a violation of human rights and freedoms is found, which cannot be completely repaired nor returned to zero point when the violation did not exist, the question arises as to the effect of the Judgment finding the violation in question.

149. The Court recalls that in its case-law, similar questions about the effect of the decision have been raised in several different cases, including the cases of the election issues (see in this respect the case of Court KI207/19, Applicant *Social Democratic Initiative, New Kosovo Alliance and the Justice Party*, Judgment of 5 January 2021, paragraph 240; see also Judgment of the Court in case KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraphs 149-151 where, among other references, cites the case of the ECtHR, *Kingsley v. the United Kingdom*, Judgment of 28 May 2002, paragraph 40; KI10/18, Applicant *Fahri Deqani*, Judgment of 8 October 2019, paragraphs 116-120; KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 1 October 2019, paragraph 196).

150. The Court notes that, for objective reasons and in the interest of legal certainty, this Judgment cannot produce retroactive legal effect in relation to the

mandates of deputies. In this regard, the Court clarifies that based on the principle of legal certainty, this Judgment has no retroactive effect and does not affect the rights of third parties acquired on the basis of decisions annulled by this Judgment. However, this Judgment is not merely declarative and without effect.

151. The Court reiterates the fact that although it does not have the legal authority to award compensation of damage in cases where it finds a violation of the respective constitutional provisions, such an aspect does not mean that the Applicants are not entitled to seek compensation from the public authorities in case of violation of their rights and freedoms based on the Constitution and applicable laws in the Republic of Kosovo.

152. The first effect of this Judgment is the repeal of the challenged decisions of the Supreme Court, the ECAP and the CEC, as incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 (a) of the Law on General Elections. Through the repeal of these preliminary decisions, this Judgment clarifies for the future that, based on a correct and contextual reading of Article 112.2 (a) of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: *first*, a minimum representation of 30% of the underrepresented gender (minority gender) is ensured, which cannot be questioned at any time; and *secondly*, in cases where the gender quota of 30% has been met based on the election result (as it was the case), then the replacements of candidates for deputies should be made on the basis of the election result, without being limited in terms of replacement based on of the same gender, as long as the minimum representation of the underrepresented gender is not endangered.

153. The second effect that this Judgment provides has to do with the right that for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force. These parties have the right to use other legal remedies available for the further exercise of their rights in accordance with the findings of this Judgment. This right with respect to the Applicants arises from the moment when they should have become deputies, if Article 112.1.a of the Law on General Elections were to be interpreted in accordance with the reasoning of this Judgment (see, *mutatis mutandis*, Judgment of the European Court of Human Rights in case of *Paunović and Milivojević v. Serbia*, of 24 May 2016, application no. 41683/06 - case where the ECtHR found a violation of Article 3 of Protocol No. 1 to the ECHR on the grounds that "*the termination of the applicant's mandate* [elected deputy of the Assembly] *was in breach of the* the *Election of Members of Parliament Act*", paragraphs 61-66 and paragraph 80).

Conclusions

154. The joined cases KI45/20 and KI46/20 are two cases concerning the disputes over the elections of 6 October 2019. The Referrals were submitted by two candidates (Tinka Kurti and Drita Millaku) for deputy coming from the Political Entity of VETËVENDOSJE Movement! (LVV) – who alleged that the CEC, ECAP and the Supreme Court had applied the manner of replacement of

deputies defined by Article 112.2 a) of the Law on General Elections in an unconstitutional way.

155. The Court recalls that some deputies of the political entity LVV, who were elected to Government/municipal positions, vacated some positions of deputies which had to be replaced by eligible candidates in the queue for deputies. Thus, from the deputies who vacated their seats, the following replacements were made: the candidate Enver Haliti with 7,777 votes replaced the deputy Albin Kurti; the candidate Alban Hyseni with 7,767 votes replaced the deputy Glauk Konjufca; the candidate Arta Bajralia with 7,674 votes replaced the deputy Albulena Haxhiu; the candidate Fitim Haziri with 7,542 votes replaced the deputy Arben Vitia; the candidate Eman Rrahmani with 7,044 votes replaced the deputy Haki Abazi. Later, the candidate Taulant Kryeziu with 6968 votes replaced the deputy Shpejtim Bulliqi.

156. The necessity of replacing the deputies automatically activated the legal provisions established in Article 112.2 a) of the Law on General Elections – an article that specifies the manner of replacing the deputies, with the following text:

> *"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*
> *a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; […]".*

157. The Court notes that, according to the interpretation of this article made by the CEC, ECAP, and the Supreme Court, all replacements were made based on the criterion of "*gender*" and irrespective of the result achieved by the candidates for deputy after the achievement of the legally required quota of 30% of underrepresented gender or minority gender. This manner of replacement provided by law, according to the Supreme Court, could not be avoided by either the CEC, the ECAP or the Supreme Court because there is an assumption that the laws are compatible with the Constitution and that they should be applied as they are "*until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution".*

158. Having disagreed with this interpretation, the Applicants submitted their Referrals to the Constitutional Court, under the key allegation that the CEC, ECAP and the Supreme Court have applied the manner of replacing the deputies provided by Article 112.2 a) of the Law on General Elections, in an unconstitutional manner. In essence, they alleged that despite reaching and exceeding of the quota of 30% by women candidates for deputy from LVV – replacements for deputies were not made based on the election result but based on gender. According to them, this has caused inequality in treatment and violation of their right to be elected.

159. The Court recalls that, on the basis of the replacement manner by the CEC, ECAP and the Supreme Court, men deputies were replaced by men candidates for deputy and women deputies were replaced by women candidates for deputy

– despite the fact that the Applicants received more votes that some of the male candidates who managed to get elected to the Assembly. The first Applicant, Tinka Kurti had collected 7655 votes while the second Applicant Drita Millaku had collected 7063 votes.

160. The Court clarified that it is not assessing *in abstracto* whether Article 112.2.a of the Law on General Elections is or is not compatible with the Constitution. This is due to the fact that, neither before this Court nor before the previous public institutions that have addressed this issue, the Applicants have never claimed that the article in question is unconstitutional. On the contrary, the Applicants have only alleged that this article was applied in unconstitutional manner by the CEC, ECAP and the Supreme Court.

161. Taking into consideration the above facts and the allegations raised in this case, the Court in this constitutional complaint dealt with the fact: Whether the Article 112.2.a of the Law on General Elections has been implemented by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol no. 1 of the ECHR?

162. The Constitutional Court found that the interpretation of this Article by the CEC, the ECAP and the Supreme Court is not an accurate and constitutional interpretation for some of the following reasons – which are extensively elaborated in the Judgment.

163. First, the Court found that the CEC, the ECAP, and the Supreme Court have interpreted Article 112.2 a) of the Law on General Elections in a rigid and textual manner and separated from all other legal norms set forth by the Law on General Elections and the Law on Gender Equality, as well as the principles, values, and the spirit of the letter of the Constitution. This type of interpretation has abstracted the context, purpose, and reason for setting the quota of 30% as a special measure to help achieve equal representation between the two genders in the Assembly of the Republic.

164. Secondly, the Court noted that the *ratio legis* of the Law on General Elections in the context of gender representation in the Assembly consists in providing – in any circumstance – representation of at least 30% of the underrepresented or minority gender (whatever it may be). However, obviously, 30% represents only the minimum limit of gender representation of the minority gender, but not the highest limit of representation of one gender. Consequently, the Court considers that, once a minimum representation of 30% is ensured for the underrepresented gender, all future replacements must be made on the basis of the ranking of candidates for deputy, which is determined by the election result. On this basis, the gender quota is applied only until the purpose for which it has been set is achieved, namely to ensure the mandatory minimum representation of the minority gender in the quota of 30%, although the constitutional ideal and spirit of the Constitution reflected in Article 7 aim to achieve factual equality of 50% to 50% between the two genders.

165. Thirdly, the Court pointed out that the interpretation of Article 112.2 (a) of the Law on General Elections according to the manner of interpretation by the CEC, ECAP and the Supreme Court would make sense only in the situation when non-replacements gender-for-gender (woman-for-woman or man-for-man) could risk non-compliance with the legal quota of 30% of representation for the underrepresented gender. However, the interpretation of this article in the way as it was done, knowing that in the elections of 6 October 2019, women candidates of the political entity LVV had managed to get meritorious votes beyond the legal quota percentage of 30%, is an erroneous interpretation of this norm and inconsistent with the very purpose of the legal quotas stipulated in Article 27 of the Law on General Elections.

166. Fourthly, the Court emphasized that the purpose of setting quotas relates to the need to advance gender equality within society until when the factual equality is reached and quotas become unnecessary. Article 112.2 a) of the Law on General Elections exists for a single reason: to introduce the manner of the replacement of deputies – by always preserving the purpose of mandatory legal representation of at least 30% of the minority gender. If, after meeting the 30% norm, minority (underrepresented) candidates manage to become deputies on their own, by achieving better results than members of the majority gender, they should not be denied the right to be elected deputy of the Assembly.

167. The Court found that the Applicant Tinka Kurti was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when the opportunity for the replacement of deputies emerged, even though she had more votes than the men candidates for deputies Fitim Haziri and Eman Rrahmani, she was not enabled to become a deputy.

168. Further, the Court also found that the Applicant Drita Millaku was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when the possibility for future replacements of deputies was created, namely when deputy Shpejtim Bulliqi resigned, in his stead, based on the determination for replacement within the same gender, on 18 December 2020, the mandate of the deputy was taken by the candidate Taulant Kryeziu with 6968 votes.

169. Consequently, the Court found that: Decision [AA. No. 4/2020] of the Supreme Court, of 19 February 2020; Decision [AA. No. 3/2020] of the Supreme Court, of 19 February 2020; ECAP Decision, [Anr. 35/2020] of 13 February 2020; ECAP Decision, [Anr. 36/2020] of 13 February 2020; as well as point 5 of the CEC Decision, [No. 102/A-2020] of 7 February 2020, are in contradiction with Article 24 [Equality Before the Law] and 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

170. Regarding the effect of Judgment, the Court for objective reasons and in the interest of legal certainty, this Judgment cannot produce retroactive legal effect in respect to the mandate of the deputies. In this regard, the Court clarified that this Judgment does not have a retroactive effect and based on the principle of legal certainty it does not affect rights acquired by third parties based on the decisions annulled by this Judgment. However, this does not mean that this Judgment is merely declaratory and without any effect.

171. The first effect of this Judgment is the repeal of the challenged decisions of the Supreme Court, the ECAP and the CEC, as being incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 (a) of the Law on General Elections. Through the repealing of these decisions, this Judgment clarifies for the future that, based on an accurate and contextual reading of Article 112.2 (a) of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: *firstly*, to ensure a minimum representation of 30% of the underrepresented gender (minority gender), which cannot be put into question at any time; and *secondly*, in cases where the gender quota of 30% has been met based on the election result (as in the present case), then the replacement of candidates for deputy should be done based on the election result, without being limited in terms of replacement based on the same gender, as long as the minimum representation of the underrepresented gender is not endangered.

172. The second effect that this Judgment produces concerns the right that emerges for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force. The right of these parties is created to use other legal remedies available for the further exercise of their rights in accordance with the findings of this Judgment and the case law of the ECtHR cited in the present Judgment.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 26 March 2021, unanimously:

DECIDES

I. TO DECLARE the Referrals admissible;

II. TO HOLD that there has been a violation of Article 24 [Equality Before the Law] and Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo in conjunction with Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights;

III. TO DECLARE invalid:

(i) Decisions [AA. No. 3/2020 and AA. No. 4/2020] of the Supreme Court of the Republic of Kosovo, of 19 February 2020;
(ii) Decisions [Anr. 35/2020 and Anr. 36/2020] of the Election Complaints and Appeals Panel, of 13 February 2020;
(iii) Item 5 of Decision [No. 102/A-2020] of the Central Election Commission, of 7 February 2020.

IV. TO HOLD that that this Judgment has no retroactive effect and that according to the principle of legal certainty does not affect the rights of third parties acquired on the basis of the annulled decisions;

V. TO OBLIGE all public authorities of the Republic of Kosovo to interpret Article 112.2 (a) of the Law on General Elections in accordance with the findings of this Judgment;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. TO DECLARE that this Judgment is effective on the date of its publication and it service to the parties.

Judge Rapporteur **President of the Constitutional Court**

Nexhmi Rexhepi

Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.