REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 26 May 2023
Ref. no.:AGJ 2197/23

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JUDGMENT

in

case no. KI69/21

Applicant

Partia Liberale Egjiptiane (PLE)
Partia Rome e Bashkuar e Kosovës (PREBK)

Constitutional review
of Judgment AA. no. 29/2021 of the Supreme Court of Kosovo
of 12 March 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge, and
Enver Peci, Judge

Applicants

1. The Referral is submitted by Partia Liberale Egjiptiane (PLE), represented with power of attorney by Veton Berisha and Partia Rome e Bashkuar e Kosovës (PREBK), represented with power of attorney by Albert Kinolli (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment [AA. no. 29/2021] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 12 March 2021 in conjunction with Decision [A. no. 736/2021] of the Election Complaints and Appeals Panel (hereinafter: the ECAP) of 7 March 2021.

3. The Applicants were served with the challenged Judgment of the Supreme Court on 15 March 2021.

Subject matter

4. The subject matter is constitutional review of the challenged Judgment of the Supreme Court, whereby the Applicants' rights guaranteed by (i) Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: Constitution) in conjunction with Article 3 [Right to free elections] of Protocol no. 1 of the European Convention on Human Rights (hereinafter: ECHR); (ii) paragraph 4 of Article 58 [Responsibilities of the State] of the Constitution in conjunction with Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities (hereinafter: the Framework Convention); and (iii) Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 1 (General prohibition of discrimination) of Protocol no. 12 of the ECHR, have allegedly been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and 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 Court

6. On 13 April 2021, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 14 April 2021, the President of the Court by Decision [No. GJR.KSH KI 69/21] appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel, composed of judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 19 April 2021, the Court notified the Applicants about the registration of the Referral and requested them to: (i) complete the referral form; (ii) submit authorizations for representation before the Constitutional Court; and (iii) submit their complaints submitted to the ECAP and the Supreme Court.

9. On 28 April 2021, the Applicants submitted to the Court: (i) the completed referral form; (ii) authorizations for representation before the Constitutional Court by Veton Berisha and Albert Kinolli, respectively; and (iii) copies of their complaints submitted to the ECAP and the copy of complaint of the Applicant (PLE) before the Supreme Court.

10. On 11 May 2021, the Court sent a copy of the referral to the Supreme Court, ECAP, the Central Election Commission (hereinafter: CEC) and the Ombudsperson Institution.

11. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

12. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

13. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision [KK160/21], decided that judge Gresa Caka-Nimani is appointed Presiding of the Review Panels in cases where she is appointed a member of the Panel, including the present case.

14. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision [KK-SP 71-2/21] of 17 May 2021 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

15. On 28 June 2021, the President of the Court, Gresa Caka-Nimani, by Decision [KSH. KI69/21], appointed Judge Nexhmi Rexhepi a member of the Review Panel instead of Arta Rama-Hajrizi, whose term as a judge ended on 26 June 2021.

16. On 6 August 2021, the Ombudsperson submitted an opinion to the Court with title *"Ombudsperson's Opinion with regard to the request of political entities: Partia Liberale Egjiptiane (PLE), Partia Rome e Bashkuar e Kosovës (PREBK),and persons Veton Berisha and Albert Kinolli"*.

17. On. 10 December 2021, the Court considered the report of the Judge Rapporteur and unanimously decided to postpone the further consideration of the referral for a next session after it has been completed with additional analysis.

18. On 31 January 2022, the representative of the Applicant (PLE) submitted a request to the Court for (i) information at which stage of the proceedings is its referral; and (ii) requested that his referral be dealt with urgently.

19. On 1 February 2022, the Court notified the Applicant (PLE) that his request is in the review procedure before the Court.

20. On 30 March 2023, the Court reviewed the report of Judge Rapporteur and unanimously decided to determine the further review of the referral after further additions for another session.

21. On 1 June 2022, the Applicant's (PLE) representative submitted a request to the Court for information on the status of the proceedings on his referral.

22. On 11 November 2022, the Applicant's (PLE) representative submitted a request to the Court for information on the status of the proceedings on his referral.

23. On 16 November 2022, the Court notified the Applicant (PLE) that his request is in the review procedure before the Court.

24. On 16 December 2022, Judge Enver Peci took the oath before the President of the Republic of Kosovo, whereby his mandate with the Court commenced.

25. On 13 April 2023, the Court reviewed the report of Judge Rapporteur and unanimously decided to determine the further review of the referral after further additions for another session.

26. On 20 April 2023, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the Court admissibility of the referral. On the same day, the Court decided (i) unanimously to declare inadmissible the referral of Partia Rome e Bashkuar e Kosovës (PREBK) represented by Albert Kinolli; (ii) unanimously to declare admissible the referral of Partia Liberale Egjiptiane (PLE), represented by Veton Berisha,; (iii) by majority to hold that the Judgment [AA.no.29/2021] of 12 March 2021 of the Supreme Court has not violated the right of the applicant, to be elected according to paragraph 1 of Article 45 [Freedom of election and participation] of the Constitution in conjunction with Article 3 (Right to free elections) of Protocol no. 1 of the ECHR; and (iv) by majority to hold that this Judgment does not have retroactive effect and that, based on the principle of legal certainty, it does not affect the rights of third parties.

27. In accordance with Rule 62 (Concurring Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a concurring opinion, which will be published together with this Judgment.

Summary of facts

28. On 6 January 2021, Her Excellency the President Mrs. Vjosa Osmani issued Decree No. 02/2021, for scheduling and announcing early elections for the Assembly of the Republic of Kosovo (hereinafter: the Assembly), which were scheduled to be held on 14 February 2021.

29. On 22 January 2021, the Applicants [PLE and PREBK], by Decisions [229/221] and [224/2021] of the CEC, were certified as political entities to run in the elections of 14 February 2021. On the same date, by Decision [231/2021] of the CEC, the political entity Romani Iniciyativa was also certified as a political entity to run in the elections of 14 February 2021.

30. On 14 February 2021, the elections for the Assembly of the Republic of Kosovo were held.

31. On 4 March 2021, the CEC by Decision [no. 860-2021] announced the results of the elections for the Assembly held on 14 February 2021.

32. According to the results announced by the CEC (i) the Applicants, namely the political entity PLE received 2,430 votes while the political entity PBREK received 1,074 votes; and (ii) the political entity Romani Iniciyativa received 4,049 votes.

33. On 5 March 2021, the Applicants, namely PLE and PBREK, as well as the three (3) political entities, Partia e Ashkalinjëve për Integrim (PAI), Partia Demokratike e Ashkalinjëve të Kosovës (PDAK) and Lëvizja Përparimtare e Romëve të Kosovës (LPRK), respectively, submitted a joint complaint to Elections Complaints and Appeals Panel (ECAP) *"regarding the votes obtained in an unconstitutional and illegal manner by the Political Entity "Romani Iniciyativa"*. The Applicants challenged by their complaint *"the result of the Political Entity "Romani Iniciyativa" of the Early Elections held on 14 February*", alleging a violation of paragraph 4 of Article 58 of the Constitution.

34. The Applicants, in essence, claimed that (i) "*the votes won by the Political Entity "Romani Iniciyativa" are orchestrated and coordinated between this political entity and the Political Entity Lista Srpska, as well as with other political entities, in order to strengthen their illegal political position in the Assembly of Republic of Kosovo";* and (ii) *"the votes of the "Lista Srpska" in the parliamentary elections of 2019 in Kosovo were higher in terms of number and this time, in these elections they were smaller, as the rest of them are also in the Political Entity "Romani Iniciyativa";* and (iii) *"Lista Srpska" organized, orchestrated and forced the rest of the Serbian voters to vote for the "Romani Iniciyativa" Political Entity. Moreover, in the above-mentioned municipalities [Kamenica, Leposavic, Lipjan, Novobërdë, Graçanica, Kllokot and North Mitrovica], the number of residents from the Roma community is much smaller than the votes received by the Political Entity "Romani Iniciyativa", while in the municipalities of Ranillug and Partesh, based on the official statistical data of the Statistical Agency of Kosovo, published in 2011, based on the population census, there were no members of the Roma community in these two municipalities."*

35. Further and in relation to the allegation of violation of paragraph 4 of Article 58 of the Constitution, the Applicants claimed, among other things, that *(i) "The Republic of Kosovo and all its authorities, including the ECAP, have a constitutional obligation in accordance with Article 58 (4) that, among other things, guarantee the effective participation of all communities in public life and decision-making. Such an obligation for Kosovo also derives from Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities, which, in accordance with Article 22 (4) of the Constitution, has constitutional status and is directly applicable in Kosovo and, in case of conflict, has precedence over legal provisions and other acts of public authorities"; and (ii) "The key mechanism in this whole structure, without the efficiency of which the other participation mechanisms of the communities in Kosovo have no meaning, is obviously the guaranteed participation of the non-majority communities in the Assembly of Kosovo. Twenty seats out of a total of 120 are guaranteed to non-majority communities according to Article 64 (2) of the Constitution (which is further elaborated by Article 111 of the Law on General Elections). This constitutional guarantee of twenty guaranteed seats (ten for Serbs and ten for non-Serbs) is sanctioned by the fact that neither the Constitution nor the Law on General Elections define a threshold for winning these seats, but it is enough to fulfill two conditions: first, that those who compete declare that they belong to and represent the relevant community; and, two, that, regardless of the vote won, the twenty seats are guaranteed because the vote is assumed to come from exactly the same community as the one claimed to represent the community competing for the deputy".*

36. Based on the case file it rezukts that the CEC submitted a response to the aforementioned appeals, through which, among other things, had requested that the ECAP rejects the

appeals as ungrounded, emphasizing, among other things, that: *"The Counting and Results Center (CRC) has completed the work process, as well as data entry, scanning of election materials, verification, investigation of Data and Results Matching Forms, Candidate Results Forms (CRF), processes that enable the avoidance of any technical and non-relevant errors". Based on Electoral Rule No. 06/2013, the Results Form, before it begins to be processed, is subject to the audit process at the CRC, during which the votes of the subjects are compared with the votes of the candidates. From the audit that was done to the Results Forms, it appears that there were problems of not correctly recording the votes of the subjects in the technical sense, when compared with the votes of the candidates, it turns out that the candidates have votes but the subject has no votes and there are cases when the subject has votes while the candidates have no votes. The CRC procedure does not allow any Results Form (to be processed as regular) if the votes of the subject do not match the votes of the candidates, which means that if the subject has no votes and the candidates have votes, then the Form is not processed as regular and goes to audit. Likewise, in cases where the subject has votes and the candidates do not have votes, the Form is not processed as regular and goes to audit. During the audit process, all these cases are checked and a report is prepared based on the findings. Therefore, on the basis of the findings from the audit report, the CRC has recommended to the CEC that some of the polling stations that have had problems of this nature be recounted. Such a thing has always happened in the past, when it was possible to correct each omission that was observed in the process, as well as in these elections. Forms that do not match mathematically cannot be processed as regular (this is not allowed by the data processing system) and the same will be subject to an audit at the CRC, and depending on the result, eventually renumbering. In the CRC, the data from the Results Forms from the subjects and their candidates are processed, based on the data that is in the CRF and MRF. Therefore, the CEC is obliged to process the processed forms in a regular manner and the result which is reflected in the CRF and MRF. Whereas, during the processing of the election material, the CEC does not have the authorization to evaluate how the communities voted and who they voted for. Therefore, we consider that the complaint is about constitutional rights, and not procedural rights, so the CEC is not competent to make constitutional interpretations, but only organizes the elections in a technical and procedural way. Therefore, all the election material which is found in the CRC, if the ECAP finds and considers it necessary, it can investigate and verify the factual situation*" (see page 5 of the Decision [A. no. 736/2021] of 7 March 2021 of ECAP).

37. On 7 March 2021, ECAP by Decision [A. no. 736/2021] decided that,

> *I. I. The appeals of the applicants and the political entities PAI and PDAK are partially APPROVED by deciding to annul the ballots [specified in this point] for the political entity Romani Iniciyativa in the forty-one (41) polling stations specified in this Decision in the Municipality of Leposavic [234 ballots in 10 polling stations], Municipality of Novobërda [209 ballots in 11 polling stations], Municipality of Ranillug [159 ballots in 8 polling stations] Municipality of Partesh [88 ballots in 7 polling stations] and Municipality of Kllokot [147 ballots in 5 polling stations];*
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> *II. TO ORDER CEC to remove the annulled ballots according to point I of the enacting clause of the Decision from the final result of the Early Elections for the Assembly of the Republic of Kosovo, published by CEC Decision no. 860-2021 of 4 March 2021;*

III. The appeals of the Applicants [PLE and PBREK], and the political entities PAI and PDAK for the annulment of the ballots for the entity Romani Iniciyativa in the specified polling stations [the 50 polling stations specified in this point of the enacting clause, page 2 of the ECAP Decision] in this decision are REJECTED as partially ungrounded. At this point, it was not decided regarding the request of the applicants for the annulment of the ballots in the Municipality of North Mitrovica.

38. In its Decision, ECAP initially emphasized that *"The panel, on 6 and 7 March 2021, ex-officio, conducted investigations to prove the factual situation of the present case and came to the conclusion that the appeals are partially grounded: The political entity Romani Iniciyativa received more votes than it had potential voters of the Roma community, to vote on the voting day of 14 February 2021, in [41 polling stations specified in the ECAP Decision, page 6 referring to the municipalities of Leposavic, Novobërda, Ranillug, Partesh and Kllokot] based in the report of the Kosovo Statistics Agency, of 2011, the OSCE Report of 2018 and based on the Final Voting List verified name by name for each potential voter, in the aforementioned polling stations. The votes received in the aforementioned polling stations by Romani Iniciyativa are disproportionate to the number of residents of the Roma community, which represent invalid votes, due to the fact that it is an undemocratic standard to ensure with the votes of voters of another community the right of representing another community and as such do not represent an objective relationship between the voter and the voted entity".*

39. Secondly, ECAP in its Decision adds that: *"For the first time in the general elections of the Republic of Kosovo, certain entities, as in this case Romani Iniciyativa, received the majority of votes from the Serb Community, which in this case represents a deviation of the will of the Roma community voters, and all this essentially undermines the integrity of the process."* In the context of the latter, ECAP considered that *"According to the Panel's assessment, the undermining of the election process, through voting in this way orchestrated for certain subjects to elect representatives of the Roma community, in addition to the deviation of the voter's will, this in itself violates the internal electoral democracy, eliminates the competition between entities for the guaranteed seats and all this is contrary to Article 111 paragraph 1 of the [Law on General Elections], Article 58, paragraph 4 of the Constitution of the Republic of Kosovo and the basic principles of the European electoral heritage".*

40. Thirdly, according to ECAP: *"The right to vote and the freedom to vote, according to the Panel's assessment, in the case of reserved seats is not identical to the case of non-reserved seats, since for reserved seats the objective link between the voter and the voted entity is more important, because this is the only way to ensure the right of representation in terms of the provisions of the LGE and in the spirit of the provisions and constitutional standards. The reserved seats are constitutional guarantees, which the Republic of Kosovo has received, with the sole purpose of the advanced treatment of minority rights within state institutions."*

41. ECAP found that: *" [...] that there were orchestrated votes for certain entities and which votes were won by voters who belong to a different community compared to the community of the entity for which they voted, this is proven by the number of residents compared to the number of votes received, while the number of residents is reflected through the data obtained from the Statistics Agency of the Republic of Kosovo in 2011,*

but also the credible reports of the OSCE [Organization for Security and Cooperation in Europe] and Voters' Books".

42. Fourthly, ECAP based on the OSCE Reports [of 2018]; The Final List of Voters, verified by ECAP in relation to the municipalities of Leposavic, Novobërda, Partesh, Kllokot and Ranillug, emphasized and concluded as follows: (i) in the Municipality of Leposavic, the number of inhabitants of the Roma community is 12, and from the list of voters it turns out to be one voter, and in this municipality 234 voters voted for the Romani Iniciyativa political entity; (ii) in the Municipality of Novobërda *"number of inhabitants of Roma community [...] is 63 inhabitants, while from the Final List of Voters, verified by ECAP, for PS [Polling Stations] in this Municipality it turns out that there are no potential voters from the Roma community, while in this municipality 209 voters have voted for the political entity Romani Iniciyativa, which results that the residents of another community, not from the Roma community, voted"* in this municipality; (iii) in the Municipality of Ranillug, according to the OSCE Report *"also from the Final List of Voters, verified by ECAP, for PS in this municipality, there is no potential voter from the Roma community, while in this municipality 159 voters voted for the political entity Romani Iniciyativa, which turns out that the residents of another community voted, not from the Roma community, since there is no resident of the Roma community in this municipality";* (iv) in the Municipality of Partesh, ECAP based on the OSCE Report emphasized that there are no residents of the Roma community in the Municipality of Partesh, nor from the Final List of Voters, verified by ECAP, for PS [Polling Stations] in this Municipality, there is no potential voter from the Roma community, while in this municipality 88 voters voted for the Romani Iniciyativa political entity, which results in the fact that the residents of another community, not from the Roma community, voted; and (v) in the Municipality of Kllokot, ECAP based on the aforementioned OSCE Report specified that in this Municipality there are 9 residents of the Roma community in the Municipality of Kllokot, while from the Final List of Voters, verified by ECAP there are no potential voters from the Roma community, while in this municipality 147 voters voted for the political entity Romani Iniciyativa, which results in the fact that residents of another community, not from the Roma community, voted.

43. In the context of the latter, ECAP assessed that *"the tendency to create such practices of mass voting by the members of one community for the entity of the other community, represents a dangerous practice which in the future could be used by the majority community, to deny the right of representation in an objective way to other minority communities"*.

44. In the end, ECAP in relation to point III of the enacting clause, through which the appeals of the applicants were rejected as partially ungrounded, found that *"[...] the complaining party did not make credible with convincing evidence the request for the annulment of all votes in the polling stations mentioned as in point III of the enacting clause of this decision, it would constitute an unfounded annulment of valid ballots, since not all votes for the Roma community have been orchestrated"*.

45. On 9 March 2021, against the above-mentioned Decision of 7 March 2021 of the ECAP, the political entities PLE, PAI and LPRK submitted an appeal to the Supreme Court, by which they challenged the legality of the ECAP Decision and requested that their appeal be approved and the ballots belonging to the political entity Romani Iniciyativa in polling stations specified in the complaint in the municipalities of Graçanica, Kamenica and North Mitrovica be annulled. The political entities PLE and PAI, in their complaint,

specified that ECAP has not decided about the polling stations in the Municipality of North Mitrovica.

46. Against the aforementioned Decision of 7 March 2021 of the ECAP, the political entity PBREK did not file a complaint with the Supreme Court.

47. In their appeal against the Decision of 7 March 2021 of the ECAP submitted to the Supreme Court, the Applicant, namely PLE (i) initially emphasized that the ECAP, by its Decision of 7 March 2021, had not decided on its request for the annulment of the ballots of the political entity Romani Iniciyativa in the specified polling stations in the Municipality of North Mitrovica; (ii) *"[...] for all polling stations which we contested in these three municipalities [Graçanica, Kamenica and North Mitrovica] as above, the votes that went for "Romani Iniciyativa" should be ANNULLED proportionally to the number of the Roma population, given that even in these municipalities there is a disproportion between the vote given for this entity and the real number of the Roma population: In Graçanica, where RI won 1773 votes while the number of potential voters of the Roma population is 745, 1028 votes for RI should be annulled; In Kamenica, where RI won 283 votes, while the number of potential voters of the Roma population is 240, 43 votes for RI be annulled; as well as in North Mitrovica, where RI has won 198 votes, while the number of potential voters of the Roma population is 40, 158 votes for RI are to be annulled";* and (iii) *"We welcome the Decision of the ECAP which partially found our appeal as grounded. As a result of this ECAP Decision, one seat designed to be filled by Roma representatives but elected by the Serb community will apparently be returned to the legitimate representatives of the Roma, Ashkali and Egyptian communities. However, since the other seat will continue to be represented by a deputy of "Roma origin but elected by the Serb community, we consider that such a situation constitutes a violation of the fundamental rights guaranteed by Article 58 (4) of the Constitution (Amendment I), denying the Roma, Ashkali and Egyptian communities effective representation in the Assembly of Kosovo, as we elaborated in our Complaint submitted to the ECAP (which we attach to this Complaint to the Supreme Court and ask the Court to refer, in particular, to the section entitled Constitutional and legal violations of the case)".*

48. On 10 March 2021, ECAP issued the supplementary Decision [A. no. 736/2021] by which it decided that its Decision [A. no. 736/2021] of 7 March 2021 be completed as follows:

> *I. The appeals A. no. 736/2021 of 5 March 2021, submitted by the political entities PLE, PAI, PBREK, PDAK, LPRK are partially approved, 40 ballots in Polling Station 3502/01R in Ranillug Municipality, which belong to the political entity Romani Iniciyativa are annulled; and*
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> *II. The appeals submitted by the political entities PLE, PAI, PREBK, PDAK and LPRK, by which they requested to annul the ballots in the fifteen (15) specified polling stations belonging to the political entity Romani Iniciyativa, are rejected as ungrounded. [According to the verification through the CEC website, these polling stations are located in the Municipality of North Mitrovica].*

49. Against the supplementary Decision of the ECAP of 10 March 2021 the Applicants, namely PLE and PBREK, did not file an appeal with the Supreme Court.

50. On 9 March and 11 March 2021, respectively, against the above-mentioned Decision of 7 March 2021 of the ECAP and the supplementary Decision of 10 March 2021 of the ECAP, the political entity Romani Iniciyativa filed a complaint, among other things, requesting the Supreme Court to annul the Decisions of the ECAP, after finding that rgw latter are in contradiction with Article 2 of the Law on General Elections as well as Articles 24 and 45 of the Constitution.

51. On an unspecified date, ECAP submitted to the Supreme Court a response to the aforementioned complaints of the Applicant (PLE) and the political entity (PAI), as well as the complaint of the political entity Romani Iniciyativa.

52. On 12 March 2021, the Supreme Court by the Judgment [AA. no. 29/2021] decided: (i) to reject as ungrounded the appeal of the political entity Romani Iniciyativa against the Decision of the ECAP of 7 March 2021 and the supplementary Decision of the ECAP of 10 March 2021; and (ii) to reject as ungrounded the appeal of the Applicant (PLE) and political entities, PAI and LPRK against the Decision of the ECAP of 7 March 2021.

53. On 13 March 2021, the CEC, by Decision [no. 950/2021], certified the results of the elections for the Assembly of 14 February 2021, according to the following list of election results:

a. VETËVENDOSJE! Movement (hereinafter LVV), 58 deputies;
b. Democratic Party of Kosovo- PDK, 19 deputies;
c. Democratic League of Kosovo- LDK, 15 deputies;
d. Srpska Lista, 10 deputies;
e. Alliance for the Future of Kosovo-AAK, 8 deputies;
f. Kosova Demokratik Turk Partisi - KDTP, 2 deputies;
g. Coalition “Vakat”, 1 deputy;
h. New Democratic Initiative of Kosovo, 1 deputy;
i. Roman Iniciyativa– RI, 1 deputy;
j. Nova Demokratska Stranka - NDS, 1 deputy;
k. Social Democratic Union–SDU, 1 deputy;
l. The United Goranska Party, 1 deputy;
m. Party of Ashkali for Integration, 1 deputy;
n. The Progressive Movement of Kosovo Roma - LPRK, 1 deputy.

Applicants’ allegations

54. The Applicants allege that the challenged Judgment of the Supreme Court regarding the rejection of their appeal against the Decisions of the ECAP, by which their appeals for the annulment of the ballots for the political entity Romani Iniciyativa in the polling stations of the Municipality of Graçanica, Kamenica and North Mitrovica were partially rejected, constitute a violation of (i) paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention; and (ii) Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR.

55. The Applicants, in their referral, initially point out that *“As a result of these challenged Decisions, only one seat in the Assembly of Kosovo that was won in the elections by the Romani Initiativa (the joint seat for the Roma, Ashkali and Egyptian community) was able to be recovered, in which case the mandate of the deputy in this seat was finally won by the other (legitimate) representative from the Roma community. Meanwhile, the*

mandate of the other seat, the one guaranteed for the Roma community, continues to be exercised in an illegitimate manner by the representative of Romani Iniciyativa. If ECAP and the Supreme Court had annuled the irregular votes that the Romani Iniciyativa received in the three aforementioned municipalities, where the number of votes won is also higher than the number of residents of the Roma community in that municipality (especially in Graçanica), in the next guaranteed seat, the other legitimate representative from the Roma community would come (where the current legitimate representative in the joint seat for the Roma, Ashkali and Egyptian community would occupy the guaranteed seat for the Roma community that is currently represented by the Romani Iniciyativa, meanwhile another legitimate representative would occupy the joint seat for the Roma, Ashkali and Egyptian community). Thus, the Roma, Ashkali and Egyptian communities continue to not be effectively represented in the Assembly of the Republic of Kosovo as a result of these partially incorrect Decisions".

(i) Regarding the allegation of violation of paragraph 4 of Article 58 of the Constitution, in conjunction with Article 15 of the Framework Convention

56. In relation to paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention, the Applicants, in essence, claim (i) violation of the effective representation of non-majority communities in the municipalities of Kamenica, Graçanica and North Mitrovica; (ii) lack of concrete mechanisms to guarantee the effective participation of non-majority communities; and (iii) violation of Article 24 of the Constitution in conjunction with Article 1 of Protocol no. 12 of the ECHR and Article 4 (2) of the Framework Convention.

57. With regard to paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention, the Applicants initially point out that "*in the Kosovar constitutional order there is a constitutional right of communities to effective representation and participation in political life*" and in this regard, they refer to chapter III [Rights of Communities and their Members] of the Constitution, in which chapter according to them "*the right of communities to effective participation in the political process is also included, which corresponds to the state obligation to guarantee this participation, as provided for by the Framework Convention of the Council of Europe for the Protection of National Minorities".* In this regard, the Applicants specifically refer to paragraph 4 of Article 58 of the Constitution (which has been amended by Amendment No. 1 of the Amendment to the Constitution of the Republic of Kosovo regarding the ending of the international supervision of the independence of Kosovo, published in the Official Gazette on 7 September 2012).

58. According to the Applicants, *"The Republic of Kosovo and all its state authorities have a constitutional obligation in accordance with Article 58 (4) of the Constitution that, among other things, guarantee the effective participation of all communities in public life and decision-making. Such an obligation for Kosovo also derives from Article 15 of the Framework Convention of the Council of Europe for the Protection of National Minorities, which, in accordance with Article 22 (4) of Chapter II of the Constitution [Direct Applicability of International Agreements and Instruments], has constitutional status and is directly applicable in Kosovo and, in case of conflict, has precedence over legal provisions and other acts of public authorities".*

59. The Applicants further emphasize that *"Not only are the rights from Chapter III applicable and each individual from the community can request their implementation (including the rights from Article 58 (4), which are expressly guaranteed to not only communities but also their members), but the right to effective participation in this case is also guaranteed by Chapter II of the Constitution [Fundamental Rights and Freedoms], through the provisions of the Framework Convention of the Council of Europe for the Protection of National Minorities (the implementation of which is guaranteed by Article 22 of the Constitution). In this way, the admissibility requirements from Article 113 (7) of the Constitution regarding allegations of violation of these provisions are met, given that we, as applicants, in addition to being representatives of political entities, are also members of communities, entitled to effective representation of those who are affected by the challenged Decisions"*.

60. Further and according to the Applicants, *"Twenty seats out of a total of 120 are guaranteed for non-majority communities according to Article 64 (2) of the Constitution. This constitutional guarantee of twenty guaranteed seats (ten for Serbs and ten for non-Serbs) is sanctioned by the fact that neither the Constitution nor the Law on General Elections define a threshold for winning these seats, but it is enough to fulfill two conditions: the first, that those who compete declare that they belong to and represent the relevant community; and, two, that, regardless of the vote won, the twenty seats are guaranteed because the vote is assumed to come from exactly the same community as the one claimed to represent the community running for the deputy"*. Based on this reasoning, the Applicants emphasize that this is a variant of consociational democracy.

61. In the context of the circumstances of the present case, the Applicants claim that *"In the specific case of the elections of 14 February 2021, the representative of Romani Iniciyativa, who currently occupies the seat in the Assembly, lacks an objective link with the Roma community, since the votes that this political entity received in the municipality of Graçanica, Kamenica and North Mitrovica are also in larger numbers than the residents of the Roma community in these municipalities, so those votes were received by voters of other communities. Without these irregular votes, this representative would not currently exercise this function in the Assembly. The representative from the Roma community has managed to be elected deputy in guaranteed seats as a result of the votes of another community, for the simple fact that that community is numerically larger than the Roma community. Consequently, there is a disconnection between the representative and the electorate of this community which, according to the Constitution, is supposed to give representative legitimacy to the deputy in the first place. Such a deformation of this representative mechanism denies the effective representation of the Roma, Ashkali and Egyptian communities and their members in Kosovo and contradicts Article 58 (4) and 64 (2) of the Constitution of Kosovo"*.

62. Regarding the challenged decisions of the ECAP and the Supreme Court, the Applicants emphasize that during their interpretation: *"ECAP and the Supreme Court were on the right track to constitute an "adequate measure" in the circumstances of the present case to guarantee the effective participation of communities in political life. Unfortunately, for reasons unclear to us, ECAP and then the Supreme Court, perhaps even in the absence of precise legal standards, did not annul the votes that the Romani Iniciyativa had won in the three aforementioned municipalities, although the same irregularities were applied in these municipalities as well, thus showing the lack of adequacy of the*

measures and efforts of the state of Kosovo to guarantee the effective participation of communities in political life".

63. Applicants specify that "*there are no precise international practices and norms, neither within the frame of the Council of Europe nor elsewhere, which expressly determine that on guaranteed seats must be elected in any place and in any case, representatives only with votes coming from the members of the community to which that representative belongs. As a matter of fact, there are no even precise international standards generally accepted that require guaranteed seats in the first place*", and as a result, among others, they propose that: "*The Constitutional Court of the Republic of Kosovo should regulate this situation. We assess that the Constitutional Court would regulate the current state of the deficient community participation in public affairs and decision-making in Kosovo, where one community determines the representative to the other community in the guaranteed seats, finding first that the current measures to guarantee this participation, despite the requirements of Article 58 (4) of the Constitution and Article 15 of the Framework Convention, are not adequate - and therefore we are dealing with a constitutional violation of these articles*".

64. Furthermore, the Applicants consider that, *"[...] The Constitutional Court should oblige the Assembly of the Republic of Kosovo to take these adequate measures as soon as possible and create the necessary conditions, by regulating the legal framework in this field, so that the non-majority communities in the country can be effectively represented in guaranteed seats, and, as a result, effective representation in public affairs and decision-making in general. These adequate measures should guarantee that communities substantially choose their representatives, not allowing the conversion of guaranteed seats into illusory representation mechanisms. The Constitutional Court, in accordance with international standards and practices, should leave the Assembly a wide margin of appreciation to determine which measures would be adequate to achieve this effective participation. Such an adequate measure, for the Kosovar constitutional context, would be, for example, the legal determination that communities be registered in separate communal / electoral rolls) so that only the voters of the communities found in those lists can vote for the representatives who have declared that they will represent those communities in guaranteed seats. No one outside those lists would be able to vote for the seats guaranteed to the other community. Thus, manipulative voting between communities would be impossible on the scale that happened in the Elections of 14 February (Although, as we said, precise and expressive international standards are missing, at least in one case it has been suggested by the Venice Commission that such a measure of special electoral lists of communities be implemented, taking into account the specifics of the situation in that country.) Of course, registration in these electoral lists would not be mandatory: each member of the non-majority community, in accordance with international standards and practices, would be able to decide whether to register in the special lists of communities (to vote for their own community), or in the general list of voters (to vote for the other 100 seats in the Assembly of Kosovo). The registration of the ethnicity of members of non-majority communities in electoral lists will be done with objective criteria of affiliation, in accordance with the Constitution and case law of the ECtHR, always preserving the privacy of the declarants as defined by the standards of the Venice Commission".*

65. Applicants claim that the decision of the ECAP and the the challenged judgment of the Supreme Court on the non-annulment of the votes also in the three (3) municipalities, namely Graçanica, Kamenica and North Mitrovica *"constitutes a violation of Article 58*

(4) of the Constitution of Kosovo and Article 15 of the Framework Convention of the Council of Europe for the Protection of National Minorities, the implementation of which is guaranteed by Article 22 of the Constitution of Kosovo".

66. Applicants also consider that, *"The challenged decisions thus violated the other component of Article 58 (4) of the Constitution (effective equality) in conjunction with Article 4 (2) of the Framework Convention, as well as Article 24 of the Constitution in conjunction with Article 1 of Protocol 12 of the European Convention on Human Rights, which establishes a general prohibition of discrimination for all rights guaranteed by the constitution and law".*

(ii)Regarding the allegation of violation of Article 45 of the Constitution, in conjunction with Article 3 of Protocol No. 1 of the ECHR

67. While in relation to Article 45 of the Constitution in relation to Article 3 of Protocol no. 1 of the ECHR, the Applicants basically claim (i) violation of Veton Berisha's right to be elected; and (ii) lack of reasoning of the court decision, namely the challenged Judgment of the Supreme Court.

68. Regarding the allegation of violation of Article 45 of the Constitution, the Applicants emphasize that, "*If the challenged Decisions had also annulled the votes that the Romani Inicijativa received from the non-Roma communities in Graçanica, Kamenica, and North Mitrovica, one of the Applicants, Veton Berisha from the Egyptian Liberal Party (PLE), would have become a deputy of the Assembly of Kosovo instead of the current (legitimate) representative from the Roma community who represents the joint seat for the Roma, Ashkali and Egyptian communities in the Assembly of Kosovo, which legitimate representative will then occupy the special seat for the Roma community which currently is illegally occupied by the representative of Romani Inicijativa".*

69. Furthermore, the Applicants note that *"The case law of the ECtHR has determined that the rights guaranteed in Article 3 of Protocol no. 1 include not only the organization and management of the voting process, but also the way of reviewing election results as well as disputes that may arise regarding the counting of votes and the certification of election results [...] in these Decisions, it is not well justified why the votes of the Romani Inicijativa were not annulled in the municipalities of Graçanica, Kamenica and North Mitrovica, although in these municipalities the same criteria for annulment as in the other municipalities where the votes were annulled also apply: in these three municipalities, the number of votes won by the Romani Inicijativa was higher than the number of Roma residents in these municipalities. Although according to the case law of the ECtHR, electoral disputes are not examined under the prism of Article 6 [of the ECHR] (right to a fair trial) of the ECHR, this case law has nevertheless determined that decisions regarding electoral disputes must be sufficiently reasoned and objective, a practice confirmed by the Constitutional Court of Kosovo. According to this case law, the resolution of electoral disputes must be such as to guarantee a sufficiently reasoned, fair and objective decision."*

70. According to the Applicants, *"The challenged decisions did not properly respect these requirements. In the decision of the ECAP and then the Supreme Court, the reason why the votes in Graçanica, Kamenica and North Mitrovica were not annulled is not given sufficiently and convincingly. Reasoning is attempted, but it is not fair and objective reasoning. First, the challenged decision of the ECAP merely states that "[i]n relation to*

the rejecting part, the complaining party did not make the request credible with convincing evidence because the annulment of all votes in the polling stations mentioned as in point III of the enacting clause of this decision, would constitute an ungrounded annulment of valid ballots, since not all votes for the Roma community were orchestrated […]at no point do the Decisions correctly indicate how and for what reason this claim was not credible. This is because the same conditions existed in the three aforementioned municipalities as in the other municipalities where the votes were annulled: even here the residents of the Roma community were in smaller numbers than the votes that the Romani Inicijativa received in these municipalities. Such a thing was easily proven, since ECAP and the Supreme Court had access to the official population census data for these municipalities as well as for other municipalities where they annulled the votes. In fact, let's say, in the main municipality where we contest the non-annulment (Graçanica), ECAP and the Supreme Court had only annulled the votes obtained irregularly for the Bosniak community, finding that there was orchestration of votes in these municipalities as well. Therefore, we do not understand why our request in this part was not reliable. In a completely arbitrary way, what was valid for the Bosnian community was not valid for the Roma community, although the same standards and criteria for annulment apply to both communities and in the municipality of Graçanica, where the votes received for certain political entities are significantly more larger than the population of the respective community".

71. Therefore, the Applicants conclude that the challenged decisions *"did not have a fair and objective but arbitrary reasoning and were insufficiently reasoned. With this, they committed a violation of Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR".*

72. In addition the Court emphasizes that Applicants also submitted to the Court the decision of the ECAP [A. no. 565/2021] of 7 March 2021 and the Judgment [AA. no. 30/2021] of 11 March 2021 of the Supreme Court that refer to the appeals of political entities *Nasha Iniciyativa*; *Bosnian List Social Democratic Union and Nova Demokratksa Stranka* against the Decision of the CEC of 4 March 2021 and the appeal of the political entity *Ujedinjena Zajednica-Adrijana Hodžić* v. the Decision [A.No. 656/2021] of 7 March 2021 of the ECAP in the Supreme Court. In relation to these decisions, the Applicants reiterate that in the case of the political entities, representing the above-mentioned entities, which had submitted appeals against the Decision of the CEC of 4 March 2021 and had requested the annulment of the ballots of the political entity *Ujedinjena Zajednica-Adrijana Hodžić*, ECAP by the Decision had annulled the ballots in all the polling stations which were challenged by the four (4) political entities mentioned above.

73. The Applicants specify in their referral that,

> *"However, if the Constitutional Court finds that our claims are correct and there has been a constitutional violation, this means that the current representative in the Assembly of Kosovo from Romani Iniciyativa is exercising such a function in an unconstitutional manner. Consequently, we request the Constitutional Court, if it reaches such a conclusion, to annull the mandate of the same deputy and to fill the guaranteed seat with another deputy as a legitimate representative of the Roma, Ashkali and Egyptian communities in the Republic of Kosovo, elected with votes of the respective communities. It cannot be tolerated that only the violation is established while the matter is not returned to its previous state. If the illegitimacy of a deputy is established in this case, that deputy should not continue to exercise this*

function for the next four years, while for these four years the Roma, Ashkali and Egyptian communities are not effectively represented in the Assembly of Kosovo. Therefore, we ask the Constitutional Court, that in the form it deems most appropriate, to return to the previous situation and to guarantee the effective participation of non-majority communities in this legislature of the Assembly of Kosovo. In the following, we will present our proposal of how such a return to the previous situation should look like; however, we ask the Court to assess on its own initiative the best ways of how such a thing should happen, taking into account the situation in the present case. It is important to achieve the result required by the Constitution: the effective representation of communities in political life."

74. Finally, the Applicants request the Constitutional Court as follows:

"Considering all this, we propose that the Constitutional Court of the Republic of Kosovo:

DECIDES

I. To declare the referral admissible;
II. To hold the constitutional violations in the challenged Decisions and partially annul the decision of the Supreme Court, so as to oblige the latter to correct the decision in the appealing part in accordance with the findings of the Constitutional Court, proportionally annulling the votes in Graçanica, Kamenica and North Mitrovica, and then the possible replacements of deputies in the Assembly of Kosovo be made in conformity with this annulment;
III. To determine the obligation of the Assembly to issue the relevant legislation so that the state responsibilities for guaranteeing the effective participation of the communities according to Article 58(4) of the Constitution are met."

The letter titled "Ombudsperson's Opinion with regard to the request of political entities: Egyptian Liberal Party (ELP), Kosovo United Roma Party (KURP, and individuals Veton Berisha and Albert Kinolli"

75. In his letter titled Opinion, the Ombudsperson initially emphasized that *"This Opinion aims to express Ombudsperson's stands viewed from human rights perspective with regard to the issue raised with the Constitutional Court by political entities: Egyptian Liberal Party (ELP), Kosovo United Roma Party (KURP), as well as the following persons: Veton Berisha from the Egyptian community and Albert Kinolli from the Roma community, in the capacity of the Applicant, who requested from the Court: "To conduct a constitutional review of Judgment AA. no. 29 / 2021 of the Supreme Court of Kosovo, as well as Decision A. no. 736/2021 of the Election Complaints and Appeals Panel (ECAP)".*

76. Subsequently, after the elaboration of the Applicants' referral for the constitutional review of the Judgment [AA. no. 29/2021] of the Supreme Court as well as the Decision [A. no. 736/2021] of the ECAP, submitted to the Constitutional Court, the Ombudsperson informs the Court that: "*Mr. Veton Berisha from the Egyptian community has submitted a complaint to the Ombudsperson […]".* The Ombudsperson elaborates the factual chronology of the case, namely the issuance of challenged decisions, the decision of these two authorities in relation to the request and the complaint of the Applicants, respectively, and the reasoning given by these decisions.

77. In this regard, the Ombudsperson emphasizes that, *"In this regard, the Ombudsperson notes that the ECAP and the Supreme Court have a unique stand, that in order for a vote to be considered valid, there must be an objective link between the voter and the voting entity, which relates to the right to vote and the freedom to vote in the case of reserved seats. Based on to the information provided by the complainants, it is understood that the ECAP and the Supreme Court has failed to give due attention to the arguments presented by the complainants about the number of votes that Romani Initiativa received in three municipalities, subject of the appeal, in relation to Roma population in the municipalities of Graçanica, Kamenica and North Mitrovica, which are proves exactly the same as in other cases in which the ECAP and the Supreme Court have annulled voting in some polling stations.*
In this regard, the Ombudsperson has been informed from the complainants that in three above mentioned municipalities, the number of votes and the voters is as follows:
-Municipality of Graçanica, 745 number of Roma population, 1773 number of votes.
-Municipality of Kamenica, 243 number of Roma population, 283 number of votes.
-Municipality of North Mitrovica, 40 number of Roma population, 198 number of votes".

78. Further, the Ombudsperson refers to the content of Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR, Article 58 of the Constitution, and Article 15 of the Framework Convention. In this context, the Ombudsperson emphasizes that: *"In respect of this, the Ombudsperson considers that it is the responsibility of Republic of Kosovo institutions to organize the electoral process, to guarantee accomplishment of electoral rights and participation for all citizens of the Republic of Kosovo, including members of non-majority communities. The Ombudsperson has noted that the international standards (ECHR and FKPNM) clearly define the institutional obligation to take all actions in order to ensure the free of expression of the opinion of the people in the choice of the legislature. The Ombudsperson deems that the institutional obligation of Kosovo Republic institutions spreads over all institutions which are responsible to organize and decide on the right to vote and to participate, guaranteed by the Constitution and international instruments".*

79. Further, the Ombudsperson also specifies that *"The Ombudsperson, having in regard the competencies entrusted to him, restrains from providing assessment and comments to ECAP and the Supreme Court decisions. Despite this fact, the Ombudsperson estimates that for the same cases the decision-making bodies should issue the same decisions. In this way, the unselective accomplishment of the voting and participation rights, guaranteed by the Constitution and international instruments, is guaranteed. On the contrary, if different decisions are issued for the same cases, then a situation of inequality and double standards set by decision-making bodies is created".*

80. The Ombudsperson also emphasizes the arguments presented by the Applicants in their referral to the Court, stressing that, *"In complainants' case, the Ombudsperson observes that the ECAP and the Supreme Court have used the arguments presented by the complainants and based on them have issued decisions according to which some were partially approved, while some have been rejected. Regarding this issue, the Ombudsperson noted that in all cases complained of by the complainants, the arguments were the same (discrepancy between the number of voters and the votes won by political entities). Therefore, the Ombudsperson considers of a great importance the review of this case by the Constitutional Court".*

81. The Ombudsperson further: *"[...] considers as necessary that the Constitutional Court reviews the referral of political entities: Partia Liberale Egjiptiane (PLE), Partia Rome e Bashkuar e Kosovës (PREBK), as well as from individuals: Veton Berisha from the Egyptian community and Albert Kinolli from the Roma community, and to assess whether in this case the electoral and participation rights guaranteed by the Constitution of the Republic of Kosovo have been breached or not".*

82. Based on the above, the Ombudsperson emphasizes that, *" [...] from all of above, as well as the fact that the Constitutional Court is the highest authority for reviewing the compatibility of other acts with the Constitution, considers that it is important to assess whether or not in the complainants' case there was a breach of the right to vote and to participate, as well as the responsibility of the state in this regard, guaranteed by the Constitution of the Republic of Kosovo".*

83. In the end, the Ombudsperson concludes in his Opinion: *"[...] that the institutions of the Republic of Kosovo should be responsible and guarantors for the organization and conduct of the electoral process as a whole, by respecting entirely and without distinction the constitutional provisions regarding the right of voting and freedom of participation".*

(i) Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 22
[Direct applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions:
(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination Against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;

Amendment no. 26 [approved by the Assembly of the Republic of Kosovo on 25 September 2020, published in the Official Gazette of the Republic of Kosovo on 30 September 2020]

In article 22, after paragraph (8) the paragraph (9) shall be added, as follows:
(9) Council of Europe Convention on preventing and combating violence against women and domestic violence.

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 58
[Responsibilities of the State]

1. The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities. The Government shall particularly support cultural initiatives from communities and their members, including through financial assistance
2. The Republic of Kosovo shall promote a spirit of tolerance, dialogue and supportreconciliation among communities and respect the standards set forth in the Council ofEurope Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.
3. The Republic of Kosovo shall take all necessary measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, cultural, linguistic or religious identity
***4.* [amended through Amendment no. 1** of Constitution of the Republic of Kosovo regarding the ending of international supervision of independence of Kosovo, published in the Official Gazette on September 7, 2012]
5. The Republic of Kosovo shall promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo. The Republic of Kosovo shall have a special duty to ensure an effective protection of the entirety of sites and monuments of cultural and religious significance to the communities.
6. The Republic of Kosovo shall take effective actions against all those undermining the enjoyment of the rights of members of Communities. The Republic of Kosovo shall refrain from policies or practices aimed at assimilation of persons belonging to Communities against their will, and shall protect these persons from any action aimed at such assimilation.
7. The Republic of Kosovo ensures, on a non-discriminatory basis, that all communities and their members may exercise their rights specified in this Constitution.

Article 64
[Structure of Assembly]

1. The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.
2. In the framework of this distribution, twenty (20) of the one hundred twenty (120) seats are guaranteed for representation of communities that are not in the majority

in Kosovo as follows:

(1) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10);
(2) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat if the number of seats won by each community is less than the number guaranteed.

Article 71
[Qualification and Gender Equality]

1. Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly.

2. The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality.

Article 73
[Ineligibility]

1. The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty:
(1) judges and prosecutors;
(2) members of the Kosovo Security Force;
(3) members of the Kosovo Police;
(4) members of the Customs Service of Kosovo;
(5) members of the Kosovo Intelligence Agency;
(6) heads of independent agencies;
(7) diplomatic representatives;
(8) chairpersons and members of the Central Election Commission.
2. Persons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.
3. Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty.

Article 139
[Central Election Commission]

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

[...]

International Agreements and Instruments directly applicable under Article 22 of the Constitution

Universal Declaration of Human Rights

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Protocol No. 1 of the European Convention on Human Rights.

Article 3
(Right to Free Elections)

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

International Covenant on Civil and Political Rights

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Framework Convention for the Protection of National Minorities of the Council of Europe

Section II

Article 4

[...]

2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to

the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

Article 15

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

Law no 03/L-073 on General Elections in the Republic of Kosovo, supplemented and amended by Law no. 03/L-256 on amending and supplementing Law no. 03/L-073 on General Elections in the Republic of Kosovo [published in the Official Gazette on 16 November 2012]

Article 2
[of Law no. 03/L-256 on amending and supplementing Law no. 03/L-073 on General Elections in the Republic of Kosovo]

In the whole text of the law in force "ECAC" - Elections Complaints and Appeals Committee is replaced by "ECAP" - Elections Complaints and Appeals Panel

CHAPTER II
VOTER ELIGIBILITY, VOTERS LIST, AND CHALLENGE AND CONFIRMATION PERIOD FOR THE VOTERS LIST

Article 5
Voter Eligibility

5.1 A person is eligible to vote in an election in accordance with the present Law if he or she is at least eighteen (18) years of age on the day of the election and satisfies at least one of the following criteria:
a) he or she is registered as a citizen of Kosovo in the Central Civil Registry;
b) he or she is residing outside Kosovo and left Kosovo on or after 1 January 1998, provided that he or she meets the criteria in applicable legislation for being a citizen of Kosovo; or
c) he or she obtained the status of a refugee, as defined in the Convention Relating to the Status of Refugees of 28 July 1951 and its Protocol of 16 December 1966, on or after 1 January 1995, and is eligible to be registered in the Central Civil Registry as a habitual resident of Kosovo.
5.2 No person may vote if he or she:
a) is serving a sentence imposed by the International Criminal Tribunal for the former Yugoslavia ("the Tribunal");
b) is under indictment by the Tribunal and has failed to comply with an order to appear before the Tribunal; or
c) has been declared mentally incompetent by a final court decision.

Article 7

Voters List

7.1 The CEC shall maintain a Voters List and it shall ensure that the Voters List is accurate and up to date, which represents:
a) the most recent available extract from the Central Civil Registry of all eligible voters who are registered as citizens of Kosovo pursuant to the law on Citizenship; and b) eligible voters who have successfully applied to vote outside of Kosovo.
7.2 All eligible voters listed in the manner required by the CEC. The personal information provided for each voter shall be: name, surname, date of birth, address, and the Polling Center where he/she is assigned to vote.
7.3 For confirmation of eligibility, the CEC shall have access to registers, records of residence, and other official records.
7.4 The Voters List shall be accessible as set out by CEC rules.
7.5 All activities and documents of the state bodies, and all submissions and evidence related to registering citizens in the Voters List shall be exempted from payment of fees and taxes.
7.6 The personal data of the citizens on the Voters List shall be written in the languages and alphabets in which the original records are kept and in accordance with the Law on the Use of Languages in Kosovo.
7.7 The competent court shall submit data to the CEC on persons who have been deprived of their legal capacity with a final court decision. Such data shall be delivered as required by the CEC.
7.8 The Central Civil Registry shall supply the CEC with all relevant information that the CEC requires to maintain the Voters List in accordance with deadlines established by the CEC.
7.9 The CEC shall provide the Municipal Election Commissions (hereinafter: MECs) with an electronic copy of the entire VL and one printed copy of the VL for their municipality.

CHAPTER III
POLITICAL PARTY REGISTRATION AND POLITICAL ENTITY CERTIFICATION

[…]

Article 12
Political Party Registration

12.1 Applications for registration of Political Parties may be submitted to the Office at any time during normal working hours.
12.2 Applications submitted for registration to the Office between the day of the declaration of the election date by the President of Kosovo and the date established for the ballot drawing will only be considered as applications for certification as a political entity in accordance with this law.
12.3. The application for the registration of a Political Party shall be submitted in the form established by CEC rule as required by the Office, and shall include the following:
a) name, surname, address and telephone number of the president of the Party;
b) name, surname, address and telephone number of the authorized financial agent of the party;

c) name, surname, address and telephone number of the person authorized to communicate with the CEC on behalf of the Party;
d) telephone number and the postal address of the headquarter of the party;
e) statement signed by the President of the Party to respect and abide by the Political Party Code of Conduct;
f) statute of the Party;
g) any acronym or seal of the Party;
h) the most recent financial statement of the Party;
i) the date of the most recent party convention;
j) name and address of at least 500 party members who are residing in Kosovo and who are found on the Kosovo Voters List.

Article 106
Election results

106.1 The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo. (Amended by Law no. 03/L-256, Article 6).
[…]
106.3 The results of an election are final and binding once they have been certified by the CEC.
[…]

CHAPTER XVIII
ELECTORAL SYSTEM FOR THE ASSEMBLY OF KOSOVO

Article 110
General provisions
[supplemented and amended by Article 7 of Law no.03/L-256 on amending and supplementing Law no. 03/L-073 on General Elections in the Republic of Kosovo]

110.1. Kosovo shall be considered a single electoral district.
110.2. A Political Entity that is not an independent candidate shall submit a list of candidates that complies with Article 27, Article 29 and CEC rules.

110.3. Each certified Political Entity shall appear on an "open list" ballot.
110.4. A voter shall be issued with a single ballot for the election and a) shall mark it with a vote for one (1) political entity, and b) may also mark it with votes for up to five (5) candidates from the list for the political entity for whom the voter has voted.
110.5. If a ballot is marked for more than five (5) candidates only the vote for the Political Entity shall be counted.

Article 111
Distribution of Seats

111.1 Seats in the Assembly shall be distributed according to the system of representation established by article 64 of the Constitution of the Republic of Kosovo, by allocating:
a) one hundred (100) seats amongst all certified Political Entities in proportion to the number of valid votes received by them; and
b) twenty (20) seats guaranteed for representation of communities that are not in the majority in the Republic of Kosovo, as follows:
(i) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10);
(ii) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat if the number of seats won by each community is less than the number guaranteed.
[...]
111.3 The twenty (20) reserved seats of the Assembly as described in point (b) of paragraph 1 of this Article shall be allocated to the Political Entities representing the Kosovo Serb community and other non majority communities in the same manner as described in article 111.2 of this Law, based on the total number of valid votes received by each Political Entity, irrespective of the number of seats already allocated from the hundred (100) seats.
[...]

Article 117
Procedures of [ECAP]

117.1 The ECAC shall establish its own rules of procedure.
117.2 The ECAC shall, in adjudicating a complaint or appeal examine and investigate all relevant evidence, and grant a hearing if it deems it necessary.
117.3 Adjudication on appeals and complains by ECAC shall be based on clear and convincing evidence.
[...]

Article 118
Decisions

[...]
118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed.
(Amended by Law no. 03/L-256, Article 12 paragraph 2.

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

Article 119
Complaints

[Supplemented and amended by Article 13 of Law no.03/L-256 on amending and supplementing Law no. 03/L-073 on General Elections in the Republic of Kosovo]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received.
[…]
119.3 The ECAC shall not consider a complaint concerning a decision of the CEC, but may consider an appeal from a decision of the CEC as specified under article 122 of this Law.
[…]

Article 122
Electoral Appeals

[Supplemented and amended by Article 15 of Law no.03/L-256 on amending and supplementing Law no. 03/L-073 on General Elections in the Republic of Kosovo]

122.1 A natural or legal person whose legal rights have been affected by any of the following decisions of the CEC may appeal that decision to the ECAP within twenty four (24) hours after the decision being appealed is announced by CEC and the appeal must be decided by ECAP within seventy two (72) hours after the appeal is made.
[…]

RULES OF PROCEDURE no. 02/2015 of ECAP, 4 December 2015

Article 2
Definitions

The expressions used in these Rules shall have the following meaning:

[…]
2.1 "Complaint" – shall mean a regular legal remedy submitted in writing by a person who has a legal interest or whose rights were violated during the election process.
2.2 "Appeal" – shall mean a regular legal remedy against decisions of the first instance.
[…]

COMPLAINTS
Article 5
Conditions for submission of complaints

[…]
5.5 For all issues not directly related to voting and recounting, the complaint must be submitted to the ECAP within 24 hours of the alleged violation.
[…]

CEC ELECTION REGULATION No. 01/2013 ON REGISTRATION AND OPERATION OF POLITICAL PARTIES [repealed by REGULATION 01/2023 ON THE REGISTRATION AND OPERATION OF POLITICAL PARTIES]

Article 3
Registration of political parties

3.1 Political party can apply for registration by submitting to the office:
[…]
3.1.6. Ethnicity statement founders of political initiative,
[…]

ELECTION REGULATION No. 06 / 2013 ON COUNT AND RESULTS CENTER

Article 7
Counting of ballots in CRC

[…]

7.2 Ballots must be considered as invalid if:
a) more than one political entity was marked in the ballot; or
b) the way the ballot was marked makes the purpose of the voter unclear; or
c) the ballot was not stamped with official ballot stamp, unless it is a ballot of by mail voting program; or
d) is a ballot of by-mail voting program that is not an acceptable ballot as defined with article 1.3 of Election Regulation no.03/20 13 for Out of Kosovo Voting.

ELECTION REGULATION No. 09/ 2013 VOTING, COUNTlNG AND MANAGEMENT OF POLLING CENTER

Article 21
The process of counting in regular polling stations

21.10 Ballot for the Kosovo Assembly, and Municipal Assembly and the mayor will be deemed invalid if:
a) a ballot has been marked in more than one political subj ect;
b) the way the ballot is marked makes no clear intention of the voter, or
c) ballot is not stamped with the offi cial stamp of the ballot, when removed from the ballot box.

In addition, the ballot for the Kosovo Assembly and the Municipal Assembly shall be deemed in valid if:

d) the voter marks only the candidate (s) and not a political entity.

CEC REGULATION 01/2023 ON THE REGISTRATION AND OPERATION OF POLITICAL PARTIES

Article 2
Registration of political parties

[...]

1.5. The date of the convention/founding assembly of the party. annex II, which contains the declaration of ethnicity which the political initiative represents if it races for the guaranteed seats;

[...]

CEC REGULATION NO. 04/2023 ON THE CERTIFICATION OF POLITICAL ENTITIES AND THEIR CANDIDATES

Article 2
Application for certification of the political entity

[...]
5.12. the political entity indicates in its application whether it wants to enter the race for the Assembly of Kosovo, to win any of the seats guaranteed for the representation of Serbs and other non-majority communities of Kosovo, according to Article 64 of the Constitution.

(ii) General principles according to the Code of Good Practice, the opinions and reports of the Venice Commission and other relevant documents of the Council of Europe and the LUND Recommendations on the Effective Participation of National Minorities in Public Life, of the Organization for Security and Cooperation in Europe (OSCE)

Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy through Law ("Venice Commission") at its 51st and 52nd meetings (July 5-6 and 18 - 19 October 2002)

1. Alongside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status.
2. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the "European electoral heritage". . This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as

fundamental rights, stability of electoral law and effective procedural guarantees, are met. The text which follows – like the foregoing guidelines – is therefore in two parts. The first covering the definition and practical implications of the principles of the European electoral heritage and the second the conditions necessary for their application.
[…]

I. The underlying principles of Europe's electoral heritage

Introduction: principles and their legal basis

3. If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules: suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically. All these principles together constitute the European electoral heritage.
4. Although all these principles are conventional in nature, their implementation raises a number of questions that call for close scrutiny. We would do well to identify the "hard core" of these principles, which must be scrupulously respected by all European states.
5. The hard core of the European electoral heritage consists mainly of international rules. The relevant universal rule is Article 25 (b) of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, although the latter is implied. The common European rule is Article 3 of the Additional Protocol to the European Convention on Human Rights, which explicitly provides for the right to periodical elections by free and secret suffrage;3 the other principles have also been recognised in human rights case law. The right to direct elections has also been admitted by the Strasbourg Court, at least implicitly. However, the constitutional principles common to the whole continent do not figure only in the international texts: on the contrary, they are often mentioned in more detail in the national constitutions.
6. Where the legislation and practice of different countries converge, the content of the principles can be more accurately pinpointed.

1. Universal suffrage
1.1. Rule and exceptions
6. Universal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions, all of which are given below. The most usual are age and nationality.
[…]

2.4. Equality and national minorities

"a. Parties representing national minorities must be permitted.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority ."

[…]
II. Conditions for implementing these principles
…
3. Procedural guarantees
[…]

3.3. An effective system of appeal
a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.
b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.
c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.
d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.
e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.
f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.
g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).
h. The applicant's right to a hearing involving both parties must be protected.
i. Where the appeal body is a higher electoral commission, it must be able ex officio to rectify or set aside decisions taken by lower electoral commissions.

Explanatory Report of the Code of Good Practice in Electoral Matters

[…]

2.4. Equality and national minorities

"22. In accordance with the principles of international law, the electoral law must guarantee equality for persons belonging to national minorities, which includes prohibiting any discrimination against them.21 In particular, the national minorities must be allowed to set up political parties.22 Constituency delimitations and quorum regulations must not be such as to form an obstacle to the presence of persons belonging to minorities in the elected body.

23. Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, eg by waiving the quorum for the national minorities' parties24 do not infringe the principle of quality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority.."

4. Secret suffrage

"52. Secrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed. [footnote omitted].

53. Voting must be individual. Family voting, whereby one member of a given family can supervise the votes cast by the other members, infringes the secrecy of the ballot; it is a common violation of the electoral law. All other forms of control by one voter over the vote of another must also be prohibited. Proxy voting, which is subject to strict conditions, is a separate issue.

54. Moreover, since abstention may indicate a political choice, lists of persons voting should not be published.

55. Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom.

[...]

3.3. An effective system of appeal

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;
- appeals may be heard by an electoral commission.

There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

95. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for

lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.
96. The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.
97. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated.
[...]
99. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.
100. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.
101. The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.
102. Where higher-level commissions are appeal bodies, they should be able to rectify or annul ex officio the decisions of lower electoral commissions."

Report on electoral rules and affirmative actions for the participation of minorities in the decision-making process in European countries [CDL-AD(2005)009], adopted by the Council for Democratic Elections on 10 March 2005 and the Venice Commission at its plenary meeting on 11-12 March 2005
[...]

7. On the basis of these presumptions, the affirmative action is defined as a set of "policies and practices which favour groups (mainly ethnic groups and women) who have historically experienced disadvantages".
This definition does not neglect the relevance of the function and, in particular, of the practical aim of policies and practices implied. The emphasis is rather on the political and the legal grounds on which the policies are developed and justified. On these grounds, the definition overrides the distinction between the narrow concept of "affirmative action" stricto sensu, and the concept of "special measures".
8. Somehow traditional arenas of the policies and practices of affirmative action have been education and employment. Yet in the last two decades the affirmative

action has been introduced in the field of conflict management and prevention, and particularly in the area of protection and development of national minorities. Among the ground breaking efforts in this area the opinions of the Advisory Committee on the Framework Convention for the Protection of the National Minorities in connection with Article 15 of the Convention are to be recognised. Here we would also mention Recommendation 1623 (2003) of the Parliamentary Assembly of the Council of Europe. The Assembly recommends to the "...state parties to pay particular attention ... to ensure parliamentary representation of minorities".
9. In this regard our report is focused on the achievements of one of the latest developments of affirmative action in the sphere of electoral rules as a mechanism for participation of national minorities in the decision making processes.

[...]

2. Affirmative Action and election rules

12. As mentioned above, the extension of the interest for the protection of national minorities in the field of their participation in the decision making is a relatively late development. But its importance has already attracted the attention of the relevant international organisations and bodies. Among the most prominent ones in this area, the efforts and achievements of the OSCE High Commissioner on National Minorities (HCNM) and Office for Democratic Institutions and Human Rights (ODIHR) need to be mentioned.6 The Venice Commission has also accepted the challenge and conducted its study on Electoral law and National Minorities.
13. Both studies are focused on the more general issue of the "importance of the electoral process for facilitating the participation of minorities in the political sphere". In this respect, the Lund Recommendation on elections: No. 7 appeals that the "States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including the rights to vote and stand for office without discrimination."
14. The study of the Venice Commission on the Electoral Law and National Minorities, includes important general conclusions which provide a solid starting ground for the future efforts to develop the discussion on affirmative action in the field of electoral rules for national minorities' participation in the decision making.

CONCLUSION

65. The country by country reviews show that there are already in existence interesting electoral rules that have affirmative action goals, in the broader meaning of the concept accepted here. These are of course not the only rules of electoral law allowing for a representation of minorities (see appendix). In most of the countries such rules are introduced as isolated elements while in a few of the countries they are introduced in a more systematic way. In the first case, the affirmative action electoral rules are introduced directly in the law. In the second case such rules are deducted from the more general constitutional provisions. The second pattern is more common among the newly democratised countries.
66. In general, the electoral rules that favour affirmative action have limited range. The number of beneficiaries of such electoral rules is clearly and sharply determined either by the Constitution or the Law or by other accompanying legislative acts. For example, the number of parliamentary seats guaranteed to minorities is almost always lower than the number of minorities present in the country. Affirmative

action may apply only at national, regional, local or even European level, and/or only in a part of the country. This means that the original inspiration for such electoral rules is not purely legally based, but probably political. The legislators are forced to use political criteria for classifying and treating a number of national minorities as one group for the purpose of election of a joint representative. The great differences in the number of members of particular minorities reduce the electoral chances of some minorities, because seats go to the candidate of the minority with the largest number of voters. This is a particularly relevant problem of affirmative action having in mind that the definitions of national minorities applied in each country are ad hoc, vague and vary significantly.
[...]
68. The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. In that direction the Venice Commissions' Code of good practice in electoral matters provides some of the basic principles for developing electoral affirmative action rules in accordance with the Europe's electoral heritage. Among them we will emphasise here the following principles:
a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
d. Electoral thresholds should not affect the chances of national minorities to be represented.
e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs [adopted by the Advisory Committee on the Framework Convention for the Protection of Minorities, adopted on 27 February 2008]

5. The protection of national minorities and of the rights and freedoms of persons belonging to national minorities, as embedded in the Framework Convention for the Protection of National Minorities, forms an integral part of the international protection of human rights.2 Hence the right to effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, as spelled out in Article 15 of the Framework Convention, forms also part of the international protection of human rights.
6. Although the Framework Convention protects the rights of individual persons belonging to national minorities,3 the enjoyment of certain rights, including the right to effective participation, has a collective dimension. This means that some

rights can be effectively enjoyed only in community with other persons belonging to national minorities.
[…]
10. Article 15, like other provisions contained in the Framework Convention, implies for the State Parties an obligation of result: they shall ensure that the conditions for effective participation are in place, but the most appropriate means to reach this aim are left to their margin of appreciation. This Commentary aims to provide the State Parties with an analysis of existing experiences so as to help them to identify the most effective options.
[…]
80. The participation of persons belonging to national minorities in electoral processes is crucial to enable minorities to express their views when legislative measures and public policies of relevance to them are designed.
81. Bearing in mind that State Parties are sovereign to decide on their electoral systems, the Advisory Committee has highlighted that it is important to provide opportunities for minority concerns to be included on the public agenda. This may be achieved either through the presence of minority representatives in elected bodies and/or through the inclusion of their concerns in the agenda of elected bodies.
82. The Advisory Committee has noted that when electoral laws provide for a threshold requirement, its potentially negative impact on the participation of national minorities in the electoral process needs to be duly taken into account.26 Exemptions from threshold requirements have proved useful to enhance national minority participation in elected bodies.
83. Constitutional guarantees for the representation of persons belonging to national minorities in elected bodies need to be coupled with effective implementing legislation and accompanying measures within reasonable time.27 The Advisory Committee considers it essential that persons belonging to national minorities participate or are consulted in the process of drafting such legislation and monitoring its implementation.

[…]

iv. Reserved seats system

91. Arrangements involving reserved and/or shared seats for representatives of national minorities have in a number of cases proved to be a useful means to enhance participation of persons belonging to national minorities in decision-making. The provision of reserved seats, whether shared between various national minorities or designed for one group, is one of the ways in which the representation of persons belonging to national minorities can be ensured in elected bodies.
92. The 'shared seats' system is particularly adapted to the needs of numerically small minorities. For such an arrangement to have a significant impact on the participation of all the national minorities represented through the shared seat(s), it is important that the minorities concerned agree on a common strategy and shared goals to be reached through the representation in the electoral body at stake. Elected representatives occupying shared seats should take due care to represent the concerns of all persons belonging to national minorities in the constituency. A rotation of the representatives of the different national minorities may help create the sense of a shared seat.
93. In order to ensure that a guaranteed seat arrangement contributes substantially to effective participation, it is important that the minority representatives elected

are effectively involved in decision-making processes. Moreover, they should have a real possibility to influence decisions taken by the elected body, including those not strictly related to national minorities. It is therefore important that they have speaking and voting rights in the elected body and that their role is not limited to a mere observer status.
94. However, the Advisory Committee is of the opinion that the mere establishment of such arrangements does not automatically provide persons belonging to national minorities with a genuine and substantial influence in decision-making.

THE LUND RECOMMENDATIONS ON THE EFFECTIVE PARTICIPATION OF NATIONAL MINORITIES IN PUBLIC LIFE, Organization for Security and Cooperation in Europe (OSCE) [1 September 1999]

II. Participation in decision-making
[...]

B. Elections

7) Experience in Europe and elsewhere demonstrates the importance of the electoral process for facilitating the participation of minorities in the political sphere. States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and stand for office without discrimination.
8) The regulation of the formation and activity of political parties shall comply with the international law principle of freedom of association.
This principle includes the freedom to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community.
9) The electoral system should facilitate minority representation and influence.
• Where minorities are concentrated territorially, single-member districts may provide sufficient minority representation.
• Proportional representation systems, where a political party's share in the national vote is reflected in its share of the legislative seats, may assist in the representation of minorities.
• Some forms of preference voting, where voters rank candidates in order of choice, may facilitate minority representation and promote inter-communal cooperation.
• Lower numerical thresholds for representation in the legislature may enhance the inclusion of national minorities in governance.
10) The geographic boundaries of electoral districts should facilitate the equitable representation of national minoritie

EXPLANATORY NOTE TO THE LUND RECOMMENDATIONS ON THE EFFECTIVE PARTICIPATION OF NATIONAL MINORITIES IN PUBLIC LIFE

B. Elections

7) Representative government through free, fair and periodic elections is the hallmark of contemporary democracy. The fundamental objective is, in the words of Article 21(3) of the Universal Declaration of Human Rights, that "The will of the

people shall be the basis of the authority of government". This basic standard is articulated in universal and European treaties, namely Article 25 of the International Covenant on Civil and Political Rights and Article 3 of Protocol I additional to the European Convention on Human Rights. For OSCE participating States, paragraphs 5 and 6 of the Copenhagen Document specify that, "among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings", "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government".

While States have considerable latitude in choosing the specific manner in which to comply with these obligations, they must do so without discrimination and should aim for as much representativeness as possible. Indeed, within the context of the United Nations, the Human Rights Committee has explained in paragraph 12 of its General Comment 25 on Article 25 (57th Session 1996) that "Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. [...] Information and materials about voting should be available in minority languages." Moreover, paragraph 5 of General Comment 25 clarifies that "The conduct of public affairs [...] is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels."

Insofar as no electoral system is neutral from the perspective of varying views and interests, States should adopt the system which would result in the most representative government in their specific situation. This is especially important for persons belonging to national minorities who might otherwise not have adequate representation.

8) In principle, democracies should not interfere with the way in which people organize themselves politically – as long as their means are peaceful and respectful of the rights of others. Essentially, this is a matter of freedom of association, as articulated in a wide variety of international instruments including: Article 20 of the Universal Declaration of Human Rights; Article 22 of the International Covenant on Civil and Political Rights; Article 11 of the European Convention on Human Rights; and paragraph 6 of the Copenhagen Document. Freedom of association has also been guaranteed specifically for persons belonging to national minorities under paragraph 32.6 of the Copenhagen Document and Article 7 of the Framework Convention. More specifically, paragraph 24 of Part VI of the Helsinki Document commits OSCE participatin g States "to ensure the free exercise by persons belonging to national minorities, individually or in community with others, of their human rights and fundamental freedoms, including the right to participate fully, [...] in the political [...] life of their countries including [...] through political parties and associations."

While full respect for equal rights and non-discrimination will reduce or eliminate the demand and need for political parties formed on the basis of ethnic ties, in some situations such communal parties may be the only hope for effective representation of specific interests and, thus, for effective participation. Of course, parties may be formed on other bases, e.g. regional interests. Ideally, parties should be open and

should cut across narrow ethnic issues; thus, mainstream parties should seek to include members of minorities to reduce the need or desire for ethnic parties. The choice of electoral system may be important in this regard. In any event, no political party or other association may incite racial hatred, which is prohibited by Article 20 of the International Covenant on Civil and Political Rights and Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination.

9) The electoral system may provide for the selection of both the legislature and other bodies and institutions, including individual officials. While single member constituencies may provide sufficient representation for minorities, depending upon how the constituencies are drawn and the concentration of minority communities, proportional representation might help guarantee such minority representation. Various forms of proportional representation are practised in OSCE participating States, including the following: "preference voting", whereby voters rank candidates in order of choice; "open list systems", whereby electors can express a preference for a candidate within a party list, as well as voting for the party; "panachage", whereby electors can vote for more than one candidate across different party lines; and "cumulation", whereby voters can cast more than one vote for a preferred candidate. Thresholds should not be so high as to hamper minority representation.

10) In drawing the boundaries of electoral districts, the concerns and interests of national minorities should be taken into account with a view to assuring their representation in decision-making bodies. The notion of "equity" means that no one should be prejudiced by the chosen method and that all concerns and interests should be given fair consideration. Ideally, boundaries should be determined by an independent and impartial body to ensure, among other concerns, respect for minority rights. This is often accomplished in OSCE participating States by means of standing, professional electoral commissions.

In any event, States should not alter electoral boundaries, or otherwise alter the proportions of the population in a district, for the purpose of diluting or excluding minority representation. This is expressly prohibited by Article 16 of the Framework Convention, while Article 5 of the European Charter of Local Self-Government stipulates that "Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute" (see recommendation 19 regarding territorial arrangements).

Assessment of the admissibility of the Referral

84. The Court shall first examine whether the admissibility requirements established in the Constitution and further specified in the Law and in the Rules of Procedure have been met.

85. As mentioned above, the Court recalls that the Applicants claim that the challenged Judgment of the Supreme Court was rendered in violation (i) of paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention; as well as (ii) Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR.

86. Based on the aforementioned allegations of the Applicants, the Court will next examine and elaborate each of their specific claims in terms of fulfilling the criteria of admissibility of the referral.

87. In this regard, the Court, applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case established in Article 113, paragraph 7 of the Constitution; articles 47, 48 and 49 of the Law; and rules 39 [Admissibility Criteria] and 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, will consider whether: (i) the referral was submitted by authorized parties; (ii) the decisions of public authorities are challenged; (iii) all legal remedies have been exhausted; (iv) the referral was submitted within the time limit established by the Law and the Rules of Procedure; (v) the rights and freedoms claimed to have been violated are specified; (vi) the referral is manifestly ill-founded; and (vii) if there are any additional admissibility criteria, which according to Rule 39 (3) of the Rules of Procedure have not been met.

(i) As to the authorized party

88. 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."*

89. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

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

90. The Court in the end also refers to item (a) of paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure which stipulates:

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

91. Regarding the fulfillment of the requirement for the authorized party, the Court notes that Partia Liberale Egjiptiane (PLE) and Partia Rome e Bashkuar e Kosovës (PREBK) appear before the Court, which are registered in the CEC as political entities to compete in the elections of 14 February 2021 for the Assembly. The Applicants in the Court are represented by the authorized parties, according to the authorization given by the President of the PLE Party and the President of the PREBK Party, respectively Veton Berisha and Albert Kinolli.

92. The Court notes that, based on paragraph 4 of Article 21 of the Constitution, the applicants have the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, insofar as they are applicable (see cases of the Constitutional Court KI48/18 Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 101; and KI207/19, Applicant *The Social Democratic Initiative, New Kosovo Alliance and the Justice Party*, Judgment, of 10 December 2020, paragraph 206 and see also the ECtHR case, *Party for a Democratic Society and others v. Turkey*, no. 3840/10, Judgment of 12 January 2016).

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

94. The Court notes that the Applicants challenge the Judgment [AA. no. 29/2021] of 12 March 2021 of the Supreme Court in conjunction with the Decision [A. no. 736/2021] of 7 March 2021 of the ECAP. Consequently, the Court finds that the referral was submitted by an authorized party that has a direct interest in the constitutionality of the challenged decision of the Supreme Court in terms of the protection of the rights and freedoms guaranteed by the Constitution and the ECHR and that the Applicants challenge acts of public authorities.

(ii) Regarding the act of public authority

95. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and Article 47 [Individual Requests] of the Law, which provide that "*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. […]*".

96. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides *"(2) A referral under this Rule must accurately clarify […] what concrete act of public authority is subject to challenge"*.

97. In this regard, the Court notes that the Applicants challenge the Judgment [AA. no. 29/2021] of 12 March 2021 of the Supreme Court in conjunction with the Decision [A. no. 736/2021] of 7 March 2021 of the ECAP.

98. Therefore, the Court finds that the Applicants challenge acts of a public authority.

(iii) Regarding the exhaustion of legal remedies

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

Article 47
(Individual Requests)

(...)

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

Rule 39
[Admissibility Criteria]

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

(...)

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

100. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also defined by Article 47 of the Law and item (b) of paragraph (1) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.

101. In this regard, the Court also based on its case law recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court that they must first use the effective legal remedies available to them in accordance with law, against a challenged act or decision of the public authority or of the regular court.

102. In terms of fulfilling the criterion for the exhaustion of legal remedies in a formal-procedural sense, the Court, based on the case file submitted by the Applicants, notes that the appeal against the Decision of the ECAP of 7 March 2021 with the Supreme Court, was filed only by the Applicant, namely the political entity PLE. The latter, however, had not submitted an appeal to the Supreme Court against the supplementary Decision of the ECAP of 10 March 2021.

103. Having said that, from the case file it also results that the political entity PREBK, in the capacity of the Applicant before this Court, did not file an appeal with the Supreme Court against the aforementioned Decision of the ECAP, of 7 March 2021, nor against the supplementary decision, of 10 March 2021.

104. The Court referring to the relevant legal provisions, namely paragraph 4 of Article 118 of Law 03/L-073 on General Elections [amended and supplemented by paragraph 2 of Article 12 of Law no. 03/L-256], notes that the Applicant, namely the political entity PREBK, had available also as a regular legal remedy, the appeal to the Supreme Court against the decisions of the ECAP. However, the Court reiterates that the Applicant, namely the political entity PREBK, against the CEC Decision had submitted an appeal only to the ECAP, but not to the Supreme Court.

105. In the context of fulfilling the criterion for the exhaustion of legal remedies, the Court has consistently emphasized that it respects the principle of subsidiarity, considering that all applicants must exhaust all procedural possibilities in the regular proceedings, in order to

prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right guaranteed by the Constitution. The Court has also consistently emphasized that the Applicants are liable to have their respective case declared inadmissible by the Court, if they did not use the regular procedure or did not report violations of the Constitution in the regular procedures (see, *inter alia*, cases of the Court: KI139/12, Applicant *Besnik Asllani*, Decision on the request for interim measure and Resolution on Inadmissibility, of 25 February 2013, paragraph 45; KI07/09, Applicant *Demë Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility, of 19 May 2010, paragraphs 18-19; KI89/15, Applicant *Fatmir Koçi*, Resolution on Inadmissibility, of 22 March 2016, paragraph 35; KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility, of 16 November 2016, paragraph 39; and KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility, of 7 August 2017, paragraphs 35-37).

106. Only in that way, the regular courts must be afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of ECHR, that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach, regardless whether or not the provisions of the ECHR are incorporated in national law (see, *inter alia*, case of ECtHR *Aksoy v. Turkey*, Judgment of 18 December 1996, paragraph 51).

107. Therefore, the Court, based on the above, finds that the Applicant, namely the political entity PLE has exhausted all legal remedies to challenge in the Court also the Judgment [AA. no. 29/2021] of 12 March 2021 of the Supreme Court in conjunction with the Decision of the ECAP of 7 March 2021, but only pertaining to the rejection of his appeal regarding the Municipality of Kamenica and Graçanica, for the reason that the latter had not submitted an appeal against the supplementary Decision of the ECAP of 10 March 2021, which decision was made regarding the refusal to annull the ballots of the political entity Romani Iniciyativa in the Municipality of North Mitrovica.

108. Whereas, the Applicant, namely the political entity PREBK, in terms of the exhaustion of legal remedies in the formal-procedural sense, has not exhausted the legal remedies, as specified by Article 113, paragraph 7 of the Constitution, in conjunction with Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

109. Consequently, and based on the above, the Court will continue with the examination and assessment of the fulfillment of further admissibility criteria of the referral only in relation to the Applicant, namely the political entity PLE.

(iv) As to the accuracy of the Referral and the deadline regarding the political entity PLE

110. In the following, the Court also examines whether the Applicant, namely the political entity PLE, has met the other admissibility criteria, further established in the Law and in the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of the Referral] and Article 49 [Deadline] of the Law, which provide:

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

111. The Court recalls that the same requirements are further provided in items (c) and (d) of paragraph (1) of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.

112. Regarding the fulfillment of these criteria, the Court notes that the applicant (PLE) has clarified accurately which fundamental rights and freedoms guaranteed by the Constitution and the ECHR he claims to have been violated and has specified the concrete acts of the public authority which he is challenging in accordance with Article 48 of the Law and the relevant provisions of the Rules of Procedure and has submitted the referral within the four (4) month deadline prescribed by Article 49 of the Law and the relevant provisions of the Rules of Procedure.

113. Consequently, the Court finds that the applicant (PLE) has specified its referral and submitted it within the legal time limit.

(v) Conclusion as to the admissibility of the referral pertaining to the Applicant PLE

114. The Court reaches the conclusion that the applicant (PLE), (i) in terms of the request for the constitutional review of the challenged Judgment of the Supreme Court, of 12 March 2021 in relation to the Decision of the ECAP is an authorized party; (ii) challenges two decisions of the public authority, namely the Judgment of the Supreme Court of 12 March 2021 regarding the Decision of the ECAP of 7 March 2021; (iii) has exhausted legal remedies in the formal-procedural sense as specifically elaborated above; (vi) has specified the rights and freedoms guaranteed by the Constitution, and the ECHR, which he claims to have been violated; and (v) has submitted the referral within the deadline prescribed by the Law and the Rules of Procedure.

115. Consequently, the Court declares the referral of the applicant, namely the political entity, PLE admissible and in the following will continue with the examination of the merits of the applicant's referral.

Merits

116. The Court first recalls that the circumstances of the present case are related to the participation of the Applicant, namely the political entity PLE, in the elections for the Assembly held on 14 February 2021. In these elections, as a result of the certification by the CEC, among others, competed the Applicant, namely PLE and the political entity Romani Iniciyativa. On 4 March 2021, the CEC by Decision [no. 860-2021], announced the final results of the elections for the Assembly (i) the political entity Romani

Iniciyativa received 4,049 votes, whereas (ii) the political entity PLE received 2,430 votes. On 5 March 2021, the Applicants, namely PLE and the four (4) political entities, representing the non-majority Roma, Ashkali and Egyptian communities, namely PREBK, PAI, PDAK and LPRK, had submitted joint complaints/appeals to ECAP challenging *"votes obtained in an unconstitutional and illegal manner by the Political Entity "Romani Iniciyativa" requesting the annulment of the ballots of this entity in 107 polling stations."* Therefore, and on 7 March 2021, initially ECAP by Decision [A. no. 736/2021] decided that (i) to partially approve the appeals of the applicants and the political entities by deciding to annul the ballots [specified in point I of the enacting clause for the political entity Romani Iniciyativa in the forty-one (41) polling stations specified in this Decision in the Municipality of Leposavic, Novobërde, Ranillug Partesh and Kllokot; (ii) to order CEC to remove the annulled ballots according to point I of the enacting clause of the Decision from the final result of the elections, published by CEC Decision [no. 860-2021] of 4 March 2021; and (iii) to reject as partially ungrounded the above-mentioned appeals for the annulment of the ballots for the entity Romani Iniciyativa in the specified polling stations [the 50 polling stations specified in this point of the enacting clause, page 2 of the ECAP Decision]. ECAP by Decision of 7 March 2021 did not decide regarding the request submitted in the appeal for the annulment of the ballots in the Municipality of North Mitrovica. As a result, on 9 March 2021, against the above-mentioned Decision of 7 March 2021 of the ECAP, the Aplicant, namely the PLE submitted an appeal to the Supreme Court, By the latter was challenged the legality of the ECAP Decision of 7 March 2021, by which their appeal was partially rejected, specifying that ECAP has not decided about the Municipality of North Mitrovica. On 10 March 2021, ECAP issued the supplementary Decision, namely Decision [A. no. 736/2021] by which it supplemented the previous decision of 7 March 2021 as follows: (i) the appeals submitted by the political entities PLE, and other respective entities and (40) ballots in Polling Station 3502/01R in Ranillug Municipality, which according to the election results, belong to the political entity Romani Iniciyativa are annulled; (ii) the appeals submitted by the political entities PLE, and other respective entities by which they requested to annul the ballots in the fifteen (15) specified polling stations belonging to the political entity Romani Iniciyativa, are rejected as ungrounded, namely at the polling stations in the Municipality of North Mitrovica. Against this supplementary Decision of the ECAP, the Applicant, namely the political entity PLE, had not submitted an appeal to the Supreme Court. In the latter, the appeal of the Applicant, namely the PLE was submitted only regarding the Decision of 7 March 2021. Whereas, an appeal against two Decisions of the ECAP, namely that of 7 March 2021 and 10 March 2021, was also submitted political entity Romani Iniciyativa. On 12 March 2021, the Supreme Court by the Judgment [AA. no. 29/2021] decided to reject as unfounded (i) the appeal of the political entity Romani Iniciyativa against the Decision of the ECAP of 7 March 2021 and the supplementary Decision of the ECAP of 10 March 2021; and (ii) the appeal of the Applicant, namely PLE and other political entities against the Decision of the ECAP of 7 March 2021, thus upholding the decision-making of the ECAP.

117. The Court recalls that the Applicant (PLE) partially challenges the decision of the Supreme Court before the Court, essentially claiming that the Supreme Court should have confirmed the annulment/declaration of the votes invalid in three (3) other municipalities, namely Graçanica, Kamenica and North Mitrovica, with the clarification that, as a result of the votes received by the political entity Romani Iniciyativa in the aforementioned municipalities and which according to the Applicant, do not represent the votes of the Roma, Ashkali and Egyptian community, but the votes of the Serbian community, he was denied his right to be elected or to have representatives in the

Assembly of Kosovo in violation of the constitutional guarantees. Having said this, the Applicant himself emphasizes that in the Republic of Kosovo, there is a lack of constitutional and legal basis, also emphasizing that "there *are no precise international practices and norms*" and which expressly determine that the guaranteed seats for national minorities can be won only if they are voted by the same community they claim to represent. In the absence of this constitutional and legal basis, the Applicant alleges that based on paragraph 4 of Article 58 of the Constitution, the Court should oblige the Assembly to take adequate measures, by issuing laws, through which the effective participation of communities that are not the majority in Kosovo would be ensured, so that, among other things, the guaranteed seats in the Assembly of Kosovo would only be won if they are voted for by members of the same community that they declare to represent.

118. In the context of the Applicant's allegations, the Court recalls that the Applicant, by the appeal submitted to the ECAP, alleged that the CEC decision constituted a violation of paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention. Based on these allegations, the ECAP, by its Decision of 7 March 2021, annulled the ballots of the political entity Romani Iniciyativa in polling stations in five (5) municipalities of the Republic of Kosovo, namely Leposavic, Novobërda, Ranillug, Partesh and Kllokot, putting emphasis, among other things, on "*the lack of objective link between the voter and the voted entity*". This decision of the ECAP, as explained above, did not decide on the appeals regarding the Municipality of North Mitrovica, and this municipality was addressed by the supplementary Decision of 10 March 2021, rejecting the respective appeal. As explained above, the Applicant did not file an appeal against the supplementary decision.

119. The Court recalls that the Applicant filed the same allegations with the Supreme Court when it challenged the decision of the ECAP of 7 March 2021, essentially requesting that the votes in the municipalities of Graçanica and Kamenica also be annulled/declared invalid. By the appeal to the Supreme Court, the latter, among other things, emphasized that (i) "*there iwass a disproportion between the vote given for entity Romani Iniciativa and the real number of the Roma population in the municipalities of Kamenica, Graçanica and North Mitrovica,* adding that *"in Graçanica, where RI won 1773 votes while the number of potential voters of the Roma population is 745, 1028 votes for RI should be annullled; in Kamenica, where RI won 283 votes, while the number of potential voters of the Roma population is 240, 43 votes for RI be annullled; as well as in North Mitrovica, where RI has won 198 votes, while the number of potential voters of the Roma population is 40, 158 votes for RI are to be annulled";* and that as a result, (ii) the refusal of the ECAP to annul the ballots of the entity Romani Iniciyativa also in the municipalities of Kamenica, Graçanica and North Mitrovica, constituted a violation of paragraph 4 of Article 58 of the Constitution and Article 15 of the Framework Convention. The Court recalls that the Supreme Court upheld the decision-making of the ECAP, namely (i) it had approved the interpretation of the ECAP based on which the ballots in a number of polling stations were declared invalid; and (ii) confirmed that the Applicant's request that certain ballots be declared invalid in the municipality of Graçanica and Kamenica should be rejected.

120. The Court recalls that the applicant (PLE) before the Court, challenges the Judgment of the court, in essence, precisely because his request to declare invalid also the votes in the designated polling stations in the municipality of Graçanica and Kamenica, respectively, was rejected. The Applicant raises the same allegations that he raised before the ECAP

and the Supreme Court, according to which, in essence, its right to be elected as a member of the Assembly of Kosovo was violated because a larger number of ballots had to be annulled/declared invalid. In this regard, the Applicant before the Court, among other things, emphasizes that "*in the present case of the elections of 14 February 2021, the representatives of Romani Iniciyativa, who currently occupies the seat in the Assembly, lacks an objective link with the Roma community, since the votes that this political entity received in the municipality of Graçanica, Kamenica and North Mitrovica are also in larger numbers than the residents of the Roma community in these municipalities, so those votes were received by voters of other communities. Without these irregular votes, this representative would not currently exercise this function in the Assembly. The representative from the Roma community has managed to be elected deputy in guaranteed seats as a result of the votes of another community, for the simple fact that that community is numerically larger than the Roma community. Consequently, there is a disconnection between the representative and the electorate of this community which, according to the Constitution, is supposed to give representative legitimacy to the deputy in the first place. Such a deformation of this representative mechanism denies the effective representation of the Roma, Ashkali and Egyptian communities and their members in Kosovo and contradicts Article 58 (4) and 64 (2) of the Constitution of Kosovo".*

121. Based on the content of the allegations raised by the Applicant in its referral before the Court, the Court notes that the Applicant, in reasoning the violation of paragraph 4 of Article 58 of the Constitution in conjunction with Article 15 of the Framework Convention, uses the reasoning given by the ECAP and the Supreme Court, which decisions found that the votes won by the political entity Romani Iniciyativa in the five (5) aforementioned municipalities should be annulled/declared invalid, essentially, because taking into account the difference of the number of Roma, Ashkali and Egyptian citizens in the respective municipalities and the votes won by the Romani Iniciativa, "*the objective link the voter and the voted entity was lacking*".

122. In this regard, the Court notes that based on the interpretation of the ECAP and the Supreme Court, in accordance with paragraph 4 of Article 58 of the Constitution and paragraph 2 of Article 64 of the Constitution, there must be "*an the objective link between the voter and the voted entit*", namely the exercise of the active and passive right to vote in the Republic of Kosovo, is conditioned by ethnic background and that, in essence, any vote that exceeds the number of the population determined in a polling station, must consequently be annulled/declared invalid. According to Applicant's allegation, this interpretation of the Constitution should also be confirmed by the Constitutional Court and consequently confirm that the respective votes should have been declared invalid in the polling stations designated in at least two other municipalities, namely Graçanica and Kamenica.

123. Based on these allegations and as mentioned above, the Court will first (i) elaborate the general principles related to the election rights guaranteed by Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR, including the principles stemming from the Court's own case law, of the ECtHR and international instruments, including the opinions and reports of the relevant international mechanisms regarding the election rights; and then (ii) shall apply the latter to the circumstances of the present case.

I. General principles

124. In the following and as far as it is relevant in the circumstances of the present case, the Court will present in a summarized manner, (i) the general principles for electoral rights according to the Constitution; (ii) general principles for the representation of non-majority communities under the Constitution and the Framework Convention; (iii) general principles according to the case law of the Court and the ECtHR; (iv) the relevant case law of the ECtHR regarding the electoral rights of national minorities; and (v) general principles according to the Code of Good Practice, opinions and reports of the Venice Commission and other relevant documents of the Council of Europe and of the LUND Recommendations on the Participation of National Minorities in Public Life, of the Organization for Security and Cooperation in Europe (OSCE) .

(i) General principles for electoral rights according to the Constitution

125. The Court first refers to Article 45 [Freedom of Election and Participation] of the Constitution, which stipulates that:

> *"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."*

126. In relation to electoral rights, the Court also refers to the International Instruments and Agreements contained in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, which are directly applicable and are part of the legal order of the Republic of Kosovo (see, among others, case no. KO162/18, applicant: *the President of the Assembly of the Republic of Kosovo*, Judgment of 19 December 2018, paragraph 36 and KI207/19, applicant *NISMA Socialdemokrate, Aleanca Kosova e Re and Partia e Drejtësisë,* quoted above, paragraph 107).

127. Protocol no. 1 of the ECHR by Article 3 (Right to free elections) has established that: "*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

128. In the following, the Court also refers to Article 21 of the Universal Declaration of Human Rights, by which it is established that:

> *"1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
> *2. Everyone has the right of equal access to public service in his country.*
> *3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

129. The Court also refers to Article 25 of the International Covenant on Civil and Political Rights, which stipulates that:

> *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
> *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
> *(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
> *(c) To have access, on general terms of equality, to public service in his country."*

(ii) General principles for the representation of non-majority communities under the Constitution and the Framework Convention

130. The Court first refers to paragraph 4 [amended according to amendment no. 1 of the Constitution of the Republic of Kosovo regarding the termination of the international supervision of Kosovo's independence, published in the Official Gazette on 7 September 2012] of Article 58 of the Constitution, which stipulates that:

> "*The Republic of Kosovo shall adopt adequate measures as may be necessary to promote full and effective equality in all areas of economic, social, political and cultural life, among members of communities and the effective participation of communities and their members in public life and decision making. Such measures shall not be considered to be an act of discrimination".*

131. The Court further refers to Article 15 of the Framework Convention, which stipulates that:

> *"The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them".*

132. The Court also recalls that Article 64 [Structure of the Assembly] of the Constitution stipulates that:

> *"1. The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.*
> *2. In the framework of this distribution, twenty (20) of the one hundred twenty (120) seats are guaranteed for representation of communities that are not in the majority in Kosovo as follows:*
> *(1) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10);*
> *(2) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional*

seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat if the number of seats won by each community is less than the number guaranteed.

(iii) General principles according to the case law of the Court and the ECtHR

133. The Court, referring to its case law, among others, elaborated in Judgment KI48/18, initially emphasizes that *"Article 45 of the Constitution consists of 3 separate paragraphs and each of them has the relevant elements and rules. [...] the first paragraph of Article 45 of the Constitution defines the right to vote (the active right of vote) and the right to be elected (passive right of vote). The first right, i.e. the one of active vote, belongs only to individuals, i.e. to natural persons, who are citizens of the Republic of Kosovo and who have reached the age of 18, even on the voting day and in the event that their right is not limited by a court decision. The other right, that of a passive vote, belongs to the candidates as individuals, namely as natural persons, who run in elections at the local or central level, as well as to political entities, namely legal persons competing in the elections at the local or central level. Also for the passive right of vote applies the condition that right of the latter to exercise this right is not limited by a court decision."* (see, paragraph 225 of the Judgment in case KI48/18).

134. In the same case, the Court further emphasized that: *"[...] the second paragraph of Article 45 of the Constitution guarantees that the vote is personal, equal, free and secret. The same guarantees are also defined in terms of local self-government, which according to Article 123 of the Constitution is exercised through representative authorities elected in general, equal, free and direct elections and by secret ballot. These constitutional guarantees are also further specified by the LGE, the Law on Amending and Supplementing the LGE and the Law No. 03/L-072 on Local Elections in the Republic of Kosovo. In addition, the latter are in harmony with the five fundamental principles of the European electoral heritage, summarized in the Code of Good Practice and respective Explanatory Report, which, as summarized above, include the universal vote, equal vote, free vote, secret vote, and direct vote."*

135. In the interpretation of guarantees embodied in Article 45 of the Constitution, the Court refers to the ECtHR case-law, which has also interpreted Article 3 of Protocol no.1 to the ECHR as a guarantee of "*the active right of vote*" and "*the passive right of vote*". Both provide substantial and procedural safeguards. However, the Court notes that, based on the case-law of the ECtHR, the passive rights have been equipped by less protection through the ECtHR case-law than active rights (See ECHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, para. 105 -106). The ECtHR case-law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election. (See ECtHR cases, *Zdanoka v. Latvia* cited above, paragraph 115; *Melnitchenko v. Ukraine*, no. 17707/02, Judgment of 19 October 2004, paragraph 57).

136. The Court further emphasizes that, based on the case law of the ECtHR, the rights guaranteed under Article 3 of Protocol no. 1 to the ECHR are essential for establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. (See, the case of ECtHR, *Hirst v. United Kingdom* (no.2) [GC] no. 74025/01, Judgment of 6 October 2005, paragraph 58). However, according to ECtHR,

these rights are not absolute. They have space for "*implicit restrictions*" and the Contracting States are given room for assessment in this sphere. (See cases of ECtHR *Mathieu Mohin and Clerfayt*, cited above, paragraph 52, *Matthews v. United Kingdom*, no.24883/94, Judgment of 18 February 1999, paragraph 63, *Labita v. Italy*, no. 26772/95, Judgment of 6 April 2000, paragraph 201; *Podkolzina v. Latvia*, No. 46726/99, paragraph 33; and *Parteider Friesen v. Germany*, no. 65480/10, Judgment of 28 January 201, paragraphs 43-44).

137. In addition, it is important to note that the guarantees of Article 3 of Protocol no. 1 to the ECHR differ from other rights guaranteed by the ECHR, and this is reflected in the wording of its own article which is focused on determining the obligation on the Contracting States to hold elections that ensure the free expression of the voters' opinion and is not formulated in the light of a particular right or freedom. Consequently, the focus of Article 3 of Protocol no. 1 is on the obligation of the Contracting State and not on the rights and freedoms of natural or legal persons, even though they are not excluded, as the case-law of the ECtHR emphasizes (See, the case of ECtHR *Mathieu-Mohin and Clerfayt v. Belgium*, no. 9267/81 Judgment of 2 March 1987, paragraphs 46-51, and see also Court's case KI48/18, cited above, paragraphs 219-220).

138. The ECtHR in its case *Mathieu-Mohin and Clerfayt v. Belgium*, has specified that the right to universal and equal suffrage is included in this right. In this case, the ECtHR has specified that this article extends to equal treatment for all citizens (paragraph 54 of the Judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*). In addition to this guarantee, the ECtHR has also specified that Article 3 of Protocol no. 1 of the ECHR guarantees the right to a free and secret vote, namely elections must be organized in such a way as to provide an alternative for free elections and take place in circumstances that ensure the secrecy of voting.

(iv) Relevant case law of the ECtHR regarding the electoral rights of national minorities

139. In the following, the Court will refer to the case law of the ECtHR that is related to the electoral rights of national minorities, both in the sense of the right to be elected and the right to elect, respectively the active and passive right to vote.

140. In the context of the active right to vote, the Court first refers to the ECtHR case of *Aziz v. Cyprus* (no. 69949/01, Judgment of 22 June 2004), the circumstances of which are related to the fact that applicant complained that he was refused permission to be registered on the electoral roll, in order to vote in the parliamentary elections of 27 May 2001, because he was a member of the Turkish-Cypriot community. His request was refused on the ground that, under Article 63 of the Constitution, members of the Turkish-Cypriot community could not be registered in the Greek-Cypriot electoral roll. The ECtHR held that there had been a violation of Article 3 of Protocol No. 1 to the Convention on account of the abnormal situation existing in Cyprus since 1963 and the legislative vacuum, he, as a member of the Turkish-Cypriot community living in the Republic of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives. The ECtHR also held that there had been a violation of Article 14 (prohibition of discrimination) of the ECHR taken together with Article 3 of Protocol No. 1, finding a clear inequality of treatment in the enjoyment of the right in question, between the members of the Turkish-Cypriot community and those of the Greek-Cypriot community. The ECtHR reiterated in this

respect that States had considerable latitude to establish rules for parliamentary elections, but such rules had to be justified on reasonable and objective grounds.

141. On the other hand, in the most current case of the ECtHR, namely the case of *Bakirdzi and E.C. v. Hungary* (applications no. 49636/14 and 65678/14, Judgment of 3 April 2023, which became final on 3 April 2023), the circumstances of which concern two Applicants members of national mniorities in Hungary, who were registered to vote in the 2014 parliamentary elections in Hungary. Based on the relevant Hungarian electoral law, (i) the national minorities' members may register as national minority voters on the basis of self-identification; (ii) national minority voters can only vote for the list of the national minority to which they belong; (iii) for the purpose of voting of national minorities, each national minority has a separate closed list of candidates appearing on a separate ballot; and (iv) the only option of voters of the respective national minorities is to vote or not to vote for the closed list presented with respect to their national minority. The relevant electoral law specifically distinguishes between all voters residing in Hungary and voters residing in Hungary who are registered in the electoral register as voters of the national minorities.

142. Pursuant to Article 3 of Protocol No. 1 of the Convention in conjunction with Article 14 of the Convention, the applicants complained that the voting system of national minorities constituted a discriminatory interference into their active electoral rights. The respective applicants, among other things, complained that the fundamental element of free elections was a real choice between competitors in the political race. Nevertheless, they did not have a real choice because (i) first, the national minority voters did not have the opportunity to vote for political parties' lists; (ii) secondly, they could not vote for anyone other than candidates of their own national minority group. The same before the ECtHR claimed that having an identical ethnic origin does not result in having identical political views. The respective applicants further alleged that by limiting their choice to voting for the closed list of national minorities, their right to vote secrecy was also violated, because once they were identified as national minority voters, it was known immediately the manner how they voted. Finally, and in the view of the respective applicants, the measure was discriminatory given that - due to their status of belonging to a national minority - they were treated differently from the rest of the voters.

143. Having assessed the allegations of the aforementioned applicants, the ECtHR found a violation of Article 3 of Protocol no. 1 in conjunction to Article 14 of the ECHR. In the reasoning of the respective violation, the ECtHR, among other things, addressed in detail the allegations pertaining to (i) the alleged lack of free choice for the voters of the national minorities; and (ii) the alleged violation of the secrecy of the vote.

144. With respect to the first, namely the alleged lack of free choice for the voters of the national minorities, the ECtHR noted that as a result of being registered as voters of national minorities, the applicants could only vote for their respective lists of national minorities or to abstain from voting for the list of national minorities. Consequently, they had no choice between different party lists, nor any impact on the order of elected candidates from national minority lists. Further on and as far as it is relevant to the circumstances of the concrete case, the ECtHR emphasized that the right to vote includes the possibility for voters to pick the candidates or party lists that best reflect their political views and that the electoral regulations should not be asking the voters to support political positions, which they do not support. According to the ECtHR, while the system designed for national minority voters did not put pressure on the applicants in

picking one or more candidates, it did not allow them to honestly reflect their will as voters or to cast their vote in the promotion of political ideas and programs of political action, or to associate for political purposes through voting. In other words, the applicants, as national minority voters, could not express their political views or choice at the ballot box, but only the fact that they sought representation in political decision-making as members of a national minority group. The ECtHR pointed out that there are doubts that a system in which a vote can only be cast for a specific closed list of candidates and which requires voters to give up their party affiliations in order to have representation as a member of a minority ensures *"free expression of opinion of the people in election of the legislature"* (paragraphs 64-66 of the Judgment in case *Bakirdzi and E.C. v. Hungary)*.

145. Whereas with respect to the second, namely the alleged violation of the secrecy of the vote, the ECtHR noted that it considers that a voting system must ensure the secrecy of the vote, allowing the electorate to exercise the right to vote for a preferred candidate freely and effectively, in line with their own consciousness and free of any undue influence, intimidation or disapproval by others. According to the ECtHR, this also serves the larger public interest in ensuring free and fair elections. In practical terms, according to the ECtHR, the question of who a voter has voted for in an election should not be revealed to the public because the voting system must assure the voters that they will not be directly or indirectly compelled to tell who they voted for. The ECtHR further explained that there are no allegations by the applicants that the procedure at the polling stations did not ensure the secrecy of their votes, but to the contrary given that they had only one choice as national minority voters, their electoral choice was indirectly revealed to everybody. According to the ECtHR, if a voter chooses to be registered as a national minority voter of a particular minority, he or she shall only have one choice and in practice he/she will be given a ballot with the candidates of the national minority list, instead of the ballot offering selection between different candidates of political parties. Therefore, all those present at the polling station at the relevant time, especially the members of the respective election commissions, would realize that the voter had voted the candidates on the national minorities list. Similarly, national minority voters could be tied to their votes during the counting procedure, especially in polling stations where the number of registered national minority voters was limited. Apparently, according to the ECtHR, the regulation imposed on minority voters allowed for the details of how a national minority voter cast his or her vote to be known to all and to gather information about the electoral intentions of the national minority voters as soon as they are registered as such. In other words, the right to complete secrecy was not available to the applicants as national minority voters. The ECtHR emphasized that it considers that voters who decide to cast their votes as voters of a national minority should be protected in the same way as electoral rules that protect the right of voters who decide to cast their votes in favor of a political party or an independent candidate. Therefore, according to the ECtHR, confidentiality is required for both categories of persons. Yet, according to the ECHR, the voting system in the national minorities list was not available to the applicants without violating the right to secrecy of their vote (paragraphs 68-71 of the Judgment in case *Bakirdzi and E.C. v. Hungary*).

146. The ECtHR reiterated in the end that any electoral legislation must be evaluated in the light of the political evolution of the country in question, so that features that would be unacceptable in the context of one system could be justified in the context of another one. The ECtHR also acknowledged that it is aware that there isn't any single requirement under the Convention for different treatment in favor of the minority parties. However, it

pointed out that once the legislature decides to create a system that aims to eliminate or reduce the current cases of inequality in political representation, it is natural that such measure shall contribute to the participation of the national minorities on an equal footing with others in the election of legislature, instead of perpetuating exclusion of the minority representatives from political decision-making at the national level (see paragraph 73 of the Judgment in case *Bakirdzi and E.C. v. Hungary*).

147. On the other hand, in the context of the passive right to vote, the ECtHR, in its case *Sejdić and Finci v. Bosnia and Herzegovina* [GC*],* no. 27996/06 and 34836/06, Judgment, of 22 December 2009, examined, among other things, the impossibility of the respective applicants, who had identified themselves as members of the Roma community and of Jewish origin, respectively, to run for elections in the House of Representatives and the Presidency of the State, because they had not declared their affiliation with one of the "*constituent peoples*", as required by the provisions of the Constitution of Bosnia and Herzegovina. The ECtHR found that the constitutional provisions, which prevented the applicants from running in the elections for the Presidency of the State, were discriminatory under Article 1 of Protocol no. 12 of the ECHR. In that case, the ECtHR, among other things, had noted:

> *"45. Turning to the present case, the Court observes that in order to be eligible to stand for election to the House of People of Bosnia and Herzegovina, one has to declare affiliation with a "constituent people". The applicants, who describe themselves to be of Roma and Jewish origin respectively and who do not wish to declare affiliation with a "constituent people", are, as a result, excluded (see paragraph 11 above). The Court notes that this exclusion rule pursued at least one aim which is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace.[...]."*

148. Similarly, in the case of *Zornić v. Bosnia and Herzegovina* (no. 3681/06, Judgment of 15 July 2014), namely, the circumstances of the case, similar to those in the case *Sejdic and Finci v. Bosnia and Herzegovina,* are related to the fact that the applicant as a result of her refusal to declare her affiliation with one of the constituent people but simply declaring as a citizen of Bosnia and Herzegovina was denied her right to be elected to the Parliament and the Presidency of Bosnia and Herzegovina. In this case also, the ECtHR found a violation of Article 14 in conjunction with Article 3 of Protocol no. 1 of the ECHR and violation of Article 1 of Protocol No. 12 of the ECHR. In this case, the ECtHR, among others, emphasized that the finding of a violation in the present case was the direct result of the failure of the authorities to introduce measures to ensure compliance with the judgment of the Grand Chamber of ECtHR in case *Sejdić and Finci*. According to the ECtHR, the failure of the state authorities to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with the ECHR, is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.

149. In the end, and in respect of Article 15 of the Framework Convention, the ECtHR, among other things, emphasized that the latter does not necessarily require different treatment for minority communities and that each state has the margin of appreciation, namely to determine adequate measures to protect and promote non-majority communities, measures which, after approval, cannot constitute a basis for discrimination. More specifically, in the case of *Partei die Friesen v. Germany*, the ECtHR, among other

things, had emphasized that *"[ECtHR] initially observes that the Framework Convention, while acknowledging the margin of appreciation enjoyed by the State in electoral matters, puts an emphasis on the participation of national minorities in public affairs (see Article 15 of the Framework Convention). [...] The States party to the Framework Convention enjoy a wide margin of appreciation in how to approach the Framework Convention's aim of promoting the effective participation of persons belonging to national minorities in public affairs as stipulated in Article 15 [of the Framework Convention].. Consequently, the [ECtHR] takes the view that, even interpreted in the light of the Framework, the Convention does not call for a different treatment in favour of minority parties in this context. 44. There has accordingly been no violation of Article 14 of the [ECHR] read in conjunction with Article 3 of Protocol No. 1. (see paragraphs 43 and 44)."*

(v) General principles according to the Code of Good Practice, opinions and reports of the Venice Commission and other relevant documents of the Council of Europe

150. In the following, and insofar as it is relevant to the circumstances of the present case, the Court will elaborate the general principles and standards developed through the Code of Good Practice, the opinions and reports of the Venice Commission and the Commentary of the Advisory Committee on the Framework Convention for the Protection of National Minorities.

151. In this regard, the Court first points out that the Code of Good Practice of Electoral Matters, in its point 2.4 [Equality and national minorities], establishes the admission of political entities representing national minorities and that the specific rules that national minorities which guarantee reserved seats in principle are not contrary to equal vote and that neither candidates nor voters are obliged to reveal their affiliation as a national minority.

152. Further and in point 4 of the same code, it is determined that for voters, the secrecy of the vote is not only a right but also an obligation, the non-compliance of which should be punishable by disqualification of any vote which content is discovered. More precisely, point 4 of this Code states that:

[...]
"b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.
c. The list of persons actually voting should not be published.
d. The violation of secret suffrage should be sanctioned."

153. The Court notes that in relation to point 2.4 in the Explanatory Report of the Code of Good Practice, among other things, it was emphasized that: *"Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, eg by waiving the quorum for the national minorities' parties do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority."*

154. Furthermore, the Commentary of the Advisory Committee on the Framework Convention, of 27 February in relation to Article 15 of the Framework Convention, among other things, emphasizes that:

> *80. The participation of persons belonging to national minorities in electoral processes is crucial to enable minorities to express their views when legislative measures and public policies of relevance to them are designed.*
> *81. Bearing in mind that State Parties are sovereign to decide on their electoral systems, the Advisory Committee has highlighted that it is important to provide opportunities for minority concerns to be included on the public agenda. This may be achieved either through the presence of minority representatives in elected bodies and/or through the inclusion of their concerns in the agenda of elected bodies.*
> *82. The Advisory Committee has noted that when electoral laws provide for a threshold requirement, its potentially negative impact on the participation of national minorities in the electoral process needs to be duly taken into account.26 Exemptions from threshold requirements have proved useful to enhance national minority participation in elected bodies."*

(vi) General Principles according to LUND recommendations

155. In the following the Court will elaborate the general principles reflected in LUND recommendations, of the OSCE, which in the context of the elections recommend that, *(i)* "*States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and stand for office without discrimination; (ii) The regulation of the formation and activity of political parties shall comply with the international law principle of freedom of association. This principle includes the freedom to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community; and (iii) The electoral system should facilitate minority representation and influence.*

156. The explanatory note to these recommendations underline that "7) *Representative government through free, fair and periodic elections is the hallmark of contemporary democracy. The fundamental objective is, in the words of Article 21(3) of the Universal Declaration of Human Rights, that "The will of the people shall be the basis of the authority of government". This basic standard is articulated in universal and European treaties, namely Article 25 of the International Covenant on Civil and Political Rights and Article 3 of Protocol 1 […] to the European Convention on Human Rights. For OSCE participating States, paragraphs 5 and 6 of the Copenhagen Document specify that, "among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings", "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government".*

(vii) Conclusion regarding the constitutional provisions, the principles developed by the ECtHR, the case law of the Court, mechanisms of the Council of Europe and of OSCE

157. Based on the constitutional provisions and those of international instruments, the case law of the ECtHR and the Code of Good Practice in Electoral Matters, the opinions and reports of the Venice Commission in electoral matters and the Commentary of the

Advisory Committee on the Framework Convention and LUND Recommendations, the Court notes that the aforementioned in summary and among others, in principle and as far as it is relevant to the circumstances of the present case, include the following: (i) within the meaning of Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR, the right to elect and to be elected, both for individuals and for political entities, in capacity of legal persons; (ii) Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 of the ECHR includes substantive guarantees, such as the vote is personal, free, equal and secret; (iii) Code of Good Practice in Electoral Matters states that neither candidates nor voters should be asked to indicate their ethnicity; and (iv) member states of the Framework Convention have space and margin of appreciation to decide on their electoral systems.

158. In the following and in the light of the allegations of the Applicant (PLE), the Court will assess whether the Supreme Court in its decision-making has interpreted and applied these above-mentioned principles and guarantees established by binding provisions, relevant international instruments, case law of the ECtHR, the Code of Good Practice in Electoral Matters, the opinions and reports of the Venice Commission in electoral matters, the Commentary of the Advisory Committee on the Framework Convention and LUND Recommendations. In this regard, and taking into account the characteristics and circumstances of the present case, the Court will refer to the substantive guarantees of electoral rights in the active and passive aspects of voting in the post-election contexts.

II. Application of general principles in the circumstances of the concrete case

159. The Court initially recalls that the applicant's referral before the Court concerns two main questions, namely the request that the Court (i) annul only partially the Judgment of the Supreme Court, respectively oblige the Supreme Court to annul/declare invalid proportionally also the ballots in the specified polling stations in Gracanicë, Kamenica and North Mitrovica, so that the applicant would have achieved the necessary votes to become a deputy, and then to order the possible replacement of the deputies in the Assembly of Kosovo; and (ii) "*to establish the obligation of the Assembly to adopt the relevant legislation so that the state responsibilities for guaranteeing effective participation of communities according to Article 58(4) of the Constitution are fulfilled*" (the applicant's allegations are presented in detail in paragraphs 56-65 of this Judgment).

160. More precisely, in relation to the first question, the applicant states that the right of the applicant to be elected as a deputy of the Assembly of the Republic of Kosovo in the parliamentary elections of 14 February 2021 has been violated as a result of the refusal to annul/declare the ballots invalid in specified polling stations in the three aforementioned municipalities. The Applicant, and as elaborated in the part related to the applicant's allegations of this Judgment, in essence, states that (i) the ballots in the relevant polling stations should be annulled/declared invalid in proportion to the number of voters that represent the relevant community because otherwise, the elected representative in the Assembly "*lacks an objective connection with the community*" that he/she declares to represent; and (ii) the guaranteed seats in the Assembly according to paragraph 2 of Article 64 of the Constitution can only be won if they are voted for by the same community that the parties, coalitions, citizens' initiatives and independent candidates competing for these seats, declare that they represent. Having said this, the applicant himself emphasizes that "*there are no precise international practices and norms, neither in the Council of Europe nor elsewhere, which explicitly stipulate that in the guaranteed*

seats must be elected, in any place and in any case, the representatives only with votes coming from the members of the community to which that representative belongs and in the absence of this constitutional and legal basis, the applicant alleges that based on paragraph 4 of Article 58 of the Constitution, the Court should oblige the Assembly to take adequate measures, through the issuance of laws, through which the effective participation of communities that are not in the majority in Kosovo, so that, among other things, the guaranteed seats in the Assembly of Kosovo would be won only if they are voted for by members of the same community that they declare to represent, and more precisely that "*communities will be registered in special electoral rolls (separate communal/electoral rolls) so that only the voters of the communities found in those lists can vote for the representatives who have declared that they will represent those communities in the guaranteed seats*".

161. In the context of the applicant's allegations, the Court will first (i) review the constitutionality of the Judgment of the Supreme Court, to the extent it has been challenged by the applicant, namely the Supreme Court's refusal to annul/declare the ballots invalid in specified polling stations in the municipalities of Graçanica, Kamenica and North Mitrovica; and then (ii) address the Applicant's claims, based on which the Court should oblige the Assembly to adopt a law.

(i) whether the refusal to annul/declare the votes invalid in the municipalities of Graçanica and Kamenica violated the applicant's right to be elected, contrary to the guarantees specified in paragraph 1 of Article 45 of the Constitution

162. In assessing the applicant's allegation regarding the rejection by ECAP and the subsequent confirmation by the Supreme Court to annul/declare the ballots invalid in the polling stations in the municipalities of Graçanica, Kamenica and North Mitrovica, the Court initially and as explained in the summary of the facts of this Judgment, clarifies that the decision of the ECAP of 7 March 2021, had not decided on the complaints/appeals pertaining to the municipality of North Mitrovica. As a result, and after the relevant complaints, ECAP had decided regarding the ballots in the municipality of North Mitrovica, on 10March 2021. This decision of the ECAP was not appealed by the Applicant to the Supreme Court. As a result, the Applicant has not exhausted the legal remedies as provided in paragraph 7 of Article 113 of the Constitution to challenge the refusal to annul/declare the ballots invalid in the municipality of North Mitrovica. Consequently, the allegations of the applicant can be subject to constitutional review only in relation to the refusal to annul/declare the ballots invalid in specified polling stations in the municipalities of Graçanica and Kamenica, respectively.

163. In the following, the Court clarifies that based on Article 53 of the Constitution, it is obliged to interpret fundamental rights and freedoms consistent with the court decisions of the ECtHR, and in the context of electoral rights, consistent with the court decisions of the ECtHR in the interpretation of Article 3 of Protocol no. 1 of the ECHR. In the context of the case law of the ECtHR, which, among others, in terms of post-election disputes, assessed compliance with Article 3 of Protocol no. 1 of the ECHR of the annulment, namely the declaration of votes invalid, the Court refers to the cases of the ECtHR, *Kovach v. Ukraine, Kerimova v. Azerbaijan and Riza and others v. Bulgaria*.

164. More specifically, case *Kovach v. Ukraine* (Application No. 39424/02, Judgment of 7 February 2008) concerned the manner in which the result of the election was examined

by the responsible local authorities. The circumstances of the case concern a candidate who competed in the election and received a bigger number of votes than the pertinent counter-candidate. However, the competent authorities annulled/declared a number of votes invalid, based on a legal provision, according to which, the votes could be declared invalid, if "*other circumstances make it impossible to determine the results that reflect the will of the voters*". In the evaluation of the ECtHR, such a legal basis was not sufficient to justify the annulment of the votes, because, among others, there was no legal provision or internal practice that could explain which factors could be considered as "*other circumstances that make it impossible to determine the results that reflect the will of the voters*". According to the ECtHR, the lack of clarity of the legal provision in question and consequently the possible risks to electoral rights required special care from the local authorities and as a result, the ECtHR reached the conclusion that the decision to annul voting in the four electoral divisions should be considered arbitrary and not proportional and, as a result, a violation of the guarantees of Article 3 of Protocol no. 1 of the ECHR (see reasoning of the ECtHR, para. 59-61 of Judgment).

165. More specifically, case *Kerimova v. Azerbaijan* (Application No. 20799/06, Judgment of 30 September 2010) also concerned the manner in which the result of the election was reviewed by the responsible local authorities. The circumstances of this case also concern a candidate in the election who received the largest number of votes, but a part of which was later annulled by the competent electoral authorities. Moreover, in this case, the relevant authorities had also determined that two election officials had tampered with the election process. However, and despite the fact that such manipulation was confirmed by the competent authorities, according to the ECtHR, the electoral authorities decided to declare votes invalid in a number of polling stations, without a clear legal basis and without assessing whether the manipulation by the relevant officials could have been of such extent so as to change the will of the voters in the given area and, moreover, without justifying why they did not use the legal provisions through which the votes could have been recounted or/even re-voting could have been ordered in certain areas. According to the ECtHR, the invalidation of the votes had resulted in the violation of the electoral rights of the respective applicant contrary to the guarantees of Article 3 of Protocol no. 1 of the ECHR. According to ECtHR, it is not the role of the courts to modify the expression of the will of voters (see reasoning of the ECtHR, para. 52-54 of Judgment).

166. On the other hand, in case *Riza and others v. Bulgaria*, (Application No. 48555/10 and 48377/10, Judgment of 13 October 2015) the results of 23 polling stations set up abroad were declared invalid due to alleged irregularities, thereby depriving a deputy of his the right of mandate. The ECtHR examined both the interference with the right to vote of 101 voters, and the right to be elected for the deputy and the party he represented. The ECtHR found that only purely formal reasons were given to declare the elections invalid in a number of polling stations. Moreover, the circumstances relied upon by the court to justify its decision were not provided for, in a sufficiently clear and foreseeable manner, in the domestic legislation and it was not shown that they would have changed the choice of the voters or distorted the result of elections. In addition, the electoral law did not provide for the possibility of organizing new elections in polling stations where the ballot was declared invalid - contrary to the Code of Good Practice in Electoral Matters of the Venice Commission - which would have equated to the legitimate aim followed by the annulment of the election results, namely the preservation of the legality of the electoral process, with the subjective rights of voters and candidates in parliamentary elections. As a consequence, ECtHR held that there had been a violation of Article 3 of Protocol no. 1 of the ECHR (see reasoning of the ECtHR, para. 176-179 of Judgment).

167. Based on the above, and to the extent relevant for the circumstances of the concrete case, it is important to note that according to the case law of the ECtHR (i) it is not the role of the courts to determine the will of the voters; (ii) in assessing whether the ballots in an electoral area can be declared invalid, the relevant authorities must be based on clear legal provisions; and (iii) among others, in case *Kovach v. Ukraine,* the ECtHR found a violation of Article 3 of Protocol no. 1 of the ECtHR even in the circumstances when the relevant authorities referred to a legal basis which enabled the declaration of votes invalid, but which, according to the ECtHR, was not clear enough to prevent the arbitrariness of the relevant authorities in the annulment, namely the declaration of ballots invalid and which had affected the election result.

168. Based on the aforementioned case law of the ECtHR, and which emphasizes the fact that (i) it is not the role of the courts to determine the will of the voters; and (ii) any declaration of votes invalid must be based on a clear legal basis, Court should assess in the following whether in Republic of Kosovo, there is a constitutional and legal basis to declare ballots invalid based on the ethnicity of voters and/or the obligation according to which parties, coalitions, citizens' initiatives and independent candidates competing for the guaranteed seats under paragraph 2 of Article 64 of the Constitution must be voted for only by the voters whose ethnicity they declare to represent.

169. Initially and in the context of the validity and/or invalidity of the ballots, the Court first recalls Article 64 of the Constitution, and according to which, among others, seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly. On the other hand, the Law on General Elections, while it does not stipulate the criteria on the basis of which the validity and/or invalidity of votes can be established, based on its Article 115 (Appointment of Election Complaints and Appeals Commission), defines ECAP- as a permanent and independent body competent to decide on permissible complaints and appeals pertaining to the electoral process as provided by this law and the electoral rules, including the competence to annul/declare ballots invalid in exceptional circumstances but always based on the applicable regulations.

170. More precisely, based on Article 117 (Procedures of ECAP) of the aforementioned law, (i) ECAP shall establish its rules and procedures; (ii) when adjudicating a complaint or appeal, ECAP shall examine and investigate all relevant evidence and grant a hearing if it deems it necessary; (iii) the adjudication on appeals and complaints by ECAP is based on clear and convincing evidence; and (iv) ECAP may order the recount of ballots at a polling station or polling center as well as the examination of balloting material as part of investigations into a complaint or appeal. Further and based on Article 120 (Remedies and Sanctions for Violations), among others, and in exceptional circumstances, ECAP may annul the election results at a polling station or instruct the CEC to order a repeat of the voting at a polling center. Finally, and based on Article 118 (Decisions) of the Law on General Elections, the decisions of the ECAP can be challenged before the Supreme Court, and the appeal is accepted (i) in case the fine involved is higher than 5,000 Euro; and (ii) in case the matter affects a fundamental right. Based on Article 106 (Election Results) of the Law on General Elections, election results are final and binding when certified by the CEC.

171. Based on the aforementioned, the Court emphasizes that, the criteria on the basis of which votes can be declared invalid are defined in the regulations of the CEC, namely, (i) Electoral Rule no. 06/2013 on Counting and Results Centers; and (ii) Electoral Rule no. 09/2013 on Voting, Counting at the Polling Station and Polling Center Management. The former in its Article 7 (Counting of ballots in CRC) specifies cases when a ballot is considered invalid, namely if (i) more than one political entity was marked in the ballot; (ii) the way the ballot was marked makes the purpose of the voter unclear; (iii) the ballot was not stamped with official ballot stamp, unless it is a ballot of by-mail voting program, which is not required to be stamped; and (iv) it is a ballot of by-mail voting program that is not an acceptable ballot as defined by Election Rule no.03/2013 for Out of Kosovo Voting. While the latter, in Article 21 (Counting process at regular polling stations), namely point 21.10, accurately provides the circumstances in which a ballot should be considered invalid, namely if (i) more than one political entity is marked on the ballot; (ii) the manner in which the ballot is marked makes the voter's intention unclear; (iii) it was not stamped with the official ballot stamp when it was taken out of the ballot box; and (iv) the voter marks only the candidate and not the political entity. Neither the Law nor the regulations of the CEC provide any other criteria on the basis of which ballots can be declared invalid, and even less criteria based on the ethnicity of the voters.

172. Having said this, the Court recalls that in the circumstances of the applicant, ECAP and the Supreme Court, while they rejected the annulment/declaration of the votes invalid in the municipalities of Graçanica and Kamenica, respectively, through the same decisions, they decided and confirmed the declaration of ballots invalid in specified polling stations in the municipalities of Leposaviq, Novobërda, Ranillug, Partesh and Kllokot. In confirming the annulment/declaration of ballots invalid as specified through the decision of the ECAP of 7 March 2021, the Supreme Court, among others, had emphasized the following, (i) "*each community has the right to elect its representatives, and this guaranteed right, the state has an obligation to protect it, since the protection of these rights is a constitutional obligation based on Article 58, paragraphs 4 and 7 of the Constitution*" and in this specific context, concluded that considering that the three communities that are not in the majority, namely, the Roma, Ashkali and Egyptian, are guaranteed a seat of representation in the Assembly and an additional seat also belongs to one of these three communities, the election of the Roma representative with the votes of the other communities, does not represent the election and realization of the representation of the Roma community, "*because only the votes of the Roma community represent their will, and in no way can it be considered that we have representation of the non-majority community, according to the reserved seats, as long as one is not elected by the votes of the community itself whose seat is reserved*"; (ii) that in five (5) municipalities, in which the ballots of the political entity Romani Iniciyativa were annulled, "*there were orchestrated votes for certain entities whose votes were won by voters who belong to the other community compared to the community of the entity for which he voted, this is proven by the number of inhabitants compared to the number of votes received, while the number of inhabitants is reflected through data obtained from the Statistical Agency of the Republic of Kosovo of 2011, but also from credible reports of the OSCE and Voters' Books.*"; (iii) in the present case "*there is no objective connection between the voters and the voted subject*", even though this condition is necessary to consider that the representation has been realized in accordance with the legal and constitutional provisions for the reserved seats of communities that are not in the majority; (iv) "*in the specific case, the principles compete, but the principle of guaranteeing the representation of communities, when it comes to the reserved seats according to the law and the constitution, prevails over any other principle, since even*

Article 45 of the Constitution is in function of the implementation of equal representation from the community in accordance with the law and the constitution, but also the practice established by the European Court for Human Rights."; (v) in terms of the concept of consociational democracy, he emphasized that "*beyond the constitutional framework, the legal provisions for reserved seats have premises of this concept, which dictate the preservation of the effective representation of communities through mechanisms that primarily guarantee the right to vote, but within this framework also the right of representation for communities by representatives with objective connection to the community, especially the connection of ethnic belonging, without excluding language, etc." and "in the Constitution of the Republic, through reserved seats for non-majority communities, the representation of all groups in the representative body was intended, therefore for this representation there an objective connection between the representatives and the voters of the respective community must exist, otherwise the effective representation of communities for which the Constitution has guaranteed reserved seats is distorted [...]*" and, in this regard, the Supreme Court has emphasized that (vi) it does not promote the concept of consociational democracy beyond the constitutional framework, but interprets that the legal and constitutional provisions for reserved seats "*have premises of this concept, which dictate the preservation of effective representation of the communities through mechanisms which in primarily guarantee the right to vote, but within this framework also the right of representation for the communities by representatives with an objective connection with the community, especially the connection of ethnic belonging without excluding language, etc.*"

173. The Court notes that according to the reasoning of the Supreme Court, in essence, in the context of parliamentary elections, the active and passive right to vote is limited by ethnicity. More precisely, according to the aforementioned reasoning (i) communities that are not in the majority in Kosovo in the context of the active right to vote are limited to vote, namely to elect only candidates of the same community; (ii) in the context of the passive right to vote, to receive votes, respectively to be elected, only from the same community; and (iii) despite the lack of a mechanism stipulated in the Constitution and/or law, all votes in a given polling station that exceed the number of citizens of an ethnicity must be declared invalid, according to the ECAP and the Supreme Court, based in the data from the "*Statistics Agency of the Republic of Kosovo of 2011, but also from the credible reports of the OSCE and the Voters' Books.*"

174. In the context of this interpretation of the ECAP and the Supreme Court, and to the extent relevant in the circumstances of the concrete case, the Court emphasizes that the essential issue is related to whether (i) in the constitutional and legal order of the Republic of Kosovo, the exercise of the rights guaranteed through Article 45 of the Constitution is conditioned by ethnicity; and (ii) whether the relevant authorities, namely CEC, ECAP but also the Supreme Court, can declare ballots invalid or confirm their invalidity based on the ethnicity of the voters, respectively as is the case in the circumstances of the concrete case, declaring votes invalid in a polling station at the moment when the proportion is exceeded between the votes won by parties, coalitions, citizens' initiatives and independent candidates, who have declared representing the relevant community and the number of voters who are assumed to represent the same community based on the "*data obtained from the Statistics Agency of the Republic of Kosovo of 2011, but also from the credible reports of the OSCE and Voters' Books.*"

175. The Court already clarified that such a basis for declaring ballots invalid is not provided in the Law on General Elections or/and in the applicable regulations of the CEC, which is in fact very clear and specific when it defines the circumstances in which the ballots can be annulled, a fact which the CEC itself had emphasized in the respective response before the ECAP to the applicant's complaint. Having said that, taking into account that ECAP and the Supreme Court, in declaring the ballots in the five (5) aforementioned municipalities invalid, referred to paragraph 4 of Article 58 and paragraph 2 of Article 64 of the Constitution, circumventing Article 45 of the Constitution, the Court in following will elaborate whether the Constitution, including the applicable international instruments as specified in this Judgment but also the case law of the ECtHR, enable the declaration of ballots invalid based on the assumption that in the context of guaranteed seats under paragraph 2 of Article 64 of the Constitution, the exercise of active and passive electoral rights is conditional on ethnicity. In this context, the Court emphasizes once again the case law of the ECtHR, which, based on Article 53 of the Constitution, is binding in the interpretation of fundamental rights and freedoms, and according to which, as explained above, in post-election disputes, ballots can be declared invalid by the competent authorities only according to specified constitutional and/or legal bases.

176. The Court also recalls that in declaring the ballots in the five aforementioned municipalities invalid, the interpretation of the ECAP and the Supreme Court was based on paragraph 4 of Article 58 of the Constitution and Article 15 of the Framework Convention. In this context and initially, the Court recalls Article 15 of the Framework Convention which is directly applicable in the Republic of Kosovo and which specifies that each state must create the necessary conditions for the active participation of persons belonging to national minorities in cultural, social and economic life, and in public affairs, especially for those that affect them. This obligation, in fact, is also part of the Constitution of Kosovo, defined through paragraph 4 of its Article 58, and based on which, the Republic of Kosovo, as necessary, will adopt adequate measures to promote full and the effective equality of community members in all areas of economic, social, political and cultural life and the effective participation of communities and their members in public life and in decision-making and that such measures will not be considered an act of discrimination.

177. In this context, the Court first recalls that Article 45 of the Constitution is the fundamental article that regulates electoral and participation rights. This Article stipulates that (i) every citizen of the Republic of Kosovo who has reached the age of eighteen, even on the election day, enjoys the right to vote and be elected, except when this right is limited by a court decision, thus guaranteeing the active and passive electoral right as laid down through the case law of the Court and of the ECtHR; (i) that the vote is "*personal*", "*equal*", "*free*" and "*secret*"; and (iii) state institutions support the opportunities for everyone's participation in public activities and the right of everyone to democratically influence the decisions of public bodies.

178. Besides Article 45 of the Constitution, Article 22 of the Constitution also determines the direct applicability of international instruments that guarantee electoral rights, including the ECHR, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and its Protocols. These international instruments and as explained in the general principles part of this Judgment, read together and in principle, and as far as it is relevant in the circumstances of the concrete case, guarantee (i) the organization of free elections in reasonable time intervals; and (ii) secret and equal voting

and free expression of the people's opinion in the election of the legislative body according to the relevant free voting procedure.

179. Based on the provisions of the Constitution, the active aspect of electoral rights, namely the right to elect, is subject to only two constitutional limitations, age and the relevant court decision. The same rights are guaranteed through the Law on General Elections in the Republic of Kosovo. The latter, in Chapter II, defines the Right to Vote, Voter Lists and the Objection and Confirmation Periods for the Voter List. As far as it is relevant for the circumstances of the specific case, in its Article 5 (Right to Vote), it also defines some restrictions related to the right to vote, while in Article 7 (List of Voters) it defines that citizens with the right to vote are those registered in the Central Civil Registry, specifying that the necessary information for the List of Voters is "*name, surname, date of birth, address and Voting Center where he/she is assigned to vote*", data these that are written in the languages and alphabets in which the original notes are kept in accordance with the Law on the Use of Languages in Kosovo. The law and the applicable regulations of the CEC do not contain any obligation for voters to declare their ethnic affiliation for purposes of the List of Voters and the exercise of active electoral rights. Such an approach is in fact fully consistent with international instruments, including as clarified through the Explanatory Report of the Code of Good Practice in Electoral Matters, and according to which, among other things, neither candidates nor voters should be required to indicate their affiliation to a national minority. The characteristics of the vote that are related to its freedom and secrecy are guaranteed by all international instruments, as explained in the part of relevant principles of this Judgment.

180. Whereas, in the context of the right to be elected, namely the passive aspect of electoral rights, Article 45 of the Constitution, with the exception of age and limitation through the court decision, does not define any other limitations or conditions. However, in the context of parliamentary elections, this article must be read and interpreted together with Articles 64 [Structure of the Assembly], 71 [Qualification and Gender Equality] and 73 [Ineligibility] of the Constitution, respectively. The first, determines that twenty (20) seats in the Assembly of Kosovo are guaranteed for parties, coalitions, citizens' initiatives and independent candidates, who have declared that they represent the Serbian community or other communities, regardless of the number of seats won, while the second and third determine the necessary qualifications to run and the circumstances of the impossibility of running for the member of the Assembly. For the circumstances of the concrete case, the interrelationship of Articles 45 and 64 of the Constitution, respectively, is relevant.

181. In this context, the Court first reiterates that Article 45 of the Constitution guarantees the active and passive right to vote, namely the right to elect and to be elected, and specifies that this vote is personal, equal, free and secret. On the other hand, Article 64 of the Constitution emphasizes the secret vote, also emphasizing open electoral lists. This article also states that (i) the Assembly has one hundred and twenty (120) deputies elected by secret ballot based on open electoral lists; and (ii) seats in the Assembly are divided between all parties, coalitions, citizens' initiatives and independent candidates, in proportion to the number of valid votes won by them, in the elections for the Assembly.

182. Having said that, and as an exception to this general principle and without taking into account the number of votes, namely the seats won, Article 64 of the Constitution specifies that within this division, twenty (20) out of one hundred and twenty (120) seats are guaranteed for the representation of communities that are not the majority in Kosovo.

More precisely, this article specifies that (i) parties, coalitions, civilians' initiatives and independent candidates, who have declared that they represent the Serbian community, will have the number of seats in the Assembly won in open elections, with a minimum of ten (10) guaranteed places, in case the number of places won is less than ten (10); and (ii) parties, coalitions, citizens' initiatives and independent candidates, who have declared that they represent other communities, in the Assembly will have the number of seats won in the open elections with the minimum guaranteed seats as follows: Roma community one (1) seat; Ashkali community one (1) seat; the Egyptian community one (1) seat; and one (1) additional seat shall be awarded to the Roma, Ashkali, or Egyptian community having the largest number of overall votes; the Bosnian community three (3) seats, the Turkish community two (2) seats and the Goran community one (1) seat, if the number of seats won by each community is less than the number of guaranteed seats.

183. In spite of the general principles defined in Article 45 of the Constitution, but in the light of paragraph 4 of Article 58 of the Constitution and Article 15 of the Framework Convention, Article 64 of the Constitution determines that, besides the guarantee for the equality of the vote and regardless of the number of votes, namely the number of seats won in the Assembly, the communities that are not the majority, have a certain number of guaranteed seats in the Assembly of Kosovo, according to the specifications defined in Article 64 of the Constitution.

184. Furthermore, the Court emphasizes that based on Article 110 of the Law on General Elections, (i) Kosovo is considered one electoral zone with many candidates; (ii) the political entity submits the list of candidates based on the procedures determined by the CEC and this law; (iii) each list of candidates shall have at least thirty percent (30%) of candidates of the other gender; (iv) each certified political subject appears in the voting with an "*open list*"; and (v) exercising his/her right to vote, the voter votes for one (1) certified political entity and may vote for one (1) candidate from the list of candidates of this political entity. Further, the Law on General Elections in the Republic of Kosovo, the issues related to the procedures related to the registration of political parties and political entities, specifies in Chapter III (Registration of political parties and certification of political entities) of this law. None of these procedures stipulate exceptions or special procedures in terms of non-majority communities. Such a criterion, based on paragraph 2 of Article 64 of the Constitution, namely the definition of guaranteed seats for the community that has declared itself to represent the Serbian or other communities that are not the majority, is defined in the Rules of the CEC. More precisely, Rule no. 01/2013 on the Registration and Operation of Political Parties, in its Article 3 regarding the registration of political parties, within the documentation necessary for the relevant registration, also provides "*the statement of ethnic affiliation of the founder of the political initiative*". Such a criterion is also foreseen in the regulation of the CEC issued after the parliamentary elections of 2021, namely in (i) item 5.12 of Article 2 (Application for certification of the political entity) of Regulation no. 04/2023 regarding the Certification of Political Entities and their Candidates; and (ii) point 1.5 of Article 2 (Registration of political parties) of Regulation no. 01/2023 regarding the Registration and Functioning of Political Parties.

185. Based on the above, in the legal order of the Republic of Kosovo, (i) based on paragraph 1 of Article 64 of the Constitution, the Assembly has one hundred and twenty (120) deputies elected by secret ballot on the basis of open lists; (ii) based on paragraph 1 of Article 110 of the Law on General Elections, Kosovo is considered one electoral zone with many candidates; (iii) based on paragraph 2 of Article 45 of the Constitution, the vote is

personal, equal, free and secret; and (iv) The list of voters according to the provisions of the Law on General Elections does not contain data on the ethnic affiliation of the voters in accordance with the standards arising from the international instruments as elaborated in this Judgment. Parties, coalitions, citizens' initiatives and independent candidates, who have declared that they represent communities that are not in the majority according to paragraph 2 of Article 64 of the Constitution, *"will have the number of seats in the Assembly won through open elections*", without taking into account the number of votes won. The Constitution, the electoral law and the applicable regulations of the CEC do not define any obligation and/or mechanism through which (i) in the context of active electoral rights, voters would be forced to elect only parties, coalitions, citizens' initiatives and independent candidates who declare themselves to represent the community they represent; and (ii) in the context of passive electoral rights, neither the guaranteed seats in the Assembly of Kosovo for parties, coalitions, citizens' initiatives and independent candidates are conditioned only on the vote of citizens who belong to the communities they declare to represent.

186. In the context of the aforementioned finding, the Court notes that the guarantee of certain seats in the Assembly for communities that are not the majority, but also in other institutions, is characteristic of, among others, states with consociational democracy. Having said this, in the context of the regulation of the electoral system and as it has been emphasized through the case law of the ECtHR but also other relevant international instruments, states have a freedom of assessment, namely the determination of the characteristics of their own electoral system, based on the historical and political characteristics of the respective state. In more concrete terms, guaranteeing certain seats in the Assembly for the communities that are not the majority, not necessarily entails the obligation that these seats can only be won if they are voted for by the same community that is not the majority.

187. More precisely, the issues related to the rights of national minorities in the context of electoral systems, besides the general principles elaborated in this Judgment, are also elaborated in detail in the following documents:

(i) Electoral Law and National Minorities of the Council of Europe of 25 January 2000 (CDL-INF (2000) 4);
(ii) Report on Electoral Rules and Affirmative Actions on the Participation of National Minorities in the Decision-Making Process in European States, approved by the Venice Commission on March 11-12, 2005 (CDL-AD(2005)009);
(iii) Comments on the Note of the OSCE High Commission on National Minorities regarding the analysis of the Venice Commission on the double voting of national minorities of 13 September 2007 (CDL-EL(2007)025;
(iv) Protection of National Minorities and Elections, adopted by the Venice Commission on May 16, 2008 (CDL-EL(2008)002rev); and
(v) Compilation of Opinions and Reports related to Electoral systems and National Minorities adopted by the Venice Commission on June 24, 2019 (CDL-PI(2019)004.

188. The aforementioned reports and opinions clarify the electoral systems in all European countries and beyond in the context of the accommodation of national minorities. As explained in the above-mentioned documents, in most of them, the electoral rules do not distinguish voters, while there are also electoral systems which, in the context of passive electoral rights, define additional guarantees and/or facilities related to national

minorities, while in the context of active electoral rights, they emphasize the freedom and secrecy of the vote, and exceptionally and in special cases by enabling double voting or separate electoral lists for national minorities. Having said that, as far as they are relevant to the circumstances of the case, the aforementioned documents, among others, summarize various arrangements of electoral systems and which, depending on the characteristics of each state, can facilitate the representation of minorities, including mechanisms possible as follows (i) parties representing national minorities should be allowed, however, the participation of national minorities in political parties is not and will not be limited to so-called ethnic-based parties; (ii) special rules guaranteeing seats reserved for national minorities or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for example, exemption from the quorum requirement) do not in principle conflict with equal rights of voting; (iii) neither candidates nor voters should be obliged to disclose their membership of a national minority; (iv) electoral thresholds should not affect the possibilities of representation of national minorities; and (v) constituencies (their number, size and shape, magnitude) can be designed in order to increase the participation of minorities in decision-making processes (see CDL-PI(2019)0004, page 13).

189. Regarding, in particular, the specific voting rules for national minorities, according to the aforementioned reports, states may exceptionally deviate from the principle of equal voting rights by adopting special systems in relation to national minorities if such a system constitutes a legitimate and necessary purpose and the method chosen is proportionate to the desired result (CDL-EL(2008)002rev, paragraph 48). In the context of specific regulation for national minorities in the context of active electoral rights, and as explained above, these systems may provide for (i) double voting rights; and (ii) separate voter lists (see CDL-AD(2005)009, paragraph 16). These systems should be embodied in the Constitutions and/or electoral laws of the respective countries.

190. In the Republic of Kosovo, such a system, which defines a special electoral system for communities that are not a majority in the context of active electoral rights, is not provided by the Constitution and the Law on General Elections, including the regulations of the CEC. In fact, based on the above, the Court emphasizes that in the legal order of the Republic of Kosovo, the active electoral rights, namely the right to elect based on Article 45 of the Constitution is subject only to the age limit, namely eighteen years old and the court decision, and in addition to these two criteria, it is personal, free, equal and secret and, based on the Law on General Elections, is not subject to any restrictions in the context of the ethnic affiliation of the voters. The Constitution and the Law on General Elections do not have any provision based on which the seats guaranteed under paragraph 2 of Article 64 of the Constitution can be won only on the condition that the vote for them has been given by the same community and as long as the states have the margin of appreciation and freedom in determining electoral systems, such an approach is compatible with the international instruments as explained above and the case law of the ECtHR. According to the Constitution, the vote is personal, free, equal and secret while, among other things, according to the Code of Good Practices, neither the candidates nor the voters are obliged to reveal their affiliation as a national minority.

191. Furthermore, the Court also recalls the Judgments of the ECtHR, elaborated above and based on which it has dealt with electoral rights and/or disputes in terms of the rights of non-majority communities and in which a violation of Article 3 of Protocol No. 1 of the ECHR was contested. The violations determined by the ECtHR, and always in the light of the factual circumstances and contexts in which the relevant judgments were issued,

specify in principle (i) that ethnicity cannot be an obstacle to being registered in electoral lists, respectively to exercise the right to elect (the active aspect of the vote), as is the case in the Judgment *Aziz v. Cyprus* or to be elected (the passive aspect of the vote), as is the case in the Judgment *Sejdić and Finci v. Bosnia and Herzegovina* but also *Zornic v. Bosnia and Herzegovina*; and (ii) that ethnic affiliation cannot deprive one of the right to freely exercise the right to vote (the active aspect of voting), by limiting a citizen of a national minority to vote only for the closed and specific list of candidates of the relevant minority as is the case with the Judgment *Bakirdzi and E.C. v. Hungary*.

192. In fact, the latter, namely case *Bakirdzi and EC v. Hungary*, is very relevant to the circumstances of the concrete case, because, among other things, it pertains to the (i) free expression of the voters will; (ii) shortcomings of the national minorities' voting system that affects the secrecy of the vote; (iii) systems that require a national minority candidate to be elected only by voters of the same minority; (iv) systems that allow for the national minority voters to vote only for their respective national minority lists and not for general lists of political parties; and (v) systems that limit the ability of national minority voters to increase their political effectivity as a group and the risk of reducing diversity and participation of minorities in political decision-making.

193. In this case, in spite of the fact that the Hungarian law itself stipulates the correlation between the active and passive electoral rights to the relevant ethnic background pertaining to the designated seats in the Assembly, the ECtHR, in the context of the circumstances of the case at hand, found that the electoral rights of the voters of national minorities had been infringed in violation with the guarantees stipulated through Article 3 of Protocol No. 1 of the ECHR, emphasizing among other things, that (i) there are doubts that in a system in which the vote can be only cast for a specific closed list of the candidates that requires from the voters to give up their political party affiliation in order to be represented as members of a national minority, enables "free expression of the people's opinion in the election of the legislature"; and (ii) the right of the secrecy of the vote, is not accessible to the voters of the national minority.

194. The aforementioned principles clarify that (i) the principles originating from international instruments as elaborated in this Judgment do not contain any obligation based on which states must adopt mechanisms according to which the national minorities are limited to vote only for political subjects, having declared themselves representing the same national minority, on the contrary according to the same instruments, the states have a wide margin of appreciation and determination regarding the electoral systems based on the relevant historical and political characteristics, always finding the necessary mechanisms for the effective representation of the national minorities in decision-making; and (ii) based on the case law of the ECtHR, ethnic background cannot present limitations on the active and passive electoral rights, with emphasis on the fact that any system that defines exceptions in terms of the electoral rights of the national minorities, must ensure that it enables *"free expression of the people's opinion in the election of the legislature"* and ensures freedom and secrecy of the vote.

195. Furthermore, the principles explained above also stipulate that (i) pursuant to paragraph 2 of Article 45 of the Constitution of the Republic of Kosovo, the vote is personal, equal, free and secret; (ii) pursuant to paragraph 2 of Article 64 of the Constitution, regardless of the number of won seats, twenty (20) seats in the Assembly of the Republic of Kosovo belong to the communities that are not the majority in the manner specified in this article; (iii) the Constitution, the international instruments specified in its Article 22, the

case law of the ECtHR and Law on General Elections, do not include the conditioning of active and passive electoral rights on ethnicity, respectively and in the context of guaranteed seats pursuant to paragraph 2 of Article 64 of the Constitution, the obligation of voters to elect only parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the same community that is not a majority in Kosovo, nor the obligation that the latter who are voted only by the community they declared to be representing; (iv) if the state opts for such a system, the same should be determined through laws adopted by the Assembly and in line with the constitutional provisions and values; and (v) based on the case law of the ECtHR, it is not the role of the courts to determine the will of the voters and that any declaration of invalid votes must be based on a clear legal basis and in compliance with the correct procedure as stipulated in the applicable laws and regulations.

Conclusion

196. Based on the aforementioned clarifications, within the current electoral system in the Republic of Kosovo, there is no legal basis on which ballots can be declared invalid in certain polling stations based on assumptions about the ethnic background of the voters, including the proportion between the number of ballots that a party, coalition, citizens' initiative and independent candidates having declared themselves representing that community may have won and the calculated number of voters of the same community in the respective polling stations. The court recalls that according to the ECtHR (i) it is not the duty of the courts to determine the will of the voters, including by declaring the ballots invalid without a clear legal basis; and (ii) any declaration of invalid ballots must be based on a clear legal basis, a requirement that originates from Law on General Elections itself and the regulations of the CEC in the context of the competence of the ECAP, to annul/declare invalid ballots.

197. Consequently, and in the context of the applicant's referral to conclude that the contested Judgment of the Supreme Court has resulted in the violation of the applicant's right to be elected as a member of the Kosovo Assembly in the parliamentary elections of 2021 as consequence of the refusal to annul the ballots in the municipalities of Graçanica and Kamenica, respectively, the Court must find that this is not the case. This is because according to the aforementioned clarifications based on the Constitution, applicable international instruments, the case law of the ECtHR and Law on General Elections, there isn't any legal basis on whose basis ballots could be declared invalid because of the ethnic background of the voters, including the supposed declaration of ethnic background that the voters represent.

198. Finally, the Court reiterates that the vote in the Republic of Kosovo is personal, equal, free and secret and as such it cannot be annulled/declared invalid based on ethnic affiliation of the voter.

199. Consequently, the Court must find that the refusal of annulment, namely declaration of the ballots as invalid in the specified polling stations in the municipality of Graçanica and Kamenica, respectively through the contested part of the Supreme Court Judgment, of 12 March 2021, did not result in the violation of the Applicant's rights to be elected as a member of the Assembly of Kosovo as guaranteed by paragraph 1 of Article 45 of the Constitution of the Republic of Kosovo.

(ii) Regarding the Applicant's allegation on lack of concrete mechanisms for guaranteeing the effective participation of non-majority communities and the Applicant's request to the Court to oblige the Assembly to adopt a law

200. The Applicant in the context of his allegation of violation of para. 4 of Article 58 of the Constitution, in conjunction with Article 15 of the Framework Convention, also alleges lack of concrete mechanisms for guaranteeing the effective participation of non-majority communities, considering that: *"[…] The Constitutional Court should oblige the Assembly of the Republic of Kosovo to take these adequate measures as soon as possible and create the necessary conditions, by regulating the legal framework in this field, so that the non-majority communities in the country can be effectively represented in guaranteed seats, and, as a result, effective representation in public affairs and decision-making in general. These adequate measures should guarantee that communities substantially choose their representatives, not allowing the conversion of guaranteed seats into illusory representation mechanisms. The Constitutional Court, in accordance with international standards and practices, should leave the Assembly a wide margin of appreciation to determine which measures would be adequate to achieve this effective participation. Such an adequate measure, for the Kosovar constitutional context, would be, for example, the legal determination that communities be registered in separate communal / electoral rolls) so that only the voters of the communities found in those lists can vote for the representatives who have declared that they will represent those communities in guaranteed seats. No one outside those lists would be able to vote for the seats guaranteed to the other community. Thus, manipulative voting between communities would be impossible on the scale that happened in the Elections of 14 February (Although, as we said, precise and expressive international standards are missing, at least in one case it has been suggested by the Venice Commission that such a measure of special electoral lists of communities be implemented, taking into account the specifics of the situation in that country.) Of course, registration in these electoral lists would not be mandatory: each member of the non-majority community, in accordance with international standards and practices, would be able to decide whether to register in the special lists of communities (to vote for their own community), or in the general list of voters (to vote for the other 100 seats in the Assembly of Kosovo). The registration of the ethnicity of members of non-majority communities in electoral lists will be done with objective criteria of affiliation, in accordance with the Constitution and case law of the ECtHR, always preserving the privacy of the declarants as defined by the standards of the Venice Commission".*

201. The Applicants allege that the decision of the ECAP and Supreme Court on non-annulment of the votes in the three municipalities of Graçanica, Kamenica and North Mitrovica, *"constitutes a violation of Article 58 (4) of the Constitution of Kosovo and Article 15 of the Framework Convention of the Council of Europe for the Protection of National Minorities, the implementation of which is guaranteed by Article 22 of the Constitution of Kosovo".*

202. The Applicants further allege that: *"The challenged decisions thus violated the other component of Article 58 (4) of the Constitution (effective equality) in conjunction with Article 4 (2) of the Framework Convention, as well as Article 24 of the Constitution in conjunction with Article 1 of Protocol 12 of the European Convention on Human Rights, which establishes a general prohibition of discrimination for all rights guaranteed by the constitution and law".*

203. Having said this, the Court emphasizes that paragraph 4 of Article 58 of the Constitution does not define individual rights, but an obligation of the state, which*, "as necessary, will adopt adequate measures"* to promote full and effective equality between members of communities in all areas of economic, social, political and cultural life. According to the same article and in the context of the preceding sentence, such measures, once approved, will not be considered to constitute discrimination. In addition, and in relation to Article 15 of the Framework Convention, the Court recalls the case law of the ECtHR in a case in which, among others, Article 15 of the Framework Convention was referred to, namely case *Partei der Friesen v. Germany*. In this case, the ECtHR, among other things, emphasized that *"[the ECtHR] observes that the Framework Convention, while acknowledging the margin of appreciation enjoyed by the State in electoral matters, puts an emphasis on the participation of national minorities in public affairs (see Article 15 of the Framework Convention) [...]. The States party to the Framework Convention enjoy a wide margin of appreciation in how to approach the Framework Convention's aim of promoting the effective participation of persons belonging to national minorities in public affairs as stipulated in Article 15. Consequently, the Court takes the view that, even interpreted in the light of the Framework Convention, the Convention does not call for a different treatment in favor of minority parties in this context. There has accordingly been no violation of Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1."* (see, paragraphs 43 and 44 of the *Partei der Friesen v. Germany* Judgment).

204. In the light of the above clarifications, the Court emphasizes that paragraph 4 of Article 58 of the Constitution, read together with Article 15 of the Framework Convention, determine the possibility of the state to adopt certain measures to promote full and effective equality between members of communities, including in the field of the electoral system, and that such measures do not constitute discrimination. Having said that, in order for paragraph 4 of Article 58 of the Constitution together with Article 15 of the Framework Convention to create an individual right in the context of electoral rights, such a measure must have been adopted by the state, and based on the principle of separation and balancing of powers, undertaking and/or approving such a measure in the context of the electoral system belongs to the legislative power and not to the judicial power, which has the task of interpreting/implementing the relevant measure after it has been adopted. Consequently, the Court emphasizes that electoral rights in the Republic of Kosovo cannot be interpreted based on paragraph 4 of Article 58 of the Constitution, but the starting point of the analysis should be Article 45 of the Constitution.

205. In the context of the applicant's request that the Court "*should oblige the Assembly of the Republic of Kosovo to take these adequate measures as soon as possible and create the necessary conditions, by regulating the legal framework in this field,"* the Court initially emphasizes two issues, namely (i) the nature of the request of the applicant; and (ii) the jurisdiction and competence of the Constitutional Court.

206. In this context, the Court clarifies that the applicant submitted an individual referral pursuant to paragraph 7 of Article 113 of the Constitution, according to which 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.

207. On the other hand, pursuant to Article 63 [General Principles] of the Constitution, the Assembly is the legislative institution of the Republic of Kosovo. The Assembly of the Republic of Kosovo has full competence to determine the model and specifics of the electoral system as well as the relevant procedures through adopted laws. Based on the principle of separation and balancing of powers, the laws adopted by the Assembly may be subject to the constitutional review by the Constitutional Court if contested before the Court pursuant to the provisions of Article 113 of the Constitution.

208. In the end, the Court emphasizes the following three other issues that are related to the circumstances of the concrete case (i) another Judgment of the Supreme Court, in which it was decided similarly to the circumstances of the Applicant; (ii) the constitutional obligation that only the votes declared valid shall determine the winner of the respective seat in the Assembly, and the relevant procedures for declaring them invalid, including the treatment of claims for violations, namely possible criminal offenses, related to implementation of electoral rules and procedures, as stipulated in the applicable laws of the Republic of Kosovo; and (iii) the effects of this Judgment.

209. Regarding the first issue, the Judgment clarifies that the applicant in his submission also referred to another Judgment of the Supreme Court, namely [AA. No. 30/2021] of 11 March 2021, which was issued after appeals to political entities representing the Bosniak community *Nasha Iniciyativa; Lista Boshnjake Unioni Social Demokrat* and *Nova Demokratksa Stranka,* and which, according to the applicant, based on the same interpretation of paragraph 4 of Article 58 of the Constitution, annulled/declared invalid the ballots in all polling stations which were contested by the complaining political entities. The Court emphasizes that this Judgment has never been contested before the Court and, as a result, has not been subject to constitutional review.

210. With respect to the second issue, Judgment clarifies that paragraph 1 of Article 64 of the Constitution specifically refers to the *"number of valid votes"* in determining the seats won in the Assembly of the Republic, while the relevant legal basis and the way of declaring the ballots invalid is specifically defined in the Law on General Elections and other applicable electoral regulations. The court puts an emphasis on the fact that based on the case law of the ECtHR but also the applicable laws of the Republic of Kosovo, declaration of ballots as invalid must be based on clear legal grounds. Furthermore, the Court emphasizes that criminal offenses against the voting rights are stipulated in Chapter XVIII of the Criminal Code of the Republic of Kosovo. Allegations of violations during the election process, including the misuse of the right to vote and the procedures on how to address them as such, are stipulated in the Law on General Elections and the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo.

211. In the end, with respect to the third issue, namely the effects of this Judgment, the latter clarifies that, as it has specified in at least two previous Judgments that are related to individual rights and freedoms in post-election disputes, namely in (i) Judgment of the Court KI207/19, with applicants *NISMA Socialdemokrate, Aleanca Kosova e Re* and *Partia e Drejtësisë*, regarding the constitutional review of Judgments [A.A.U.ZH. No. 20/2019] of 30 October 2019 and [A.A.U.ZH. No. 21/ 2019] of 5 November 2019 of the Supreme Court of the Republic of Kosovo; and (ii) Judgment of the Court in cases KI45/20 and KI46/20, with applicants *Tinka Kurti* and *Drita Millaku*, regarding the constitutional review of Rulings [AA. no. 4/2020] of 19 February 2020 and [AA. no. 3/2020] of 19 February 2020 of the Supreme Court, based on the principle of legal

certainty, this Judgment cannot produce a retroactive legal effect on the declared election result fo the parliamentary elections held on 14 February 2021.

212. However, as it has been pointed out in the two aforementioned Judgments, this does not imply that this Judgment is merely declarative and without any effect. Through this Judgment it has been clarified, among other things, that (i) pursuant to paragraph 2 of Article 45 of the Constitution of the Republic of Kosovo, the vote is personal, equal, free and secret; (ii) pursuant paragraph 2 of Article 64 of the Constitution, regardless of the number of seats won, twenty (20) seats in the Assembly of the Republic of Kosovo belong to communities that are not in the majority in the manner specified in this article; (iii) The Constitution, the international instruments specified in its Article 22, the case law of the ECtHR and Law on General Elections, in the context of active electoral rights, do not include the obligation for the voters to vote only for parties, coalitions, citizens' initiatives and independent candidates having declared themselves of representing the community they represent and in the context of passive electoral rights, neither the guaranteed seats in the Assembly of Kosovo for parties, coalitions, citizens' initiatives and independent candidates are conditional solely on the vote of citizens belonging to the communities they declare to represent; (iv) if the state opts for such a system, the same must be stipulated in applicable laws adopted by the Assembly and in compliance with the constitutional definitions and values; and (v) that based on the case law of the ECtHR, it is not the role of the courts to determine the will of the voters and that any declaration of ballots as invalid must be based on clear legal grounds and in line with the correct procedure as stipulated in applicable laws and regulations. Such an interpretation should be taken into consideration in the upcoming electoral cycle of parliamentary elections, insofar as the electoral system, as stipulated in Law on General Elections, remains un-amended by the Assembly of the Republic of Kosovo.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4 and 113, paragraph 1 and 7, of the Constitution, Articles 20, 47 and 48 of the Law and Rules 39 and 59 (1) of the Rules of Procedure, in its session held on 20 April 2023,

DECIDED

I. TO DECLARE, unanimously, inadmissible the referral of Partia Rome e Bashkuar e Kosovës (PREBK), represented by Albert Kinolli;

II. TO DECLARE, unanimously, admissible the referral of Partia Liberale Egjiptiane (PLE), represented by Veton Berisha;

III. TO HOLD, by majority, that the Judgment [AA. No.29/2021] of 12 March 2021 of the Supreme Court has not violated the Applicant's right to be elected under paragraph 1 of Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights;

IV. TO HOLD, by majority, that this Judgment does not have retroactive effect and that, based on the principle of legal certainty, it does not affect the rights of third parties;

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

VI. This Judgment is effective on the day of publication in the Official Gazette in accordance with Article 20.5 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.