



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

Prishtina, on 26 May 2023
Ref. no.:MK 2202/23

CONCURRING OPINION

Judge

RADOMIR LABAN

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

Expressing at the outset my respect and agreement with the opinion of the majority of judges that in this case, the judgment [AA. no. 29/2021] of the Supreme Court of 12 March 2021 did not violate the Applicant's right to be elected in accordance with paragraph 1 of Article 45 [Right to election and participation] of the Constitution in connection with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights. As a judge of the Constitutional Court, I believe that there is one violation of human rights guaranteed by the Constitution, which was done to the Applicant and which refers to the violation of the rights of the Applicant guaranteed by paragraph 4 of Article 58 [Responsibilities of the State] of the Constitution in connection with Article 15 of the Framework Convention of the Council of Europe for the protection of national minorities (hereinafter: Framework Convention), which I will try to reason below.

As a judge, I agree with the factual situation as stated and presented in the Judgment and I accept the same factual situation as correct. I also agree with the way the Applicant's allegations were stated and presented in the Judgment. However, I completely disagree with the legal analysis presented in the Judgment as well as with the disposition of the Judgment.

Due to the above, and in accordance with Rules 62 and 63 of the Rules of Procedure of the Constitutional Court, I will present my concurring opinion in writing. In order to make it as easy and clear as possible to follow the reasoning of my concurring opinion, I will explain (I) the time frame of the Judgment; (II) Regarding the request submitted by the Partia Rome e

Bashkuar e Kosovës (PREBK), represented by Albert Kinolli; (III) Regarding the request submitted by Partia Liberale Egjiptiane (PLE), represented with a power of attorney by Veton Berisha; (IV) Regarding the allegation (PLE) about the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR; (V) The first unexplained issue regarding the allegation (PLE) of the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR; (VI) The second unexplained issue regarding the allegation (PLE) of the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR; (VII) Regarding the allegation (PLE) about the violation of paragraph 4 of Article 58 of the Constitution in connection with Article 15 of the Framework Convention; (VIII) Regarding the effect of the Judgment; (IX) Conclusion regarding alleged violations of the Applicant's rights.

(I) Time frame for adjudication

1. I, as a single judge, do not agree with the time frame for issuing this Judgment, I believe that the Court had to make this and every other judgment concerning the election process within the longest period of 6 (six) months. I emphasized this position of mine before the first review of this case in case KO61-21, which concerned the constitutionality of the representation of non-majority communities in the Government of the Republic of Kosovo. The Court has shown that the Court is capable of issuing judgments in a very short period of time in cases KO54-20, where the Applicant was the President of the Republic of Kosovo, and KO61-20, where the Applicant was Uran Ismaili and 29 other members of the Assembly of the Republic of Kosovo. Both of these cases were resolved by the Court within less than 30 days.
2. I have considered that since this case raises the issue of representation of non-majority communities in the Assembly of the Republic of Kosovo, while case KO61-21 raised the issue of representation of communities in the Government of the Republic of Kosovo, it is logical that these two cases should be jointly reviewed, especially as it was mentioned in both cases the term constitutional democracy or consociational democracy.
3. Also, these two cases were submitted to the Constitutional Court within a time gap of 15 days, so logic dictated that, considering that both are related to electoral rights and representation of non-majority communities, they should be resolved in the same or approximately the same time frames.
4. Unfortunately, my suggestions remained in the minority and the case KO61-21 was resolved on 8 October 2021, while this case remained in the process of reviewing for a much longer period of time, where the Court allowed that due to the untimely resolution of the case, it became the subject of public discussions, which acquired a political rather than a legal connotation.
5. The Court in particular has no justification for the period from 30 March 2022 until the moment of the final decision, where the Court exclusively conducted a legal analysis of the case for over a year, because in this period the Court did not receive any new information, request opinions or take any action that would influence the course of the proceedings, in this period we had to make a much greater effort, including myself, to do a high-quality legal analysis of the case and resolve the case much earlier.
6. In this way, we would avoid all malicious speculations and political connotations that were given to this case in public opinion, and at the same time, by quickly resolving this case, as well as any other case related to electoral rights, we would significantly contribute to legal certainty and reduce uncertainty regarding the rights of the Applicants themselves.

7. Because of everything stated above, I consider that the Court had to find a way to resolve this case and every other one related to electoral rights within a time frame of no longer than 6 (six) months.

(II) Regarding the request submitted by the Partia Rome e Bashkuar e Kosovës (PREBK), represented by Albert Kinolli

8. I fully agree with the position of the majority, the Applicant, that is, the political entity PBREK, has not exhausted the legal remedies established by Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, in order to challenge the judgment of AA. no. 29/2021 of the Supreme Court. As a consequence, I conclude that the Applicant, that is, PBREK, did not meet the admissibility criterion related to the exhaustion of legal remedies established by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure, and accordingly, the referral of the Applicant, that is, the political entity PBREK, must be declared inadmissible.

(III) Regarding the request submitted by Partia Liberale Egjiptiane (PLE), represented with a power of attorney by Veton Berisha

9. I fully agree that the Applicant, namely the political entity PLE has exhausted all legal remedies to challenge before the Court the Judgment [AA. no. 29/2021] of the Supreme Court in conjunction with Decision of the ECAP of 7 March 2021, but only pertaining to the rejection of his appeal regarding the Municipality of Kamenica and Gracanica, for the reason that the same had not submitted an appeal against the supplementary Decision of the ECAP of 10 March 2021, which decision was made regarding the refusal to cancel the ballots of the political entity Romani Iniciyativa in the Municipality of North Mitrovica.

(IV) Regarding the allegation (PLE) about the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR

10. Regarding these allegations, I partially agree with the majority's position and consider that the judgment [AA. no. 29/2021] of the Supreme Court from 12 March 2021 did not violate the Applicant's right to be elected in accordance with paragraph 1 of Article 45 [Right to election and participation] of the Constitution in connection with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights.
11. Firstly I would like to recall that to the extent relevant for the circumstances of the concrete case, it is important to emphasize 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.
12. In addition, I would like to recall 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 Count and Results Center; and (ii) Electoral Rule no. 09/2013 on Voting, Counting at the Polling Station and Polling Center Management. The first Rule 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.

13. Further, I agree with the stand of the majority 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.
14. I agree that based on the clarifications above, within the current electoral system in the Republic of Kosovo, there is no legal basis on which ballots can be declared invalid at certain polling stations based on assumptions about the ethnicity of the voters, including the relationship between the number of ballots which party, coalition, citizens' initiative and independent candidate claiming to represent the community could win the calculated number of voters of the same community at certain polling stations. The Court reminds that according to the ECtHR (i) it is not the duty of the courts to determine the will of the voters, including declaring ballots invalid without a clear legal basis; and (ii) any declaration of ballots invalid must be based on a clear legal basis, a criteria originating from the Law on General Elections itself and the regulation of the CEC in the context of the competence of the ECAP to annul/declare invalid the ballots.
15. According to that, and in the context of the Applicant's request to establish that the challenged Judgment of the Supreme Court resulted in a violation of the Applicant's right to be elected as a member of the Assembly of Kosovo in the 2021 parliamentary elections, as a consequence of the refusal to annul ballots in the municipalities of Gračanica and Kamenica, I agree with the stand of the majority that the Court must hold that this is not the case. This is because, according to the aforementioned clarifications based on the Constitution, valid international instruments, ECtHR case law and the Law on General Elections, there is no legal basis on which ballots can be declared invalid based on the ethnicity of the voter, including the alleged declaration of ethnicity which voters represent.
16. Accordingly, I believe that the refusal to annul, i.e. the declaration of ballots invalid at the mentioned polling stations in the municipalities of Gračanica and Kamenica, i.e. the challenged part of the judgment of the Supreme Court, did not result in a violation of the Applicant's right to be elected as a member of the Assembly of Kosovo, as guaranteed in paragraph 1 of Article 45 of the Constitution of the Republic of Kosovo.
17. Due to all of the above, I agree with the legal analysis regarding the majority's conclusion that the declaration of ballots as invalid is not established by the Law on General Elections or/and the current regulation of the CEC, which is in fact very clear and specific

when it determines the circumstances in which can anull ballots, a fact that the CEC itself emphasized in the relevant response in the ECAP to the Applicant's appeal. Having said that, taking into account that the ECAP and the Supreme Court, declaring the ballots in the five mentioned municipalities invalid, referred to paragraph 4 of Article 58 and paragraph 2 of Article 64 of the Constitution, bypassing Article 45.

18. However, I believe that although this conclusion is in accordance with the legal analysis of the Constitutional guarantees provided by Article 45 of the Constitution, it is contrary to the spirit of the Constitution of the Republic of Kosovo and that it must be read together with Articles 58 and 64 of the Constitution
19. Namely, I consider that the framers of the Constitution of Kosovo had in mind parliamentary democracy when writing it, which is multi-ethnic and should ensure representative representation of all communities living in Kosovo.
20. I am convinced that the intention of all those who wrote the Constitution of Kosovo was that the representative representation of the Albanian community in the Assembly of Kosovo represent the Albanians, that the representative representatives of the Serb community represent the Serbs, that the representative representatives of the Bosniaks represent the Bosniaks, that the representative representatives of the REA community represent the REA community, as well as representative representatives of the Gorani community represent Gorani in the Parliament, only with this interpretation does Constitutional parliamentary multi-ethnic democracy make sense. This position on the need for more or less representative representation was already taken by the Court in the judgment KO119-14.
21. Otherwise, the rights of non-majority communities, which are guaranteed by the Constitution of Kosovo, become ineffective and unenforceable, they remain only a letter on paper that the communities cannot realize because there are no mechanisms for their protection.
22. Therefore, I consider that, regardless of the fact that the declaration of ballots invalid is not established by the Law on General Elections or/and the valid regulations of the CEC, I consider that such decisions of the ECAP and the Supreme Court are in accordance with the spirit of the Kosovo Constitution because they protected the constitutionally guaranteed rights of non-majority communities, which are prescribed in Article 64 of the Constitution and concern the representative representation of non-majority communities. I consider that with such decisions the ECAP and the Supreme Court tried to fill the legal gap regarding the protection of the rights of non-majority communities, which arose as a result of not adopting the appropriate protection mechanisms required by Article 58 of the Constitution
23. Based on everything said above, I believe that judgment [AA. no. 29/2021] of the Supreme Court of 12 March 2021 did not violate the Applicant's right to be elected in accordance with paragraph 1 of Article 45 [Right to election and participation] of the Constitution in connection with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights

(V) The first unexplained issue regarding the allegation (PLE) of the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR

24. In addition to the fact that the Court clarified in detail that according to the aforementioned clarifications based on the Constitution, valid international instruments, ECtHR jurisprudence and the Law on General Elections, there is no legal

basis on which ballots can be declared invalid based on the ethnicity of the voters, including the alleged declaration of ethnicity that the voters represent, which I totally agree with.

25. I consider that the Court observes the process as a whole and the Court has emphasized this in all the cases it has reviewed so far, taking into account the fact that the Applicant is challenging 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: ECAP) of 7 March 2021.
26. Furthermore, I note that Election Complaints and Appeals Panel by Decision [A. no. 736/2021] of 7 March 2021 decided;

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 Inicijativa 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];

TO ORDER CEC to remove the canceled 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;

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 Inicijativa 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.

27. With this decision, the ECAP annulled a large number of votes by declaring them invalid based on the ethnic affiliation of the voters, I think that the Court had to give some explanation regarding these votes because the Court has already established that based on valid international instruments, ECtHR jurisprudence and the Law on General Elections, there is no legal basis on which ballots can be declared invalid based on the ethnicity of the voter, including the alleged declaration of the ethnicity represented by the voter
28. I consider that this was an obligation of the Court for two reasons, firstly because the Decision [A. no. 736/2021] of the Election Complaints and Appeals Panel of 7 March 2021 was the subject of constitutional review, so the Court had to make a conclusion regarding this decision, and secondly for the sake of the public and some future election processes, so that this situation does not happen again.
29. Furthermore, the Applicant challenges the Judgment [AA. no. 29/2021] of the Supreme Court of the Republic of Kosovo of 12 March 2021, which confirmed the Decision [A. no. 736/2021] of the Election Complaints and Appeals Panel of 7 March 2021, which annulled a large number of votes by declaring them invalid based on the ethnicity of the voters, I think the Court had to give some explanation regarding these votes because the Court already established that based on valid international instruments, ECtHR jurisprudence and the Law on General Elections, there is no legal basis on which ballots

can be declared invalid based on the ethnicity of the voter, so it is illogical for the Court to leave these challenged decisions after such conclusions in legal force.

30. I consider that after the Court's conclusions on the impossibility of declaring ballots invalid based on ethnicity, the Court should have declared the Decision [A. no. 736/2021] of the Election Complaints and Appeals Panel of 7 March 2021, and the Judgment [AA. no. 29/2021] of the Supreme Court of the Republic of Kosovo of 12 March 2021, unconstitutional and held that the violation is of a DECLARATIVE nature and does not have retroactive effect, because the decisions do not violate the rights of the Applicant. In this way, the Court would ensure legal certainty and the Court would not go beyond the request of the Applicant. In my opinion, this was necessary because only the enacting clause of the judgment legally binds all persons and institutions, not the reasoning, although these conclusions are not adequately explained in the reasoning either.

(VI) The second unexplained issue regarding the allegation (PLE) of the violation of rights from Article 45 of the Constitution in connection with Article 3 of Protocol no. 1 of the ECHR

31. I would like to recall that, the 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 the Supreme Court that refer to the appeals of political entities that represent the Bosnian community Nasha Inicijativa; 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 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 and had requested the cancellation of the ballots of the political entity Ujedinjena Zajednica-Adrijana Hodžić, ECAP by the Decision had canceled the ballots in all the polling stations which were challenged by the four (4) political entities mentioned above.
32. Also in his response, 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”*.
33. 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”*.

34. 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”*.
35. I do not agree with the majority in this part as well, i.e. the way in which the majority responded to the allegations of the Applicant, I observe these allegations and the Ombudsman's response as allegations that point to different case law of the Supreme Court and the ECAP in similar or almost identical situations, however the Court responded with one paragraph which I quote;
- “...the Applicant in his submission also referred to another Judgment of the Supreme Court, namely [AA. No. 30/2021], which was issued after appeals to political entities representing the Bosniak community Nasha Inicijativa; 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“*.
36. I consider that the Applicant did not address the Constitutional Court to get an answer if the Supreme Court Judgment [AA. no. 30/2021], has been contested before the Court or if it was the subject of review before the Constitutional Court, because these are public documents on which the Applicant could have found out very easily.
37. I consider that the Applicant has mentioned and respectively submitted the decisions of the ECAP [A. no. 565/2021] of 7 March 2021 and the Judgment [AA. no. 30.2021] of the Supreme Court, to prove different decisions of the ECAP and the Supreme Court in very similar and almost identical situations. That this reading of mine is correct, this is also confirmed by the answers of the Ombudsperson, who also considers that there was a different decision making and different case law on the part of the Supreme Court and the ECAP.
38. I consider that the Court should have answered clearly for the sake of public opinion these allegations of the applicant regarding different case law or CONCLUDE that even the decision [A. no. 736/2021] of the Electoral Complaints and Appeals Panel of 7 March 2021, also the Judgment [AA. no. 29/2021] of the Supreme Court of Kosovo of 12 March 2021, are two contested decisions in violation with the Constitution and to find that the violation is of a DECLARATIVE nature and has no retroactive effect, in order to ensure legal certainty. In this way, the Court would not have to justify the allegations on different decision making and different case law of the Supreme Court and the ECAP.

(VII) Pertaining to allegations (of the PLE) on violation of par. 4 of Article 58 of the Constitution, as read with Article 15 of the Framework Convention

39. Pertaining to allegations of violation of par. 4 of Article 58 of the Constitution, as read with Article 15 of the Framework Convention, I do not agree at any point with the opinion, reasoning and conclusion of the majority and consider that allegations of the applicant in this part are based on the violation of Article 58 of the Constitution during

the election procedure, viewed as a whole. It is for this reason, that I will first reiterate the allegations of the applicant and then I will present my findings regarding such allegations of the applicant.

40. I remind you that the applicants, with relation to par. 4 of Article 58 of the Constitution, as read with Article 15 of the Framework Convention, initially emphasize that *"in the Kosovo legal order there is a constitutional legal right of communities to effective representation and participation in political life"* and in that context they refer to Chapter III [Rights of Communities and their Members], chapter in which, according to their allegations, *"is also included the right of communities to effective participation in the political process, which corresponds to the state's obligation to guarantee this participation, as provided for by the Framework Convention of the Council of Europe for protection of national minorities"*. In that context, the applicants explicitly refer to par. 4 of Article 58 of the Constitution (which was amended by Amendment No. 1 of the Amendments to the Constitution of the Republic of Kosovo regarding the ending of the International Supervision of Independence of Kosovo, published in the Official Gazette of September 7, 2012).
41. According to the allegations of the applicant: *"Republic of Kosovo and all its state authorities have a constitutional obligation in accordance with Article 58 (4) of the Constitution to, 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."*
42. The applicants further emphasize: *"Not only that the rights from Chapter III are applicable and each individual from the community can request their implementation (including the rights from Article 58 (4), which are explicitly guaranteed to communities and their members), but the right to effective participation in the specific case is also guaranteed by Chapter II of the Constitution [Fundamental Rights and Freedoms], through provisions of the Framework Convention of the Council of Europe for the Protection of National Minorities (implementation of which is guaranteed by Article 22 of the Constitution). In this way, the admissibility requirements from Article 113 (7) of the Constitution are fulfilled in terms of allegations for violation of these provisions, given that we, as applicants, in addition to being representatives of political entities, are also members of these communities, whose rights to effective representation are affected by contested Decisions."*
43. Further, 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 suffices 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 have come from just the same community as the ones having declared themselves representing the community running for the deputy."* Based on such reasoning, the applicants emphasize that this is a variant of consolidated democracy.
44. In the context of the circumstances of the specific case, the applicants allege that: *"In the specific case of Elections held on 14 February 2021, the representative of the Romani*

Initiative who currently occupies the seat in the Assembly lacks an objective connection with the Roma community, given that the votes that this political subject received in the municipality of Gračanica, Kamenica and North Mitrovica are also in larger numbers than the residents of the Roma community in these municipalities, therefore those votes were obtained by the voters of other communities. Without these irregular votes, this representative would not currently exercise his current 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, due to the mere fact that that community is numerically larger than the Roma one. 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 to the Roma, Ashkali and Egyptian communities and their members in Kosovo and is in violation with Article 58 (4) and 64 (2) of the Constitution of Kosovo".

45. In relation to the contested decisions of the ECAP and the Supreme Court, the applicants allege that in the case of their interpretation: *"The rationale of interpretation by the ECAP and the Supreme Court was on the right track to constitute an "adequate measure" in the circumstances of the concrete case in order to guarantee the effective participation of communities in political life. Unfortunately, for reasons unclear to us, ECAP and then the Supreme Court, perhaps in the absence of precise legal standards, did not cancel the votes that Romani Initiative had won in the three aforementioned municipalities, although the same irregularities were also present in those municipalities, thus showing a lack of adequacy of the measures and efforts of the State of Kosovo in guaranteeing the effective participation of communities in political life."*
46. In the context of the aforementioned elaboration, which, according to the applicants, concerns the lack of concrete mechanisms to guarantee the effective participation of non-majority communities in political life, emphasizing, among other things, that it should be acknowledged that *"there are neither practices nor precise international norms, neither within the Council of Europe nor elsewhere, which explicitly determine that within the guaranteed seats representatives must be elected everywhere and in every case only through the votes coming from the members of the community to whom that representative belongs to. After all, there are no precise international standards generally accepted that require guaranteed seats in the first place,"* and as a result of this, among others, they propose that: *"The Constitutional Court of the Republic of Kosovo should fix this situation. We deem that the Constitutional Court would fix the current situation of insufficient participation of communities in public affairs and decision-making in Kosovo, where one community assigns the representative to the other community within the guaranteed seats, finding first that the current measures to guarantee this participation, in spite of requirements of Article 58 (4) of the Constitution and Article 15 of the Framework Convention, are not adequate - and consequently we are dealing with a constitutional violation of these articles."*
47. In continuation of the aforementioned proposal, the applicants specify the following: *"[...] 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 adjusting the legal framework in this aspect, so that non-majority communities in the country are enabled to have effective representation in guaranteed seats, and, as a result, effective representation in public affairs and decision-making in general. These adequate measures should guarantee the communities to substantially elect their own representatives, not allowing the conversion of guaranteed seats into illusory mechanisms of representation. 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 electoral lists (separate communal/electoral rolls) so that only the voters of the communities found in those lists could vote for the representatives who have declared that they will represent those communities within the 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 occurred in Elections of 14 February. (Although, as we said, precise and expressive international standards are lacking, 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, could 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 would be conducted in accordance with the objective background criteria, in line with the Constitution and the case law of the ECtHR, always preserving the privacy of the declarants as defined by the standards of the Venice Commission."

48. In the end, the applicants assert that the decision of the ECAP and the Supreme Court not to cancel the votes in the three municipalities, Gračanica, Kamenica and Northern 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, whose implementation is guaranteed by Article 22 of the Constitution of Kosovo".
49. The applicants further point out that: "the contested decisions have violated, in addition to the other component of Article 58 (4) of the Constitution (effective equality) in relation to Article 4 (2) of the Framework Convention, also Article 24 of the Constitution in relation to Article 1 of Protocol 12 of the European Convention on Human Rights, which stipulates a general prohibition of discrimination for all rights guaranteed by the constitution and law."
50. Looking at the essence of the allegations of the applicants, it briefly states that the rights proclaimed for non-majority communities in the Constitution of Kosovo should be protected by legal guarantees provided for in Article 58 of the Constitution, that such protection of a legal right does not currently exist, even though it is mandatory according to Article 58 of the Constitution, for which the applicant requests that the Constitutional Court oblige the Assembly of Kosovo in fulfilling its obligation in line with Article 58 of the Constitution and render relevant legal measures in order to protect the rights proclaimed by the Constitution of non-majority communities.
51. The Constitutional Court has responded to these allegations of the applicants in the following three paragraphs, in which it actually fails to answer to the applicants' allegations;

"In the context of the applicant's request that the Court should oblige the Assembly of the Republic of Kosovo in undertaking adequate measures, through the adoption of laws, which would ensure the effective participation of communities that are not the majority in Kosovo, so that, among other things, the guaranteed seats pursuant to par. 2 of Article 64 of the Constitution in the Assembly of Kosovo, would be obtained only if they were voted by the voters of the same community

that is not in the majority and which they declared to represent, a right which could be realized through special electoral lists for the purposes of guaranteed seats in the sense of the aforementioned provision, the Court shall initially point out two issues, namely (i) the nature of the applicant's referral; and (ii) the jurisdiction and competence of the Constitutional Court.

In this context, the Court explains that the Applicant has submitted his referral as an individual referral, in accordance with par. 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. Before the Court, the applicant has partially challenged the contested judgment of the Court, and that only regarding the refusal to annul/declare invalid the ballots in the municipalities of Graçanica and Kamenica, respectively. The Court has already explained that the refusal to annul/declare invalid the ballots in the specified polling stations in the municipalities of Graçanica and Kamenica, respectively, in the absence of the relevant legal basis specified by the Constitution, international instruments and/or applicable laws, has not resulted in violation of the right to be elected of the applicant, in accordance with the guarantees of par. 1 of Article 45 of the Constitution.

The Court further emphasizes that based on 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 powers to determine the model and specifics of the electoral system as well as the relevant procedures through its adopted laws. Based on the principle of separation of powers and the checks and balances among them, the laws adopted by the Assembly can be subject to constitutional review by the Constitutional Court if they are challenged based on the provisions of Article 113 of the Constitution."

52. I do not agree at all with this part of the judgment because first of all I consider that it is the Constitutional Court of Kosovo that is the main guardian of the Kosovar Constitutionality, and being the last instance, it is obliged to protect all the rights proclaimed by the Constitution, of individuals, communities and legal entities.
53. Proclaimed constitutional rights shall be meaningless if they are not effective and if there are no adequate mechanisms for their protection, since these proclaimed rights shall become unrealizable and enabling misuse of these proclaimed rights with the Constitution, in which case the non-majority communities shall be put in the worst position due to their small numbers and the possibility of abusing with their rights proclaimed by the Constitution by the larger communities.
54. It is undisputable that in accordance with Article 58 of the Constitution, it is a positive legal requirement of the legal regulation of Kosovo to render relevant norms that would protect the rights of non-majority communities, this constitutes which constitutes the positive obligation taken over by the State of Kosovo when rendering the Constitution.
55. In the Constitution of Kosovo, apart from the rights guaranteed by Article 64 of the Constitution, which deals with the representative representation of non-majority communities, a whole range of other rights are stipulated by the Constitution of Kosovo for the sake of guaranteeing them to non-majority communities, such as the rights pursuant to Article 67 of the Constitution related to the election of the Deputy Speaker of the Assembly of Kosovo from among non-majority communities, then the rights stipulated by Articles 77 and 78 of the Constitution related to the representation of communities in the parliamentary committees, then the rights pursuant to Article 81 of

the Constitution that deal with the rights of communities in the case of passing laws of vital interest, then the rights that are guaranteed by Article 96 of the Constitution that deal with the representative representation of communities in the Government of the Republic of Kosovo, then the rights guaranteed by Articles 103, 108, 109 and 114 of the Constitution, which are related to the representation of non-majority communities in the judicial and prosecutorial systems of the Republic of Kosovo, then the rights guaranteed by Articles 133 and 139 of the Constitution, which are related to the representation of non-majority communities in the institution of the Ombudsperson and in the Central Electoral Commission, and finally the rights guaranteed by Article 144 of the Constitution, which make it impossible to amend the existing Constitution without the consent of the majority of two thirds (2/3) of non-majority communities.

56. All these rights guaranteed by the Constitution shall be meaningful only if they are realizable and if there are effective mechanisms for their protection, on the contrary they shall remain only declarative and unrealizable. In the concrete case, the applicant has reached the last judicial instance that could protect his rights proclaimed by the Constitution and he demands from the Constitutional Court to order the Assembly in rendering mechanisms for the protection of his rights.
57. I reiterate that I am convinced that the aim of all those who have written the Constitution of Kosovo was that the representative representatives of the Albanian community in the Assembly of Kosovo should represent the Albanians, that the representative representatives of the Serb community should represent the Serbs, that the representative representatives of the Bosnian community should represent the Bosnians, that the representatives of the RAE community should represent the RAE community, that the representative representatives of the Goran community should represent the Gorans in the Parliament. It is only through such an interpretation that the multiethnic constitutional democracy shall make sense.
58. During the realization of these rights, in addition to the principle of equality, it is also important to realize the principle of legitimacy, namely that the representative representatives of a community occupy the guaranteed seats of that community as required in the spirit of the Constitution Republic of Kosovo, when we read together Articles 45, 48 and 64 of the Constitution.
59. Because of what was said above, I agree with the reasoning of the Supreme Court that in understanding the concept of consolidated democracy, it is necessary that *"in addition to the constitutional framework, the legal provisions for reserved seats contain premises of this concept, which dictate the preservation of the effective representation of communities through mechanisms which, first of all, shall guarantee the right to vote, but within them also the right to represent communities through representatives with objective connections to the community, especially connections to their ethnic background, without excluding language, etc."* and " the Constitution of the Republic, through seats reserved for non-majority communities, stipulates the representation of all groups in the representative body, hence for such representation there must be an objective connection between the representative and the voters of the respective community, otherwise the effective representation of the communities, to whom the Constitution has guaranteed these reserved seats, shall be distorted [...]",
60. This is especially important because if non-representative representatives are allowed to enter the Assembly, then other rights guaranteed by the Constitution of Kosovo, such as the rights from Article 67 of the Constitution, which are related to the election of the vice-presidents of the Assembly of Kosovo from non-majority communities, then the rights defined by articles 77 and 78 of the Constitution related to the representation of communities in parliamentary committees, further the rights from article 81 of the

Constitution that relate to the rights of communities with the case of passing laws of vital interest, then the rights guaranteed by Article 96 of the Constitution and related to the representative representation of communities in the Government of the Republic of Kosovo, then the rights guaranteed by Article 139 of the Constitution related to representation of non-majority communities in the Central Elections Commission, and finally the rights guaranteed by Article 144 of the Constitution, which make it impossible to change the existing Constitution without the agreement of a two-thirds (2/3) majority of non-majority communities.

61. Once these rights have been realized, we shall automatically end up with non-representative representatives of the communities because the seats in the Assembly have been occupied by the persons who do not represent that community, and with this the entire system for protection of minorities' rights has been jeopardized and rendered ineffective.
62. It is undisputable that the Republic of Kosovo has not fulfilled its positive legal obligations contained in Article 58 of the Constitution, and the Court itself in its judgment admits that there are no protective mechanisms put in place yet, which should have been brought into existence, but the Court, namely the majority is trying to put the responsibility on the Assembly of Kosovo as a competent legislative body to render such appropriate protective mechanisms.
63. I do not agree with the Court avoiding its own responsibility, the applicant is a person who has exhausted all legal remedies and alleges a violation of the right which the Constitutional Court itself can ascertain, further the Court is obliged because pursuant to Article 53 of the Constitution, it has the duty to interpret the fundamental rights and freedoms in line with the case law of the ECtHR, which on numerous occasions of individual referrals orders the states to harmonize the legislation in line with the rights guaranteed by the European Convention of Human Rights.
64. Following this logic, the ECtHR very often orders general preventive measures, through which particularly in individual cases it orders the states to harmonize their legislation (for example, by introducing laws that enable legal remedies to regulate the payment of pensions, by regulating real estate issues, etc.) Analogically, just in compliance with the obligation arising from Article 53 of the Constitution, I therefore consider that in this case, the Constitutional Court should have asserted that there are no protective mechanisms put in place, as foreseen by Article 58 of the Constitution, and to order general preventive measures, thereby ordering the Assembly of Kosovo to harmonize the legislation with the rights proclaimed by Article 58 of the Constitution of Kosovo.
65. By doing so, the Constitutional Court would make it feasible, during the upcoming elections or in the case of other elections, to be in the same or identical situation, and what is most important, to protect the rights guaranteed by the Constitution of non-majority communities and to make it impossible for anyone to abuse with their rights, which ultimately remains the main role of the Constitutional Court.
66. Due to all that was said above, I therefore consider that the applicant's right stipulated by Article 58 of the Constitution had continuously been violated throughout the electoral process, in the sense of Article 64 of the Constitution, on the grounds that he had no adequate and effective means for the protection of their rights guaranteed by the Constitution, namely Article 64 of the Constitution, which the State of Kosovo had to ensure in compliance with Article 58 of the Constitution.
67. It is for this reason that I consider that the Court should assert that the applicant's right stipulated by Article 58 of the Constitution had continuously been violated throughout

the electoral process, in the sense of Article 64 of the Constitution, on the grounds that he had no adequate and effective means for the protection of their rights guaranteed by the Constitution, namely Article 64 of the Constitution,. The Court had to order general preventive measures, ordering thereby the Assembly of the Republic of Kosovo in harmonizing its electoral legislation in line with the constitutional guarantees arising from Article 58 of the Constitution.

(VII) Pertaining to the effect of the Judgment

68. As for the effect of the Judgment, I agree with the opinion of the majority that this judgment has no retroactive effect and based on the principle of the legal certainty, it does not affect the rights of third parties.
69. However, I disagree with the manner in which this was reasoned since the judgment has neither found any violation nor annulled any decision annulled and that said it does not make any sense to assert that the judgment has no retroactive effect and based on the principle of legal certainty does not affect the rights of third parties.
70. I consider that the Court should have CONCLUDED that Decision [A. no. 736/2021] of the Elections Complaints and Appeals Panel of 7 March 2021, and Judgment [AA. no. 29/2021] of the Supreme Court of the Republic of Kosovo of 12 March 2021, are in violation with par. 1 of Article 45 [Freedom of Election and Participation] of the Constitution, related to Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights and should have concluded that the violations are of a DECLARATIVE nature.
71. Following such conclusions by the Court and the annulment of the judgments for declaring the ballots invalid on the grounds of ethnicity, this is in violation with the conclusion of the Court on the impossibility of declaring ballots invalid based on ethnic background.
72. The court had to conclude that this judgment does not have a retroactive effect and based on the principle of legal certainty, it does not affect the rights of third parties because decisions have not violated the rights of the applicant. In this way, the Court would have ensured the legal certainty and would not have gone beyond the scope of the Applicant's referral.

(VIII) Conclusion pertaining to the violations alleged by the Applicant

73. Based on the aforementioned, and considering reviewed allegations of the Applicant in his referral:
 - I. **I AGREE** with the opinion of the majority **TO DECLARE** inadmissible Referral filed by Partia Rome e Bashkuar e Kosovës (PREBK), represented by Albert Kinolli;
 - II. **I AGREE** with the opinion of the majority **TO DECLARE** admissible Referral filed Partia Liberale Egjiptiane (PLE), represented by Veton Berisha;
 - III. **I AGREE** with the opinion of the majority **TO CONCLUDE THAT** Judgment [AA. no. 29/2021] of the Supreme Court of 12 March 2021 did not violate the Applicant's right to be elected pursuant to par. 1 of Article 45 [Freedom of Election and Participation] of the Constitution, as read with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights.

- IV. I CONSIDER THAT** the Court should have **CONCLUDED** that Decision [A. no. 736/2021] of the Elections Complaints and Appeals Panel of 7 March 2021, and Judgment [AA. no. 29/2021] of the Supreme Court of the Republic of Kosovo of 12 March 2021, are in violation with par. 1 of Article 45 [Freedom of Election and Participation] of the Constitution, as read with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights in line with the reasoning of the judgment itself, then IT should have **CONCLUDED** that the violation is of a **DECLARATIVE** nature and it does not have a retroactive effect since it did not violate the Applicant's rights.
- V. I CONSIDER THAT** the Court should have **CONCLUDED** that the Applicant's right stipulated by Article 58 of the Constitution had continuously been violated throughout the electoral process, in the sense of Article 64 of the Constitution, on the grounds that he had no adequate and effective means for the protection of his rights guaranteed by the Constitution, namely Article 64 of the Constitution,.
- VI. I CONSIDER THAT** the Court should have **ORDERED** general preventive measures, ordering thereby the Assembly of the Republic of Kosovo within a reasonable timeframe to **HARMONIZE** the electoral legislation in line with the constitutional guarantees arising from Article 58, as read with Article 64 of the Constitution.
- VII. I AGREE** with the opinion of the majority **TO ASCERTAIN** that this judgment shall not have a retroactive effect and that based on the principle of the legal certainty it shall not affect the rights of the third parties.

I am convinced that with an enacting clause like this, the Court could have produced the desired effects for the future as well, and avoid abusing with the rights proclaimed by the Constitution of non-majority communities. I consider that the last paragraph of the reasoning of the judgment shall not oblige the individuals, communities, institutions and legal entities, if such obligations do not appear in the enacting clause of the judgment, given that it is absurd to expect from all citizens of Kosovo to know all the statements of reasons rendered by the Constitutional Court, which is in the end also in violation with the case law, legal norms and international standards, never is the reasoning of the judgment legally binding, this is always the case with the enacting clause of the judgment.

Concurring opinion was submitted by the judge;

Radomir Laban, Judge

On 25 April 2023, in Prishtina.