



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

Prishtina, on 1 March 2024  
Ref. no.: AGJ 2400/24

*This translation is unofficial and serves for informational purposes only.*

## **JUDGMENT**

in

**case no. KI195/22**

Applicant

**Besim Morina**

**Constitutional review of Judgment AA. no. 11/2022 of the Supreme Court of  
Kosovo, of 25 August 2022**

### **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

#### **Applicant**

1. The Referral is submitted by Besim Morina, residing in the municipality of Kamenica (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges Judgment [AA. no. 11/2022] of 25 August 2022, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [A. no. 01/2022] of 19 August 2022, of the Election Complaints and Appeals Commission (hereinafter: ECAC) and Judgment [337-2022] of 22 February 2022, of the Central Election Commission (hereinafter: the CEC).

## **Subject matter**

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

## **Legal basis**

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

## **Proceedings before the Constitutional Court**

6. On 9 December 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 20 December 2022, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Safet Hoxha (Presiding), Nexhmi Rexhepi and Enver Peci, members.
8. On 27 December 2022, the Court notified the Supreme Court about the registration of the Referral, and provided the latter with a copy of the Referral.
9. On the same date, the Court notified the Applicant about the registration of the Referral.

10. On 16 December 2022, Judge Enver Peci took the oath in front of the President of the Republic of Kosovo, in which case his mandate at the Court began.
11. On 29 January 2024, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.
12. On the same date, the Court decided, unanimously, that the Referral is admissible; held that the Judgment [A.A. no. 11/2022] of 25 August 2022, of the Supreme Court of Kosovo is not contrary to Article 24 [Equality Before the Law] and paragraphs 1 and 2 of Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of Protocol no. 1 of the European Convention on Human Rights and Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights; held that this Judgment enters into force on the day of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

### Summary of facts

13. On 17 October 2021, the local elections were held in Kosovo, which were certified by the CEC on 16 November 2021, by decision [No. 3147/2021]. The Applicant was a candidate for member of the Municipal Assembly in Kamenica from among the political entity Alliance for the Future of Kosovo (hereinafter: the AAK). The latter, despite having won 127 votes, did not manage to be elected a member of the Municipal Assembly of Kamenica.
14. From the case file, it follows that Ms. K. M. replaced Ms. D.K., member of the Municipal Assembly in Kamenica, from the political entity “*Alliance for the Future of Kosovo*”. Consequently, on 22 February 2022, the CEC by Decision [337-2022] decided as follows: (I) Ms. K.M. is appointed a member of the Municipal Assembly in Kamenica, from the political entity AAK, replacing the member of the Municipal Assembly Ms. D. K.; (II) The Secretariat of the CEC is obliged to communicate this decision to Ms. K.M., and take procedural actions for implementation. In the reasoning of its Decision, the CEC emphasized the following:

*The next candidate has given the declaration of acceptance of the mandate as the next candidate, from the same political entity, of the same gender and with a higher number of votes, not exceeding the quota of 30%, of the minimum limit of gender representation of the gender minority, according to the certified results of the local elections of 2021. Therefore, after meeting all the legal conditions, the CEC decided as in point I of this decision.*

15. On 12 August 2022, the Applicant submitted to the CEC “*Request for reassessment of the decision to replace the Member of the Municipal Assembly of Kamenica, Decision Prot. no. 337-2022, of 22.02.2022, and repeal.*” By this request, the Applicant stated that during the local elections for a member of the Municipal Assembly of Kamenica, as a member of the AAK political entity, had received a total of 127 votes, respectively 4 votes more than Ms. K. M. Consequently, the Applicant claimed that the replacement was made “[...] *contrary to the Law on and the Judgment of the Constitutional Court, KI45/20 and KI46/20, disregarding the re-ranked list of candidates who have received a greater number of votes.*”
16. On 16 August 2022, the CEC by Decision [971/4-2022] submitted “*Response to the request regarding the reassessment of the decision to replace the member of the Municipal Assembly in Kamenica, CEC decision No. 337/2022, of 22.02.2022 and repeal.*” In this regard, the CEC justified its response as follows:

*“The CEC, by the decision of 22.02.2022,. protocol no 337/2022, based on article 10 of the Law on local elections, article 37.2 item (c), of the Law on Local Self-Government, no. 03 L/040, as well as article 5.6 and 7 of the Administrative Instruction for the Replacement of the Member of the Municipal Assembly No. 01/2017, as well as the Judgment of the Constitutional Court KI45/2020 and KI46/20, replaced the member of the Municipal Assembly in Kamenica Ms. D.K. with, the next candidate, Ms. K.M., from the political entity “Alliance for the Future of Kosovo-AAK.”*

*Therefore, the claims of the request are contrary to Article 8 and Article 10 of the Law on Local Elections, regarding the formula for the allocation of seats, the replacement of members of the Municipal Assembly, as well as the smaller number of candidates by gender, unless the number of candidates who have won mandates is two (2) then the smaller number of both genders must be one (1), there must be one male and one female.”*

17. On 17 August 2022, the Applicant submitted a complaint to the CEC against the Decision of the CEC [no. 971/4-2022] claiming as follows: (i) *“The Municipal Assembly of Kamenica, consists of 27 (twenty seven) members of the Municipal Assembly, of whom divided into Males of 15 or 55.55%, and Females of 12 or 44.40%.”*; and that (ii) *in the spirit of the Judgment of the Constitutional Court of the Republic of Kosovo, the replacement of the Members of the Municipal Assembly of Kamenica should also be done, since the complained candidate, Mr. Besim Morina, received a total of 127 votes, and was re-ranked as a pending candidate with number 7, to replace the Members of the Municipal Assembly of Kamenica.”*
18. On 19 August 2022, ECAP by Decision [A. no. 01/2022] rejected as ungrounded the appeal submitted by the candidate for member of the Municipal Assembly in the Municipality of Kamenica Besim Morina, from the political entity AAK, branch in Kamenica, whereby it requested that Decision [97/4-2022] of 16 August 2022, of the CEC be reassessed and annulled, as well as that the CEC be obliged to appoint the candidate to replace the member of the Municipal Assembly in Kamenica that has the highest number of votes in the Local Elections 2021 held on 17 October 2021, within the same political entity, regardless of gender. In the reasoning of its decision, ECAP emphasized as follows: *“The panel concluded that in the present case the Political Entity AAK, branch in Kamenica, won 4 (four) seats, then the smaller number of both genders should be 2 (two), so there must be two men and two women, because if it is otherwise, the minimum representation in the quota of 30%, of the opposite gender, will not be achieved.”*
19. On 22 August 2022, the Applicant submitted a complaint to the Supreme Court against the aforementioned Decision of the ECAP, emphasizing that *“Viewed from the basis of the legal spirit of the representation of the minority gender, which in the present case is the female gender, it has guaranteed 30% of the representation with 1 (one) member, while the other members must be replaced according to the re-rakning of receiving general votes for the Municipal Assembly of Kamenica.”*
20. On 25 August 2022, the Supreme Court by the Judgment [AA. no. 11/2022] rejected as ungrounded the complaint of the Applicant, candidate for member of the Municipal Assembly in Kamenica, from the political entity, AAK, branch in Kamenica, submitted against the Decision of the ECAP, [A. no. 01/2022], of 19 August 2022. The Supreme Court reasoned its Judgment as follows:

*“[...] decisive for the assessment of the legality of the decision of the ECAP, are the legal provisions of the Law on Local Elections article 8.3 and 8.4, according to which it is determined that the gender quota of 30% is applied within the lists of*

*political entities that have won mandates, according to the formula for the allocation of seats, and not the quota of the Municipal Assembly as a whole as claimed by the complaining party.*

*In the present case since the political entity AAK has 4 mandates, then based on the percentage of 30%, it must be of two males and two females, because if it were otherwise, the minimum representation of 30% would not be achieved.*

*Likewise, the other claims that the appealed decision was rendered contrary to the judgments of the Constitutional Court KI45/2020 and KI46/2020 are also not grounded, because according to these judgments, the manner of decision is in the spirit of respect and implementation of the constitutional principles of gender equality and non-discrimination that are of particular importance and to avoid gender inequalities in the spirit of the normative constitutional system. According to these judgments, gender representation consists in the fact that in any case the representation of 30% of the under-represented gender, this represents only the minimum limit of gender representation of the minority gender as a special measure, but not the highest limit of equal representation of the same gender. Therefore, in the case under review, if it were decided otherwise in this matter, this principle of the gender quota would be violated, as a legal guarantee regulated by the concrete provisions of the legislation on Local Elections, such as the one on which the ECAP is based in its decision by rejecting the appeal against the decision of the CEC.”*

### **Applicant's allegations**

21. The Applicant alleges that the Judgment of the Supreme Court [AA. no. 11/2022] of 25 August 2022, was rendered in violation of his fundamental rights and freedoms guaranteed by articles 7 [Values], 24 [Equality Before the Law], 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of the ECHR and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.
22. The Applicant alleging violation of the abovementioned articles of the Constitution, he only quotes them. In the following, the Applicant states that *“The Municipal Assembly of Kamenica, consists of 27 (twenty-seven) members of the municipal assembly, of which they are divided into the majority or Male gender of 15 or 55.55%, and the minority or Female gender of 12 or 44.40 %.”*
23. In what follows, the Applicant states that while he received 127 votes, and Ms. K.M. received 4 votes less, he was treated unfairly *“contrary to the law and the Judgment of the Constitutional Court, KI45/2020 and KI46/20, by disregarding the reordered list of candidates who received the largest number of votes, which reordering does not harm the minority gender but gives the right of replacement to the appellant.”*
24. The Applicant also refers to the Judgment of the Constitutional Court, in the joint cases KI45/2020 and KI46/20, respectively in *“[...] item 58, item 106, item 152, as well as item 171 which establishes that ‘the replacement of candidates for deputies should be done in such a way that: first, a minimum representation of 30% of the underrepresented gender (minority gender) is ensured, which cannot be questioned at any time; and secondly, in cases where the gender quota of 30% has been met based on the election result (as it was the case), then the replacements of candidates for deputies should be made on the basis of the election result, without being limited in terms of replacement based on of the same gender, as long as the minimum representation of the underrepresented gender is not endangered”.*

25. The Applicant states that the Municipal Assembly of Kamenica consists of 27 Members (of the Assembly), of which 12 are females, while 15 are male members, therefore the replacement of the member of the Municipal Assembly of Kamenica Ms. D.K., according to the Applicant, should be done through replacement with the Applicant, who does not endanger the gender quota of 30% of minority representation. Consequently, according to the Applicant *“the representation that violates the free vote of citizens who have been determined for their representative who has received 127 valid votes, and with more votes than the one now replaced, is unlawful.”*
26. Finally, the Applicant requests the Court *“to also do the breakdown-elaboration of the representation of the minimum of 30% of the minority gender, when we are dealing with the right of representation of 4 assembly members in the Municipal Assembly, what is the quota of representation of the minimum of 30% of the minority gender. And on the minimum representation quota, should the right of representation be applied according to the meritocracy of receiving votes from citizens with the right to vote who carried their right to representation according to the proportional system with open lists.”*

## **Relevant constitutional and legal provisions**

### **Constitution of the Republic of Kosovo**

#### ***Article 7 [Values]***

1. *The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.*
2. *The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.*

#### ***Article 24 [Equality Before the Law]***

1. *All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
2. *No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
3. *Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

#### ***Article 45 [Freedom of Election and Participation]***

1. *Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
2. *The vote is personal, equal, free and secret.*

*3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.*

### **Article 55 [Limitations on Fundamental Rights and Freedoms]**

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

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

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

*4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.*

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

## **Law No.03/L-072 on General Elections in the Republic of Kosovo**

### **Article 3 Basic Provisions**

*3.1 The conduct and administration of municipal elections in Kosovo and the legislation pertaining to elections shall be guided by the following principles:*

*[...]*

*- All political entities and elections bodies are obliged to respect the gender quota requirements as set forth by this law.*

### **Article 8 Distribution of seats in the Municipal Assembly**

*[...]*

*8.3 The seats allocated to a Political Entity under paragraph 1 of this Article, shall be distributed to the candidates on the Political Entity's candidate list as reordered in paragraph 2 of this Article, starting from the first candidate on the reordered candidate list in strict descending order, until the number of seats allocated to the Political Entity*

*8.4 If, after the allocation of seats as set out in paragraph 3 of this Article, the candidates of minority gender within a political entity have not been allocated at least 30% of the total seats for that political entity, the last elected candidate of the majority gender will be replaced by the next eligible candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender becomes is at least 30%.*

**Article 10**  
**Replacement of members of Municipal Assembly**

*10.1 The mandate of the municipal assembly member cannot be altered or terminated before the expiry of the municipal assembly mandate, with the exception of the cases determined with the Law on Local Self-Government.*

*10.2 The Chair of the Municipal Assembly shall notify the CEC of any vacant seat in the Municipal Assembly.*

*10.3 The CEC fills the vacancy in accordance with following determined criteria:*

*a) by the next eligible candidate of the same gender on the reordered candidate list of the same Political Entity;*

*b) by the following candidate of the reordered list of candidates of the same political entity, if there is no other candidate of the same gender in the reordered list of candidates;*

*c) by the following candidate in the reordered list of candidates of the political entity, which had the highest coefficient of votes immediately after the former political entity in accordance with the formula indicated in Article 7.1 of this Law, in the latest elections, if there is no other candidate remaining in the reordered list of candidates of the former political entity;*

*d) by the following candidate in the reordered list of candidates of the political entity, which had the highest coefficient of votes immediately after the previous political entity in accordance with the formula 6 specified in Article 7.1, if the member is an independent candidate.*

*10.4 The Municipal Assembly dissolves in accordance with the Law on Local Self-Government.*

**Law no. 03/L-040 on Local Self Government**

**Article 37**  
**Term of Office**

*37.1 The term of office of members of the Municipal Assembly shall be four years.*

*37.2 A member of the Municipal Assembly shall cease to be a member:*

*[..]*

*c) upon the submission of a written resignation of his post to the Mayor of the Municipality;*

**Administrative Instruction No. 01/2017, on the Procedure for Replacing a Member of the Municipal Assembly (CEC)**

**Article 3**  
**Submission of the request for the replacement of the member of the Municipal Assembly**

*3.7 The CEC replaces the member of the Municipal Assembly in order, based on the results of the elections as follows:*

*3.7.1 From the next qualified candidate of the same gender found in the reordered list of candidates of the same political subject.  
[...]*

### **Admissibility of the Referral**

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

28. 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.*

29. In addition, the Court also examines whether the Applicants fulfilled the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

#### **Article 47 [Individual Requests]**

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

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

#### **Article 48 [Accuracy of the Referral]**

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

#### **Article 49 [Deadlines]**

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

30. With regard to the fulfillment of these criteria, the Court notes that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment [AA. no. 11/2022] of 2 August 2022 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms that he claims to have been violated, in accordance with Article 48 of the Law, and submitted the Referral within the time limit set out in Article 49 of the Law.
31. The Court finds that the Applicant's Referral meets the admissibility criteria established in Rule 39 (1) of the Rules of Procedure. The Referral, also, cannot be declared inadmissible on the basis of the requirements defined in Rule 39 (3) of the Rules of Procedure. Therefore, the latter is declared admissible for review on the merits.

### **Merits of the Referral**

32. The Court first recalls the circumstances of the present case, that in the local elections of 2021, the Applicant was a candidate for member of the Municipal Assembly of Kamenica from among the political entity AAK. In these elections, AAK won 4 seats, while the Applicant, despite not being elected member of the assembly, won 127 votes. After the resignation of Ms. D. K., the member of the assembly from the ranks of the political entity AAK, the latter was replaced by Ms. K. M., from the same entity, which in the local elections had received 4 votes less than the Applicant. The Applicant raised claims that while the Municipal Assembly of Kamenica consists of twenty-seven (27) members of the Municipal Assembly, of which fifteen (15) or 55.55% are divided into the majority or male gender, and the minority or female gender is twelve (12) or 44.40%, therefore, in the present case of replacement, priority should be given to the voting result. Therefore, he considers that he was treated unfairly in violation of the law and the Judgment of the Constitutional Court, in the joint cases KI45/20 and KI46/20, disregarding the reordered list of candidates who received a greater number of votes, which rearrangement does not harm the minority gender but gives the right of replacement to the Applicant. The CEC rejected the Applicant's request for re-assessment of the decision to replace the member of the Municipal Assembly in Kamenica. Subsequently, after the Applicant's appeal against the decision of the CEC, the ECAP rejected the Applicant's appeal as ungrounded on the grounds that *"the political entity AAK, branch in Kamenica, won 4 (four) seats, then a smaller number from both genders must be 2 (two), namely there must be two males and two females, because if it is otherwise, the minimum representation in the quota of 30% of the opposite gender will not be achieved."* Ultimately, the Applicant's appeal to the Supreme Court was rejected as ungrounded, which, among other things, emphasized that *"the legal provisions of the Law on Local Elections, article 8.3 and 8.4, are decisive for the assessment of the legality of the decision of the ECAP, according to which it is determined that the gender quota of 30% is applied within the lists of political entities that have won mandates, according to the formula for the allocation of seats, and not the quota of the Municipal Assembly as a whole as claimed by the complaining party. In the present case where the political entity AAK has 4 mandates, then based on the percentage of 30%, it should be two men and two women, because if it were otherwise, the minimum representation of 30% would not be achieved."*
33. In this regard, the Court notes that the substance of the case raised by the Applicants refers to the aspect of *"equality before the law"* and of *"the right to be elected"* in the process of implementing the Law on General Elections in the case of replacement of the deputies of the Assembly of the Republic of Kosovo.
34. It follows that the individual constitutional complaint in this case concerns the fact: Has the Law on Local Elections been applied by the CEC, the ECAP and the Supreme

Court, in accordance with the guarantees, the values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR.

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

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

36. The Republic of Kosovo is determined for a constitutional order in which gender equality is one of the fundamental values. This value has a direct impact on the democratic development of society and the realization of equal opportunities for women and men in political, economic, social, cultural and other areas of social life (see Article 7 of the Constitution).
37. The need to create equal opportunities creates for the state positive obligations for the use of various instruments and measures, including legal norms, in order to eliminate *factual inequalities* between women and men. In the context of ensuring gender equality, the Law on Local Elections defines the gender quota of under-represented gender representation in the 30% quota. The issue of under-represented gender in the applicable legislation is called “*minority gender*”, without specifying which gender it is specifically, due to the fact that at different times the minority gender may be one or the other (read in this context Article 24 of the Constitution and Article 27 of the Law on General Elections).
38. According to the Constitution, it is expressly provided that the principles of equal protection do not prevent the imposition of necessary measures for the protection and advancement of the rights of individuals and groups who are in an unequal position (see Article 24.3 of the Constitution). Such special measures are instruments by which the state, namely the Republic of Kosovo, develops the policy of equal opportunities, as well as mitigates or eliminates *factual inequality*. Such measures can be implemented indefinitely, but only until the achievement of the purpose for which they are set.
39. On the other hand, with regard to Article 45 of the Constitution, the Court notes that this constitutional norm guarantees the right to elect (the active aspect of the vote) as well as the right to be elected (the passive aspect of the vote) (see, for more on these two aspects, the cases of the Constitutional Court where various issues related to Article 45 of the Constitution have been addressed: [KI01/18](#), with Applicants *Gani Dreshaj and the Alliance for the Future of Kosovo (AAK)*, Judgment of 4 February 2019; [KI48/18](#), Applicants *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019). More specifically, the passive aspect of the vote that is reflected in the right to be elected, represents a specific right relevant in this particular case, belongs to the candidates as individuals, namely as natural persons, who run in the elections, at local or central level, as well as political entities, respectively legal entities running in elections, at local or central level.
40. The rights guaranteed by Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR are fundamental rights towards establishing and maintaining the

foundations of an effective and valid democracy governed by the rule of law. However, these rights are not absolute. Both the Constitution and the ECHR allow a space for “implicit restrictions” in which field the state has a wide margin of appreciation (see the case of the Constitutional Court, [KI207/19](#), Applicant *Social Democratic NISMA, New Kosovo Alliance and the Justice Party*, Judgment of 10 December 2020, paragraphs 148-153, and references cited therein: the case of the ECtHR, *Yumak and Sadak v. Turkey*, Judgment of 8 July 2008, paragraph 109 and references cited therein).

41. The ECtHR has clarified that as an article with special features, Article 3 of Protocol No. 1 of the ECHR does not contain a list of legitimate aims which would justify the restriction of the exercise of the right guaranteed by this article. It also does not refer to the “*legitimate aims*” which are exhaustively set out in Articles 8 to 11 of the ECHR. As a result, the ECtHR has emphasized that states are free to invoke their “*specific purposes*” when restricting the exercise of this right provided that such purposes are: (i) in accordance with the rule of law; and (ii) the general objectives of the Convention (see the case of Court KI207/19, cited above, paragraphs 148-153 and the references cited therein).
42. Furthermore, regarding the interpretation of the guarantees embodied in Articles 24 and 45 of the Constitution, the Court refers to the case law of the ECtHR (with particular emphasis on the case *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009), in the context of the application of the equivalent articles, namely Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.
43. Article 14 of the ECHR complements the other essential provisions of the Convention and its Protocols. This article does not act independently as it has effect only in relation to the “*enjoyment of rights and freedoms*” protected by other provisions. Although the application of Article 14 does not presuppose a violation of those provisions - and is to this extent autonomous, there can be no room for its application unless the facts in question fall “*within the scope*” of one or more of the latter (see, cases of the ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 39; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, paragraph 71; *Petrovic v. Austria*, Judgment of 27 March 1998, paragraph 22; and *Sahin v. Germany*, Judgment of 8 July 2003, paragraph 85). The prohibition of discrimination in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee. This article also applies to those additional rights that fall within the general scope of each article of the ECHR, which the state has decided to provide voluntarily. This principle is well based on the case law of the ECtHR (see case “*Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium* (merits), Judgment of 23 July 1968, paragraph 9; *Stec and Others v. The United Kingdom (December)*, para. 40; and *EB v. France*, Judgment of 22 January 2008, paragraph 48).
44. According to the case law of the ECtHR, for the purposes of Article 14 of the Convention, the treatment is discriminatory if “*there is no objective and reasonable justification*”, namely if it does not pursue a “*legitimate aim*” or if there is no “*reasonable relationship of proportionality between the means employed and the aim sought to be achieved*” (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 94, pp. 35-36, paragraph 72). The ECtHR noted that the Contracting States enjoy a certain margin of appreciation as to whether and to what extent differences in similar situations justify a different

treatment (see ECtHR case [Willis v. the United Kingdom](#), Judgment of 11 June 2002, paragraph 39).

45. The ECtHR has also emphasized that Article 14 of the Convention does not exist independently but plays an important role in complementing the other provisions of the Convention and its Protocols, as it protects individuals, placed in similar situations, from any discrimination in enjoyment of the rights defined by other provisions. When there are allegations of a violation of an essential provision of the Convention on which it is based, both in and of itself in relation to Article 14, and a particular violation of substantive Article has been found, it is not generally necessary for the Court to examine the case under Article 14 as well, although the position is different if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see ECtHR case: [Dudgeon v. the United Kingdom](#), Judgment of 22 October 1981, Series A No. 45, p. 26, paragraph 67, and [Chassagnou and others v. France](#), no. 25088/94, application no. 28331/95 and application no. 28443/95, paragraph 89, ECHR 1999-III).
46. The ECtHR has often underlined that Article 14 merely complements the other essential provisions of the Convention and its Protocols (see the ECtHR cases: [Molla Sali v. Greece](#), Application No. 20452/14, Judgment of 19 December 2018, paragraph 123; [Carson and Others v. the United Kingdom](#), Application No. 42184/05, Judgment of 16 March 2010, paragraph 63; [EB v. France](#), Application No. 43546/02, Judgment of 22 January 2008, paragraph 47; [Marckx v. Belgium](#), Application No. 6833/74, Judgment of 13 June 1979, paragraph 32). This means that Article 14 does not prohibit discrimination as such, but only discrimination in the enjoyment of “the rights and freedoms set forth in the Convention”. In other words, the guarantee provided for in Article 14 does not exist independently (Case “[relating to certain aspects of laws on the use of languages in education in Belgium](#)” v. Belgium (“Belgian language case”), applications no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, paragraph 9 in Part “Law”; [Carson and Others v. the United Kingdom](#) paragraph 63; [EB v. France](#), cited above, paragraph 47) and that this article forms an integral part of each of the articles defining rights and freedoms ([Belgian language issue](#), cited above, paragraph 9 of the “Law” section; [Marckx v. Belgium](#), cited above, paragraph 32; [Inze v. Austria](#), application no. 8695/79, Judgment of 28 October 1987, paragraph 36). In practice, the ECtHR always examines Article 14 in conjunction with another essential provision of the Convention.
47. Finally, not all differences in treatment - or failure to treat persons differently in relatively different situations - constitute discrimination, but only those without “an objective and reasonable justification” (see ECtHR cases: [Molla Sali v. Greece](#), application no. 20452/14, Judgment of 19 December 2018, paragraph 135; [Fabris v. France](#), application no. 16574/08, Judgment of 7 February 2013, paragraph 56; [D.H. and Others v. Czech Republic](#), application no. 57325 /00, Judgment of 13 November 2007, paragraph 175; [Hoogendijk v. the Netherlands](#), application no. 58641/00, Decision on Inadmissibility of 1 June 2005).
48. In deciding the discrimination issues, the ECtHR applies the following test:
  1. Has there been a difference in the treatment of persons in analogous or relatively similar situations - or a failure to treat persons in relatively different situations differently?
  2. If so, is such a difference objectively justified - or the absence of such a change in treatment? In particular: a. Does it pursue a legitimate aim? b. Are the remedies used reasonably proportionate to the aim pursued?

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

49. International practice shows that special measures imposed in different systems to address factual inequalities in gender representation - are legal arrangements that require a minimum percentage of minority gender representation. As such and in so far as they serve such a purpose, these special measures shall not be regarded as contrary to the principle of equal voting.
50. Some national legislations and practices of some European parties have gone a step further in introducing quotas with the aim of improving gender balance or, more directly, achieving equal representation of women and men in the elected body. While these practices are specific to countries and political parties, the introduction of gender equality measures is gradually becoming the dominant trend. Otherwise, persistent and recurring situations of gender unequal representation can in no way be considered evidence of good practice.
51. On this basis, gender quotas aim to improve gender balance in politics. Among other things, they specify the minimum percentages of women candidates for election, usually in the party lists. Furthermore, there may be provisions for the order of ranking in the list.
52. Gender quotas can be legally set ("*legal quota*", "*compulsory quotas*" or "*mandatory quota*"), or they can be approved voluntarily by political parties ("*voluntary quota*" or "*party quota*"). Legal quotas are mandatory for all parties nominating candidates for parliament, while party quotas are only self-binding for the respective party. Both types of quotas can play an important role in the electoral process.
53. According to the Venice Commission and the Committee of Ministers of the Council of Europe, gender electoral quotas can be considered as "*an appropriate and legitimate measure to increase women's parliamentary representation*". The 2009 Declaration of the Committee of Ministers "*Making Gender Equality a Reality*" urges member states to allow positive actions or specific measures to be adopted in order to achieve balanced representation in political and public decision-making.
54. Similarly, in accordance with OSCE Decision no. 7/09 on the Participation of Women in Political and Public Life, the Council of Ministers calls on the participating States to "*consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making*", and "*encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender-balanced representation in elected public offices at all levels of decision-making*". Consequently, the Court notes that all such steps are considered good practice.
55. The Council of Europe and the OSCE recognize that legislative measures are effective mechanisms for promoting women's participation in political and public life. On the other hand, Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) makes it clear that "*adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination...*". As such, and in light of the historical inequalities suffered by women across the OSCE region and globally, states may issue specific legal requirements or impose other measures aimed at ensuring equal participation of women in political life and as candidates.

56. The guidelines for the regulation of political parties acknowledge that *"the small number of women in politics remains a critical issue that undermines the full functioning of the democratic process"*. Therefore, *"electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation"*.
57. There are various socio-economic, cultural, and political factors that may hinder women's access to the political arena. Structural barriers in society that limit women's political representation are not easy to remove and fundamental change requires a lot of time and effort. Thus, for example, changing the electoral system by introducing quota rules may provide a practical alternative to increase women's representation. The Venice Commission, in *its Code of Good Practice in Electoral Matters*, considered that legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered contrary to the principle of equal suffrage if they have a constitutional basis.
58. The analysis of gender quota electoral systems and their implementation in Europe shows that one type of gender electoral quota for public elections is in use in 35 countries. Thirteen countries (Albania, Belgium, Bosnia and Herzegovina, France, Greece, Ireland, Montenegro, Poland, Portugal, Serbia, Slovenia, Spain and Northern Macedonia) have incorporated legal quotas that are mandatory for all political parties. Voluntary quotas of the parties have been implemented in 22 countries, meaning that at least one of the political parties represented in parliament has included gender electoral quotas in its statutes. In six countries, no gender quota is in use for national elections.
59. However, it should be noted that in the European experience, although gender quotas are an effective means of increasing the presence of women in political bodies, they do not automatically result in equal representation of women and men. Quotas should include rules regarding ranking and relevant sanctions for non-compliance. [...]. “
60. The Venice Commission and the OSCE/ODIHR have on several occasions stated that *"the small number of women in politics remains a critical issue that undermines the full functioning of democratic processes"*. In accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Report on the Method of Nomination of Candidates within Political Parties considers electoral quotas as interim special measures that may act as an *"appropriate and legitimate measure to increase parliamentary representation of women"*. It is up to each state to decide how to improve gender equality. However, the Venice Commission considers that, if legal quotas are set, they *"should provide for at least 30 percent of women on the lists" of parties, while 40 or 50 are preferable*, in order to be effective.
61. In addition, the Court notes that the relevant parts of Resolution 1706 (2010) on increasing the representation of women in politics through the electoral system adopted by the Parliamentary Assembly on 27 January 2010, define the following:

*"4 [...] Changing the electoral system to one more favourable to women's representation in politics, in particular by adopting gender quotas, can lead to more gender-balanced, and thus more legitimate, political and public decision making.*

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

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

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

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

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

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

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

### **(III) Application of the abovementioned Principles in the present case**

64. The Court first recalls that the Applicants, in the local elections of 17 October 2021, in the capacity of the candidate for member of the Municipal Assembly of Kamenica from the ranks of the political entity AAK had managed to win one hundred and twenty seven (127) votes. Meanwhile, on the other hand, the candidate K.M. managed to win four (4) votes less than the Applicant. On this basis, the Court notes that in the case of the resignation of the member of the Municipal Assembly from the ranks of the political entity AAK, Ms. D. K., the CEC decided to replace her with the candidate of the same gender, Ms. K. M., also from the political entity AAK. The same position was approved by the ECAP and the Supreme Court in their respective decisions.
65. In this context, as defined above, the Court reiterates that the main aspect of this constitutional complaint concerns the fact that: *Has the Law on Local Elections been implemented by the CEC, ECAP and the Supreme Court, in accordance with the guarantees, values and principles defined in Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol no. 1 of the ECHR?*
66. As a result, the Court's assessment in this case is a concrete assessment which is limited to examining the constitutionality of the contested decision of the Supreme Court and the fact that this decision is in compliance with Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol no. 1 of the ECHR.
67. In what follows, the Court will assess and ascertain whether the contested decision is contrary to Article 24 in conjunction with Article 45 of the Constitution. In this context, and in terms of the test that is applied to ascertain whether an act issued by a

public authority is contrary to Article 14 of the ECHR, the ECtHR in its case law has defined the criteria as follows:

- (i) If there has been a difference in the treatment of persons in analogous or relatively similar situations - or a failure to treat persons differently in relatively different situations;
  - (ii) If this is the case, then it is assessed whether such a difference - or lack of difference - is objectively justified, respectively:
    - (a) If the limitation has pursued a legitimate aim;
    - (b) The measure taken was proportionate to the aim pursued.
68. Whereas, based on the case-law of the Court, the constitutional test to ascertain whether the act or action constitutes discrimination, contains the following criteria (see, *inter alia*, the cases of the Court: [KO01/17](#), Applicant *Aida Dërguti and 23 other deputies of the Assembly*, Judgment, of 28 March 2017; and [KO157/18](#), Applicant *the Supreme Court*, Judgment of 13 March 2019 and [KO93/21](#), Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 298):
- (i) Determine if there is a difference in treatment; and
  - (ii) If this is the case, to assess:
    - (a) Whether the difference in treatment is prescribed by law;
    - (b) Whether the difference in treatment has pursued a legitimate aim; and
    - (c) Whether there is a relationship of proportionality between the difference in treatment and the purpose to be achieved.

**(a) If the difference in treatment is “prescribed by law”**

69. Based on paragraph 1 of Article 55 of the Constitution, the limitation of the rights guaranteed by the Constitution is possible, but this limitation must be done “*only by law*”, which means, among other things, that the authorities responsible to implement a law where limitations are provided, can apply the limitation only to the extent that is “*prescribed by law*”. This paragraph therefore presents the first and essential requirement which must be met to determine whether a “*limitation*” of fundamental rights and freedoms is constitutional (see, specifically, the Court’s position in case [KO54/20](#), Applicant *President of the Republic of Kosovo*, Judgment of 31 March 2020, paragraph 192). As explained above, the Court will present the general principles regarding this criterion and apply the latter in the circumstances of the case (see, also and among the others, case of the Court [KO93/21](#), Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 312; [KI45/20 and KI46/20](#), Applicant *Tinka Kurti and Drita Millaku*, cited above, paragraph 124).
70. In relation to the requirements derived from Article 24 of the Constitution and Article 14 of the ECHR as well as Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR, the Court emphasizes that the preliminary issue that must be defined is whether there has been a difference in treatment between the Applicant and the candidate for member of the Assembly of the Municipality of Kamenica, Ms. K.M., who was chosen from the list of replacement candidates for candidates for members of the Municipal Assembly.
71. In this regard, the Court recalls that the aforementioned replacement of the member of the Municipal Assembly of Kamenica with new members was necessary as a result of the resignation of the member of the Municipal Assembly Ms. D.K.. This necessity of replacing the member of the Municipal Assembly has activated the legal provisions

established in paragraphs 3 and 4 of article 8, as well as 10.3.a of the Law on Local Elections, which emphasize the following:

**Article 10**  
**Replacement of members of Municipal Assembly**

*10.3 The CEC fills the vacancy in accordance with following determined criteria:*

*a) by the next eligible candidate of the same gender on the reordered candidate list of the same Political Entity;*

**Article 8**  
**Distribution of seats in the Municipal Assembly**

[...]

*8.3 The seats allocated to a Political Entity under paragraph 1 of this Article, shall be distributed to the candidates on the Political Entity's candidate list as reordered in paragraph 2 of this Article, starting from the first candidate on the reordered candidate list in strict descending order, until the number of seats allocated to the Political Entity*

*8.4 If, after the allocation of seats as set out in paragraph 3 of this Article, the candidates of minority gender within a political entity have not been allocated at least 30% of the total seats for that political entity, the last elected candidate of the majority gender will be replaced by the next eligible candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender becomes is at least 30%.*

72. Returning to the present case, underlining the abovementioned results of the local elections 2021, the Court emphasizes that it is evident that within the political entity AAK, based on the election result of the local elections of 17 October 2021, it results that the same political entity had won four (4) seats of members of the Municipal Assembly, in which case the division in terms of gender, there were two (2) positions of the member of the Municipal Assembly for male members and two (2) positions of the member of the Municipal Assembly for female members. In the following, the Court notes that the difference in treatment between the Applicant and the member of the Municipal Assembly of Kamenica, Ms. K.M., who was chosen from the list of the replacement candidates, regarding the replacement of members of the Municipal Assembly, was *prescribed by law*, respectively through paragraphs 3 and 4 of Article 8, as well as Article 10.3.a of the Law on Local Elections, as well as interpretation by the regular judiciary of the Judgment in case KI45/20 and KI46/20.
73. The Court will further assess whether the contested Decision meets the requirements for *pursuing a legitimate aim* and is in accordance with the *principle of proportionality*

**(b) If there is a legitimate aim**

74. Based on paragraph 3 of Article 55 of the Constitution, but also the principles stemming from the case-law of the ECtHR and the Court, it is determined that the rights and freedoms guaranteed by the Constitution “*may not be limited for purposes other than those for which they were provided.*” According to this paragraph it follows that the purpose of a limitation must be clearly determinable and no public authority may limit any right or freedom on the basis of another purpose beyond that

which is already specified in the law in which the limitation is permitted in accordance with Article 55 of the Constitution (see, in this regard, the case of Court [KO190/19](#), Applicant *the Supreme Court of Kosovo, Constitutional review of Article 8, paragraph 2 of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with Article 5 and 6 of the Administrative Instruction (MLSW) no. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions according to Qualification Structure and Duration of Payment of Contributions*, Judgment of 16 January 2023, paragraph 203; case [KO54/20](#), Applicant *The President of the Republic of Kosovo*, Judgment of 31 March 2020, paragraph 193).

75. The Court emphasizes that in order to justify the difference in treatment, according to the ECtHR, the limitation or difference in treatment must have an “*objective and reasonable justification*”, namely be based on a legitimate aim (see, *inter alia*, the case [Molla Sali v. Greece](#), no. 20452/14, cited above, paragraph 135; and [Fabris v. France](#), no. 16574/08, Judgment of 7 February 2013, paragraph 56). Furthermore, according to the ECtHR, the states must prove that there is a relationship between the legitimate aim pursued and the difference in treatment alleged by the relevant applicants (see ECtHR case [Ünal Tekeli v. Turkey](#), no. 29865/96, Judgment of 16 November 2004, paragraph 66).
76. While in the present case the difference in treatment is based on the gender of the candidates, the concept of reasonable and objective justification must be strictly interpreted. Having said that, it is also worth mentioning that Article 24 of the Constitution and Article 14 of the ECHR do not prohibit the different treatment of groups in order to correct “*factual inequality*” between them. In fact in certain cases failure to correct inequalities through different treatment may, without a reasonable and objective justification, constitute a violation of that article (see Court’s case [KI45/20 and KI46/20](#), with Applicants *Tinka Kurti and Drita Millaku*, Judgment of 29 March 2021, paragraph 123; see also ECtHR cases: Case “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium*, cited above, paragraph 10; *Thlimmenos v. Greece*, Judgment of 6 April 2000, paragraph 44; and *D.H. and Others v. Czech Republic*, Judgment of 13 November 2007, paragraph 175; *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 44).
77. Returning to the present case, the Court notes that the CEC implemented the articles of the Law on Local Elections as well as the principles of the Court’s Judgment in case [KI45/20 and KI46/20](#), so that the replacement of the member of the Municipal Assembly of Kamenica Ms. D.K., after her resignation, was recommended to be done with the next candidate of the same gender, taking into account the fact that the quota of 30% of the underrepresented gender was not met. Therefore, the CEC had recommended that the candidate K.M. be appointed as a member of the Municipal Assembly in Kamenica by the political entity AAK.
78. Further, the ECAP confirmed the way the CEC interpreted the Law on Local Elections in the Applicant’s circumstances. In this regard, the ECAP clarified that in the circumstances of the present case “[...] *The Political Entity AAK, branch in Kamenica, has won 4 (four) seats, then the smaller number of both genders must be 2 (two), that is, there must be two males and two females, because otherwise it will not to achieve the minimum representation in the quota of 30%, of the opposite gender.*”
79. This logic of interpretation and this reasonableness of implementation was also supported by the Supreme Court when it fully upheld as lawful the decision-making at the level of ECAP and CEC. According to the Supreme Court:

*“In the present case since the political entity AAK has 4 mandates, then based on the percentage of 30%, it must be of two males and two females, because if it were otherwise, the minimum representation of 30% would not be achieved.*

*Likewise, the other claims that the appealed decision was rendered contrary to the judgments of the Constitutional Court KI45/2020 and KI46/2020 are also not grounded, because according to these judgments, the manner of decision is in the spirit of respect and implementation of the constitutional principles of gender equality and non-discrimination that are of particular importance and to avoid gender inequalities in the spirit of the normative constitutional system. According to these judgments, gender representation consists in the fact that in any case the representation of 30% of the under-represented gender, this represents only the minimum limit of gender representation of the minority gender as a special measure, but not the highest limit of equal representation of the same gender. Therefore, in the case under review, if it were decided otherwise in this matter, this principle of the gender quota would be violated, as a legal guarantee regulated by the concrete provisions of the legislation on Local Elections, such as the one on which the ECAP is based in its decision by rejecting the appeal against the decision of the CEC.”*

80. In the circumstances of the present case, the Court notes that based on the assessment of the CEC, the ECAP and the Supreme Court, in order for the candidate to be eligible to replace the members of the Municipal Assembly, the primary criterion was gender of the candidate, while the second criterion was the election result for candidates of the list of candidates of the political entity AAK. So, the election result achieved by the candidates for the members of the Municipal Assembly of Kamenica based on the first assessment is affirmed (as it is primary to replace the members of the Municipal Assembly with *candidates for members of the Municipal Assembly of the same gender*), while the election result comes into play only in determining the ranking of candidates within the same gender.
81. On this basis, the Court notes that the concept of gender quota, as well as the promotion of gender equality, remains a key objective in the member states of the Council of Europe, the organization in which Kosovo aspires to become a member (the Republic of Kosovo has officially applied for membership in the Council of Europe on 12 May 2022). Also, the institutions of this organization consider that the lack of gender equality in policy-making poses a threat to democratic legitimacy and a violation of gender equality. The approach of framing gender quotas in Kosovo's legal system is also embraced by the Law on Local Elections, which contains the obligation to represent the underrepresented gender in the gender quota of 30% (see article 3.1 point 9 and 8.4 of the Law on Local Elections; On the other hand, in the context of the elaboration of the representation of the underrepresented gender in the gender quota of 30% at the central level, see also case of the Court KI45/20 and KI46/20, with applicants *Tinka Kurti and Drita Millaku*, cited above, paragraph 127).
82. The Court notes that the Law on Local Elections contains the obligation of a gender quota as a form of representation in the Assembly of Kosovo, at a *minimum of 30% for the under-represented gender*. Thus, the allocation of seats works in such a way that after the allocation of seats for political entities, if the minority gender candidates are not allocated at least 30% of the total number of seats of the political entity, the last elected candidate of the majority gender, is replaced by another candidate of the opposite gender in the re-ranked list of candidates, until the total number of seats allocated for the minority gender is at least 30% (see Article 8.4 of the Law on Local - this article is cited in the part of constitutional and legal provisions).
83. In the context of the gender quota set out in the Law on Local Elections, the Court also recalls paragraph 3 of Article 24 of the Constitution which stipulates that:

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

84. The Court notes that the meaning of equality intended in the present case has another dimension, namely positive discrimination, or the determination of a gender quota for the representation of women in the capacity of the underrepresented gender, which is considered to be in line with the spirit of constitutional ideals and the constitutional identity of the Republic of Kosovo. Consequently, the constitutional principles of gender equality and non-discrimination remain crucial and that the issue of gender quotas, for historical and cultural reasons, as well as the elimination of *factual inequalities* between women and men, is in line with the spirit of the constitutional normative system. Finally, the concept of gender equality and non-discrimination is dynamic and evolves towards meeting the sublime ideal of equality in representation of women and men in the 50% to 50% ratio (see Court case KI45/20 and KI46/20, with applicants *Tinka Kurti and Drita Millaku*, cited above, paragraph 131).
85. The Court therefore notes that the purpose of the Law on Local Elections in the context of gender representation within the Municipal Assembly is to provide for representation of the underrepresented gender (minority gender), which may not be less than 30%.
86. In the same spirit is Article 8.4 in conjunction with Article 10 of the Law on Local Elections, which serves to show the manner of replacement of the members of the Municipal Assembly, in which case candidates of the same gender are replaced as a way to maintain the minimum threshold of representation of the underrepresented gender in the quota of 30%. The Court considers that this measure set out in the Law on Local Elections, namely the determination of the minimum representation of the minority gender to a minimum of 30%, as such is necessary in order to enable the representation of the under-represented gender, namely women in the Municipal Assembly of Kamenica. As such, this definition of the law on gender quotas, in principle, does not constitute a violation of the voting rights and coincides with a *legitimate aim* for which it was established.

***(c) If there is a relationship of proportionality between the limitation of the right and the aim to be achieved***

87. Based on paragraph 4 of Article 55 of the Constitution, but also the principles stemming from the case law of the ECtHR and of the Court, it was established that in cases of limitation of fundamental rights and freedoms, constitutional responsibility is created for public authorities, that during the interpretation and decision in cases before them, pay attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the aim to be achieved, and to consider the possibility of achieving the purpose with a lesser limitation (see, inter alia, the case of the Court, KO190/19, Applicant *Supreme Court of Kosovo*, cited above, paragraph 212; KO157/18, with the Applicant *the Supreme Court of the Republic of Kosovo*, cited above, paragraph 102).
88. Finally, Court will further assess whether the contested Decision of the Supreme Court is in compliance with the *principle of proportionality*. In this regard, the Court finds that at the time of replacing the candidate for member of the Municipal Assembly, in which case Ms. D.K. was replaced with Ms. K.M., on the basis of the replacement of the same gender, it was found that the essence of the election result was not violated, since such a measure (gender quota 30%) established for the elimination of factual

inequalities between women and men, in the present case has continued to be implemented, in order to maintain the quota of minimum 30% representation of women members in the Municipal Assembly of Kamenica from the ranks of the AAK political entity.

89. If it were otherwise, and the replacement be done in such a way that instead of Ms. D.K. the Applicant was appointed, the quota of gender representation of the underrepresented gender, namely at least 30%, would be violated. Consequently, the gender quota for the representation of the underrepresented gender in the Municipal Assembly, defined at least 30% in the Law on Local Elections, consists of the best practices towards achieving proper gender representation in the public life of the country and as such has been correctly implemented by the CEC, the ECAP and the Supreme Court.
90. Therefore, the Court recalls that in these cases the gender quota is applied until the goal for which it was imposed is achieved, that is, to ensure the mandatory minimum representation of the minority gender in the quota of 30%, at the level of the political entity and not at the level of the Municipal Assembly. Therefore, in the present case, the Applicant was not discriminated against on the basis of gender, at the time when he was not elected a member of the Municipal Assembly of Kamenica, since the candidate K.M. was next in line, in the context of fulfilling the minimum quota of 30% through the election result within the political entity AAK.
91. Finally, the Court assesses that the Judgment of the Supreme Court in the present case did not interfere with the constitutional rights of the Applicant, therefore, the latter did not result in a violation of Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

### **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rule 48 (1)(a) of the Rules of Procedure, in its session held on 29 January 2024, unanimously:

### **DECIDES**

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that Judgment [A.A. no. 11/2022] of 25 August 2022, of the Supreme Court of Kosovo is not contrary to Article 24 [Equality Before the Law] and paragraphs 1 and 2 of Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo in conjunction with Article 14 (Prohibition of discrimination) of Protocol no. 1 of the European Convention on Human Rights and Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights.;
- III. TO NOTIFY this Judgment to the parties;
- IV. TO PUBLISH this Judgement in the Official Gazette, in accordance with Article 20.4 of the Law;
- V. This Judgment is effective on the date of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

**Judge Rapporteur**

**President of the Constitutional Court**

Bajram Ljatifi

Gresa Caka-Nimani

*This translation is unofficial and serves for informational purposes only.*