



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

Prishtina, on 28 March 2019
Ref. no.:AGJ 1341/19

JUDGMENT

in

Case No. KO157/18

Applicant

The Supreme Court of the Republic of Kosovo

**Constitutional review of Article 14, paragraph 1.7 of the Law No. 03/L-179
on Red Cross of the Republic of Kosovo**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the Supreme Court of the Republic of Kosovo (hereinafter: the referring court) signed by the President Enver Peci.

Challenged decision

2. The referring court raises doubts as to the constitutionality of Article 14, paragraph 1.7 of the challenged Law No. 03/L-179, on Red Cross of the Republic of Kosovo, published in the Official Gazette, on 20 July 2010 (hereinafter: the challenged Law).

Subject matter

3. The subject matter of the Referral is the constitutional review of Article 14, paragraph 1.7 of the challenged Law, raising allegations that it is not in compliance with Articles 24 [Equality Before the Law], 46 [Protection of Property], 119 [General Principles] and 120 [Public Finances] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.8 of the Constitution, Articles 51, 52 and 53 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law), and Rule 77 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 15 October 2018, the referring court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 16 October 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.
7. On 19 October 2018, the Court notified the referring court, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo, the Ombudsperson, the Red Cross of the Republic of Kosovo (hereinafter: the Red Cross), Insurance Company "Illyria" j.s.c.. (hereinafter: "Illyria" Company) and the Insurance Association of Kosovo.
8. The Court also notified the referring court that based on Article 52 of the Law on the Court and Rule 77 (5) of the Rules of Procedure, the proceedings relating to the case that is connected to the Referral submitted to the Court are suspended until a decision is rendered by the Constitutional Court. The Court also requested the referring court that within a time limit of 15 (fifteen) days submits a copy of the case file in relation to which it filed the referral to the Court and a copy of the challenged law. Whereas, the Red Cross (in the capacity of the interested party) was notified that their comments, if any, may submit within 15 (fifteen) days from the day of receipt of the notification from the Court.

9. On 23 October 2018, the referring court submitted to the Court the documents requested by the letter of 19 October 2018.
10. On 5 November 2018, the Red Cross submitted comments regarding the Referral.
11. On 8 November 2018, the Court notified the referring court, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo, the Ombudsperson, the "Ilyria" Company and the Kosovo Insurance Association about the comments of the Red Cross. The referring court was notified that its comments regarding the comments of the Red Cross, if any, may be submitted by 29 November 2018. The referring court did not submit any comment regarding the comments of the Red Cross.
12. On 13 March 2019, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.
13. On the same date, the Court voted, unanimously, that the Referral is admissible and that Article 14, paragraph 1.7 of the challenged Law, is not in compliance with Articles 24, 119 and 46 of the Constitution.

Summary of facts

14. On 10 June 2010, the Assembly of Kosovo adopted the challenged law, which was published in the Official Gazette on 20 July 2010.
15. On 26 November 2010, the Insurance Association of Kosovo, based on Article 113, paragraph 7 of the Constitution, filed a referral with the Court for annulment of Article 14, paragraph 1.7 of the challenged Law (that is, it is the same article of the challenged law, which is the subject of review).
16. On 23 May 2011, the Court, by Resolution on Inadmissibility KI118/10, Applicant, the Insurance Association of Kosovo, declared the Referral inadmissible after finding that the Applicant was not a party authorized to challenge the above mentioned Law.
17. On 2 December 2014, Str. P., director of the Insurance Association of Kosovo, based on Article 113, paragraph 7 of the Constitution, submitted the Referral KI174/14 for the constitutional review of Article 14 of the challenged Law (that is, it is the same article of the challenged law, which is the subject of review).
18. On 3 February 2015, the Court declared the Referral KI174/14 inadmissible by a resolution after finding that the Applicant was not an authorized party to challenge the above-mentioned law.
19. On an unspecified date, the Red Cross filed a lawsuit with the Basic Court in Prishtina (hereinafter: the Basic Court), against the "Illyria" company, requesting it to pay it one percent (1%) of gross prim of the value of the

compulsory insurance of the vehicles carried out by the “Illyria” company, for the period 2010-2016.

20. On 16 November 2016, the Basic Court, by Judgment C. No. 546/13, approved the statement of claim of the Red Cross and obliged “Illyria” company, that in the name on the collection of gross premium from vehicle insurance for 1% “*For the period from 05.08.2010 until 31.07.2017, to pay the amount of 248.648,16 €, with interest [...] and the costs of the proceedings in the amount of 1.065 €, within 15 days*”. The Basic Court reasoned that the obligation to pay the amount determined by the above-mentioned judgment stems from Article 14, paragraph 1.7 of the challenged Law.
21. On 16 February 2017, against the Judgment of the Basic Court, “Illyria” company filed an appeal with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), claiming that there has been a substantial violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law, requesting that the case be remanded for re consideration. The Insurance Company also claimed that the challenged law is unconstitutional and requested that the Court of Appeals seek a constitutional review of Article 14, paragraph 1.7 of the challenged Law, before the Constitutional Court.
22. On 14 October 2017, “Illyria” company submitted an appeal with the Court of Appeals for the extension of the appeal, considering that the challenged law is also in collision with the Law on Foreign Investments.
23. On 12 June 2018, the Court of Appeals, by Judgment AC. No. 1165/2017 rejected as ungrounded the appeal and the extension of the appeal and upheld the Judgment of the Basic Court. Regarding the allegation of the “Illyria” company, that the challenged law is unconstitutional and the request that the question of constitutionality of Article 14, paragraph 1.7 of the challenged Law be referred to the Constitutional Court for constitutional review, the Court of Appeals reasoned as follows: *[it is the assessment of the Court of Appeals that the challenged law] is a law which has no flaw that the latter be considered unconstitutional, as [Illyria Company] claims, so that, as the first instance court, which did not consider it reasonable to submit this law to the Constitutional Court for assessment, the Court of Appeals considers the same, because the law as such is well and should be applied by those whom this law obliges by its provisions, as it is in the present case the provision of Article 14 paragraph 1.7 of the same law, referring to the Insurance Companies in Kosovo*”.
24. On 15 August 2018, the “Illyria” Company filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals mentioned above. It also requested from the Supreme Court to refer the case to the Constitutional Court for the assessment of the compatibility of Article 14, paragraph 1.7 of the challenged law with the Constitution, and requested that the implementation of the Judgment of the Court of Appeals and the Basic Court be suspended until the decision by the Constitutional Court is rendered.

25. In addition, "Illyria" Company in its submission of 15 August 2018 reasoned: *"Given that neither the [CBK] Regulation on Determination of the Premium's Structure Insurance for Compulsory Motor Liability Insurance, nor the Law No. 04/L-018 [on Compulsory Motor Liability Insurance], specified that the insurance premium should contain the funding of the Red Cross, the respondent was unable to collect funds for the Red Cross. On the other hand, the premium amount cannot be increased because it is not authorized by the CBK. Hence, the Law on Red Cross constitutes direct expropriation of the respondent's income. On the other hand, the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in its Chapter II guarantees the protection of human rights and fundamental freedoms. According to Article 21 par. 4 of the Constitution, the fundamental rights and freedoms guaranteed in Chapter II of the Constitution also apply to legal persons, as to the extent applicable. In this regard, it should be noted that the respondent has the status of a legal person and the provisions of this chapter apply also to it"*.
26. On 15 October 2018, the referring court (namely the the Supreme Court) submitted to the Court the referral for assessment of the compatibility of the provision of Article 14, paragraph 1.7 of the challenged Law with the Constitution.

Applicant's allegations

27. The referring court alleges that Article 14, paragraph 1.7 of the challenged Law is incompatible with Articles 24 [Equality Before the Law], 46 [Protection of Property], Article 119 [General Principles] and 120 [Public Finances] of the Constitution.
28. The essence of the Referral of the referring court, also referring to the allegations of the "Illyria" Company presented before it, consists in the allegation that paragraph 1.7 of Article 14 of the challenged Law, which obliges the insurance companies in Kosovo to pay (1%) of the gross prim value of insured vehicles insurance and which does not foresee any obligation to contribute to other companies in Kosovo, places insurance companies in a discriminatory position in relation to other companies, contrary to the principle set out in paragraph 2 of Article 119 of the Constitution [General Principles], which provides that *"The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises"*.
29. The referring court also claims that *"the right of property of citizens as natural persons and various domestic and foreign private enterprises is guaranteed by law and by the Constitution. In this context, we consider that the respondent rightly raised the issue of compliance of the abovementioned legal provision, considering that the same legal provision is in contravention with Article 46 of the Constitution of the Republic of Kosovo"*.
30. In support of its allegations, the referring court refers to the decision of the Constitutional Court UI-2441/2002, UI-1107/2002 of 12 February 2013. In this regard, the referring court notes that the Constitutional Court of Croatia. in assessing the constitutionality of the provisions of the Law on Croatia, as

Article 14 of the challenged Law, held that those provisions “are in contradiction with the provisions of Article 49, paragraph 2 (The State shall provide all the undertakings concerned with the legality of the provisions of Article 49 , paragraph 2 (The state shall ensure all entrepreneurs equal legal status in the market) and Article 51, paragraph 1 (Everyone shall participate in the defrayment of public expenses, in accordance with their economic capability) of the Croatian Constitution”.

31. The referring court states that “[even Ombudsperson [...], in the capacity of a court friend (amicus curiae) with submission no. 1553/2018, of 04.07.2018, provided legal opinion that this disputed legal provision is in contradiction with the aforementioned constitutional provisions”.
32. Finally, the referring court ascertains that “[for the reasons presented above, we would like to inform you that the decision on merits of the Supreme Court of Kosovo in the present case is directly related to the legal norm challenged above, so the Supreme Court cannot decide upon revision, until the Constitutional Court [...] takes a decision on merits regarding this referral”.

Comments of the Red Cross

33. The Red Cross, initially, referring to the judgments of the Court in cases KO126/16 and KO142/16, reiterates the admissibility criteria in relation to the referrals submitted under Article 113, paragraph 8 of the Constitution. In this respect, they claim that, according to the Court's interpretation, the right to “refer a request for incidental control is recognized to a judge or a trial panel which is competent to adjudicate the case. [...] In the present case, [...], the Referral was not referred by the Trial Panel which is competent to decide on the merits of the case”.
34. The Red Cross also alleges that the preliminary procedure for initiating a request for a constitutional review of a norm in an incidental control proceeding obliges the referring court to first examine itself in its composition (trial panel) the suspicion despite the constitutionality of the norm . Only if the trial panel considers that the norm is unconstitutional, it may address the Constitutional Court with a request for assessment of the constitutionality of the specific provision. In the present case, such an assessment was not carried out by the competent trial panel.
35. The Red Cross also claims that after the referring court has not submitted the “file to the Constitutional Court”, the essence of the dispute cannot be understood even if the other criteria of direct application of the challenged norm in the present case and that the constitutionality of the challenged norm be a prerequisite for the resolution of the case, are fulfilled. Consequently, they claim that the admissibility criteria under Article 113, paragraph 8 of the Constitution are not fulfilled.
36. They also claim that the referring court did not justify its referral as required by the Judgment in case KO126/ 6, as they merely mentioned Articles 46 and 120 of the Constitution. Also from the referral of the referring court it is seen that the President of the Supreme Court has submitted the Referral to the Court

and informed that the procedure in the concrete case will be suspended. This constitutes a violation of the principle of legal certainty and infringement of an independent court, as the proceedings may be suspended only by a court decision and by the trial panel of the concrete case.

37. As to the merits of the case, the Red Cross alleges that the referring court merely considers that the challenged provisions “*violate Articles 46 and 120 of the Constitution and moreover, mentioned a decision of the Constitutional Court of Croatia and a submission of the Ombudsperson*” adding that “*the decision of the Court of Croatia may serve, along with some decisions of other European constitutional courts, as reference to support its claims*”, but not to merely mention the constitutional articles, and then to point out that the Constitutional Court of Croatia did so.
38. In this regard, the Red Cross emphasizes that the Constitutional Court of Croatia has not found a violation of the right to property, as the referring court alleges.
39. Regarding the violation of Article 120, the Red Cross states that “*the Constitutional Court has declared inadmissible in a number of decisions the referrals of individuals for alleged violation of other articles outside the chapter on fundamental freedoms and rights as manifestly ill-founded*”.
40. The Red Cross finally requires that the Referral of “*the President [the referring court] be declared inadmissible*”, requiring that the procedural and substantive omissions of the referring court be dealt seriously.

Relevant provisions of the challenged law (Law No. 03/L-179 on Red Cross of the Republic of Kosovo):

Article 1

The objective of the Law

This Law regulates the status, functions and financial sources of the Red Cross of Kosovo.

Article 2

Field of application

1. Red Cross of Kosovo is the only National Society of the Red Cross in the Republic of Kosovo, which carries out its voluntary, humanitarian and non profitable activities in the whole territory of Kosovo.

2. Red Cross of Kosovo acts as an auxiliary to the government on humanitarian issues in the whole territory and enjoys support from Government Institutions.

Article 7

Mission of Red Cross of Kosovo

The mission of Red Cross of Kosovo is to alleviate the suffering of individuals and the communities at risk through focused programs, with priority and sustainability as an auxiliary to the central and local authorities, in accordance with the Fundamental Principles of the International Red Cross and Red Crescent Movement.

Article 14

Financial resources

1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:

- 1.1. membership with the Red Cross of Kosovo;*
- 1.2. activities which are entrusted to Red Cross of Kosovo, by Republic of Kosovo, natural and legal persons;*
- 1.3. traditional activities;*
- 1.4. contributions (donations) done by natural and legal persons of the republic of Kosovo and foreign countries;*
- 1.5. incomes from properties and rights of Red Cross of Kosovo;*
- 1.6. incomes from implementation of programs contracted with cooperation agreements with respective ministries;*
- 1.7. obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance;*
- 1.8. from the divided fund for humanitarian support from Lottery of Kosovo, in accordance with law in force;*
- 1.9. Red Cross of Kosovo shall not accept donations directly stemming from revenues of activities contrary to the Fundamental Principles of the International Red Cross and Red Crescent Movement.*

Article 19

Punitive provisions

For not respecting the obligations from Article 13 sub-paragraphs 1.1, 1.2, 1.3 and Article 14, paragraphs 1.7, 1.8, 1.9, Competent Court for violations fines with cash, the legal persons in the amount from one thousand (1000) to three thousand (3000) Euros while the natural person respectively legal representatives of the natural persons in amount from five hundred (500) to one thousand (1000) Euros.

Admissibility of the Referral

41. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, further specified in the Law, and the Rules of Procedure.
42. In this respect, the Court refers to paragraphs 1 and 8 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.

(...)

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that

the referring court's decision on that case depends on the compatibility of the law at issue”.

43. The Court refers to Articles 51, 52 and 53 of the Law, which stipulate:

*Article 51
Accuracy of referral*

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

*Article 52
Procedure before a court*

After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.

*Article 53
Decision*

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

44. The Court also takes into account Rules 39 and 77 of the Rules of Procedure, which specify:

Rule 39 [Admissibility Criteria]

[...]

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.

[...]

Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.

(2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:

(a) the contested law is to be directly applied by the court with regard to the pending case; and

(b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

(3) The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Constitution. The case file under consideration by the court shall be attached to the referral.

(4) The referring court may file the referral *ex officio* or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.

(5) After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.

45. In the light of the above normative framework, it results that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria:

- a) The referral must be filed by a “court”;
- b) The (referring) court must not be certain of the compliance of the challenged law with the Constitution;
- c) The referring court must specify which provisions of the challenged law are considered incompatible with the Constitution
- d) The challenged law must be applied directly by the referring court in the case before it;
- e) The legality of the challenged law is a prerequisite for deciding in the case under consideration.

46. The Court recalls its case-law, which confirms the abovementioned criteria, regarding the admissibility of referrals filed under Article 113.8 of the Constitution (see, *mutatis mutandis*, case of the Constitutional Court, KO126/16, Applicant: *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, of 27 March 2017, paragraph 62, and the case of the Constitutional Court KO142/16, Applicant: *Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, of 9 May 2017, paragraph 58).

47. Consequently, the Court first finds that the referring court is an authorized party to submit such a referral.

48. In this regard, the Court recalls that the Referral was submitted by the Supreme Court and was signed by its President within the scope of authorizations relating to his function. The Referral clearly states that it is

submitted by the Supreme Court which has to decide on the revision of the “Illyria” Company Hence, the Court considers that the present Referral was submitted by the “court” within the meaning of Article 113.8 of the Constitution (see case of the Constitutional Court, KO04/11, Applicant: *the Supreme Court of Kosovo*, of 1 March 2011. See also cases of the Constitutional Court, KO126/16).

49. The Court also notes that the referring court has raised doubts as to the constitutionality of the challenged law. Thus, the referring court is not sure about the compliance of the challenged law with the Constitution.
50. In addition, the referring court has specifically specified paragraph 1.7 of Article 14 of the challenged law as a provision which it considers to be inconsistent with the Constitution.
51. The Court further considers whether the challenged law should be directly applied by the referring court in the case before it, and if the legality of the challenged law is a prerequisite for the decision of the referring court.
52. The Court considers that “the direct application” of the concrete norm means that the outcome of the decision by the referring court depends on the direct implementation or non-implementation of the challenged norm. Namely, as a result of the direct implementation or non-implementation of the specific norm, the regular courts could render decisions with different results (see, Case of the Constitutional Court, KO126/16, cited above, paragraph 64).
53. Therefore, in order to have a direct connection, there must be a necessary relation between the decision of the Constitutional Court (resolution of the issue of the constitutionality of the law by this Court) and resolution of the main issue by the referring court, in the sense that the adjudication by the referring court cannot be completed independently from the adjudication in the Constitutional Court” (see, *mutatis mutandis*, the case of the Constitutional Court, KO126/16, cited above, paragraph 65, and the Constitutional Court, KO142 / 16, cited above, paragraph 62.)
54. In this regard, the Court refers to Article 14, paragraph 1.7 of the challenged Law:
 1. *For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:*

[...]

1.7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance”.
55. The Court notes that the Red Cross lawsuit was initiated because it considered that “Illyria” Company did not fulfill the legal obligation under Article 14, paragraph 1.7 of the challenged Law, to pay one percent (1%) of the gross prim of the insurance value of the vehicle from compulsory motor insurance.

56. The statement of claim of the Red Cross was approved by the Basic Court and upheld by the Court of Appeals, obliging the “Illyria” Company to pay to the Red Cross the amount determined, entirely based on the provisions of Article 14, paragraph 1.7 of the challenged law.
57. The Court recalls that, following the Judgment of the Court of Appeals on the Red Cross lawsuit, the “Illyria” company submitted a revision to the Supreme Court, where the allegations in the revision are directly related to the challenged law and the constitutionality of the challenged legal norm. In this regard, the referring court clarifies that “*it cannot decide upon revision until the Constitutional Court takes a decision on merits regarding this Referral*”.
58. Therefore, having regard to the foregoing, the Court considers that the challenged law must be directly applied by the referring court in the case under consideration before it.
59. In addition, the Court considers that the constitutionality of the challenged law is a precondition for deciding in the case under consideration, since the declaration (un) constitutional of the challenged provisions would have a decisive influence on the decision-making epilogue on the revision by the Supreme Court (see, *mutatis mutandis*, the case of the Constitutional Court, KO126/16, cited above, paragraph 65.)
60. Therefore, with regard to the fulfillment of the admissibility criteria, the Court finds that the referring court is an authorized party, has raised reasonable doubts about the challenged law and has proved that that law should be applied directly by the referring court in the case under consideration before it. The referring court also reasoned that the legality, namely the constitutionality of the challenged law is a prerequisite for taking a decision in the case under review and has clarified what provisions of the challenged law are considered incompatible with specific provisions of the Constitution.
61. Moreover, the Court notes that the Referral is not inadmissible on any of the grounds contained in Rule 39 [Admissibility Criteria] of the Rules of Procedure.
62. Therefore, the Court declares that the Referral is admissible for review of its merits.

Merits of the Referral

63. The Court recalls that the referring court in the course of the examination of the present case raised doubts as to the incompatibility of Article 14, paragraph 1.7 of the challenged Law with Articles 24 [Equality Before the Law] and 46 [Protection of Property], Article 119 [General Principles], and 120 [Public Finances] of the Constitution.
64. The Court recalls, again, paragraph 1.7 of Article 14 of the challenged Law, which provides that:

“1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:

[...]

1.7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance”.

65. The substance of the Referral of the referring court consists in the allegation that paragraph 1.7 of Article 14 of the challenged Law, obliging him to pay one percent (1%) of the gross prim of the insurance value of insured vehicles insurance companies in Kosovo, and by not foresseing any such obligation to other companies in Kosovo, places insurance companies in a discriminatory position in relation to other companies. This, in violation of the principle set out in Article 24, paragraph 2, and Article 119 of the Constitution.

66. In this regard, the referring court, based on the allegation of the “Illyria” Company reasons that the prim amount paid by the insured cannot be increased to cover the requirements of the challenged law, since the prim increase should be authorized by the Central Bank of Kosovo (hereinafter: the CBK), based on the prim structure and this payment is not foreseen in the prim structure. Therefore, the amount of one percent (1%) of gross prim of vehicle insurance should be paid from the budget of the insurance companies that provide this service. Therefore, according to them, unequal treatment of insurance companies offering this type of insurance in relation to other companies in Kosovo results in violation of their right to property under Article 46 of the Constitution.

67. In this regard, the Court refers to Article 24 [Equality Before the Law] of the Constitution, which establishes:

“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”.

68. The Court further refers to Article 14 [Prohibition of Discrimination] of the ECHR, which defines:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

69. With regard to Article 14 of the Convention, the Court also refers to Article 1 of Protocol No. 1 [Protection of Property] of the ECHR, which defines:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”.

70. The Court further refers to Article 46 [Protection of Property] of the Constitution, which defines:

“1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated. [...].”.

71. The Court also refers to Article 119 [General Principles] and Article 120 [Public Finances] of the Constitution, which define:

“Article 119 [General Principles]

1. The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property..

2. The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises.

[...]

8. Every person is required to pay taxes and other contributions as provided by law.

[...]

Article 120 [Public Finances]

1. Public expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and transparency.

2. *The conduct of fiscal policy at all levels of government shall be compatible with the conditions for low-inflationary and sustainable economic growth and employment creation.*
3. *Public borrowing shall be regulated by law and shall be compatible with economic stability and fiscal sustainability”.*

72. The Court notes that the substance of the claims of the allegations of the Referral relates to the incompatibility of Article 14 (1.7) of the challenged Law with Articles 24, 46 and 119 of the Constitution.

73. In this connection, the Court first notes that, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.*

74. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes: *“[Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”.*

General principles regarding equality before the law and right to property

75. The Court reiterates that Article 24 of the Constitution provides that everyone is equal before the law and that everyone enjoys the right to equal legal protection.

76. With regard to this right, the ECtHR has reiterated that *“Article 14 [of the ECHR] complements other substantive provisions of the Convention and the Protocols. There is no independent existence, as it only has an effect on the ‘enjoyment of the rights and freedoms’ protected by those provisions”* (See case of *ECtHR Khamtokhu and Aksenchik v. Russia*, Application Nos 60367/08 and 961/11, Judgment of 24 January 2017, para 53. The ECtHR further established that *“although the application of Article 14 does not imply the violation of those [other] provisions - and in that regard is independent - there can be no room for its implementation, as long as the facts of the case do not fall within any of those [provisions],* (see case *Sejdic and Finci v. Bosnia and Herzegovina*, Judgment of 22 January 2009).

77. The Court refers to the case-law, which emphasizes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution and Article 14 of the ECHR. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, *mutatis mutandis*, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71, 5920/72 and 5926/72, 7 December 1976, para 56, *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, para. 61).

78. The Court considers that, for the purposes of interpreting Article 24 of the Constitution and Article 14 of the ECHR, a difference of treatment is

discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or 2) if there is not a reasonable relationship (namely proportionality) between the means employed and the aim sought to be realised (See, *mutatis mutandis*, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application no. 9214/80; 9473/81 and 9474/81, 24 April 1985, paragraph 72).

79. The Court emphasizes that the Government and the Assembly enjoy a margin of appreciation, respectively a discretionary space, in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin varies according to the circumstances, according to the subject matter and the history of the case. A wide margin is usually allowed when it comes to general measures of the economic or social strategy, unless they are clearly without any reasonable grounds (See, *mutatis mutandis*, *Burden v. United Kingdom*, Application No. 13378/05, 29 April 2008, paragraph 60; *Khamtokh and Aksenchik v. Russia*, cited above, paragraph 64).
80. The Court notes that the essence of the Referral concerns the allegations of incompatibility of the challenged law with Article 24 of the Constitution. However, the Referral also raised claims of the property rights, guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the Convention. Regarding the rights guaranteed and protected by Article 46 of the Constitution, the Court emphasizes that paragraph 1 of Article 46 of the Constitution guarantees the right to property; paragraph 2 of Article 46 of the Constitution defines the manner of use of the property, clearly specifying that its use is regulated by law and in accordance with the public interest and in paragraph 3, guarantees that no one can arbitrarily be deprived of property, also specifying the conditions under which property may be expropriated (see, *mutatis mutandis*, Case KI50/16, Applicant *Veli Berisha and Others*, Resolution on Inadmissibility of 10 March 2017, paragraph 31).
81. The Court notes that the ECtHR has ascertained that the right to property consists of three fundamental rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph (See, *mutatis mutandis*, the ECHR Judgment of 23 September 1982, *Sporrong and Lonrot v. Sweden*, no. 7151/75; 7152/75, para. 61).
82. The three rules are not, however, “distinct” in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (See, *mutatis mutandis*, ECHR Judgment of 21 February 1986, *James and Others v. United Kingdom*, no. 8793/79, para 37).

Application of general principles of equal treatment with regard to the right to property in the present case

A. With regard to unequal treatment

83. The Court first determines whether there is a difference in the treatment of companies providing insurance to self-employed persons, on one hand, and other companies exercising their economic activity in Kosovo (including those providing other insurance services) on the other.
84. Initially, the Court notes that the challenged law establishes some sources of funding for the Red Cross of Kosovo, where Article 14 (1.7) creates specific obligations for a category of economic entities, namely insurance companies providing motor liability insurance.
85. The Court notes that paragraph 1.7 of Article 14 of the challenged Law foresees that, for the fulfillment of duties and obligations determined by this Law, the Red Cross of Kosovo provides financial resources by collecting one percent (1%) of the gross prim value. This amount is to be paid only by the companies offering this type of insurance in Kosovo. However, other economic entities operating in Kosovo, which provide insurance in Kosovo, but do not provide vehicle insurance, are not obliged to pay this amount set for the Red Cross. Similar contributions are not required to pay neither other economic entities operating in Kosovo.
86. The Court notes that from paragraph 1.7 of Article 14 of the challenged Law follows that only the companies providing this type of insurance are obliged to pay one percentage of their income for the Red Cross.
87. The Court considers that insurance companies that provide vehicle insurance services, on one hand, and companies that exercise other activities in Kosovo, on the other, are in an analogous situation or in a similar situation compared to the activity of the Red Cross. So all of them, exercise their activity in Kosovo. However, due to their scope, the provision of vehicle insurance, they are placed in a different position regarding the obligation to contribute to the Red Cross budget.
88. The Court further notes that the scope of the companies, in this case the provision of vehicle insurance, is a criterion for imposing an obligation to contribute to the Red Cross budget. The Court recalls that the scope constitutes an aspect of personal status for the purposes of Article 24 of the Constitution. Article 24 requires that no one may be discriminated against, *inter alia*, on the basis of “any other personal status”, whereas, in this connection, Article 119 of the Constitution stipulates that “*The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises*”.
89. The Court therefore considers that the distinction in the obligation to contribute to the Red Cross has been made dependent on the scope of the companies in Kosovo, resulting in a situation in which the companies providing motor insurance in Kosovo are obliged to pay one percent (1%) of the prim from vehicle insurance, but not those that offer different types of

insurance or engage in other activities in Kosovo. However, all the companies that exercise the activity in Kosovo are in a relatively similar situation.

90. Therefore, the Court concludes that there is a difference in the treatment of the companies in Kosovo that are in an analogous situation or in a similar situation which is manifested through the obligation to pay a certain amount of their income for the financing of the Red Cross of Kosovo. This fact limits their right to equality before the law, which results in the restriction of the right to protection of property under Articles 24, 119 and 46 of the Constitution.

B. Regarding the justification of limitations of rights

91. The Court recalls the human rights set forth by the Constitution may be limited in specific cases, if the limitation pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means used and the purpose sought to be achieved.

92. In this respect, the Court refers to Article 55 [Limitation on Fundamental Rights and Freedoms] of the Constitution, which establishes:

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”.*

93. In light of this constitutional provision as well as the ECtHR case law regarding Article 14 of the ECHR (which refers to the same conditions as regards the assessment of discrimination), in the present case the Court shall analyze:

- 1) whether the limitation of rights is foreseen by law;
- 2) whether there was a legitimate aim that was to be achieved by the limitation; and
- 3) whether there was a relationship of proportionality between the limitation of rights the legitimate aim intended to be achieved.

1) whether the limitation is foreseen by law

94. The Court firstly recalls that the institutions of public authority enjoy a margin of appreciation of the issues of general interest and coverage of various spheres by written norms, namely by law.
95. In this regard, the Constitution in Chapter II has given special importance to human rights and freedoms and has also provided for cases where such rights may be restricted by law, if this is required by the general interest of society and State.
96. With regard to the limitation provided by law, the Court notes that the limitation of the rights in the present case was foreseen by Article 14, paragraph 1.7 of the challenged Law, which was approved by the Assembly on 10 June 2010, an institution in which the Constitution vested the exercise of legislative power.
97. Therefore, given that a right guaranteed by Chapter II of the Constitution may be limited by law, where this is required by the general interest, the Court considers that the limitation of the rights is in accordance with the requirements of paragraph 1 of Article 55 of the Constitution. The Court finds that the obligation of the insurance companies to pay one percent (1%) of the prim from vehicle insurance in the present case, was provided for by law.

2) whether the limitation pursues a legitimate aim and is proportionate

98. With regard to the second criterion, the Court notes its case-law and the ECtHR case-law, stating that unequal treatment is not in accordance with Article 24 of the Constitution and Article 14 of the Convention if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means used and the purpose sought to be achieved (see the Judgment of the Constitutional Court in the case KO01/17). Along this line of argument, the ECtHR in case *Sejdic and Finci v. Bosnia and Herzegovina*, emphasized that: “[...] *discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. No objective and reasonable justification means that the distinction in issue does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*”.
99. In this regard, the Court notes that the legislator through the adoption of the challenged law aimed at regulating the status, activity and financial resources of the Red Cross. Pursuant to Article 2 of the challenged Law, Red Cross of Kosovo is an association which carries out its humanitarian, voluntary, non-profitable activity, in the whole territory of Kosovo - an activity which enjoys the support of the governmental institutions of the Republic of Kosovo. The mission of the Red Cross under Article 7 of the challenged Law is the support of central and local authorities in alleviating the suffering of individuals, communities at risk, and their health education.

100. Moreover, although the Red Cross of Kosovo has been established as an association, its status is regulated by a special law issued by the Assembly of the Republic of Kosovo. This fact testifies the public benefit of the Red Cross of Kosovo and, consequently, the need to ensure its sustainable funding resources.
101. In this context, the Court points out that the power institutions based on their competencies and their free assessment considered that the issuance of the challenged law is of general interest, taking into account the mission and activity of the Red Cross in providing assistance and support to central and local institutions for the benefit of the individual and society and serving the public interest.
102. However, the Court recalls the requirements of paragraph 4, of Article 55 of the Constitution, which clearly states what are the obligations and duties of the institutions of the public authorities and of the courts in cases of limitation of rights. This provision expressly stipulates that the institutions concerned should pay attention to the essence of the rights that are restricted, the importance, the purpose of limiting the rights, the nature and scope of the limitation, the relationship between the limitation and the purpose intended to be achieved, as well and to consider the possibility of achieving that aim with the least limitation of rights, which implies the existence of a proportionality relationship between the limitation and purpose intended to be achieved.
103. In that regard, the Court will assess whether the payment provided for in the provision of the challenged law has an objective and reasonable justification and, if proportionate, to the extent that that obligation does not affect the essence of the rights which the Constitution and the ECHR guarantee to the natural and legal persons, first of all the right to equality before the law.
104. Initially, the Court wishes to emphasize that the provision of the challenged law, namely paragraph 1.7, of Article 14 is a provision of a binding character, which foresees one of the forms of funding of the Red Cross. The binding character of this provision is provided by Article 19 [Punitive provisions] of the challenged Law, which foresees:

“For not respecting the obligations from... and Article 14, paragraphs 1.7... Competent Court for violations fines with cash, the legal persons in the amount from one thousand (1000) to three thousand (3000) Euros while the natural person respectively legal representatives of the natural persons in amount from five hundred (500) to one thousand (1000) Euros”.
105. The Court also notes that, apart from the binding character, the provision of the challenged law also has a selective character, because it obliges only one category of economic entities, namely insurance companies, that from their assets (property) collected from the compulsory vehicle insurance allocate one percent (1%) of the gross prim for financing the Red Cross and not other economic entities operating in the Republic of Kosovo.

106. The Court considers that although the legislator, by limiting the rights, aimed at achieving an aim that is in line with the general social interest, it is not clear why the lawmaker did not extend and distribute the financial obligation established by the provision of the challenged law also to other economic entities, but only to the insurance companies that provide this type of insurance.
107. Thus, the Court notes that neither the Assembly nor any other relevant instance, have not presented any consistent reasoning as to why the challenged law obliges only the insurance companies to contribute to the financing of the Red Cross.
108. The Court considers that, if the payment provided for by the provision of the challenged law would be reasonably and proportionately distributed to all economic entities, this would be in accordance with the requirements of Article 24 [Equality Before the Law] of the Constitution, with the equal position in the market guaranteed by Article 119 of the Constitution, as well as with the requirements of paragraphs 4 and 5 of Article 55 of the Constitution.
109. In this connection, the Court refers to the Decision of the Constitutional Court of the Republic of Croatia, No. U-I-244112002, U-I-1107/2002 of 12 February 2003, in which case the referring court also referred to. In the case of Croatia, the application was filed by the Croatian Insurance Office and Chamber of Commerce of Croatia, which requested the Constitutional Court of Croatia the assessment of compatibility of Article 12, paragraph 3 and Article 24, paragraph 1.1 of the Law on the Red Cross of Croatia (the challenged law), with Articles 3, 49, 50 and 51 of the Constitution of the Republic of Croatia.
110. Article 12, paragraph 3 of the Law on the Red Cross of Croatia provided for: *“From the compulsory car insurance, 1% of the means is allocated annually to the Croatian Red Cross for the advancement of the activities related to first aid, with the aim of decreasing the number of traffic accidents”*. Whereas, Article 24 (Punitive provisions), paragraph 1, item (1), provided for the imposition of a fine in the event of non-application of Article 12, paragraph 3, by Croatian motor insurance companies.
111. As to the compatibility of the provision of the Law on the Red Cross of Croatia with Article 49 (2) of the Croatian Constitution (Equal Position), the Constitutional Court of Croatia considered that this provision of the challenged law: *“Is in contradiction with the constitutional guarantee of the equal legal status of all entrepreneurs in the market, the determination of obligations by which a group of entrepreneurs is placed unequally in relation to others. This is done with the challenged legal provision to insurance companies, which alone among all commercial organizations have to allocate funds from insurance premiums, in the present case of those insurance in which the owners or users of motor vehicles are insured from the liability for damages that are caused to the third parties in traffic (...)”*.
112. The Constitutional Court of Croatia also found that the provision of the challenged law is not in accordance with Article 51 of the Constitution of Croatia, reasoning that: *“[...] if the lawmaker considered that it was necessary*

in the interest of the social community to improve the conditions of exercising the activity of the Croatian Red Cross in general, then the obligation of increased allocation for this purpose had to be determined for all economic entities in accordance with their possibilities, and this would also be in accordance with the provision of Article 51, paragraph 1 of the Constitution "Everyone shall participate in the defrayment of public expenses, in accordance with their economic capability".

113. In the light of the foregoing considerations, the Court considers that the obligation of only insurance companies to pay the determined amount from the income collected from the motor liability insurance as a contribution to the Red Cross budget is not justified, namely it is not based on objective reasons. Consequently, there is no legitimate aim that would justify the unequal treatment of vehicle insurance companies.
114. The Court refers to its case law (see Judgment in case KO01/17), when it found that the non-existence of a legitimate aim of unequal treatment rendered unnecessary the analysis of the proportionality between the means used and the aim to be achieved.
115. In this respect, the Court considers that as a consequence of unequal treatment of insurance companies in relation to other companies in Kosovo, and by taking into account that the payment by insurance companies of one percent (1%) of the amount of the gross vehicle prim reduces the wealth of insurance companies, paragraph 1.7 of Article 14 of the challenged law also does not comply with the right of property, according to Article 46 of the Constitution.
116. From the foregoing, the Court considers that the provision of the challenged law is incompatible with the requirements of Article 24 [Equality Before the Law], paragraph 2 of Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution, in conjunction with Articles 14 and 1 of Protocol No. 1 to the ECHR.
117. The Court recalls that the referring court also raises the issue of compliance of the challenged law with Article 120 [Public Finances] of the Constitution. However, having in mind that the Court found a violation of Articles 24, 46 and 119 of the Constitution, it does not find it necessary to assess the compliance of the challenged law with Article 120 of the Constitution.
118. In sum, the Court concludes that paragraph 1.7 of Article 14 of the challenged Law is not compatible with Article 24 [Equality Before the Law], Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 and 116.3 of the Constitution, Articles 20 and 51 of the Law and Rules 39 and 59 (a) of the Rules of Procedure, on 13 March 2019, unanimously

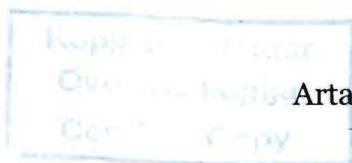
DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that paragraph 1.7 of Article 14 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, is not in compliance with Article 24 [Equality Before the Law], Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution;
- III. DECIDES, in accordance with Article 116.3 of the Constitution, that paragraph 1.7 of Article 14 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, is invalid, from the day of entering into force of this judgment;
- IV. TO NOTIFY this judgment to the Parties;
- V. TO PUBLISH this judgment in the Official Gazette in accordance with Article 20.4 of the Law; and
- VI. This judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu



Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.