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

Prishtina, on 20 May 2019
Ref. no.:AG 1363/19

[This translation is unofficial and serves for informational purposes only]

JUDGMENT

in

Case No. KO171/18

Applicant

The Ombudsperson

Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Institution of the Ombudsperson of the Republic of Kosovo (hereinafter: the Applicant).

Challenged decisions

2. The Applicant challenges the constitutionality of certain provisions of Law No. 06/L-048 on the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the challenged Law), which entered into force on 25 August 2018, namely, Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (sub-paragraphs 5, 6, 7 and 8), 20 (paragraph 5) 21, 22, 23, 24 and 25 (paragraphs 2 and 3).

Subject matter

3. The subject matter of the Referral is the constitutional review of the abovementioned provisions of the challenged Law, which according to the Applicant's allegations, are not in accordance with Article 132 [Role and Competencies of the Ombudsperson] and Chapter VI [Government of the Republic of Kosovo] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

4. The Applicant requested the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to suspend the application of Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (sub-paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of the challenged Law.

Legal basis

5. The Referral is based on paragraph 2, subparagraph 1, of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, Articles 22 [Proceedings of the Referral], 27 [Provisional Measures], 29 [Accuracy of Referral] and 30 [Deadlines] of the Law on the Constitutional Court of the Republic of Kosovo, as well as Rules 32 [Filing of Referrals and Replies], 56 [Request for Interim Measures] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 2 November 2018, the Applicant submitted the Referral to the Court.

7. On 5 November 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Nexhmi Rexhepi.

8. On 7 November 2018, the Applicant was notified about the registration of the Referral.

9. On the same date, the Referral was communicated to the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo with the instruction to distribute the referral to all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), to the Prime Minister of the Republic of Kosovo, the Chair of the Committee on Public Administration, Local Governance and Media of the Assembly of the Republic of Kosovo, the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Board) with the instruction to submit to the Court the comments, if any, by 21 November 2018.

10. The Referral was also communicated to the Secretariat of the Assembly of the Republic of Kosovo, which was requested to submit to the Court all relevant documents regarding the referral.

11. On 9 November 2018, the Referral was communicated to the Auditor General of Kosovo, the Central Election Commission, the Central Bank of Kosovo and the Independent Media Commission with an instruction to submit to the Court their comments, if any, by 21 November 2018.

12. On 12 November 2018, the Secretariat of the Assembly submitted to the Court the documentation regarding the procedure for reviewing and approving the challenged Law in the Assembly, *inter alia*, as follows: the legislative initiative, namely the Draft Law on the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Draft Law); the opinion of the Government regarding the Draft Law; transcript of the session for approval in principle of the draft law; the transcript of the session in which the challenged Law was approved; and the Decision of the Assembly on the adoption of the challenged Law.

13. On 20 November 2018, the Independent Media Commission sent a document confirming that it supports the allegations raised by the Applicant.

14. On 21 November 2018, the Board submitted their comments, by which they challenge in entirety the Applicant's allegations, also submitting additional documents.

15. On 29 November 2018, the Applicant submitted the response to the comments of the Board of 21 November 2018.

16. On 28 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.

17. On 25 April 2019, the Court voted on the admissibility of the Referral and to find a violation in respect of the challenged Law.

Summary of facts

18. On 22 December 2001, UNMIK Regulation No. 2001/36 on the Kosovo Civil Service, which established the Independent Oversight Board of Kosovo, was rendered within the Ministry of Public Administration.

19. On 16 August 2010, the Law No. 03/L-192 on the Independent Oversight Board for Civil Service of Kosovo was promulgated in the Official Gazette.

20. In January 2018, the Committee on Public Administration, Local Governance and Media of the Assembly of the Republic of Kosovo initiated the procedure for the adoption of the challenged Law.

21. On 23 July 2018, the Assembly of Kosovo adopted the challenged Law, with 58 (fifty-eight) votes for, 1 (one) vote against and 7 (seven) abstentions.

22. On 8 August 2018, the challenged Law was promulgated by the President of the Republic of Kosovo (Decree no. DL - 028-2018).

23. On 10 August 2018, the challenged Law was published in the Official Gazette of the Republic of Kosovo.

24. Article 32 of the challenged Law provides that: *"This law shall enter into force fifteen (15) days after the publication in the Official Gazette of the Republic of Kosovo".*

25. Article 31 of the challenged Law provides that: *"upon the entry into force of this Law, the Law no. 03/L-192 on Independent Oversight Board for Civil Service of Kosovo is abrogated".*

Applicant's allegations

26. The Applicant challenges the provisions of the challenged Law, namely Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (sub-paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3).

27. The Applicant with respect to the challenged provisions of the challenged Law raises allegations regarding: (i) *violation of the constitutional independence of the Ombudsperson; (ii) exceeding the narrow scope of the Board, established in Chapter VI (Government of the Republic of Kosovo) of the Constitution; and (iii) immunity from criminal prosecution, civil lawsuit or dismissal, with respect to the performance of the functions of the Board.*

(i) Regarding the allegation of violation of the constitutional independence of the Ombudsperson

28. The Applicant, initially referring to Article 2 [Scope] of the challenged Law, alleges that, *"the functions and competencies that the law provides to the Board in the supervision of the Ombudsperson Institution, among other institutions "*without providing exclusion regarding this scope in relation to independent institutions seriously violate *"constitutional independence of this Institution"*. According to the Applicant *"...this constitutional independence is guaranteed by Article 132, par. 2 of the Constitution of the Republic of Kosovo, which stipulates that "The Ombudsperson independently exercises*

her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo". This allegation is supported by the Applicant, referring also to the Judgment of the Constitutional Court, in the case KO73/16.

29. The Applicant summarizes his allegations and challenged provisions of the new Law on Independent Oversight Board as follows: *"By authorizing direct guidance and direct interference to the Ombudsperson Institution, the law gives the Board the right to:*

- *"reviews and decides on the complaints filed by civil servants and candidates for admission to the civil service (Article 6, par. 1, subparagraph 1);*
- *"supervises the selection procedure and decides whether the appointments of civil servants of senior management level and of the management level, have been conducted in accordance with the rules and principles of civil service legislation (Article 6, par. 1, subparagraph 2);*
- *"monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation" (Article 6, par. 1, par. 3);*
- *"have access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation" (Article 7, par. 1, subparagraph 2);*
- *"interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions" (Article 7, par. 1, subparagraph 3);*
- *"requires and obtains from institutions any information necessary for the performance of its duties" (Article 7, par. 1, subparagraph 4);*
- *"decides... repeals or annuls the administrative act" (Article 18, par. 1, subparagraph 2);*
- *"decides... changes the administrative act" (Article 18, par. 1, subparagraph 3);*
- *"annuls the election procedure, when it determines that it was conducted in violation of the rules and principles of legislation for civil service (Article 19, par. 5, subparagraph 2) and*
- *"monitors public administration institutions employing civil servants.... through regular monitoring conducted based on the annual plan of monitoring, and through extraordinary monitoring carried out in special cases, related to serious breaches of the civil service legislation (Article 20, par. 1 and 2).*

30. The Applicant referring to the provisions of the challenged Law referring to the obligation to implement the recommendations of the Board (Article 20, paragraph 5), the consequences for the responsible person of the institution in the event that the Decision of the Board is not applicable (Article 21, paragraphs 1 and 3), as well as the obligation to cooperate with the Board (Article 25, paragraph 2), states that *"these provisions make it clear that the Ombudsperson cannot consider other Board decisions and actions merely as recommendations or suggestions. On the contrary, the Law claims to force the Ombudsperson to comply with these decisions and actions".*

31. Furthermore, the Applicant referring to the provisions of the challenged Law, pertaining to the reporting of the Board in case of non-enforcement of its decision and in case of non-cooperation (Article 23, paragraphs 1 and 3), and the financial consequences in the case of non-implementation of the Board decision (Article 24, paragraph 1) alleges that *"all these provisions of the Law on the Board have the purpose and effect of obliging the Ombudsperson to receive instructions and interference from the Board. In this way, the Law represents a direct violation of Article 132, par. 2 of the Constitution, which obliges the Ombudsperson not to "accept any instructions or intrusions from the organs, institutions or other authorities". According to the Applicant: "[...] the instructions and intrusions provided by the Law on the Board are not irrelevant. On the contrary, these instructions and intrusions affect the very essence of independence of the Ombudsperson Institution, seriously violating the organizational independence of this Institution".*

32. The Applicant further states that *"The Law on the Board is constitutionally deficient because it imposes on the Ombudsperson precisely [...] "technical and unifying" approach, which gives the Board the same competencies over all institutions, without making the "necessary distinction between independent institutions and other state bodies". Moreover, this "technical and unifying" approach differs, for example, from Law No. 03/L-149 on Civil Service, which expressly states that: "During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected" (ibid., Article 3, par. 7). No such provision, which could have emphasized that, in the implementation of the Law on the Board, "the constitutional autonomy of the institutions independent from the Board shall be respected" is not included anywhere in the Law. Without the inclusion of this differentiation, the Law on the Board constitutes a violation of constitutional independence, not only of the Ombudsperson but of all independent institutions".*

33. However, the Applicant clarifies that *"The Board can still play an advisory role for the Ombudsperson on matters within the scope of the Board, such as the development of job vacancies. However, in the end, the Ombudsperson should be the one who decides whether to follow the suggestions of the Board or not. In other words, in order to comply with the Constitution, these suggestions should remain merely suggestions, not mandatory instructions, which is how they are presented in the current Law. This distinction, between non-binding suggestions and binding instructions, is important for assessing the constitutionality of the various provisions of the Law".*

(ii) ***Regarding the Applicant's allegation that the narrow scope of the Board, as defined in Chapter VI (Government of the Republic of Kosovo) of the Constitution, has been exceeded***

34. The Applicant alleges that the scope of the challenged Law, as defined in Article 1, paragraph 2 *"[...] is in direct contradiction with its narrow scope as envisaged by the Constitution".*

35. The Applicant specifically states that: *"The Constitution does not explicitly define the term "civil service" nor does it stipulate that employees of which*

institutions are considered part of this "civil service". However, even in the absence of such a definition, the fact that Article 101 is included within Chapter VI clearly shows that at the constitutional level, the civil service is considered part of the Government".

36. The Applicant continues: *"not only in this case, but throughout the structure of the Constitution, classification of institutions according to the chapter in which they appear constitutes an important principle of interpretation. For example, the Constitution, in any of its provisions, does not explicitly state that the Auditor General has the status of an independent institution (see Constitution, Articles 136-138). However, the fact that Article 136 ("Auditor General of Kosovo") is included within Chapter XII ("Independent Institutions") is sufficient to establish the status of this institution as an independent institution, even in the absence of such an explicit definition".*

37. The Applicant also alleges that *"moreover, given the fact noted above, that the Constitution obliges the Ombudsperson to not accept "instructions or intrusions from the organs, institutions or other authorities", it is necessary that the Constitution be interpreted in such a way that give the Board the power to oversee the Ombudsperson Institution. On the contrary, there would be a direct contradiction between Article 101 of the Constitution, which would give the Board the right to instruct and interfere in the Ombudsperson Institution, and Article 132, which prohibits precisely such a thing. In order to avoid this contradiction, it is necessary that the term "civil service" be interpreted in a limited way, not including the staff of the Ombudsperson Institution".*

38. In this regard, the Applicant states that *"an important principle of interpretation is that constitutional terms have an autonomous meaning that does not depend on other lower legal acts".*

39. The Applicant concludes by reiterating that *"[...] by conferring on the Board the power to oversee institutions outside the Government, the Law directly contradicts Chapter VI of the Constitution of the Republic of Kosovo, which clearly defines the civil service as part of the Government".*

(iii) Regarding the allegation that the challenged Law "gives the President and the members of the Board the immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of the functions of the Board"

40. With respect to this allegation, the Applicant states that *"this broad immunity has no basis in the Constitution. The Constitution states very clearly and in detail what state officials enjoy immunity, and how extensive this immunity is in each case. In this regard, according to the Constitution, only the members of the Assembly (Article 75), the President (Article 89), the members of the Government (Article 98), judges of the regular courts (Article 107), judges of the Constitutional Court (Article 117) and the Ombudsperson (Article 134) enjoy immunity. In contrast to these, the Independent Oversight Board is not given any immunity in the text of the Constitution. For this reason, according to the practice of this Court, it should not enjoy any kind of immunity".*

41. The Applicant, referring to the Judgment of the Court, in case no. KO98/11 (Applicant: *The Government of the Republic of Kosovo, concerning the immunity of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and Members of the Government of the Republic of Kosovo, Judgment of 20 September 2011)"* further states that *"Immunity cannot be granted with other legal acts unless it is provided by the Constitution itself. The Constitution is the only legal act that determines which officials enjoy immunity and how wide is this immunity. In other words, it is the Constitution that has the first and last word regarding the issue of immunity of state officials".*

42. Accordingly, the Applicant claims that *"Article 11, par. 3 of the Law on the Board, giving the President and members of the Board immunity from criminal prosecution, civil lawsuit or dismissal, must be of no legal value, as the Constitution does not provide such immunity".*

Request for interim measure

43. The Applicant requested the Court to impose an interim measure, namely to suspend the application of the provisions of the challenged Law *"or at least to suspend the application of these provisions in relation to the Ombudsperson"*, until the final decision of this Court.

44. The Applicant alleges that *"the arguments put forward in this request give more grounds than prima facie for the annulment of the challenged provisions".*

45. The Applicant also alleges that *"in the absence of the approval of the interim measure, the functioning of the Ombudsperson Institution will be severely hampered by the ongoing interference of the Board in this institution".*

46. In this regard, the Applicant clarifies that *"so far, the Board annulled the results of the four job vacancies announced by the Ombudsperson. Lack of sufficient staff to deal with citizens' complaints coming to the Institution's doors will result in the inability of existing staff to give due attention to these complaints, including urgent complaints. Especially in these urgent cases, the ongoing interventions of the Board will cause irreparable damage to the citizens of the Republic of Kosovo".* Accordingly, the Applicant also considers that *"in order to avoid these damages, [...] it is necessary that this Court immediately suspend the challenged provisions on the basis of which the Board is preventing the efficient work of the Ombudsperson and his staff".*

47. In conclusion, the Applicant alleges that *"The Ombudsperson Institution often serves as the ultimate hope for victims of human rights violations to address these violations and to resolve them. The impossibility of normal functioning and exercise of the mandate of the Ombudsperson as the only national institution for human rights would inevitably prevent the protection of the fundamental rights and freedoms of citizens of the Republic of Kosovo".*

48. Therefore, the Applicant considers that *"[...] the approval of the interim measure, in order to ensure that the staff of the Institution is completed as quickly as possible, is clearly of public interest"*.

Comments of Independent Oversight Board

49. The Board submitted its comments on the Referral and completely rejected the Applicant's allegations.

50. Initially, the Board clarified that *"The functions and powers of the Board since its establishment by the UNMIK Regulation have so far not changed and they are focused on reviewing the complaints of civil servants and applicants for employment in the Kosovo civil service, overseeing the implementation of civil service legislation and observing the election of civil servants of the management level in the central and local public administration institutions"*. In addition, the Board reasoned that most of the provisions of the previous law are the same as those of the challenged Law.

51. In its comments, the Board provided its comments regarding the Referral, explaining and justifying its position regarding: (i) the functions and powers of the Board established in the challenged Law; exceeding the Applicant's mandate and the powers of the Board; (ii) the scope of the challenged Law; (iii) the issue of independence of independent institutions; (iv) the issue of immunities; (v) the selection, appointment or dismissal of civil servants; and (vi) sanctions.

(i) Concerning the issue of the functions and competencies of the Board

52. The Board considers that the Applicant *"has exceeded outside its mandate to protect fundamental rights and freedoms from the unlawful and irregular actions and inactions of public authorities because its tendency [Applicant] to minimize the role of the Independent Oversight Board for Civil Service of Kosovo, such as an independent constitutional institution (see Article 101.2 of the Constitution) as well as its request for the removal of the functions of the Board established by law would directly affect public authorities to create space to abuse and violate the rights from the employment relationship of the civil servants and candidates for admission to the civil service "*. According to them, the abolition of the powers of the Board foreseen by the challenged Law, as the Applicant claims, would violate the rights of civil servants and the candidates for civil service, while *"[...] no public authority, including independent constitutional institutions, can violate human rights and fundamental freedoms"*.

(ii) Regarding the scope of the challenged law

53. As to the scope of the challenged Law, the Board specifies: *"The Ombudsperson has no clear address regarding the scope of the civil service of the Republic of Kosovo, because this scope is not defined by the Law on the Independent Oversight Board but by the Law on Civil Service of Kosovo, therefore the Board under Article 101.2 of the Constitution exercises competences in the*

civil service, and accordingly within the scope given to the civil service, by the relevant Law on Civil Service.

Therefore, the scope of the Law on the Board is directly dependent on the limitation of the term "civil servant" in Law No. 03/L-149 on Civil Service of the Republic of Kosovo".

54. The Board further specifies that *"[...] in Article 32, paragraph 2 of Law No. 05/L-019 on the Ombudsperson, it was determined that "The other employees of the Institution of Ombudsperson shall be subject to the legal provisions in force for civil servants".*

55. Therefore, the Board considers that: *"taking into account the provisions of the Law on the Ombudsperson, it is concluded that the Board has a full mandate to exercise its constitutional and legal functions, to civil servants employed in the Ombudsperson Institution, respecting constitutional independence in accordance with Article 3 , paragraph 7 of Law No. 03/L-149 on Civil Service of the Republic of Kosovo, which stipulates that: "During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected".*

56. In this regard, the Board also refers to the Judgment of the Court in Case KI129/11, Applicant *Viktor Marku*, namely paragraph 42 of this Judgment, whereby the Court, *inter alia*, reasoned *"[...] all obligations arising by this institution [the Board] regarding the matters that are under the jurisdiction of this institution produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service [...] The decision of this institution provides final administrative decision [...]".*

57. According to the Board, if *"the civil service should be understood only as a part of the Government", then the Ombudsperson as the Applicant of this Referral should have raised the issue of compatibility of the Law on Civil Service with the Constitution because this law defines the scope of the civil service, which has established the scope of the civil service also outside the executive branch, namely: "administration of the Assembly, administration of the Presidency, Office of Prime Minister and Ministries, executive agencies, independent and regulatory agencies and municipal administration".*

(iii) Regarding institutional independence

58. The Board considers the issue of institutional independence *"relates to the constitutional and legal functions of the Ombudsperson, but does not relate to the constitutional and legal right of the Board to oversee the respect of civil service legislation related to the employment relationship of civil servants to these institutions".*

59. The Board also refers to its decision No. 144/2017 of 5 September 2017, which found that *"the request for obtaining the authorization to announce vacancies for civil servants of independent constitutional institutions from the Ministry of Public Administration and obtaining the budget confirmation from the*

Ministry of Finance constitutes an interference with the independence of the independent constitutional institutions [...]".

60. The Board further specifies that *"the vacancy criteria are determined by the independent constitutional institution itself, because setting criteria for the education and work experience for the positions of civil servants of the independent constitutional institutions constitutes an interference with their institutional independence"*. Also regarding the salaries of civil servants in the independent constitutional institutions, the Board asserts that the Assembly of Kosovo has recommended that *"the same wage principle for the same work should not apply to independent institutions"*.

iv) With regard to functional immunity

61. As to the functional immunity, the Board stated that according to the Judgment of the Constitutional Court in Case KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2017 (hereinafter: case KI33/16), is stipulated that *"[the Board] enjoys prerogatives of a court [...]"*. Therefore, according to the Board, they enjoy the prerogatives of a *"court"*, namely *"those of the judges of the regular courts (Article 75 of the Constitution)"*. Furthermore, the Board refers to the Law on Ombudsperson, according to which the deputies and staff of the Ombudsperson Institution enjoy the same immunity.

(v) Regarding the selection, appointment or dismissal of civil servants

62. As regards the Ombudsperson's allegation of the Board competence to "*select, appoint or dismiss civil servants*", the Board notes that their competence is limited only to assessing whether the selection procedure and their appointment have been made in accordance with the legislation in force.

63. The Board further clarifies that *"termination of employment relationship is made by the Disciplinary Committee of the employment body and the Council does not have the power to dismiss the civil servant from the civil service, nor in the independent constitutional institutions, or in any other public administration institution that employs civil servants"*.

64. The Board specifies that if the challenged provisions of the challenged Law were annulled, as requested by the Applicant, then the law would become non-functional, and consequently the Board too.

65. The Board, in the end, states that *"the request of the Ombudsperson to remove the executive power of the decisions of the Independent Oversight Board for the Civil Service would directly affect the protection of the employment relationship of civil servants, which is related to the right to work and to exercise the profession as defined in Article 49 of the Constitution of the Republic of Kosovo"*.

(vi) Regarding the issue of sanctions

66. Finally, as regards the issue of sanctions, the Board notes that the sanctions have been set in order to influence the implementation of the Board's decisions, and according to them, if the sanctions are removed, only *"irresponsible officer"* who has not applied the law and has therefore violated the fundamental freedoms and rights of the civil servants and citizens of the Republic of Kosovo applying for admission to the civil service, would be protected.

The Applicant's response to the Board's comments

67. Initially, the Applicant clarified that he did not challenge the competence of the Board with regard to civil servants employed in public authorities, but same as in case KO73/16 raised the question of the Board's competence in independent institutions, same as it has acted in case KO73/16.

68. The Applicant further states that *"the issue raised in the present case constitutes a constitutional issue in the sense of the independence of the Ombudsperson which has a direct impact on fundamental rights and freedoms [...] because the Ombudsperson cannot exercise his or her mandate if his/her independence is violated"*.

69. With regard to the Board's comments on the Applicant's immunity, he stated that the immunity of the Ombudsperson *"is based on the Constitution, which then extends to its deputies and staff, because each action taken by the deputies of the Ombudsperson and the staff within their duties and responsibilities is taken on behalf of the Ombudsperson. The scope of the immunity for the deputies of the Ombudsperson and the staff is justified and is recommended by the Venice Commission"*.

70. With regard to the issue of immunity, the Applicant specifies that, according to the Board *"The Board "enjoys the prerogatives of a court" [...], we consider that [the Board] makes a deformed and partial interpretation. When it comes to Article 6 of the ECHR, it should be noted that it is also applicable in administrative proceedings. The Constitutional Court in the same Judgment (KI33/16) stipulates that a decision of the Board produces legal effects on the parties and, therefore, such a decision is final administrative (emphasis added) and enforceable, thus implying that the Board is an administrative body, but that in aspect of decision of matters, within its competences, the based on the rules of law enjoys the prerogatives of a court. But that does not mean that the Board must necessarily enjoy immunity. Therefore, the Board may not be the only administrative body that may, within the scope of legally defined competences, have the prerogatives of a court"*.

71. In this regard, the Applicant concludes that *"[...] such an interpretation by the Board is not sustainable from a constitutional point of view, because the Constitution itself stipulates that powers in the Republic of Kosovo are separated, and in this regard the Board, as an administrative body cannot be part of the judiciary and does not can enjoy the immunity of judges"*.

72. With respect to the announcement of vacancies for civil servants, for which procedure the Board had stated that independent institutions do not need to

obtain approval from the Ministry of Public Administration and that of Finance, the Applicant assesses that the Board's comments are contradictory, because they do not reflect the Board's decisions to cancel the recruitment procedures in the Ombudsperson Institution. In this regard, the Applicant cites a Board Decision issued on 28 November 2018, where the Board reasoned that *"no approval was granted for authorization of public announcement by the Ministry of Public Administration [...]"*.

73. As regards the example of the Board regarding the oversight by the National Audit Office (hereinafter: the NAO) to independent institutions, the Applicant emphasizes two differences between the Board and the NAO. The first difference is that the NAO gives recommendations while the Board instructions. Whereas, the second distinction according to the Applicant is that the Auditor General, unlike the Board, is an independent institution under Chapter XII of the Constitution.

74. Finally, the Applicant considers that *"The challenged law does not contain provisions that carry the constitutional spirit of the independence of the Ombudsperson and to what extent extend the competences of the Board vis-à-vis independent institutions, therefore, we consider that the challenged provisions of the Law are in contradiction with the Constitution"*.

Comments submitted by the Independent Media Commission

75. The Independent Media Commission submitted a letter confirming the allegations raised by the Ombudsperson regarding respect for the independence of independent institutions and at the same time requests the Constitutional Court that, based on its constitutional and legal mandate, reconfirms the constitutional independence and the importance of Independent Institutions, as defined in Chapter XII of the Constitution of the Republic of Kosovo.

Relevant provisions of the challenged Law:

Article 2
Scope

The scope of this law includes Board and all institutions of the public administration employing Civil Servants.

Article 3
Definitions

1. Terms used in this law shall have the following meaning:
1.1. Independent Oversight Board of Civil Service of Kosovo- the independent constitutional institution which ensures the compliance with the rules and principles governing the civil service
1.2. Civil Servant- the civil servant as defined in the Law on Civil Service;
1.3. Senior Civil Servant of the management level – the civil servants of the senior management level as defined by the Law on Civil Service;

1.4. Civil Servants of the management level - the civil servants of the management level as defined by the Law on Civil Service;
[...]

Article 4

Independent Oversight Board of the Civil Service of Kosovo

1. The Board is an autonomous constitutional body that ensures the compliance with the rules and principles governing the civil service.
[...]

Article 6
Functions of the Board

1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:
1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service;
1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation;
1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation.

Article 7
Powers of the Board

1. For the purpose of exercising its functions, the Board has the right to:
[...]
1.2. obtain access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation;
1.3. interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions;
1.4. requires and obtains from institutions any information necessary for the performance of its duties;

[...]

Article 11
Term of Office for members of Board

[...]
3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge.
[...]

Article 18
Deciding on complaints

1. College of the Board which reviews complaints, decides in the following way:

1.1. leaves the administrative act in force and rejects the complaint;
1.2. repeals or annuls the administrative act and approves the complaint;
1.3. changes the administrative act by partially approving the complaint;
1.4. obliges the competent administrative body to issue an administrative act when its issuance was unrightfully rejected;
1.5. ends the administrative proceeding;
1.6. returns for review;
1.7. dismisses the complaint;
1.8. declares not competent;
1.9. suspends the proceedings.

2. Colleges of the Board reviewing the complaints, based on paragraph 1., sub-paragraph 1.3. of this Article, have the right to change the disciplinary measures in cases when it is confirmed that the civil servant has made a breach, but the employing authority has not set the disciplinary measure corresponding to the breach.

Article 19
Oversight procedure for the selection of senior management and management level of Civil Servants

[...]
5. After reviewing the report, the Board issues a decision and decides to:

5.1. approve the election procedure, when determined it was developed in accordance with rules and principles of the legislation on Civil Service;

5.2. to annul the election procedure, when it determines that it was developed in violation of the rules and principles of legislation for Civil Service

6. The Board is obliged to issue a decision for the procedure of election of senior management and management level Civil Servants, within the thirty (30) days deadline from receiving the complete file from the employing authority.

7. If the development of the procedure for election of senior management and management level Civil Servants, is done without notifying the Board for participating in the oversight, the procedure is considered invalid and according to its official duty the Board issues a decision for annulment of the procedure.

8. The decision of the Board about the procedure for election of senior management and management level Civil Servants, is a final decision in the administrative procedure and against this decision the parties in the procedure can initiate an administrative conflict, in accordance with the provisions of the law on administrative conflict.

Article 20
Monitoring of public administration institutions regarding the implementation of rules and principles of the legislation for Civil Service

[...]

5. Relevant institution of the public administration is obliged to implement the recommendations of the Board, within the deadline set with the Board decision.

Article 21
Board's decision

1. Board's decision is a final administrative decision and is implemented by the senior management level official or the responsible person from the institution that made the first decision towards the party.
2. Implementation of the decision should be done within fifteen (15) days deadline from the receipt of the Board decision.
3. Non-implementation of the Board decision by the responsible person from the institution, constitutes serious breach of the work duties..

Article 22
Initiation of the administration conflict

1. The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict.
2. Initiating an administrative conflict does not stop the execution of the Board decision.

Article 23
Procedure in case of non-implementation of the Board decision

1. If the responsible person from the institution does not implement the Board decision within the deadline foreseen in Article 21 of this Law, in all such cases, Chairperson of the Board should inform in written the President of the Assembly, relevant Committee on Public Administration and the immediate supervisor of the person responsible for non-implementation, within fifteen (15) days from the day of expiry of the execution deadline.
2. In cases when the person responsible for implementation of the Board decision is within the executive branch, the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.

3. In cases when the person responsible for implementation of the Board decision is the Mayor of the Municipality, the relevant minister for local government and the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
4. Notice from paragraph 1. and 2. of this Article is considered as a request for initiating a disciplinary procedure against the person responsible for implementation, a procedure which is developed in accordance with the provisions foreseen by the legislation in force.
5. Prime Minister or the responsible supervisor is obliged to initiate the disciplinary procedure towards the person responsible for implementation, within the thirty (30) days deadline from the receipt of the notice by the Chairperson of the Board.
6. In case the actions foreseen under paragraph 5. of this article are not taken, Chairperson of the Board informs the President of the Assembly and the relevant Committee for Public Administration in written. President of the Assembly requires in written from the Prime Minister or the responsible supervisor of the institution, to take all the necessary actions for immediate implementation of the Board decision and take the necessary measures towards the responsible person in accordance with the provisions foreseen by the legislation in force.
7. Within thirty (30) days deadline from the expiry of the Board decision implementation deadline, party can initiate the enforcement procedure for the Board decision at the competent court, in accordance with the provisions of the Law on Enforcement Procedure.

Article 24
Administrative sanctions for non-implementation of the Board decision

1. In cases of non-implementation of the Board decision according to Article 21 of this law, Chairperson of the Board issues a decision for withholding fifty percent (50%) of the monthly salary of the responsible person, until the implementation of the Board decision.
2. According to paragraph 1. of this Article, the decision is sent for implementation to the main administrative official of the relevant ministry for managing payrolls, who is obliged to implement the decision within fifteen (15) days deadline from the receipt of the decision and inform in written the Board about the implementation of the decision.
3. Against the decision for withholding fifty percent (50%) of the monthly salary, the unsatisfied party has the right to initiate an administrative conflict at the competent court for administrative issues, in accordance with the provisions of the Law on Administrative Conflict.
4. Initiation of an administrative conflict does not stop the execution of the Board decision.
5. In cases of non-implementation of the decision of the Chairperson of the Board on withholding fifty percent (50%) of the monthly salary, the Board may initiate the enforcement procedure for the decision at the competent court, in accordance with the provisions of the law on enforcement procedure within thirty (30) days deadline from the expiry of the implementation deadline.

Article 25

Cooperation with public administration institutions

[...]

2. Public administration institutions with Civil Servants employed, as well as all other public officials or Civil Servants, that have competencies in administration of the civil service, or are informed about this field, are obliged to cooperate with the Board.

3. In cases when the employing authority or the responsible person does not cooperate, the Board reports to the Assembly about this non-cooperation, which shall then forward this notice to the Prime Minister or the immediate supervisor of the responsible person".

Admissibility of the Referral

76. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.

77. Initially, the Court refers to paragraph 1, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes that *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

78. In addition, the Court refers to paragraph 2, subparagraph 2 of Article 113 of the Constitution, which provides that:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> > *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government";*

79. The Court also refers to paragraph 4, of Article 135 [Ombudsperson Reporting], which stipulates that: *"The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution".*

80. In this regard, the Court notes that the Applicant is an authorized party, which raises the issue of the compatibility of the challenged Law before the Court, pursuant to Article 113, paragraph 2 of the Constitution.

81. The Court also takes into account Article 30 [Deadlines] of the Law and Rule 67, paragraph 4 of the Rules of Procedure, which provide that the Referral must be filed within a period of 6 (six) months after the entry into force of the challenged act.

82. The Court notes that the challenged Law entered into force on 25 August 2018, while the Applicant filed the Referral with the Court on 2 November 2018.

83. In addition, the Court takes into account Article 29 [Accuracy of the Referral] of the Law, which provides that:

> *"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.*
>
> *2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.*
>
> *3. A referral shall specify the objections put forward against the constitutionality of the contested act".*

84. The Court also refers to Rule 67 of the Rules of Procedure, which specifies:

> Rule 67
> Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law
>
> *"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.*
> *(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.*
> *(3) The referral shall specify the objections put forward against the constitutionality of the contested act.*
> *(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act".*

85. The Court notes that the Applicant specified the relevant constitutional provisions that allegedly have been violated, he also specified the provisions of the challenged Law that are considered incompatible with the Constitution and has submitted evidence supporting his allegations.

86. In conclusion, the Court finds that the Applicant is an authorized party, has identified the challenged provisions of the challenged Law, specified its constitutional allegations, provided supporting evidence and filed the referral within the prescribed time-limit.

87. Therefore, the Court declares that the Referral is admissible for review of its merits.

Assessment of the merits of the Referral

88. The Court recalls once more that the Applicant challenges the constitutionality of certain provisions of the challenged Law, namely Articles 2, 3 (paragraph 1,

subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3), claiming they are not in compliance with Article 132 [Role and Competencies of the Ombudsperson] and Chapter VI [Government of the Republic of Kosovo] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

89. In this regard, he alleges that the challenged provisions:

(i) *Vest the Board with the competence to supervise not only the institutions of the Government but also other institutions, exceeding the narrow scope of the Board, established in Chapter VI (Government of the Republic of Kosovo) of the Constitution";*

(ii) *Vest the Board with the power to issue instructions and to interfere in the Ombudsperson Institution, constituting a violation of the constitutional independence of the Ombudsperson"; and*

(iii) *Provisions of the challenged Law immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of the Board functions.*

(i) As to the allegation of exceeding the narrow scope of the Board, defined in Chapter VI (Government of the Republic of Kosovo) of the Constitution;

90. The Court recalls that the Applicant alleges that the Constitution does not expressly define the term "Civil Service", nor does it stipulate that employees of which institutions are considered part of that civil service. In addition, the Applicant alleges that the fact that Article 101 is included within Chapter VI [Government of the Republic of Kosovo] clearly shows that at the constitutional level the civil service are considered the Government employees themselves.

91. Therefore, the Court notes that the Applicant alleges that the scope of the challenged Law, as defined by Article 2 of the Law in question , violates Article 101 [Civil Service] of the Constitution.

92. With regard to this, the Court again refers to Article 2 of the challenged Law, which defines:

"The scope of this law includes Board and all institutions of the public administration employing Civil Servants".

93. The Court also refers to the provisions of Article 101 [Civil Service] of the Constitution, which establish:

"1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.

2. An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo".

94. First of all, the Court wants to clarify that the interpretation of constitutional norms should not be understood as creating a new norm, but as a reading and a fair interpretation of existing norms, when they create ambiguity in terms of their content and purpose.

95. The Court recalls that Article 101 [Civil Service] of the Constitution, with which the Applicant alleges that Article 2 of the challenged Law is in contradiction, is mentioned at the end of Chapter VI of the Constitution.

96. In this regard, the Court notes that Chapter VI regulates the following issues: 1) composition, competencies, election, responsibilities, immunity of the members of Government, procedures, and motion of no confidence of the Government, 2) the competencies of the Prime Minister, 3) establishment , the number of ministries and the representation of communities within them. At the end of this chapter, the legislator with the provisions of Article 101 of the Constitution mentions the term "Civil Service". This Article of the Constitution in paragraph 1 defines: 1) the composition (diversity) of the civil service at the level of the Republic of Kosovo, and 2) the establishment of an independent institution that oversees the observance of the norms and principles of the civil service. These two provisions within the meaning of Article 101 of the Constitution are in chain interdependence, yet not in chain interdependence with the other articles of Chapter VI of the Constitution.

97. By reading this article in context, namely by its content and purpose, we come to the conclusion that we are dealing with a constitutional norm which requires that the matter (civil service) be regulated more specifically by special acts.

98. In this respect, the right to issue a special law for the regulation of civil service in the Republic of Kosovo derives from paragraph 1 of Article 101 of the Constitution, whereas the right to issue a special law on the Board derives from paragraph 2, of Article 101 of the Constitution.

99. From the foregoing, paragraph 2 of Article 101 is closely related and is a derivative of paragraph 1, which specifically requires that the application of legal norms governing the civil service will be overseen by an "independent oversight board". Therefore, in this connection, the Court notes that the scope of the Board is limited and closely linked to the basic law, namely the special law governing the civil service.

100. In this respect, the Court refers to the relevant provisions of the Law on Civil Service, which establish as follows:

Article 1
Purpose and Scope

"1. This law regulates the status of Civil Servants and the terms and conditions of their employment relationship with the institutions of the central and municipal administrations.

2. For the purposes of this law, the institutions of the central and municipal administrations that are subject to this law include: the administration of Assembly, the administration of the Office of the President, the Office of the Prime Minister and ministries, executive agencies, independent and regulatory agencies and municipal administrations.
[...]
4. The institutions of the public administration that regulated by special law shall be subject to the provisions of this law, except in cases where the special law contains provisions that are different from this law.

Article 2
Definitions

1. Terms used in this law have the following meaning:
1.1. Civil service – the entire body of employed administrative personnel, in institutions of central and municipal administration foreseen by this law, which apply policies and ensure respectability of certain rules and procedures.
[...]

Article 3
The Civil Service of the Republic of Kosovo

[...]
7. During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected".
[...]

101. According to the abovementioned provisions, the purpose of this law is to regulate the status and employment of employees in the central and local administration institutions. Further, the legislator in paragraph 2 of Article 1 stipulates that the central administration includes the administration of the Assembly, the administration of Presidency, the Office of the Prime Minister and ministries, executive agencies, independent and regulatory agencies, as well as the municipal administration.

102. However, the legislator with paragraph 4 of Article 1 also foresees limitations on the scope and application of provisions of the LSC, stating that central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on Civil Service. Moreover, as outlined above, the lawmaker in the drafting of the law has also considered the constitutional independence of the independent institutions, and by Article 3, paragraph 7 of the Law on Civil Service has determined that during the implementation of this law the constitutional independence of independent institutions from the executive should be respected.

103. The Court also notes that the legislator in Article 2 [Definitions] of the Law on Civil Service clarifies the definitions used in the law. Always under this article the term "Civil Service" refers to employees in the central and municipal

administration level, and not only to civil servants of the administration of the Government, namely ministries, as the Applicant claims.

104. Therefore, in the light of all the foregoing considerations, the Court considers that the expression "Civil Service" as read and interpreted by Article 101 of the Constitution must be understood in its context and the purpose of the drawer. This purpose is expressed in Article 1 of the Law on Civil Service, together with the limitations of the scope provided for in paragraph 4 of Article 1 of the LCS, stipulating that the central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on the Civil Service, thus avoiding the possibility of misinterpretations or technical interpretations of the norm in question.

105. For these reasons, the Court finds that Article 2 of the challenged Law does not limit and does not affect the essence of Article 101 [Civil Service] of the Constitution. Therefore, the Court considers that Article 2 of the challenged Law is in compliance with Article 101 [Civil Service], paragraphs 1 and 2 of the Constitution.

(ii) Regarding the allegation of violation of the constitutional independence of the Ombudsperson and other independent constitutional institutions

106. With respect to independent constitutional institutions, the Court refers to independent institutions explicitly listed in Chapter XII [Independent Institutions], namely Articles: 132-135 [Role and Competencies of the Ombudsperson], 136-138 [Auditor General of Kosovo], 139 [Central Election Commission], 140 [Central Bank of Kosovo] and 141 [Independent Media Commission], as well as regarding the Constitutional Court as defined in Chapter VIII [Constitutional Court] of the Constitution.

107. The Court recalls that in relation to the constitutional independence of the Ombudsperson and other independent institutions, the Applicant essentially alleges that:

> *a)* The challenged Law, conferring competence on the Board, *inter alia*, for overseeing the selection and appointment of staff of independent constitutional institutions, to decide on complaints related to violations of civil service legislation, namely by issuing binding decisions and recommendations for implementation of civil service legislation for the Ombudsperson; and
>
> *b)* Applying in the same/uniform manner the provisions of the Law, regarding the Applicant's staff and other independent institutions on one hand, and other institutions employing civil servants, on the other, violates the organizational independence of the Applicant in violation of Article 132, paragraph 2 of the Constitution and the independence of other independent constitutional institutions.

108. Accordingly, the Applicant challenges the competencies of the Board foreseen by the challenged Law on overseeing the implementation of civil service legislation and to issue binding decisions regarding the implementation of civil service legislation towards independent constitutional institutions, without taking into account the internal rules of the civil service issued based on the Constitution and specific laws. The Applicant alleges that civil service legislation cannot be applied to the independent constitutional institutions, in particular the Ombudsperson, as well as to civil servants of other institutions, as this violates the independence of the independent constitutional institutions guaranteed by the Constitution and special laws.

109. With respect to the foregoing, the Court first notes that the Board, by the challenged Law, is a body established by Article 101, paragraph 2 of the Constitution, and is specifically mandated to *"ensure the respect of the rules and principles governing the civil service [...]"*.

110. As regards the legal status of the Board, the Court recalls its case-law in which it held that the Board is an independent institution established by the law, in compliance with the Constitution, namely by Article 101 (2) of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction of this institution, produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. The decision of this institution presents final administrative decision, and as such should be enforced by the competent court as proposed for enforcement by a creditor in terms of realization of the right earned in administrative procedure (see cases of the Constitutional Court, KI33/16, Applicant *Minire Zeka*, Judgment of 6 July 2017, par. 56; KI50/12, Applicant *Agush Llolluni*, Judgment of 9 July 2012, par. 36; and KI129/11, Applicant *Viktor Marku*, Judgment of 11 July 2012, para. 42).

111. The Court notes that the challenged law in detail specifies, apart from the competence of the Board to receive complaints from dissatisfied parties with the implementation of civil service legislation by state authorities, the competence to oversee the selection of senior management officers and of the management level. This Law does not distinguish between the personnel of the independent constitutional institutions set out in Chapter VIII and XII of the Constitution and other state administration institutions.

112. The Court also notes that Article 19 of the challenged Law increased the oversight of the selection of civil servants for senior management positions, while the abrogated Law had established or regulated that one (1) member of the Board *"will participate as an observer"* in the procedure of selection or promotion of the candidates for the position of the management level.

113. The Court notes that in the challenged Law, namely Article 19, paragraphs 5, 6, 7 and 8, unlike the repealed Law, is provided that after the conclusion of the oversight procedure and submission of the report by the member of the Board, who supervised the selection procedure, the Board issues a decision, which according to paragraph 8 of this challenged article is considered as *"a final decision in the administrative procedure and against this decision the parties*

in the procedure can initiate an administrative conflict". While in the previous (repealed) Law, the Board regarding the selection procedure for civil servants in management level positions after submitting the report by the Board member in the capacity of the observer, the Board had the power to issue a recommendation only if "*decisions of appointment committees are taken pursuant to rules and principles set out in Law on Civil Service in the Republic of Kosovo*".

114. Based on the foregoing, the Court notes that the Board, with regard to the selection procedure for senior management and management level, has the power to simultaneously oversee the selection procedure and finally issue a decision, which is final and binding decision in relation to the regularity of the selection procedure, whether or not a complaint is filed in respect of that procedure.

115. In fact, the Court notes that the Board considers that, having regard to the challenged Law and the provisions of the Law on the Ombudsperson, the Board has a full mandate to exercise the constitutional and legal functions towards civil servants employed in the Institution of the Ombudsperson, namely to oversee the respect of the civil service legislation regarding the employment relationship of civil servants of the Ombudsperson and this does not affect the exercise of the constitutional and legal competencies of the Ombudsperson. Thus, according to the Board, the Ombudsperson staff are civil servants and civil service norms are also applicable to them, as well as for other state administration institutions.

116. The Court notes that the challenged Law does not provide for an exception to the Board's scope regarding the exercise of its powers referred to above, towards the independent constitutional institutions nor towards the application of the rules of civil service legislation to the independent constitutional institutions. Consequently, the challenged law does not foresee that in the exercise of its competencies, special laws of independent institutions and their internal rules will be considered.

General principles concerning the independence of independent constitutional institutions established in Chapter VIII and XII of the Constitution

117. The Court notes that the Applicant challenges the challenged Law also in relation to other independent institutions, including among others the Constitutional Court and the independent institutions included in Chapter XII of the Constitution. The Court notes that in this regard, the Applicant mentions only its independence guaranteed by Article 132 of the Constitution. However, the Court reiterates that it is master of the characterization to be given in law to the facts of the case *vis-à-vis* constitutional norms, and it does not consider itself bound by the characterization given by an applicant (see, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, par. 44).

118. The Court also recalls that in case KO73/16, Applicant, *the Ombudsperson*, Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016, Judgment of 16 November 2016 (hereinafter: Judgment KO73/16), the subject matter was precisely the independence of the independent constitutional institutions, in particular, the independence of the Applicant and the Court.

119. In the abovementioned judgment, the Court stated that *"the Constitution is based on the principle of separation of powers. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of separation of powers and the checks and balances among them, The separation of powers is one of the bases that guarantees the democratic functioning of a State. In addition to the three branches of government referred to above, the Constitution guarantees a special status to the Office of the Ombudsperson and to the other independent institutions enumerated in Chapter XII of the Constitution. The Constitution also safeguards a special status to the Constitutional Court as the final guarantor and interpreter of the Constitution. The Applicant and the Constitutional Court are not part of the legislative, executive and the regular judiciary. The same applies for the other independent institutions enumerated in Chapter XII of the Constitution"* (see, *mutatis mutandis*, Judgment KO73/16, par. 63, 64, 65. See also Judgment in case KO98/11 of 20 September 2011, Applicant *the Government of Kosovo*, regarding the immunity of Members of the Assembly of the Republic of Kosovo, President Republic of Kosovo and members of the Government of the Republic of Kosovo, par. 44).

120. In this respect, the Court recalls Article 132. 2 of the Constitution, which provides that *"The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo"* and Article 133 [Office of Ombudsperson], which establishes that *"The Office of the Ombudsperson shall be an independent office and shall propose and administer its budget in a manner provided by law"*.

121. The Court also refers to Law No. 05/L-019 on the Ombudsperson, namely Article 3 [Basic Principles of the Ombudsperson's Activity], paragraph 2, which states that *"The institution of the Ombudsperson enjoys organizational, administrative and financial independence in the implementation of tasks set forth by the Constitution of the Republic of Kosovo and the Law"*, as well as Article 32 [Personnel], paragraph 2, which establishes that: *"The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extend that there is no infringement of constitutional independence of the Institution"*.

122. The court also recalls that under Article 37 [Regulations of the Institution] of the Law on Ombudsperson, *"The Ombudsperson issues the Rules of Procedure, Regulation for internal organization and systematization of job positions, decision making processes and other organizational issues in accordance with the Law"*.

123. The Court in Judgment KO73/16, noted that *"The Court notes that the Office of Ombudsperson is an independent institution which was created to ensure accountability from the public authorities vis-a.-vis the rights and freedoms of individuals. In fulfilling this role, the Institution independently exercises its mandate without accepting any instructions or intrusions from any other state authority. Additionally, the Constitution places an obligation on the organs of state through legislative and other means to ensure the independence, impartiality, dignity and effectiveness of the Office of the Ombudsperson and the other independent institutions"* (See Judgment KO73/16, par. 68 and 69).

124. In addition, the Court emphasized that all institutions are obliged by the Constitution to respect the independence of the Office of Ombudsperson. The Court also emphasized that the Ombudsperson is obliged to ensure its independence by issuing regulations, orders or other legal acts in such a manner that they do not curtail its functional, organizational and financial independence. (See, *mutatis mutandis*, Judgment KO73/16, par. 69).

125. The Court, in the abovementioned judgment, regarding the Constitutional Court, referred to Article 112, paragraph 2 of the Constitution [General Principles] where it is foreseen that *"The Constitutional Court is fully independent in the performance of its responsibilities"*, and Article 115 [Organization of the Constitutional Court] specifying that *"The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law"* (see Judgment KO73/16).

126. In addition, The Law on the Constitutional Court provides in Article 14 [Budget] that *"Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo [...] The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly of for adoption"*. This Article also specifies that, *"The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo* (see Judgment KO73/16, paragraph 90).

127. Article 12, paragraph 5 of the Law on Constitutional Court also stipulates that legal provisions on civil servants shall apply to employees of the Secretariat. In addition, Rule 20 [Staffing of the Secretariat], paragraph 4 of the Rules of Procedure of the Court provides that*"The legal provisions foreseen for civil servants, as referred by Article 12 of the Law shall be applied to the constitutional administrative staff only to the extent that such legal provisions do not impact on the independence of the Court as guaranteed in Article 112.2 of the Constitution and Article 2 of the Law*".

128. Similarly to the Applicant, as to the Constitutional Court, in its Judgment KO73/16, the Court found that the mandate to issue its own rules of procedure was established within the exclusive competence of the Court, reasoning also the purpose of this the definition as follows:*"[Evidently the authors of the*

Constitution aimed at securing the independence and efficiency of the Constitutional Court by enabling the Court itself to create its own rules of procedure and thereby prevent any interference with the exercise of its assigned responsibilities. This also shows and confirms that the Court has a special position and authority according to the Constitution and within the system of the state institutions. Accordingly the independence of the Court requires it to be governed by specific rules, moreover, of constitutional values, and obliges the Government and its branches to respect them" (See Judgment KO73/16, par.79 and 80).

129. The Court also emphasized that it should be able to decide for itself on its internal organization and to achieve efficient functioning. It is up to the Assembly to determine and approve the budget of the institutions of the Republic of Kosovo, but in accordance with the Constitution. The Constitution obliges the lawmaker and the executive to not violate the independence of the Court (See, for example, *Decision on the admissibility and merits of the Constitutional Court of Bosnia and Herzegovina* in case No. U. 6/06 of 29 March 2008).

130. This special status of the Applicant and of the independent constitutional institutions set forth in Chapter VIII and XII of the Constitution is further reflected in Law No. 03/L-149 on Civil Service of the Republic of Kosovo, namely, paragraph 4 of Article 1 [Purpose and Scope] that stipulates that *"The institutions of the public administration that regulated by special law shall be subject to the provisions of this law [Law on Civil Service], except in cases where the special law contains provisions that are different from this law"* and Article 3 [The Civil Service of the Republic of Kosovo] which establishes that *"[During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected".*

131. The Court also notes that in its Judgment KO73/16, in which it assessed the Government Circular on classification of positions in the civil service, it stated that *"the implementation of laws and state policies is one of the constitutional duties of the Government. However, the Government is to take into account the special status of the Ombudsperson, the Court and the other independent institutions in accordance with the constitutional guarantee of their independence as outlined above. Accordingly the preparation, the content and the applicability of any norms related to their functioning and internal job descriptions and remuneration has to be adequately and appropriately developed and determined. The Government cannot suffice by applying identical criteria to those applied to the governmental agencies to be applied in the same manner to the independent institutions defined in the Constitution"* (Shih, *mutatis mutandis*, Judgment KO73/16, par. 69).

132. The Court in case KO73/16, as to the independence of the constitutional institutions, the Constitutional Court of Albania in Decision (V-19-07) in Case. No. 43/13 of 3 May 2007 reasoned:

> *"The notion of independence does not and cannot have the same substance or meaning in reference to all constitutional organs and institutions, That notion varies depending on th e nature of the organ and its constitutional*

duties and junction, However', generally speaking, it must be emphasized that their' independence as guaranteed by the Constitution and the respective organic laws, has as its component or inherent element organizational, functional and financial independence, Beside questions of election, appointment or dismissal o manager's and other high officials of constitutional organs and institutions, among other's, the organizational independence is also valid with regard to their' entitlement to draft and appoint, in compliance with certain criteria, their structure and organogram, including the right to appoint directors and advisors, the quantity and the set up of officials of supporting cabinets, appointment of officials of lower positions, recruitment of personnel of different levels, etc, The functional independence of the constitutional organs and institutions is closely knit with the substance of the work that they discharge, which is directly regulated for and has its foundations in the respective constitutional provisions [...] no other organ or' institution, whether it a part of one of the three branches of the government, cannot interfere in treatment and solving of questions, as the case may be, would make up the central object of the work of other constitutional organs and institutions ... while, on the other hand, the constitutional provisions and organic laws patently establish that management of the budget in accordance with the law should be left at the hand of these organs themselves. Surely, they know and assess their requests and problems, needs for investment, objectives that they want to reach, etc better than anyone else" (see Decision (V-19-07) in case no. 43/13, of 3 May 2007, of the Constitutional Court of Albania).

133. Therefore, as regards the status of the personnel of the independent constitutional institutions, in particular the Applicant and the Constitutional Court, as it established from the Constitution and the special laws, the Court notes that:

a) the provisions of relevant legislation, including civil service legislation, do not specifically refer to the staff of independent constitutional institutions as civil servants, but foresee the application of the civil service legislation;

b) civil service legislation, including the challenged Law, applies to the staff of these independent constitutional institutions only to the extent that they do not violate their independence;

c) The Constitution and the special laws authorize and oblige the independent institutions, in particular the Applicant and the Court, to issue regulations, orders and other legal acts to regulate the specifics related to the employment relationship of their staff, which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence, but only to the extent necessary to ensure their independence as provided for by the Constitution and special laws.

d) the regulations and other legal acts of the independent constitutional institutions that regulate the specifics related to the employment

relationships of the staff of independent institutions deriving from the Constitution and the special laws must be respected by all institutions including the executive and other institutions , such as the Board, and have priority over other laws.

134. On the other hand, the Court emphasized that the independent institutions, including the Applicant, cannot act in vacuum in relation to the legal framework. The Court considers that the independence of the Applicant and the Court is also subject to some limitations and control. These are included in Article 14.3 of the Law on the Constitutional Court that provides: *"The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo". In a similar way, Article 35-4 of the Law on Ombudsperson Institution provides: "The Ombudsperson Institution independently manages with its own budget and is subject to internal and external audit by the Auditor General of the Republic Kosovo"* (see Judgment KO73/16, par. 90).

135. In addition, the Court notes that according to Article 137 of the Constitution [Competencies of the Auditor-General of Kosovo], the Auditor General of the Republic of Kosovo is the only authority established by the Constitution that can audit the economic activity of the Applicant and the Court, as well as of all other public institutions in the Republic of Kosovo (see Judgment KO73/16, par. 91).

136. The Court further recalls that in accordance with Article 32 [Right to Legal Remedies] of the Constitution, *"every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."*.

137. Therefore, even the constitutional independent institutions cannot be exempted from the obligation that in the regulations and other legal acts regulate the specifics regarding the employment relationship of their staff, to ensure that the right to use remedies is not violated to anyone against their administrative decisions, as guaranteed by Article 32 of the Constitution.

Constitutional review of the provisions of the challenged Law with respect to independent constitutional institutions and other public institutions

138. The Court initially notes that the challenged Law does not provide for an exception to the scope of the Board in Article 2 [Scope] or any other provision thereof with regard to the independent constitutional institutions included in Chapter VIII and XII of the Constitution, special laws and the Law on Civil Service.

139. However, assessing the constitutionality of Article 2 of the challenged Law, where it explained that the expression "Civil Service" as read and interpreted by Article 101 of the Constitution must be understood in its context and the purpose of the drawer, a purpose which is expressed in Article 1 of the Law on Civil Service, together with the limitations of the scope provided for in

paragraph 4 of Article 1 of the LCS, stipulating that the central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on the Civil Service, thus avoiding the possibility of misinterpretations or technical interpretations of the norm in question.

140. Furthermore, the Board, in accordance with Article 4 of the challenged Law, (and as interpreted by the Board itself in its response addressed to the Court), carries out its functions, based solely on the implementation of civil service legislation but not on the internal rules of independent constitutional institutions, issued based on the Constitution and special laws, and considers the employees of independent institutions as civil servants with automation.

141. The Court recalls that the competencies of the Board include, *inter alia*:
- reviewing and taking binding and final decisions on complaints of civil servants (Article 6 (1.1), Article 18);
- supervising the selection procedure, of management level and senior management level of civil servants, without any complaint from interested parties (Article 6 (1.2), Article 19) by issuing a binding decision regarding them; and
- regular annual and extraordinary monitoring of public administration institutions employing civil servants (Article 6 (1.3) and Article 20) and issuing binding recommendations in relation to them;

142. The Court further notes that the Board is entitled, under Article 24 of the challenged Law, to impose sanctions for non-implementation of Board's decisions and recommendations and, according to Articles 7 and 25 of the challenged Law, to request all institutions to cooperate with the Board, access to each file and document regarding the implementation of the rules and principles of civil legislation, interviewing any civil servant and other information.

143. The Court considers that the challenged Law foresees a uniform approach to assess the implementation of civil service laws to all public institutions including independent constitutional institutions.

144. The Court recalls once again that according to the Constitution and the special laws on the staff of independent constitutional institutions, the rules of civil service apply unless they do not violate their independence. This also means the laws that regulate the oversight of the implementation of these laws such as the challenged Law. However, as it derives from the Constitution and the special laws, the independent institutions, in particular, the Applicant and the Court, are authorized to issue regulations, orders and other legal acts to regulate the specifics regarding the employment relationship of staff which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence. These special norms should be respected by all institutions including the Board.

145. Therefore, the Court considers that, in the implementation of the challenged law, the functions and the specific authority of the independent constitutional institutions is to be recognized, *inter alia*, in the issuance and application of their internal rules to protect their independence as established in the Constitution and special laws, to the extent necessary to protect their organizational, functional and budgetary independence, as required by the principles outlined above, including the internal rules of these institutions and the specifics of the work of their staff.

146. The Court therefore concludes that the competencies of the Board envisaged by the challenged Law apply to the independent constitutional institutions, as long as this does not affect their independence guaranteed by the Constitution, and that this independence is reflected in the issuance of internal acts of these institutions, based on their competences foreseen by the Constitution and special laws, to protect their independence.

147. In addition, the Court considers that the issues raised by the Applicant regarding the challenged provisions extend to other public institutions that have employed civil servants, in addition to the independent institutions.

148. In this regard, the Court reiterates once more that it is master of the characterization to be given in law to the facts of the case *vis-à-vis* constitutional norms, and that it does not consider itself bound by the characterization given by an applicant (See, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, para. 44).

149. Therefore, the Court will further assess with individual assessment of the constitutionality of the challenged articles of the Law, regarding their application in all public institutions, other than Articles 2 and 11 (paragraph 3) which are separately treated as part of the Applicant's specific claims.

Constitutionality of Article 3 (paragraphs 2, 3 and 4) of the challenged Law

150. The Court refers again to Article 3 (paragraphs 2, 3 and 4) of the challenged Law, which provides that:

"Article 3
Definitions

1. Terms used in this law shall have the following meaning:
[...]
1.2. Civil Servant- the civil servant as defined in the Law on Civil Service;
1.3. Senior Civil Servant of the management level – the civil servants of the senior management level as defined by the Law on Civil Service;
1.4. Civil Servants of the management level - the civil servants of the management level as defined by the Law on Civil Service;

[...]".

151. The Court notes that the definitions laid down by the abovementioned provisions are the same as the definitions laid down in the Law on Civil Service.

152. Therefore, the Court finds that Article 3, paragraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Accordingly, these provisions are in compliance with the Constitution.

Constitutional review of Article 4 (paragraph 1) of the challenged Law in conjunction with Articles 3 (paragraph 1.1) of the challenged Law

153. The Court recalls Article 3 (paragraph 1.1) and Article 4 (paragraph 1) of the challenged Law, which provides that:

"Article 3
Definitions

1. Terms used in this law shall have the following meaning:
1.1 Independent Oversight Board of Civil Service of Kosovo- the independent
constitutional institution which ensures the compliance with the rules and principles governing the civil service;
[...]

Article 4
Independent Oversight Board of the Civil Service of Kosovo

1. The Board is an autonomous constitutional body that ensures the compliance with the rules and principles governing the civil service.
[...]"

154. The Court notes that the Applicant challenges Article 4, paragraph 1 of the challenged Law, which is directly related to Article 3, paragraph 1.1, where, according to the abovementioned provisions, the Board has been given the status of an independent constitutional institution. Therefore, the Court will deal with the constitutional review of Article 4, paragraph 1 in conjunction with Article 3, paragraph 1.1 of the challenged Law.

155. In this regard, the Court recalls that the Constitution explicitly defined in its Chapter XII, the independent constitutional institutions, defining their role and their status.

156. The Court also notes that in Chapter XII, Article 142 of the Constitution, has established the legal basis for the establishment of independent agencies, determining that:

"Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent

agencies exercise their functions independently from any other body or authority in the Republic of Kosovo".

157. The Court notes that the independent agencies established under Article 142 of the Constitution do not have the same status as that of the independent constitutional institutions expressly mentioned in Chapter XII of the Constitution. This is because the establishment, role and status of the independent constitutional institutions is expressly regulated by Chapter XII of the Constitution, due to the importance and the specifics of the constitutional powers they exercise. However the role, status and competencies of independent agencies are regulated by law approved by Assembly based on the criteria set forth in Article 142 of the Constitution.

158. Chapter XII of the Constitution does not authorize the Assembly of Kosovo to establish by law other independent constitutional institutions with the same status of independent institutions included in Chapter XII, but only independent agencies giving the powers established in Article 142 of the Constitution.

159. Therefore, the Court considers that the Board cannot be categorized as an independent institution under the Chapter XII of the Constitution.

160. For these reasons, the Court finds that Article 4, paragraph 1, in conjunction with Article 3.1, subparagraph 1.1 of the challenged Law, is not in accordance with Chapter XII of the Constitution. Accordingly, these provisions are not in compliance with the Constitution.

Constitutional review of Article 6 of the challenged Law

161. The Court recalls Article 6 of the challenged Law, which establishes:

"Article 6
Functions of the Board

1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:
1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service;
1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation;
1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation".

162. The Court recalls that the competencies of the Board under Article 6 include:
- reviewing and taking binding and final decisions on complaints of civil servants;

- supervising the selection procedure, of management level and senior management level of civil servants, without any complaint from interested parties by issuing a binding decision regarding them; and
- regular annual and extraordinary monitoring of public administration institutions employing civil servants.

163. In this regard, the Court recalls once more that in Case KI33/16 it stated that the Board enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution and Article 6 of the ECHR and that a "tribunal" is categorized in the substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]", stating that the decisions of the Board are "final, binding and enforceable" and that the Board, from the point of view of Article 31 of the Constitution and Article 6 of the ECHR, is independent as (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59. Regarding the independence of an "independent tribunal" see case KO12/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017 par. 75).

164. The Court recalls that the applicability of Article 31 of the Constitution and Article 6, paragraph 1 of ECHR, depends on the existence of a "dispute". According to this concept, the dispute must be genuine and serious and be related not only to the actual existence of the right, but also to the scope and manner of exercising that right (see ECtHR case, *Denisov v. Ukraine*, No. 76639/11, Judgment of 25 September 2018, para 44).

165. In this respect, the Court notes that the Board is regarded as a "*quasi-judicial*" institution, namely as a tribunal regarding the civil service (the name "tribunal" is widely used in the ECtHR discourse). As such it enjoys the prerogatives of a court precisely because of the independence of the executive, and as an institution having full jurisdiction and issuing binding decisions in relation to the dispute between civil servants or civil servants or the candidates on one hand, and institutions employing civil servants on the other.

166. Therefore, delegating competences to the Board for certain positions to decide on the selection of civil servants, becoming part of the decision-making without taking into account whether there is a dispute or not in relation to a particular position, and in the end of this process to issue a binding decision on the legality of the selection, contradicts its role as a "*quasi-judicial*" institution that has the prerogatives of a "*tribunal*", independent of the executive, which decides on the complaints of the authorized parties, as it is already defined in the case law of the Constitutional Court.

167. The Court considers that the primary function of the Independent Oversight Board is the resolution of disputes arising between civil servants or candidates for civil servants on one hand and institutions employing civil servants on the other. Taking over the executive functions by the Independent Oversight Board in the selection procedure of candidates is directly in contradiction with its

"quasi-judicial" role, which is the primary function of the Independent Oversight Board.

168. The Court also notes that, with regard to the review of civil servants' complaints and regular annual monitoring, the Board has the competence in relation to all civil servants without exception. Whereas, with regard to overseeing the selection procedure for civil servants, the competencies of the Board are limited only to management level and senior management level positions. This competence of the Board does not include oversight of the selection procedure in relation to the rest of the civil servants, resulting in different treatment of civil servants in relation to the competencies of the Board.

169. In this regard, the Court refers to Article 24 of the Constitution, which establishes that all are equal before the law and that all enjoy the right to equal legal protection.

170. 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, par. 56, *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, par. 61).

171. 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).

172. 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).

173. Therefore, the Court will specifically assess whether Article 6, paragraph 1.2 of the challenged Law is in compliance with the rights to equality before the law under Article 24 of the Constitution.

a. Unequal treatment

174. The Court first determines whether there is a difference in the treatment of civil servants in analogous situations or in similar relevant situations.

175. The Court notes that, under paragraph 1.2 of Article 6 of the challenged Law, the Board oversees the selection of civil servants of the management level and senior management level, and issues a binding decision on the legality of their selection, which is the final decision in the administrative procedure. The dissatisfied parties then have the opportunity to challenge this decision through the opening of the administrative conflict. While, with regard to the rest of civil servants, such monitoring is not foreseen, but it is allowed the possibility of a complaint to the Board for dissatisfied parties, and then the parties dissatisfied with the Board decisions have the right to initiate the administrative conflict.

176. The Court notes that from what was said above, it follows that the civil servants of the management level and senior management level have the oversight of the Board for their selection which issue binding decisions, but to other civil servants, this obligation is not foreseen but only the possibility of appeal to the Board.

177. The Court considers that the two categories, both management level and senior management level civil servants, on one hand, and other civil servants on the other, are in an analogous situation or in a relatively similar situation: namely they are all civil servants. However, due to their level of position, they are in a different substantive situation regarding the selection process.

178. Therefore, the Court considers that the difference in the manner of their selection and the role of the Board in their selection was made depending on their position in the civil service. As a result, the Court concludes that there is a difference in the treatment of civil servants who are in an analogous situation or in a similar relevant situation, which constitutes a limitation on the right to be selected in the civil service.

b. Legitimate and proportionate

179. The Court recalls what was said above that unequal treatment is not in compliance with Article 24 of the Constitution if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means used and the aim sought to be realized.

180. In this connection, the Court will analyze whether,:

(1) The limitation is foreseen by law;
(2) There is a legitimate aim that to be realized by limitation; and
(3) There is a relationship of proportionality between the limitation of the right and aim sought to be achieved

181. Regarding the criterion (1), the Court notes that the competence of the Board for supervision of selection of civil servants of the management level and senior management level is foreseen by Article 6, paragraph 1.2 of the challenged Law adopted by the Assembly, which is the state institution which the Constitution has vested with the exercise of legislative power. The Court concludes that the limitation of the right to equality before the law is foreseen by law.

182. With respect to the criterion (2), the Court notes that Article 1 of the challenged Law establishes that the purpose of issuing this law is to determine the functions, competences and organization of the Board.

183. However, the Court notes that from the provisions of the challenged Law, it cannot be determined which was the purpose of the provision by which the supervisory role of the Board was defined solely for the management level and senior management level positions, and not for other categories of civil service.

184. Therefore, the Court concludes that there is no legitimate aim sought to be achieved with the different treatment of candidates/civil servants.

185. The Court refers to its case law (see Judgment in cases KO01/17 and KO157/18) when it found that the inexistence of a legitimate aim, of unequal treatment rendered unnecessary the analysis of proportionality between the means employed and the aim sought to be achieved.

186. Accordingly, the Court considers that the unequal treatment of civil servants in relation to the competence of the Board for overseeing the selection of civil servants, as defined by Article 6, paragraph 1.2 of the challenged Law, is not in compliance with Article 24 [Equality Before the Law] of the Constitution.

Constitutionality of Article 7 (paragraph 1, subparagraphs 2, 3 and 4) of the challenged Law

187. The Court recalls Article 7 (paragraph 1, subparagraphs 2, 3 and 4) of the challenged Law, which provides that:

"Article 7
Powers of the Board

1. For the purpose of exercising its functions, the Board has the right to:
[...]
1.2. obtain access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation;
1.3. interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions;
1.4. requires and obtains from institutions any information necessary for the performance of its duties;
[...]"

188. In this regard, having in mind what was said in relation to the powers of the Board to decide on the selection of a category of civil servants, the Court emphasizes that the competencies of the Board provided for in this article,

relate only to the functions of the Board with respect of the assessment of complaints and its monitoring role for the implementation of the principles and rules of civil service legislation.

189. Therefore, the Court finds that Article 7, paragraph 1, subparagraphs 2, 3 and 4 of the challenged Law do not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 18 of the challenged Law

190. The Court recalls Article 18 of the challenged Law, which provides that:

"Article 18
Deciding on complaints

1. College of the Board which reviews complaints, decides in the following way:
1.1. leaves the administrative act in force and rejects the complaint;
1.2. repeals or annuls the administrative act and approves the complaint;
1.3. changes the administrative act by partially approving the complaint;
1.4. obliges the competent administrative body to issue an administrative act when its issuance was unrightfully rejected;
1.5. ends the administrative proceeding;
1.6. returns for review;
1.7. dismisses the complaint;
1.8. declares not competent;
1.9. suspends the proceedings.
2. Colleges of the Board reviewing the complaints, based on paragraph 1., sub-paragraph 1.3. of this Article, have the right to change the disciplinary measures in cases when it is confirmed that the civil servant has made a breach, but the employing authority has not set the disciplinary measure corresponding to the breach.

191. In this respect, the abovementioned competences relate only to the functions of the Board in relation to complaints when there is a "*dispute*".. Also, given what was explained above, that the Council enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution, the Board, in addition to independence from the executive, should have this "*full jurisdiction*" to decide on what is before it, that include the power to quash in all respects, on questions of fact and law, the decisions of the body issuing that decision or that is required to issue such decision. (See *Schmautzer v Austria*, cited above, paragraph 36; *Gradinger v Austria*, cited above, paragraph 44; and *Terra Woningen B. V. v. The Netherlands*, cited above, paragraph 52).

192. The competences listed in Article 18 of the challenged Law also serve this purpose. Therefore, the Court finds that Article 18 of the challenged Law does not limit the essence of any specific provision of the Constitution. Accordingly, these provisions are in accordance with the Constitution.

Constitutionality of Article 19 (paragraphs 5, 6, 7 and 8) of the challenged Law

193. The Court recalls that Article 19 (paragraphs 5, 6, 7 and 8) of the challenged Law, establish that:

Article 19
Oversight procedure for the selection of senior management and management level Civil Servants

[...]

5. After reviewing the report, the Board issues a decision and decides to:

5.1. approve the election procedure, when determined it was developed in accordance with rules and principles of the legislation on Civil Service;

5.2. to annul the election procedure, when it determines that it was developed in violation of the rules and principles of legislation for Civil Service.

6. The Board is obliged to issue a decision for the procedure of election of senior management and management level Civil Servants, within the thirty (30) days deadline from receiving the complete file from the employing authority.

7. If the development of the procedure for election of senior management and management
level Civil Servants, is done without notifying the Board for participating in the oversight, the procedure is considered invalid and according to its official duty the Board issues a decision for annulment of the procedure.

8. The decision of the Board about the procedure for election of senior management and
management level Civil Servants, is a final decision in the administrative procedure and against this decision the parties in the procedure can initiate an administrative conflict, in accordance with the provisions of the law on administrative conflict".

194. In this regard, having in mind that Article 6, paragraph 1.2 of the challenged Law, which provides for the competence of the Board to decide by a binding decision without any complaint and without a "dispute" with regard to the legality of the supervision of civil servants of the senior management level and management level, was declared by the Court to be in contradiction with its "quasi-judicial" role, which is the primary function of the Independent Oversight Board, and that the latter is not in compliance with Article 24 [Equality Before the Law] of the Constitution.

195. Therefore, the Court finds that Article 19, paragraphs 5, 6, 7 and 8 of the challenged Law, as they govern the issue of binding decision regarding the selection of a category of civil servants, are also not compatible with Article 24

[Equality Before the Law] of the Constitution. Therefore, these provisions are not in compliance with the Constitution.

Constitutional review of Article 20 (paragraph 5) of the challenged Law

196. The Court recalls that Article 20 (paragraph 5) of the challenged Law provides that::

"Article 20
Monitoring of public administration institutions regarding the implementation of rules and principles of the legislation for Civil Service

[...]

5. Relevant institution of the public administration is obliged to implement the recommendations of the Board, within the deadline set with the Board decision".

197. The Court notes that, having in mind that the Court has not found a violation of Article 6, paragraph 1.3, where it assessed Article 6 of the challenged Law which foresees the competence of the Board for monitoring of public administration institutions employing civil servants.

198. Therefore, for these reasons, the Court finds that Article 20, paragraph 5 of the challenged Law also does not limit and infringe the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 21 of the challenged Law

199. The Court recalls Article 21 of the challenged Law, which establishes:

Article 21
Board's decision
"1. Board's decision is a final administrative decision and is implemented by the senior management level official or the responsible person from the institution that made the first decision towards the party.
2. Implementation of the decision should be done within fifteen (15) days deadline from the receipt of the Board decision.
3. Non-implementation of the Board decision by the responsible person from the institution, constitutes serious breach of the work duties.

200. The Court notes that, having regard to what was said in relation to Article 6, paragraph 1.2 of the challenged Law, the Court notes that the competencies of the Board as established in this Article, relate only to the functions of the Board with regard to the assessment of complaints where there is a "*dispute*" and its monitoring role for the implementation of the principles and rules of civil service legislation.

201. Therefore, for these reasons, the Court finds that Article 21 of the challenged Law does not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 22 of the challenged Law

202. The Court recalls Article 22 of the challenged Law, which establishes:

Article 22
Initiation of the administration conflict

1. The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict.
2. Initiating an administrative conflict does not stop the execution of the Board decision.

203. The Court notes that this Article of the challenged Law is also related to Article 22 of Law No. 03/L-202 on Administrative Conflict, establishing that *"The indictment does not prohibit the execution of an administrative act, against which the indictment has been submitted, unless otherwise provided for by the law"*. In addition, Article 22 of the challenged Law confirms the judicial protection of the parties dissatisfied with the decisions of the Board.

204. Therefore, for these reasons, the Court finds that Article 22 of the challenged Law does not limit the violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 23 of the challenged Law

205. The Court recalls Article 23 of the challenged Law, which stipulates:

Article 23
Procedure in case of non-implementation of the Board decision

1. If the responsible person from the institution does not implement the Board decision within the deadline foreseen in Article 21 of this Law, in all such cases, Chairperson of the Board should inform in written the President of the Assembly, relevant Committee on Public Administration and the immediate supervisor of the person responsible for non-implementation, within fifteen (15) days from the day of expiry of the execution deadline.
2. In cases when the person responsible for implementation of the Board decision is within the executive branch, the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
3. In cases when the person responsible for implementation of the Board decision is the Mayor of the Municipality, the relevant minister for local

government and the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
4. 4. Notice from paragraph 1. and 2. of this Article is considered as a request for initiating a disciplinary procedure against the person responsible for implementation, a procedure which is developed in accordance with the provisions foreseen by the legislation in force.
5. Prime Minister or the responsible supervisor is obliged to initiate the disciplinary procedure towards the person responsible for implementation, within the thirty (30) days deadline from the receipt of the notice by the Chairperson of the Board.
6. In case the actions foreseen under paragraph 5. of this article are not taken, Chairperson of the Board informs the President of the Assembly and the relevant Committee for Public Administration in written. President of the Assembly requires in written from the Prime Minister
or the responsible supervisor of the institution, to take all the necessary actions for immediate implementation of the Board decision and take the necessary measures towards the responsible person in accordance with the provisions foreseen by the legislation in force.
7. Within thirty (30) days deadline from the expiry of the Board decision implementation deadline, party can initiate the enforcement procedure for the Board decision at the competent court, in accordance with the provisions of the Law on Enforcement Procedure.

206. The Court notes that the competences of the Board set out in this article, relate solely to the functions of the Board with regard to assessment of the complaints where there is a "*dispute*" and its monitoring role for the application of the principles and rules of civil service legislation.

207. Therefore, for these reasons, the Court finds that Article 23 of the challenged Law does not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 24 of the challenged Law

208. The Court recalls Article 24 of the challenged Law, which establishes:

Article 24
Administrative sanctions for non-implementation of the Board decision

1. In cases of non-implementation of the Board decision according to Article 21 of this law, Chairperson of the Board issues a decision for withholding fifty percent (50%) of the monthly salary of the responsible person, until the implementation of the Board decision.
2. According to paragraph 1. of this Article, the decision is sent for implementation to the main administrative official of the relevant ministry for managing payrolls, who is obliged to implement the decision within fifteen (15) days deadline from the receipt of the decision and inform in written the Board about the implementation of the decision.
3. Against the decision for withholding fifty percent (50%) of the monthly salary, the unsatisfied party has the right to initiate an administrative

conflict at the competent court for administrative issues, in accordance with the provisions of the Law on Administrative Conflict.
4. Initiation of an administrative conflict does not stop the execution of the Board decision.
5. In cases of non-implementation of the decision of the Chairperson of the Board on withholding fifty percent (50%) of the monthly salary, the Board may initiate the enforcement procedure for the decision at the competent court, in accordance with the provisions of the law on enforcement procedure within thirty (30) days deadline from the expiry of the implementation deadline.

209. The Court notes that the competencies of the Council set out in this article, aim at establishing a mechanism for the enforcement of its decisions. Such competencies for the enforcement of its decisions are also provided by other administrative institutions. In this regard, the Court also refers to Law No. 2002/09, for Labor Inspectorate in Kosovo, amended and supplemented by Law No. 03/L-017 on Amending and Supplementing the Law on the Labor Inspectorate No. 2002/9, which provides that the Chief Labor Inspector shall supervise executions of decisions on violations relating to labor law, protection and safety work rules, and related sanctions taken. The Court also refers to Article 92 of the Law on Labor no. 03/L-212 which establishes that, *"1. Any natural or legal person who disregards the provisions of this Law, in a legal procedure, shall be fined from one hundred (100) up to ten thousand (10,000) Euro. 2. This law also provides that where the offence is committed against an employee who is under eighteen (18) years of age, the employer shall be liable to twice the height of the fine specified in paragraph 1 of this Article".*

210. The Court recalls that in the event of non-implementation of its decisions, the Board has the right to initiate the enforcement procedure under the Law on Enforcement Procedure. Article 24 of the contested Law also provides for the judicial protection of persons dissatisfied with the decisions of the Board.

211. Therefore, for these reasons, the Court finds that Article 24 of the challenged Law does not limit and violate the core of any specific provisions of the Constitution. Therefore, these provisions are in accordance with the Constitution.

Constitutional review of Article 25 of the challenged Law

212. The Court recalls Article 25 of the challenged Law, which establishes:

"Article 25
Cooperation with public administration institutions

[...]
2. Public administration institutions with Civil Servants employed, as well as all other public officials or Civil Servants, that have competencies in administration of the civil service, or are informed about this field, are obliged to cooperate with the Board.
3. In cases when the employing authority or the responsible person does not cooperate, the Board reports to the Assembly about this non-

cooperation, which shall then forward this notice to the Prime Minister or the immediate supervisor of the responsible person".

213. In this regard, the Court emphasizes that the competences of the Board set out in this article, relate solely to the functions of the Board with regard to assessment of the complaints where there is a "*dispute*" and its monitoring role for the application of the principles and rules of civil service legislation.

214. For these reasons, the Court finds that Article 25, paragraphs 2 and 3 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

(iii) Regarding the allegation of immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of Board functions

215. The Court notes that the Applicant also challenges Article 11 [Term of office for members of Board] paragraph 3 of the challegned law with regard to the immunity of members of the Board, defining:

"3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge".

216. In this regard, the Court recalls the Applicant's allegations, stating that the immunity of the members of the Board has no basis in the Constitution as it clearly specifies the state officials who enjoy immunity. He states that under the Constitution, only the deputies of the Assembly, members of the Government, judges of regular courts, judges of the Constitutional Court and the Ombudsperson enjoy immunity.

217. The Applicant, referring to Judgment KO98/11 of the Court, the Applicant, *the Government of the Republic of Kosovo*, concerning the immunity of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and Members of the Government of the Republic of Kosovo, Judgment of 20 September 2011 (hereinafter: case KO98/11), claims that this type of immunity can not be granted by other legal acts unless it is provided for by the Constitution itself.

218. The Court notes that the Board, on the other hand, bases its justification for immunity also on the basis of the Judgment of the Constitutional Court, KI33/16, cited above, whereby the Court stated that the Board enjoys the prerogatives of a "*court*" within the meaning of Article 6 of the ECHR.

219. The Court notes that the Board alleges that its members should enjoy immunity as they enjoy the prerogatives of a "*court*" and as such should have the same immunity as judges of regular courts.

220. Therefore, the Court will initially assess whether the members of the Board can enjoy the immunity enjoyed by judges.

221. The Court recalls that in case KI33/16, it stated that the Board *"gëzon prerogativat e një gjykate në kuptim të nenit 6 të KEDNJ-së"* dhe se *"gjykata" kategorizohet në kuptimin substancial të termit nga funksioni i saj gjyqësor, që do të thotë vendosja e çështjeve brenda kompetencave të saj në bazë të rregullave të së drejtës dhe pas procedurave të kryera në mënyrë të paraparë*

it stated that the Board "*enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution and Article 6 of the ECHR*" and that a "*tribunal*" *is categorized in the substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]*".

222. In this regard, the Court notes that in Case KI33/16, the reference to Article 6 of the ECHR was made in order to emphasize that the decisions of the Board are "*final, binding and enforceable*" *and that the Board, from the point of view Article 6 of the ECHR, is independent as (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR* (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59. Regarding the independence of an "*independent tribunal*" see case KO12/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017 par. 75).

223. Accordingly, Case KI33/16 can not be used as a basis for categorizing the Board as a "court" within the meaning of what has already been provided by the Constitution in paragraph 1 of Article 102 [General Principles of the Judicial System] which stipulates that "*the judicial power in the Republic of Kosovo is exercised by the courts*".

224. In this regard, the Court considers that the existence of factors which make the rights of the parties to a certain proceedings necessary does not automatically give the privileges of a "*court*" to the authority/body that is competent to develop that administrative procedure , namely the Board in the present case.

225. Therefore, the Court notes that, based on the finding that the Board is not a court within the meaning of Article 102 of the Constitution, and on the fact that referral to the "court" and Article 6 of the ECHR in case KI33/16, was done in a limited manner and solely for the purpose of giving the parties a wider legal protection before the Board and in relation to the legal effects of the decisions of the Board, the members of the Board may not benefit from such status. The use of the precedent in case KI33/16, in order to increase the status privileges of the members of the Board, is not contrary to the very spirit of the case in question.

226. The argument of the Board that it is an independent body under the Constitution should not be confused with the type of independence it carries and is guaranteed to the bodies of the judicial power, which fall in their entirety within the framework of Article 6 of the ECHR. Independent bodies of

the final administrative instance, which decisions are subject to the same procedural guarantees for the parties, are numerous, but they should not be confused with the judicial power and the characteristics associated with such power in the prism of freedoms and rights guaranteed by the Constitution and the ECHR.

227. Consequently, the Court considers that the members of the Board cannot be considered "judges"" within the meaning of the Constitution and the immunities enjoyed by the judges pursuant to Article 107 of the Constitution.

228. The Court will further assess whether Article 11, paragraph 3 of the challenged Law violates the provisions of the Constitution as alleged by the Applicant.

229. In this regard, the Applicant referred to the articles of the Constitution which provide for immunity for the President of the Republic, deputies of the Assembly, members of the Government, judges of regular courts, judges of the Constitutional Court and the Ombudsperson.

230. In this regard, the Court notes that the articles of the Constitution which establish immunity for the above mentioned officials, which the Applicant referred to, are not exhaustive in so far as they regulate immunity for the above mentioned officials but do not restrict or prohibit expressly that immunities for other officials be assigned by special laws. This issue is not regulated either in Article 101, paragraph 2 of the Constitution, which defines the Board as an institution to oversee the rules and principles of civil service.

231. The practice of granting immunity through law, even though the Constitution has not explicitly envisaged such a thing, is also known in other countries and the granting of immunity regarding several state institutions is also encouraged by the European Commission for Democracy through Law, known as the "Venice Commission". The Venice Commission in the compilation of the Venice Commission regarding the Ombudsperson Institution has assessed the laws of different states which have foreseen functional immunity for the Ombudsperson, his deputies, but also for the supporting staff of the Ombudsperson Institution.

232. In this regard, the Venice Commission, evaluating the Armenian Law on the Ombudsperson, stated that the Ombudsperson and supporting staff should be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity – functional immunity (see Compilation of the Venice Commission Opinions concerning the Ombudsman Institution, CDL-PI (2016) 001, of 5 February 2016, p. 14).

233. A similar assessment of granting immunity through law not only for the Ombudsperson and his deputies, but also for the supporting staff of these institutions, the Venice Commission also made when assessing the laws pertaining to the institutions of Ombudsperson of Moldova, Montenegro and Serbia, which not necessarily had the immunity regulated by the Constitution

(see Compilation of the Venice Commission Opinions concerning the Ombudsman Institution, CDL-PI (2016) 001, of 5 February 2016, page 14).

234. The granting of immunity through laws has been assessed by the Venice Commission even in the case of the immunity of prosecutors (see summary of Opinions relating to Prosecutors, CDL-PI (2018) 001 of 11 November 2017).

235. However, what needs to be assessed is whether granting immunity to the members of the Board violates any of the rights set forth in the Constitution.

236. In this respect, the Court recalls that the issue of immunity of public officials is linked to the right to a fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. Therefore, the Court refers to the provisions of Article 31 of the Constitution and Article 6 of the ECHR, which define:

"Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

Article 6 (Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
[...]".

237. The Court also reiterates that in accordance with 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".*

238. With regard to immunities, the ECtHR has emphasized that immunity may be granted to certain categories of state officials and this may be in accordance with the requirements of Article 6, paragraph 1 of the ECHR (see, *mutatis mutandis, Gryzanov v. Russia*, No. 19673/03, Judgment of 12 June 2012)

239. The Court reiterates that, the ECtHR found that Article 6, paragraph 1 guarantees the "right to a court", of which the "right of access", that is, the right to institute proceedings before a court in civil matters, constitutes one aspect, as an essential part of the right to a fair trial. However, this right is not absolute, but may be subject to limitations; these are permitted by implication

since the "right of access" by its very nature calls for regulation by the states. In this respect, the states enjoy a certain margin of appreciation, although the final decision as to the observance of the requirements of the right to a fair trial rests with the Court (see, *mutatis mutandis,* ECtHR case, *Osman v. United Kingdom*, No. 87/1997/871/1083, Judgment of 28 October 1998, par. 147; see ECtHR case, *Prince Hans-Adam II of Liechtenstein v. Germany,* nr. 42527/98, Judgment of 12 July 2001, paragraph 44).

240. The Court should assess whether the limitations applied do not restrict or reduce the access to the court left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 paragraph 1 of the ECHR if it does not pursue an objective aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, *mutatis mutandis,* ECtHR case, *Osman v. United Kingdom*, No. 87/1997/871/1083, Judgment of 28 October 1998, par. 147; see ECtHR case, *Prince Hans-Adam II of Liechtenstein v. Germany,* nr. 42527/98, Judgment of 12 July 2001, paragraph 44).

241. Accordingly, the Court in the present case will assess whether the immunity provided to the members of the Board under the challenged Law (i) pursues a legitimate aim, and (ii) is proportionate in that the applicants have a reasonable alternative to protect in effective manner their rights under the Board decisions.

242. The Court recalls that the immunity of the members of the Board under Article 11 paragraph of the challenged Law provides immunity as to the decision-making within the constitutional and legal functions in respect of which members of the Board enjoy immunity from criminal prosecution, civil lawsuit or discharge.

243. Thus, immunity for the members of the Board is a functional immunity, as clarified by the Court in case KO98/11, regarding the immunity of the President, deputies of the Assembly and members of the Government, which means that members of the Board are exempt from liability of any nature over the opinions expressed, votes cast or decisions taken in their work as member of the Board and other actions taken while performing their duties. This type of immunity extends after their mandate comes to the end and it is of unlimited duration. They will never be liable to answer to anyone or any court for such actions or decisions (see, case KO98/11, cited above, paragraph 54).

244. However, the functional immunity guaranteed to members of the Board under the challenged Law is limited and they do not have special protection for actions beyond their scope as members of the Board or if they are accused of criminal offenses that are not simply related with the fact that they have exercised their functions in relation to the views expressed, the manner of voting or the decisions taken during their work. They also have no immunity from arrest.

245. The Court notes that the challenged Law does not foresee other immunity for the members of the Board, except the functional immunity that was explained

above, which has to do with inviolability for actions outside the scope of their responsibilities as members of the Board. Therefore, in their capacity as ordinary citizens, members of the Board are treated the same as all other citizens.

246. With regard to the aim sought to be achieved with the immunity, the Court also recalls its Judgment in case KO98 11, and by which the Court emphasized that *"[...] those that implement power and exercise duties in the State have immunities and special status in order to ensure their independence so that they can do their work effectively, to ensure that other powers are stopped from interfering with their work and to prevent abuse"* (see case KO98/11, cited above, paragraph 47).

247. Accordingly, in the present case also, the Court notes that the purpose of the immunity is that the members of the Board are free to exercise their functions with independence and without fear of the consequences for the performance of their functions, therefore the immunity serves this purpose and the Court considers that it is legitimate.

248. In this respect, the ECtHR in the case of *Gryaznov v. Russia* has elaborated that immunity is in the public interest, in which interest is that judges are free to exercise their functions with independence and without fear of consequences, while the litigating parties can defend themselves from judicial errors by having the opportunity to submit their appeals to a court of appeals without being instructed to claims for personal liability (see, *mutatis mutandis*, ECtHR case *Gryaznov v. Russia*, no. 19673/03 Judgment of 12 June 2012, par. 78).

249. Therefore, what is important is whether the parties have the right to use legal remedies, against the decisions of the Board without having to raise their personal liability.

250. In this connection, the Court recalls Article 22 [Initiation of the administration conflict] of the challenged Law, which provides that *"The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict".*

251. Therefore, dissatisfied parties have a reasonable alternative and may exercise their rights towards the decisions of the Board by initiating an administrative conflict before the courts to protect their rights.

252. Therefore, having regard to the limited immunity guaranteed to members of the Board by Article 11, paragraph 3 of the challenged Law, and the fact that against the decisions of the Board, the parties have the right to initiate an administrative conflict, the Court considers that the measure employed is proportionate to the aim sought to be achieved as the interested parties are able to effectively protect their rights against the decisions of the Board by initiating an administrative conflict.

253. Therefore, the Court finds that Article 11, paragraph 3 of the challenged Law is in compliance with the right of access to court as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. Accordingly, this article is in compliance with the Constitution.

Request for interim measure

254. The Court recalls that the Applicant also requests the Court to impose interim measure, namely the suspension of the application of the provisions of the challenged Law *"or at least to suspend the application of these provisions in relation to the Ombudsperson"*, until the final decision of this Court.

255. Given that the Court has decided on the merits of the case, it does not consider necessary to review the Applicant's request for the imposition of the interim measure.

Conclusion

256. Taking into account and referring to the reasons elaborated above, the Court, regarding the Applicant's allegation of exceeding the narrow scope of the Board as set out in Chapter VI (Government of the Republic of Kosovo) of the Constitution, concludes that:

    i. Article 2 of the challenged Law does not limit and violate the essence of Article 101 [Civil Service] of the Constitution. Consequently, Article 2 of the challenged Law is in compliance with Article 101 [Civil Service], paragraphs 1 and 2 of the Constitution and the latter must be interpreted by all public authorities in accordance with the interpretation presented in this Judgment.

257. The Court, as regards the assessment of the constitutionality of the provisions of the challenged Law in relation to the independent constitutional institutions and other public institutions, concludes that:

    ii. during the implementation of the challenged Law, the functions and the specific authority of the independent constitutional institutions should be recognized, which is reflected, *inter alia,* in the issuance and application of their internal rules to protect their independence as established by the Constitution and specific laws, to the extent necessary to protect their organizational, functional and budgetary independence, including the specifics of the work of their personnel
    iii. Article 3, paragraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,
    iv. Article 4, paragraph 1, in conjunction with Article 3.1, subparagraph 1.1. of the challenged Law are not in compliance with Chapter XII of the Constitution,
    v. Article 6, paragraph 1.2 of the challenged Law with respect to the competence of the Board to decide whether the appointment of civil

servants of senior management level and, in cases when there is no "*conflict*", represents unequal treatment of civil servants, is not in compliance with Article 24 [Equality Before the Law] of the Constitution,

vi. Article 7, paragraph 1, subparagraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

vii. Article 18 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

viii. Article 19, paragraphs 5, 6, 7 and 8 of the challenged Law, as they regulate the issue of binding decision regarding the selection of a category of civil servants even in cases where there is no "*conflict*", are also not in compliance with Article 24 [Equality Before the Law] of the Constitution,

ix. Article 20, paragraph 5 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the article in question is in compliance with the Constitution,

x. Article 21 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the latter are in compliance with the Constitution,

xi. Article 22 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Consequently, the provisions in question are in compliance with the Constitution,

xii. Article 23 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

xiii. Article 24 of the challenged Law does not limit and violate the essence of any specific provisions of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

xiv. Article 25, paragraphs 2 and 3 of the challenged Law do not limit or violate the essence of any specific provision of the Constitution. Therefore, the latter are in are in compliance with the Constitution.

258. The Court, as regards the Applicant's allegation of immunity from criminal prosecution, civil lawsuit or dismissal, in relation to the performance of the Board functions, concludes that:

xv. Article 11, paragraph 3 of the challenged Law is in compliance with the right of access to the court as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. Therefore, the article in question is in compliance with the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.2 of the Constitution, Articles 20 and 27 of the Law and Rules 56, 57 and 59 of the Rules of Procedure, on 25 April 2019

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Article 4 (paragraph 1) in conjunction with Article 3 (paragraph 1.1), Article 6 (paragraph 1.2) and Article 19 (sub-paragraphs 5, 6, 7 and 8) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are not in compliance with the Constitution;

III. DECIDES, unanimously, in accordance with Article 116.3 of the Constitution, that Articles 3 (paragraph 1.1), 4 (paragraph 1), 6 (paragraph 1.2) and 19 (sub-paragraphs 5, 6, 7 and 8) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are invalid from the date this Judgment becomes effective;

IV. TO HOLD, unanimously, that articles 2, 3 (paragraphs 1.2, 1.3, 1.4), 7 (paragraph 1, subparagraphs 2, 3 and 4), 18, 20 (paragraph 5), 21, 22, 23 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo are in compliance with the Constitution;

V. TO HOLD, with majority of votes, that articles 11 (paragraph 3) and 24 of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are in compliance with the Constitution;

VI. TO REJECT the request for interim measure;

VII. TO NOTIFY this Judgment to the Parties;

VIII. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law; and

IX. This Judgment is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Kopje e vërtetë
Overena kopija
Certified Copy

Radomir Laban | Arta Rama-Hajrizi

[This translation is unofficial and serves for informational purposes only]