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

Prishtina, on 16 January 2023
Ref.No.: AGJ 2113/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KO190/19

Applicant

The Supreme Court of the Republic of Kosovo

Constitutional review of Article 8, paragraph 2 of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with Article 5 and 6 of the Administrative Instruction (MLSW) no. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions according to Qualification Structure and Duration of Payment of Contributions

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Collegium of the Supreme Court of the Republic of Kosovo (hereinafter: the referring Court), signed by its president, Enver Peci.

Challenged decision

2. The referring Court raises doubts about the constitutionality of paragraph 2 of Article 8 (Conditions and criteria for recognition of the right to age-contribution-payer pension) of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with Articles 5 (Qualification of Contributory Pension Beneficiaries) and 6 (Required documents for recognition of the right to contributors pensions) of Administrative Instruction No. 09/2015 on Categorization of Beneficiaries of Contribute Qualification Structure and Duration of Payment Contribution of Contributions-Pension Experience (hereinafter: challenged Law).

3. The challenged Law was adopted by the Assembly of the Republic of Kosovo on 6 May 2014 and entered into force on 20 June 2014, while the challenged Administrative Instruction was approved by the Ministry of Labor and Social Welfare (hereinafter: the MLSW) on 31 December 2015 and entered into force on 7 January 2016.

Subject matter

4. The subject matter of the referral is the constitutional review of paragraph 2 of Article 8 of the challenged Law in conjunction with articles 5 and 6 of the challenged Administrative Instruction, which are claimed to be contrary to articles 24 [Equality Before the Law] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: ECHR) and Article 1 (Protection of property) of Protocol No. 1 of the ECHR.

Legal basis

5. The Referral is based on paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 51 [Accuracy of referral], 52 [Procedure before a court] and 53 [Decision] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 22 October 2019, the referring Court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 29 October 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha (members).

8. On 6 November 2019, the Court notified the referring court, the President of the Republic of Kosovo, the acting Prime Minister of the Republic of Kosovo, the Ombudsperson and the Secretary General of the Assembly of the Republic of Kosovo about the registration of the referral.

9. On the same date, the Court also notified the lawyer of the interested party M.A., who was provided the opportunity to submit comments within 15 (fifteen) days from the day of receipt of this letter.

10. On 10 June 2020, the referring Court submitted for notification to the Court, also the Decision [ARJ-UZVP. no. 10/2020] of 14 January 2020, by which it terminated the similar procedure submitted by the interested party Sh. G, against MLSW.

11. On 16 June 2020, the referring Court also submitted for notification to the Court the Decision [ARJ-UZVP. no. 41/2020] of 11 ‚June 2020, by which it terminated the similar procedure submitted by the interested party K.B, against MLSW.

12. On 15 January 2021, the Court notified the MLSW about the registration of the referral KO190/19 and asked the latter, among other things, to provide its comments regarding the questions as follows:

    (1) What is the purpose of restricting the right to earn the old-age contribution paying pension, only if the work experience and contributions for 15 years until 1‚January 1999 are confirmed?;

    (2) Does the Republic of Kosovo have access to the contributions collected in the former pension fund? If not, on what basis is the difference made in the treatment of category I (persons who have 15 years of contributions before 1999) and category II (persons who do not have 15 years before 1999, but have a total of 15 years of experience) and more years of work experience, e.g. 33 years) in terms of dividing the time period before 1‚January 1999 and after that date?;

    (3) What are the rights of those persons who provide proof of contribution under 15 years of work experience before 1 January 1999 and how can they exercise this right in the current circumstances?;

    (4) Do you consider that the workers of all other sectors are in a more disadvantageous position than the workers of education, health and others who have worked in the RKS system (who are recognized with work experience for the period 1989-1999, according to Article 8.6 of the Law) whose right to contribution paying pension is recognized by the provisions of the Law?; and

    (5) Do the Institutions of Kosovo have access to the register of the employment relationship of the workers in the period 1990-1999? How is the issue of the burden of proof for the provision of such evidence regulated in case of an application for an old-age contribution paying pension?

13. On 27 January 2021, the MLSW submitted its comments where explanations were given for (i) the background of the pension and disability system of the Republic of Kosovo; (ii) a brief description of the development stages of the pension and disability system in the Republic of Kosovo; and (iii) the reformed pension and disability system in the Republic of Kosovo starting from 2002 onwards. The relevant data of the opinion/answers of the MLSW are reflected in the reasoning part of this Judgment.

14. On 29 January 2020, the referring Court also submitted for notification to the Court the Decision [ARJ-UZVP. no. 45/2020] of 27 July 2020, by which it terminated the similar procedure submitted by the interested party H.M, against MLSW.

15. On 2 March 2021, the referring Court also submitted for notification to the Court the Decision [ARJ-UZVP no. 51/2020] of 27 August 2020, by which it terminated the similar procedure submitted by the interested party F.T, against MLSW.

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

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

18. On 31 May 2021, the President of the Court, Arta Rama Hajrizi, by Decision No. KK-160/21 decided that Judge Gresa Caka Nimani is appointed as the Presiding of the Review Panels where she is appointed as a member of the Panel, including the present case.

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

20. On 28 June 2021, based on paragraph 2 of Rule 11 (Appointment of Review Panels) of the Rules of Procedure, the President of the Court Gresa Caka-Nimani, by Decision No. KSH-KO190/19, determined that Judge Selvete Gërxaliu-Krasniqi be appointed a member of the Review Panel in this case.

21. On 22 July 2021, the Court considered the case and decided to postpone the decision-making for another session in accordance with the recommendations and required supplementations.

22. On 16 June 2022, the Court requested the Ministry of Finance, Labor and Transfers, additional information regarding the following issues: (i) did it undertake any initiative for the drafting of the new Administrative Instruction regarding the categorization of contribution-payer pension beneficiaries according to the qualification structure and the duration of the payment of contributions-pension experience?; and (ii) if yes, what are the changes defined in this Instruction, and if there is any time frame when the approval of the latter is foreseen.

23. On 29 June 2022, the Ministry of Finance, Labor and Transfers submitted its comments, among other things, clarifying that *"[...] The Program Plan of the Government of the Republic of Kosovo 2021-2025 has foreseen a review of the legal framework for social and pension schemes and the Draft Law for amending and supplementing Law No. 04/L-131 on Pension Schemes Financed by the State (basic law) is in the Legislative Program of 2022. This draft law is expected to be processed for approval by the Government of the Republic of Kosovo until 25.11.2022."*

24. On 4 July 2022, the Court submitted to the Forum of the Venice Commission certain questions regarding the effect of the Court's decisions in cases where a law is declared unconstitutional. The Court in the aforementioned Forum submitted the following questions:

    1. *When a challenged law is found unconstitutional, what is the time frame that the Constitutional Court gives to the national legislator to bring the respective law*

into accordance with the Constitution? What is the effect of the law declared unconstitutional, during this period, until the national legislator introduces a new law compliant with the Constitution?;

2. *Taking into account that this is an incidental control procedure, and thus assuming the law is found unconstitutional, the challenged law cannot be applied in the cases at hand (Venice Commission – CDL-AD (2010)039rev, pg. 170; CDL-AD(2018)012 pg. 37), namely the rule of the instant case, would also all pending/unresolved cases before the regular courts also benefit from the new law, namely the law adopted by the Assembly based on the Constitutional Court decision?;*

3. *More specifically, do ordinary courts suspend decision-making in all active cases which would otherwise require the application of the unconstitutional law, until the national legislator, within the provided time frame, amends the unconstitutional legal provision to comply with the Constitution and the conclusions of the Constitutional Court? ;*

4. *What about cases that are already decided by the regular courts under the legal provision that was found unconstitutional by the Constitutional Court? Are they liable to be open to a fresh judicial review or does the principle of legal certainty prevail?; and*

5. *What is the practice in your country in relation to the above-stated questions and do you have any case-law in this regard?.*

25. On 14 July 2022, the trade union of state employees of Kosovo of the 90s and the trade union of former policemen of Kosovo of the 90s, by respective submission, asked for the acceleration of decision-making in this case.

26. On 16 December 2022, judge Enver Peci. took the oath before the President of the Republic of Kosovo, on which occasion his mandate in the Court began.

27. On 20 December 2022, judge Enver Peci, based on Article 18 (Exclusion of a Judge) of the Law on the Constitutional Court, requested his exclusion from decision-making in case KO 190/19.

28. On 20 December 2022, the President of the Court, by Decision [No. KK 227/22], approved the request for exclusion from decision-making in case KO190/19, submitted by judge Enver Peci.

29. On 30 December 2022, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

30. On the same date, the Court voted unanimously that: (i) the referral is admissible; (ii) paragraph 2 of Article 8 of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with sub-paragraph 2.3 of paragraph 2 of Article 6 of Administrative Instruction no. 09/2015 on Categorization of Beneficiaries of Contribute Qualification Structure and Duration of Payment Contribution of Contributions-Pension Experience, are not in compliance with Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of ECHR and Article 1 (General prohibition of discrimination) of Protocol no. 12 of ECHR.

Summary of facts

31. The Applicant, namely the referring Court, in its request for incidental control of the constitutionality of paragraph 2 of Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction, with Articles 24 and 46 of the Constitution, submitted to the Court five (5) different cases and by which it raised doubts about the unconstitutionality of the challenged norms.

32. In the following, the Court will present (I) the essence of the cases submitted to the Court through the mechanism of incidental control, emphasizing that the facts and circumstances of concrete cases are not before the Court for the constitutional review, but only the constitutional review of the challenged provisions of the Law and of the relevant Administrative Instruction and which the referring Court claims, namely raises doubts to be in contradiction with the relevant constitutional provisions; and (II) the report with *ex officio* Recommendations no. 235/2018 of the Ombudsperson regarding the category of citizens who worked before 1999 and do not benefit from the age-contribution-payer pension because they do not meet the criterion of 15 years of pension experience as a result of discriminatory dismissal from work; and (III) the brief summary of the history of the pension and disability system in Kosovo based on the information provided by the MLSW on 29 January 2021.

I. Summary of the cases referred by the Supreme Court whereby the unconstitutionality of the respective provisions of the challenged Law is alleged

(i) *Facts related to the interested party M.A regarding the Decision [UZVP - ARJ no. 99/2019] of 22 August 2019 of the Supreme Court*

33. From the case file, it appears that the interested party M.A, who was a judge in the Kosovo judicial system, reached retirement age on 3 November 2014. She applied for a contribution-payer pension at the Regional Pension Office in Prishtina, but she was only approved for the grant of the basic old age pension in the amount of 75 euro. M.A filed an appeal against the decision of the Pension Office with the proposal to recognize the right to a contribution-payer pension in the amount of 150 euro, this request was rejected by the Department of Pension Administration (hereinafter: DPA) within the framework of MLSW. Following the administrative conflict procedure, the Basic Court initially approved the statement of claim of the M.A as well as annulled the DPA notification of the MLSW, and remanded the case to the latter for retrial. Subsequently, the interested party turned to the MLSW with a request to render a new decision in accordance with the Judgment of the Basic Court, and since it did not respond, M.A, by the lawsuit, asked the Basic Court to decide on the approval of her lawsuit for the recognition of the right to a contribution-payer pension, namely to recognize a total of 18 years, 2 months and 19 days of the pension insurance experience of the contribution-payer and to make the payment of entire difference to this pension with superior background, retroactively from 30 March 2015 and onwards. The Basic Court rejected the statement of claim of the interested party M.A, this decision was followed by the Decision of the Court of Appeals upholding the latter. Subsequently, M.A submitted a request for an extraordinary review of the court decision against the Judgment of the Court of Appeals and the Judgment of the Basic Court.

34. On 22 August 2019, the Supreme Court by the Decision [UZVP – ARJ no. 99/2019] decided to suspend the proceedings according to the lawsuit of the interested party M.A. against the respondent MLSW. The procedure according to this legal matter is continued in the Constitutional Court of Kosovo according to the request of the

Supreme Court for the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of Administrative Instruction no. 09/2015 for Categorization of Contribution-Payer Pension Beneficiaries.

35. On 22 October 2019, the referring Court, in accordance with paragraph 8 of Article 113 of the Constitution, submitted to the Court the request for the assessment of the compatibility of paragraph 2 of Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction which have allegedly been contrary to Article 24 [Equality Before the Law] and 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of property) of Protocol No. 1 of the ECHR.

(ii) *Facts related to the interested party Sh.G regarding the Decision [ARJ no. 99/2020] of 14 January 2020 of the Supreme Court*

36. From the case file, it appears that the interested party, Sh.G., had applied for the recognition of the right to a contribution-payer pension to the Pension Office in the Municipality of Peja, which had rejected this request since sufficient evidence had not been presented in terms of the Law and Administrative Instruction challenged for fifty (15) years of contribution experience. The latter filed a complaint on the grounds that due to the imposition of interim measures by the Serbian regime in the 90s, his employment relationship was terminated and it was not possible for him to travel from Peja to Prishtina at his place of work, a complaint which was rejected by the Complaints Commission within the MLSW. Subsequently, in the administrative conflict procedure, the Basic Court and the Court of Appeals rejected his statement of claim as ungrounded. Sh.G. submitted a request for an extraordinary review of the court decision against the Judgment of the Court of Appeals and the Judgment of the Basic Court.

37. On 10 June 2020, the Supreme Court by the Decision [ARJ – ARJ no. 99/2020]: (i) suspended the proceedings according to the lawsuit of the claimant Sh.G. submitted against the respondent MLSW'; and explained that (ii) procedure according to this legal matter is continued in the Constitutional Court according to the request of the Supreme Court for the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of Administrative Instruction no. 09/2015 for the Categorization of Contribution-Payer Pension Beneficiaries.

(iii) *Facts related to the interested party K.B regarding the Decision [ARJ no. 41/2020] of 11 June 2020 of the Supreme Court*

38. The third supplementation of the referring court was made on 16 June 2020, when the referring Court submitted to the Court the Decision [ARJ – ARJ no. 41/2020] of 11 June 2020, by which it: (i) suspended the proceedings according to the lawsuit of the interested party K.B. against the respondent MLSW'; and explained that (ii) the procedure according to this legal matter will continue after a decision is rendered by the Constitutional Court according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of Administrative Instruction no. 09/2015 on Categorization of Contribution-Payer Pension Beneficiaries.

39. From the case file it results that the interested party K.B, under his claim that he fulfills the criteria of the challenged Law and Administrative Instruction, to qualify as

a contribution-payer pension beneficiary, as well as under the claim that he graduated in 2005, has challenged the decision of 11 July 2017 of the MLSW regarding the rejection of his request to qualify as a contribution-payer pension beneficiary. Following and during the administrative conflict procedure, the Basic Court and the Court of Appeals rejected K.B. statement of claim as ungrounded. The latter submitted a request for an extraordinary review of the court decision against the Judgment of the Court of Appeals and the Judgment of the Basic Court to the Supreme Court. The latter, on 11 June 2020, by the Decision [ARJ-UZVP. no. 41/2020], suspended the procedure according to the lawsuit of K.B, until the Decision is rendered by the Constitutional Court according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State, as well as Articles 5 and 6 of Administrative Instruction No. 09/2015 on the Categorization of Contribution-Payer Pension Beneficiaries.

(iv) *Facts related to the interested party H.M regarding the Decision [ARJ - UZVP no. 45/2020] of 27 July 2020 of the Supreme Court;*

40. The fourth supplementation of the referring court was made on 29 January 2021, when the referring court submitted to the Court the Decision [ARJ–ARJ no. 45/2020] of 27 July 2020 of the Supreme Court, by which it: (i) suspended the proceedings according to the lawsuit of the claimant H.M. against the respondent MLSW'; and explained that (ii) the procedure according to this legal matter is continued after the Constitutional Court renders the decision according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of Administrative Instruction no. 09/2015 on the Categorization of Contribution-Payer Pension Beneficiaries.

41. From the case file it results that the interested party H.M applied for the recognition of the right to contribution-payer pension at the Pension Office, which rejected this request In the following and during the procedure of the administrative conflict, the Basic Court and the Court of Appeals rejected as ungrounded the statement of claim of H.M. The latter subsequently submitted a request for an extraordinary review of the court decision against the Judgment of the Court of Appeals and the Judgment of the Basic Court to the Supreme Court. The latter, on 27 July 2020, by the respective Decision suspended the procedure according to the lawsuit of H.M, until the Decision is rendered by the Constitutional Court according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State, as well as Articles 5 and 6 of Administrative Instruction No. 09/2015 on the Categorization of Contribution-Payer Pension Beneficiaries.

(v) *Facts related to the interested party F. T. regarding the Decision [ARJ - UZVP no. 51/2020] of 27 August 2020 of the Supreme Court.*

42. Finally, the fifth supplementation of the referring court was made on 2 March 2021, when the referring court submitted to the Court the Decision [ARJ – ARJ no. 51/2020] of 27 August 2020 of the Supreme Court, by which it: (i) suspended the proceedings according to the lawsuit of the claimant F.T. against the respondent MLSW'; and explained that (ii) the procedure is continued after the Constitutional Court renders the decision according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of Administrative Instruction no. 09/2015 on the Categorization of Contribution-Payer Pension Beneficiaries.

43. From the case file it results that the interested party F.T applied for the recognition of the right to contribution-payer pension at the Pension Office, which rejected this request by the decisions of 6 August 2016 and of 12 January 2017. In the following and during the procedure of the administrative conflict, the Basic Court and the Court of Appeals rejected as ungrounded the statement of claim of F.T. The latter subsequently submitted a request for an extraordinary review of the court decision against the Judgment of the Court of Appeals and the Judgment of the Basic Court to the Supreme Court. The latter, on 27 July 2020, by the respective Decision terminated the procedure according to the lawsuit of F.T, until the Decision is rendered by the Constitutional Court according to the request of the Supreme Court regarding the constitutional review of paragraph 2 of Article 8 of the Law on Pension Schemes Financed by the State, as well as Articles 5 and 6 of Administrative Instruction No. 09/2015 on the Categorization of Contribution-Payer Pension Beneficiaries.

II. *Ex officio* Recommendations Report no. 235/2018 of the Ombudsperson regarding the category of citizens who worked before 1999 and do not benefit from the age contribution-payer pension because they do not meet the criterion of 15 years of pension experience as a result of discriminatory dismissal from work

44. The Court notes that the Ombudsperson Institution on 6 April 2018 published the *ex officio* report on *"[...] draw attention to the need for positive adjustment of the contributory pension for the category of citizens of the Republic of Kosovo who worked prior to 1999 and not for their fault, they have not reached the time of 15 years pension, due to the discriminatory dismissal at the time of the violent measures imposed in Kosovo"*.

45. In paragraphs 7-9 of the respective Report, the Ombudsperson, among other things, states that *"the Ombudsperson reiterates that the category of citizens who worked before 1999 and did not meet the eligibility criteria of 15 years of pension experience as a consequence of discriminatory dismissal from work due to violent measures imposed in Kosovo, represent the main challenge for treatment by the state of Kosovo"*.
In fact, the right of citizens belonging to this category, to exercise the right to a contribution payer pension for the period prior to 1999 (who failed to meet 15 years of pension service) consists in a collision between the law that has defined the criterion of the benefit of this type of pension (15 years of pension work experience, as stated in current legislation) with principles related to fundamental human rights (namely the right of protection of human dignity, the right not to be discriminated against) and positive obligations of the state in relation to the rights of its citizens. The right to benefit age contribution-payer pension for this category of Kosovo citizens is a special issue (sui generis) and complex. This has to do with the fact that with the law of that time (before 1999), as a criterion for the benefit of this type of pension is defined a 15 years of experience, but due to exceptional circumstances, namely the imposition of violent measures in Kosovo, a part of Kosovo's citizens did not meet this criterion, without their fault, because of the discriminatory dismissal from work. On the other hand, the complexity of this issue is expressed by the necessity of amending the legislation affirmatively, due to the new and exceptional circumstances that have taken place, despite the criteria established by the law in force at the time these citizens have established working relationship. On the other hand, the current legislation of Kosovo has also regulated the right to benefit age contribution-payer pension based on the same criterion as the laws of that time, which right to benefit have only the workers who have reached (15) years of pension experience.

46. In the following paragraphs of the Report, the Ombudsperson, among other things, emphasized the following:

> *"12. The right to contribution pension before 1999 is regulated by Law no. 011-24/83 on Pension and Disability Insurance, published in the Official Gazette of SAPK no. 26/83 (hereinafter referred to as Law No. 011-24 / 83 of SAPK) and the Federal Law of the former SFRY, where is defined the aforementioned criterion of 15 years of pension experience to acquire the right to benefit the contribution-payer pension. As such, these laws are not considered to have discriminatory character and of course for the time when they were approved there was no such content.*
>
> *13. However, the Ombudsperson reiterates that the dismissal from work, at the time of violent measures for a category of Kosovo citizens, has been the main reason as to why they have not reached 15 years of pension experience. Therefore this fact constitutes a new and extraordinary circumstance beyond the provisions of the law, which has been in force and has defined the eligibility criteria for the right to contribution-payer pension.*
>
> *14. On this basis, the Ombudsperson estimates that the right to a contribution-payer pension for citizens of this category should be determined not only in relation to the criterion prescribed by the law of that time (the 15 years of pension experience) but also considering that the dismissal from work has been discriminatory act at the time of violent measures.*
>
> *[...]*
>
> *18. The Ombudsperson has analyzed this problem in order to clarify the circumstances that have influenced the non-fulfillment of this criterion by a part of the citizens who worked before 1999. This fact consists in the dismissal from work in an arbitrary and discriminatory manner at the time of the installation of violent measures in Kosovo in the 90s. On this basis, the Ombudsperson insists that this fact cannot be ignored by the institutions of the Republic of Kosovo and that a reasonable legal solution must be found on the right of citizens to benefit from contribution-payer pension.*
>
> *19. Several cases of dismissal from work in the 90s, at the time of the imposition of violent measures, have been analyzed, in order to argue that this process was arbitrary and discriminatory. Therefore, this fact is a sufficient reason to change the Law on Pensions and to recognize the right to age contribution-payer pension for this category, even though they have not reached the criterion of 15 years of pension experience.*
>
> *[...]*
>
> *25. [...] This scheme was initially implemented in a linear way where all beneficiaries received the same payment, regardless of the profession they performed and the years of pension experience. However, this aspect is regulated by Administrative Instruction No. 09/2015 of 31.12.2015 (hereinafter: Instruction No. 09/2015) on Categorization of Beneficiaries of Contribute Qualification Structure and Duration of Payment Contribution of Contributions Pension Experience, which has made the categorization of pensioners who benefit from this scheme.*

26. This scheme applies to citizens of Kosovo who have paid contributions to the former Pension Fund of Kosovo before 01.01.1999 according to the provisions of Law No. 011-24/83 of the SAPK.

27. The conditions and criteria for recognizing the right to age-contribution-payer pension are defined in Article 8 of the LPSFS, which stipulates that the right to age-contribution-payer pension is realized by all persons who have the citizenship of Kosovo and who:

1.1. have reached the age of sixty-five (65);

1.2. should have pension contribution-payer work experience, according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 1.01.1999.

1.3. provide valid evidence on payment of contributions under provisions of the Law on Pension and Disability Insurance No.011-24/83 (Official Gazette of SAPK No.26/83) before 01.01.1999;

28. From this provision, it appears that the current law in relation to the criterion of pension experience for the category of citizens who worked before 1999 does not determine the duration of contribution-payer pension. The current law refers to Law No. 011-24/83 of the SAPK, which, in accordance with the federal law, regulates in detail the rights from pension and disability insurance for the SAPK, in accordance with the federal law, namely the Law on Fundamental Rights from Pension and Invalid Insurance (Off. Gazette of SFRY no., 23/82, 77/82) where such criteria are expressly defined (hereinafter: Federal Law). So it is the federal law, which defines the basic rights from the pension insurance, and in this sense the criteria for the benefit of the contribution-payer pension are also defined, one of which is the length of the pension experience.

29. The federal law, as a supreme act applicable to all former Republics and Provinces, has defined the basic principles, rights and conditions related to pension and disability insurance, while Law No. 011-24/83 of SAPK defines the details and specifics of pension insurance. The federal tax law defines the conditions for benefiting from the right to a contribution-payer age pension (Chapter III, Part 1, Article 21) as follows: "... The insured acquires the right to age pension when he reaches the age of 65 (male), respectively 60 years (female) and at least 15 years of pension experience...".

30. As such, this criterion for "pension experience of at least 15 years" has been carried over into the legislation of the Republic of Kosovo, namely LPSFS (Article 8), as we referred above. Precisely this determination prevents a part of the citizens who worked before 1999 from benefiting from the age contribution-payer pension scheme, who did not manage to have a pension experience of 15 years due to arbitrary and discriminatory dismissal from work, at the time of imposing violent measures in Kosovo. It should be noted that the same criterion is also referred to the Administrative Instruction (AI) No. 11/2007 for the Implementation of Government Decision 13/2007, where in Article 3 the criteria for benefiting from the contribution-payer pension have been defined as reaching the age of 65 and a minimum of 15 years of pension insurance experience. This instruction seems to have regulated this field until the entry into force of the LPSFS.

31. From what was presented above, it can be noted that according to the current legislation (ex lege), citizens of Kosovo who worked before 1999 but who did not reach the pension experience of 15 years cannot benefit from the age contribution-payer pension. Thus, without changing the legislation in force, this category of citizens cannot be included in this pension scheme, while we are dealing with an unfavorable legal criterion for this category.

32. This definition of Article 8 of the LPSFS, which regulates the criterion of 15 years of pension experience as defined in the Law of the SAPK, namely the federal Law, despite the fact that it follows a harmonious logic in terms of the drafting of the legislation, the Ombudsperson considers it unfair in relation to the employees who were arbitrarily and discriminatingly dismissed from work in the 90s, at the time of the violent measures.

[...]

33. The Ombudsperson notes that for a non-discriminatory, fair treatment and in accordance with respect for human dignity, the state of Kosovo must affirm the rights of citizens not to be harmed by discriminatory practices that occurred in the past, as it has was the practice of violent dismissal, through no fault of the workers.

[...]

46. On this basis, the Ombudsperson recalls that the Law on Employment Relationship in Special Circumstances (Official Gazette of the Republic of Serbia no. 40/90) was discriminatory and based on this act approved at the time the violent measures were imposed, the workers, mainly of Albanian ethnicity, were dismissed from work. This fact is clearly observed in the case presented above (see point 19). Also, the Ombudsperson recalls that this law is considered discriminatory according to UNMIK Regulation 1999/24.

47. Therefore, while the above-mentioned law has a discriminatory character, a logical interpretation shows that all the consequences produced by this law as such are discriminatory. Based on this fact, the Ombudsperson insists that the amendment of the LPSFS, namely its Article 8, is necessary in order to recognize the right to contribution-payer pension of all citizens who worked before 1999 and did not reach "the pension experience for 15 years" due to dismissal based on discrimination.

48. In this regard, the Ombudsperson also recalls the reference of the SCSC in the Resolution of the UN General Assembly no. 48/153 of 20 December 1993, which recognizes (and condemns) among others "...the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including: ... b. The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system".

49. In addition, the "Law on Interim Measures for the Social Protection of Self-Management Rights and Social Property"(RSS Official Gazette no. 49 of 28 October 1989) has also been a discriminatory law that has enabled through the so-called "Interim Measures" imposed on the Social Enterprises (SOEs), the

Albanian management has been dismissed and replaced by the Serbian management. Even this category of dismissed managers is typically represented by the presented case of the worker with a managerial position S.J. Likewise, this law is also considered repealed by UNMIK Regulation 1999/24 due to its discriminatory character.

50. From what was discussed above, it is clear that dismissal from work at the time of violent measures was a discriminatory process based on discriminatory laws. On this basis, the Ombudsperson draws attention to the fact that from these facts arises the constitutional obligation for the Government of the Republic of Kosovo to take measures to avoid discrimination of this category of citizens by recognizing their right to an age contribution-payer pension for citizens who do not have reached the retirement age of 15 years due to the violent and discriminatory dismissal from work in the 90s.

Constitutional obligations and positive obligations of the state of Kosovo in relation to the rights of citizens

51. The obligation of the state of Kosovo to recognize the right to a contribution-payer pension for the category of citizens who have been dismissed from work on discriminatory grounds stems from a number of provisions of the Constitution. In the first place from the basic provisions of the Constitution, namely Article 3 [Equality Before the Law] where, among other things, it is determined that: "The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms..." (paragraph 2).

52. In the spirit of this basic provision, the legislation that defines certain rights of citizens should be adopted, including the law that defines the right to pension. In this regard, while it is an indisputable fact that a part of the citizens were dismissed their jobs on a discriminatory basis, at the time of the violent measures, and for this reason did not reach the "pension experience of 15 years", then for an equality before the law, this category cannot be equated with the rest of the citizens to whom the same practice has not been applied (to whom, therefore, the criterion for pension experience of 15 years can be applied). Specifically, the respect of this principle would mean the amendment of Article 8 of LPSFS, and for this category of citizens to recognize the right to a contribution-payer pension even if the criterion for pension experience has not been reached. On the contrary, the Ombudsperson estimates that the provision of Article 8 of the LPSFS, as it currently stands, legitimizes the discriminatory practice of dismissal from work during violent measures, and in its spirit violates the fundamental principle of equality of citizens before the law.

[...]

58. Furthermore, the Ombudsperson points out that the denial of the right to an age-contribution-payer pension for this category of citizens, in addition to constituting a violation of equality before the law and discrimination, also violates their dignity, which according to the Constitution should be the basis of all other human rights. This standard is defined in Article 23 of the Constitution, where it is emphasized that "Human dignity is inviolable and is the basis of all human rights and fundamental freedoms".

59. In conclusion, based on the facts and arguments presented in this report, the Ombudsperson considers that the Government of the Republic of Kosovo, namely the MLSW in accordance with the Constitution and the positive obligations of the state in relation to the advancement of human rights, should initiate the change of LPSFS in order that all citizens who were dismissed from work on a discriminatory basis in the 90s, benefit from the age contribution-payer pension even though they have not reached the pension experience of 15 years.

60. Certainly, in accordance with the nature of the right to pension, the MLSW has the authority to categorize pensioners who worked before 1999 depending on years of work, profession, duties and other criteria for this purpose.

66. From the analysis of the facts and events that happened after 1989, namely the practice of dismissal from work at the time of violent measures, the Ombudsperson concludes that this process was discriminatory. From the research of the OI, it appears that dismissal from work in the 90s after the imposition of violent measures in Kosovo, was based on arbitrary practice, implemented by "interim bodies" (e.g. "interim labor management body" as is also presented in this report) and according to special discriminatory laws.

67. Moreover, this practice has been described as discriminatory by the UN Resolutions, the Hague Tribunal and the Supreme Court of Kosovo. On this basis, the Ombudsperson draws attention that such a discriminatory practice should not continue to produce consequences for the citizens of Kosovo, namely the category of citizens who do not benefit from contribution-payer pension.

68. For these reasons, and based on the constitutional obligations and the positive obligations that the state has in relation to citizens, the Ombudsperson states the necessity for the Government of the Republic of Kosovo to take measures so that all citizens who worked before 1999 and are dismissed from work on discriminatory grounds to benefit from the age contribution-payer pension. For this purpose, it is necessary to amend the LPSFS, namely its Article 8.

III. Brief summary of the history of the pension and disability system in Kosovo based on the information provided by the MLSW on 29 January 2021

47. On 29 January 2021, the MLSW submitted to the Court "*Information related to case KO190/90*". Among other things, the MLSW explained that the pension and disability system in Kosovo has gone through several stages: (i) the first stage includes the period from 1947 to 1983 when the laws of the former Yugoslav Federation were applied in Kosovo; (ii) the second stage includes the period from 1983 to 1992 when Kosovo had an autonomous pension and disability system regulated according to laws approved by the Assembly of Kosovo; (iii) the third stage includes the period from 1992 to 1999 when the pension and disability system of Kosovo, with discriminatory laws, was integrated into the pension and disability system of the Republic of Serbia; (iv) the fourth stage of the pension and disability system is from 1999-2002 known as "*the institutional and legal vacuum stage*" in Kosovo, because due to the war in this period of time, the pension and disability system of Kosovo did not work at all, in which case the vast majority of Kosovar pensioners were left without pensions; and (v) the fifth stage begins from 1 July 2002 onwards, as a reforming stage with a new concept of the pension and disabilitz system composed of three pillars, where two forms of pensions, the basic one of age and of individual savings are mandatory and the third pillar reflects the form of voluntary pensions.

48. In the following, the MLSW emphasized that *"after the abolition of Kosovo's autonomy in 1989,* the *abolition of the Disability Pension Insurance Fund follows."* While from 1992 to 1999, violent measures entered the PDI Fund, and the latter was transferred to the competences of the Pension and Invalid Fund of Serbia. In the following, the MLSW emphasizes that *"As a result of the war in 1999, the total destruction of the pension system in Kosovo resulted, as well as the cessation of pension payments for ethnic Albanians, because the assets of the Kosovo Pension Fund were transferred to the Pension Fund of Serbia."* MLSW also clarifies that *"after this period, in 2002, Kosovo will be finally separated from the pension system implemented in the former Yugoslavia (pay as you go for short PAYG)."*

49. In addition, the MLSW explained that the pension system in Kosovo since 2002 consists of three pillars, where two forms of pensions, the basic age pension and that of individual savings, respectively, are mandatory, while the third pillar is a form of voluntary pensions.

50. Based on the clarification provided, *"the first pillar includes the pension schemes financed by the state budget, initially it consisted of public pensions paid to all Kosovars - basic pensions, including the disability pension; this pillar was later continuously supplemented with the following pension schemes and compensations: contribution-payer pensions, premature pensions of the miners of mines in Kosovo and the "Trepça" Complex, pensions of members of the Kosovo Protection Corps (KPC), pensions of members of the of Kosovo Security Force , the compensation for the Blind, the scheme for the compensation of Paraplegic and Tetraplegic persons, the scheme for the compensation of Education Workers from the school year 1990/91 to the school year 1998/99."*

51. The MLSW continued to clarify that *"The second pillar includes pension savings in individual accounts that are mandatory for all employees working in Kosovo, aged over 18 years. Mandatory contributions are the main source of pension savings. The contribution is set to be 10% percent of the salary amount, with participation of 5% contributions by the employer and 5% by the employee. The amount of the pension depends on the amount of contributions paid, while income is earned from their investment (capitalization of individual investments)."*

52. In the end, the MLSW emphasizes that *"third pillar - voluntary (supplementary) pension system. This system is a voluntary private pension organized on an individual basis or by the enterprises themselves. This system complements the first and second pillar system."*

53. Finally, the MLSW emphasizes that contribution-payer pensions are categories paid from the state budget, despite the fact that the scheme is called contribution-payer. Consequently, the amount of the pension and the categorization has nothing to do with the amount of the contribution paid before 1999, as the latter is fully covered by the state budget.

54. The MLSW also emphasized that currently education workers are the most favored category of beneficiaries in terms of the right to a contribution-payer pension because, in addition to the recognition of work experience from 1990 to 1999, they also receive an additional compensation that varies depending on how much was worked during the years 1989 -1990 to 1998-1999. The challenged law by the referring Court stipulates that "*by this law, the work experience for contribution-payer pension for 1998-1999 is recognized to education, health workers and others who have worked in the system of the Republic of Kosovo*", by paragraph 6 of Article 8 of the Law on Pension Schemes Financed by the State.

55. In connection with the Court's question to the MLSW "*what are the rights of those persons who provide proof of contribution under 15 years of work experience before 1 January 1999 and how can they realize this right in the current circumstances?", the latter states that: "All contribution-payer pension applicants who do not provide proof of 15 years of work experience exercise their right to a basic pension; in the following, the MLSW also emphasizes that: "I remind you that we have drawn up a new administrative instruction that foresees some substantial changes in terms of realizing the contribution-payer pension as they are; - recognition of the period 1990 to 31.12.1998 as a contributory experience for all those dismissed from work by the violent Serbian administration [emphasis added]; - as well as the recognition of diplomas until 1998;*

56. Finally, as to the 5th question of the Court, addressed to the MLSW, namely "*Do the Institutions of Kosovo have access to the register of the employment relationship of the workers in the period 1990-1999? How is the issue of the burden of proof for the provision of such evidence regulated in case of an application for an age contribution-payer paying pension?"*, the latter replied as follows:

> *"The institutions of Kosovo, namely MLSW-DPs, possess several registers, copies of forms for payment of contributions (several organizations), court judgments before and after the war, various decisions of the PO at the time, decisions on annual leave and other relevant material evidence, documents issued by PAK (they have the files of PO that have been privatized), simply put, any document that is considered valid for employment; the material evidence that we possess as a department we provide from our databases respectively from the archives that we have inherited, while we instruct the parties for the eventual evidence that we do not possess."*

Allegations of the referring court

57. The essence of the referral of the referring Court consists in the doubts regarding the constitutionality of paragraph 2 of Article 8 of the challenged Law, as well as the compatibility of this Article with *"international instruments that regulate the corpus of human rights and freedoms"*. The referring Court claims the existence of a violation of Articles 24 [Equality Before the Law] and 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of property) of Protocol no. 1 of the ECHR.

58. According to the interpretation of the referring Court, the aforementioned article of the challenged Law provides that the categorization of contribution-payer retirement beneficiaries, according to the duration of the contribution payment, according to the qualifying structure and other criteria, is determined by a sub-legal act, which is approved by the relevant Ministry. In this regard, the relevant Ministry, namely the MLSW, by the challenged Administrative Instruction, in its Article 6, as a criterion for recognizing the right to a contribution-payer pension, has defined the condition that the beneficiaries must have at least fifty (15) years of contribution-payer pension experience before 1 January 1999, according to *"Pension and Disability Insurance Law (PDI) of Kosovo, no. 26/83"*.

59. Consequently, the referring Court emphasizes that in order to benefit from the contribution-payer pension, the person who has at least fifty (15) years of pension experience prior to 1 January 1999 is qualified. Therefore, according to the referring court, such time limitation is contrary to the Constitution and all international instruments, from which does not receive as a basis for pension *"contribution-payer*

century of work" (or the work period of the contribution-payer), but his contribution in a certain period of time, which consists in the fact that someone who until 1999 and has only 15 years of work experience, will receive a full pension, while those who in the case of applying for a pension, still have 30 years of contribution, but they do not have 15 years until 1 January 1999, do not receive a pension. The referring Court also states that it is "*widely known*", that the Albanian community was dismissed massively from work in the period 1990-1999.

60. Finally, the referring Court emphasizes that the provisions of the challenged Law and the challenged Administrative Instruction are in violation of Articles 24 and 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR. Therefore, based on the arguments above, the referring Court proposes (i) the approval of the referral and the declaration of unconstitutionality of the aforementioned provisions of the challenged Law and Administrative Instruction; and (ii) to order the legislative body, namely the Assembly, to harmonize the law in question with the Constitution of the Republic of Kosovo as soon as possible.

Responses received from members of the Venice Commission Forum

61. In the questions addressed by the Court to the Forum of the Venice Commission, as noted in paragraph 24 above, the Court has received answers from: (i) the Constitutional Court of the Czech Republic; (ii) the Constitutional Court of Romania; (iii) Constitutional Court of North Macedonia; (iv) Constitutional Court of Bosnia and Herzegovina; (v) Liechtenstein; (vi) the Court of the Netherlands; (vii) the Constitutional Court of Latvia; (viii) the Constitutional Court of Bulgaria; (ix) the Constitutional Tribunal of Poland; (x) the Constitutional Court of Slovakia; (xi) Constitutional Court of Croatia; (xii) the Supreme Administrative Court of Sweden; and (xiii) the Constitutional Court of South Africa. In the following, the Court will present the answers of the aforementioned Courts, to the Court's questions as elaborated in paragraph xx of this Judgment.

(i) Constitutional Court of the Czech Republic

62. Decisions of the Constitutional Court annulling a statute, other enactment or individual provisions thereof are according to the Art. 58 (1) of the Constitutional Court Act enforceable on the day they are published in the Collection of Laws, unless the Court decides otherwise. Art. 70 (1) of the Act provides that in such a decision the Constitutional Court shall specify the day of the annulment.

63. To avoid undesirable consequences of an immediate annulment of the challenged law it is sometimes necessary to postpone the enforcement (effectiveness) of a decision. The time given by the Constitutional Court to the legislator to bring the law in question into conformity with the constitutional order varies. Even though there is no fixed period stated, in most cases it lies somewhere between 2 to 18 months (depends on the individual circumstances of the case). During this period the law declared unconstitutional remains in the meantime a part of a legal order and is still binding on all public authorities and persons.

64. Speaking of pending/unresolved cases, an inactivity of courts would be probably the worst case scenario. According to legal theory courts should not wait for the enforcement of the decision of the Constitutional Court, respectively for an adoption of a new law by the Parliament. They should continue proceedings and, if possible, directly apply the relevant provisions of constitutional laws or international treaties instead of the law derogated by the Constitutional Court. If such direct application of constitutional norms is not an option, the courts have no choice but to apply the

unconstitutional law (as it is still officially binding – see above). They shall, however, try to interpret and apply the law in a constitutionally conforming manner, bearing in mind reasoning of the quashing decision of the Constitutional Court.

65. In the following, the Constitutional Court of the Czech Republic emphasized that it is important to add that a sole fact that an ordinary court applied a law that was found unconstitutional (but such decision of the Constitutional Court has not been enforceable yet) should not constitute a sufficient reason for an annulment of the decision of the ordinary court. The Constitutional Court may intervene only if the manner of the application of the unconstitutional law by the ordinary court caused a breach of fundamental rights of an individual.

66. Annulment of a statute or its individual provisions by the Constitutional Court can constitute grounds for reopening a case only in criminal proceedings if the judgment of an ordinary court has not yet been enforced. Other decisions issued on the basis of annulled law should remain unaffected; rights and duties arising from these decisions cannot be enforced though. In this context, see Article 71 of the Law on the Constitutional Court:

> *Article 71*
> *(1) If, on the basis of a statute or some other enactment which the Court has annulled, a court in a criminal proceeding has passed a judgment which has acquired legal effect but has not yet been enforced, the invalidation of this statute or other enactment shall constitute grounds for reopening the proceeding in accordance with the provisions of the law on criminal judicial proceedings.*
> *(2) Other legally effective decisions issued on the basis of a statute, or some other enactment, which has been annulled remain unaffected; however, rights and duties arising from such decisions may not be enforced.*
> *(3) The provisions of paragraphs 1 and 2 apply also in cases when a part of a statute or some other enactment, or any of the provisions thereof, is invalidated.*
> *(4) Otherwise rights and duties flowing from legal relations created prior to the invalidation of the statute, or other type of enactment, remain unaffected.*

67. By a judgment of 28 March 1995 [No. Pl.ÚS 20/94], the Constitutional Court annulled several legal provisions related to institutional care for children. Bearing in mind the necessity to maintain a legal framework for pursuing various urgent legal steps in the interest of a child, the Court decided to postpone the enforcement (effectiveness) of the decision to 1 October 1995 in order to provide the legislator a reasonable time for introducing necessary legislative changes

68. A similar approach was taken in a number of other decisions. For example in a judgment of 18 October 1995 [No. Pl. ÚS 26/94] (constitutional conformity of legal provisions on financing of political parties) the Constitutional Court postponed the effectiveness of the decision for 14 months; it ruled that the legal loophole caused by an immediate repeal of the challenged law would have been in conflict with the principle of proportionality and the rule of law.

69. In a judgment of 17 January 2001 [No. Pl. ÚS 9/2000] the effect of derogation of challenged law (absence of judicial review of specific decisions of administrative bodies) was postponed for more than a year (to 28 February 2002) because the immediate derogation would have caused overburdening of the Constitutional Court. In the meantime the Parliament was supposed to continue working on the new legislation on administrative judiciary and take conclusions of the Court into account.

(ii) The Constitutional Court of Romania

70. Pursuant to the first sentence of Article 147 (1) of the Constitution, the provisions of the laws and ordinances in force, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, have failed to bring the unconstitutional provisions into line with the provisions of the Constitution. The law or ordinance or its provisions found to be unconstitutional can no longer be applied by any court in any case or by any other public authority from the date of publication in the Official Gazette of the Constitutional Court's decision. "*The decision ascertaining the unconstitutionality forms part of the normative legal order, and through its effect the unconstitutional provision ceases to apply for the future*" (Decision No 847 of 8 July 2008, published in the Official Gazette No 605 of 14 August 2008). The intervention of the Parliament or the Government within the period within which the provisions found to be unconstitutional are suspended for the purpose of them being brought into line with the decision of the Constitutional Court is an expression of the generally binding and final nature of the decisions of the Constitutional Court. For the period laid down in Article 147 (1) of the Constitution, the provisions found to be unconstitutional are suspended as of right and the courts may not apply them.

71. Neither the Romanian Constitution nor Law No. 47/1992 on the organisation and functioning of the Constitutional Court provides for a time limit within which the legislator is required to bring the rule found to be unconstitutional into line with the Constitution.

72. Therefore, the decision ascertaining the unconstitutionality applies directly to all cases pending before the courts. It will also apply, by means of the extraordinary avenue of appeal consisting in revision, also to a case which has been settled by a final decision, if the decision of the Constitutional Court for admission of the exception was pronounced after the moment when the exception of unconstitutionality was raised in that particular case.

73. In summary, the decision ascertaining the unconstitutionality will not apply to cases settled by means of a final decision before the date of its publication in the Official Gazette, since throughout the period of activity of the rule, the latter does enjoy a presumption of constitutionality, but it will apply to all cases pending before courts on the date of publication of the decision in the Official Gazette. It is an application of the provisions of the final sentence of Article 147 (4) of the Constitution, according to which, from the date of publication, decisions take effect only for the future and it is thus respected the presumption of constitutionality of the legal rule for the period prior to the publication of the decision of unconstitutionality. However, the decision will always apply in the case in which the exception was raised, whether or not it has been settled by means of a final decision.

74. There are (rare) situations in which the correction of the regulatory deficiency found in the Constitutional Court's admission decision is carried out by the legislator within the period from the date of delivery of the solution to the date of publication of the decision in the Official Gazette of Romania. In that case, it is the intervention of the legislator which removes the defect of unconstitutionality, of course from the date of its entry into force, but the decision of the Court will produce its effects for all legal relationships pending on the date of its publication, in cases pending before the courts and in cases settled by means of a final decision, but in which an exception of unconstitutionality was raised before the date of publication of the decision in the Official Gazette.

75. The Romanian normative framework does not provide for the courts' possibility to suspend cases pending on their dockets until the legislator adopts a law through which it brings the rule declared unconstitutional into line with the Constitution.

76. In its case-law on the effects of the admission decisions which it delivers, the Court has held that, in order to determine the need for further intervention by the legislator, it is necessary to examine to what extent the body of legislation to which the decision of the Constitutional Court is based provides the necessary elements for its application in a uniform and foreseeable manner, despite the passivity of the legislator.

77. A first hypothesis is that, until the adoption of the appropriate legislative solution, as a consequence of the decision upholding the exception of unconstitutionality, the courts directly apply the constitutional provisions set out in the Court's decision in relation to the normative situation found to be contrary to the Constitution. The courts may therefore, by virtue of the admission decision and the express authorisation given therein, directly apply the Constitution.

78. Then, there are situations in which, despite the silence of the legislator, the body of legislation in force provides all the necessary legislative elements, which allows those rules to be applied in a predictable and uniform manner by the courts.

79. On the other hand, there may be situations in which, despite a comprehensive rule which, in principle, would allow the foreseeable application of the rule sanctioned by the Court's decision, such application is impossible insofar the principle of legality requires that the matter in question be expressly regulated (for example, the rules on the criminalisation of criminal offences and the determination of penalties). Finally, there are cases where the body of legislation in force does not provide all the legislative elements necessary for the foreseeable application of the rules sanctioned by the decisions of the Constitutional Court ascertaining the unconstitutionality of certain legislative solutions.

80. If, in the first two hypotheses, there is no need for the legislator to intervene in order to bring the statutory rule into line with the Constitution, in the latter two hypotheses, the legislator's intervention is necessary so that the legal concept found to be unconstitutional can be applied. If the legislator refuses or omits to regulate, the legislative vacuum cannot be filled by a court, the courts cannot stay the proceedings, and they are obliged to deal with the cases before them in accordance with the existing legislative framework.

(iii) North Macedonia

81. When a challenged law is found unconstitutional by a decision of the Constitutional Court, the repealed provisions are no longer part of the legal order and may not be applied anymore. However, the Constitutional Court in its decision states the reasons for the unconstitutionality of the law/some provisions of the law, but, it does not give any instructions on the Parliament on how to remedy the situation regarding the unconstitutional law. The Constitutional Court cannot commission the Assembly of the Republic of North Macedonia as the holder of the legislative power with the adoption of a law or determine deadlines to it to that effect. The Assembly, being a legislative body under the Constitution, is obliged to observe the Constitution, the laws it has adopted, but also the decisions of the Constitutional Court by which it has repealed or invalidated certain law (or provisions of a law). Even in case when a gap occurs owing to a decision of the Constitutional Court, the Constitutional Court may neither impose directly an obligation to the legislative body to adopt a new law, nor to point to Parliament what the content of the new law should be. Hence, the filling of

the legal gap that occurred as a consequence of the termination of validity of the unconstitutional law is a task of the legislator.

82. In the period from the adoption of a resolution for initiation of a procedure for appraisal of the constitutionality (which is the first phase of the constitutional decision making) of the law that is submitted to the Assembly of the Republic of North Macedonia for an opinion (with a 30-day deadline for a reply) until the final decision for its repeal, the Assembly may change the law or adopt a new law, following which the Court suspends the procedure.

83. In order to prevent the law (on which the Constitutional Court has expressed doubts about its constitutionality) from producing legal consequences, the Constitutional Court usually, together with the decision to initiate a procedure for constitutional review of the law, also adopts a decision on so called temporary measures. Under Article 27 of the Rules of Procedure, the Constitutional court may, at any stage of the procedure until the adoption of final decision, decide to suspend the execution of individual acts or activities which are undertaken on the basis of a law, other regulation or a general act whose constitutionality i.e. legality is being assessed, if its execution could cause consequences that could not be easily eliminated. In such cases, the Constitutional court is obliged to finalize the procedure as soon as possible.

84. In the following, unresolved cases before the regular courts will benefit from the new law adopted by the Assembly based on the Constitutional Court decision. However, Article 18 of the Law on the Courts (which is the only article on the incidental constitutional review) allows also for a direct application of the provisions of the Constitution. Under Article 18 par. 2, if the court deems that the law to be applied in a particular case is not in compliance with the Constitution, and the constitutional provisions cannot apply directly, it shall suspend the procedure until the Constitutional Court adopts a decision.

85. The legal effects of the decisions of the Constitutional Court on cases already decided by the regular courts depend on the type of the decision. Thus, decisions for annulment have *ex tunc* effects. According to this rule, such decisions of the Court have an effect not only in the future but also retroactively, that is from the moment of the adoption of the annulled law or other regulation. The consequences from the implementation of the annulled law or other regulation are removed with restoration of the matters to previous condition, i.e. condition that existed prior to the adoption of the very law, that is, other regulation.

86. In line with this legal effect of the annulling decisions of the Constitutional Court, and for the purposes of removing the consequences from the implementation of the law or other regulation that was annulled, Article 81 paragraph 1 of the Rules of Procedure of the Constitutional Court envisages that everyone who had his/her right violated with a final or effective decision adopted on the basis of a law, regulation or other general act which was annulled by a decision of the Constitutional Court, is entitled to request from the competent authority to annul that individual act, within 6 months from the date of the publication of the decisions of the Court in the Official Gazette. If the consequences from the implementation of the law, regulation or general act which was annulled by a decision of the Constitutional Court may not be removed with a change of the individual act in the sense of the preceding paragraph, the Court may adjudicate that the consequences be removed by restoration to previous condition, with a damage compensation or in some other way.

87. However, in no procedural law of the Republic of North Macedonia is there an express provision that the reopening of a court procedure may be requested also in case when

a law on the basis of which an effective court decision had been made, was annulled by a decision of the Constitutional Court. But, the absence of such provision should not be an obstacle for the competent court to decide on a concrete request by the party for the annulment or change of an effective court decision on that ground as well, since the annulling decision of the Constitutional Court binds it to that, given that its legal effect applies to all (erga omnes), including other courts as well. Unlike the annulling decisions, the legal effects of the decisions of the Constitutional Court which repeal a law (other regulation or general act refer to the future only, which means that the repealed law, other regulation or general act ceases to be implemented and to generate legal effect ex nunc (from the repeal onward) and the consequences already produced, remain.

(iv) The Constitutional Court of Bosnia and Herzegovina

88. The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

89. As to the effects of the decision on request, relevant provision is Article 61 of the Rules of the Constitutional Court of Bosnia and Herzegovina. It reads as follows: "*(1) The Constitutional Court shall, in the decision granting a request, decide on its legal effect (ex tunc, ex nunc). (2) In a decision establishing the incompatibility under Article VI (3)(a) and VI (3)(c) of the Constitution, the Constitutional Court may quash the general act or some of its provisions, in full or partly. (3) The quashed general act, or its quashed provisions, shall be rendered ineffective on the next day following the date of the publication of the decision in the Official Gazette of Bosnia and Herzegovina. (4) Exceptionally, the Constitutional Court may, by its decision finding the incompatibility under Article VI (3) (a) and VI (3) (c) of the Constitution, grant a time-limit for harmonization, which may not exceed six months. (5) If the established incompatibility is not removed within the time-limit referred to in paragraph 4 of this Article, the Constitutional Court will, by its decision, establish that the incompatible provisions are rendered ineffective. (6) The incompatible provisions shall be rendered ineffective on the first day following the date of publication of the decision referred to in paragraph 4 of this Article in the Official Gazette of Bosnia and Herzegovina.*"

90. The case law of the Constitutional Court of Bosnia and Herzegovina consists in the fact that the decisions of the Constitutional Court do not have retroactive effect. The Constitutional Court considers that it is indisputable that our positive legislation links the applicability of laws or bylaws or decisions of constitutional courts with the moment of their publication in official gazettes. In the present case, the Law on the Procedure before the Constitutional Court of the Federation of BiH is completely clear. The provisions of Articles 40 and 41 of the said Law stipulate that the law or other regulation determined by the Constitutional Court of the Federation of BiH as unconstitutional will not be applied as of the date of publishing the Constitutional Court's judgment in the "Official Gazette of the Federation of BiH". In view of the above, the Constitutional Court holds that the position of the Supreme Court that the decision of the Constitutional Court of the Federation of BiH has no retroactive effect cannot be considered arbitrary.

(v) Liechtenstein

91. When the Constitutional Court holds that a law is unconstitutional, the ruling is published by the Government in the Liechtenstein Legal Gazette without delay. The repeal of the law becomes legally effective upon publication, unless the Constitutional Court sets a time limit of a maximum of one year; the case of cause shall be exempted from this (Article 19(3) of the Law on the Constitutional Court [StGHG]). In other words, if the Constitutional Court sets a time limit, the law remains in force until the national legislator introduces a new law compliant with the Constitution.

92. Pending/unresolved cases which require the application of the unconstitutional law are not, as a rule, suspended until a new law is passed. Since in case of a time limit set by the Constitutional Court, the law continues to be in force, it is applied by the ordinary courts. Cases already decided by ordinary courts are not subject to a fresh judicial review.

(vi) The Netherlands

93. First of all, the situation in the Netherlands is slightly different from that in most other European countries. Article 120 of our Constitution prohibits judges (any judge, the Netherlands doesn't have a constitutional court) from assessing the constitutionality of a law that has been approved by the parliament (parliamentary act). A situation as described before your Court, where the Constitutional Court is requested to assess the constitutionality of a parliamentary act, will therefore not occur in the Netherlands.

94. Judges in the Netherlands can, on the other hand, assess the constitutionality of lower types of legislation, such as governmental or ministerial decrees and local legislation. In addition, judges can assess the conformity of all types of legislation, including parliamentary laws, with EU-law and international human rights treaties.

95. Still, also in cases where a judge comes to the conclusion that a law violates EU-law or an international human rights treaty, he is not allowed to order the legislator to do anything or give him a timeframe within which he has to fix the violation (famous is for example case ECLI:NL:HR:2003:AE8462). All a judge can do is to conclude that a legal provision violates EU-law or an international human rights treaty. He cannot say anything about what the legislator has to do about this. In an exceptional case, the supreme court has warned that, if the legislator doesn't fix a known incompatibility 'in time' (the court doesn't give a specific timeframe), a judge might be allowed to solve the matter by himself (see case ECLI: NL: HR: 1999: AA2756).

96. In general, the assumption is that it is up to the legislator to decide whether, when and how to amend a unconstitutional law. The existing law stays in place until the legislator makes amendments and can still be applied in other cases. The rationality behind this, is that it is up to the democratically elected legislator and not the judiciary to make political choices. This '*mandate of the legislator*' is quite strong in the Netherlands and has far reaching consequences for the role of the judges when it comes to assessing the constitutionality of parliamentary acts or their conformity with higher law.

97. Courts in the Netherlands do not suspend decision-making in active cases until the national legislator has amended the unconstitutional provision or in the Dutch context, a provision that has been declared to violate EU-law or an international human rights treaty. As mentioned above, judges in the Netherlands cannot order the legislator to amend legislation, so it would not make sense to wait for the outcome of that. Lower courts would generally follow the highest courts in their judgments, meaning that potential precedents set with regard to the incompatibility of the application of a legal provision with higher law will normally be followed.

(vii) The Constitutional Court of Latvia

98. The Constitutional Court of Latvia has emphasized that when a legal [provision] that the Constitutional Court has declared unconstitutional shall be regarded as not in effect from the day of publication of the Constitutional Court judgment, unless the Constitutional Court has determined otherwise. The Constitutional Court of Latvia frequently gives time to the legislator to adjust the legal system by, for instance, amending the provision that has been declared unconstitutional. Normally during this interim period (i) the unconstitutional provision continues to be in force and applicable as before; or, (ii) the Court includes specific instructions with regard to the application of the unconstitutional provision, usually indicating that in the interim period the unconstitutional provision is to be applied in line with the ruling of the Constitutional Court.

99. In principle, all the cases that were adjudicated before the Constitutional Court declared the provision unconstitutional will remain unaffected, so they will not be reopened. The answer to this question depends on the time effect of the decision of the Constitutional Court. However, if the judgment of the Constitutional Court has a retroactive effect, then the three procedural laws (civil, criminal and administrative), foresee the possibility to request the reopening of the procedure, considering that the provision has been declared unconstitutional.

100. The Constitutional Court in cases where it is aware of pending cases in which the unconstitutional provision is to be applied gives a retroactive effect to the invalidity of the unconstitutional provision with respect "*to those persons, who already have started defending their rights by general legal remedies and to whom the contested norm has been applied.*" This means that the invalidity extends to the pending cases of which the Constitutional Court is aware but also to the cases of which it is unaware.

(viii) Constitutional Court of Bulgaria

101. The Constitutional Court of Bulgaria emphasizes that the legal provision that is declared unconstitutional is not implemented, but the Parliament is the sole authority competent to amend it or annul the legal provision declared unconstitutional by the Constitutional Court. All cases that are pending and still unresolved are suspended and finally decided in accordance with the decision of the Constitutional Court, which means that the unconstitutional legal provision does not apply. In cases where the Constitutional Court declares a legal provision unconstitutional, it is up to the legislator to issue a new law and it is not limited by a time frame or deadline. The Constitutional Court emphasizes that the Supreme Court of Cassation that the decision of the Constitutional Court by which a legal provision is declared unconstitutional cannot be considered as a ground for annulling an enforceable decision.

(ix) Constitutional Tribunal of Poland

102. The Constitutional Tribunal of Poland emphasizes that judgments of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 12 or 18 months. Where a judgment has financial consequences, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers. The possibility of delaying the date when unconstitutional provisions cease to have effect, in particular so as to provide the legislator with

indispensable time to change the law, and thus so as to prevent the emergence of '*legislative gap*'.

103. Based on the jurisprudence of the Constitutional Tribunal, the unconstitutional legal provision remains binding until the legislator issues the new law, however, in some cases the Constitutional Tribunal clarifies that as long as the unconstitutional legal provision remains binding, the regular courts must take into account that the legal provision declared unconstitutional lacks the presumption of constitutionality. After the end of the procedure before the Constitutional Tribunal, the regular courts rely on the reasoning given by the Constitutional Tribunal, especially regarding the effects of the judgment. The Constitutional Tribunal points out that in some cases the interested individuals can file a complaint for the reopening of the procedure because their case was decided based on the unconstitutional legal provision, however, in practice the reopening of the procedures is not allowed because those provisions have already been implemented.

(x) The Constitutional Court of Slovakia

104. The Constitutional Court of Slovakia states that when a legal provision is declared unconstitutional then it is up to the body that issued the unconstitutional provision to harmonize it with the Constitution within six (6) months from the publication of the Constitutional Court's judgment. If the body responsible for harmonizing the unconstitutional provision with the Constitution does not perform this action within six months, then the unconstitutional provision loses its validity after the said deadline.

105. In practice, the regular courts apply the legal provisions that are challenged and that are awaiting the assessment of their constitutionality by the Constitutional Court. The effects of the decisions of the Constitutional Court are binding for everyone and mainly have an effect in the future *(ex nunc)* with the exception of criminal cases, while the procedures established by the civil and administrative field are not re-opened.

(xi) The Constitutional Court of Croatia

106. The Constitutional Court of Croatia points out that the deadline given to the legislator to enact a new law in accordance with the Constitution varies from a few months to a year or two given the complexity of the issues dealt with and how many legal provisions have been repealed. The effects of the decisions of the Constitutional Court extend into the future *(ex nunc)*. Regarding the time limit, the repealed law or another regulation (and this can be a by-law in the Croatian language "*drugi odnosno podzakonski propis*"), or their repealed special provisions, lose their legal force on the day of publication of the decision of the Constitutional Court in the Official Gazette, unless the Constitutional Court sets another deadline. The Constitutional Court in the enacting clause of its decision determines the exact date when the repealed law expires.

107. Also, the Constitutional Court decides that with the entry into force of a new law (respectively the one that must be approved by the Assembly instead of the repealed one) the repealed law will expire. Cases decided by the regular courts based on the legal provision declared unconstitutional by the Constitutional Court can be reopened if the requirements stipulated by the Law on the Constitutional Court are met within a period of six months from the date of publication of the decision of the Constitutional Court in the Official Gazette . The referring court in the incidental control procedure,

suspends the procedure and submits a request to the Constitutional Court to assess the constitutionality of the law or some of its provisions.

(xii) The Supreme Administrative Court of Sweden

108. There is no Constitutional Court in Sweden. The functions of such a court are performed by the Supreme Court and the Supreme Administrative Court, but the Supreme Administrative Court has no jurisdiction to declare a norm unconstitutional .

109. However, if a Swedish court, in an individual case, considers that a provision conflicts with a provision of a fundamental law or with a provision of any other superior statute, or that the prescribed procedure was ignored in any important respect when the provision was inaugurated , then such a provision cannot be applied.

(xiii) The Constitutional Court of the South Africa

110. Regarding the first question, the Constitutional Court of South Africa has answered as follows: "*The point of departure is section 172(2)(a) of the Constitution of the Republic of South Africa (Constitution). In terms of this provision, where an Act of Parliament or a provincial Act is declared unconstitutional by the Supreme Court of Appeal, the High Courts or courts of similar status (lower courts), the order will have no force unless it is confirmed by the Constitutional Court of the Republic of South Africa (Constitutional Court). Therefore, it is the Constitutional Court that makes the final determination regarding the constitutionality of an impugned provision".*

111. The South African Constitutional Court further notes that the period granted to the Legislature to amend the impugned legislation has ranged from 6 to 24 months. However, the power of the Court to make an order that is just and equitable is wide enough to include the power to reserve to itself the power to reconsider the period of suspension it previously granted and even extend the suspension period (see, the case of the Constitutional Court of South Africa, *Zondi v MEC for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) paragraph 51).

112. Therefore, according to the Constitutional Court of South Africa there are a number of considerations that the Court takes into account when determining the period of suspension. All considerations are subject to discretion exercised in a fair and equitable manner.

113. In case SAMWU, the Court in relation to Article 172(1)(b) of the Constitution decided the following: "*The wording of section 172(1)(b) makes plain two pertinent points. The first is that, in the context of an order of constitutional invalidity, suspension of the order is not applied automatically. A declaration of invalidity renders the impugned legislation invalid immediately with retrospective effect. This is because it is undesirable for a constitutionally invalid provision to remain effective once a court of law has found it to be inconsistent with the Constitution. The second is that, once an Act has been found to be constitutionally invalid, its invalidity operates retrospectively unless a court finds that it would be just and equitable to limit its retrospective effect.*" (See the South African Constitutional Court case: *SAMWU*, cited above).

114. In the context of the clarifications given, the Constitutional Court of South Africa, in relation to Article 172(1)(b), the retrospective effect of a law that has been declared unconstitutional maybe limited by the Court. In case *Zuma* (see the case of the Constitutional Court of South Africa: *S v. Zuma* [1995] ZACC 1; 1995 (1) SACR 568

(CC); 1995 (4) BCLR 401 (CC)) The Court declared unconstitutional section 217(1)(b)(ii) of the Criminal Procedure Law, the provisions of which presume, unless the contrary is proved, that a confession made by an accused has been made freely and voluntarily, unconstitutional.

115. In this case, the Court found that although the application of the impugned provision since 27 April 1994 may have caused injustice to accused persons, it could not repair all past injustice. The effect of the order was that in those trials that begun on or after 27 April 1994 and that were not completed by the date of the order, a reconsideration of the admissibility of confessions already admitted was required, including the hearing of further evidence (see Constitutional Court case of South Africa: *Zuma*, cited above, paragraph 44). Therefore, the Court limited the retrospective effect of the order of invalidity, but in respect of matters pending before the High Courts (subject to the conditions of the order), admissions made by an accused person had to be reconsidered, to comply with the order.

116. In case *Cross-Border* (see South African Constitutional Court case Cross Border Road Transport Agency v Central African Road Services (Pty) Ltd[2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) on 31 March 2011, the Minister of Transport promulgated amendment regulations in terms of section 51 of the Cross-Border Road Transport Act. These regulations increased the permit fees payable by cross-border road transport operators by a substantial amount. Following an application before the High Court, on 15 February 2023, the regulations were declared unconstitutional. The declaration of constitutional invalidity was suspended for a period of six months to enable the Minister to republish the regulations.

117. The Minister failed to promulgate valid regulations within the period of suspension, and also failed to make an application to extend the six-month period. It was common cause that the order of invalidity came into operation at midnight on 14 August 2013, after the six-month period lapsed, but the parties disputed whether the order operated retrospectively as of the date the regulations were promulgated, 31 March 2011, or prospectively from 15 August 2013 (see South African Constitutional Court case *Cross Border*, cited above, paragraph 5).

118. In this case, the Court reiterated the following principles:

(a) A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences (paragraph 13).
(b) If the unconstitutionality is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue. That would mean that the impugned law and everything done under it would be invalidated (paragraph 17). (Emphasis added.)
(c) When the Constitution came into force there were many old laws on the statute book which were inconsistent with the Constitution. If all of them were to have been struck down and all action taken under them declared to be invalid, there would have been a legislative vacuum and chaotic conditions (paragraph 19).
(d) The consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default position. This default position can, however, be varied by an order of court, exercising the express power under section 172(1)(b)(i) of the Constitution. It is only an order of court that can vary the consequences that flow from the doctrine of constitutional invalidity. (Emphasis added.)

119. Having considered the aforementioned principles, the Constitutional Court held because the order and judgment of the High Court declaring the regulations invalid were silent on the question of limiting the retrospective effect of the declaration, the declaration of constitutional invalidity was retrospectively invalid from the date the regulations were promulgated.

120. Where an order of Constitutional invalidity was suspended, the declaration of invalidity will take effect at the moment the suspension expires (see South African Constitutional Court case: *Ex parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC). This means that until expiry of the suspension period, or until the constitutional defect is rectified, the impugned law will continue to apply during the period of suspension, unless the order states otherwise.

121. In the following, the South African Constitutional Court emphasized that matters pending before the courts will only benefit from the amended legislation if the order of constitutional invalidity or the new legislation makes provision for such matters to be decided in accordance with the new legislation, even if the matter was before the courts before enactment of the amended legislation.

122. In case *Dykema,* (see the case of the Constitutional Court of South Africa: *Dykema v Malebane* [2019] ZACC 33; [2019] JOL 45686 (CC);2019 (11) BCLR 1299 (CC), the Constitutional Court had previously declared chapters V and VI of the Development Facilitation Act (DFA) constitutionally invalid. The declaration of invalidity would expire on 17 June 2012. Until then, the Provincial Development Tribunals established under the DFA could continue to accept new applications and decide pending applications (see South African Constitutional Court case: *Dykema v. Malebane,* cited above, paragraphs 7 and 8).

123. In the circumstances of this particular case, by 17 June 2012, the Parliament had not passed any remedial legislation. A draft bill, which ultimately became enacted as the Spatial Planning and Land Use Management Act (SPLUMA), was in progress. SPLUMA came into effect on 1 July 2015 so that between 17 June 2012 and 1 July 2015 a legislative vacuum existed (see South African Constitutional Court case: *Dykema v. Malebane,* cited above, paragraphs 12, 15 and 17).

124. In February 2012, the applicant lodged an application with a Tribunal for planning permission under Chapter V of the DFA. The Tribunal issued its decision approving his application on 1 November 2012. The Municipality refused to give effect to the decision, arguing that the Tribunal's decision was invalid because after 17 June 2012 (when the suspension of the declaration of invalidity came to an end) it had no further decision-making power (see the case of the Constitutional Court of South Africa: *Dykema v. Malebane,* cited above, paragraph 22).

125. The Constitutional Court held that the rights-preserving rationale of the suspension and the constitutional imperative of remedial legislation supported the view that applications submitted, but not finalised, before 17 June 2012 remained valid as pending applications when the suspension period ended. It found that there was no obstacle to the applicant's application being one that was "*pending*" to be continued and disposed of in terms of SPLUMA before another competent authority that was not the Tribunal (see the case of the Constitutional Court of South Africa: *Dykema v. Malebane,* cited above, paragraph 49).

126. The rationale for suspension of the declaration of invalidity is to avoid serious disruptions or dislocations in state administration that would ensue if the order of invalidity were to take immediate effect and to prevent prejudice. Therefore, once the

impugned legislation is amended and new legislation is enacted, it follows that, subject to the Court's order, those with pending cases should benefit from the new legislation.

127. The South African Constitutional Court stated that lower Courts do not suspend their decision-making powers in matters pending before them, following a declaration of an order of constitutional invalidity.

128. Where the order provides interim relief while the impugned law is amended by Parliament, as was the case in *Ramahovhi*, matters pending before the lower courts will be decided in accordance with the interim remedy provided in the order.

129. Where the declaration of constitutional invalidity is suspended, but no interim remedy is provided, the invalid law continues to operate with full force and effect as was the case in *Dykema*. However, it is important to note that section 172(1)(b) authorises a court to impose any conditions it deems necessary to regulate the temporary arrangement of allowing an invalid law to continue to apply while the competent authority corrects the defects.

130. As a general rule, in terms of section 172(1)(b) of the Constitution, a declaration of invalidity renders the impugned legislation invalid immediately with retrospective effect. However, a court has the power to limit the retrospective effect of the order if it finds that it is just and equitable to do so, and to suspend the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

131. Finally, the Court put emphasis on that the Constitutional Court of Southern Africa emphasizes that the challenged law is discriminatory because it does not take into account that according to the discriminatory laws of the former Yugoslavia during the 1990s, a majority of Albanian-speaking employees were "expelled" from employment in the public service.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

Article 46 [Protection of Property]

"1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.
5. Intellectual property is protected by law.

Protocol No. 1 of the ECHR
Article 1 [Protection of property]

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

Law on Pension and Disability Insurance no. 011-34/83 (Official Gazette of SAPK no. 26/83)

Article 1
[No title]

With this law, basic rights from pension and disability insurance are regulated in more detail in accordance with the Law on basic rights from pension and disability insurance ("Official Gazette of the SFRY" no. 23/82 and 77/82, in the following text : Law on fundamental rights) and other fundamental rights from pension and disability insurance are also regulated.

Law on basic pension and disability insurance rights (published in the "Official Gazette of the SFRY", no. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 44/ 90, 41/94)

III. ACQUISITION AND CREATION OF RIGHTS
Old age pension
Article 21

The employee from articles 18 to 20 of this Law (hereinafter: the insured) acquires the right to the old-age pension when he reaches 60 years (male), respectively 55 years (female) of life and 20 years of pension experience.

The insured who has not reached the retirement age of 20 years acquires the right to the old-age pension when he reaches 65 years (male) or 60 years (female) of life, respectively ***and at least 15 years of insurance experience.***

The insured acquires the right to the old-age pension when he reaches 40 years (male) or 35 years of pension experience (female), regardless of years of life.

Provisions of the Challenged Law (Law No. 04/L-131 on Pension Schemes Financed by the State)

Article 8
Conditions and criteria for recognition of the right to age contribution-payer pension

1. *The right to age contribution-payer pension shall be realized by all persons who have citizenship of Kosovo and who:*

1.1. have reached the age of sixty-five (65);

1.2. should have pension contribution-payer work experience, according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 1.01.1999.

1.3. provide valid evidence on payment of contributions under provisions of the Law on Pension and Disability Insurance No.011-24/83 (Official Gazette of SAPK No.26/83) before 01.01.1999;

2. Categorization of users of contribution-payer pension, according to the duration of the payment of contribution according to the qualification structure and other criteria shall be defined by a sub-legal act which shall be approved by the respective Ministry.

[...]

6. *With this Law there shall be recognized the work experience on contribution-payer pension for the years 1989-1999 of the employees of education, health and others who have worked in the system of the Republic of Kosovo.*

The provisions of the challenged Administrative Instruction (Administrative Instruction (MLSW) No. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions according Qualification Structure and Duration of Payment of Contributions - Pension Experience

Article 5
Qualification of beneficiaries of contribute-paying pension

1. Beneficiary of contributor's pension with low level of education is considered the pensioner, respectively the insured who has completed at least primary education.
2. Beneficiary of contributor's pension with secondary level of education is considered the pensioner, respectively the insured who has completed the secondary school.
3. Beneficiary of contributor's pension with higher school level of education is considered the pensioner, respectively the insured who has completed the higher school.
4. Beneficiary of contributor's pension with superior level of education is considered the pensioner, respectively the insured who has completed the university education.
5. All evidence for the qualification prescribed by paragraph 2, 3 and 4 of this Article shall be before 01.01.1991.

Article 6
Required documents for recognition of the right to contributors pension

1. All beneficiaries of contributor's pension, namely the insured in case of request for contributor's pension, based on the categorization according to the qualification structure should bring relevant evidence set forth in Article 4 and 5 of this Instruction, depending on which category he/she applies.
2. In addition to the general conditions set forth in the applicable provisions of the Law on State Financed Pension Schemes, the current beneficiaries and those applying in the future, must submit necessary documents, such as:
2.1 Identity Card of the Republic of Kosovo
2.2 Extract of birth:

2.3 ***Have pension contributing experience at least fifteen (15) years before the date 01.01.1999, as per Law on SIP of Kosovo, no. 26/83, verified by any of the following documents,*** *such as:*
2.3.1 decision that the applicant has been a beneficiary of the contributors pension as per provisions of the Law on SPI No. 26/83, before date 01.01.1999;
2.3.2 the check for the payment of contributory pension under the provisions of the Law on Kosovo SPI;
2.3.3 workbook with matrix number of the insured;
2.3.4 evidence that the applicant has paid contributions or the employer where he/she has worked;
2.3.5 extract from M-4, if the pension offices possess them, which are issued and verified and filled by verification official pension experience in the relevant form;
2.3.6 evidence that the applicant is not a beneficiary of the pension from any of the states that Kosovo has not agreement with;

LAW NO. 06/L-073 ON THE STATUS OF ALBANIAN EDUCATION EMPLOYEES OF THE REPUBLIC OF KOSOVO FROM ACADEMIC YEAR 1990/91 UP TO THE ACADEMIC YEAR 1998/99

Article 1
[Purpose]

The purpose of this Law is to recognize the work experience and to determine the rights to additional compensation over the pension that the beneficiary realizes, for the Albanian education employees of the Republic of Kosovo who worked from the academic year 1990/91 up to the academic year 1998/99.

Article 2
[Scope]

1. The scope of this Law is to determine the rights on additional compensation for Albanian education employees of the Republic of Kosovo who worked from the academic year 1990/91up to the academic year 1998/99.
2. This law shall not be applicable to all employees who have contributed during this period and were financed outside the system of the Republic of Kosovo.

Admissibility of the Referral

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

133. In this respect, the Court refers to paragraphs 1 and 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

1. "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties;

(...)

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

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

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

Article 51
Accuracy of referral

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

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

Article 52
Proceedings before a court

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

Article 53
Decision

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

135. The Court also takes into account the provisions of Rule 77 of the Rules of Procedure, which stipulates:

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

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

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

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

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

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

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

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

136. In light of the aforementioned provisions, it follows that any referral submitted under paragraph 8 of Article 113 of the Constitution, to be admissible, must meet the following criteria:

a) The referral to be submitted by a "*court*";
b) The (referring) Court is uncertain as to the compatibility of the challenged law with the Constitution;
c) The referring Court must specify what provisions of the law are considered incompatible with the Constitution;
d) The challenged law must be applied directly by the referring court in the case under consideration before it; and
e) The legality of the challenged Law is a prerequisite for rendering a decision in the case under consideration.

137. The Court recalls its case law which confirms the above-mentioned criteria regarding the admissibility of the Referrals submitted pursuant to Article 113.8 of the Constitution (see, *mutatis mutandis*, the cases of the Constitutional Court, KO157/18, Applicant: the *Supreme Court of the Republic of Kosovo in case Constitutional review of Article 14, paragraph 1.7 of Law no. 03/L-179 on the Red Cross of the Republic of Kosovo, Judgment of 28 March 2019, paragraph* 45; case KO126/16, Applicant: the *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters*, Judgment of 27 March 2017, paragraph 62, case KO142/16, Applicant: *the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters*, of 9 May 2017, paragraph 58).

138. Therefore, the Court initially assesses whether the referring court is an authorized party to submit such a referral. In this regard, the Court recalls that the referral was submitted by the Supreme Court and signed by its president, within the framework of the competences related to its function. The referral is clearly stated that it is filed by the Collegium of the Supreme Court which must decide on the request for the extraordinary review of the court decision. Therefore, the Court considers that the current referral was submitted by a "*court*" within the meaning of Article 113.8 of the Constitution (see Constitutional Court cases, KO157/18, Applicant, *the Supreme Court of Kosovo*, cited above, paragraph 48; KO126/16, Applicant, *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters*, cited above, paragraphs 55-60).

139. The Court also notes that the referring Court raised doubts regarding the constitutionality of the challenged Law. In addition, the referring Court has specified paragraph 2 of Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction, as provisions which it considers may be in contradiction with the Constitution.

140. The Court further considers whether the challenged Law should be directly applied by the referring Court in the case under consideration before it, and if the

constitutionality of the challenged law is a prerequisite for taking the decision by the referring Court.

141. The Court considers that "*the direct application*" of the concrete norm means that the outcome of the decision by the referring court. Namely, as a result of the direct implementation or non-implementation of the specific norm, the regular courts could render decisions with different results (see, Case of the Constitutional Court, KO157/18, cited above, paragraph 52).

142. Therefore, in order for there to be a direct connection, there must be a necessary relationship between the decision of the Constitutional Court (the resolution of the issue of constitutionality of the law by this Court) and the resolution of the main issue by the referring court, in the sense that the adjudication by the referring court cannot be completed independently without the adjudication of the Constitutional Court (see, *mutatis mutandis,* the cases of the Constitutional Court, KO157/18, cited above, paragraph 53; and KO142/16, cited above, paragraph 62).

143. In light of the facts of the case and the considerations above, the Court considers that the referral raises serious doubts regarding the constitutionality of paragraph 2 of Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction. Also, the referring Court has argued that the specific articles of the Law in conjunction with the challenged Administrative Instruction should be applied directly in the case before it.

144. Accordingly, in terms of fulfilling the admissibility criteria, the Court finds that the referring Court (i) is an authorized party; (ii) raises reasonable doubts about the challenged Law; and (iii) has demonstrated that that law should be applied directly by the referring court in the case before it. Also, the referring court reasoned that the constitutional review of the challenged Law is a prerequisite for rendering a decision in the case under consideration and has clarified what provisions of the challenged Law are considered incompatible with concrete provisions of the Constitution of the Republic of Kosovo.

145. Therefore, the Court finds that the referral is admissible for review on the merits.

Merits of the Referral

146. The Court recalls that the referring court, during the examination of specific cases, has raised doubts about the incompatibility of Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction, with Articles 24 [Equality Before the Law] and 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of property) of Protocol No. 1 of the ECHR.

147. The Court assesses that for the constitutional review of the relevant provisions of the challenged Law and Administrative Instruction, the legal basis must first be clarified regarding the categories that benefit and those that do not benefit from the contribution-payer pension, as well as the connection of the challenged Law and Administrative Instruction with the laws of the former SAPK and the former SFRY, in particular regarding the criterion of fifteen (15) years of contribution-payer work experience, which constitutes the main allegation of the referring Court regarding the unconstitutionality of the challenged acts with the aforementioned constitutional provisions.

148. In this context, the Court first notes that the Law on Pension Schemes Financed by the State among other things, defines (i) the types of pensions; and (ii) criteria and administrative procedures necessary for recognition of the right in the relevant pension category. Regarding the types of pensions, in Article 4 (The rights established by this Law) of the challenged Law, the types of pensions are defined, as follows (i) the right to basic age pension; (ii) the right to age contribution-payer pension; (iii) the right to disability pension; (iv) the right to early pension; (v) the right to work disability pension; and (vi) the right to family pension. The following articles of the challenged Law define the conditions and criteria for the recognition of each of the above pension categories, while Article 19 (Administrative Procedures) of the challenged Law defines the necessary procedure that must be followed by the respective applicants for recognition of the right to pension, specifying the deadlines for submitting requests and complaints regarding the recognition/respectively non-recognition of the right to the respective pension categories.

149. The Court further notes that the subject of examination before the Court in the circumstances of the present case is only the second category of pensions as established in Article 4 of the Law on Pension Schemes Financed by the State, namely the right to age contribution-payer pension. More precisely, this category based on the challenged Law is defined as "*regular monthly pension for employed citizens in the Republic of Kosovo, who have paid contributions in the former Kosovo Pension Fund before 01.01.1999 under the provisions of the Law on Pension and Disability Insurance No. 011-24/83 (SAPK Official Gazette No. 26/83) `who meet the criteria foreseen in this Law*".

150. In relation to this category of pension, the Court notes that the conditions and criteria for recognizing the right to age-contribution-payer pension are established in Article 8 of the challenged Law, and which in this respect defines three main criteria, namely that persons who have the citizenship of Kosovo, (i) have reached the age of sixty-five (65); (ii) have contribution-payer pension experience, according to the Law on Pension and Disability Insurance no. 011-24/83 published in the SAPK Official Gazette no. 26/83 (hereinafter: Law of the former SAPK) before 1 January 1999; and (iii) provide valid evidence on payment of contributions according to the provisions of the aforementioned Law of the former SAPK, before 1 January 1999.

151. Beyond these three legal criteria, paragraph 2 of Article 8 of the challenged Law, determines that the categorization of beneficiaries of this type of pension must be determined by a sub-legal act, *"according to the duration of the payment of contribution according to the qualification structure and other criteria*". This sub-legal act is Administrative Instruction no. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pension according to Qualification Structure and Duration of Payment of Contributions issued by the MLSW in 2015, namely the challenged Administrative Instruction in the circumstances of the present case.

152. The Court further emphasizes that based on this Administrative Instruction, among others, are determined (i) categorization, qualification and necessary documents for recognition of the right to contribution-payer pension in articles 4 (Categorization according to the qualification structure and duration of payment of contributions), 5 (Qualification of Contributory Pension Beneficiaries), 6 (Required documents for recognition of the right to contributors pensions) and 7 (Other supplementary evidence), respectively; and (ii) administrative procedures for the recognition and realization of contribution-payer pension in articles 10 (Administrative procedures for the recognition and realization of contributions pension), 11 (Granting of applications), 12 (Review and evaluation of the request) and 13 (Right of appeal), respectively.

153. Regarding the categorization, qualification and necessary documents, the aforementioned articles of the Administrative Instruction, among other things, determine that: (i) all evidence for the relevant qualification must be before 1 January 1991; and (ii) that the respective applicants for the recognition of the right to a contribution-payer pension must have at least fifteen (15) years of contribution-payer pension experience before 1 January 1999, according to the Law of the former SAPK, specifying also the necessary documents through which the relevant work experience could be proven.

154. Regarding the criterion of fifteen (15) years, the Court notes that the latter is given implicitly/indirectly through subparagraph 1.2 of Article 8 of the challenged Law. In this regard, the Court assesses that sub-paragraphs 1.2 and 1.3 of paragraph 1 and 2 of Article 8 of the challenged Law and sub-paragraph 2.3 of paragraph 2 of Article 6 of the challenged Administrative Instruction, which expressly define the criterion of fifteen (15) years, must be read together and in harmony with each other because these provisions determine: (i) that the right to contribution-payer pension is realized by persons who have at least fifteen (15) years of contribution-payer pension experience, according to the former SAPK Law - before 1 January 1999; and (ii) must provide valid evidence of the payment of contributions according to the provisions of the aforementioned Law of the former SAPK - before 1 January 1999.

155. The Court also notes that paragraph 2 of Article 8 of the challenged Law stipulates that the categorization and other criteria for the qualification of contribution-payer pensioners must be determined by a sub-legal act, without specifying what the content of the sub-legal act should be, but specifying that the categorization of contribution-payer pension beneficiaries must be done "*according to the duration of the payment of contribution according to the qualification structure and other criteria*". However, as elaborated above, paragraph 2 of Article 8 should be read together with sub-paragraphs 1.2 and 1.3 of paragraph 1 of Article 8 of the challenged Law that determine the use of the standard defined by the former SAPK Law. On this premise, the sub-legal act, namely the challenged Administrative Instruction, determines the criterion of fifteen (15) years of experience before 1 January 1999.

156. The Court, in this regard, recalls that by Article 1 of the Law of the former SAPK, it is provided that this law regulates basic rights from pension and disability insurance in accordance with the Law on Basic Rights from Pension and Disability Insurance of the former SFRY, while Article 21 of the Law of the former SFRY provides that the employee, namely the insured, acquires the right to the "*old age pension*" with fifteen (15) years of insurance experience.

157. The Court, in this regard, clarifies that the reference to the aforementioned laws of the former SAPK and the former SFRY stems from the Law approved by the Assembly of the Republic of Kosovo, namely the Law on Pension Schemes Financed by the State, regarding the contribution-payer pension category. However, the criterion for this category of pensions to be discontinued in 1999, namely to apply only to citizens of the Republic of Kosovo who may have contributed until 1999, is specified only by the challenged Law. Therefore, the challenged Law takes into account the political circumstances of the same year, namely the placement of Kosovo under international administration as foreseen by UN Security Council Resolution 1244 (1999), as a consequence of which, among other things, resulted the termination of the preliminary contribution-payer system from which this category of pensions originates. Whereas, the criterion of the fifteen (15) year contribution-payer experience was determined only by the relevant sub-legal act, namely the challenged Administrative Instruction, based on the aforementioned laws of the former SAPK and former SFRY, despite the fact that the wording of the law which delegates this

competence to the relevant Ministry, requires that the categorization of contribution-payer pension users be done according to "*duration of the payment of contribution*" (for more regarding the connection between the Law of the former SAPK and the Law of the former SFRY regarding the fifteen (15) year work experience criterion, see the report of the Ombudsperson Institution of 6 April 2018, with emphasis on paragraph 12).

158. In the context of the content of the aforementioned provisions, the Court reiterates that paragraph 2 of Article 8 of the challenged Law and sub-paragraph 2.3 paragraph 2 of Article 6 of the challenged Administrative Instruction, read together and in harmony with each other, among other things, specify that (i) the right to a contribution-payer pension is enjoyed by persons with the citizenship of Kosovo who have contribution-payer experience according to the Law of the former SAPK until 1 January 1999; (ii) must provide valid evidence for the payment of these contributions according to the relevant Law of the former SAPK by 1 January 1999; and (iii) categorization of contribution-payer pension users "*according to the duration of the payment of contribution*" shall be defined by a sub-legal act. The latter, namely, the challenged Administrative Instruction, determines the additional criteria and according to which (i) the right to contribution-payer pension is exercised by persons who have at least fifteen (15) years of contribution-payer pension experience according to the Law of the former SAPK before 1 January 1999; and (ii) must provide valid evidence of the payment of contributions according to the provisions of the aforementioned Law of the former SAPK, before 1 January 1999.

159. The Court notes that despite the aforementioned criteria, the challenged Law, by paragraph 6 of Article 8, has determined the work experience for contribution-payer pension for the years 1989-1999 is recognized to "*the employees of education, health and others who have worked in the system of the Republic of Kosovo*", although the latter did not pay the contributions according to the relevant Law of the former SAPK until 1 January 1999, but they worked "*in the system of the Republic of Kosovo*".

160. Therefore, the Court notes that the main constitutional issue raised by this referral is whether the citizens who have not proved the experience of fifteen (15) years of contribution-payer pension, before 1 January 1999, have been discriminated against: (i) compared to "*the employees of education, health and others who have worked in the parallel system of the Republic of Kosovo*" to whom the experience in question in the years 1989-1999 is recognized; and, (ii) if taking into account the situation of Kosovo during the 90s, the standard of fifteen (15) years of work experience for contribution-payer pension before 1 January 1999, is a non-proportional criterion to prove the relevant experience during that period.

161. In determining the categories of these employees, the Court deems it necessary to clarify the historical background, where the main place is occupied by the category of employees who worked before 1999 and did not reach the pension contribution-payer period of fifteen (15) years due to dismissal from work at the time of the imposition of violent measures in Kosovo, by the discriminatory laws of Serbia, including but not limited to: (i) the Law on Labor Relations in Special Circumstances published in the Official Gazette of the SSR no. 40/90; (ii) Law on Temporary Measures for the Social Protection of Self-Management Rights and Social Property, published in the Official Gazette of the RSS no. 49 of 28 October 1989; and (iii) Law on the Actions of the Republican Authorities in a State of Emergency published in the Official Gazette of the RSS no. 30/1990, of 26 June 1990). (see, moreover, the *ex officio* report of the Ombudsperson no. 235/2018, *regarding the category of citizens who worked before 1999 and do not benefit from the age contribution-payer pension because they do not meet the criterion of 15 years of pension experience as a result of discriminatory*

dismissal from work, 6 April 2018, paragraphs 38-50; see also the written comments of the Republic of Slovenia of 17 July 2009 addressed to the International Court of Justice regarding the request for *Advisory Opinion on Compliance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo*).

162. In this context, the Court also points out once again that the challenged Law, through paragraph 6 of Article 8 of the challenged Law, specifically excludes a certain category of citizens of Kosovo, directly recognizing the work experience during the years 1989-1999, respectively, to "*the employees of education, health and others who have worked in the system of the Republic of Kosovo*". Moreover, the Court notes that for the first group of this category, namely education employees, in 2019, Law no. 06/L-073 on the Status of Albanian Education Employees of the Republic of Kosovo from Academic Year 1990/91 up to the Academic Year 1998/99 was adopted, and on the basis of which, additional compensation for education employees for the work done during the aforementioned period is provided.

163. The Court emphasizes that "*other categories*" who did not work in the "*system of the Republic of Kosovo*" during the period 1989-1999, and which are excluded in paragraph 6 of Article 8 of the challenged Law and which are subject to the criteria of paragraph 2 of Article 8 of the challenged Law in conjunction with Article 6 of the challenged Administrative Instruction, includes, among others, the positions of the category of employees of socially-owned enterprises, professional and craft positions and administrative, police and judicial employees, as well as other active positions in the economic system of that period and who, unlike "*the employees of education, health and others who have worked in the system of the Republic of Kosovo*", their work experience during the years 1989-1999 is not recognized and are required to provide concrete proof of work experience in duration of at least fifteen (15) years before 1 January 1999. However, it is not disputed that the vast majority of citizens were dismissed from their working places as a result of violent and discriminatory measures against the Albanian community, in which case they were also unable to pay contributions in the period 89-99 (see, in this regard: *Resolution of the General Assembly of the United Nations no. 48/153*, of 20 December 1993, point 18.b; and see in addition the other sub-points of point 18 of this Resolution, which describe the discriminatory practices and the violation of the human rights of the ethnic Albanians of Kosovo by the Serbian authorities during the above-mentioned years).

164. The Court also notes that despite the fact that the category of "*the employees of* education*, health and others who have worked in the system of the Republic of Kosovo*" whose work experience in the period 1989-1999 was recognized, without paying the contributions to the then pension system, the challenged Law, in its Article 5 (Provision of financial means for pension payments), precisely determines that all categories of pensions specified in Article 4 of the same law, including contribution-payer pensions, are provided by the Budget of the Republic of Kosovo. Consequently, despite the fact that the scheme is called contribution-payer, the amount of the pension as well as the relevant categorization, have nothing to do with the amount of the contribution paid before 1 January 1999, because this scheme is fully covered by the budget of the Republic of Kosovo. Thus, it is a fact that the fund for Pension and Invalid Insurance of the former SAPK was appropriated by Serbia and as a result, the receipt of contribution-payer pensions based on the contributions paid to this fund was terminated.

165. Taking into account the aforementioned background and the allegations of the referring Court regarding the unconstitutionality of the relevant provisions of the challenged Law and of the relevant Administrative Instruction, with emphasis on the

allegations regarding the constitutional right to equality before the law guaranteed by Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 thereof, the Court, in order to assess the constitutionality of the challenged acts, will present: (i) the general principles of the prohibition of discrimination as developed by the case law of the ECtHR; and (ii) will apply those principles in relation to the provisions of the acts challenged by the referring Court. In this regard, it is important to reiterate that in the context of an incidental control, referred to the Court based on paragraph 8 of Article 113 of the Constitution, the Court only decides on the compatibility or not of the challenged legal provisions with the Constitution and does not decide on other factual or legal issues related to the specific judicial dispute before the referring Court.

166. The Court recalls that the Applicants allege that Article 8 of the challenged Law in conjunction with Articles 5 and 6 of the challenged Administrative Instruction is in conflict with Article 24 of the Constitution because they treat the citizens of the Republic of Kosovo differently in relation to the right to benefit from the contribution-payer pension established in the challenged Law. More specifically, Article 8 of the challenged Law in conjunction with the relevant Administrative Instruction treats differently (i) all those who have pension work experience but who have not reached the condition of fifteen (15) years of contribution-payer experience before 1999 due to dismissal from work at the time when violent and discriminatory measures were imposed; and (ii) "*the employees of education, health and others who have worked in the system of the Republic of Kosovo*" who, on the basis of paragraph 6 of Article 8 of the challenged Law, are recognized the work experience for a contribution-payer pension for the years 1989-1999, despite the fact that they also did not contribute to the pension fund according to the Law of the former SAPK, but who have worked and contributed to "*the system of the Republic of Kosovo*". The Court recalls that regardless of the duration of the contribution to the former pension fund, all categories of pensions provided by the Law on Pension Schemes Financed by the State, are covered by the budget of the Republic of Kosovo.

167. The Court also emphasizes that despite the allegations of the referring Court regarding "*the century of work*", based on which also claims discrimination related to years of work experience after 1999, the Court emphasizes that: (i) the Law on Pension Schemes Financed by the State precisely defines several categories of pensions and which cannot be linked to each other; (ii) that the criterion of fifteen (15) years of contribution-payer experience is exclusively related only to the age contribution-payer pension category stipulated by point 1.2 of paragraph 1 of Article 8 of the challenged Law; and that consequently (iii) in the circumstances of the present case, the Court will assess the allegations of equality before the law and/or discrimination, only within the category of persons who may be entitled to the contribution-payer pension based on the aforementioned provisions of the challenged Law.

168. In the following and in this context of the relevant provisions of the challenged acts, the Court initially refers to Article 24 [Equality Before the Law] of the Constitution, which stipulates that:

> *1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
>
> *2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*

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

169. The Court also recalls the respective articles of the ECHR, namely Article 14 (Prohibition of discrimination) of the ECHR, which stipulates that:

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

170. Finally, the Court also refers to Article 1 (General prohibition of discrimination) of Protocol no. 12 of the ECHR, which establishes that:

> *1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
>
> *2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

171. In the context of the provisions above, the Court first recalls that Article 14 of the ECHR guarantees protection against discrimination in the enjoyment of the rights guaranteed by the ECHR. According to the case-law of the ECtHR, the principle of non-discrimination is of a "*fundamental*" nature and relates the Convention to the rule of law and the values of tolerance and social peace (see, inter alia, the case of the ECtHR *S.A.S v. France*, no. 43835/11, Judgment, of 1 July 2014 paragraph 149). The protection against discrimination set out in Article 14 of the ECHR has been further completed and strengthened by Article 1 of Protocol No. 12 to the ECHR, which prohibits discrimination in a more general way, beyond the rights guaranteed by the ECHR, even in the enjoyment of any right provided by law (see, also and *inter alia*, Judgment of the Court in case KO93/21, Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo, Judgment of 28 December, 2021, paragraph* 287).

172. The Court, based on the case-law of the ECtHR, notes that the latter, in principle, has held that Article 14 of the ECHR does not have autonomous existence, but in order for this Article to be applicable it must be related also with the allegation of a violation of another right or freedom guaranteed by the provisions of the ECHR. However, the ECtHR in its case-law has emphasized that the prohibition of discrimination also applies in relation to other additional rights, which fall within the general scope of one of the articles of the ECHR, for which rights, states have decided to guarantee their protection (see, in this context, *Fábián v. Hungary* , no. 78117/13, Judgment of 5 September 2016, paragraph 112; *Biao v. Denmark*, no. 38590/10, Judgment of 24 May 2016, paragraph 88; *İzzettin Doğan and Others v. Turkey*, no. 62649/10, Judgment of 26 April 2016, paragraph 158; and *Carson and Others v. the United Kingdom*, no. 42184/05, Judgment of 10 March 2010, paragraph 63).

173. Having said that, Article 1 of Protocol no. 12 of the ECHR, has expanded the scope of protection against discrimination in the level of the ECtHR, defining a general prohibition of discrimination, and consequently including the rights defined by law.

174. More precisely, Article 1 of Protocol no. 12 of the ECHR expands the scope of protection against discrimination of "*any rights prescribed by law*" (see, *inter alia,* cases of ECtHR; *Savez Crkava "Riječ života" and others v. Croatia*, no. 7798/08, Judgment of 9 December 2010, paragraph 103; and *Sejdić and Finci v. Bosnia and Herzegovina*, no. 27996/06 and no. 34836/06, Judgment of 22 December 2009, paragraph 53). According to the ECtHR, this article includes the general prohibition of discrimination. The ECtHR, moreover, through the relevant case-law, emphasized that this general prohibition of discrimination derives from paragraph 2 of this Article, which stipulates that no one can be discriminated against by a public authority. According to paragraph 22 of the Explanatory Report of Protocol no. 12 of the ECHR, adopted by the Council of Europe on 4 November 2000, the scope of Article 1 of this Protocol includes four categories of circumstances when "*an individual is discriminated against*", as follows: (i) the enjoyment of every right guaranteed specifically for an individual under domestic law; (ii) the enjoyment of rights, which derive from a clear obligation of public authority under domestic law, where the public authority is obliged to behave in a certain way; (iii) by public authority in the exercise of discretionary power; and (iv) on the basis of an act or omission of a public authority (see, also and among others, the Judgment of the Court in case KO93/21, applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 290).

175. Within the meaning of Article 24 of the Constitution, the Court also points out that the scope of this article is wide and extends to guarantee the prohibition of discrimination, not only in terms of the rights guaranteed by the Constitution, but also by law. Consequently, the assessment of allegations of violation of this Article must be made beyond the guarantees of Article 14 of the ECHR, and must include the guarantees set forth in Article 1 of Protocol No. 12 of the ECHR (see, also and among others, the Judgment of the Court in case KO93/21, Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 292).

176. Following this, within the meaning of Article 24 of the Constitution and also applying the position of the ECtHR articulated through its case law in relation to Article 1 of Protocol no. 12 of the ECHR, the Court again refers to the legal provisions which define the rights regarding the contribution-payer pension.

177. The Court recalls the language of Article 8 (Conditions and criteria for recognition of the right to age contribution-payer pension) of the Law on Pension Schemes Financed by the State, which stipulates that:

> *1. The right to age contribution-payer pension shall be realized by all persons who have citizenship of Kosovo and who:*
>
> > *1.1. have reached the age of sixty-five (65);*
> > *1.2. should have pension contribution-payer work experience, according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 1.01.1999.*
> > *1.3. provide valid evidence on payment of contributions under provisions of the Law on Pension and Disability Insurance No.011-24/83 (Official Gazette of SAPK No.26/83) before 01.01.1999;*
>
> *2. Categorization of users of contribution-payer pension, according to the duration of the payment of contribution according to the qualification structure and other criteria shall be defined by a sub-legal act which shall be approved by the respective Ministry.*

[...]

6. With this Law there shall be recognized the work experience on contribution-payer pension for the years 1989-1999 of the employees of education, health and others who have worked in the system of the Republic of Kosovo.

178. The Court further refers to Article 5 (Qualification of beneficiaries of contribute paying pension) of the challenged Administrative Instruction, which, among other things, stipulates that:

5. [...] All evidence for the qualification prescribed by paragraph 2, 3 and 4 of this Article shall be before 01.01.1991.

179. The Court also refers to Article 6 (Required documents for recognition of the right to contributors pension) of the challenged Administrative Instruction, which, among other things, stipulates that:

1. All beneficiaries of contributor's pension, namely the insured in case of request for contributor's pension, based on the categorization according to the qualification structure should bring relevant evidence set forth in Article 4 and 5 of this Instruction, depending on which category he/she applies.

2. In addition to the general conditions set forth in the applicable provisions of the Law on State Financed Pension Schemes, the current beneficiaries and those applying in the future, must submit necessary documents, such as:

[...]

2. Have pension contributing experience at least fifteen (15) years before the date 01.01.1999, as per Law on SIP of Kosovo, no. 26/83, verified by any of the following documents, such as:

[...]

180. In the following, based on the above-mentioned provisions, the Court will assess and ascertain whether the acts challenged by the referring Court, namely the challenged Law in conjunction with the relevant Administrative Instruction, are in violation of Article 24 of the Constitution and Article 1 of Protocol no. 12 of the ECHR. In this context, and in terms of the test that is applied to ascertain whether an act issued by the public authority is in violation of Article 14 of the ECHR and Article 1 of Protocol No. 12 of the ECHR, the ECtHR in its case law, has established the criteria as follows:

(i) If there has been a difference in the treatment of persons in analogous or relatively similar situations - or a failure to treat persons differently in relatively different situations;
(ii) If this is the case, then it is assessed whether such a difference - or lack of difference - is objectively justified, respectively:
  (a) If the limitation has pursued a legitimate aim;
  (b) The measure taken was proportionate to the aim pursued.

181. Whereas, based on the case-law of the Court, the constitutional test to ascertain whether the act or action constitutes discrimination, contains the following criteria (see, *inter alia*, the cases of the Court: KO01/17, Applicant *Aida Dërguti and 23 other deputies of the Assembly*, Judgment, of 28 March 2017; and KO157/18, Applicant *the Supreme Court*, Judgment of 13 March 2019 and KO93/21, Applicant, *Blerta Deliu-*

Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo, cited above, paragraph 298):

(i) Determine if there is a difference in treatment; and
(ii) If this is the case, to assess:
  (a) Whether the difference in treatment is prescribed by law;
  (b) Whether the difference in treatment has pursued a legitimate aim; and
  (c) Whether there is a relationship of proportionality between the difference in treatment and the purpose to be achieved.

182. Based on the above, and taking into account the case-law of the ECtHR and that of the Court, in cases where the latter has assessed whether the right to equality before the law, guaranteed by Article 24 of the Constitution is limited, the Court also applied Article 1 of Protocol no. 12 of the ECHR and taking into account the rights and obligations of citizens in relation to the contribution-payer pension category, will assess whether there was a "*difference in the treatment*" of the citizens of Kosovo in relation to the criteria that must be met in order to benefit from this right, and if this is the case, in the following it will apply the abovementioned test which stems from the case law of the Court and the ECtHR, assessing whether the difference in treatment has been (a) prescribed by law; (b) has pursued a legitimate aim; and (c) whether there is a relationship of proportionality between the limitation of the right and the aim pursued to be achieved (see, also and among others, Court cases KI45/20 and KI46/20, applicants, *Tinka Kurti and Drita Millaku*, Judgment of 26 March 2021, paragraph 85; see also case KO93/21, Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 300).

(i) if there was a difference in treatment

183. In the context of assessing whether the relevant provisions of the challenged Law in conjunction with the relevant Administrative Instruction are discriminatory, the Court first reiterates that based on Article 24 of the Constitution and the aforementioned Articles of the ECHR, and as further clarified through the case-law of the ECtHR but also of the Court, not every "*difference in treatment"* constitutes discrimination. The difference in treatment results in discrimination if the same does not have "*an objective and reasonable justification*". Therefore, in assessing whether the circumstances of a case have resulted in discrimination, the case-law of the ECtHR and the Court first determines whether it is necessary to assess whether there is a difference in the treatment of persons in "*analogous or relevantly similar situations*". (See, *inter alia*, the Judgment of the Court in case KO01/17, Applicant *Aida Dërguti and 23 other deputies of the Assembly*, of 4 April 2017, paragraph74).

184. Consequently, in assessing the Applicants' allegations, the Court must first assess whether, in the circumstances of the present case, a difference in the treatment of persons in "*analogous or relatively similar situations*", and if this is the case, to proceed further, by applying the test of the ECtHR and the Court, to ascertain whether such a difference in treatment has an "*objective and reasonable justification*" or not (see, also and among others, the Judgment of the Court in the case KO93/21, Applicant, *Blerta Deliu-Kodra and 12 Other Deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 302).

185. Based on paragraphs 1 and 2 of Article 8 of the challenged Law in conjunction with Article 6 of the Administrative Instruction, it follows that (i) all citizens of Kosovo who have reached the age of sixty-five (65) years are entitled to contribution-payer pension and have the contribution-payer pension experience according to the Law of the former SAPK before 1 January 1999 and have valid evidence of payment of

contributions under the same law; (ii) that all citizens have completed qualification, namely the lower, secondary, and higher education, as defined in paragraph 5 of Article 5 of the Administrative Instruction, before 1 January 1999; and (iii) who have at least fifteen (15) years of proven pension contribution-payer experience until 1 January 1999. In contrast to these criteria, "*education, health workers and others who have worked in the system of the Republic of Kosovo*" "*were recognized contribution-payer pension work experience for the years 1989-1999*", regardless of whether or not contributions were paid to the former pension fund at that time, recognizing their contribution-payer experience during the period 1989-1999. Finally, it should be recalled once again the fact that the state, namely the Republic of Kosovo, through its budget, finances both categories.

186. In this context, the Court assesses that it is not disputable that (i) in terms of the legal provisions regarding the contribution-payer pension category, all citizens who have proof of the respective qualifications as defined by the challenged Law and Administrative Instruction before 1 January 1991 and have a contribution-payer experience, are in "*analogous or relatively similar situations*"; and (ii) that there is a "*difference in treatment*" among the latter regarding the fulfillment of the criteria for contribution-payer experience for a period of fifteen (15) years, the period of time determined by Article 6 of the challenged Administrative Instruction based on the Law of the former SAPK. This is because pension experience for the period 1989-1999 is recognized to a category of citizens, namely the category of citizens established in paragraph 6 of Article 8 of the challenged Law, namely "*the employees of education, health and others who have worked in the system of the Republic of Kosovo*", but the pension experience for the period 1989-1999 is not recognized to those who were dismissed from their jobs in the 90s based on discriminatory laws. In this context, these two categories are *"in analogous or relatively similar situations"* since both categories, (i) have contribution-payer experience before 1989; and (ii) neither category contributed to the pension fund according to the former SAPK Law during the period 1989-1999 due to the historical and political circumstances of that time. However, as explained above, to determine whether this "*difference in treatment*" results in discrimination contrary to Article 24 of the Constitution and the respective articles of the ECHR, the Court, based on its case law and that of the ECtHR, must assess whether this difference in treatment has "*an objective and reasonable justification*".

187. In the light of this finding, in the following, the Court must examine whether the challenged relevant provisions of the Law in conjunction with the Administrative Instruction are in violation of Article 24 of the Constitution in conjunction with Article 1 of Protocol no. 12 of the ECHR, and in this context must assess and apply the criteria that derive from the case law of the ECtHR and of the Court, namely if the "*relevant difference in treatment*": (a) is prescribed by law; (b) has pursued a legitimate aim; and (c) whether there is a relationship of proportionality between the limitation of the right and the purpose pursued to be achieved. For each of these criteria, the Court will first present the general principles and then apply them to the circumstances of the case (see, also and *inter alia*, Judgment of the Court in the case KO93/21, Applicant, *Blerta Deliu-Kodra dhe 12 other deputies of the Assembly of the Republic of Kosovo*, regarding Constitutional review of the Recommendations no. 08-R-01 of the Assembly of the Republic of Kosovo, of 6 May 2021, paragraph 311).

(a) If the difference in treatment is "prescribed by law"

188. Based on paragraph 1 of Article 55 of the Constitution but also the principles stemming from the case law of the ECtHR and the Court, the limitation of the rights guaranteed by the Constitution is possible, but this limitation must be done "*only by*

law", which means, among other things, that the authorities responsible to implement a law where limitations are provided, can apply the limitation only to the extent that is *'prescribed by law*". This paragraph therefore presents the first and essential requirement which must be met to determine whether a "*limitation*" of fundamental rights and freedoms is constitutional (see, specifically, the Court's position in case KO54/20, cited above, paragraph 192). As explained above, the Court will present the general principles regarding this criterion and apply the latter in the circumstances of the case (see, also and among others, case of the Court KO93/21, Applicant, *Blerta Deliu-Kodra dhe 12 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 312).

(i) General principles

189. As regards the principle "*prescribed by law*", the Court finds it necessary to clarify, first, the meaning of the term "*law*" from the point of view of limiting human rights. In this respect, the Court recalls that according to the case law of the ECtHR, the latter has always understood the term "*law*" in its "substantive" sense, not its "*formal*" one. In this regard, the term "*law*" includes laws enactments of lower ranking statutes, or sub-legal acts, and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament. In addition, according to the ECtHR "*law*" must be understood to include both "*statutory"* law, but also "*sub-legal acts*" and "*judicial precedents*". In sum, the term "law" is the provision in force as the competent courts have interpreted it (see*, mutatis mutandis,* ECtHR case *Gülcü v. Turkey*, no. 17526/10, Judgment of 19 January 2016, paragraph 104: and case *Leyla Şahin v. Turkey*, no. 44774/98, Judgment of 10 November 2005, paragraph 84; see also Court case KI27/20, Applicant *Vetëvendosje*! *Movement*, Judgment of 22 July 2020, paragraph 68).

190. The Court will further present the cases of the ECtHR, where through the case-law the criterion "*prescribed by law*" is elaborated and the way the ECtHR analyzes whether a limitation or "*interference*" undertaken is defined by/in the law or not. Although the factual issues of those cases differ from the circumstances of the present case, the general interpretation of the criterion "*prescribed by law*" that the ECtHR refers to in its case-law remains important. This interpretation of the ECtHR is also affirmed in the case-law of the Court itself (see, *inter alia*, cases of the Court, KO131/12, Applicant, *Shaip Muja and 11 deputies of the Assembly of the Republic of Kosovo*, Judgment of 15 March 2013; KO108/13, Applicant, *Albulena Haxhiu and 12 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 3 September 2013; KO01/17, Applicant, *Aida Dërguti and 23 other deputies of the Assembly of the Republic of Kosovo*, cited above; KO157/18, Applicant, *the Supreme Court*, cited above; KO54/20, Applicant, *the President of the Republic of Kosovo*, cited above; and, KO93/21, Applicant, *Blerta Deliu-Kodra dhe 12 other deputies of the Assembly of the Republic of Kosovo*, cited above).

191. The ECtHR stated that: *"The expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects". The ECtHR further stated that: "a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities" and that a law "which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law*" (see, among others, the ECtHR case, *Tommaso v. Italy*, application no. 43395/09, Judgment of 23 February 2017, paragraphs 106-109 and references cited therein)).

192. The Court in the context of the assessment of "*prescribed by law*", referring to the case-law of the ECtHR, notes that this criterion should contain at least the following elements: (i) the existence of a clear legal basis; (ii) the predictability of the relevant limitation (see the case of the ECtHR, *Kudrevičius and Others v. Lithuania*, no. 3753/05, Judgment of 15 October 2015, paragraph 109); (iii) the existence of safeguards against interference, namely the limitation of rights by public authorities; and (iv) sufficient clarity in the law as to the discretion of the public authority regarding the possibility of limitation and the manner of exercising this discretion (see, the case of the ECtHR, *Navalnyy v. Russia*, no. 29580/12, 36847/12, 11252/13, 12317/13, 43746/14, Judgment of 15 November 2018, paragraphs 115-119).

193. In Case KO01/17 of the Court, in paragraph 90, regarding the requirement that the limitation should be prescribed by law, the Court stated that: "*the alleged limitation of the KLA Veteran's right to a pension is foreseen by Article 3 (2) of the challenged Law adopted by the Assembly, which is the state institution vested by the Constitution with the exercise of the legislative power. Thus, the Court considers that such limitation complies with the requirements contained in Article 55 (1) of the Constitution. Therefore, the Court concludes that the limitation of the KLA Veteran's right to pension has been foreseen by law*." (see, KO01/17, Applicant *Aida Dërguti and 23 other deputies of the Assembly*, cited above, paragraph 90).

194. In case KO157/18, paragraphs 93-96, regarding the requirement that the limitation must be prescribed by law, the Court stated that "*the Constitution in Chapter II has given special importance to human rights and freedoms and has also provided for cases where such rights may be restricted by law, if this is required by the general interest of society and State."* However, in the following paragraphs where it conducted the analysis as to whether for the circumstances of that case the limitation was prescribed by law, the Court stated that*: "With regard to the limitation provided by law, the Court notes that the limitation of the rights in the present case was foreseen by Article 14, paragraph 1.7 of the challenged Law, which was approved by the Assembly on 10 June 2010, an institution in which the Constitution vested the exercise of legislative power. Therefore, given that a right guaranteed by Chapter II of the Constitution may be limited by law, where this is required by the general interest, the Court considers that the limitation of the rights is in accordance with the requirements of paragraph 1 of Article 55 of the Constitution. The Court finds that the obligation of the insurance companies to pay one percent (1%) of the prim from vehicle insurance in the present case, was provided for by law*." (see case KO157/18, Applicant *the Supreme Court of the Republic of Kosovo*, cited above, paragraphs 95-96).

195. In case KO108/13, in paragraphs 133-134, regarding the requirement that the limitation must be prescribed by law, the Court referred to the ECtHR case, *Centro Europa 7 S.R.L. and di Stefano v. Italy* (ECtHR Judgment of 7 June 2012), and reiterated that: "*a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. […]"* (see case KO108/13, Applicant *Albulena Haxhiu and 12 other deputies of the Assembly*, Judgment of 3 September 3013, cited above).

196. In case KO131/12, in paragraph 130, regarding the requirement that the limitation must be prescribed by law, the Court stated that "*the alleged limitation on the right to work is included in a law approved by the Assembly of Kosovo, which is a state institution vested with legislative power by the Constitution. As such, the limitation complies with the requirement that the limitation is granted by law, as described in*

paragraph 1 of Article 55." (see case of the Court KO131/12, Applicant *Shaip Muja and 11 deputies of the Assembly of the Republic of Kosovo*, cited above).

197. In case KO131/12, in paragraph 130, regarding the requirement that the limitation must be prescribed by law, the Court stated that "*the alleged limitation on the right to work is included in a law approved by the Assembly of Kosovo, which is a state institution vested with legislative power by the Constitution. As such, the limitation complies with the requirement that the limitation is granted by law, as described in paragraph 1 of Article 55*." (see case of the Court, KO131/12, Applicant *Shaip Muja and 11 deputies of the Assembly of the Republic of Kosovo*, cited above).

198. In case KO93/21, in paragraph 312, regarding the condition that the limitation must be prescribed by law, the Court emphasized: "*Based on paragraph 1 of Article 55 of the Constitution, the limitation of the rights guaranteed by the Constitution is possible, but this limitation must be done "only by law", which means, among other things, that the authorities responsible to implement a law where limitations are provided, can apply the limitation only to the extent that is 'prescribed by law". This paragraph therefore presents the first and essential requirement which must be met to determine whether a "limitation" of fundamental rights and freedoms is constitutiona*l" (see Court case KO93/21 Applicant, Blerta *Deliu-Kodra and 12 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 312).

(ii) Application of the above principles in the present case

199. The Court initially recalls that the category of contribution-payer pensions is established in Article 4 of the Law on Pension Schemes Financed by the State. The conditions and criteria for the recognition of this category of pension are established in Article 8 of the aforementioned Law, namely the challenged Law. The latter defines two categories of criteria for possible benefit of contribution-payer pension, namely the category established in paragraph 2 of Article 8 of the challenged Law and the one provided by paragraph 6 of Article 8 of the challenged Law. More precisely, the first category is all citizens of Kosovo and who have contribution-payer pension experience and valid evidence of the payment of contributions based on the relevant law of the former SAPK before 1 January 1999 and who are subject to the criterion of contribution-payer experience of fifteen (15) years, as established in the challenged Administrative Instruction. Whereas, the second category are the citizens of Kosovo who have worked in "*the system of the Republic of Kosovo*", namely "*the employees of education, health and others*", to whom the work experience on contribution-payer pension for the years 1989- 1999 is recognized.

200. The Court recalls that Article 6 of the challenged Administrative Instruction, has adopted the determination of the criterion to prove that the contributions have been paid for a period of fifteen (15) years, from the Law of the former SAPK, where the aforementioned criterion of fifteen (15) years of pension experience to acquire the right to a contributory pension is established.

201. In the context of the clarifications given above, the Court emphasizes that the difference in treatment between the two aforementioned categories of citizens of Kosovo is "*prescribed by law*", namely in the Law on Pension Schemes Financed by the State in conjunction with the relevant Administrative Instruction challenged by the referring court. As a result, the Court finds that there is a "*difference in treatment*" of emplozees who worked before 1999 and did not reach the contribution-payer pension experience of fifteen (15) years due to dismissal from work at the time of the imposition of violent measures in Kosovo. More specifically, according to the same Law, while the category defined by paragraph 6 of Article 8 of the challenged Law is

recognized the work experience for the contribution-payer pension for the years 1989-1999, for the second category, namely that defined by paragraph 2 of Article 8 of the challenged Law, this is not the case.

202. Following this finding, the Court should proceed with the assessment of whether the aforementioned *"difference in treatment"* and "*prescribed by law"* pursued a "*legitimate aim*", and if this is the case, should proceed with the assessment of whether the measures taken were proportionate to the aim pursued to be achieved.

(b) If there is a legitimate aim

203. The third paragraph of Article 55 of the Constitution, but also the principles stemming from the case-law of the ECtHR and the Court, it is determined that the rights and freedoms guaranteed by the Constitution "*may not be limited for purposes other than those for which they were provided*." This paragraph implies that the purpose of a limitation must be clearly determinable and no public authority may limit any right or freedom on the basis of another purpose beyond that which is already specified in the law in which the limitation is permitted in accordance with Article 55 of the Constitution (see, in this regard, the case of Court KO54/20, cited above, paragraph 193). As explained above, the Court will further present the general principles regarding this criterion and apply the same in the circumstances of the present case (see, also and *inter alia*, Judgment of the Court in case KO93/21, Applicant, *Blerta Deliu-Kodra and 12 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 333).

(i) General principles

204. The Court emphasizes that in order to justify the difference in treatment, according to the ECtHR the limitation or difference in treatment must have an "*objective and reasonable justification*", namely be based on a legitimate aim (see, *inter alia*, the case *Molla Sali v. Greece*, no . 20452/14, Judgment of 18 June 2020, paragraph 135; and *Fabris v. France*, no. 16574/08, Judgment of 7 February 2013, paragraph 56). Furthermore, according to the ECtHR, the states must prove that there is a relationship between the legitimate aim pursued and the difference in treatment alleged by the relevant applicants (see ECtHR case *Ünal Tekeli v. Turkey*, no. 29865/96, Judgment of 16 November 2004, paragraph 66).

205. The ECtHR has identified that the legitimate aim may include, but is not limited to: (i) the restoration of peace (see the ECtHR case *Sejdić and Finci v. Bosnia and Herzegovina*, cited above, paragraph 45); (ii) the protection of national security (see, ECtHR case *Konstatin Markin v. Russia*, no. 30078/06, Judgment of 22 March 2012, paragraph 137); (iii) maintaining economic stability and debt restructuring in the context of a serious political, economic and social crisis (see the ECtHR case, *Mamatas and Others v. Greece*, no. 63066/14, 64297/14, 66106/14, Judgment of 21 July 2016, paragraph 103); or (iv) the protection of the rights of others (see the ECtHR case *Napotnik v. Romania*, no. 33139/13, Judgment of January 10, 2021, paragraphs 79 and 86).

(ii) Application of the abovementioned principles in the present case

206. The Court first emphasizes that based on the case law of the Court and of the ECtHR, as to the burden of proof regarding the allegation of discrimination, the Court has established that once the applicant has shown a "*difference in treatment*", in the present case the Supreme Court in capacity of the referring court, it is for the Government to show that the difference was justified (see *inter alia* ECtHR case *D.H.*

and Others v. Czech Republic, application no. 57325/00, Judgment of 13 November 2007, paragraph 177).

207. For this purpose, in the circumstances of the present case, the Court recalls that one of the questions it addressed to the MLSW concerned the explanation of "*legitimate aim"* regarding the criterion for contribution-payer experience in the period of fifteen (15) years before 1 January 1999, as stipulated by the challenged Law in conjunction with the challenged Administrative Instruction.

208. The MLSW reply to the "*legitimate aim*" of determining the criteria for contribution-payer experience in the period of fifteen (15) years before 1 January 1999, can be summarized, among other things, as follows: (i) the fact that Kosovo was part of the pension and disability insurance of the former Yugoslavia and according to the latter it was required that the beneficiary has at least fifteen (15) years of contribution-payer experience for the exercise of this right based on the Law of the former SAPK; (ii) in 2007, the Government of Kosovo approved Administrative Instruction no. 11/2007 for the recognition of the right to contribution-payer pension, which also required the provision of material evidence that contributions have been paid for at least fifteen (15) years of contribution-payer experience; and (iii) in 2014, the Assembly of Kosovo adopted the Law on Pension Schemes Financed by the State, in which case the possibility of exercising the right to a contribution-payer pension was consolidated, despite the additional criteria that were established by the challenged Administrative Instruction.

209. Whereas the Court notes, that the purpose of "*difference in treatment*" of the two comparable categories related to recognition of work experience during the 90s was about recognizing the contribution of workers who had worked in "*the system of the Republic of Kosovo*" during the years 1989-1999, counting it as work experience for the purpose of calculating the fifteen (15) year experience according to the challenged Law even though the latter, like the other categories, had not contributed to the pension fund according to the Law of the former SAPK, still maintaining the economic stability, this goal based on the practice of the ECtHR and as explained above, constitutes a "*legitimate aim*" for possible different treatment, namely the limitations of fundamental rights and freedoms. Therefore, the Court accepts the "*difference in treatment*" which has been applied by the Assembly and the MLSW pursues at least one "*legitimate aim*" that is broadly compatible with the general objectives, namely the protection of the economic system of the country. This is because, it is indisputable that after the placement of Kosovo under international administration, the international administration, together with the authorities of the Provisional Institutions of Self-Government in Kosovo, faced a set of challenges related to the need to establish a sustainable social security system, also conditional on the reduced budget capacity of the country. The Court recalls that the contribution-payer pension was not introduced until 2007, through the approval of AI-11/2007 on the recognition of the right to contribution-payer pension, and then it was further categorized in 2014 through the approval of the challenged Law by the Assembly, namely six (6) years after the declaration of independence of the Republic of Kosovo. The Court notes that in the context of a newly created democratic legislative power, there might have been a need for time for reflection in a period of democratic transition to enable it to consider what measures are required to ensure the economic well-being of the country (see, *mutatis mutandis*, the ECtHR cases, *Ždanoka v. Latvia*, no. 58278/00, Judgment of 16 March 2006, paragraph 131; and *Andrejeva v. Latvia*, no. 55707/00, Judgment of 18 February 2009, paragraph 86).

210. In this regard, the Court notes that "*difference in treatment*" which was applied by the Assembly of the Republic of Kosovo by the challenged Law and then, the MLSW by the

challenged Administrative Instruction, follows at least one "*legitimate aim*" which is broadly compatible with the general objectives, namely the protection of the economic system of the country.

211. Therefore, based on the above, and taking into account that the Court already found that (i) the "*difference in treatment*" between the two categories of citizens of Kosovo, namely those established in paragraph 2 of Article 8 of the challenged Law and to those established in paragraph 6 of Article 8 of the challenged Law, is "*prescribed by law*"; and (ii) pursues at least one "*legitimate aim*", namely and among others, that of preserving the economic stability of the country, further, based on the case-law of the ECtHR and of the Court, remains to be determined if there was a reasonable relationship of proportionality between the aforementioned legitimate aim and the means employed in the present case.

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

212. The fourth paragraph of Article 55 of the Constitution emphasizes the fact, but also the principles from the case law of the ECtHR and of the Court that in cases of limitation of fundamental rights and freedoms, constitutional responsibility is created for public authorities, that during the interpretation and decision in cases before them, pay attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the aim to be achieved, and to consider the possibility of achieving the purpose with a lesser limitation (see, inter alia, the case of the Court, KO157/18, Applicant Supreme Court of the Republic of Kosovo, cited above, paragraph 102). As explained above, the Court will present the general principles regarding this criterion and apply the same in the circumstances of the case (see, also and among others, the case of the Court KO93/21, Applicant, *Blerta Deliu-Kodra and 12 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 346).

(i) General principles

213. The Court emphasizes the importance of the purpose of the limitation and the relationship of proportionality between the limitation and the aim to be achieved. In light of this criterion, the Court also refers to the case-law of the ECtHR, through which it has emphasized that the difference in treatment requires a fair balance between the protection of the interests of the community and respect for the rights of individuals. Therefore, the ECtHR specified that the difference in treatment requires a reasonable relationship of proportionality between the measure taken and the aim to be achieved (see, ECtHR cases: *Molla Sali v. Greece*, cited above, paragraph 135; *Fabris v. France*, no. 16574/08, Judgment of 7 February 2013, paragraph 56; *Mazurek v. France*, no. 34406/97, Judgment of 1 February 2000, paragraphs 46 and 48; and *Larkos v. Cyprus*, no. 29515/95, Judgment, 18 February 1999, paragraph 29). Along this line of argument, the ECtHR in case *Sejdić and Finci v. Bosnia and Herzegovina* stated that: "[...] *discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. No objective and reasonable justification means that the distinction in issue does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised* (see ECtHR case, *Sejdić and Finci v. Bosnia and Herzegovina*, cited above, paragraph 42).

214. The Court also recalls that the ECtHR has also pointed out that it is not its role to replace the competent local authorities in assessing the extent to which differences in similar situations have justified a difference in treatment and that in such cases states

enjoy a margin of appreciation. The scope of this margin of appreciation, according to the ECtHR, will depend on the circumstances, the object of the assessment and the specifics of the case (see, *Molla Sali v. Greece*, cited above, paragraph 136; and *Carson and Others v. the United Kingdom*, cited above, paragraph 61).

215. On the one hand, the ECtHR has specified several areas, where the margin of appreciation continues to be broad. For example, the ECtHR reiterated that, due to the knowledge of the society and its needs, the domestic authorities are in principle in a better position than international judges to assess what is in the public interest in economic and social terms, and the ECtHR will respect the choice of legislator unless it is manifestly without any reasonable basis (see, ECtHR cases *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13, Judgment of 11 December 2018, paragraph 94; *Burden and Burden v. the United Kingdom* no. 13378/05, Judgment of 12 December 2006, paragraph 60; and *Carson and Others v. the United Kingdom*, cited above, paragraph 61).

216. Therefore, according to the ECtHR, a wide margin of appreciation is usually allowed when it comes to general economic or social strategy measures, unless they are manifestly without any reasonable foundation (see *Burden and Burden v. the United Kingdom*, cited above, paragraph 60, and case KO01/17, Applicant, *Aida Dërguti and 23 other deputies of the Assembly of the Republic of Kosovo,* cited above, paragraph 76).

(ii) Application of the above mentioned principles to the present case

217. The Court first emphasizes that at the time when the contribution-payer work experience of fifteen (15) years was determined by the Law of the former SAPK, it may not have had a discriminatory character. The possible discriminatory effect of this provision, however, must be assessed in the light of the factual and legal circumstances of the 90s in Kosovo, during which, it is not disputed that there was *"[...] the discriminatory removal of ethnic Albanian officials from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities"* (see, *inter alia*, Resolution A/RES/48/153 of 7 February 1994, adopted by the General Assembly of the United Nations, page 6, paragraph 18, point (b); see also the report of the Ombudsperson Institution of 6 April 2018).

218. The Court assesses that the condition of proving that the contributions have been paid for fifteen (15) years and limited in terms of time until 1 January 1999, is not in accordance with the reality created during the 90s due to the violent measures, unrest and war of 1998-99. As mentioned above, the criterion of fifteen (15) years to prove that pension contributions have been paid would be a reasonable and proportional criterion because the legislator has the right and prerogative to set conditions for the acquisition of rights related to the categories of pensions. However, taking into account the discriminatory laws in force during the 90s, as a result of which the vast majority of Albanian employees were forcibly removed from the functions they held, the adoption and formal application of the criterion of proof of the payment of contributions for fifteen (15) years until 1 January 1999 from the Law of the former SAPK through the challenged Law and the challenged Administrative Instruction, in the circumstances of the 90s, places a disproportionate burden on the categories of citizens who claim to enjoy the right to a contribution-payer pension.

219. In addition, and as explained above, the right to pension contribution-payer experience for the years 1989-1999 was recognized to the employees of "*education,*

health and others who have worked in the parallel system of the Republic of Kosovo", for their service during the years 1989/90 to 1998/99, while all other categories who worked during the 1990s, who were dismissed based on discriminatory laws applicable during the 1990s and therefore, have been subject to the objective impossibility to realize and prove the payment of pension contributions for fifteen (15) years until 1999, proof of work experience through the payment of the respective contributions is required.

220. Regarding the comparison of the two aforementioned categories, the Court assesses that based on the consolidated case law of the ECtHR, the criterion to demonstrate a comparable situation does not require that the comparative groups be identical. Complainants must prove that, given the special nature of their complaints, they were in a relevantly comparable position to others who were treated differently (see ECtHR case, *Fábián v. Hungary* , cited above, paragraph 113; *Clift v. the United Kingdom,* no. 7205/07, Judgment of 13 July 2010, paragraph 66). The elements which characterize different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question (see ECtHR case, *Fábián v. Hungary* , cited above, paragraph 121). In other words, the analysis of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is both specific and contextual; (see *inter alia*, Guide on Article 14 of the ECHR and Article 1 of Protocol No. 12, Prohibition of discrimination, updated on 31 August 2020, point A. Difference in treatment, paragraph 54).

221. In this regard, the Court assesses that: (i) The challenged law makes distinction between two categories of citizens in the context of the contribution-payer pension category, determining, on the one hand, that the work experience for contribution-payer pension for the years 1989-1999 is recognized to "*the employees of education, health and others who have worked in the system of the Republic of Kosovo",* while on the other hand, determining that for other categories of citizens, the criteria for recognition of the corresponding contribution-payer experience must be determined by a sub-legal act; (ii) based on this challenged Law, the respective sub-legal act, namely, the challenged Administrative Instruction, adopts and applies the criterion for the payment of contributions of fifteen (15) years until 1 January 1999 from the Law of the former SAPK, without conducting any analysis of discriminatory circumstances throughout the 90s, in essence, excluding from this right the category of citizens who have been violently expelled from the respective workplaces and who have not "*worked in the system of the Republic of Kosovo*"; (iii) despite the fact that the challenged Law, in paragraph 2 of its article 8, specifies that the criteria and conditions for acquiring the right to a contribution-payer pension according to "*the duration of the payment of contribution*" by a sub-legal act, the latter, namely the challenged Administrative Instruction, simply adopts a criterion of fifteen (15) years, applying it to historical and political circumstances, in the context of which, the realization of this criterion was made impossible in a discriminatory manner for the majority of citizens; and (iv) the same Law, as explained above, determines the financing from the budget of the Republic of Kosovo, for all categories of pensions, including the contribution-payer one, without taking into account the contributions of employees to the relevant pension fund based on the Law of the former SAPK. Consequently, the Court notes that although the pension scheme is called contributory, the amount of the pension and the categorization has nothing to do with the amount of the contribution paid before 1999, since the amount of pension is entirely covered by the state budget of the Republic of Kosovo.

222. The Court also recalls the fact that the MLSW in the response sent to the Court had emphasized that they have *"drafted administrative instruction that foresees some*

substantial changes in terms of realizing the contribution-payer pension as they are; - recognition of the period 1990 to 31.12.1998 as a contributory experience for all those dismissed from work by the violent Serbian administration; as well as the recognition of diplomas until 1998." This answer is a clear reflection of the MLSW itself regarding the non-proportionality of the measures imposed by the challenged Law.

223. Based on the above, the Court assesses that the condition determined by the challenged Law and challenged Administrative Instruction to provide evidence that contributions have been paid for at least fifteen (15) years until 1 January 1999 for the category of citizens defined by paragraph 2 of Article 8 of the challenged Law in conjunction with that determined by paragraph 6 of Article 8 of the challenged Law, is not proportional because (i) it does not take into account the application of discriminatory laws during the 90s and adopts and automatically applies the condition of proof of payment of contributions of at least fifteen (15) years until 1 January 1999 from the relevant Law of the former SAPK; (ii) employees of other categories who worked during the 90s in social enterprises, judiciary, police, administration, professional and craft positions, who were dismissed as a result of violent measures, and who were unable to pay pension contributions, the work experience of contribution-payer pension in the years 1989-1999 is not recognized to them, whereas the category of "*the employees of education, health and others who have worked in the paralle system of the Republic of Kosovo*", are recognized this right; and (iii) although the scheme is called contributory, the amount of the pension and the categorization has nothing to do with the amount of the contribution paid before 1999, since the latter is fully covered by the budget of the Republic of Kosovo.

224. On this basis, the Court finds that the condition of providing evidence for the payment of contributions for at least fifteen (15) years before 1 January 1999 provided by the challenged Law and Administrative Instruction, and which has been adopted within the legal system of the Republic of Kosovo in a completely formalistic way and not taking into account the discriminatory circumstances in Kosovo in the 90s, cannot be considered necessary and proportionate.

225. Consequently, the Court finds that paragraph 2 of Article 8 of the challenged Law in conjunction with sub-paragraph 2.3 paragraph 2 of Article 6 of the challenged Administrative Instruction, are not in compliance with Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 of the ECHR.

226. The Court also notes that the referring court (i) also challenges the constitutionality of Article 5 of the challenged Administrative Instruction; and (ii) claims that the challenged articles of the challenged Law in conjunction with the relevant Administrative Instruction are in contradiction with Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

227. Regarding the first issue, namely the unconstitutionality of Article 5 of the Administrative Instruction, the Court initially notes that the applicability of this Article is related to the category of citizens established in paragraph 2 of Article 8 of the challenged Law and determines the qualification of users of contribution-payer pensions, specifying (i) the relevant qualifications in first four (4) paragraphs; and (ii) the obligation that all evidence of relevant qualifications must be before 1 January 1991, in its fifth paragraph. What is disputable in the circumstances of this paragraph, namely paragraph 5 of Article 5 of the challenged Administrative Instruction, is the reasonableness of determining 1 January 1991, as the final date on the basis of which the evidence provided by the first four (4) paragraphs of Article 5 of the challenged

Administrative Instruction should be valid. Having said that, neither the referring Court, nor the 2018 Opinion of the Ombudsperson referred to in this Judgment, nor the answers of the MLSW, clarify the reasonableness of this date and the reasons on the basis of which such a date can be discriminatory and therefore contrary to the Constitution. However, in supplementing and amending the challenged Law in conjunction with the challenged Administrative Instruction, as determined by this Judgment, nothing prevents the relevant authorities of the Republic of Kosovo from assessing the reasonableness of Article 5 of the challenged Administrative Instruction in terms of the necessary proportionality applied to all categories of citizens who may be beneficiaries of the contribution-payer pension according to the provisions of the Law on Pension Schemes Financed by the State and its supplementations/amendments according to this Judgment.

228. Whereas, with regard to the second issue, namely the claims that the challenged articles of the challenged Law in conjunction with the challenged Administrative Instruction are also in contradiction with Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR, the Court emphasizes that based on its case law, taking into account that it has already challenged that paragraph 2 of Article 8 of the challenged Law in conjunction with sub-paragraph 2.3 of paragraph 2 of Article 6 of the challenged Administrative Instruction, are not compatible with Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 of the ECHR, it is not necessary to assess the claims of unconstitutionality of the challenged provisions with Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

229. In the end, the Court emphasizes that (i) the difficulties of the legislator in adopting a comprehensive legal framework in the field of pensions and the treatment of all respective and complex issues, do not exempt the State of Kosovo from the obligations stemming from the Constitution (see, ECHR cases, *Schirmer v. Poland*, no. 68880/01, Judment of 21 September 2004, paragraph 38; and *Skibińscy v. Poland*, no. 52589/99, Judgment of 14 November 2006, paragraph 96). Having said that, the Court emphasizes that the legislator has "*wide margin of appreciation*" during the issuance of laws in the context of the change of the political and economic regime (see, the case of the ECtHR, *Kopecký v. Slovakia*, no. 44912/98, Judgment of 28 September 2004, paragraph 35) as well as in the context of the country's transition towards a democratic regime (see the ECHR case, *Broniowski v. Poland*, no. 31443/96, Judgment of 28 September 2005, paragraph 182).

230. The Court emphasizes that, in accordance with the case law of the ECtHR, it is not within its scope to replace the public policies determined by the legislator. The Court also emphasizes that it is not its duty to determine social and pension policies, since this is the duty and prerogative of two other powers, namely the executive and legislative. The duty of the Court in the present case is to assess whether the challenged Law and Administrative Instruction are compatible with the Constitution. Given that the Court has found that the relevant provisions of the challenged Law in conjunction with the relevant Administrative Instruction are not compatible with the Constitution, it is the executive and legislative power that should determine proportional and reasonable criteria regarding the acquisition of the status of contribution-payer pensioner.

Effects of this judgment

231. The Court initially refers to Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that (i) Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo; (ii) While a

proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages; (iii) if not otherwise provided by the Constitutional Court decision, the repeal of the law or other act or action is effective on the day of the publication of the Court decision; and (iv) decisions of the Constitutional Court are published in the Official Gazette. Based on this constitutional provision and the consolidated case law of the Constitutional Court, in the event that the latter determines that the act challenged before the Court is contrary to the Constitution, the repeal of the relevant act enters into force on the date of publication of the relevant Judgment of the Court, unless, as determined by the Constitution, the Constitutional Court, by the relevant Judgment, determines otherwise.

232. The Court recalls the legal effect of the entry into force of the decisions of the Constitutional Court, has been addressed, by the Venice Commission in its opinions, regarding the temporal effects of, among other things, the decisions of the Constitutional Courts (see, among others, CDL-AD (2018)012 *Amicus Curiae* Opinion for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases). The latter, *inter alia*, addresses temporal effects in terms of (i) moderate *ex tunc* effects; (ii) strict *ex nunc* effects; (iii) moderate *ex nunc* effects; and (iv) the rule "*for the instant case*".

233. In principle, based on the aforementioned report and to the extent it is relevant to the circumstances of the present case, (i) retroactive effects of court decisions should be avoided because they may have consequences on the principle of legal certainty; (ii) final court decisions based on the relevant law/provision that was subsequently declared unconstitutional, in principle, do not benefit from the declaration of the relevant norm as unconstitutional; (iii) that in the service of the principle of legal certainty, in principle, a norm, despite the fact that it has been declared unconstitutional, can continue to be in force and continue to be applied, until the legislator has amended the corresponding norm in accordance with the Judgment of a Court and in compliance with the deadline given by it; and that (iv) however, the respective Constitutional Courts must have sufficient flexibility to establish the appropriate balance, depending on the circumstances of the concrete cases, regarding individual rights, on the one hand, and the principle of legal certainty, on the other.

234. Such an approach has been clarified before the Court through the responses of the majority of the Constitutional Courts that are members of the Venice Commission. As explained in this Judgment, in order to accurately determine the legal effects of this Judgment, the Court has also sought the opinion of member states of the Venice Commission Forum. The detailed responses of these states are presented in paragraphs 62 to 130 of this Judgment. The common denominator of the respective answers, in principle, reflects that these Constitutional Courts have a certain flexibility regarding the determination of the moment of entry into force of the relevant Judgments and the temporal effects of the latter. For the circumstances of the present case, the consolidated practice of the respective Constitutional Courts is relevant in the context of (i) avoiding the consequences of the immediate annulment of a legal provision, leaving the possibility to other powers, namely the executive and legislative, to undertake the measures necessary for the amendment of the norm declared unconstitutional in compliance with the Constitution and the relevant Judgment of the Constitutional Court; (ii) the effect of a Judgment of a Court declaring a norm unconstitutional in cases pending before regular courts and the rule of "*the instant case*"; and (iii) the retroactive or non-retroactive effects of the relevant Judgments.

235. Regarding the entry into force of the Judgment declaring a law/provision contrary to the Constitution, the vast majority of responses submitted by the Forum of the Venice Commission, in accordance with the relevant Opinions of the Venice Commission, among others, specify that (i) the Constitution or the relevant applicable law, enable the Constitutional Court, depending on the circumstances of concrete cases, to determine the date of entry into force of the relevant Judgment and/or of the annulment/repeal of the relevant provision that has been assessed as being contrary to the Constitution; (ii) in principle, the relevant laws/provisions which have been assessed as being contrary to the Constitution, must be repealed immediately and eliminated from the relevant legal system; but that (iii) however, in order to avoid unpredictable consequences of an immediate annulment of the challenged law/provision, it is sometimes necessary to postpone the implementation/entry into force of a Judgment of the Constitutional Court.

236. In such circumstances, the Constitutional Court, despite the fact that it has assessed a relevant law/provision as being contrary to the Constitution, it leaves the same in force for a certain time, if it assesses that the legal gap caused by the immediate repeal of the challenged specific law/provision would be contrary to the principle of proportionality, legal certainty and the rule of law. In this way, the Court allows the legislative power a certain time, which can extend, based on the circumstances of concrete cases, from two (2) to eighteen (18) months, so that it can amend the relevant law/provision in accordance with the Constitution and the relevant Judgment of the Constitutional Court. Based on the vast majority of responses from Constitutional Courts member of the Venice Commission Forum, during this period the law declared unconstitutional remains part of the legal order and is still binding on all public authorities.

237. Regarding the pending/ unresolved cases before the regular courts during the period within which the Court has assessed a relevant law/provision as unconstitutional but the repeal of the latter has not entered into force, taking into account the necessary time allocated for the relevant action of legislative power, the response of the vast majority of Constitutional Courts, members of the Venice Commission Forum, in principle, specifies that public authorities and/or courts must continue the procedures and, if possible, directly apply the relevant provisions of the constitutional laws or the Constitution instead of the provision/law assessed as unconstitutional by the Constitutional Court. If such a direct application of constitutional norms is not possible/appropriate, the courts have no choice but to apply the unconstitutional law as long as it remains in force. Having said that, in principle, in cases of incidental control, based on the Opinions of the Venice Commission, the rule of the "*instant case"* applies, based on which the applicant whose request has resulted in the request for incidental control, benefits from the declaration of the relevant law/provision as unconstitutional, as far as possible/applicable/appropriate, in the circumstances of the concrete case (see, among others, part 3. Rule of the rule for the instant case, paragraphs 53-57, of CDL-AD (2018)012 Opinion *Amicus Curiae* for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases). In principle, with the entry into force of the relevant Judgment and/or the repeal of the relevant provisions and the implementation of the latter by public authorities through the supplementation/amendment of the relevant law/provision, the cases before the regular courts and which have not been completed by a final decision, benefit from the supplemented/amended legal provisions.

238. Finally, it is worth noting that with regard to the possibility of the retroactive effect of a Judgment, despite the exceptions, the vast majority of the answers submitted by the Constitutional Courts that are members of the Venice Commission, in harmony with

the respective Opinions of the Venice Commission, avoid the latter. In principle, the annulment of a law or its individual provisions by the Constitutional Court cannot constitute a basis for reopening a case completed by a final decision. A decision of the Constitutional Court regarding the finding of the unconstitutionality of a law/provision, in principle, will not be applied to cases resolved by a final decision before the date of publication in the Official Gazette/repeal of the relevant provisions, since during the entire period of the applicability of the relevant law/provision, the latter enjoys a presumption of constitutionality. Consequently, and in principle, the effects of the relevant Judgment of the Constitutional Court will be applied to all cases that are pending before the courts from the entry into force of the effects of the relevant Judgment because in this way the presumption of the constitutionality of the legal rule for the period before the publication of the Judgment regarding the unconstitutionality of the relevant law/provision is respected.

239. Taking into account the provisions of the Constitution of the Republic of Kosovo, the relevant Opinions of the Venice Commission, the responses of the Constitutional Courts that are members of the Venice Commission and its case law, the Court, in the circumstances of the present case, assesses that in order to balance individual rights and the principle of legal certainty, the repeal of the norms assessed as unconstitutional according to the Judgment of the Court, based on paragraph 3 of Article 116 of the Constitution, must be determined on 15 July 2023, thus granting the necessary time to the executive and legislative power to amend/supplement the challenged Law in conjunction with the challenged Administrative Instruction in accordance with the Constitution and the Judgment of this Court. On 15 July 2023, the provisions declared unconstitutional by this Judgment are considered repealed.

240. Such an approach is also in compliance with (i) the Court's own case law in Court's case KO54/20, Applicant the President of the Republic of Kosovo, Judgment of 31 March 2020; (ii) Relevant opinions of the Venice Commission; and (iii) the case law of a vast majority of the Constitutional Courts that are members of the Venice Commission Forum. In the circumstances of the present case, and balancing individual fundamental rights and freedoms and the principle of legal certainty, such an approach, exceptionally, is necessary to (i) avoid the legal gap in the Republic of Kosovo regarding the category of contribution-payer pension; (ii) to protect the rights of all those individuals who in the meantime could benefit from the right to contribution-payer pension and whose rights could potentially be infringed by the immediate repeal of the relevant provisions of the Law in conjunction with the challenged Administrative Instruction; and (iii) to protect the procedural rights of the parties, including the deadlines for claims and appeals, as defined in the challenged Law in conjunction with the challenged Administrative Instruction.

241. Within the period granted by the Court, the relevant institutions of the Republic of Kosovo, in the first instance the Assembly and the MLSW, must take the appropriate measures to ensure that the relevant provisions of the challenged Law and Administrative Instruction are replaced with provisions that are in accordance with this Judgment and the Constitution of the Republic of Kosovo, in order to categorize the persons who can benefit from the contribution-payer pension scheme for work performed before 1999, and who were dismissed from work as a result of discriminatory measures.

242. Moreover, in accordance with the aforementioned Opinions of the Venice Commission, the Court must be careful so that this Judgment does not have an effect from the beginning (*ex tunc*), but only in the future (*ex nunc*), so that the state budget is not unreasonably burdened and an unconstitutional situation greater than that created by the challenged Law and Administrative Instruction is avoided. Therefore,

the Court emphasizes that this Court Judgment will have effect only in the future (*ex nunc*), as the only possibility to correct the incompatibility with the Constitution of the challenged Law and Administrative Instruction, taking into account the balance between individual rights and the principle of legal certainty.

243. Finally, the Court assesses that in the present case, legal certainty is more effectively protected by: (i) determining the effects of this Judgment after a period of six (6) months, namely on 15 July 2023, in order to avoid legal gap and which may negatively affect citizens who may benefit from the relevant provisions of the challenged Law in conjunction with the relevant Administrative Instruction; (ii) considering the legislative and financial implications of the changes that must be made to replace the relevant provisions of the challenged Law and Administrative Instruction, the Court, in accordance with international constitutional practice, gives the legislator six (6) months within which the provisions of the challenged Law and of the challenged Administrative Instruction found as unconstitutional, must be replaced with provisions that are in accordance with this Judgment and the Constitution of the Republic of Kosovo; and (iii) that for reasons of legal certainty, the temporal effect of this Judgment will be only in the future *(ex nunc)*.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with articles 113 (8) and 116 of the Constitution, articles 51 and 52 of the Law and based on rules 66 (4), 77 and 59 (1) of the Rules of Procedure, on 30 December 2022, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that paragraph 2 of Article 8 of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with sub-paragraph 2.3 of paragraph 2 of Article 6 of Administrative Instruction no. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions according to Qualification Structure and Duration of Payment of Contributions-Pension Experience, are not compatible with Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of the European Convention on Human Rights and Article 1 (General Prohibition of Discrimination) of Protocol no. 12 to the European Convention on Human Rights;

III. TO HOLD, in accordance with paragraph 3 of Article 116 of the Constitution, paragraph 5 of Article 20 of the Law and paragraph 5 of Rule 60 of the Rules of Procedure, that paragraph 2 of Article 8 of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with sub-paragraph 2.3 of paragraph 2 of Article 6 of Administrative Instruction no. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions according to Qualification Structure and Duration of Payment of Contributions-Pension Experience, are repealed on 15 July 2023;

IV. TO ORDER, in accordance with paragraph 1 of Article 116 of the Constitution, the Assembly and the Government of the Republic of Kosovo, to take necessary actions, no later than 15 July 2023, to supplement and amend Law no. 04/L-131 on Pension Schemes Financed by the State in compliance with the Constitution and this Judgment;

V. TO REQUEST from the Assembly and the Government of the Republic of Kosovo, in accordance with paragraph 5 of Rule 66 of the Rules of Procedure, to inform the Constitutional Court of the Republic of Kosovo about the measures taken to enforce this Judgment;

VI. TO NOTIFY this Judgment to the parties;

VII. TO HOLD that the Judgment is effective on the date of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.