IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONSTITUTIONALITY OF ARTICLES 5, 7, 8, 37, 38, 45, 49 AND 86 OF THE LAW OF THE REPUBLIC OF ARMENIA ON FUNDED PENSIONS ON THE BASIS OF THE APPLICATION OF THE DEPUTIES OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF ARMENIA

Yerevan **2 April 2014**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), Justices K. Balayan (Rapporteur), F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhannisyan (Rapporteur), H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representatives of the Applicant, the representatives of the Deputies of the National Assembly of the Republic of Armenia: A. Minasyan, Deputy of the National Assembly of the Republic of Armenia, A. Zeynalyan, lawyer, and M. Khachatryan, advocate,

representatives of the Respondent: H. Hakobyan, official representative of the National Assembly of the Republic of Armenia, Chair of Standing Committee on Social Affairs, S. Tevanyan, Advisor to the Department of Expertise of the Staff of the National Assembly,

official representatives of the Government of the Republic of Armenia invited to the examination of the case: A. Asatryan, Minister of Labour and Social Issues of the Republic of Armenia, K. Tamazyan, Head of the Staff of the Ministry of Finance of the Republic of Armenia,

K. Hakobyan, Deputy Head of the Staff of the Ministry of Justice of the Republic of Armenia,

official representatives of the Central Bank of the Republic of Armenia invited to the case examination: N. Yeritsyan, Deputy Chair of the Central Bank of the Republic of Armenia, M. Abrahamyan, Head of the Department of Financial Regulation of the Central Bank of the Republic of Armenia, V. Shahnazaryan, Specialist of the Division of Regulation of Stocks of Financial system regulation Department of the Central Bank of the Republic of Armenia,

pursuant to Article 100, Point 1, Article 101, Part 1, Point 3 of the Constitution of the Republic of Armenia, Articles 25, 38 and 68 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by an oral procedure the Case on Constitutionality of Articles 5, 7, 8, 37, 38, 45, 49 And 86 of the Law of the Republic of Armenia on Funded Pensions on the Basis of the Application of the Deputies of the National Assembly of the Republic of Armenia.

The Case was initiated on the basis of the application submitted to the Constitutional Court of the Republic of Armenia by 36 deputies of the National Assembly of the Republic of Armenia on December 16, 2013.

Having examined the combined report of the Rapporteurs on the Case, the explanations of the Applicants and the Respondents, clarifications of the official representatives of the Government of the Republic of Armenia and the Central Bank of the Republic of Armenia, as well as having studied the Law of the Republic of Armenia on Funded Pensions, other laws and normative legal acts systematically related to the latter, international practice of pension reforms, and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The Law of the Republic of Armenia on Funded Pensions was adopted by the National Assembly of the Republic of Armenia on December 22, 2010, signed by the President of the Republic of Armenia on December 30, 2010 and came into force on 9 January, 2011 in accordance with Article 86, Part 1 of the Law.

In accordance with Article 86, Part 2 of the Law, the provisions herein concerning the obligation on making mandatory funded contributions entered into force on January 1, 2014.

Article 5 of the Law on Funded Pensions, titled "Mandatory participants of mandatory funded component" **prescribes**:

"1. The following persons born on and after 1 January 1974 shall mandatorily participate in mandatory funded component:

a/ Hired employees;

b/ Notaries;

c/ Individual entrepreneurs.

Meanwhile, the persons mentioned in this Part shall be obligated to make funded contributions also from contractual income by the rate prescribed by this law.

2. Part 1 of this Article shall be applicable also with respect to foreign citizens and stateless persons, who were born on January 1, 1974 and after, and gain basic income in the manner prescribed by the legislation of the Republic of Armenia or, in accordance with Article 7, Part 1, Point 3, Paragraph 1 of this Law, carry out any activity taxed by the fixed payments as prescribed by the Law of the Republic of Armenia on Fixed Payments or included in the list of Appendix 7 of the Law of the Republic of Armenia on Patent Payments or by the turnover tax of the Law of the Republic of Armenia on Turnover Tax.

Article 5 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012 and the RA Law ՀՕ-67-Ն adopted on 10.06.2013.

Article 7 of the Law titled "Rates of the Mandatory Funded Contributions" **prescribes**:

"1. Funded contributions for persons provided in Article 5, Part 1 of this Law, except for the persons mentioned in Paragraph 1 of Point 3 of Part 1 of this Article, shall be paid at the rate of 10% from the basic income as follows:

1) a hired employee, a foreign national and a stateless person participating in the scheme, who is in receipt of basic income in the manner prescribed by the legislation of the Republic of Armenia and whose monthly income does not exceed AMD 500.000, shall make a monthly funded contribution in his/her pension account in the amount of 5% of the basic income, while the remaining 5% shall be paid for (in favor of) the participant from the state budget to secure 10% of the required contributions;

2) a hired employee, a foreign national and a stateless person participating in the scheme who is in receipt of basic income in the manner as envisaged by the legislation of the Republic of Armenia and whose monthly income exceeds AMD 500.000, shall receive AMD 25.000 on monthly basis in his/her pension account from the state budget, while the remaining contributions shall be paid by such persons each month to secure 10% of the required contributions;

3) an individual entrepreneur or a notary, who participates in the scheme and who carries out any activity taxed by the fixed payments as prescribed by the Law of the Republic of Armenia On Fixed Payments, or included in the list of Appendix 7 of the Law of the Republic of Armenia On Patent Payments, or by the turnover tax of the Law of the Republic of Armenia On Turnover Tax, shall be obligated to make a monthly funded contribution in the amount of AMD 5.000, which is considered as final obligation in respect of calculated funded contribution received from the incomes from the types of activity taxed by the circulated tax in accordance with the Law of the Republic of Armenia On Fixed Payments, or included in the list of Appendix 7 of the Law of the Republic of Armenia On Patent Payments, or by the turnover tax of the Law of the Republic of Armenia On Turnover Tax, and AMD 5.000 shall be paid for (in favor of) the participant from the state budget on monthly basis.

An individual entrepreneur or a notary, not included in Paragraph 1 of this Point who participates in the scheme and whose basic annual income does not exceed AMD 6.000.000, shall be obligated to make monthly funded contributions in his/her individual pension account in the amount of 5% of the basic income, while the remaining 5% shall be paid for (in favor of) the participant from the state budget to secure 10% of the required contributions;

4) in case if an individual entrepreneur or a notary participates in the scheme and whose basic annual income exceeds AMD 6.000.000, annually AMD 300.000 shall be paid for (in favor of) the participant from the state budget to the pension account, while the remaining annual contributions shall be annually made by such a person to secure 10% of required contributions.

2. Funded contribution from contractual income and income from self-employed activities shall be made by participants, as referred to in Article 5 of this Law, at the rate of 5%, without additional contribution from the state budget. Moreover, the participant shall voluntarily make funded contribution from the gained incomes as a self-employed person.

3. According to Article 6 of this Law, the participant who voluntarily joined the mandatory funded component shall make funded contributions at the rate of 5% of basic income and contractual income, and, as a self-employed person − 5% of income. No additional contributions shall be made for (in favor of) him/her from the state budget. Meanwhile, as a self-employed person the participant shall voluntarily make funded contribution from the income.

3.1. An individual entrepreneur or a notary, who carries out any activity taxed by the fixed payments as prescribed by the Law of the Republic of Armenia On Fixed Payments, or included in the list of Appendix 7 of the Law of the Republic of Armenia On Patent Payments, or by the turnover tax of the Law of the Republic of Armenia On Turnover Tax, and who voluntarily joined the mandatory funded component according to Article 6 of this Law, shall make a monthly funded contribution at the rate of AMD 5.000, which is considered as final obligation in respect of calculated funded contribution received from the incomes from the types of activity taxed by the circulated tax in accordance with the Law of the Republic of Armenia On Fixed Payments, or included in the list of Appendix 7 of the Law of the Republic of Armenia On Patent Payments, or by the turnover tax of the Law of the Republic of Armenia On Turnover Tax.

4. If persons born after 1974 who gain contractual income as well as self-employed persons who voluntarily joined the mandatory funded component, become hired employees, notaries, or individual entrepreneurs, they shall pay funded contribution as provided by Part 1 and 2 of this Article. If a hired employee, notary or individual entrepreneur as a participant of mandatory funded component becomes a self-employed person or a person who gains contractual income, he/she shall pay funded contribution as provided by Part 2 of this Article.

5. In the event the participant is in receipt of basic income simultaneously from several sources, as prescribed by this Law, the obligation for making funded contributions and the rate of the funded

contributions shall be applied in each certain case by the procedure defined by this Law. Moreover, the overall contributions made from the state budget for (in favor of) the participants as prescribed in Article 5 of this Law, who are in receipt of income simultaneously from several sources, may not exceed the rates in regard to contributions made from the State, as prescribed in Part 1 of this Article. A participant in receipt of income simultaneously from several sources shall be obligated to make additional funded contribution before May 31 of the year following the calendar year at the rate of the difference of 10 percent of his/her annual basic income, as well as at the rate of the difference of funded contributions already withheld by fiscal agents and at the rate of the respective contributions made by the State.

The participant mentioned in this Part may pay the amount of additional funded contribution each month at the rate of the difference of 10 percent of his/her monthly basic income and at the rate of the difference of funded contributions already withheld by fiscal agents, as well as at the rate of the respective contributions made by the State.

6. Once the retirement age is reached, the participant shall carry on making funded contributions until he/she submits an application as provided by Part 7 of this Article.

7. The participant having reached retirement age shall cease paying funded contribution in case:

1) he/she submits an application to the Tax Authority on ceasing of payment of funded contribution; or
2) he/she submits an application to the Registrar of participants on receiving funded pension.

8. Application (and the form thereof) to the Tax Authority on ceasing of payment of funded contribution by the participant having reached retirement age, shall be defined by the Government of the Republic of Armenia. The hired employee and the person who gains contractual income shall submit the application to the Tax Authority through the employer.

9. The Registrar of participants shall notify the Tax Authority about the submission of an application by the participant on receiving funded pension, and the Tax Authority shall notify to the employer by the procedure defined by the Government of the Republic of Armenia.

10. The participant having reached retirement age shall cease making funded contributions:

1) on the 1st of the month following the submission of an application (to cease contributions from salary, other contributions equated to the salary and income) to the employer for submitting it to the Tax Authority, or submission of the application to the Registrar of participants;
2) on January 1 of the year following the submission of an application (to cease contributions from entrepreneurial and notarial activity, as well as from income from self-employed activities) to the employer for submitting it to the Tax Authority, or submission of the application to the Register of Participants.

11. Once the retirement age of the participant is reached, the rate of funded contribution shall be 5% of the basic income, and no funded contributions shall be made for (in favor of) the participant from the state budget."

Article 7 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012, the RA Law ՀՕ-67-Ն adopted on 10.06.2013 and the RA Law ՀՕ-132-Ն adopted on 12.12.2013.

Article 8 of the Law titled "Mandatory Funded Contributions" **prescribes:**

"1. Acting as fiscal agents, employers shall bear the obligation to calculate and transfer funded contributions for (in favor of) hired employees and persons who gain contractual income.

2. Employers shall electronically register hired employees and persons who gain contractual income (with whom employers are in labor or civil legal relations) at the Tax Authority within the period and in the manner specified in the law; and according to the rate stipulated by this Law, acting as fiscal agents, employers shall also calculate and transfer funded contributions of hired employees and persons who gain contractual income within the period set for calculation and transfer of income tax as provided by the Law of the Republic of Armenia On Income Tax.

Non-resident organizations in the Republic of Armenia acting as fiscal agents according to the procedure envisaged in the Law of the Republic of Armenia On Income Tax, shall calculate and transfer funded contributions of hired employees and persons who gain contractual income for the employer within the period stipulated by this Point and within the rate prescribed by this Law. In this case, fiscal agent shall submit an annual personalized electronic report on mandatory funded contri-

bution to the Tax Authority within the period set forth by the Law of the Republic of Armenia On Income Tax.

3. Employers shall submit a personalized electronic report to the Tax Authority within the period set forth by the Law of the Republic of Armenia On Income Tax.

4. Notaries, individual entrepreneurs and self-employed persons, as well as hired employees and persons who gain contractual income, as participants of mandatory funded contribution component, shall be responsible for annually calculating and transferring funded contributions from the income on their own and within the period defined by the Law of the Republic of Armenia On Income Tax.

In case the employer is exempt from a fiscal agent's responsibility, the participant of mandatory funded contribution component and the hired employee shall calculate and transfer funded contributions on their own and within the period envisaged for the employer.

5. Notaries, individual entrepreneurs and self-employed persons shall submit a personalized electronic report to the Tax Authority within the period set forth by the Law of the Republic of Armenia On Income Tax.

Hired employees and persons who gain contractual income, as stipulated by Part 4, Paragraph 2 of this Article, shall monthly submit a personalized electronic report (simplified) to the Tax Authority for the employer.

6. Relations concerning the registration of hired employees and persons who gain contractual income, as well as submission of personalized reports of the latter to the Tax Authority shall be regulated by the Law of the Republic of Armenia On Income Tax and Personalized Funded Contribution Record.

7. Employers, as well as hired employees and persons who gain contractual income as stipulated by Part 4, Paragraph 2 of this Article, may exceptionally electronically submit corrected calculations to the Tax Authority in case errors are detected in calculations of mandatory funded contribution submitted for previous accounting periods, and based on it, recalculation of mandatory funded contributions for the mentioned periods shall be made.

8. Notaries, individual entrepreneurs and self-employed persons shall have the right to make corrections to the data in calculations after submission of annual report on mandatory funded contribution for the accounting period.

9. No corrections to calculations of mandatory funded contributions shall be made in regard to the periods in the process or after inspection of persons making mandatory funded contributions (employers) carried out by the Tax Authority.

Article 8 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012.

Article 37 of the Law titled "Obligation of participants to select mandatory pension fund" **prescribes:**

"1. Participants of mandatory funded contribution component are obliged to select any pension fund. Meanwhile, in each case participant may select only one fund. Funded contribution(s) made for (in favor of) the participant shall not be simultaneously directed to more than one pension fund.

2. Complete and updated information on pension fund managers and their pension funds must be available for the Registrar of participants (including the website) and the account operator."

Article 37 of the Law was not amended since adoption.

Article 38 of the Law titled "Selection of pension fund" **prescribes:**

"1. Participant must submit an application to the Registrar of participants for selection of pension fund by the means stipulated by Article 12, Part 5, Paragraph 2 of this Law or via the account operator. Form of application and order of submission are defined by the regulation of the Central Bank.

2. Application stipulated by Part 1 of this Article must comprise the following information:

1) participant's name and surname, serial number of passport and date of birth;
2) Public Service Number or number of the statement on non-possession of Public Service Number;
3) contact information of participant /telephone number, electronic mail address (if available), place of residence, etc./;
4) preferred means of receipt of information (statement of pension account, letter, electronic message, etc.) from Registrar of participants;
5) name of selected pension fund manager and pension fund;
6) confirmation of consent on pension fund manager's management fees and rules of fund;
7) statement of being aware of the obligation on making funded contributions;

8) date of submission of application (year/month/day);

9) signature of participant (authorized representative of participant) except for the cases when the application is filed electronically, which ensures identification of the person.

3. Participants shall inform the Registrar of participants, in a manner stipulated by the Registrar of participants, about changes in personal data provided in the application stipulated by Part 1 of this Article."

Article 38 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012.

Article 45 of the Law titled "Contributions made in the account of participant of mandatory pension fund and fees levied from mandatory pension fund assets, and expenses" **prescribes:**

"1. For management of pension fund, pension fund manager shall levy fee (manager's bonus) from mandatory pension fund assets in the amount stipulated by Article 47 of this Law.

In addition to the bonus stipulated by Paragraph 1 of this Part, for management of the given pension fund, pension fund manager may also cover expenses from pension fund assets, composition and maximum level of which shall be defined by the Central Bank by arranging it with the state authorized body of financial sector of the Government of the Republic of Armenia.

Deductions from assets of mandatory pension funds other than fees and expenses provided by this Law shall be prohibited.

2. Except for the cases provided by Part 3 of this Article, pension fund rules may stipulate fee for redemption of mandatory pension fund shares, which shall not exceed 1% of book value of redeemable shares.

3. Fee for redemption of mandatory pension fund shares shall not be levied in case of receipt of cumulated means upon retirement as an annuity, programmed payment or lump-sum payment, as well as in the following cases:

1) when the participant exchanges his/her pension fund shares with other pension fund shares of the same manager;

2) when exchanging pension fund shares as provided by the grounds stipulated by Article 32, Part 7 of this Law;

3) when the participant for the first time in the course of 12 months exchanges the given pension fund shares with other pension fund shares, except for the cases of exchanging the shares of the fund where the shares (a part thereof) have been purchased as a re-

sult of exchange of shares in the course of the last 12 months. Meanwhile, according to the given Point:

a) exchange for the first time also means the exchange of pension fund shares with the shares of more than one pension funds in the course of 12 months, provided that the application (applications) for the exchange of shares has/have been submitted to the Registrar of participants within the same day,

b) calculation of exchange of pension fund shares does not include the transactions of exchange of the pension fund shares managed by the same pension fund manager;

4) according to this Law, when exchanging pension fund shares for the first time selected by the participant (for the participant) for the first time after opening pension account for the person by the procedure stipulated by Article 38 or 39 of this Law;

5) when the heir arranges the first exchange deal of inherited shares in accordance with Chapter 12 of this Law;

6) when acquiring shares of other mandatory pension fund at the expense of the participant's assets in the event of termination of the pension fund."

Article 45 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012.

Article 49 of the Law titled "Guarantying of recurrence of mandatory funded contributions made by participants" **prescribes:**

"1. As provided by Article 5 of this Law, recurrence of the total amount of mandatory funded contributions due to annual inflation made by participants shall be guaranteed. The procedure for adjustment of the amount of funded contributions due to annual inflation stipulated by this Part shall be stipulated by the Government of the Republic of Armenia.

2. Guarantee Fund established on the basis of this Law shall secure recurrence of 20 percent of the amount stipulated by Article 1 of this Law, and the remaining 80 percent shall be recovered by the Republic of Armenia."

Article 49 of the Law was amended pursuant to the RA Law ՀՕ-207-Ն adopted on 12.11.2012.

Article 86 of the Law titled "Final provisions" **prescribes:**

"1. This Law enters into force on the tenth day following its official publication, except for the obligation on making mandatory funded contributions stipulated by this Law.

2. Provisions relating to the obligation on making mandatory funded contributions enter into force on January 1, 2014.

3. Participants of mandatory funded component must select pension fund and pension fund manager by the procedure stipulated by this Law until January 1, 2014 otherwise selection is made by the procedure stipulated by Article 10, Part 1 and 2, and Article 39 of this Law.

Article 86 of the Law was not amended since adoption.

2. Challenging the constitutionality of Articles 5, 7, 8, 37, 38, 45, 49 and 86 of the Law of the Republic of Armenia on Funded Pensions, the Applicant finds that the latter contradict Articles 1, 3, 6, 8, 14, 14.1, 31, 34, 36, 37, 42, 45, 48 and 117 of the Constitution of the Republic of Armenia.

Grounding his position and referring to the position expressed in the Decision DCC-649 of the Constitutional Court of the Republic of Armenia, according to which the salary is the citizen's property, as well as insisting that based on the commentary to Article 31 of the Constitution of the Republic of Armenia, mandatory funded contribution has no relation to the prevailing public interest, and that no restriction shall be legitimate except for the grounds stipulated by the Constitution, the Applicant states: "Defining mandatory funded contribution at the rate of 5-10 percent from non-taxed salary of the person, the constitutionally protected right to property of the person is violated by Article 7 of the Law and Article 45 of the Law correlated with the latter."

Examining Article 8 of the Law from the aspect of Article 45 of the RA Constitution and referring to the position expressed in the Decision DCC-753 of the Constitutional Court of the Republic of Armenia, according to which mandatory contributions possess public legal nature and intended to be paid into state or community budget, the Applicant finds that "Defining, levying and transferring mandatory funded contribution to private pension funds as provided by the Law contradict the requirements of Article 45 of the Constitution." Simultaneously, the Applicant expresses his concern that "... in case the mentioned demand is beyond the regulations of the given Article of the Constitutions, it is not clear which norm of the Constitution obligates to make funded contribution."

As regards to the constitutionality of the norms of the Law defining the scope of those who make mandatory funded contributions, the Ap-

plicant finds that those norms contradict Articles 3, 14.1 and 42 of the Constitution of the Republic of Armenia. To substantiate this position the Applicant notes the following: "... linking the application of binding norm to the age and property status, the person is often obligated to take actions inconsistent with his/her consent. We believe that the establishment of such a norm is also a manifestation of disrespectful and improper interference in current labor relations, which is prohibited by Article 42 of the Constitution, according to which the laws and other legal acts exacerbating the legal status of an individual shall not be retroactive."

As regards to the constitutionality of the norms of the Law defining the mandatory funded component, referring to the Law of the Republic of Armenia on Subsistence Minimum Basket and Subsistence Minimum Budget and the Law of the Republic of Armenia on Minimum Monthly Wage, the Applicant finds that those norms contradict the idea of social state stipulated by Article 1 of the Constitution of the Republic of Armenia, as well as Articles 34, 37, 48 and 117, since Article 48 of the Constitution stipulates that "... proper implementation of the state's obligation in the social sector assumes not only making explicit actions to improve the living conditions, but also the requirement to refrain from actions that worsen the living standards of citizens. Meanwhile, levying mandatory contribution at the rate of 5-10 percent from non-taxed salary is not only disproportionate, as it shall be 6.61-13 percent from taxable income, but also discriminatory, and essentially reducing the person's income, it actually restricts the constitutional right of a person to improve personal living conditions. ...Besides, in the case of those who receive minimum wage, levying mandatory funded contributions will also lead to gaining less income by the person as prescribed by the Law of the Republic of Armenia on Minimum Monthly Wage, since, in accordance with Article 4 of the Law, mandatory funded contribution plays no role in defining the minimum wage.

Meanwhile, according to the requirement of Part 3 of Article 117 of the Constitution, after the amendments to the Constitution come into force ... the social rights provided in the Constitution shall be valid to the extent specified by appropriate laws."

The Applicant also finds that in the mandatory funded component stipulated by the Law mandatory transition occurs from distributive

pension system or the system of consent of the generations to an individual or "self-financing" funded system, which, according to the Applicant, contradicts Article 36 of the Constitution of the Republic of Armenia, since the latter, based on the preamble of the Constitution, "... shall protect the idea of civic harmony of generations in each family and society, which is applied as a distribution system developed on the basis of the principle of harmony of generations in the field of pensions as a system of social protection of disabled persons."

Furthermore, noting that the conditions stipulated by the Decision No. 1487-Ն of November 13, 2008 of the Government of the Republic of Armenia were annulled by the Decision No. 1491-Ն of November 11, 2011 of the Government of the Republic of Armenia, the Applicant finds that "... without providing current pensioners decent pensions, mandatory funded component in its enactment does not also guarantee the possibility for future generations to receive decent pension."

The Applicant also finds that Article 49 of the Law, which guarantees that the Republic of Armenia shall secure recurrence of 80 percent of the total amount of mandatory funded contributions, contradicts Article 11 of the RA Law on the Budgetary System, which stipulates that the total amount of the guaranteed obligations for the current budget year may not exceed 10 percent of the revenues of the state budget for the previous budget year. Moreover, the Applicant expresses his concern that even the simplest calculations show that the accumulating resources will several times exceed the limit provided by the Law.

Touching upon the introduction of mandatory funded component from the viewpoint of the issues of socio-economic, moral and spiritual, informational and infrastructural compliance, and stating the fact that a number of activities stipulated by the program approved by the Decision No. 1487-Ն of November 13, 2008 of the Government of the Republic of Armenia were not taken in a timely manner, the Applicant tried to prove that by virtue of Part 3 of Article 86 of the Law, the obligation of selecting a pension fund and a fund manager up to January 1, 2014 were not fulfilled, meanwhile, according to the Applicant, in accordance with Part 3 of Article 45 of the RA Law on Legal Acts, "normative legal acts shall not use norms which implementation is impossible or for noncompliance of which no legal consequences are provided."

3. Objecting to the arguments of the Applicant, the Respondent finds that the norms in dispute do not contradict the Constitution of the Republic of Armenia.

Touching upon the importance and necessity of pension reforms, submitting the main conclusions of research and discussions on different approaches and options, the Respondent emphasizes that the main task is to obligate persons by the force of law to save up to support themselves additional income in retirement.

The Respondent notes that the principle of mutual responsibility of the state and the individual is also stipulated by the RA Constitution, and by the analysis of certain provisions of which it becomes clear that stipulating the principle of mutual responsibility of the state and the individual is not an end in itself and is aimed at ensuring full-fledged and timely solution of assigned social problems of the state. In other words, in the given relations the State not only performs obligations, but also it is endowed with certain rights in so far as necessary to the aim pursued, as well as to ensure decent living standards of older people. The Respondent finds that first of all it is necessary to examine the RA Law on Funded Pensions namely from this point of view.

In contrary to the arguments of the Applicant, the Respondent also specifically produces the legal positions of the RA Constitutional Court expressed in the Decision DCC-1073 of January 30, 2013 from the viewpoint of legal regulations of the law in dispute, and concludes that:

- exercise of the right to property of the person is guaranteed, but it is not an absolute right;
- restriction of the right to property is permissible if stipulated by the law, pursues constitutionally reasonable aim, i.e. it is aimed to ensure reasonable balance between the rights of owners and other individuals and public interests, and it does not anyhow go beyond international commitments assumed by the Republic of Armenia.

The Respondent emphasizes that by making mandatory funded contributions, the person still retains the right to property ownership over those resources, and the state shall guarantee recurrence of mandatory funded contributions due to annual inflation made by the person.

Referring to Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as several Judgments of the European Court of Human Rights, the

Respondent concludes that "... restriction of the right to property must be considered in the context of the following issues:

1. how (at what extent) the given restriction pursues legitimate aim (also necessary for fulfillment of the obligations of the state as provided by the RA Constitution);

2. at what extent the size of the given restrictions is equivalent to the aims pursued."

Based on the above mentioned, the Respondent concludes that it is more than obvious that pension reforms are based on public interest, and the restriction of the property (a part of salary) of the person stipulated by the law is necessary to ensure decent living standards of older people.

As for the proportionality (or the rate of funded contribution) of the restrictions stipulated by the RA Law on Funded Pensions, the Respondent notes that the expression "... decent living standards of older people" or in other words "effective pension" is not abstract in the sense of its extent." According to the Respondent, invasion factor, i.e. the ratio of labor incomes /salary/ and the extent of pension of the person are the main criteria for evaluating the effectiveness of the pension system.

Touching upon the Applicant's approach in the aspect of age discrimination, the Respondent refers to Article 14.1 of the RA Constitution and finds that "In this case prescribing by the Law that only the persons born on and after January 1, 1974 shall participate in mandatory funded component, the legislator took as a basis the actual possibility of the state to ensure pensions. Taking into account the given circumstance, objective criterion of separation by age was stipulated by the Law, based on the real possibility." Simultaneously, it is noted that "... the power to define the capacity and forms of social security as a key element of social state is at the discretion of the legislator according to the Constitution."

The Respondent also considers legitimate the functions provided to the Government of the Republic of Armenia by the Law of the Republic of Armenia on Funded Pensions, and finds that the latter "... cannot be considered as restrictions of the rights and freedoms of individuals and legal entities, or determination of responsibilities for the latter by force of the normative legal act adopted by the RA Government." According to the Respondent, the mentioned responsibilities are in fact

stipulated by the RA Law on Funded Pensions, and the RA Government is entitled to stipulate procedures to achieve the objectives set forth by the Law.

The Respondent finds that the RA Law on Funded Pensions also entitled the RA Central Bank to regulate similar procedural issues, i.e. the form of registration of the rules of pension funds, the form of reports submitted by pension fund managers for the participants (in the case of voluntary pension funds), as well as the form of published reports, the form of stipulating the procedure for its submission and the form of stipulating the procedure for the activities of account operators etc.

Touching upon the arguments of the Applicant on Subsistence Minimum Budget, the Respondent finds that "... the minimum wage in the Republic of Armenia is higher than the minimum consumer basket, hence funded contributions made from minimum wage cannot exert an impact on the requirement of stipulating minimum salary equivalent to the minimum consumer basket guaranteed by the Constitution."

The Respondent considers mandatory funded pension component in the framework of constitutional legal criteria of restriction of the right to property, compares the latter and draws a parallel with the institution of securing the action as provided by the RA Civil Procedure Code, as well as with the institution of arrest on the property as provided by the legislation.

4. Based on the necessity of ensuring the supremacy and direct effect of the Constitution of the Republic of Armenia, the Constitutional Court of the Republic of Armenia, within the framework of its constitutional powers, stresses the importance of revealing the constitutional legal content of the norm in dispute of this Case, taking into account:

a/ the necessity of effective implementation of the functions of the state on the basis of the fundamental values and principles of the Constitution;

b/ the constitutional provisions concerning the right to property and its protection, as well as the legal positions expressed in the decisions of the Constitutional Court of the Republic of Armenia concerning the latter;

c/ the constitutional approaches in regard to guaranteeing, ensuring and protecting the right to social security;

d/ the constitutional legal requirements to the legal acts and the

scopes of legal regulation prescribed by the latter, as well as to the margin of appreciation of the authorities;

e/ the requirements of consistent implementation of the principles of legal certainty and proportionality, based on the necessity of ensuring the rule of law.

5. The Constitutional Court of the Republic of Armenia states that in international aspect especially in the last twenty years the implementation of major reforms in the domains of social protection and especially social security became a very topical issue. The latter is conditioned by many objective factors and amongst others, in particular, the circumstances of ageing population, reduction in the number of working population, qualitative change in reproductive performance of the population and the total demographic picture. For example, when in 1889, in Germany Otto von Bismarck for the first time introduced the institution of state pensions for those who reached the age of 70, the average life expectancy in the country was 45 years. Today, in many countries it exceeded the level of 80 years. The circumstance that in recent decades traditional social relations gradually acquire new quality is also considered to be an important factor.

Taking into account also the large gap between the levels of social security and the tendency of deepening of the latter, as well as the rise in unemployment, significant decrease in the number of actual working population, who reached retirement age, many countries raised the issue of qualitative reform of the social security system of the most vulnerable segments of society. In particular, the European countries also introduced the funded system in the field of pension reforms together with the previously existing distributive system, without which it was impossible to foresee any positive result in the given domain.

The study of experience of more than fifty countries shows that due to the introduction of funded pension system life support of the person in the retirement age becomes more guaranteed and stable, as it is not directly depended on demographic, socio-economic and other situational changes. Moreover, the mentioned stability is incommensurably more than distributive pension system. In addition, most positive results regarding the issue of social security of the population were recorded in those countries where the state-distributive, mandatory funded and voluntary funded pension systems were most correctly compared.

Along with emphasizing the introduction of funded pension system, even the Member States of the European Union chose different ways regarding its forms and the choice of methods of its introduction (enactment).

Comparative analysis of international practice states that:

a/ there is almost no country where no reforms have not been taken over the past decades in the domains of social security, insurance and assistance of the population have not been undertaken;

b/ the experience of different countries shows that migration processes, fertility decline of the population, rising life expectancy, aging tendencies, rate of unemployment, high level of poverty and many other factors may lead to an even more difficult situation in the near future concerning the issue of guaranteeing a stable living wage for the most vulnerable segments of the population;

c/ countries more socially advantaged than Armenia, a long time before took reforms in this domain and gained some experience, that can be useful for us. Simultaneously, every experience is valuable provided that reasonably combined with special social realities of the certain country and does not presume mechanical imitation, especially when nearly all countries for many years made significant amendments to own pension systems;

d/ the Republic of Armenia also has to resolve this issue, as it is the obligation of the sovereign, democratic, social state governed by the rule of law to provide preconditions for ensuring the well-being not only for the current working population, but also for ensuring overall well-being and civic harmony of future generations. The latter is a norm-objective stipulated by the Constitution of the Republic of Armenia, and it needs target, consistent and effective implementation of the functions of the state for guaranteeing the latter, being based on the fundamental values and principles of the Constitution of the Republic of Armenia and deeply taking into account certain legal, economic, social and general demographic peculiarities in the country. Guaranteeing effective exercise of the right to social security of people for decades is possible only this way.

6. The Constitutional Court of the Republic of Armenia in its Decision DCC-649 of October 4, 2006 held that "Ratifying the International Covenant on Civil and Political Rights, the Republic of Armenia recognized the fundamental position of its Preamble, according to which "human rights are derivative from the inherent dignity of the human person." Article 3, Part 1 of the Constitution of the Republic of Armenia stipulates that "The human being, his dignity and the fundamental human rights and freedoms are an ultimate value." The notion "ultimate value" is not abstract here and it has certain legal content. "Ultimate value" means that no any other value may be ranked above, including any system called to resolve state and public issues. The norm stipulated by Part 3 of the given Article of the Constitution, according to which "The state shall be limited by fundamental human and civil rights as possessing direct effect," follows from the above mentioned.

Similar legal position was expressed regarding the pension issue and, therefore, the Constitutional Court also stated in the same decision that "In practice, the payment of pensions is a mean of transfer of the property to the owner. As a mean of social security, the pension, however, is a form of ownership also according to the case law of the European Court (the case Burdov vs. Russia)."

The Constitutional Court of the Republic of Armenia finds that disputed legal norms of this case must firstly be subject to review from the viewpoint of constitutional approaches of recognition, safeguarding and protection of the right to property.

In a number of decisions, the Constitutional Court of the Republic of Armenia touched upon the issue of protection of the right to property. In particular, the Constitutional Court stated in its Decision DCC-630 of April 18, 2006 that the Law of the Republic of Armenia on the Constitutional Court requires that in determining the constitutionality of laws and other legal acts, the Constitutional Court should, among other circumstances, take into account the necessity of protection and free exercise of constitutionally stipulated human and civil rights and freedoms, the framework and grounds for the permitted restrictions of the latter and the necessity of ensuring the direct effect of the Constitution.

It was also stressed that "According to Article 31, Part 1 of the Constitution, "Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him." Article 43 of the Constitution does not consider the right to property as a right restricted by

the grounds of the given Article. This is a specific case of restriction of rights, when the Constitution defines the criteria and limits of the given right, not even vesting it to the competence of the legislator. Firstly, it may be exercised by exceptionally judicially deprivation of property in the cases provided by the law, as an enforcement action following from responsibility. Secondly, it may be exercised by "alienation of property," which is an institution significantly differing from " deprivation of property," and it must be exercised on the grounds of Article 31, Part 3 of the Constitution."

The Constitutional Court of the Republic of Armenia expressed the legal position in the Decision DCC-741 of March 18, 2008, according to which: "The right to property, guaranteed by Article 31 of the Constitution of the Republic of Armenia, shall be granted to the persons whose right to property has already been recognized by the procedure stipulated by the law, or those who have a legitimate expectation of the acquisition of the right to property by the force of law."

The Constitutional Court stated in its Decision DCC-930 of July 13, 2010 that: "Article 31 of the Constitution of the Republic of Armenia envisages four distinct from each other circumstances of **restriction on exercising** the right to property:

a) restriction on exercising the right to property conditioned with the ban to cause damage to the environment or infringe on the rights and lawful interests of other persons, the society and the state (second sentence of Part 1 of Article 31);
b) deprivation of property (Part 2 of Article 31);
c) alienation of property for the needs of the society and the state (Part 3 of Article 31);
d) restriction on the right to land ownership for foreign citizens and stateless persons.

As it follows from the content of the above mentioned sub-point a), the legislator conditions **enjoyment of the right** to property with the demand for observance of certain public values. Those are as follows: the environment, the rights and lawful interests of **other persons**, the society and the state. Such approach is aimed to ensure reasonable balance between the rights of owners and other individuals and public interests..." In this context, the demand for laying down certain legitimate conditions for the process of implementation of certain right, and not its restriction is constitutionally stipulated.

Taking into consideration the direct relation of the issue in dispute with the right to property, the Constitutional Court of the Republic of Armenia also draws attention to the legal positions expressed in the Decision DCC-1009 of February 24, 2012. In particular, the Constitutional Court of the Republic of Armenia stated that "While recognizing the right to property as fundamental right of everyone as prescribed in the first sentence of Part 1 of Article 31 of the Constitution, the content of the given right is revealed, i.e. the powers to own, use, dispose of and bequeath his/her property, simultaneously defining the **discretion of the owner** as precondition for the realization of the latter." In this constitutional norm the emphasis of the wording "at his/her discretion" means that the realization of right of ownership is based on the precisely expressed will of the owner; the latter is considered as mandatory precondition for the realization of the right of ownership, and in the process of realization of property the will of a person is decisive. The content of this provision leads to the fact that the implementation of property rights should be based on the principles of inviolability of ownership and freedom of contract, which assume, inter alia, **property independence and autonomy of will of the participants in civil legal relations**."

The Constitutional Court also stated in the same Decision that Article 163 of the Civil Code of the Republic of Armenia reveals the content of the right of disposition of property. Particularly, it highlights that "... the right of disposition is the legally supported possibility to determine the destiny of the property." Simultaneously, Part 2 of this Article prescribes that "The owner is authorized to commit at his/her discretion any action in connection with the property belonging to him/her, which does not contradict the law and does not violate the rights and interests of other persons protected by the law, including to alienate his/her property to the ownership of other persons, transfer them the rights of use, possession and disposition of the property, put in pledge the property or dispose it in other manner."

The following circumstance was also emphasized: **"The power of disposition of property assumes the right of the owner within the scopes and procedure prescribed by law to determine the legal and factual destiny of his/her property through making actions in connection with the property or refraining from the latter."** This is nothing else than the **discretion**, or otherwise **right to manifest au-**

tonomy of will in respect of the destiny of the property within the scopes prescribed by Part 1 of Article 31 of the Constitution of the Republic of Armenia, and in the conditions and by the procedure stipulated by the law. Emphasizing that "The mentioned discretion is of subjective nature, and must be manifested by a will of the certain person", the Constitutional Court concluded that "The stipulation of other conditions for realization of the right to propery than it is defined by Article 31 of the Constitution, will inevitably lead to the blockage of that right."

The Constitution of the Republic of Armenia also stipulates that "Limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia" (Article 43). In this regard, the provision of Article 1 of the Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms is worthy of attention, according to which "Every natural or legal person is entitled to the peaceful enjoyment of his possessions."

Summarizing the above-mentioned and assessing the explanations and clarifications of the participants of trial within the framework of this Case, the Constitutional Court of the Republic of Armenia states that:

Firstly, Article 8 of the Constitution of the Republic of Armenia stipulates that "The right to property is recognized and protected in the Republic of Armenia," and the equivalent public legal obligation of the state follows from it.

Secondly, the precondition for the implementation of the mentioned obligation is that according to Article 31 of the Constitution, "Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him."

Thirdly, the mentioned constitutional right may not be limited by the law, since Articles 31, 43 and 44 of the Constitution do not provide necessary grounds for it.

Fourthly, under such constitutional legal regulation certain articles of the considered law /in particular, Articles 5, 7, 13, 76/ directly or indirectly stipulate restrictions of the right to property that do not correspond to the requirements of Article 31 of the Constitution of the Republic of Armenia and legal positions of the Constitutional Court of the Republic of Armenia.

Five, Article 89 of the Constitution of the Republic of Armenia entitles the Government of the Republic of Armenia to manage **exceptionally state property**. According to the law, managing the property of persons or self-government bodies, as a function, shall not be included in the scopes of exercise of that right.

Six, on one hand, the above mentioned legal positions of the Constitutional Court of the Republic of Armenia indicate their precise and coherent nature, and the latter also served as basis for declaring several legal norms contradicting the Constitution of the Republic of Armenia and void. From the other hand, it is obvious that the latter were not thoroughly taken into account when adopting the considered law. Meanwhile, Article 9, Part 2 of the Law of the Republic of Armenia on Legal Acts definitely states: "The laws shall conform the Constitution and shall not contradict the decisions of the Constitutional Court of the Republic of Armenia." In addition, conformity of the laws with the Constitution is a constitutional legal requirement (Article 6, Part 2 of the Constitution).

7. The concept "pension" is not anyhow stipulated by the Constitution of the Republic of Armenia. However, the term "social" is considered as a characteristic of the social nature of the state /Article 1/, circumstance excluding discrimination /Article 14.1/, manifestation of interests of employees /Article 32/, characteristic of the right to social security /Article 37/, field determining the scopes of main issues of the state /Article 48/, sphere of policy exercised by the Government /Article 89/. In all cases it is essential that the state, which also proclaimed itself as social, constitutionally assumes precise positions with regard to the issues concerning the social life of people. *Inter alia*, the right to social security was recognized as one of underlying rights of citizens of the Republic of Armenia, and by virtue of Article 3 of the Constitution the state shall be also limited by this right as possessing direct effect.

Ratifying the International Covenant of 16 December 1966 on Economic, Social and Cultural Rights, the Republic of Armenia also assumed international commitment to recognize the right of everyone to social security according to Article 9 of the latter.

According to the constitutional provision /Article 37/, the extent and types of social security shall be stipulated by law, which is one of the basic peculiarities of guaranteeing, ensuring and protecting the given

right. Constitutional legal regulations precisely indicate that both the issues on the extent (quantitative definiteness) and types of social security are left to the legislator's discretion. **In this field, based on the requirements of fundamental principles of adequacy and proportionality, the margins of discretion shall be conditioned by socio-economic facilities of the state on one hand and constitutional requirements of the social state on the other.**

It is essential how the above mentioned circumstances are taken into account in course of pension reforms in our country from the viewpoint of revealing the constitutional content of the norms in dispute.

The grounds for developing the present pension system in the Republic of Armenia was laid in 2005, namely, on 28 April of that year the Government of the Republic of Armenia adopted the Decision No. 666-Ն on approving conceptual approaches of reforms of social security system of the Republic of Armenia. It was stated that keeping the present pension system as it was, would not only result in deep systemic crisis, but also impede socio-economic development of the country. "Generation of a pension security system equivalent to the changes in economic domain" was considered as strategic issue. Such oncoming system was based on the following principle: "the state must offer facilities for all members of society to "earn" pension." "...Taking care of those who could not manage to "earn" pension" was also considered as the issue of the state. Within the framework of the given methodological approach the following issue was put forward: "to pass into multilayer pension system supplied by different sources taking into account international practice," and mandatory funded pension insurance was one of essential components of the latter. It was also stipulated that the sense of the latter results in the fact that the participant "...shall have individual account and gain pension based on the reckoning of mandatory social contributions paid (made) into that account until attainment of the pension age and reckoning of the average life expectancy." One of important accentuations of the given Decision of the Government was not only the fact that mandatory funded component, like in many countries, should **be developed at the expense of mandatory social contributions**, but also it stressed the importance of "tough control," and the following issue was put forward: " to pass into the new system comprehensively prepared and smoothly, up to providing for "holding public discussions, namely, round-tables, seminar conferences, TV debates etc."

After a year, on 26 May 2006, the Government of the Republic of Armenia adopted the Decision No. 796-Ն on approving the concept of reforms of social security system of the Republic of Armenia. In practice, the Government of the Republic of Armenia issued approaches concerning the oncoming pension system and put forward sequence of actions to ensure introduction of the system. Namely, it was accentuated that the approaches were developed in the result of broad public discussions and consultation with international organizations. Nevertheless, there was uncertainty in this document concerning methodological approach of development of mandatory funded pension. In particular, Paragraph 7 of the part concerning "Income Tax and Social Contributions" stipulated that "Anyway, citizens joined the new system shall via the employer pay the current 3% from their salary and additional social payment at the rate of 7% /in total 10 percent/ and the latter shall be transferred to personal accounts in pension funds the citizens select." In this statement (wording) the term **"social contribution"** is worthy of special attention. It possesses precise legal content and concerns the relations regulated within the framework of legal regulation of Article 45 of the Constitution of the Republic of Armenia.

Nevertheless, the given concept puts forward the notion of "integration of income tax and the system of social contributions," and, according to the Constitutional Court, the latter is supposed to be a mechanical combination of dissimilar phenomenon, and later on the mentioned starting point served as ground for the reforms of pension system. Moreover, the section on "Mandatory Funded Pension" of the given Decision does not mention social contributions and it emphasizes that "Persons who joined the new system shall be obligated to monthly transfer the amount of 10 percent of salary to individual accounts in pension funds they select." In this case, not only social contributions are not mentioned, but also bearing the responsibility of 5 percent of funded contributions by the state are not referred. By the way, the given Decision stipulated that "Introduction of the system shall start on January 1, 2008."

As a matter of fact, the ideology of the present system of funded pension was based on the Decision No. 796-Ն of May 26, 2006 of the Government of the Republic of Armenia, which was ratified by the President of the Republic of Armenia on June 17, 2006. It was developed by further decisions of the Government of the Republic of Armenia.

In particular, the Decision No. 1487-Ն of November 13, 2008 of the Government of the Republic of Armenia approved the project of pension reforms and stipulated that "The rate of mandatory funded contributions for persons who became participants in the mandatory funded pension system on a mandatory basis on January 1, 2014, shall be defined at the rate of 10 percent of salary and incomes equated to the salary, and the half of the latter or 5 percent of salary and incomes equated to the salary, but not more than AMD 25000 shall be paid by the state." Afterwards, the given conceptual approach entirely served as a ground for the Law of the Republic of Armenia on Funded Pensions dated December 22, 2010.

In practice, in 2006-2010 the internationally and generally accepted concept of resolving social security issue via social contribution was gradually replaced with the concept of developing mandatory funded pension component via additional deductions from salary. Consequently, as a direct participant in resolving social security issues of own employees the employer was extruded from these legal relations, the state obtained additional responsibilities due to tax-payers, ambiguity was introduced with regard to the issue of ensuring the right to social security stipulated by Article 37 of the Constitution of the Republic of Armenia and with regard to the issue of embodying the constitutional legal approaches of ensuring prerequisite and guarantees for the right to social security stipulated by Article 45 of the Constitution of the Republic of Armenia.

Afterwards, the mentioned situation also got into legislative field. The National Assembly of the Republic of Armenia adopted the Law on Income Tax on December 22, 2010. Due to the final provisions of Part 2 of Article 28 of the given Law, from the moment of entry of this Law into force /on January 1, 2013/, the Law of the Republic of Armenia ՀՕ-183 on Income Tax dated December 27, 1997 and the Law of the Republic of Armenia ՀՕ-179 on Mandatory Social Security Contributions dated December 26, 1997 were revoked.

The problem is not only that the term "tax on income" was replaced with "income tax." The essential fact was that the concept "mandatory social security contribution" ceased to exist; it was pulled out from the scopes of the given legal **relations replacing mandatory social security contribution with tax.**

Researches prove that such experience is almost unique particularly in Pan-European legal area.

Nevertheless, the issue was not resolved only by technical solutions, namely, due to replacing two contributions with one regardless of the circumstance of incompatibility of contents. The circumstance that besides budgetary domain, the employer, as it was mentioned, was in practice pulled out from the given legal relations is more typical for this issue. As a result, budgetary revenues decreased at the rate of social security contributions, and tax burden of employees was increased. Concerning budgetary employees tax burden increase was compensated with equivalent wage increase due to amending the Law of the Republic of Armenia on Remuneration of Civil Servants dated November 12, 2012 and the Law of the Republic of Armenia on the Rates of Official Salaries of Senior Officials of Legislative, Executive and Judicial Authorities. Simultaneously, Article 25, Part 6 of the Law of the Republic of Armenia on Income Tax stipulates: "...at the moment this Law enters into force, the employer shall at his/her own expense assume additional responsibility at the rate of full amount of Income Tax withheld and paid from the calculated salaries of hired employees for each month of the year, if after entry of this Law into force withholding of income tax from hired employees has led to reduction of the amount stipulated by the Government of the Republic of Armenia and payable to the latter based on salaries after taxation."

In the conditions of such legal regulation, the institution of **social security contributions** still operates in many other laws of the Republic of Armenia. In particular, according to Article 32 of the Law of the Republic of Armenia on Profit Tax: "In the process of deductions from gross income in respect of expenses concerning taxpayers, social security contributions shall also be considered in line with funded contributions made in respect of voluntary funded pensions, and, as it was mentioned, the latter ceased to exist."

8. The Constitutional Court of the Republic of Armenia states that in international practice, percentage ratio of social security contributions made by employers and employees is such that from half to two-thirds of overall target social security contributions are developed mainly at the expense of employers. Regardless of peculiarities of pension system, experience of many countries /Sweden, USA, Great Britain, France, Singapore, Poland, Hungary, Slovenia, Croatia, Slovakia etc./ indicates that the states where the three main subjects, namely, the state, em-

ployer and employee participate in solution of the issue of pension security, have relatively more success.

Besides, in many countries even the burden of mandatory funded contributions is also distributed between the employee and employer. Unlike the above mentioned, in our country the burden of employers of non-state system working in the field of social security, is also on the state /particularly, due to 5 percent subsidy/.

In practice, Armenia is one of the unique countries that established the constitutional principle of social and legal state, where individual target contributions of pension fund are not developed from social security contributions and the latter are developed via additional mandatory deductions and taxes from salary.

There are many other certain examples of countries following other methodology. The Federative Law No. 424-ФЗ on Funded Pension in Russian Federation dated December 28, 2013 is the latest example yet, according to which people were provided with the opportunity to make a choice between insurance and funded pensions, and the rate of their participation **within the framework of social insurance**. And for example, in Sweden, where pension shall be approximated to 60-80 percent of salary, social security contribution shall be 18.5 percent, and the latter shall be equally distributed between the employer and hired employee. Moreover, 16 percent of overall contribution shall be directed to distributive system and 2.5 percent to funded system.

The Constitutional Court also emphasizes the circumstance that replacing social security contribution with tax essentially expands the margin of appreciation of authorities in regard to exercise of the latter. Social security contributions not only have target addressing, but they are also made even by the employer on the principle of individualization, that is, for each hired employee. The following is worthy of attention: in the first Report on Social security around the world (November 6, 2010) of the Bureau of International Labor Affairs /the Permanent Secretariat of the International Labor Organization/, the following issue was highlighted: the countries move in the direction of reducing social security resources especially conditioned by economic crisis, as well as to reduce national debt or budget deficit. Such risk increases in our country, when social security resources are not developed from target contributions, and have been replaced with tax.

9. The Constitutional Court states that in legal practice perception of the constitutional term "social security" is not precise. Social security is not only the person's right, but also a target function conditioned by positive obligation of the state, as it is aimed to secure the subsistence of the stratums of the society, who are not able to do that for reasons independent of them. Social protection is a broader concept, which includes not only social security, but also social insurance and social aid provided by the state and society.

Article 37 of the Constitution of the Republic of Armenia states that everyone shall have the **right to social security** during old age, disability, loss of breadwinner, unemployment and other cases prescribed by the law. This Article also obligates to prescribe the extent and forms of social security by the law. It is obvious that social security issues need differentiated solution, and the latter shall not be mixed with the issues of social insurance and social aid.

It is also indisputable that social security system must thoroughly take into account the peculiarities of issues the current social society faces, as well as approaches and opportunities of resolving these issues. Nevertheless, there are issues that were generally resolved in international practice, and taking the course of correcting own mistakes concerning the mentioned issues is not the proper approach. Particularly, all over the world, pensions have initial place among the types of social security. And, for example, Pan-European practice states that even if voluntary and mandatory personal accounts are opened, the transfers shall be made from social security contributions. **Social security system, based on stabile social contributions, is more reliable and, from the viewpoint of social expectations of people, more secure.** This model is more characteristic for market economy relations which have social objectives, as well as **for the countries, which constitutionally declare themselves as social states.** Unlike social legal states, there are several methodological peculiarities in the countries that took the course of a **liberal legal state**. The European Union, in particular, within the framework of Lisbon Agreement assumed the concept of social market economy, and it is not by chance that introduction of both distributive and funded pension joint and supplemental systems at the expense of social security contributions, is typical for the member states of the European Union.

It follows that the contribution made for social security is initially of

target nature, and stipulating it by the law makes the social perspective more predictable. Subjects endowed with the obligation of making contribution are also definite, namely, the employer and the employee himself/herself. The state's obligation is to make the given relations consistent and guaranteed via legislative regulation, and take measures for effective and target solutions of social security issues. Based on the mentioned peculiarities, Article 3 of the Law of the Republic of Armenia on Mandatory Social Security Contributions stated that "Social contributions are resources mandatory paid into state budget of the Republic of Armenia by insurants." In regard to income tax both the previous Law on Tax on Income and the current Law on Income Tax /Article 2/ the latter is considered to be "... a direct tax paid into state budget ... by tax-payers," that is, a tax directly levied by the state from the income of tax-payers. Direct tax paid by the tax-payers and social security contribution made by insurants are not identical in respect of both legal nature and content, as well as pursued aims.

The requirement of precise implementation of constitutional legal content of Article 45 of the Constitution of the Republic of Armenia is important in this respect. To resolve national issues, as well as to ensure material guarantees of social security of the people, the mentioned Article of the Constitution stipulates that "Everyone shall be obliged to pay taxes, duties and other compulsory fees in conformity with the procedure prescribed by the law." The legal regulations stipulated by the Law of the Republic of Armenia on Mandatory Social Security Contributions and the Law of the Republic of Armenia on Income Tax pursued the given aim, and the latter, as it was mentioned, were combined in the Law of the Republic of Armenia on Income Tax, which was adopted in December 2010.

Within the framework of revealing the legal content of Article 45 of the Constitution of the Republic of Armenia, the Constitutional Court of the Republic of Armenia expressed legal position in the Decision DCC-753 of May 13, 2008, and the Applicant also touched upon the latter. In particular, the Constitutional Court stated that "... in the given Article the mentioned taxes and duties are also compulsory fees and, therefore, other compulsory fees mentioned in the given Article differ from taxes and duties, and must have common characteristics with the latter."

Based on the results of analysis of tax legislation, the Constitutional

Court stated that "the mentioned mandatory contributions stipulated by Article 45 of the Constitution:

a/ have public legal nature, namely, shall be stipulated and contributed within the framework of social relations, which are of public nature;

b/ are intended to be paid into state or community budget."

It follows from the given common logic that if mandatory funded contributions acted as social contributions, were in reasonable correlation with other fees pursuing the aim of non-social security, **were transferred to the special account of state budget and were passed to management with precise guarantees stipulated by the law and by the responsibility of the state:**

a/ within the scopes of budget control, the system would also get under direct control of the National Assembly of the Republic of Armenia, and such circumstance would increase reliability of ensuring reasonable management and reimbursement of resources;

b/ the obligation of the Government of the Republic of Armenia in respect of public legal responsibility would be substantive;

c/ public confidence towards reliability of the system would essentially increase;

d/ such system would provide with the opportunity to stipulate by the law additional mechanisms of encouragement also in regard to the participants in voluntary funded component.

10. The circumstance that the employee shall first pay income tax from salary, and then pay funded contribution from nominal /and not real/ salary, is typical for mandatory funded pension system introduced in the Republic of Armenia. In practice, mandatory funded contribution shall also be calculated from contributed tax. In international practice, the following approach is most common: funded contributions shall be free of all kinds of taxes.

It follows from the legal regulation of Article 6 of the Law of the Republic of Armenia on Income Tax that even calculating income tax, mandatory funded contributions of the tax-payer shall not be reduced from the tax base of income tax. It is noteworthy that, according to Parts 3 and 5 of the given Article, voluntary funded contributions and, in the scopes of mandatory funded contributions, funded contributions made for the tax-payer only by the state, shall be accordingly considered

as reducing incomes. Within the framework of this Case the Constitutional Court is not empowered to assess also the constitutionality of the provisions of the Law of the Republic of Armenia on Income Tax, nevertheless, the Court finds that such legal regulation can be problematic.

The issue of choosing the interest rate of contributions made into pension funds is very important, and it is not an end in itself. It must first correspond to the principle of legal equality. In this case, the issue leads to **stipulating reasonable correlation between current and prospective subsistence of the person**. The equivalent participation of the employer can act as significant factor of balancing the latter. Hence, once again international practice states that more balanced solution is possible due to providing opportunities of social security with joint participation of the state and the employer, as well as non-state enterprises-organizations and employers, when, the employee participates with social security contributions regarding the issue of developing from one side, pension, including pension funds, harmonized both with existence in time and tax burden, and from the other side, all employers and not the state budget shall act as participants of relevant funds and warrant of target use.

The Constitutional Court of the Republic of Armenia is not empowered to suggest certain solutions to the National Assembly of the Republic of Armenia or the Government of the Republic of Armenia concerning quantitative correlation of developing pension funds, as it is in the discretion of the latter. Nevertheless, international practice and socio-economic, demographic and other peculiarities of our country state that it is possible to make all employers participate in the reform process of social security system by the procedure and scopes provided by the law, namely, to find the correlation decreasing the burden of individual participation of employees.

11. Legislative regulations in regard to the part of mandatory funded component do not precisely solve the issue of key importance how to act in regard to those who receive minimum wage, and this is a constitutional issue. According to Article 32 of the Constitution, in the Republic of Armenia the amount of minimum wage shall be stipulated by the law. By the procedure stipulated by Article 10 of the Law of the Republic of Armenia on Income Tax, in case the amount of monthly taxable income is up to AMD 120000, the amount of income tax shall

make 24.4 percent of the latter. No inner bound is specified. According to Article 1 of the Law of the Republic of Armenia on Minimum Monthly Wage, minimum wage in the Republic of Armenia shall be AMD 45000. Article 4 of this Law stipulates that "the amount of minimum monthly wage shall not include taxes, supplements, premiums, rewards and other incentive payments paid from salary." Such wording is problematic from the viewpoint of the principle of legal certainty. On the one hand, taxes are not included in the amount of minimum monthly wage, and on the other hand, according to Article 10 of the Law of the Republic of Armenia on Income Tax, in case the amount of income is up to AMD 120000, the amount of tax shall make 24.4 percent. It can only be assumed from the latter that all the mentioned contributions shall be made at the expense of the employer or shall not be contributed. Nevertheless, any obligation must be precisely stipulated and any discretionary approach concerning this issue must be eliminated by the Law.

The Constitutional Court finds that according to the principle of legal certainty and based on the requirements of Article 32 of the Constitution of the Republic of Armenia, as for minimum wage, the issue of contribution of mandatory funded pension has not received adequate legislative solution. The requirements of the Law of the Republic of Armenia on Subsistence Minimum (Basket) and Subsistence Minimum Budget have not been taken into account.Article 4 of the Law on Subsistence Minimum Budget precisely states that definition of Subsistence Minimum (Basket) and Subsistence Minimum Budget shall be aimed, in particular, to substantiate the rate of defined minimum wage, pensions, scholarship, and also benefits and other social contributions, as well as **to determine the rate of non-taxable income**. Nevertheless, the latter, as it was mentioned, ceased to exist according to the Law of the Republic of Armenia on Income Tax.

Article 32 of the Constitution of the Republic of Armenia states that every employee shall have the right to fair remuneration (wages) at the rate **no less than the minimum** set by the law. The constitutional legal content of constitutional term "minimum wage" assumes that **the real salary of the employee shall not be less than the minimum set by the law**, as the latter must ensure the solution of certain issues of subsistence minimum. The Law of the Republic of Armenia on Funded Pensions did not substantiate this constitutional legal approach by leg-

islative regulation of the given main issue, and the real legal regulation is not in harmony with the requirements of Article 32 of the Constitution.

12. Taking into account the systemic complexity of pension domain and influence of time factor, almost in all countries **public confidence towards that system and fulfilled measures were the success of reforms**. The mentioned confidence cannot be abstract. **The latter is developed due to the guarantees of functional and institutional capability of the system, reliability of control system, transparency and the level of predictability of expectations of people**. First of all, the legal regulation must first ensure such guarantees and, regarding this issue, also stipulate effective exertion of parliamentary and other control levers.

To ensure the supremacy of the Constitution, the Constitutional Court of the Republic of Armenia considers it necessary to touch upon the mentioned main issue from the viewpoint of constitutional requirements and necessity of consistent implementation of the latter.

Article 83.5, Point 1 of the Constitution of the Republic of Armenia stipulates that terms and procedures for the exercise and protection of the rights of natural and legal persons shall be determined exclusively by the laws of the Republic of Armenia. It is precise, that the given constitutional provision concerns all rights of persons. At the same time, as it was mentioned, Article 8 of the Constitution, set forth in Chapter 1 (The Foundations of Constitutional Order), stipulates that the right to property is recognized and protected in the Republic of Armenia. Taking into account that, according to the Constitution of the Republic of Armenia, the right to property is not limited by the law, hence **terms and procedures for its protection, can be stipulated exceptionally by the law.**

The mentioned logic is not observed by the Law in dispute. In particular, according to Article 13, Part 1 of the Law, shares of pension funds shall be the personal property of the participant. The main guarantee for its protection is stipulated by the terms and procedures for **disposing** of an equivalent fund. The issue of defining terms and procedures for the exercise and protection of the rights of persons exists. The fact that the latter must become a subject of regulation of the law is a constitutional requirement. Meanwhile, according to Article 2,

Part 1, Point 6 and Article 44 of the Law in dispute, within the scopes of stipulating quantitative and currency restrictions, as well as in regard to the part of disposing of guarantee fund and stipulating the terms and procedures for management, the Government of the Republic of Armenia was vested with the mentioned power. In this case, the fact that the Government shall stipulate the terms for disposing of the mentioned fund is also worthy of attention. Disposing also assumes the right to determine the legal status or the faith of the property. The law stipulates that the resources of the fund shall be the property of citizens, nevertheless, terms for disposing property shall not be stipulated by the law, and the latter shall be stipulated by the Government. Such regulation does not follow from the requirements of Article 83.5, Point 1 and Article 89, Point 3 of the Constitution of the Republic of Armenia.

In international practice, restrictions for investment of pension fund assets, as guarantee of ensuring and protecting the mentioned resources, shall also be stipulated by the law /for example, Chapter 25 of Social Security Code, Bulgaria; Chapter 4 of the Law on Private Pensions, Romania; Chapter 15 of the Law on Organization and Functioning of Pension Funds, Poland; Chapter 13 of the Law on Mandatory Financed Pension Security, Macedonia. Similar acts are in force also in Hungary, Croatia, Slovakia and other countries/.

The mentioned issue is of key importance from the viewpoint of effective management of fund resources, risk reduction, guaranteeing repayment and strengthening confidence towards the system. Article 44, Part 2 of the Law of the Republic of Armenia on Funded Pensions stipulates the domains the pension fund assets cannot be invested in. Rather abstract responsibilities are also stipulated for the fund manager. Nevertheless, the following is essential in the mentioned legal relations: legislative clarification of the scopes of quantitative and currency restrictions in the mentioned legal relations to the extent that the discretion of executive power was not absolute. International practice also prompts it. For example, in Bulgaria it is stipulated that no less than 50 percent of investments in mandatory pension funds must be invested via buying securities issued and guaranteed by the Government. Similar demand is put forward also in Croatia and several other countries. In Romania it is stipulated that up to 70 percent of investments by pension funds can be invested in securities issued by Romania, European Union

member states and European Economic Area member states. The law precisely limits the quantity of foreign investments, as well as investments made in money market instruments, unregistered securities, transactions connected with real-estate and several other domains.

By the Decision No. 1685-Ն dated December 27, 2012 the Government of the Republic of Armenia also stipulated quantitative and currency restrictions of investment in financial instruments of mandatory pension fund assets. In particular, the latter stipulated that investments made in bank deposits and accounts may not exceed 40 percent of fund assets. The amount of investments in securities issued by the Central Bank of the Republic of Armenia, foreign bank or central bank of foreign state cannot exceed 60 percent of fund assets. Other restrictions are also stipulated. Nevertheless, the issue concerns not only the fact how the latter are grounded from the viewpoint of current policy of the Government and guaranteeing reliability of the system regarding great perspective. It is also essential to find out at what extent the mentioned regulation by sub-legislative act provides stable, controllable and reliable prerequisites for economic and social relations. Simultaneously, the sense of the very legal issue is to find out whether the Government is reliable to manage in this way the resources of share participants in pension funds as non-state property, which is stipulated by the law. Legal clarification of margin of appreciation of the Government is the issue of agenda again.

13. Risk management is one of essential guarantees of reliability of the system. The requirements to the risk management system of pension funds are not also stipulated by the law, and the latter are exceptionally left to the discretion of the Central bank of The Republic of Armenia. Article 41 of the Law of the Republic of Armenia on Funded Pensions states: "Requirements to the risk management system shall be stipulated by the normative legal act (regulation) of the Central Bank." Besides, Article 25 of this Law, titled "Requirements and Restrictions to Pension Fund Managers," stipulates: "Requirements and restrictions with respect to Investment Fund Managers stipulated by the Law of the Republic of Armenia on Investment Funds shall be applicable to Pension Fund Managers, unless otherwise stipulated by this Law. Chapter 5 /Articles 35-37/ of the RA Law on Investment Funds concerns the mentioned legal relations, and article 36, Part 2 of the latter stipulates:

"Requirements to risk management system shall be stipulated by the Central Bank." Besides, Article 41, Part 1 of the instant Law stipulates: "Restrictions on investing fund assets in the instruments defined by Article 40 of this Law shall be stipulated by normative legal acts (regulations) of the Central Bank."

Decision No. 324-Ն of December 27, 2013 of the Central Bank of the Republic of Armenia stipulated: "Minimum requirements with respect to internal control of Investment Fund Managers and the risk management system" (Regulation 10/16). Regardless of the circumstance that the sub-legislative act restricted the **"requirements"** stipulated by the law with the scope of **"minimum requirements,"** the content the given document is also far from the requirements of the Law of the Republic of Armenia on Legal Acts, particularly, Article 45, it is based on wishes following from the phrases "must" and "it is important," and it does not include any certain guarantees for reliability of the system.

By the way, according to Article 83.3 of the Constitution of the Republic of Armenia, the **main objective** of the Central Bank of the Republic of Armenia **shall be to ensure the stability of prices** in the Republic of Armenia. Moreover, Article 4, Part 2 of the Law of the Republic of Armenia on Central Bank of Armenia stipulates: "In case other objectives of the Central Bank contradict its main objective, the Central Bank grants priority to the main objective and is governed by the necessity of its implementation." Furthermore, in the conditions of such legal regulation, legal control of the main scope of requirements to risk management system, main principles, as well as restrictions of investment of pension fund assets is important.

The following circumstance is no less important: providing the Central Bank of the Republic of Armenia with rulemaking, control and organizational powers, the Law of the Republic of Armenia on Funded Pensions did not stipulate any remedies of equivalent public legal responsibility of the Central Bank for guaranteeing normal activity of the system.

The law does not also clarify terms and procedures for the exercise of the function of state authorized body of financial sector of the Government of the Republic of Armenia, according to which the latter "... shall develop and ensure the consistent policy of the funded pension component" /Article 17, Part 1, Point 3/.

The Constitutional Court of the Republic of Armenia also finds that based on the nature and peculiarities of legal relations in dispute, and according to the principle of legal certainty, requirements and restrictions to Pension Fund Managers must also be a subject of regulation of the Law in dispute. Hence, Article 25 of the Law of the Republic of Armenia on Funded Pensions also needs review.

14. The issue on indexing the shares of pension funds or due to annual inflation adjustment is of essential importance for pension funds. Initially, in international practice, the following was considered as an essential issue: **pensions must not loose purchasing power**. The question is that influence of time factor exists between developing resources for pension and exercising the right to social security. In case the latter is not taken into account, accumulating equivalent resources and guaranteeing the exercise of the right to social security is impossible. Besides, **adjustment of the total amount of funded contributions due to annual inflation pursues the aim of protection of the right to get the mentioned money back, and the latter is a subject of regulation of the law**. Simultaneously, in this regard, existence of guarantees stipulated by the law is one of the essential safeguards of reliability of the system. The Law of the Republic of Armenia on Funded Pensions almost bypassed the given main issue and did not provide equivalent legal guarantees by the law for ensuring adjustment of the total amount of funded contributions due to annual inflation. Instead, the issue of vesting the Government with certain /in this case it is also absolute/ discretion. For example, Article 49, Part 1 of the Law simply stipulated that "... procedure for adjustment of the amount of funded contributions due to annual inflation shall be stipulated by the Government of the Republic of Armenia." The legislator not only neglected **the necessity of ensuring the guarantees (stipulated by the law)** for adjustment of the amount of contributions due to annual inflation, **and harmonizing the latter with the legal regulations stipulated by several legislative acts /particularly, by the RA Law on the Budgetary System/** as a guarantee for exercising the right to social security, but also did not anyhow clarify the margins of discretion of executive power in this regard.

The Constitutional Court of the Republic of Armenia finds that such legal regulation does not also correspond to the principle of legal certainty. **The principles of legal certainty, legal security and protection**

of the right to legitimate expectations are the integral elements of legal state and guaranteeing the rule of law. The Constitutional Court in particular stated in its Decision DCC-630 of April 18, 2006 that "... the law must also be in conformity with the legal position stipulated by a number of judgments of the European Court for Human Rights, according to which no legal norm can be considered as a "law" unless it is in conformity with the principle of legal certainty *(res judicata)*, namely, it is not enough precisely worded to let the citizen to reconcile behavior with the latter." Moreover, within the framework of assuming the principle of the rule of law the legal regulations stipulated by the law must make the legitimate expectations of the person predictable. Besides, as one of underlying principles of legal state the principle of legal certainty also supposes that the actions of all subjects of legal relations, including the bearer of authority must be predictable and legitimate.

The issue is urgent as not precise legislative regulations of recalculating of funded contributions due to inflation resulted in serious problems in many countries, where the first steps were done towards introducing funded pension system.

15. The Constitutional Court of the Republic of Armenia finds that Article 49, Part 2 of the Law in dispute must also be observed from the viewpoint of the principle of proportionality of rights and obligations. The latter stipulates that "Guarantee Fund established on the basis of this Law shall secure recurrence of 20 percent of the amount stipulated by Article 1 of this Law, and the remaining 80 percent shall be recovered by the Republic of Armenia." In many countries fund managers participate in development of guarantee funds at their own expense, and such participation is solid. For example, in Croatia, in case the pension fund does not manage to ensure the minimum rate of the amount to be recovered, the mentioned minimum amount shall be recovered at the expense of own reserve fund. In case the given resources are also insufficient, 20 percent of own fund of the organization exercising the management of pension fund shall be used. In case the mentioned two resources are insufficient, the state shall be obliged to ensure contribution of the rest part.

It follows from the logic of Article 49, Part 2 of the Law of the Republic of Armenia on Funded Pensions that, providing fund managers with the power to carry out the given activity, and, in the face of the

Government of Republic of Armenia, **not entering into precise contractual relations with the latter or not laying down precise conditions supposing equivalent liability stipulated by the law,** the Republic of Armenia undertakes the main liability of recurrence of the amount /at the extent of 80 percent/ in case of possible failure of the latter, and such fact increases the risk of management of fund resources.

The Constitutional Court finds that balancing the rights and obligations, and stipulating equivalent liability for failure of fulfillment of obligations are one of paramount terms of legal regulation and law making activity, and the latter need consistent implementation.

16. Bearing in mind the special nature and level of difficulty of the legal relations regulated by the Law of the Republic of Armenia on Funded Pensions, and taking into account the opportunity of entire assessment of final results just for decades in regard to ensuring appropriate guarantees for the protection of constitutional rights of people, it was necessary to stipulate certain and differentiated approaches of legal liability /criminal, civil and administrative/ for violations typical to the legal regulations of this law. International practice states that in general, public confidence level towards private pension funds is low. In several countries of the European Union, public inquiries state that the level of the mentioned confidence is between 5-8 percent. Such situation makes necessary to safeguard legal guarantees of liability of especially competent authorities.

The Law in dispute mainly touched upon the given issues within the framework of ensuring control powers of the Central Bank of the Republic of Armenia /Articles 77-84/. Nevertheless, together with enforcement of the Law, no equivalent amendments were made also in other legal acts stipulating legal liability. Particularly, Criminal Code and Code of Administrative Offences of the Republic of Armenia, in practice, bypassed the given main issue. The provision stipulated by Article 968.9, Part 1 of the Civil Code of the Republic of Armenia states that "Damage caused to the participants of Pension Fund shall be compensated by the procedure stipulated by the law and other legal acts," and the latter is rather abstract. Meanwhile, precise regulation of liability in this domain could be an important guarantee for confidence towards this system. The given issue is of key importance also in international practice. In particular, Slovenian and Romanian examples

are worthy of attention. As for the USA, financial violations in regard to pension funds are considered as **particularly grave crimes**, and punishment is assigned for 20 years and more imprisonment.

It must be taken into account that Article 45, Part 3 of the Law of the Republic of Armenia on Legal Acts directly stipulates that "The norms ... for non-fulfillment of which no legal consequences are stipulated, shall not be applied in normative legal acts."

17. In many countries illegal and shadow labor also result in serious problems, when employers make not properly formulated contributions for de facto employees to hide taxes and social security contributions. This phenomenon is also widely spread in our country, and has a tendency of development. Especially within the scope of pension reforms, equivalent legislative solutions and possible exception of the given violations regarding this issue are also urgent issues of agenda.

International practice also states that complicated administration and necessity of big administrative expenses are serious problems for funded pension systems. In the conditions of low living standards of population, high level of unemployment and shadow economy, target use of funded pensions and ensuring reliability of the system require more operative legal guarantees for ensuring proper reliability of the subjects of law involved in the system and guaranteeing the protection of constitutional rights of people. In particular, Chapter 9 of the Law of the Republic of Armenia on Funded Pensions, titled "Fees charged for services" regulates the given legal relations. Nevertheless, the Central Bank of the Republic of Armenia shall be entitled to stipulate the maximum amount of expenses related to management of pension fund /Article 45, Part 1/. In certain countries, the maximum amount of expenses related to management of pension fund is also stipulated by the law. In the Republic of Armenia, the latter can also be stipulated by the law, or it can be a subject of regulation within the framework of contractual obligations between the Government of the Republic of Armenia and the pension fund.

The law must at least stipulate precise criteria also for assessment of pension fund activity, and the results of assessment must be transparent and available for people.

In 2013 an extensive report was released by the experts of the Organization for Economic Co-operation and Development (OECD) con-

cerning the above-mentioned issues, in particular, the peculiarities of development of funded pension system in international practice, and the existing tendencies. The research of the latter states that in all countries where there were gaps especially regarding the issue of legal regulation of recalculating of funded contributions due to inflation, fund management process and introduction of operating mechanisms for the control of administrative expenses, reliability of the system and guaranteeing transparency, stipulating equivalent measures of liability by the law, as well as regarding other issues inevitably resulted in serious negative consequences.

18. After taking this Case into examination, by the Decision PDCC-3 of January 24, 2014 the Constitutional Court of the Republic of Armenia, based on the requirements of Article 34 of the Law of the Republic of Armenia on the Constitutional Court, suspended the action of Article 76 and Part 3 of Article 86 of the Law in dispute before completion of trial as a means of ensuring the Application. The attempts of various interpretations of the Decision of the Constitutional Court by the Central Bank of the Republic of Armenia and other bodies of state government partly decreased the efficiency of the means of ensuring the Application. Taking into account that the case was at the stage of preparation for trial, and no institution of clarification of decisions of the Constitutional Court was stipulated by the law, by the Decision PDCC-6 of February 11, 2014 the Constitutional Court of the Republic of Armenia stated the necessity of touching upon the situation regarding the case trial.

The Constitutional Court finds that the issues of ensuring and protecting human rights may not be subordinated to technical and other type of organizational circumstances, and, in regard to the mentioned issues, law enforcement practice must be guided by the requirements of direct implementation of constitutional norms and, in particular, by the requirements of Article 3 of the Constitution of the Republic of Armenia.

At the process of case trial it was established that according to calculation data from January to March of this year, 5337 citizens selected pension funds and fund managers due to their application. About 1000 people entrusted their choice to computer. As of March 27, 2014, employees made contributions for 127007 people, individual accounts were

open for the latter; nevertheless, no selection of funds and fund managers for the participants was made by software module yet, as, according to Article 39, Part 1 of the Law of the Republic of Armenia on Funded Pensions, after the accounts are open, the participants shall have the right to select the fund themselves within 30 days.

Based on the current situation, it is important that to make the processes correspond to the requirements of this Decision and legal positions of the Constitutional Court of the Republic of Armenia, the Government of the Republic of Armenia and the National Assembly of the Republic of Armenia, within the framework of their powers, fulfill appropriate legal regulations to protect people's right to property, not subordinating the mentioned right to various technical terms, as well as not admitting retroactivity of the current law, and, while taking steps, to be based on unconditionally ensuring the principle of the rule of law and the international legal obligations of the Republic of Armenia in regard to the latter.

The Constitutional Court also finds necessary to state that Article 68, Part 8 of the Law ՀՕ-58 of the Republic of Armenia on the Constitutional Court dated1 June 14, 2006 lays imperative claim to the operative part of the decision of the Constitutional Court. The essence of the latter is the following: in the result of the case trial concerning the issue of constitutionality of the law or certain provisions therein the Constitutional Court is competent to make the following decisions:

1) on declaring the challenged act or its challenged provision in conformity with the Constitution;
2) on declaring the challenged act or its challenged provision in conformity with the Constitution by the constitutional legal content revealed by the decision of the Constitutional Court;
3) on declaring the challenged act fully or in part /within the scopes of challenged norms/ contradicting the Constitution and void.

After the Constitutional Court made the Decision within the framework of the powers stipulated by the Constitution of the Republic of Armenia and the procedural norms stipulated by the Law of the Republic of Armenia on the Constitutional Court, with due regard for the requirements of the given Decision, **the resolution of the issues in regard to further equivalent amendments to the law in dispute, as well as its enforcement is within the framework of competence of the legislative power.**

Simultaneously, taking into account the provision stipulated by Article 42, Part 4 of the Constitution of the Republic of Armenia, according to which "The legal acts improving the legal status of an individual, eliminating or mitigating his/her liability shall be retroactive if so prescribed by the acts in question," it is necessary that, within the framework of the mentioned constitutional provision, the new legal regulations following from the requirements of this Decision and the legal positions of the Constitutional Court apply to all the subjects participant to the legal relations concerning the considered law without time limit.

Based on the review of the Case and being governed by Article 100, Point 1, Article 101, Part 1, Point 3, Article 102 of the Constitution of the Republic of Armenia, Articles 63, 64 and 68 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare the provisions of Article 5, Part 1, Article 7, Parts 1 and 11, and Article 13, Part 2 of the Law of the Republic of Armenia on Funded Pensions systemically interrelated with the latter, in regard to the part that do not ensure the right of everyone to freely own, use and dispose of the wage belonging to him/her, and entail restriction of the people's right to property regardless of their free will, contradicting the requirements of Article 8, Part 1, Articles 31 and 43 of the Constitution of the Republic of Armenia and void.

2. To declare Article 49, Part 1 of the Law of the Republic of Armenia on Funded Pensions contradicting the requirements of Article 1, Article 3, Part 2 and Article 83.5, Point 1 of the Constitution of the Republic of Armenia and void, based on the circumstance of not stipulating certain guarantees for protection of rights equivalent to the principles of the rule of law and legal certainty and not clarifying the margins of discretion of executive power in the given legal relations.

3. To declare the provision "... terms and procedures for disposing of the latter ... shall be stipulated by the Government of the Republic of Armenia" stipulated by Article 2, Part 1, Point 6 of the Law of the Republic of Armenia on Funded Pensions, which is systemically interrelated with the articles in dispute, and Article 44, Part 1 of the given Law, contradicting the requirements of Article 83.5, Point 1 of the Constitution of the Republic of Armenia and void.

4. To declare the provision "Requirements to the risk management system shall be stipulated by normative legal acts (regulations) of the Central Bank" stipulated by Article 41, Part 4 of the Law of the Republic of Armenia on Funded Pensions, which is systemically interrelated with the articles in dispute, contradicting the requirements of Article 83.5, Point 1 of the Constitution of the Republic of Armenia and void.

5. To declare the provision restricting the right to property by seizure on the ground of an administrative act by limiting the right to own, use or dispose of the property, stipulated by Article 76, Part 2 of the Law of the Republic of Armenia on Funded Pensions, which is systemically interrelated with the articles in dispute, contradicting the requirements of Article 8, Part 1, Articles 31 and 43 of the Constitution of the Republic of Armenia and void, also taking into account that in respect of the Law in dispute, the legal relations concerning the given provision do not refer to fulfillment of direct tax liabilities of those who make mandatory funded contributions /fiscal agent/.

6. Within the framework of legal positions in the instant Decision, the disputed provisions of Article 7, Parts 2-10, Articles 8, 37, 38, 45, Article 49, Part 2 and Article 86 of the Law of the Republic of Armenia on Funded Pensions are in conformity with the Constitution of the Republic of Armenia by the constitutional legal content, according to which, legal regulations stipulated therein **cannot be based, interpreted and applied in the context of legal regulation supposing restrictions of the right to property regardless of people's discretion, and the rights of pension fund managers must be exercised in accordance with the principle of balancing only with equivalent obligations.**

7. Taking into account that the Law of the Republic of Armenia on Funded Pensions, in particular, the legal provisions declared contradicting the Constitution the Republic of Armenia by Points 1-5 of the operative part of the instant Decision, are systematically interrelated with legal regulations stipulated by more than 50 laws and more than eighty other normative legal acts (regulations) of the Republic of Armenia, and, based on the instant Decision, many provisions therein are subject to review by the procedure stipulated by the law, as well as bearing in mind the requirement of the law on systematically not jeopardizing legal security, based on Article 102, Part 3 of the Constitution

of the Republic of Armenia and Article 68, Part 15 of the Law of the Republic of Armenia on the Constitutional Court, due to the instant Decision the deadline for invalidating the legal norms declared contradicting the Constitution the Republic of Armenia shall be September 30, 2014, providing the National Assembly of the Republic of Armenia and the Government of the Republic of Armenia with the opportunity, within the framework of their powers, to make the legal regulations of the Law of the Republic of Armenia on Funded Pensions and other laws and normative legal acts (regulations) systemically interrelated with the latter, correspond to the requirements of the instant Decision.

Based on the new legal regulations following from the requirements of the instant Decision and taking into account the requirements of Article 42, Part 4 of the Constitution the Republic of Armenia, previously made contributions shall be subject to recalculation.

8. Pursuant to Article 102, Part 2 of the Constitution of the Republic of Armenia this Decision is final and enters into force from the moment of its announcement.

Chairman **G. Harutyunyan**

2 April 2014
DCC - 1142