



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

Pristina, 10 April 2013
Ref.No.:MPM406/13

Joint Dissenting Opinion
of
Judges Robert Carolan and Almiro Rodrigues

In

Case No. KO131/12

Applicant

Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo

**Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health,
No. 04/L-125, adopted by the Assembly on 13 December 2012**

In this case the Applicants allege that Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, adopted by the Assembly of the Republic of Kosovo on 13 December 2012, is incompatible with the Constitution of the Republic of Kosovo. The majority of this Court found that Articles 18, 19 and 60 of this law were compatible with the Constitution but found that Article 41 was not compatible with the Constitution. The majority concluded that Article 41 of the law violated Article 49 of the Constitution. This conclusion is based upon an erroneous interpretation of the Constitution.

Article 41 of the contested law provides:

1. *Health professional employed in the public sector on full time or part time bases don't have the right to work in private healthcare institutions.*

2. *It is strictly prohibited to refer patients from a secondary and tertiary public healthcare institution to a private healthcare institution, for reasons that cannot be justified with medical arguments, regardless of the waiting list.*
3. *Any informal or formal financial or other type of award to the health professional employed in the public health sector including referral of the citizen or resident from public to private healthcare institution, and profitable relationship with pharmaceutical industry, is strictly prohibited.*
4. *Violators of the provisions of this article will be subject to penalties or legal action as defined in this law and a separate sub-legal act issued by the Ministry.*
5. *Public health institutions have the right to allow their health professional employees to exercise their private healthcare activities within the public health institution.*
6. *The private health activity from paragraph 5 of this Article shall be implemented on basis of the special sub-legal act issued by the Ministry.*

Although Article 41 does place some restrictions on healthcare professionals who work in a public institution, it specifically allows those healthcare professionals to perform private healthcare activities at a public institution.

Article 41 places three restrictions on public health care professionals:

- (1.) If you are a health care professional employed in the public sector, you are not allowed to work in a private health care institution.
- (2.) If you wish to refer patients from a secondary or tertiary public healthcare institution to a private healthcare institution, you must articulate justifiable medical reasons for the referral.
- (3.) You cannot receive a financial award for referring a patient to a private health care facility.

The Applicants claim that this Article violates Article 49 of the Constitution with respect to the right to work and exercise a profession. Article 49 provides:

- “1. The right to work is guaranteed.*
- 2. Every person is free to choose his/her profession and occupation.”*

The issue before this Court is whether Article 41 denies any citizen the “right to work” or the right “to choose his or her profession and occupation.” It does not deny anybody the right to work or to freely choose his or her profession or occupation.

Article 41 does not prevent anybody who is duly qualified by education, training and testing to serve as a health care professional in either the public or the private sector. Indeed, consistent with Article 51 of the Constitution this law fulfills the

mandate of the Constitution that healthcare shall be regulated by law. This law does that by attempting to prohibit simultaneous employment in both sectors so that there is neither a conflict of interest nor the appearance of a conflict of interest on the part of the healthcare professionals and so that the quality of health care delivered in both the public and private sectors can be relatively equal.

Every employer has the right to place restrictions on how its employees perform their duties for the employer and whether they may simultaneously have additional employment. For example, public police officers can be prevented from also serving as private security officers because those joint roles may be in conflict. Judges are prohibited from engaging in many other types of employment while serving as judges. Indeed, the Constitution itself prohibits candidates for membership in the Assembly from holding various other occupations. Article 73 provides:

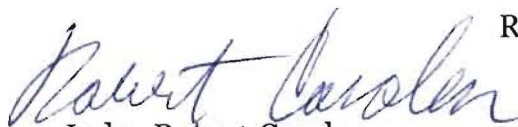
“1. The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty:

- (1) judges and prosecutors;*
- (2) members of the Kosovo Security Force;*
- (3) members of the Kosovo Police;*
- (4) members of the Customs Service of Kosovo;*
- (5) members of the Kosovo Intelligence Agency;*
- (6) heads of independent agencies;*
- (7) diplomatic representatives;*
- (8) chairpersons and members of the Central Election Commission.*

2. Persons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.

3. Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty.”

None of these restrictions deny one the right to work or to choose an occupation. They simply establish some of the qualifications to perform the work. Article 41 simply attempts to minimize in a proportional manner any conflict of interest or the appearance of a conflict of interest of a health care professional who chooses to work in the public sector. It also attempts to make more equal the quality of health care services delivered by both the public and the private sector. Whether Article 41 will meet those objectives is not for this Court to decide. That function is the sole responsibility of the members of the Assembly who are duly elected by the citizens of Kosovo. What this Court has to decide is whether Article 41 violates Article 49 of the Constitution. It does not.


Judge Robert Carolan

Respectfully submitted




Judge Almiro Rodrigues