



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 8 April 2013
Ref.No.:MM405/13

DISSENTING OPINION

In

Case No. KO 97/12

Applicant

The Ombudsperson

Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012

The majority has declared that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is incompatible with the Constitution of the Republic of Kosovo suggesting that those legal articles are incompatible with Articles 10, 44 and 46 of the Constitution. The conclusion of the majority is based upon an erroneous interpretation of the Constitution.

The Applicable Law

Article 90 of the law defines: “Capital;” “Equity;” “Donated Capital;” “Loan;” “Loan Limits;” “Low-income household;” “Low-income individual;” “NGO Microfinance Institution;” “IFRS;” and “Surplus Capital.” It also provides:

An NGO Microfinance Institution is not permitted to sell or transfer its business, merge, or change its structure, nor is it permitted to distribute or in any way pay out profits, surplus capital, dividends, or any of its assets, except in compliance with this Law.

Article 95(1.6) of this law provides:

(A) NGO Microfinance Institution is not permitted to sell or transfer its business, merge, divest, or otherwise change its structure, mission, or ownership, except in compliance with provisions of voluntary liquidation, receivership, or Official Administration as provided in this Law and with the written approval of the CBK;

Article 110 of this law provides:

- 1. In the event of voluntary liquidation, mandatory receivership, or official administration of an NGO Microfinance Institution, any remaining Donated Capital or Surplus Capital must be returned to the original donor(s) or distributed for charitable purposes in Kosovo as may be directed by the original donor (s). If the initial capital of donator is not returned, Donated Capital and the Surplus Capital will be distributed for charitable purposes according to applicable Laws and the plan approved by CBK.*
- 2. Neither the CBK itself nor the members of decision- making bodies, or persons related to CBK are permitted to benefit either directly or indirectly from any plan for the charitable disposition of the Donated Capital and Surplus Capital.*

Article 111 of this law provides:

- 1. Any NGO Microfinance Institution in order to be registered in the Ministry of Trade and Industry and in CBK as a Microfinance Institution joint stock company should implement provisions of Article 110 and 112 of this Law on Donated Capital. Any use of Donated capital or surplus capital shall be subject to the tax of Tax Administration of Kosovo. Evidence of compliance with the Tax Administration of Kosovo must be submitted to the Ministry of Trade and Industry or its successor as part of the registration as Joint Stock Company and must also be submitted to CBK. Upon registration as a Joint Stock Company at the Ministry of Trade and Industry, the NGO Microfinance Institution registration at the CBK must be terminated and new registration as a Joint Stock Company Microfinance Institution must be completed and delivered to CBK within two (2) weeks.*
- 2. The registration as an NGO Microfinance Institution remains in effect until terminated, however it shall be the responsibility of the Microfinance Institution to submit an application for registration at CBK as a Joint Stock Company Microfinance Institution.*

The Microfinance Institution is also required to notify the Ministry of Public Administration in order to remove its NGO tax exempt status.

Article 116 of this law provides:

1. Any existing Microfinance Institutions must meet the requirements of this Law, together with all applicable CBK Regulations and Orders in all their operations, and are required to apply for a new registration no later than three (3) months after the entry into force of this amending Law.

2. After the application is submitted and registration is completed under this Law with CBK, NGO Microfinance Institutions will no longer be regulated by the Ministry of Public Administration.

Under this law if a micro finance NGO voluntarily liquidates its assets or if it is forced into a receivership pursuant to the application of a law, any remaining capital it may have thereafter must either be: (1) returned to the original donors; or, (2) distributed to appropriate charities as directed by the original donors. In only those situations where the surplus capital is not returned or distributed to an appropriate charity, will the Central Bank of Kosovo make the appropriate charitable distribution to other charities such as other NGOs. This law does not take property from anybody or any legal entity unless they choose to have it so taken from them by failing to designate where its surplus or excess capital shall be transferred.

This law simply regulates any legal entity, including micro financial institutions, that attempt to act like banks or carry out activities similar in many respects to banks. If an NGO voluntarily decides to act in that manner, then this law requires that those NGOs submit to the jurisdiction of the Central Bank of Kosovo and abide by its rules and regulations with respect to how banks and institutions acting like banks must conduct business in Kosovo.

This law does not prevent anybody from establishing an NGO. It does not prevent anybody from participating in or investing in an NGO. It does not prevent anybody in forming an NGO from establishing restrictions on how the assets of the NGO will be used, distributed or returned to the investors if the NGO should re-structure its organization or attempt to change ownership. It does not prevent any entity or person from freely participating in any NGO or with any other person or legal entity.

The Challenge

The Ombudsman claims that this law, by allowing the use of property and assets acquired on a tax-exempt basis by an NGO to subsequently be used for non-tax exempt purposes, deprives somebody of a right to property protected by Article 46 of the Constitution. The Ombudsman claims that other NGOs, who might have been entitled to receive some or all of the property of the NGO that elects to be dissolved and become a joint stock company, are deprived of a right to that property. The Ombudsman then claims that without receipt of that potential property transfer to the NGOs who might be the recipient of these assets, their right to freedom of association is denied. The flaw in this reasoning is that it assumes that other NGOs

have a right to property that has never belonged to them and may never belong to them in the future. Under existing law, it is only possible, not certain, that if an NGO dissolves or changes its legal identity, that another unnamed NGO will receive some or all of the assets of that NGO. The possibility, however remote, of possible ownership of property in the future is not the same as actual ownership of property. The Constitution protects existing property rights, not the mere possibility that one may acquire property in the future.

The Constitution

Article 46 of the Constitution provides:

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

This provision of the Constitution specifically: (1) authorizes the Government to regulate the ownership of property in accordance with the public interest; and, (2) requires that no one shall be arbitrarily deprived of their property. This law regulates the use of certain property if persons or legal entities, such as a micro financial institution, choose to engage in certain banking activities. It does not arbitrarily take property away from anybody. It does require that certain for profit banking activities now be taxed in the same way as those banking activities of banks and other financial institutions are now taxed so that all entities engaged in similar business activities are treated equally.

Article 44 of the Constitution provides:

- 1. The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization.*
- 2. The freedom to establish trade unions and to organize with the intent to protect interests is guaranteed. This right may be limited by law for specific categories of employees.*
- 3. Organizations or activities that infringe on the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred may be prohibited by a decision of a competent court.*

Even the freedom of association in the Constitution is not without limitations as can be foreseen by the restrictions on this freedom set forth in paragraphs 2 nd 3 of this Article. The challenged law does not prohibit any one from belonging to any organization. It only regulates, in the “public interest” as mandated by Article 46 of the Constitution, how certain individuals or legal entities must conduct their business if they are going to engage in banking activities.

Article 10 of the Constitution provides:

A market economy with free competition is the basis of the economic order of the Republic of Kosovo.

By requiring that all legal entities, including micro finance NGOs who act like banks in Kosovo, operate under the same equal rules this law enhances and promotes a market economy with free competition. Indeed, this law breaths actual life into this provision of the Constitution by requiring that market competition will be equal and fair.

Conclusion of the Merits

It is for all of these reasons, that the challenged law, Articles 90, 95(1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is compatible with the Constitution and a legitimate exercise of the Government’s right and obligation, in the public interest, to regulate this type of financial activity.

Were there Procedural Irregularities in the Adoption of the Law?

Although it was not specifically addressed in the operative part of the Court’s judgment in the reasons articulated in the majority opinion it is suggested that this law was not properly enacted in compliance with the Constitution. That reasoning is incorrect.

Laws enacted by the Assembly are presumed to be lawfully enacted. Indeed, neither the Applicant nor any other party, who could now lawfully raise this issue with the Court, has questioned whether this law was properly enacted by the Assembly. Therefore, the question of whether this law was properly enacted is not before this Court. Even if there was a challenge to whether this law was properly enacted pursuant to the laws of Kosovo, only the regular courts, not this Court, would have the authority to interpret that issue because this Court is not and cannot serve as a fourth instance court of review of the applicable laws of Kosovo.

Even if the question of whether this law was enacted in a manner that was not compatible with the Constitution was before this Court, the Court would be compelled to find that there was no violation of the Constitution in enacting this law. In analyzing this issue at least three separate articles of the Constitution must be read and interpreted in such a manner as to make all three provisions of the Constitution compatible, if at all possible.

Article 69. 3 of the Constitution provides:

The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present.

This Article addresses the Constitutional requirements for the Assembly to have a quorum so as to be able to conduct business. It is separate and distinct from Article 80 of the Constitution which addresses the required number of votes of members of the Assembly to enact a law.

Article 80.1 of the Constitution provides:

Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution. (Emphasis added.)

This Article prohibits voting by proxy. A member of the Assembly must be both present in the Assembly and voting to have his or her vote count with respect to the enactment of a specific legislative proposal. It does not preclude a member of the Assembly being “present” for purposes of a quorum but neither officially voting nor officially acknowledging their presence in the Assembly when a specific piece of legislation is being voted upon. The official vote tally of those voting and those listing themselves as “present” is not necessarily the total number of members of the Assembly present for “quorum” purposes because some members of the Assembly may choose to neither vote nor list themselves as being “present” when the vote on a specific piece of legislation is proceeding. Therefore, it could be an erroneous assumption for this Court to conclude that when this law was enacted, it was done without a quorum if it based its conclusion solely on the official vote tallies of those listed as “voting” and those listed as “present.”

It has been noted that Article 118 of this Law, although not challenged by any of the parties to this referral, states that the law shall enter into force on 12 April 2012, the day that it was enacted by the Assembly. Article 80 of the Constitution provides that the President of the Republic has 8 days from date of receipt of the law from the President of the Assembly to return that law to the Assembly for further consideration. It is also noted that, under the Constitution, generally laws do not enter into force until 15 days after they have been published in the Official Gazette of the Republic of Kosovo. The Constitution, however, also allows the Assembly, in certain circumstances, to specify a different date for the law to enter into force.

Article 80.6 of the Constitution provides:

A law enters into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo, except when otherwise specified by the law itself. (Emphasis added.)

The fact that the Assembly decided to make this law effective the day it was passed in the Assembly rather than 15 days after publication in the Official Gazette does not render it constitutionally invalid. At worst, its effective date is postponed until 15 days after it was officially published in the Official Gazette.

Conclusion on the Procedure

Therefore, Articles 90, 95(1.6), 110, 111 and 116 of the Law on Banks, Micro Finance Institutions and Non-Bank Financial Institutions, No. 04/L-093 was enacted in a manner that was compatible with the Constitution of the Republic of Kosovo.

Respectfully submitted,



Robert Carolan
Judge

