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

Pristina, 12 April 2013
Ref. No.: AGJ403/13

JUDGMENT

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 CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the "Applicant").

Challenged law

2. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to annul 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.

Subject matter

3. The subject matter of the Referral is the assessment, by the Court, of the constitutionality 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.

4. The Applicant further requested the Court to impose interim measures suspending the implementation of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

Legal basis

5. Article 113.2 (1) of the Constitution, Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rules 54, 55, 56, 62, 64 and 65 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 11 October 2012, the Applicant submitted the Referral to the Court.

7. On 31 October 2012, the President of the Court, with Decision No. GJR. KO. 97/12, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, with Decision No. KSH. KO. 97/12, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

8. On 14 December 2012, the Referral was communicated to the President of the Republic of Kosovo, President of the Assembly, the Government, and the Applicant.

9. On the same date that Referral was communicated and the Court requested comments from the Parliamentary Committee for Legislation (hereinafter: Committee for Legislation), the Central Bank of the Republic of Kosovo (hereinafter: the "CBK"), Ministry of Finance (hereinafter: "MF"), Ministry of Public Administration, Department of Registration and Liaison with NGOs. So far, only the Committee for Legislation has not replied.

10. On 24 December 2012, the Court granted the Applicant's request for an interim measure, until 31 January 2012.

11. On 10 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo, submitted a request for information and the case file of Case KO 97/12 in order to prepare a: (i.) Request for Permission to File an Amicus Curiae Brief; and (ii.) Submission of the Amicus Curiae Brief.

12. On 14 January 2013, the Court replied to the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina providing:

> *"Considering Rule 53 of the Rules of Procedure of the Constitutional Court, which provides "The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court", and by considering items 1, 6 and 7 of the Practice Direction, NO.01/2012, on "Guidelines and Procedure for submission of Amicus Curiae Briefs", we inform you that your request has been received and registered, whereas, in compliance with the legal provisions mentioned above, the same has been forwarded to the full Court, which within the deadlines provided by the law, shall take a decision regarding your request and you will be notified as soon as the decision is taken. Considering your interest in relation to the request, as well as the applicable constitutional and legal provisions, the Court will timely inform you also for all the subsequent actions to be taken, which may be related to your request."*

13. On 18 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo, submitted the request the leave to file *Amicus curiae* brief. Furthermore, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina asked the Court not to

take into consideration its letter to this Court of 10 January 2013 *"since the receipt of the abovementioned documents does not require a response to the submission"*.

14. On 24 January 2013, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the:
    a) Decision to extend the time limit of the interim measure imposed by the Court in its initial Decision of 24 December 2012 by a further period of three months until 30 April 2013;
    b) Decision on the request for leave to file an *Amicus Curiae* brief;
    c) Decision to hold a public hearing on 5 March 2013.

15. On the same date, the full Court unanimously endorsed the recommendations of the Review Panel.

16. On 25 January 2013, the Court asked the President of the Assembly of the Republic of Kosovo the following additional information:

    a. *Can you please submit to the Court, the transcript of the session when the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions was adopted, including the electronic voting register?*

    b. *Can you please clarify and confirm whether there was a required quorum during that session, as provided by Articles 69 and 80 of the Constitution?*

    c. *Can you please submit to the Court, information about the entry into force of this law, including the date of promulgation by the President of the Republic and the date of publication in the Official Gazette of the Republic of Kosovo?*

17. On 30 January 2013, the President of the Assembly of the Republic of Kosovo replied to the Court as follows:

    a) *The Assembly of the Republic of Kosovo in its plenary session on 12 April 2012 adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.*

    b) *The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093 was sent for promulgation to the President of the Republic of Kosovo on 18 April 2012.*

    c) *The President of the Republic of Kosovo has not within eight (8) days taken a decision to either promulgate or return the law.*

Hence, based on Article 80.5 of the Constitution of the Republic of Kosovo a law is considered promulgated without the President's signature and was published in the Official Gazette on 30 April 2012.

d) *Article 118 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09, foresees that this law enters into force on 12 April 2012 (see page 21 of the transcript).*

e) *The President of the Assembly of the Republic of Kosovo furthermore provided this Court also with the following documentation: 1.) The transcript and the minutes of held plenary session on 12 April 2012; 2.) The Decision of the Assembly of the Republic of Kosovo no. 04-V-333, of 12 April 2012, for adopting the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09,; and 3.) the electronic voting register for the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.*

18. On 31 January 2013, the Court, pursuant to Rule 53 of the Rules of Procedure, sent an invitation to Pallaska & Associates L.L.C., Mr. Dastid Pallaska, attorney, to file a written *Amicus Curia* brief with the Court containing his legal stance in respect to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.

19. On 5 March 2013, the Court held a public hearing.

20. On 6 March 2013, the Secretary General of the Assembly of the Republic of Kosovo requested the Court a copy of the transcript from the public hearing.

21. On 7 March 2013, Mr. Dastid Pallaska submitted to the Court his *amicus curiae* brief in writing.

22. On 14 March 2013, the Court deliberated and voted on the case.

Summary of facts

23. On 12 April 2012, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly"), adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, with 55 (fifty-five) votes "for", 0 (zero) votes "against", and 4 (four) "abstentions".

24. The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, entered into force on 12 April 2012, pursuant to its Article 118.

25. On 19 April 2012, the non-governmental organizations: the Kosovo Civil Society Fund (KCSF), FOL Movement, Kosovo Democratic Institute (KDI) and 55 other supporting NGO's addressed a letter to the President of the Republic of Kosovo, requesting her not to promulgate the law, and to return to the Assembly for review.

26. On 11 May 2012, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, was published in the Official Gazette of the Republic of Kosovo, pursuant to Article 80 (5) of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

27. On 11 May 2012, the Ombudsperson received a submission from the above NGO's: the Kosovo Civil Society Fund (KCSF), FOL Movement, Kosovo Democratic Institute (KDI) and 55 other supporting NGOs, asking him in a joint request to address the Constitutional Court, pursuant to the duties and responsibilities vested in him by Law, to assess the constitutionality 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.

28. The NGO's considered that these Articles constituted a violation of the Constitution and requested to suspend the implementation of the contested Law until the Court would render a decision on the merits of the issue.

29. The NGO's further considered that 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, violate Article 44 [Freedom of Association], Article 46 [Protection of Property], and Article 10 [Economy] of the Constitution, international principles on non-profitable NGO's and applicable legislation in Kosovo regulating the field of freedom of association of NGO's.

Applicant's arguments

30. The Applicant in its Referral refers to the following applicable legal provisions in respect to the subject matter before the Court:

31. Article 44 [Freedom of Association] of the Constitution provides that the freedom of association is guaranteed and regulated by law:

"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. [...]"

32. Article 46 [Protection of Property] of the Constitution specifically guarantees protection of property:

"1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. [...]."

33. Article 10 [Economy] of the Constitution concerns the economic order of the Republic of Kosovo:

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

34. Article 1 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides that:

"This Law sets out the establishment, registration, internal management, activity, dissolution and removal from the register of legal persons organized as NGOs in Kosovo."

35. Article 4 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, stipulates that:

"1. NGO shall not distribute any net earnings or profits as such to any person.

2. The assets, earnings and profits of an NGO shall be used to support the non-profit purposes assigned for the organization.

3. The assets, earnings and profits of an NGO shall not be used to provide benefits, directly or indirectly, to any founder, director, officer, member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization."

36. Article 5 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, clearly defines the notion and purpose of the establishment of an NGO in Kosovo:

"1. Domestic NGO is association or foundation established in Kosovo to accomplish the purpose based on the law, either for public benefit or mutual interest.[...]"

37. Article 11.1 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides:

"1. A domestic NGO shall have the status of a legal person in Kosovo upon registration pursuant to this Law."

38. Article 20 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, defines the conditions for terminating an NGO:

"1. An NGO may be terminated when:

1.1. a voluntary decision to terminate the organization is made by the highest governing body in accordance with the NGO's statute;

1.2. the NGO becomes insolvent as defined by applicable law;

1.3. the stated time limit expires, if such time limit is defined in the establishment act;

1.4. based on the valid court decision."

39. Article 21 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides for the manners and competent bodies for deregistration, and the manner NGO asset management:

"3. In the event of the termination or removal from the register of an NGO that received tax or fiscal benefits, public donations, or government grants, all assets remaining after discharge of the NGO's liabilities shall be distributed to another NGO with the same or similar purposes. This NGO shall be identified in the NGO's statute or with a proposal of the NGOs highest governing body. The Ministry shall establish the Committee for Distribution of remained Assets of terminated or removed from register NGOs, with representatives of NGOs too, pursuant to the sub-legal act issued by the Government.

4. In all other cases, any assets remaining after the discharge of liabilities shall be distributed in accordance with the statute or a decision by the highest governing body and in all cases in compliance with Article 4 of this law."

40. In this respect, the Applicant claims that *"[...] that the Law on Banks, Micro-*financial *Institutions and Non-Banking Financial Institutions, mainly in its Chapter II, allows the NGO Micro-financial Institutions to transform into joint stock companies, namely private entities in contradiction to the purpose of their establishment. As such, this law violates constitutional principles, it breaches the international principles of non-profit law, and is in contradiction with applicable legislation in Kosovo regulating the freedom of association in NGOs, and endangers the future of civil society sector in general."*

41. Further, the Applicant alleges that the NGO Micro financial institutions have been established and registered pursuant to the right to association, as guaranteed by Article 44 of the Constitution and the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057. However, allegedly, with the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, in its changing of legal subjectivity of NGO Micro financial institutions, and allowing their transformation into joint stock companies, distances them from the scope of Article 44 of the Constitution and the Law on Freedom of Association, and impedes their right to operate based on the rights of association.

42. Moreover, allegedly, the "Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions aims to regulate the operations of NGO Micro financial institutions with its regulation of principles and procedures of management. Nevertheless, provisions of the law address the issue of legal subjectivity of NGO Micro financial institutions, thereby allowing their transformation from enjoying NGO status in to the legal status of a Joint Stock Company.

43. The Applicant claims that *"The Law on Freedom of Association in an NGO, in its Article 4, paragraphs 2 and 3, does not allow an NGO to be transformed into another legal entity, much less into a for-profit legal entity. An NGO may cease to exist (namely cancel its legal status as NGO), only by termination, and in no way by transformation. Being established and registered pursuant to this law (and preceding regulations and laws of the current law), the legal status of all NGOs (including NGO Micro financial institutions) is regulated exclusively by the Law on Freedom of Association in NGOs, and any regulation of legal status of such institutions by other laws is unlawful."*

44. Further, the Applicant argues that *"several countries do not allow such transformation (as is the case in Kosovo), while others explicitly prohibit such transformation in relevant laws such as the Law of the Republic of Bulgaria on Not-for-Profit Entities, Article 12 and Article 42; the Law of the Republic of Macedonia for Associations and Foundations, Article 6.2, and the Law of the Republic of Estonia on Foundations, Article 1.3."*

45. According to the Applicant the basic universal principle of not-for-profit sector is that it: *"prohibits distribution of net earnings or profits to any person, and the use of assets, earnings and profits of an NGO to provide benefits, directly or indirectly, to any founder, director, officer, member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization."* Allegedly, *"This principle implies that the NGO does not have an owner, and therefore its properties may not be treated as private property."The assets, earnings and profits of an NGO shall be used to support the non-profit purposes assigned for the organization", while in case of termination of an NGO, "assets of that NGO shall be distributed to another NGO with the same or similar purposes."*

46. Based on the aforementioned, the Applicant alleges that *"These provisions ensure that in no way, be that during their operations, or even after their termination, the assets of an NGO cannot be transferred to for-profit entities. On the contrary, the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, by allowing NGO Micro financial institutions to transform into joint stock companies, allows the NGO assets to be transformed into private shares/property."*

47. According to Article 46 of the Constitution no one may be deprived arbitrarily of property, including property of legal persons. Consequently, the Applicant claims that *"this Article protects the property of non-governmental organizations. NGOs are legal persons established pursuant to not-for-profit rights, and as such, they are not owned. NGO assets are managed by NGO management bodies, but always on the basis of the universal principle of profit non-distribution. The Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, by allowing transformation of NGO Microfinance Institutions into joint stock companies, arbitrarily alienates NGO assets, transferring assets from the NGO to other legal or natural persons for shareholding."*

48. According to the Applicant, *"the Law on Banks, Micro-financial Institutions and* Non-*Banking Financial Institutions, by allowing transformation of NGO Microfinance Institutions into joint stock companies, allows for the capital acquired without tax payment to be injected into commercial market*

competition between banks and other financial institutions, which are bound to pay taxes since their establishment." This, allegedly, is in contradiction with Article 10 of the Constitution which provides that *"A market economy with free competition is the basis of the economic order of the Republic of Kosovo."*

49. In the Applicant's opinion, *"the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is also in contradiction with the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe, and Law no. 04/L-057 on Freedom of Association in NGOs, a fundamental law providing for establishment, operations and termination of all NGOs in Kosovo."*

Response from the Central Bank of Kosovo

50. On 28 December 2012, CBK replied to the Court as follows *"The purpose of the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is the registration, regulation and supervision of these Institutions by CBK. Hence, this law makes it possible also for NGO's who expresses their desire to exercise financial activities determined in accordance with this Law to be registered, regulated and supervised by the CBK without making any difference between NGO's, notwithstanding their purpose for which they are established."*

51. Furthermore, CBK provides that *"The Applicant's allegations that Article 90, Article 95 (1.6), Article 110, Article 111 and Article 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are incompatible with the Constitution of the Republic of Kosovo and the applicable law that regulates the freedom of association of NGO's are unfounded [...]".*

52. In respect of Article 90, CBK argues that *"All the micro financial institutions from the moment of being registered at CBK as "Micro-financial Institution", be it as an NGO or be it as a Joint Stock Company will be subject to the legal framework and supervisory requests of CBK. Hence, this provision clearly specifies that an NGO 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. It is absolutely undisputable that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions does not encourage or force existing NGO's to transform into Joint Stock Company. It is their autonomous decision whether they desire to continue their activity as they are or transform into a Joint Stock Company."*

53. Moreover, as to Article 95 (1.6), CBK argues that *"As mentioned above, all the micro financial institutions and non-banks without taking into consideration their legal status be it as a NGO or a Joint Stock Company, from the moment of their registration with CBK for the exercise of financial activities (activities regarding credits or other financial activities) will be regulated and supervised by CBK. The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions has as object to regulate financial institutions which exercise financial activities and the only regulator of institutions which exercise financial activities in Kosovo is CBK and in no way do these provisions of this Law require or encourage any NGO or Microfinance Institution to quench or create a Microfinance Institution Joint Stock Company. Any NGO Microfinance Institution that decides to end their activities must comply with the Law on Banks, Microfinance Institution and Non-Bank Financial Institutions and other applicable laws. This Law in an explicit manner determines that the profit and means cannot be distributed and transferred besides for charity purposes in accordance with the Law on NGO's. All the financial institutions, be micro-financial institutions, banks or non-bank financial institutions, as well as then as when the micro-financial institution is an NGO, Limited Liability Company or Joint Stock Company must apply the regulative and supervision of CBK for intermediary financial issues."*

54. Furthermore, as to Article 110, CBK argues that *"It is important to specify that paragraph 1 of this Article in a clear manner determines that "the donated capital and the surplus capital must be distributed for charitable purposes according to applicable Laws", which clearly means application of applicable laws, which includes also the Law on NGO's and the purpose of this paragraph is that the Law on NGO will be applied in such cases. Furthermore, this paragraph states "and the plan approved by CBK", but since the NGO Microfinance Institution is a financial institution and that CBK supervise all the financial institutions, then it is completely clear that CBK in this way only ensures the stability of the financial sector, as one of its main objectives, and makes sure that the solution of the financial institution is done as it is supposed to be and with a minimal interference in the sector, clientele and public. Paragraph 2 of this Article makes it clear the fact that CBK cannot in any manner benefit from the solution of NGO Microfinance Institution and the distribution of the donated capital and surplus capital."*

55. In respect to Article 111, CBK argues that *"In accordance with this Article and as determined with this Law, it is clear that the donated capital cannot be used for any other purpose then for charity purposes because the donor has offered this for charitable purpose. This Article determines that if an NGO Microfinance Institution decides to register as a Joint Stock Company then this*

institution must apply the provision of Articles 110 and 112 only as to the donated capital meaning that donated capital must be returned to the original donor or distributed for charitable purposes as determined with the provisions of these Articles, respectively in accordance with the Law on NGO as determined with Article 110 which clearly points out that the "donated capital and the surplus capital will be distributed for charitable purposes in accordance with applicable laws [...]". All this means that donated capital and surplus capital must be used for charitable purposes and that in accordance with the Law on NGO and if it would have another use then it will be subject to taxation, however, in no way does the Law on Banks, Microfinance Institution and Non-Banks Financial Institutions encourage or forces any other mean to use the donated capital and surplus capital. So, the NGO Microfinance Institution that is registered as a Joint Stock Company then that Institution will have their exempted tax status as an NGO taken away by the sole fact that their charitable activity is ended.

56. As to Article 116, CBK argues that *"[...] this Article does not have anything to do with the registration of NGO's that continues to be registered and supervised by the Ministry of Public Administration but only with those NGO Microfinance Institution that develops financial activities."*

57. Furthermore, CBK considers that *"This law adds value as to the development of the market economy with free competition."*

Response from the Ministry of Finance

58. On 28 December 2012, the Ministry of Finance replied to the Court submitting that the Applicant's allegations that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is incompatible with the Constitution and in contradiction with the Law on Freedom of Association in Non-Governmental Organizations, do not stand and outlined several reasons to support their arguments.

59. In this regard, the Ministry of Finance argues that *"The Law no. 04/L-057 on Freedom of Association in Non-Governmental Organizations does not regulate the right of the NGO-s to act (be registered) as micro-financial institutions. This Law no. 04/L-057 on Freedom of Association in Non-Governmental Organizations regulates establishing, registration, internal governance, activities, termination and removal of NGO's from register, but there is no provision on activities of the NGO Micro Finance Institutions."*

60. In addition, the Ministry of Finance claims that *"[...] the Applicant has forgotten* the *legal principles "Principles Lex Temporise and Lex Specialis, the*

Law on Freedom of Association in NGO's is a general law for all NGO's, while the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, and its part on NGO Micro-Finance Institutions is specific, therefore has priority in applicability. "

61. As to Article 90, the Ministry of Finances argues that it regulates only the definitions and "*in logical order regulates the term Micro-finance NGO and it provides what are obligations, rights and responsibilities of the Micro-finance institutions, pursuant to the Law No. 04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions. Therefore there is no legal basis to allege that Article 90 of this Law ins in contradiction with the Law on Freedom of Assembly in NGOs".*

62. Furthermore, as to Article 95, the Ministry of Finance argues that "*This provision has two parts. The first part aims, not to allow from selling or transferring of activities, joining, separating of structure, or the mission to grant benefits to the founders, director, officials, members etc. This part is in compliance with Article 4 of the Law on Freedom of Association in NGOs [...] The second part of the provision is exclusionary to the limitations set up in the first part, meaning except when they are subject to voluntary or mandatory liquidation, or official administration pursuant to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. An identical provision can be found also in the Law of Freedom of Association in NGO-s, Article 20 which states: an NGO may be terminated by a voluntary decision, by a final court decision, when an NGO becomes insolvent as defined by the applicable law. Therefore, as it can be seen by these provisions, there is no incompatibility [...]".*

63. In respect of Article 110, the Ministry of Finance argues that "*The aim of this provision is that in case of voluntary or mandatory liquidation of an NGO Microfinance Institution, the donated capital from donors for establishing the NGO Microfinance Institution, in compliance with the abovementioned laws, the original donor shall be informed and given the possibility to return the donated capital with the aim to use it for charitable purposes, if the original donor does not take (return) the donated capital, then the original capital and surplus shall be distributed for charity according to applicable laws, including the Law on Freedom of Association in NGOs, based on the plan adopted by the CBK. The role of the CBK is only to supervise the financial stability."*

64. As to Article 111, the Ministry of Finance argues that "*The aim of this Article is that the donated capital cannot be used for any other purpose, apart from charitable purposes. If an NGO Microfinance Institution decides voluntarily, but in no mandatory manner, only based on the will of the NGOs, to be*

registered as a Joint Stock Company, then this institution must apply the provisions of Article 110 and 112 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. The donated capital and the surplus capital must be used only for charitable purposes and according to the Law on NGOs and if it would have another use then it would become subject to taxes, but the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions does not, in any manner, oblige or encourage the use of the donated capital and the surplus capital, as it can be noted here we only have the change of the statute from Microfinance NGO to Joint Stock Company. The Law only provides an additional legal possibility."

65. With regard to Article 116, the Ministry of Finance argues that this Article only regulates the obligations of micro-financial institutions to act in compliance with the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, and it has nothing to do with NGOs which are regulated by the Law on Freedom of Association in NGOs.

Response from the Ministry of Public Administration, Department of Registration and Liaison with NGOs

66. On 31 December 2012, the Ministry of Public Administration, Department of Registration and Liaison with NGOs replied to the Court providing that:

"...

a) *Since the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions touches on the issue of Microfinance Institutions registered as NGO's, we consider that we should have been consulted when the law was drafted based on our mandate that we have in accordance with applicable law.*

b) *As to the allegations in the submitted referral it is a fact that the challenged provisions are in collusion with the Law on Freedom of Association of NGO's in the Republic of Kosovo and as such makes their implementation difficult.*

..."

Public hearing

67. On 5 March 2013, the Court held a public hearing whereby the following were present and heard:

a) the Applicant represented by Mrs. Shqipe Malaj, Deputy-Ombudsperson;

b) the Committee for Legislation represented by Mr. Arben Gashi, the head of the Committee for Legislation;

c) the Ministry of Finance, represented by Mr. Lulzim Rafuna;
d) the Central Bank represented by Mr. Skender Kllokoqi; and
e) the Ministry of Public Administration, Department of Registration and Liaison with NGOs, represented by Mr. Muhamet Dabiçaj.

68. The Committee for Legislation, during the Public Hearing provided the Court with the following documents:
a) the Minutes from the meeting of the Committee for Budget and Finance of 18 January 2012 (No. 44/12);
b) the Minutes from the meeting of the Committee for Budget and Finance of 22 March 2012 (No. 53/11);
c) the Minutes from the meeting of the Committee for Budget and Finance of 4 April 2012 (No. 57/12); and
d) the Minutes from the meeting of the Committee for legislation of 5 April 2012 (No. 42).

69. The Ministry of Finance, during the Public Hearing provided the Court with the following documents:
a) the Transcript of the Public Hearing of the Committee for Budget and Finance of 8 February 2012; and
b) the Transcript of the Plenary Session of the Assembly of the Republic of Kosovo of 12 April 2012.

Furthermore, the Court, during the hearing, upon the request of the representative of MF, also heard Mr. Jacques Boribond as an expert witness.

70. In addition, the Court also heard Mr. Dastid Pallaska in his capacity of *amicus curiae*.

The Applicant

71. The Applicant, in addition to the Referral, during the hearing orally alleged that *"the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is also in contradiction with the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe because also Article 9 of this Recommendation provides that NGOs should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives."*

72. Furthermore, the Applicant during the hearing orally alleged that *"Article 9 of this Recommendation clearly provides that NGOs with legal personality can designate a successor to receive their property in the event of their*

termination, but only after their liabilities have been cleared and any rights of donors to repayment have been honoured. However, in the event of no successor being designated or the NGO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another NGO or legal person that most nearly conforms to its objectives or be applied towards them by the state. Moreover the state can be the successor where either the objectives or the means used by the NGO to achieve those objectives have been found to be inadmissible."

73. The Applicant, during the hearing stated orally that *"The purpose of a number of NGO Microfinance Institutions to transform into businesses, mainly in the form of joint stock companies, is an early attempt and documented at least since 2004, initially through UNMIK regulations. Efforts to transform microfinance NGOs into a joint stock company by different actors were not prohibited and they were evident during the process of amendment of the Law on Freedom of Association in Non-Governmental Organizations in 2010. The report of the Ombudsperson in 2010 had recommended that during the review process of amendment of the Law on Freedom of Association in NGO, the Parliamentary Committees should take into account comments and suggestions emerging from the civil society so that additions and changes made in the law to be transparent and as a conclusion of law to be in line with European standards. Despite the fact that the process of drafting the law had gone through many challenges the civil society with an intense commitment and cooperation with the international community in Kosovo had succeeded to stop the introduction of elements that undermine the credibility of civil society in the Law on Freedom of Association of NGOs , which was approved by the Assembly in August 2011."*

74. Moreover, the Applicant, during the hearing stated orally that *"Although the Ombudsperson challenges the aforementioned articles in respect to its content, it is also important to note that the process of adoption of this law was done in contradiction with the Rules of Procedure of the Assembly and Article 69.3 of the Constitution. Namely, article 57 of the Rules of Procedure of the Assembly determines that after the adoption of the draft law in the first reading, the Assembly obliges that, beside the Functional Committee, four other permanent Committees should review the draft law. However, this draft law was never reviewed and approved by the Parliamentary Committee for Legislation of the Assembly of the Republic of Kosovo. Instead after the review and approval of the Committee for Budget and Finance, it went to the Assembly directly for adoption. Furthermore, as to Article 69.3 of the Constitution which determines the quorum for the Assembly, the Ombudsperson, allegedly, notes based on the official documents from the Assembly that 58 deputies were present whereby*

out of these 58 deputies, 54 deputies voted pro, 4 deputies abstained and 0 against. Besides this, allegedly, a deputy had informed that he could not vote electronically which brings the number of deputies present to 59 deputies. This, allegedly, is in contradiction with the required quorum of 61 deputies present." The Court notes that this issue was not raised by the Applicant in the original Referral.

75. The Applicant stated orally also during the hearing that *"The income of the civil societies, in order for them to carry out their activities, comes mainly from donors. In Kosovo, about 80% of the non-governmental sector funding is from international donors. All these donors give funds to NGOs based on legal guarantees that their donations cannot be used for private gains. Allowing transformation of NGO Microfinance Institutions will present an unparalleled precedent, and will directly threaten the continuation of donor support for NGOs in Kosovo, because of the risk that each NGO based on this precedent can transform and change ownership of the donor funds by transforming NGOs to private companies."*

76. The Court notes that, from the presentations of the parties, the perception is that there are two types of NGOs, NGOs and NGOs Microfinance Institutions. However, the Applicant during the hearing orally stated that the Law on Freedom of Association on NGOs recognizes only one type of NGOs, but the scope of activities of the NGOs differs. The scope of activities of these different NGOs is regulated with special laws.

77. As to whether the Assembly had a quorum when the challenged law was adopted, the Applicant during the hearing repeated orally that 54 deputies voted pro, 4 deputies abstained, none of the deputies voted against and one deputy could not vote electronically, hence, allegedly, there were 59 deputies present. Furthermore, the Applicant continued by stating orally that the main substance of their Referral concerns the constitutionality of the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions.

The Committee for Legislation

78. The Committee for Legislation was summoned to participate at the public hearing in order to explain to the Court the procedures that were followed to adopt the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions.

79. According to the submitted Minutes from the meeting of the Committee for Budget and Finance of 18 January 2012 (No. 44/12), the Court notes that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions

was reviewed by this Committee and the recommendation was given to the Assembly to in principle adopt this law.

80. The Chairperson of the Committee for Budget and Finance according to the abovementioned minutes further pointed out that the draft law in question intends to regulate the legal infrastructure of bank institutions, microfinance institutions and non-banking financial institutions in respect to licensing, supervision and other issues.

81. According to these minutes, the Minister of Finance at that time also pointed out that this Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions had been harmonized with the International Monetary Fund and the World Bank and was in compliance with the international practice and the directives of the European Union. It was further pointed out in the minutes that this Law had as a purpose to repeal the UNMIK Regulations regulating this area and would strengthen the institutional framework, sustainability and stability of the financial sector. Furthermore, according to the minutes, this Law intended also to improve the standards for governance and limit the possibility for credits to banks and private persons by giving the Central Bank of Kosovo the possibility to fine or to take measures if they were in violation.

82. From the Minutes of the meeting of the Committee for Budget and Finance of 22 March 2012 (No. 53/11), the Court notes that the amendments to the draft Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions were approved by this Committee and that the recommendation was given to the Assembly to review and approve it in the further procedures.

83. The Court notes that, according to these Minutes, the amendments were of a technical nature.

84. From these Minutes from the meeting of the Committee for Budget and Finance of 4 April 2012 (No. 57/12), the Court further notes that the NGO BIRN had proposed an amendment to the draft Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, stating that this Law would not apply to NGOs that do not have financial activities because it was concerned that donors would not donate money if NGO's could transform into a Joint Stock Company. Other voices were also heard at the meeting of the Committee for Budget and Finance whereby questions were raised: a) as to who would be shareholder when an NGO transforms into a Joint Stock Company; b) if the money of the donors and the suffice capital would be distributed for charity, then where would the rest of the capital come from in order to buy 25 % of the shares of the bank. Hence, the claim was that NGO Microfinance Institutions should not be able to be transformed into a Joint Stock Company, that the Law on Banks,

Microfinance Institutions and Non-Bank Financial Institutions was, therefore, in collusion with the Law on Freedom of Association of NGO's and that the NGO Microfinance should be regulated with a special law. However, according to the Minutes these amendments were not taken into consideration.

85. As to whether the Assembly had its quorum when the challenged Law was adopted, the representative of the Committee for Legislation stated orally during the hearing that he did not know because he left the plenary session on that day.

86. As to the following circumstances: 1) which procedures were followed for the entry into force of this law, 2) what was the date of promulgation of this law by the President of the Republic of Kosovo, and 3) what was the date of publication of this law in the Official Gazette of the Republic of Kosovo, the representative of the Committee for Legislation stated orally during the hearing that the regular procedures were not followed but did not provide any further supporting documents and that as far as points 2 and 3 were concerned, he did not know.

The Ministry of Finance

87. The representative of the Ministry of Finance, in addition to the written response submitted to the Court on 28 December 2012, claimed orally during the hearing that *"[...] the Law on Banks does not regulate the right of association for persons in Kosovo and it does not abrogate any the provision in the Law on Freedom of Association for NGOs."*

88. Furthermore, the representative of the Ministry of Finance claimed orally during the hearing that *"Article 111 of the Law on Banks requires that every Microfinance NGO Institution must first register at the Ministry of Trade and Industry and the Central Bank of Kosovo as a JSC and then the NGO Microfinance Institution must treat Surplus and Donated Capital as provided in Articles 110 and 112 of this Law. This requires that Surplus Capital must be subject to taxation and Donated Capital being returned to the Donor, before the JSC is formed. This clearly means that this is not a transfer of authority, but it is an entirely new registration of a new legal entity as JSC. Therefore, the Applicants' statement that a NGOs competence transferred is not consistent with the provisions of the Law on Banking. There is no provision within the Law on Banks that takes away any right of property and no provision of this Law that is in violation of Article 46 of the Constitution. In fact Article 110 on the Law on Banks specifically acknowledges the right of the owner to his property at all times. It is only when there is no owner, no donor and no corporate governance that the CBK will step in and develop a plan to*

distribute assets. Further even if the NGO Microfinance Institution decides to create a JSC, the Law on Banks does not require the NGO Microfinance Institution to be terminated, but expressly allows it to remain in existence and to keep its Donated Capital and Surplus Capital so long as it continue to comply with registration and regulation by CBK. This decision to continue is made only by the NGO Microfinance management/owner. It must be concluded that Article 110 of the Law on Banks does not violate any right to property or freedom of association. In point of fact, it actually provides more latitude for the fair and equitable distribution of assets to other types of general purpose charitable NGOs."

89. In addition, the representative of the Ministry of Finance claimed orally during the hearing that *"Microfinance NGOs have consistently been regulated by UNMIK since 1999. Since 1999 there have always been specific laws and regulations for Microfinance Institutions even though they were also NGOs. UNMIK Regulation 1999/13 which was amended and supplemented with Regulation 20008/28 in June, 2008. This Regulation has now been abrogated with the Law on Banks."*

90. As to whether the Assembly had its quorum when the challenged Law was adopted, the representative of the Ministry of Finance orally during the hearing stated that 61 deputies were present at the session and 59 of these deputies voted.

91. As to what the legal basis for NGOs Microfinance Institutions was before the challenged Law was adopted, the representative of MF stated orally during the hearing that it was UNMIK Regulation No. 1999/13 on the Licensing of Non-Bank Micro-Finance Institutions in Kosovo, UNMIK Regulation No. 2008/28 amending UNMIK Regulation No. 1999/13 on the Registration, Licensing, Supervision and Regulation of Microfinance Institutions and now the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. Furthermore, the representative of MF also stated orally during the hearing that *"the Law on amending the law on business organization provides that an NGO cannot be registered as a Limited Liability Company but this Law does not prohibit an NGO to be registered as a Joint Stock Company."* However, the Court notes that the Law No. 04/L-006 on amending and supplementing of the Law No.02/L-123 on Business Organizations in its Article 22 only provides that *"Article 84 of basic the law is reformulated with the following text: The limited liability company may have as a founder and shareholder one or more natural or legal person, excluding the NGOs."* Nowhere, in the law it is provided that an NGO can be registered as a Joint Stock Company.

92. As to what happens with an NGO Microfinance Institution when it is transformed into a Joint Stock Company, the representative of the Ministry of Finance stated orally during the hearing that there are three possibilities:
    a) It can continue to exist as an NGO;
    b) It can be dissolved; and
    c) It can become part of a Bank with up to 25 % of the shares.

The Central Bank

93. The representative of the Central Bank confirmed orally during the hearing that the CBK confirms what was submitted in writting and stated orally during the hearing by the representative of the Ministry of Finance.

The Ministry of Public Administration, Department of Registration and Liaison with NGOs

94. The Ministry of Public Administration, Department of Registration and Liaison with NGOs once again stated orally during the hearing that they were never consulted during the preparation of this law and as consequence the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions collides with the Law on Freedom of Association of NGOs.

***Amicus Curiae* brief**

95. As to the *amicus curiae* brief, the Court reiterates that pursuant to Rule 53 of the Rules of Procedure *"The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court."* However, the Court notes also that the *amicus curiae* brief must be in compliance with the Court's Practice Direction No. 01/2012 on Guidelines and Procedure for the Submission of Amicus Curiae Briefs, issued on 5 March 2012.

96. In this respect, the Court notes that on 18 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo (hereinafter: "AMIK"), on its own initiative submitted a written *amicus curiae* brief (*see* paragraph 13 of this Judgment). However, the Court considers that this *amicus curiae* brief is not necessary for the proper analysis and determination of the pending case before this Court and, therefore, in accordance with Rule 53 of the Rules of Procedure and the Practice Direction No. 01/2012 on Guidelines and Procedure for the Submission of Amicus Curiae Briefs, will not grant leave.

97. On 31 January 2013, the Court, pursuant to Rule 53 of the Rules of Procedure, sent an invitation to Pallaska & Associates L.L.C., Mr. Dastid Pallaska, attorney, to file a written *amicus curia* to the Court containing his legal stance in respect of the issues raised in the Referral about the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.

98. On 7 March 2013, Mr. Dastid Pallaska submitted his *amicus curiae* brief in writing with respect to the question whether Articles 90, 95, paragraph 1.6, 110, 111 and 116 of the Contested Law are compatible with the Constitution.

99. In this respect, *"According to the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe "NGOs are voluntary self-governing bodies or organizations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties." Furthermore, under Section 1(9) of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe "NGOs should not distribute any profits that might arise from their activities to their members or founders but can use them for the pursuit of their objectives. This prohibition is also repeated and strengthened in Section B (54) of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe, which stipulates that "NGOs with legal personality should not utilize property acquired on tax-exempt basis for a non-tax-exempt purpose." The aforementioned principles of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe are also enshrined in the NGO Law."*

100. The brief further explains that *"In addition to the above, it should be noted that the NGO Law in its Article 16.3 also provides that "an NGO may own and manage property and assets for the accomplishment of its non-profit purposes." The principles defined above show clearly that, unless otherwise specified by law, NGOs have the right to own movable and immovable property as well as other assets but, under no circumstances, can the assets and profits of an NGO be used to provide benefits, "directly or indirectly, to any founder, director, officer, member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization."*

101. In addition, the brief stated that *"The NGO Law is the one and only law in Kosovo that governs the establishment of the NGOs, its governance, legal rights and obligations as well as voluntary dissolution of NGOs. In this*

respect, the NGO Law represents the only law with respect to this subject-matter. Having said this, it should be noted that the regulator of the financial sector and the exercise of the financial activities is the Central Bank of Kosovo, hereinafter referred to as the "CBK", which is responsible for the supervision and regulation of the financial sector." "However, while the CBK under the Contested Law remains the regulator of the licensed financial activity that may be exercised by an NGO and is responsible for overseeing, managing and regulating the forced administration and liquidation of such an NGO, CBK does not replace in any way form or shape the authority of the Department for the Registration of NGOs within the Ministry of Public Administration. Therefore, these two functions should not be mixed and the fact that an NGO possesses a license to exercise a financial activity by the CBK does not mean in any way, form or shape that this has impacted or changed the legal status of such an NGO."

102. According to the written brief *"Article 111 collides with the non-profit nature and purpose of NGOs provided for by the NGO Law as well as the other provisions of the Contested Law, including its Articles 90, 95, paragraph 1.6, and Articles 110 and as a result of this violates Articles 44 and 46 of the Constitution." "Namely, Article 111 provides that for an NGO Microfinance Institution to be registered as a joint stock company with the Ministry of Trade and Industry and the CBK, such an NGO Microfinance Institution must respect the requirements foreseen under Articles 110 and 112 of the Contested Law with respect to donated capital According to Article 111, "any use of the donated capital or surplus capital shall be subject to the tax of Tax Administration of Kosovo."*

103. As the written brief explains, *"The second sentence of Article 111 of the Contested Law, which provides that "any use of the donated capital and surplus capital is subjected to taxation by the Tax Administration of Kosovo", is in clear contradiction with Articles 90, 95, paragraph 1.6, and 110 of the Contested Law. Namely, this sentence implies that the donated capital can be used for an activity that is not within the realm of non-for-profit nature of the NGO, which is strictly prohibited by Articles 90, 95, paragraph 1.6, and 110 of the Contested Law."*

104. Furthermore, according to the written brief *"[...] the transformation of an NGO Microfinance Institution into a joint stock company represents a grave violation of Articles 90, 95, paragraph 1.6, and 110 of the Contested Law and Article 4 of the NGO Law as well as Articles 44 and 46 of the Constitution, because the property and assets generated from tax-exempt activities of an NGO are being transferred to profitable private companies."*

105. Moreover, according to the written brief *"[...] Article 111 of the Contested Law does not specify who are or would be the owners of the property rights in the newly created joint stock companies that would receive the funds from NGO Microfinance Institutions. This means that the funds from an NGO Microfinance Institution, after taxation, can be used for any purpose and shall be transferred in the ownership of profitable companies whose owners are unknown."*

106. In this respect, the written brief further states that *"In addition to the above, the application of Article 111 of the Contested Law by allowing the transfer of earnings and assets of an NGO Microfinance Institution to a profitable business organizations, it deprives of the right to property the NGOs that would benefit from the distribution of surplus remaining after the voluntary or involuntary dissolution of NGO Microfinance Institutions."*

Admissibility of the Referral

107. As to the Applicant's allegation that 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 are unconstitutional, the Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether it has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

108. The Court needs first to determine whether the Applicant can be considered as an authorized party, pursuant to Article 113.2 of the Constitution, stating that:

"The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

and Article 135.4 of the Constitution which stipulates that:

"The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution."

109. In the present Referral, the Ombudsperson contest the constitutionality 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. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court, by virtue of Article 113.2 and Article 135.4 of the Constitution.

110. In this respect, the Court notes that the Constitution gives the Ombudsperson authorization to initiate claims before the Constitutional Court "with respect to the compliance of the laws, decrees of the President and Prime Minister and regulations of the Government with the Constitution." Likewise, sub-paragraph (b) of Article 113.2 provides that the Ombudsperson is also authorized to initiate claims with respect to the "compliance of the Statute of the Municipality with the Constitution." In this regard, the Court considers that the language of Article 113.2 of the Constitution is clear and unequivocal meaning that the authorization of the Ombudsperson to initiate claims before the Constitutional Court is not limited to Chapter II of the Constitution.

111. Furthermore, as to the further requirement of Article 30 of the Law that the Applicant must have submitted the Referral "within a period of six (6) months from the day upon which the contested act enters into force", the Court determines that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, entered into force on 12 April 2012, whereas the Applicant submitted the Referral to the Court on 11 October 2012. The Applicant, therefore, has met the deadline for filing a referral with the Court, provided by Article 30 of the Constitution.

112. Since the Applicant is an authorized party, has met the necessary deadline to file a referral with the Court and accurately described the alleged violation of the Constitution, including the challenged law of the Assembly, the Court concludes that the Applicant has complied with the admissibility requirements.

Constitutional assessment of the Referral

113. When assessing this Referral, the Court should have into account that, in general, the entire legislation is assumed to be constitutional, until the opposite is proven. The mandate of the Court is only to review the constitutionality of a decision or of a legislative act and not to review its legality or whether it is supported by good public policy.

I. As to the content of the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

114. In the Republic of Kosovo and other parts of the world, non-governmental organizations make an essential contribution to the development and realization of democracy and human rights, in particular through promotion of

public awareness, participation in public life and securing transparency and accountability of public authorities.

115. This importance is also reflected in Article 44 [Freedom of Association] of the Constitution by guaranteeing the right to freedom of association. Article 44 [Freedom of Association] of the Constitution determines that *"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."* in so far the organizations or activities do not infringe on the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred.

116. Furthermore, the non-governmental organizations are also regulated by the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, setting out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs in Kosovo.

117. In addition to the Law on Freedom of Association in Non-Governmental Organizations, the Assembly adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, in order to foster and maintain a stable financial system through promoting the sound and prudent management of banks, microfinance institutions and other non bank financial institutions and providing an appropriate level of protection for depositors' interests.

118. With respect to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, the Applicant challenges the Articles that provide for an NGO Microfinance Institution to transform into a Joint Stock Company.

119. Article 90 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions determines that an **NGO Microfinance Institution** is a Microfinance Institution that is registered at the Ministry of Public Administration for the purpose of its tax exempt status as well as at the CBK as a non-governmental organization which has a charitable purpose as its mission. 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.

120. Article 95 (1.6) of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, determines that an 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.

121. In addition, Article 110 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, provides that *"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."* In this respect, *"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."*

122. Article 111 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions determines the procedures to be followed by an 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 as follows:

"...

Article 111 – Procedures

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.

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

..."

123. Article 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions provides:

"...

Article 116 – Transitional Provisions for Microfinance Institutions

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.*

..."

124. In the Referral the Applicant complains that the abovementioned Articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are contrary to Article 44 [Freedom of Association] of the Constitution because by allowing the NGO Microfinance Institutions to transform into a Microfinance Institution Joint Stock Company they would fall outside the scope of Article 44 of the Constitution and their right to operate based on the right of association would be impeded.

125. The Applicant further alleges that allowing an NGO Microfinance Institution to be transformed into a Microfinance Institution Joint Stock Company is not in accordance with the applicable law in Kosovo and international principles of non-profit law. In this respect, the Applicant argues that the Law on Freedom of Association (entered into force on 24 September 2011), Article 4 paragraph 2 and 3, Article 11 and Article 20 does not allow an NGO to be transformed into another legal entity. The Law on Freedom of Association of NGOs is the one and only law in Kosovo that governs the establishment of the NGOs, its governance,

legal rights and obligations as well as the voluntary dissolution of NGOs. In this respect, this Law represents the only law with respect to this subject matter.

126. The Court recalls that the principle of legal certainty is one of the core principles of the constitutional order of the Republic of Kosovo (*see Cases K.O. 29/12 and K.O. 48/12 Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, Judgment of 20 July 2012*).

127. In this respect, the Court held in its Case KO 61/12 that *"[...] pursuant to Article 65 [Competencies of the Assembly] of the Constitution, "The Assembly of the Republic of Kosovo: (l) adopts laws, resolutions and other general acts". The question, therefore, arises whether a Law on Amnesty can prescribe a list of "persons to be designated by name", since a law must possess the quality of a general norm, abstract in nature for the purpose which it intends to regulate and be accessible and foreseeable in its application and consequences for all persons. In this respect, the Court refers to the case law of the ECtHR, where the requirements for the classification as a law have been established in relation to complaints under those Articles of the ECHR and its Protocols which incorporate the "lawfulness" requirements: Articles 5(1), 7, 8, 9, 10 and 11 ECHR, Article 1 of Protocol NO.1, Article 2 of Protocol NO. 4 and Article 1 of Protocol NO.7. These requirements have been restated many times in a formula that, by now, has become standard and was recently repeated in Centro Europa 7 S.R.L. and di Stefano v. Italy ([GC] no. 38433/09, paras. 141-142, 7 June 2012): "[...] a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able -if need be with appropriate advice -to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The level of precision required of domestic legislation -which cannot in any case provide for every eventuality -depends on a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court considers that, if a list of "persons to be designated by name" is established by law, such a law will not satisfy the above quoted standard of the ECtHR, since its consequences will not be foreseeable to a degree which is reasonable in the circumstances."* (*see Case KO 61/12 Confirmation of proposed constitutional amendments submitted by*

the President of the Assembly of the Republic of Kosovo on 22 June 2012 by letter Nr. 04-DO-1095, Judgment of 31 October 2012).

128. The Court is aware of the existence of the principle of *lex specialis,* which means that the special law prevails over the general law and in this respect a new law cannot overrule provisions of an existing law without amending the relevant provisions which set out the general principles, rights and obligations of NGOs, because this would put at stake the principles of legal certainty and rule of law..

129. In this respect, the Court notes that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is a general law which regulates the banking and financial sector, while the Law on Freedom of Association in Non-governmental organizations regulates specifically the principles, rights and obligations of NGOs.

130. Furthermore, the Court recalls that the authorities have a constitutional obligation to ensure the uniform application of laws; therefore this constitutional obligation may be impeded by introducing provisions which completely contradict other existing relevant provisions of the law on NGOs, without changing those provisions at the same time (*see also paragraph 126 and 127*).

131. The Applicant continues its argument by referring to Article 46 [Protection of Property] of the Constitution. It complains that the abovementioned Articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are contrary to Article 46 [Protection of Property] of the Constitution because by allowing the NGO Microfinance Institutions to transform into a Joint Stock Company arbitrarily alienates NGO assets, transferring assets from the NGO to other legal or natural persons for shareholding, meaning that the property and assets generated from tax-exempted activities of an NGO are being transferred to profitable private companies.

132. The Court recalls that the assets which are the property of NGOs can be used only to pursue the aims and objectives on which the NGOs are founded, in accordance with the principle of non-profit distribution. Therefore transferring the ownership over NGOs' assets to any physical or legal persons would be against this principle.

133. Furthermore, the Court reiterates that the NGOs are considered to be a very important actor and play a crucial role in the process of development of democratic societies and promotion of human rights. Therefore transformation of NGOs into Joint Stock Companies would deviate from the initial purpose of

existence of the NGOs and may seriously damage one of the core elements of democracy.

134. The Applicant complains also that contrary to Article 10 [Economy] of the Constitution, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions allows for the capital acquired without tax payment to be injected into commercial market competition between banks and other financial institutions, which are bound to pay taxes since their establishment.

135. In this respect, since Micro Financial NGOs raise their funds and increase their assets mainly through receiving grants from donors, be it domestic or from abroad, on which they are not obliged to pay taxes. By the transformation from an NGO into a Joint Stock Company, the other institutions, which regularly pay taxes in accordance with the laws in force, are put into a commercially disadvantageous position.

136. Furthermore, the Applicant argues that the challenged Articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are contrary to the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe (adopted on 10 October 2007).

137. The Court notes that this recommendation is not a binding legal instrument but only a recommendation. However it contains universal democratic principles that the NGOs must adhere to and which are respected and widely implemented in democratic societies.

II. As to the procedure followed in adopting the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

138. The Court notes that in the Referral, the Applicant did not raise the procedural aspect of the adoption of this law. However, only at the public hearing the procedural aspect of the adoption of this law was raised by the Applicant, namely, the Applicant alleged that the required quorum for the adoption of this Law by the Assembly was not met.

139. In this respect, the Court refers to Article 69.3 [Schedule of Sessions and Quorum] of the Constitution which provides: *"The Assembly of Kosovo has its quorum when more than one half (1/2) of the Assembly Deputies are present."*

140. Furthermore, Article 51 of the Rules of Procedure of the Assembly clearly specifies that: "The Assembly has a quorum, when there are more than half of

the Deputies present in the Assembly" and that "Decisions of the Assembly sessions are valid only if when these were taken, when more than half of the Deputies in the Assembly were present." The Article provides further that "Laws, decisions and other acts of the Assembly are considered to be adopted, if the majority of the Deputies are present and voting."

141. In this respect, the Court also recalls its own case law, in particular, to Case KO 29/11, Sabri Hamiti and other Deputies - Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011., where it established that *"[...] the Deputies of the Assembly are representatives of the people and shall have an equal right and obligation to participate fully in the proceedings of the Assembly and carry out their task as representatives of the people of Kosovo in accordance with the Constitution, the Law and the Rules of Procedure of the Assembly. That is to say, by receiving the vote of the citizens, deputies have an obligation towards them, inter alia, as stipulated by Article 40 [Obligations] of the Law on Deputies, by being obliged to participate in the Plenary Sessions [...]"* and *"[...] all 120 deputies of the Assembly should feel obliged, by virtue of the Constitution, the Law on Deputies, the Rules of Procedure of the Assembly and the Code of Conduct, to participate in the plenary sessions of the Assembly and to adhere to the procedures laid down therein, [...]"* meaning that a deputy is considered to be participating in a session only when he/she meets the abovementioned obligations which includes the casting of his/her vote either in favour, against or by abstaining.

142. Additionally, the Court notes that, regarding the required procedure for the entry into force of a law, the Assembly must adhere to Article 80.6 [Adoption of Laws] of the Constitution.

143. In the present case, the Court notes that Article 118 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions stipulates that this law enters into force on the same date on which it was adopted by the Assembly, i.e. on 12 April 2012.

144. In this connection, the Court refers to Article 80.6 [Adoption of Laws] of the Constitution, which 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."* The period of 15 days, as mentioned by the Article, can be shortened if specified by the law itself, but this cannot be a shorter period then the publication as such in the Official Gazette. The objective of the publication of a law is to make the public aware what are the rules to be followed and to adapt their behavior and acts accordingly. This is a basic requirement of the rules of law.

145. Moreover, Article 80.2 of the Constitution provides that the adopted laws by the Assembly shall be promulgated upon signature by the President of the Republic of Kosovo within eight (8) days from receipt. However, the President of the Republic of Kosovo promulgated this Law on 30 April 2012. Thus, in contradiction with the Rule of Law, the principle of legal certainty as well as the aforementioned procedure, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions entered into force on the day when it had not yet become law, because the law was not promulgated by the President of the Republic of Kosovo until 30 April 2012.

146. Be that as it may, the Court reiterates that under Article 29.3 of the Law, the Applicant has an obligation in the Referral to *"specify the objections put forward against the constitutionality of the contested act."* However, in the Court's opinion, the Applicant has failed to convincingly meet this requirement and has not submitted any supporting documents to make this claim.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.2 of the Constitution, Articles 20 and 27 of the Law and Rules 54, 55 and 56 of the Rules of Procedure, on 14 March 2013,

DECIDES

I. Unanimously, TO DECLARE the Referral admissible;

II. By majority, TO DECLARE that 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, are not compatible with Articles 10 [Economy], 44 [Freedom of Association] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo;

III. Holds that 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, are null and void;

IV. Holds that the Court's Decision Extending the Interim Measures of 24 January 2013, Ref. No.: MP 354/13, suspending the implementation 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, is terminated upon the entry into force of this Judgment;

V. Orders that this Judgment be served on the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette; and,

VI. Declares that this Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani