



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

Pristine, 8 December 2011
Ref. No.:AGJ165 /11

JUDGMENT

in

Case No. KO 119/10

Applicant

Ombudsperson of the Republic of Kosovo

Constitutional Review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo.

Challenged law

2. The Applicant requests the annulment of Article 14, paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

Subject matter

3. The Applicant requests the constitutional review of Article 14, paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

Legal basis

4. Article 113.2 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), and Articles 20 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 26 November 2010, the Ombudsperson filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
6. On 29 November 2010, the President of the Court, by Decision No. GJR. 119/10, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. 119/10, appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj.
7. On 17 December 2010, the Court considered the report of the Judge Rapporteur concerning the Referral in a closed session and reached the decision on the application of the interim measure for a period of no longer than three months from the issuance of the decision immediately suspending the application of Article 14 paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, with the same duration.
8. The Court extended the application on interim measures on a number of subsequent occasions and finally, by Order dated 20 October 2011, extended the application until 31 December 2011 and the Court remained seized of the matter.
9. On 21 December 2010, the Court notified the President of the Assembly of Kosovo regarding the Referral, and asked if the Assembly had any response regarding the Referral submitted with the Court.
10. On 24 January 2011, Mr. Jakup Krasniqi, President of the Assembly, sent an official document informing the Court that the Assembly was informed of the interim measure applied by the Court regarding the suspension of the application of the said articles of the Law on Rights and Responsibilities of the Deputy as long as the interim measure was in force and he also stressed that considering the fact that the Assembly of Kosovo has been dissolved as of 2 November 2010, he cannot provide an adequate answer until the constitution of the new legislature of the Assembly of Kosovo.
11. On 16 May 2011, Mr. Ismet Krasniqi, the Secretary of the Assembly, submitted to the Secretary General of the Court a response prepared by the Assembly's Committee for

Legislation dated 11 May 2011. That response concluded that the legislation subject to this referral complied with the Constitution because it was enacted pursuant to the Rules of Procedure of the Assembly.

12. On 5 July 2011 and on 22 November 2011, the Court deliberated on the Referral and the response and decided on the admissibility and the merits of the Referral.

The facts

13. On 4 June 2010, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly") adopted the Law on Rights and Responsibilities of the Deputy with 74 (seventy-four) votes "for", 2 (two) votes "against" and 2 (two) "abstains".
14. Between 7 October 2008 and 16 March 2010, the Commission on Legislation and Judiciary met at least seven (7) different times to discuss this proposed legislation. On 21 October 2008, the Commission received the comments of the OSCE with respect to this legislation. The OSCE specifically recommended:

"Supplementary Pension provisions should be deleted as it is excessive in relation to regular pension rules. Such a provision would put a heavy burden on the State budget." (See Specific Comments and Proposed Amendments to the Draft Law on the Rights and Responsibilities of the Deputy, OSCE).

15. On 14 December 2009, one member of the Commission recommended that a decision on enacting this legislation should be delayed until there were "better political and economic conditions."
16. On 13 June 2008, the Assembly adopted Law on Kosovo Pensions Trust, No. 03/L-084.
17. The following NGOs: National Democratic Institute of Kosovo (NDI), Forum for Civic Initiatives (FIQ), "Speak Up" Movement, Community Building Mitrovica (CMB), addressed to the President of the Republic of Kosovo on 21 June 2010 with a request not to promulgate this pension Law.
18. On 25 June 2010, Mr. Bahri Hyseni, Chairperson of the Committee on Legislation and Judiciary of the Assembly of Kosovo, requested from the Secretariat of the Assembly to correct the clerical error that was made in the Law on Rights and Responsibilities of the Deputy, respectively Article 22 of the Law, that the retirement age should be 55 years of age, and not as it was approved in the plenary session of 4 June 2010, that the retirement age should be 50 years of age.
19. On 25 June 2010, the Assembly approved Mr. Bahri Hyseni's request to correct the clerical error that was made in the session of 4 June 2010. Mr. Bahri Hyseni's request was approved with 73 (seventy-three) votes "for" and 2 (two) votes "against".
20. On 5 July 2010, the Law on Rights and Responsibilities of the Deputy was promulgated by the Decree of the President of the Republic of Kosovo DL-029-2010.
21. On 19 July 2010, the Ombudsperson Institution received a submission from a number of Non-Governmental Organisations (NGOs): National Democratic Institute of Kosovo (NDI), Forum for Civic Initiatives (FIQ), Youth Initiative for Human Rights (YIHR), Kosovar Stability Initiative (IKS), Initiative for Progress (INPO), Balkan Institute of Policies (IPOL), Council for the Defense of Human Rights and Freedoms (KMDLNJ), "Speak Up" Movement, Community Building Mitrovica (CMB), Policy and Advocacy

- Centre (QPA) and Syri Vision, which jointly addressed to the Ombudsperson Institution requesting the Constitutional Court of the Republic of Kosovo, pursuant to duties and responsibilities vested on it by Law, to assess the constitutionality of Article 22 of the Law on Rights and Responsibilities of the Deputy.
22. The abovementioned NGOs considered this Article constituted a violation of the Constitution of the Republic of Kosovo and requested to ban the implementation of the law, as was foreseen from 1 January 2011 until the Constitutional Court rendered a decision on merits regarding this issue.
 23. The Law on Rights and Responsibilities of the Deputy was published in the Official Gazette of the Republic of Kosovo on 20 July 2010.
 24. On 21 July 2010, the Union of Kosovo Pensioners joined the NGOs' request.
 25. On 16 May 2011, Mr. Ismet Krasniqi, the Secretary of the Assembly, submitted to the Secretary General of the Court a response prepared by the Assembly's Committee for Legislation dated 11 May 2011. That response concluded that the legislation subject to this referral complied with the Constitution because it was enacted pursuant to the Rules of Procedure of the Assembly.
 26. On 26 July 2011, the Central Bank of Kosovo in its letter signed by Mr. Gani Gërguri, Governor of the Central Bank, notified the Constitutional Court that there was no correspondence between the Central Bank and the Kosovo Assembly concerning the fiscal and economic impact of enacting this Law, No. 03/L-111.
 27. On 27 July 2011, the Ministry of Finance, in its letter signed by Minister Mr. Bedri Hamza, notified the Constitutional Court that the Ministry of Finance had received a written request from the Kosovo Assembly about the financial cost or impact of the proposed law. The Ministry had prepared a report in response to this request, but the report was never delivered to the Assembly because further consultation was needed before this law could be enacted. However, the Kosovo Assembly on 4 June 2010 approved this law without the assessment of the Minister of Finance of the economic and fiscal impact of this law, No. 03/L-111.
 28. These two responses were forwarded to the Assembly of the Republic of Kosovo in late August, 2011 for their information only. No response was requested. No response or comment has been received.
 29. On 4 August 2011, the Constitutional Court received written materials described as "travaux préparatoires" relating to a different Members of Parliament pension law, 02/L-144, that was adopted by the Assembly in 2007 but never approved by the Special Representative of the Secretary General for the United Nations and, therefore, never enacted. Nothing in those materials related to the subject law, No. 03/L-111, challenged by the Ombudsperson in this Referral.

Applicant's claims

30. The Ombudsperson claims, *inter alia*, that the Law on Rights and Responsibilities of the Deputy contains provisions that "enable deputies of Kosovo Assembly to realize pensions that are more favorable than any other pension benefit for the other citizens, and that they are inconsistent with constitutional principles of equality, rule of law, non-discrimination and social justice".

31. The Ombudsperson also “notices that supplementary pensions foreseen by Article 22 of the Law on Rights and Responsibilities of the Deputy are clearly disproportionate to the average pensions in the country, and as such, they are not in harmony with values proclaimed in Article 7 of the Constitution of the Republic of Kosovo, whose constitutional order is based on the principles of democracy, equality, non-discrimination and social justice”.
32. Moreover, Article 38 of the Law on Rights and Responsibilities of the Deputy provides the deputies with the possibility of being reinstated to the respective job position if he/she has been employed in the public sector or in any institution financed through public means before the start of the mandate. This provides them the certainty concerning employment; they do not risk remaining jobless if they have been part of the public sector before the start of the mandate of the deputy. They can also find some other job position when it is known that the general retirement age in Kosovo is 65 years of age.
33. Finally, according to the Ombudsperson, “the privileged status of the deputies of the Assembly of Kosovo in the existing legal order of the Republic of Kosovo does not present a sufficient reasoning for that high level of deviation from general principles in the area of pensions”.

Response of the Assembly

34. A representative of the Assembly responded that the legislation subject to this referral complies with the Constitution because it was enacted pursuant to the Rules of the Assembly.

Admissibility of the Referral

35. Before determining the formal criteria on the admissibility of the Referral, the Court should provide an answer to two main issues:
 - a. If the Ombudsperson is an authorized party to raise a constitutional issue; and
 - b. If the issue raised before this Court is a constitutional issue.
36. In order to provide an adequate answer to the two said issues, the Court refers to Article 113.2 of the Constitution, which stipulates:

“ ...

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:

[...]

c. the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

d. the compatibility with the Constitution of municipal statutes.

...”

and to Article 135.4 of the Constitution, which also stipulates:

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

37. Based on the abovementioned constitutional definitions, the Ombudsperson has competencies to refer constitutional matters to the Constitutional Court, and the Ombudsperson’s request for the constitutional review of the compatibility of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, fulfils the legal criterion of Article 113.2 of the Constitution for “the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government.”
38. Furthermore, the Referral was submitted to the Constitutional Court prior to the six months from the day upon which the Law was to enter into force. Thus, the time requirement under Article 30 on the Law of the Constitutional Court of the Republic of Kosovo has been met.
39. This is a constitutional issue and it is suitable for constitutional review by the Constitutional Court.

Applicable law

40. In order to give a complete answer and based on the Constitution on the Referral submitted with it for review, the Constitutional Court shall consider the applicable legislation on pensions in Kosovo, that is:

Law on Rights and Responsibilities of the Deputy, No. 03/L-111

41. Article 14.1 (6) of the Law stipulates that:

“... ”

Financial and material benefits of the deputy

The deputy during the exercise of his/her mandate has a right on compensation for:

- e. basic salary;*
- f. transitional salary after the end of the mandate;*
- g. participation in sessions and meetings of the committees;*
- h. parliamentary functions;*
- i. monthly expenses;*
- j. supplementary pension; and*
- k. other rights determined by this Law.*

“... ”

42. Article 22 of this Law provides:

“... ”

Supplementary pension

1. The deputy, after the end of his mandate, has the right on supplementary pension, if a deputy has practiced his/her task for at least one mandate and is fifty-five (55) years of age.

2. The deputy who fulfils the conditions defined in paragraph 1 of this Article, realizes a supplementary pension in amount of fifty percent (50%) of the compensation of the deputy. The deputy that has served two (2) mandates under conditions defined in paragraph 1 of this Article realizes a supplementary pension of a deputy in amount of sixty percent (60%) of the basic compensation and the one who served in three and more mandates in amount of seventy percent (70%) of the basic salary.
..."

43. Article 23 provides:

" ...

1. The rights and responsibilities of a deputy, determined with this law, start to run from year 2001, with certification of the mandate of the deputy.

2. The status of the deputy for legislature 1990-2000 shall be regulated with special law.

..."

44. Article 24 of the same Law provides:

" ...

Pension basis

As basis for determining the supplementary pension of the deputy is used the basic recent salary that the deputy realizes in the Assembly.

The overall sum of the supplementary pension of the deputy cannot be higher than seventy percent (70 %) of the basic salary of the deputy.

..."

45. Article 25 of the Law provides:

" ...

Pension for disability reason

1. The deputy to whom because of the injury while performing his/her task was in general disabled for work, has a right on supplementary pension of a deputy regardless of the retirement seniority, age and his mandate as deputy.

The Pension from paragraph 1 of this Article is determined in sum of seventy percent (70 %) of the basic salary.

..."

46. Article 26 of the Law provides:

Special circumstances

"Criterion to realize and determine the amount of the pension is the overall retirement seniority, realized in and outside the country."

47. Article 27 provides:

“ ...

Family pension

Members of the family of the deputy who has passed away and who used the supplementary pension are entitled to the family pension in the amount of seventy percent (70 %) of that pension on the day he passed away.

The foreseen procedures for fulfillment of rights for the regular pension are applicable also for achieving the supplementary pension of the deputy.

The right to a family pension has spouse and children until the age of eighteen (18), respectively until the age of twenty-two (22), if they continue the high schooling.

...”

Pension Trust Law of Kosovo

48. When the Assembly enacted this Law, No. 03/L-084, Amending UNMIK Regulation No. 2005/20 Amending UNMIK Regulation 2001/35 on Kosovo Pensions Trust, was a law already in effect since 2008. Article 3 of that law stipulates that:

“ ...

In Section 1 of the Regulation, the paragraph entitled "BPK" shall be replaced in its entirety by the following:

“CBK” means the Central Bank of the Republic of Kosovo that is responsible as an independent agency under article 142 of the Constitution for licensing, supervision and regulation of Pension Funds, Pensions Providers, Asset Managers Open-end Vehicles, and Custodians according to this Law, and has responsibilities for supervision of the Kosovo Pensions Savings Trust.

...”

49. Article 6 of the same Law stipulates:

“ ...

Section 2.2 of the Regulation shall be replaced in its entirety by the following Section 2.2:

2.2 The setting of economic policy with respect to Pensions, as part of budgetary and fiscal policy, shall be the responsibility of the Government. The Government shall accomplish this policy through the Ministry of Labour and Social Welfare in coordination with the Ministry of Finance and Economy. The Minister of Labour and Social Welfare, the Minister of Finance and Economy, the Governor of the CBK, and others appointed by the Prime Minister, will comprise an inter-ministerial Pension Policy Working Group. The Pension Policy Working Group will propose further rules and regulations as necessary to effectuate pension policy and will make recommendations to the Government with respect to the Kosovo Pensions Savings Trust and the licensing, regulation and supervision of Pensions in Kosovo.

...”

50. Administrative Instruction No. 15/2009 for Growth of Pension for Implementation of Decision of the Government No. 02/51, Article 2 provides:

“The right to benefit in increasing the basic pension of 45 euros to 80 euros and all has: Current users of basic pension who were insured and contribute payer, based on the relationship of work, [...]”

51. Article 3 stipulates:

“Conditions and criteria for increasing the pension benefit basis: The applicant must age 65 and have minimum 15 years experience of pension insurance, according to the provisions of the Pension Security and disability, among them at least 7 years and 7 months experience working in Kosovo.”

The Substance of the Referral

52. In assessing this referral the Court should keep in mind that generally all legislation is presumed constitutional until proven otherwise. This Court’s mandate is only to assess the constitutionality of a decision or legislative act, not to assess its legality or whether it is supported by good public policy. (See Article 112 of the Constitution)

53. In assessing whether a law violates the Constitution, the Court should consider the following provisions of the Constitution:

a. Article 16:

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and their legal acts shall be in accordance with this Constitution. (Emphasis Added)

2. The power to govern stems from the Constitution.

3. The Republic of Kosovo shall respect international law.

4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution. (Emphasis added)

b. Article 3:

1. The exercise of public authority in the Republic of Kosovo shall be based upon principles of equality of all individuals before the law [...].

c. Article 7 provides:

The constitutional order of the Republic of Kosovo is based upon the principles of freedom, peace, democracy, equality [...].

d. Article 4.2 of the Constitution provides:

“The Assembly of the Republic of Kosovo exercises the legislative power.”

e. Article 65 [Competencies of the Assembly]

“The Assembly of the Republic of Kosovo:

‘(1)adopts laws, resolutions and other general acts;.....’

f. Article 74 of the Constitution provides:

“Deputies of the Assembly of Kosovo shall exercise their function in the best interest of the Republic of Kosovo and, pursuant to the Constitution, Laws and Rules of Procedure of the Assembly.”

Restrictions on Legislative Discretion

54. There are restrictions on the right or authority of the Assembly to enact legislation:

“ ...

(1) *The legislation must comply with the Constitution and the principles of the Constitution.*

(2) *Legislation which affects individuals, corporate or personal, must have a legitimate aim and must be proportional to the rights of all citizens of Kosovo.*

(3) *Legislation which provides a direct special benefit for members of Parliament must be based on reasons that are supported by clear and legitimate public purposes.*

...”

55. It is on this basis that the challenged legislation must be analyzed. Did the Assembly when enacting this law consider those principles and did it determine what the legitimate purpose of this law was? There is no evidence before this Court to suggest that the Assembly used that analysis in enacting this legislation.

56. This Court has previously pointed out that the Constitution is based on the doctrine of the separation of powers. In its Judgment in Case No. KO 98/11, dated 20 September 2011, Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo the Court said, at paragraph 44, *“The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers.”*

:

57. Article 4.2 of the Constitution explicitly states that the Assembly exercises the legislative power. There is no other reference in the Constitution to any other branch of government having that authority or responsibility. Article 74 suggests in a broad and general manner that the Assembly shall exercise that sole function in the best interests of the Republic of Kosovo and the Constitution.

58. In applying that standard to this legislation the Constitution requires that the Assembly acknowledge that all individuals are equal before the law (Article 3) and that the Constitution is based upon the principle of equality (Article 7). In applying these principles the Assembly also must acknowledge that equal protection of the law shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions (Article 24.3). In other words, the village police officer is not necessarily entitled to the same compensation as the Prime Minister or a physician because each may have differing duties, responsibilities and skills.

59. In enacting laws the Assembly must act within the parameters of Article 24 of the Constitution [Equality Before the Law], which provides:

“ ...

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

No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

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

...

Analyses of the Legislation

60. Even though the law challenged in this Referral is described as a “supplemental pension” it has many features more similar to a supplemental post employment gift than a traditional supplementary pension for the following reasons:

I. Unlike a typical pension none of the beneficiaries are required to contribute anything towards funding of the “pension.”

II. The “pension” is to be applied retroactively, and prospectively, to any deputies who had previously served in the Assembly since 2001 some of whom may already have retired.

III. The “pension” may also be paid to beneficiaries who, subsequent to their terms in the Assembly, return to work for the government or now take work for the government.

IV. This legislation was enacted without comment or review by certain government officials previously established by law in Kosovo to review pension policy. That Law, No. 03/L-084, provided that several government officials from the various ministries and the Central Bank of Kosovo were responsible for establishing pension policy in Kosovo.

V. This is not a “bonus” because typically, a bonus is an additional single inducement to a prospective candidate to take a position or a single end of a fiscal cycle reward for extraordinary performance related to specific performance goals being met or exceeded.

VI. This is not a salary increase. Salary increases generally have only prospective application for those who may consider becoming deputies in the future or renewing their mandates. This legislation has retroactive application making it more like a gift than a salary adjustment. (*See Article 11, On Salaries of Civil Servants, Law No. 03/L-147, 13 May 2010.*)

VII. This is not “severance pay.” Severance pay is usually for a defined limit of time or amount paid to an employee after he or she leaves their employment. This legislation authorizes payment of an unlimited amount for an unlimited period of time. (*See Article 22.2 On Salaries of Civil Servants, Law No. 03/L-147, 13 May 2010.*)

VIII. Funding of this pension is from the general budget of the government of Kosovo, not from a separate pension trust fund authorized by the pension law of Kosovo or a

private pension fund authorized to make annuity payments to the recipients over their lifetimes as is normal with respect to regular pension funds.

IX. This legislation is different than the law relating to regular pensioners in Kosovo, who, in order to win the right to pension from Kosovo Budget, should be at least 65 years old (old age pension) or at least 65 years old and have at least 15 years of work experience of pension insurance (*see Article 3.1.1 of Administrative Instruction No. 15/2009 for Growth of Pension for Implementation of Decision of the Government No. 02/51*).

Analyses of the role of Deputies

61. Deputies in the Assembly have duties and obligations different than others in the rest of society. They have a limited time mandate, unique working hours, the possibility of not being re-elected. They must retire from any executive post in the public administration or in any publicly owned enterprise and not exercise any other executive function as provided by law.
62. Therefore, to attract qualified candidates for these positions the Assembly is allowed to compensate new prospective candidates for the position of deputy in the Assembly in a manner and in a monetary amount that may be different than the compensation for other members of society as long as it is reasonably related to the legitimate goal of attracting qualified candidates to the position in view of the demands of the position and the insecurity involved with the position. There is no evidence that the Assembly in enacting this legislation considered these factors.
63. This pension legislation is also retroactive for any deputy who served in the Assembly since 2001 regardless of whether he or she is still serving. When different pension or compensation legislation is made retroactive to compensate former deputies of the Assembly there should be a special finding by the Assembly how that legislation accomplishes the purpose of attracting qualified candidates to campaign for and accept the position of a deputy with all of its unique authority, responsibility and sacrifice. It does not appear that the Assembly made any findings with respect to this issue.

Pensions for deputies in other countries

64. While deciding on the Ombudsperson's referral, the Court could take judicial notice of the pensions for deputies in some other countries, such as Austria, Czech Republic, Estonia, Latvia, Luxembourg, and Slovakia. Members of Parliament (MPs) realize their pension insurance rights in accordance with the general legal act that determines the right to pension insurance for all employees alike, without having a special fund for MPs. *See, Act No. 155/1995 Coll., on pension insurance, which came into effect on 1 January 1996 (Czech Republic), Funded Pensions Act Passed 14 April 2004 (Republic of Estonia), Fonds et Régimes Complémentaires de Pension (Luxembourg). Act No. 43/2004 Coll. on old-age pension saving (Slovak Republic).*
65. Another practice has been established in England (*see Statutory Instruments 2009 No. 1920 Pensions - The Parliamentary Pensions (Amendment) Regulations 2009*) and France (*see The M.P.s' pension scheme, which was set up by the Chamber of Deputies on December 23, 1904 is funded by a contribution provided by the parliamentary allowance and by a subvention included in the budget of the National Assembly (see: http://www.assemblee-nationale.fr/english/synthetic_files/file_15.asp)*), whereby MPs are obliged to realize their pension rights through the pension fund of the Parliament, which is a kind of a special pension insurance funded from deputies' incomes and supplemented from the budget of the parliament. The Italian Parliament

- also has a special pension fund for its members; however, the MPs are obliged to contribute to this pension fund with 5.6 % of their salary (see <http://www.legco.gov.hk/yr00-01/english/library/ein7.pdf>).
66. Whereas Denmark, Cyprus, Romania, Sweden, Finland and Montenegro have regulated this issue through different legal acts, mainly particular laws and regulations, such as the case of the Republic of Kosovo, but in different ways, and this does not apply only to MPs but senior officials as well, e.g., in Denmark, the pension age of the deputy is 67 years of age, in Cyprus it is 60 years of age, and the obligatory contribution of 1.75% of deputy's salary to the pension fund, in Romania, pension contributions are obligatory, in Sweden, the state pension scheme applies for deputies as well, but they are also supported by the parliament pension scheme (see <http://www.legco.gov.hk/yr00-01/english/library/ein7.pdf>).
 67. In the United States of America pensions for members of Congress (Assembly), like all other Federal government employees, are financed through a combination of employee and employer contributions. This pension is a supplementary pension to the basic Social Security pension all required of all American citizens, including members of Congress. The amount of the pension is based upon years of service and average salary but is not retroactive for those members of Congress who served before the law was enacted. (See *Federal Employees' Retirement System Act of 1986 (P.L. 99-335)* and *Congressional Research Service Report for Congress: Retirement Benefits for Members of Congress, 9 February 2007*.)

Analysis of other Constitutional Court Decisions

68. The Court also considered the fact that the Constitutional Courts of Macedonia and Montenegro have declared as unconstitutional provisions of particular laws with the same pension privileges for deputies. Whereas the Assembly of the Republic of Croatia had reduced deputies' pensions before a similar issue was decided by the Constitutional Court of Croatia.

A. Macedonian Constitutional Court Decision

69. On 12 April 2006, the Macedonian Constitutional Court declared a Macedonia law that awarded to members of parliament, not other public officials, a different and more generous pension than the general pension afforded to all other citizens of Macedonia unconstitutional. It found that this law violated Article 9 and 32 of the Macedonian Constitution. Article 9 provided that all citizens are equal before the Constitution and the laws. Article 32 provides that everyone under equal conditions is open to every job. The Court concluded that it could not find arguments that would justify this kind of compensation that only is provided to MPs and not to other public officials who also participate in the work of the authorities or bodies that are elected. The Court found that this law did not correspond to the principle that every employee has the right to appropriate remuneration in accordance with his contribution to the work and the principle of equality between the holders of public office.
70. That Court stated:

"[...] With the disputed legal provisions, the legislator has established different conditions and manner of implementation of early retirement which are based cannot be anything other than the acquisition of rights under privileged conditions and relate only to the lawmakers, not all public officials who are in the same social status or all citizens without giving reasonable grounds exist, which the legislator puts citizens in an unequal position, which is in direct contradiction with Article 9 of

the Constitution.” (See Decision of the Constitutional Court of the Republic of Macedonia, No 191/2005-0-1, dated 04.12.2006, § 5 point 45).

71. Apparently, the Macedonian Court concluded that the Macedonian Parliament had an obligation pursuant to Macedonian law or the Macedonian Constitution to make detailed findings justifying why members of its Parliament were entitled to unique and favorable pension benefits because of the nature of their work and responsibilities in comparison to other public officials or members of the Macedonian society in general.

B. Croatian Constitutional Court decision

72. In a similar case in 2003 the Constitutional Court of Croatia found that similar pension legislation did not violate the Croatian Constitution even when the legislation had retroactive application. That Court held that different regulations for parliamentary pensions than for pensions in general are grounded in the special legal position of members of Parliament. (*See File No. U-1/949/1999.*)
73. The Applicants in that case claimed that the pension legislation violated principles of equality, social justice and equal status of members of the same social categories. In finding the allegations ungrounded that Court reasoned that:

“Different view of the Constitutional Court, are grounded in the special legal position of members that emerges from the way in which they acquire office, the duties of members and the legal nature of their office, increased responsibility in performing the duties of member, public nature of the work, limitation of office, incompatibility with performing any other work, abandoning their previous professions and the like.”

C. Constitutional Court of Montenegro decision

74. In a similar case the Constitutional Court of Montenegro declared that a special supplementary pension for deputies and other state officials who carry out the highest state functions was in violation of the Constitution of Montenegro. (*See Nol 33/08 of the Official Gazette of Montenegro, U. no. 86/08, 43/09, 103/09 and 108/09, dated 24 December 2009.*)
75. The challenged law authorized certain state officials, including deputies, to a pension of from 55% to 85% of their basic salaries similar to the challenged legislation in this referral. In declaring this law unconstitutional the Montenegrin Court stated:

“Regulation of the rights to pension is one of the lawful rights that the citizens are entitled to. In this regard, the legislator is authorized to regulate that right, and therefore, to change, supplement and abolish it depending on the different circumstances, such as the financial capability, the implementation of the measures of social policy and alike. However, when regulating such relations, the legislator is obliged to take into consideration the limits set by the Constitution, and particularly those that derive from the principles of rule of law and social justice and from those principles by which are protected certain constitutional properties and values.”

.....

“... The Constitutional Court establishes that the legal position of the state officials pursuant to Article 1, paragraph 2 of the Law has its specificities that derive from the Constitution, so the regulation of their pensions in a manner that is different from the general system of pension insurance can be based on their special legal position, legal nature of mandated political functions derived from the Constitution, increased

responsibilities in conducting such functions, publicity of work, limitations of term, incompatibility to carry out other jobs for the duration of the term, leaving of the earlier occupation or profession at that time, etc., The privileged pension of the state official, due to the nature of their constitutional duties and responsibilities could consequently represent legal expression of such specificities, but it always proportionate with general social and economic conditions in country." (Emphasis added.)

Conclusion

76. By determining the right to supplementary pension for the deputies of the Assembly of Kosovo in the amount of 50%, 60% or 70% of the actual basic salary of the deputy, depending on the number of mandates of the deputy spent in the Assembly and by determining the age of 55 as the other essential condition to gain the right to supplementary pension, it appears that the Assembly unreasonably deviated from the general rules of gaining the right to a pension set forth with UNMIK Regulation No. 2005/20 and the Law No. 03/L-084 of the Assembly of Kosovo.
77. If this is not a "supplementary pension", which it appears that it may not be, there is an insufficient description of what this legislation is: (1) severance pay; (2) salary increase; (3) bonus; (4) life insurance, or (5) gift. Since it does not have the characteristics of severance pay, salary increase, life insurance or bonus, it may be a gift without a clearly demonstrated public purpose for which there is no constitutional authority for the Assembly to award.
78. In this Referral it appears that the pensions to be paid to the retired Deputies are distinctly disproportional with the average pensions in the country. The constitutional order is based on the principles of democracy, equality, non-discrimination and social justice. It appears that because the proposed pensions are to be paid from the general budget of the Republic of Kosovo without a contribution from the Deputies and because it will result in a substantial pension (50% of the compensation for one completed mandate) that this legislation creates discrimination against the members of the general public and all other pensioners in Kosovo and infringes against the principles of equality and social justice enshrined in the Constitution without a sufficient explanation or justification of any legitimate public purpose for such discriminatory treatment.
79. The Court should also note that the Law on the Rights and Responsibilities of the Deputy, by determining pensions to the scale of 50%, 60%, and 70% of the current salary of the deputy has set pensions that will be 8-10 times higher than basic pensions that are also paid by Kosovo Budget. Such a disproportion concerning the retirement age, as well as the amount of pension compared to the basic pension, without any justification concerning the purposes aimed to be achieved, raises serious questions whether the Assembly considered Articles 7, 3 and 24 of the Constitution of Kosovo when it enacted this law.
80. The Assembly of Kosovo has not provided, at the time of enactment or thereafter, a reasonable explanation concerning the "legitimate aim it has pursued" in enacting the legislation challenged by the Ombudsperson. Without such a justification this legislation loses the general presumption that it is constitutional and compatible with the Constitution. Indeed, it appears from the minutes of the Legislative and Judicial Committee, several observers strongly recommended that this legislation not be adopted and at least one member of the Assembly suggested that this was not the appropriate time to enact such legislation. Notwithstanding these objections, this legislation was enacted without an explanation or justification or comment from the

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 - Minister of Finance or the Central Bank with respect to the fiscal or economic implications of enacting this law.
81. Therefore, it must be concluded that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, are not compatible with the Constitution of the Republic of Kosovo.
82. The Court's decision does not prevent the Assembly from enacting pension legislation for members of the Assembly nor does it prevent the Assembly from enacting legislation compensating families of members of the Assembly from being compensated in an appropriate amount if the deputy dies or is injured while serving as long as the Assembly considers the requirements of the Constitution in enacting such legislation.

FOR THESE REASONS, PURSUANT TO ARTICLE 113.2 OF THE CONSTITUTION AND ARTICLES 20 AND 27 OF THE LAW AND RULE 56 (1) OF THE RULES, THE COURT UNANIMOUSLY

- I. Holds the Referral admissible;
- II. Concludes that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, is not compatible with Articles 3.2, 7 and 74 of the Constitution of the Republic of Kosovo;
- III. Holds that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, is null and void ;
- IV. Holds that the provisions of the Court's interim order of 18 October 2011 suspending the implementation of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, and most recently extended on 20 October 2011, becomes a permanent order of the Court.
- 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



Robert Carolan




Prof. Dr. Enver Hasani