



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

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Pristina, 24 December 2012

Ref. No.: MP331/12

## **DECISION ON INTERIM MEASURES**

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 request 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 request 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 October 2012, the Referral was communicated to the President of the Republic, President of the Assembly, the Government, and the Applicant.
9. On the same date the Referral was communicated and the Court requested comments from the Parliamentary Committee for Legislation, the Central Bank of the Republic of Kosovo (hereinafter: the "CBK"), Ministry of Finance, Ministry of Public Administration, Department of Registration and Liaison with NGOs. So far, none of the above-mentioned institutions replied.

## Summary of facts

10. 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) “abstains”<sup>1</sup>.
11. On 19 April 2012, the non-governmental organizations (hereinafter: the “NGO’s”): 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, demanding that the law is not promulgated, and that the law is returned to the Assembly for review.
12. 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”).
13. The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, entered into force on 12 April 2012 pursuant Article 118 of this Law.
14. On 11 May 2012, the Ombudsperson Institution received a submission from a number of NGO’s: the Kosovo Civil Society Fund (KCSF), FOL Movement, Kosovo Democratic Institute (KDI) and 55 other supporting NGOs, 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 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.
15. The abovementioned NGO’s considered these Articles constituted violation of the Constitution and requested to suspend the implementation of the law until the Court rendered a decision on merits regarding this issue.
16. The aforementioned NGO’s consider that the following provisions: 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, violates 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.

## Applicants’ arguments

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<sup>1</sup> The transcript of 12 April 2012 states on page 21 55 (fifty-five) votes “for”, 4 (four) “abstains”, 0 (zero) against and 61 (sixty-one) deputies present. However, the Applicant in the Referral states that: “1. On 12 April 2012, the Assembly of the Republic of Kosovo approved the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions with fifty-four (54) votes in favour, none against, and four (4) abstentions.”

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

18. 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. [...]"*

19. 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. [...]"*

20. 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."*

21. 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 register of legal persons organized as NGOs in Kosovo."*

22. According to Article 4 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057,:

*"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 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."*

23. Article 5 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, clearly defines the notion and purpose of 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.[...]"*

24. Article 11.1 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-053, provides:

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

25. 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."*

26. Article 21 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides on the manners and competent bodies for deregistration, and manner of 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."*

27. In this respect, the Applicant claim 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 (NGO MFIs) 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 to applicable legislation in Kosovo regulating the freedom of association in NGOs, and endangers the future of civil society sector in general.”*

28. 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 impedes their right to operate based on the rights of association.
29. 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 status of NGO to a legal entity of Joint Stock Company.
30. The Applicant claim 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 with the Law on Freedom of Association in NGOs, and any regulation of legal status of such institutions by other laws is unlawful.”*
31. Further, the Applicant makes the argument that *“several countries do not allow legal possibilities for such transformation (as is the case in Kosovo), while others explicitly prohibit such transformation in relevant laws such as Law of the Republic of Bulgaria on Not-for-Profit Entities, Article 12, Article 42; 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.”*
32. According to the Applicant the the basic universal principle of not-for-profit sector is: *“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.”*

33. 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. In 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.”*
34. According to Article 46 of the Constitution no one may be deprived arbitrarily from 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 MFIs into joint stock companies, arbitrarily alienates NGO assets, transferring assets from the NGO to other legal or natural persons for shareholding.”*
35. According to the Applicant, *“the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, by allowing transformation of NGO MFIs 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.”*
36. In the Applicant’s opinion, *“the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is also in contradiction with the Council of Europe Recommendation CMIREC (2007) 14 of the Committee of Ministers of Member Countries on the legal status of non-governmental organizations in Europe, and the Law no. 04/L-057 on Freedom of Association in NGOs, a fundamental law providing on establishment, operations and termination of all NGOs in Kosovo.”*

### **Request for Interim Measures**

37. The Applicant request 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, due to the irreparable damage that the implementation of this law might create on the civil society until a merit-based decision is rendered on the articles mentioned.”*
38. In this respect, in order for the Court to grant interim measure pursuant to Rule 55 (4) of the Rules of Procedure, it must find, namely, that:

*“(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*

*(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*

*(..)*

*If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.”*

39. The Court, bearing in mind the role and the importance of civil society and the NGOs as the essential part of it, in development of democracy, concludes that the implementation of the Law No. 04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions, more precisely the disputed Articles 90, 95 (1.6), 110, 111 and 116 can cause an unrecoverable damage to the functioning of the civil society and democracy in the Republic of Kosovo.

40. Therefore, without prejudging the final outcome of the Referral, the request of the Applicant for interim measure is granted.

## **FOR THESE REASONS**

The Court, pursuant to Article 116(2) of the Constitution and Article 27 of the Law, on 24 December 2012, unanimously

## **DECIDES**

- I. TO GRANT interim measures;
- II. TO GRANT interim measures for a duration until 31 January 2013 from the date of the adoption of this Decision;
- III. TO IMMEDIATELY SUSPEND the implementation of the 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, for the same duration;
- IV. This Decision shall be notified to the Parties; and
- V. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

**President of the Constitutional Court**

Prof. Dr. Enver Hasani

