



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

Pristine, 09. September 2012
Ref. No.: AGJ297/12

JUDGMENT

in

Case No. KO 57/12

The Referral of the President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, Contesting the Voting for the Approval of the Law no. 04/l-084 "On Pensions of Kosovo Security Forces Members"

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 Čukalović, Judge.

The Applicant

1. The Applicant is the President of the Republic of Kosovo (hereinafter, the “President of the Republic”), Her Excellency Atifete Jahjaga through the authorized representatives Mr. Xhafer Tahiri and Mrs. Ariana Qosaj Mustafa.

Legal Basis

2. The Referral is based on Articles 84.9 of the Constitution of the Republic of Kosovo (hereafter, “the Constitution”), and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, “the Rules of Procedure”).

Procedure before the Constitutional Court

3. On 31 May 2012, the President of the Republic, through her legal representatives, submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, “the Court”).
4. On 4 June 2012, the Secretariat of the Court notified the Referral to Mr. Jakup Krasniqi, President of the Assembly of the Republic of Kosovo and Mr. Agim Çeku, Minister of the Ministry for Kosovo Security Forces.
5. On 6 June 2012, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and a Review Panel consisting of Judges Snezhana Botusharova (Presiding), Ivan Čukalović and Enver Hasani.
6. Furthermore, on 7 June 2012, the Minister for Kosovo Security Forces submitted their response to the Referral. The response from the President of the Assembly was received on 18 June 2012.
7. On 13 July 2012, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral. The Court deliberated and voted in a private session on the Referral on the same date.

Subject matter

8. The President of the Republic of Kosovo “contests the constitutionality of the voting for the approval of the Law no. 04/L-0B4 on ‘Pensions of Kosovo Security Force Members’ returned for review to the Kosovo Assembly with the Decision of the President of the Republic of Kosovo.”
9. Consequently, the President of the Republic of Kosovo addresses the Court to consider whether there has been violation of the Constitution, respectively of Article 80.4, during the vote in the Assembly regarding the Decision of the President for the Return of the law for review.

10. According to the President of the Republic, the issues for consideration before the Constitutional Court are:

“ Whether Article 80, paragraph (4) of the Constitution of Republic of Kosovo was violated during voting/adopting procedure of Law No. 04L-084 " On Pension of the members of Kosovo Security Forces" which was overturned for reconsideration to the Assembly of Kosovo with the decision of the President and consequently whether the competence of the President provided in Article 84. Para. 6 of the Constitution of Republic of Kosovo, to return the Law for reconsideration is violated”?

Summary of facts

11. On 15 March 2012, the Law No. 04/L-084 on “Pensions of Kosovo Security Force Members” (hereinafter, “the Law on Pension of KSF members”) was adopted at the Plenary Session of the Assembly of the Republic of Kosovo. 69 Deputies voted in favour of the law, while there were no against and/or abstain votes.
12. On 26 March 2012, the adopted text of the Law was received in the Office of the President of the Republic for the promulgation by the President.
13. On 3 April 2012, the President of the Republic of Kosovo issued the Decision to return for review of the adopted law (hereinafter, “the Decision to return adopted law”).
14. The legal base mentioned in the Decision on Return of Law for Review of 3 April 2012 was Article 84.6 of the Constitution.
15. In the operative part of the Decision, it was stated “the President of the Republic of Kosovo issues this Decision on return to review and with the proposal of a new Article for approval, to the Assembly of the Republic of Kosovo.”
16. Indeed, the President of the Republic proposed to the Assembly an additional paragraph to Article 27 of the Law on Pension of KSF members, as follows:

“In case of lack of public funds, the Government may downsize the benefits from the law, in order it does not endanger financial security of Kosovo.”
17. The President of the Republic concludes in the Decision to return adopted law of 3 April 2012 that *“Without incorporation of this Article, would be endangered democratic function of the institutions of Republic of Kosovo in fulfillment of the obligations and duties taken over by international agreements, which implementation was sanctioned with the Constitution”*.
18. The President then gave the reasons for the Decision, arguing that, with the signing of the Agreement for membership in the International Monetary Fund (IMF), the

Republic of Kosovo has taken over the fulfillment of certain international obligations that would make possible to Kosovo to benefit financial support in a form of soft loans as well as technical assistance. She then argued why the not signing of the agreement with IMF would cause multiple damage to the Republic of Kosovo.

19. The Decision to return adopted law of 3 April 2012 was then reviewed by the Functional Committee for Internal Affairs, Security and Supervision of Kosovo Security Force.
20. However, the Committee was not in favour of approval of the amendment as proposed by the President of the Republic.
21. On 3 May 2012, the Plenary Assembly was held. Pursuant to the transcript from that Session of 3 May 2012, the last point in the agenda was "The review of the Decision brought by the President of Kosovo to review the Law on Pension for the members of the Kosovo Security Force".
22. It can be noted from the Transcript that, after acknowledging that there are 71 deputies present the President of the Assembly, it is stated as follows: "for the Request of the President to be approved there is a need to have at least 61 votes". Finally, it was stated in the Transcript: "We conclude that with 29 votes "for", 34 "against" and 2 "abstain", the Assembly does not approve the amendment proposed by the President".
23. Also on 3 May 2012, the President of the Assembly rendered Decision acknowledging that: "1. The Assembly did not approve the amendment proposed by the President of Kosovo in the Law no 04/L-84 on Pensions of Kosovo Security Force Members". It is further stated that: "Law no 04/L-84 on Pensions of Kosovo Security Force Members, remains as it is approved in Kosovo Assembly, on 15 March 212, and it is considered promulgated."

Responses from the Parties

24. On 7 June 2012, the Minister for Kosovo Security Forces responded, expressing his support on that the Court decides if Article 80 (4) of the Constitution of Republic of Kosovo was violated during voting/adopting procedure of Law on Pensions of KSF members.
25. On 18 June 2012, the Assembly submitted their reply to the Court, emphasizing that consideration of the Decision of 3 April 2012 submitted by the President to the Assembly was in accordance with Article 80.4 of the Constitution.
26. The Assembly also referred to the earlier practice in similar situations as follows: *"Since 5 June 2008, when the Constitution of the Republic of Kosovo has entered into force, the Assembly has had cases where with majority of votes of Members of Parliament (so with 61 votes "for") has approved the remarks of President in law*

and Law is considered promulgated with the remarks of the President (in absence of 61 votes "for") and the Law has remained as it was approved previously by the Assembly and it was considered promulgated."

27. Finally, the Assembly further stated: *"In the case of decision-making in the Assembly, with no provision of the Constitution of the Republic of Kosovo was not foreseen that in the case of the approval of any act in the Assembly to be requested to vote "Against" by majority of the Members of the Parliament."*

Admissibility of the Referral

28. The Constitutional Court, pursuant to Article 113.1 of the Constitution, has jurisdiction to decide only on matters referred to the Court in a legal manner by authorized parties.

29. In this respect the Court would like to recall Article 84.9 of the Constitution that insofar relevant, reads as follows:

*"Article 84 [Competencies of the President]
The President of the Republic of Kosovo...*

(9) may refer constitutional questions to the Constitutional Court..."

30. It is clear therefore that the pursuant to Article 84(9) of the Constitution, the President of the Republic of Kosovo is authorized to refer constitutional questions to the Constitutional Court.

31. The Constitutional Court notes that there are two questions posed by the President of Republic, that will consider under following order:

1) Whether the competence of the President provided in Article 84 (6) of the Constitution of Republic of Kosovo, to return the law for reconsideration has been violated?

2) Whether Article 80 (4) of the Constitution of Republic of Kosovo was violated during voting/adopting procedure of Law on Pensions of KSF members"?

32. For a Referral to be declared admissible the Constitution requires that the matter be referred to the Court in a legal manner by an authorized party, according to Article 113.1 of the Constitution. The Court finds that the questions of the President of the Republic are raised in a legal manner. The Constitutional Court, as the final authority for the interpretation of the Constitution, also considers that these questions are of a constitutional nature. Therefore the President of the Republic has raised constitutional questions and it is an authorized party.

33. The questions raised are constitutional questions as prescribed by Article 84 (9) of the Constitution. It is therefore not necessary to consider the Referral in the context of Article 113.3.1 of the Constitution.
34. Accordingly, the Referral is admissible.

Merits

35. At the outset, the Court would like to refer to the above mentioned facts of the case as summarized in paragraphs 16 and 17 above. As it was mentioned in the operative Decision of 3 April 2012 issued by the President it was stated as follows: “the President of the Republic of Kosovo issues this Decision on return to review and with the proposal of a new Article for approval, to the Assembly of the Republic of Kosovo.”
36. Consequently, the President of the Republic proposed to the Assembly an additional paragraph to Article 27 of the Law on Pension of KSF members.

Whether the competence of the President to return the law for reconsideration has been violated?

37. In order to assess the first constitutional question posed by the President, the Court needs to examine whether the President of the Republic when exercising the powers prescribed in Article 84(6) of the Constitution has the right to propose amendment to laws adopted by the Assembly pursuant to Article 80(1) of the Constitution without challenging the adopted law or any of its specific provisions.
38. The Court notes that the President of the Republic did not return any specific provision of the adopted Law on Pension of KSF members that she considered that is harmful either to the legitimate interests of the Republic or one or more Communities. The President instead proposed an additional paragraph to Article 27 Law on Pension of KSF members.
39. In addressing this issue the Court needs first to assess the constitutional competences of the President to return the adopted law for review as prescribed by Article 84.6 of the Constitution.
40. Article 84.6 of the Constitution [Competencies of the President] reads:

“The President of the Republic of Kosovo has the right to return adopted laws for reconsideration, when he/she considers them to be harmful to the legitimate interests of the Republic of Kosovo or one or more Communities. This right can be exercised only once per law.”
41. This provision of the Constitution should be read in conjunction with Article 80 paragraphs 3 and 5 of the Constitution that reads:

“Article 80[Adoption of Law]

...

3. If the President of the Republic of Kosovo returns a law to the Assembly, he/she should state the reasons of return. The President of the Republic of Kosovo may exercise this right of return only once per law.

...

5. If the President of the Republic of Kosovo does not make any decision for the promulgation or return of a law within eight (8) days from its receipt, such a law shall be considered promulgated without her/his signature and shall be published in the Official Gazette.”

42. The Constitution thus prescribes that the President of the Republic have the right to exercise the so-called “suspensive veto” to provisionally suspend the promulgation of the law.
43. In this way, the President of the Republic is the head of the State that represents the unity of the people (as defined by Article 83 of the Constitution) and is guarantor of the democratic functioning of the institutions of the Republic of Kosovo, and exercises certain legislative review function.
44. The Court considers that this function of the President, as prescribed by the Constitution, is of a rather limited nature for, *inter alia*, the reasons that follow.
45. Firstly, the President can exercise the right to provisionally suspend promulgation of the law at the stage when the law, being already adopted in the proper form by the Assembly (in accordance with Article 80.1 of the Constitution), needs only to become effective (see Article 80 paragraphs 2 and 3 of the Constitution). Only then, the President may intervene.
46. Secondly, the President has to intervene within eight days from the receipt of the adopted law; otherwise a law should be considered promulgated in line with Article 80.5 of the Constitution.
47. Thirdly, the President has to set out the reasons of returning the law at issue.
48. These reasons can only be related to the consideration of the President that promulgation of the law is harmful either to the legitimate interests of the Republic of Kosovo or one or more Communities (see Articles 80.3 and 84.6 of the Constitution).
49. Fourthly, the President may exercise this right to return a law only once per law (see Article 80.3 of the Constitution).
50. The Court is cognizant that the right of the Presidential veto in order to return a law back to parliament can be found in a number of constitutions.

51. For example, in France, Article 10 of the Constitution provides as follows: *"The President of the Republic shall promulgate acts of parliament within a period of 15 days following their final adoption and transmission to the government. He may, before the expiration of this time limit, ask parliament to reconsider the act, or some of its articles. This reconsideration may not be refused."*

52. On the other hand, Article 42 of the Greek Constitution provides as follows:

"Article 42 [Ratification of Laws, Veto]

(1) The President of the Republic shall issue and publish the laws passed by Parliament within one month from the passing thereof. The President of the Republic may, within the time limit specified in the foregoing paragraph, send back to Parliament a bill passed thereby, stating the reasons for his veto.

(2) A bill or private member's bill vetoed by the President of the Republic shall be brought before the Plenary Session of Parliament, and should it be passed again by the absolute majority of the total number of deputies, according to the procedure laid down by Article 76 (2), the President of the Republic shall issue and publish such bill within ten days from the second passing thereof."

53. Furthermore, the Constitution of Bulgaria in Article 101 defines the Veto of the President as follows:

"Article 101 [Veto]

(1) Within the term established by Article 88 (3), the President is free to return a bill together with his motives to the National Assembly for further debate, which shall not be denied.

(2) The new passage of such a bill shall require a majority of more than half of all Members of the National Assembly.

(3) Following a new passage of the bill by the National Assembly, the President shall promulgate it within seven days following its receipt".

54. Moreover, Article 72 of the Constitution of Lithuania prescribes the following procedure:

"The Seimas may consider new and adopt the law which has been referred back by the President of the Republic.

The law reconsidered by the Seimas shall be deemed adopted provided the amendments and supplements submitted by the President of the Republic were adopted or if more than 1/2 of all the Members of the Seimas voted for the law, and if it was a constitutional law—if not less than 3/5 of all the Members of the Seimas voted for it.

The President of the Republic must within three days sign and forthwith officially promulgate such laws".

55. In addition, according to Article 1, Section 7 of the United States of America Constitution, *“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”*
56. Finally, Article 136 (Enactment and veto) of the Constitution of Portugal establishes that:
- “1. Within twenty days of the receipt of any decree of the Assembly of the Republic for enactment as a law, or of the publication of a Constitutional Court ruling that does not declare any of the decree’s provisions unconstitutional, the President of the Republic shall either enact the decree or exercise the right of veto. In the latter case he shall send a message setting out the grounds therefore and requesting that the statute be reconsidered.*
- 2. If the Assembly of the Republic confirms its original vote by an absolute majority of all the Members in full exercise of their office, the President of the Republic shall enact the decree within eight days of receiving it”.*
57. Turning to the case at issue, the Court notes that the President of the Republic, on 3 April 2012, issued the Decision to return adopted law within the time limit prescribed by the Constitution. The Court also notes that the legal base was Article 84.6 of the Constitution.
58. The Court further notes that the Constitution of Kosovo, similarly as above mentioned Constitutions, obliges the President to state the specific reasons of returning the law to the Assembly.
59. In some countries such as in Lithuania the Constitution explicitly provides that the President of the Republic may submit amendments and supplements to the returned law.
60. That is not the case in the Republic of Kosovo.

61. Indeed, the Constitution of Kosovo does not provide that the President of the Republic has the right to propose amendments to the returned law for reconsideration.
62. The Court is mindful that Article 79 of the Constitution prescribes that the President has the initiative to propose laws from his/her scope of authority.
63. That provision of the Constitution is further elaborated in Article 53.1 of Rules of Procedure of the Assembly of Kosovo that reads:

“A Draft Law may be introduced to the Assembly by the President of the Republic of Kosovo within her scope of activities...”
64. The Rules of the Procedure of the Assembly further elaborates in Article 54 conditions for presenting a Draft-Law, such as an explanation note, declaration on budgetary implications, etc.
65. However, the President of the Republic in the present case did not exercise the right pursuant to Article 79 of the Constitution and further elaborated in Articles 53.1 and 54 of the Rules of Procedure of the Assembly to introduce the Law and/or its amendments to the Assembly.
66. Accordingly, based on the facts described above, the Court considers that the competence of the President of the Republic to return the law for reconsideration, as provided in Article 84 (6) of the Constitution, has not been violated.

Whether Article 80 (4) of the Constitution of Republic of Kosovo was violated during voting/adopting procedure

67. The Court would like now to address the second question posed by the President as follows: *Whether Article 80 (4) of the Constitution of Republic of Kosovo was violated during voting/adopting procedure of Law No. 04L-084, on Pension of the members of Kosovo Security Forces?*
68. The Court is mindful that the elaboration of the second question may be considered redundant *vis-a-vis* its finding in the first constitutional question.
69. The Court is of the view that there is clear obligation of the Assembly of Kosovo prescribed in Article 80.4 of the Constitution as follows

“The Assembly decides to adopt a law returned by the President of the Republic of Kosovo by majority vote of all its deputies...”
70. However, such obligation of the Assembly of Kosovo does not exist in case that the President of the Republic proposes amendments to the returned law for reconsideration.

71. Notwithstanding that, the Court, as the guardian of the Constitution and its final interpreter, considers that it is necessary to answer to all constitutional questions posed in this referral.
72. With regard to the procedure of adoption of law, Article 80 [Adoption of Laws] provides as follows:
- “1. Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.*
- 2. Laws adopted by the Assembly are signed by the President of the Assembly of Kosovo and promulgated by the President of the Republic of Kosovo upon her/his signature within eight (8) days from receipt.*
- 3. If the President of the Republic of Kosovo returns a law to the Assembly, he/she should state the reasons of return. The President of the Republic of Kosovo may exercise this right of return only once per law.*
- 4. The Assembly decides to adopt a law returned by the President of the Republic of Kosovo by a majority vote of all its deputies and such a law shall be considered promulgated.*
- 5. If the President of the Republic of Kosovo does not make any decision for the promulgation or return of a law within eight (8) days from its receipt, such a law shall be considered promulgated without her/his signature and shall be published in the Official Gazette.*
- 6. 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.”*
73. The Court recalls that the Constitution distinguishes between the terms “majority votes of deputies present and voting” and “a majority vote of all its deputies”.
74. The Constitutional Court notes that Constitution uses the term “all its deputies” at several places, such as in Articles 76, 86 (4), 86(5), 90 (2).
75. The Constitutional Court recalls that the Assembly of the Republic of Kosovo consists of 120 deputies. Consequently, when the Constitution refers to “all deputies”, it actually refers to “120 deputies”.
76. Consequently, provided that the President of the Republic exercised the veto power as prescribed in Article 80.3 of the Constitution, in order to overturn that Presidential veto, it would be necessary that at least 61 deputies vote in favour of the adopted law that was returned by the President of the Republic.
77. Accordingly, based on the facts described above, the Court considers that Article 80 (4) of the Constitution of Republic of Kosovo was not violated during voting/adopting procedure of the Law on Pension of KSF members.

**FOR THESE REASONS THE COURT, UNANIMOUSLY,
DECIDES AS FOLLOWS:**

- I. The Referral is admissible;
- II. The competence of the President of the Republic to return the law for reconsideration, as provided in Article 84 (6) of the Constitution, based on the facts described in this Judgment, has not been violated.
- III. Consequently, Article 80 (4) of the Constitution of Republic of Kosovo was not violated during voting/adopting procedure of the Law no. 04/L-0B4 on 'Pensions of Kosovo Security Force Members.'
- IV. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- V. This Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court


Altay Suroy


Prof. Dr. Enver Hasani