



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

Pristina, 16 April 2013
Ref. no.:MP407/13

Case No. KO 97/12

Applicant

The Ombudsperson

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

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

DISSENTING OPINION
of Judge Almiro Rodrigues

The Majority has declared that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions (hereinafter, the Law) are incompatible with the Constitution of the Republic of Kosovo in that those articles of the Law are in violation of Articles 10, 44 and 46 of the Constitution.

However, in our view and with all respect, the Majority should have first taken into account an essential preliminary aspect in relation to the legislative process, that is: the organized sequence of steps established by the Constitution and designed to enact a carefully weighed and well-considered law.

In fact, during the oral hearing in Case No. KO 97/12, the Ombudsperson raised procedural questions pertinent to the legislative process of the Law under review.

Firstly, the Ombudsperson mentioned that the Law was reviewed and approved by the Committee on Budget and Finance, as a functional committee of the Assembly, and proceeded with directly at the plenary session, where it was adopted as such without ever having been reviewed and approved by the permanent Committee for Legislation.

Secondly, the Ombudsperson mentioned that the quorum needed to adopt a law was not observed. The Ombudsperson invoked Article 69.3 of the Constitution and Article 51 of the Rules of Procedure of the Assembly. Both Articles stipulate that *“the Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present”*.

The Ombudsperson stated that the official data presented on the website of the Assembly of Kosovo show that 54 deputies voted in favor of adopting the Law, 4 abstained, and one deputy reported that, due to technical reasons, he was unable to vote. Thus, the total number of deputies present and voting in the plenary session was 59.

According to Article 64.1 of the Constitution, the *“Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists”*. Therefore, the required number of deputies to form a quorum is 61 or more than one half (1/2) as stipulated in Article 69.3 of the Constitution.

On the other side, Article 80 [Adoption of Laws] of the Constitution establishes:

“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. [...].”

Thus, again based on official data of the Assembly of Kosovo, on the day of the adoption of the Law 59 deputies were present and voting, which falls short of the number of deputies required.

The corollary is that the procedure for adopting the Law was not observed nor did it meet the procedural requirements to have a quorum as expressly established by the combined constitutional provisions of Articles 64.1, 69.3 and 80.1 of the Constitution. As a consequence, the Law cannot be considered to have been adopted in accordance with these Articles and, thus, is not valid.

Thirdly, even assuming that the Law was properly adopted, it could not have entered into force on the same date as the date of the adoption, which is 12 April 2012. In this regard, two constitutional provisions come into play: Article 80.2 and 80.6, and Article 84.5 and 84.6 of the Constitution.

Article 80 [Adoption of Laws] of 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.

[...]

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.”

Article 84 [Competencies of the President] of the Constitution

“The President of the Republic of Kosovo:

[...]

(5) promulgates laws approved by the Assembly of Kosovo;

(6) has the right to return adopted laws for re-consideration, 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;

[...].”

This means that the Law entered into force in disregard of the competencies of the President of the Republic established under Article 84 of the Constitution, thus without following the indispensable procedural requirements provided for by the Constitution.

In conclusion, the Law did not meet the quorum requirement as established by the combined constitutional provisions of Articles 64.1, 69.3 and 80. 1 of the Constitution; even assuming that it did, the Law could not have entered into force without being promulgated and considered by the President of the Republic of Kosovo; and the Law could not have entered into force before having been published in the Official Gazette.

Even though the aforementioned failures are of a procedural nature, they produce substantial consequences, because they impact on the principles which are the foundations of the Republic of Kosovo.

In this respect, Article 4 [Form of Government and Separation of Power] stipulates:

“1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.

2. The Assembly of the Republic of Kosovo exercises the legislative power.

3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.

[...].

6. The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution.

[...].”

In our view, the control of the constitutionality of laws consists of the examination of their compatibility with the Constitution as well as of the checking of their conformity with formal and material requirements. The Constitution demands that laws shall be prepared and enacted in a certain way and with a certain content. Thus, there will be unconstitutionality, if a given normative act is produced without the proper procedures of the legislative process as defined in the Constitution having been followed.

Failures in the procedures regarding adoption, promulgation and publication procedures of the Law disturb *“the checks and balances among [the powers] as provided in this Constitution”* and the competency of the President of the Republic to act as *“the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution”*. Therefore, those failures fall under the jurisdiction of the Court when protecting the constitutionality of normative acts.

Whenever a constitutional question is raised before the Court, regarding the abstract control of the constitutionality of normative acts, the Court must follow a three steps procedure, before embarking on the substantive examination of such acts. This three steps procedure entails the following: the examination of the competence of public authorities to issue a normative act; the examination of the procedure for issuing a normative act; and, finally, the examination of the substantive conformity of the normative act with the Constitution¹.

In the case at issue, the competence of the Assembly to exercise *“the legislative power”* to issue the Law is not disputable.

However, the followed legislative process for the issuance of the Law under review is indeed disputable, since it was characterized by multiple shortcomings at several levels as set out above. In our view, the Majority should have taken them into account.

In conclusion, by not respecting the procedures defined in the Constitution, democracy, rule of law and human rights were jeopardized. The adoption of the Law without the constitutionally required quorum breaches the democratic principle; the entry into force of the Law on the day of its adoption without the constitutionally required promulgation by the President of the Republic of Kosovo and publication on the Official Gazette, is not only in contravention with the principle of the separation of powers and checks and balances provided by the Constitution but also with the right of citizens to legal certainty and predictability as central aspects of the principle of the rule of law. Publication is an essential requirement for the law to be made known to the people who are to be bound by it.

Bearing in mind all the foregoing, the Constitutional Court as an independent organ in protecting the constitutionality and final interpreter of the Constitution (Article 4. 6 of the Constitution) should have stepped in and reinforce the supremacy of its regular constitutional power.

¹ See European Commission for Democracy through Law (Venice Commission), 30 June – 1 July 2005 Vilnius Lithuania, REPORT “Examining of facts in cases involving abstract control of normative acts” by Marek Safjan, President, Constitutional Court, Poland.

Thus, the examination of the substantive conformity of the Law with the Constitution should not have been undertaken by the Court, without prior consideration of the challenged procedural failures in the enactment of the Law under review.

Therefore, the Court should not have dwelled on the challenged provisions of the Law, because substantive procedural violations render the rest of the Referral without consequence.

Respectfully submitted



Almiro Rodrigues, Judge

