

VIOLATION OF LEGAL CERTAINTY IN THE CASE OF LAW AMENDMENTS THE CASE OF KOSOVO (AMENDMENT OF THE LAW ON ENFORCEMENT PROCEDURE)

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Abstract

The law-making process is a very important but quite a complicated process. Competent state institutions during the process of enacting laws, and especially when it comes to approval of laws which amend current laws, must be very careful in terms of guaranteeing the rights that individuals have acquired with previous legislation. The treatment of this scientific paper aimed at identifying the problem that appears in cases of laws amendments, which do not guarantee legal security as well as legitimate and reasonable expectations for individuals who have acquired their rights with previous laws and are currently in the phase of realizing those rights. Specifically, the purpose of this paper was to identify the problem that the Law no. 05/L-118 on Amendment and Supplement to the Law no. 04/L-139 on the Enforcement Procedure has been established by not defining any provision according to which the individuals who have commenced the enforcement procedure before the entry into force of this law, to continue procedure according to the previous law, respectively according to Law no. 04/L-139 for the Enforcement Procedure. The realization of this scientific paper has been done through the analytical method, more specifically through the analysis of laws and the Constitution of the Republic of Kosovo, and also through the analysis of the European Court of Human Rights decisions. Through this scientific paper, it has been pointed out that the legal amendments should carefully regulate the cases that were being conducted before the concrete law entered into force. In other words, in order to maintain legitimate and reasonable expectations, the Kosovo legislator, in the Law no. 05.L-118 on Amendment and Supplement to the Law no. 04/L-139 on the Enforcement Procedure should have establish a provision that guarantees individuals that the procedures that commenced before the entry into force of this law, continue according to the previous law. The lack of such provision has resulted in a series of human rights violations. At the end of this paper, it is ascertained that every time during the process of amending applicable laws, must be defined provisions that guarantee to persons the realization of their rights according to the laws by means of which court procedures or other procedures have been initiated. Such a rule, assures the parties that their rights must be realized according to the legislation that was in force at the time when they commenced procedures for the realization of their rights.

Keywords: Amendment of Norms, Legitimate Expectation, Legal Certainty, Enforcement Procedure

CASE SUMMARY

The legislative process as a process of establishing rules to society, is accompanied by competencies and procedures that are delegated to certain state institutions. In this regard, the Assembly of the Republic of Kosovo (hereinafter the Assembly), from the competencies delegated by the Constitution of the Republic of Kosovo (hereinafter the Constitution), enacts laws (Constitution of the Republic of Kosovo, 2008, Article 65, paragraph 1). Based on these

competencies the Assembly approves new laws, but also enacts amendments and supplements to current laws. Amending and supplementing current laws is done in order to advance the normative level in the existing legislation. According to the rule, it should be considered that amending and supplementing laws would have a positive impact in terms of legal regulation and the realization of rights of individuals arising from those laws. However, such practice does not always occur, when laws are amended and supplemented in the Republic of Kosovo. Having in mind the great importance of the enforcement procedure, the Republic of Kosovo has paid special attention to this matter by adopting special laws that have regulated the enforcement procedure.

Initially, we should emphasize that the term “*Enforcement*” means the putting into effect of judicial decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay \what has been adjudged” (Recommendation Rec (2003)17 of the Committee of Ministers, part I [Definitions] letter a).

Bearing in mind the fact that: “*Enforcement of a court judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with Article 6 of the European Convention on Human Rights (hereinafter referred to as “the ECHR”)*”, (Recommendation Rec (2003)17 of the Committee of Ministers, introductory part), the Republic of Kosovo has continuously made efforts to ensure that the enforcement procedure is covered by legal rules.

Concerning this issue, the Assembly on December 20, 2012, approved the Law no. 04/L-139 on Enforcement Procedure (hereinafter the Law no. 04/L-139), which defined “*the procedure through which Courts and private enforcement agents determine and implement enforcement [. . .]*” (the Law no. 04/L-139 on Enforcement Procedure, article 1, paragraph 1).

Under the Law no. 04/L-139, respectively Article 13 [Enforcement expenses], paragraph 4, it is determined as following: “*The debtor has the duty to pay to the creditor the procedural expenses and all other expenses incurred during the enforcement procedure.*” According to this legal provision, the financial burdens during the development of enforcement procedure shall be addressed to the debtor, as the party against whom the enforcement procedure is conducted.

Furthermore, on April 18, 2017, the Assembly approved the Law no. 05/L-118 on Amendment and Supplement to the Law no. 04/L-139 on the Enforcement Procedure (hereinafter Law no. 05/L-118). This law has amended and supplemented the Law no. 04/L-139 (the Law no. 05/L-118 on Amending and Supplementing the Law no. 04/L-139 on Enforcement Procedure, Article 1). The legal amendments introduced by the Law no. 05/L-118 are also reflected to the part of enforcement expenses, respectively to the part of efficiency fee as well as the subject to whom this fee is charged. In other words, the Law no. 05/L-118 has determined as following “*[. . .] the enforcement efficiency fee is a fee, which is paid by the creditor [. . .]*” (the Law no. 05/L-118, Article 4, paragraph 2). According to this definition, it is implied that the creditor is

obliged to pay the efficiency fee if he/she wants to realize his/her right through the enforcement procedure.

In terms of international regulation, it is noted that the Council of Ministers by Recommendation Rec (2003)17, on enforcement (hereinafter Recommendation Rec (2003)17), in part III point 5 has determined as following “The necessary costs of enforcement should be generally borne by the defendant, notwithstanding the possibility that costs may be borne by other parties if they abuse the process” (Recommendation Rec (2003)17 of the Committee of Ministers, Part III [Enforcement Procedures], point 5).

Furthermore, according to the European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement (hereinafter CEPEJ Guidelines for the Efficiency of Justice), is stipulated as following:” Enforcement fees should be borne by defendants, where he or she is solvent, together with the possibility of a performance fee borne by the claimant. Where the defendant is insolvent, the enforcement fees should be paid by the claimant.” (CEPEJ Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement, Chapter II [Realization of Enforcement], Part 2 [Costs of Enforcement], subsection 2.5 [Allocation of Enforcement Costs], § 60).

Based on what was emphasized above, it is noted that the Law no. 04/L-139 is in accordance with Recommendation Rec (2003)17, whereas the Law no. 05/L-118 is in compliance with the CEPEJ Guidelines for the Efficiency of Justice. However, we shall not stop to analyze the matter of the norm composition in this manner, hence our focus shall be oriented to the cases that have commenced to be processed according to the Law no. 04/L-139, before the Law no. 05/L-118 entered into force, and which norm should be applicable after the entry into force of the Law no. 05/L-118. We shall not stop to analyze whether the amendment of this norm is in order or not, because we consider that it is completely at the state discretion to establish rules through the adoption of new laws and the amendment of current laws, however our focus lies in the direction of identifying whether such legal amendment’s guarantee the concept of legitimate and reasonable expectation and the legal certainty of norm.

Having this in mind, when such legal amendments emerge, it is necessary to clarify the following dilemma:

What happens in those cases when the subjects that have acquired a right and have commenced the procedure for realizing that right before the Law no. 05/L-118 entered into force? Which norm should be applicable in this particular case?

We think that the legal amendments that entered into force after individuals commenced procedures for the realization of their rights, should not be applied when it comes to the continuation of those procedures. We state this considering that the new legal norm (the Law no. 05/L-118) is less favorable for the creditor, who has initiated the enforcement procedure according to the Law no. 04/L-139, and its application in such cases would establish a bad practice, which in addition to violating the legal certainty of norm, would also infringe the legitimate and reasonable expectation of individual.

In such cases of legal amendments, the legislators should carefully address the legal certainty of persons who have been involved in court proceedings, or have acquired any rights but are involved in enforcement proceedings, which did not happen in this case. Bearing in mind this fact, the Law no. 05/L-118 has not determined in any legal provision whether the legal amendments shall not apply to those subjects who are conducting the enforcement procedure for the realization of their rights. Such a situation brings legal uncertainty of the norm, due to the fact that it does present an uncertain and unstable legal norm, which may be amended by the Assembly, and bring difficulties to subjects who are being involved in judicial procedures, or have acquired any right under the previous law, however that right has not yet been realized. In such cases, the subjects must have the guarantee when they start realizing of a right according to a legal norm, that right must be realized in compliance to that norm, unless the amendments in norms bring a more favorable position for the party, in the interest of whom the procedure is being conducted, without excluding the protection of economic interest of the party against whom the procedure is conducted.

If this matter is analyzed in more detail, we draw the conclusion that subjects who have acquired a right in court proceedings, during the enforcement of that court decision, according to the recent amendments appearing by the Law no. 05/L-118, their legal and property interest is violated. Specifically, if a subject has acquired a right in a contested procedure, according to the Law no. 03/L-006 on Contested Procedure (hereinafter referred to as the Law no. 03/L-006), is guaranteed that “the party which loses the judicial process completely has the duty to the opposing party that wins the case, and the intervener who has joined it, to pay all court costs”, (the Law no. 03/L-006 on Contested Procedure, Article 452, paragraph 1). According to this legal definition, the party that has won the court case does not bear procedural costs for the conducted procedure until the court decision is rendered, however, the situation established by the Law no. 05/L-118 obliges the party who has won the court case to pay the efficiency fee if he/she wants to realize his/her right that has acquired in the court procedure.

We consider that the enforcement procedure should not be observed separately from the contentious procedure, because the execution of court decisions is an inseparable part of the judicial process entirely, and we estimate that the amendments appearing in the Law no. 05/L-118 do infringe the legal and property interest of persons who have acquired a right in the contested procedure, before the Law no. 05/L-118 entered into force.

Based on what was emphasized above, the following dilemma arises that:

Where does the legal certainty of norm remain, specifically the legitimate and reasonable expectation of the party in case of realizing his/her right through the enforcement procedure?

In such situations, these two concepts are inseparable from each other. Concerning the legal certainty concept of norm, we consider that this concept must not in any case be violated by legal amendments, and that in such cases the legislator should always take into account the fact that individuals must have guaranteed the possibility of realizing their rights that are recognized by law. In other words, according to this concept, the legislator should take into account that

the new norm should recognize the effect and result established by the previous legal norm which it has amended. Whereas related to the concept of legitimate and reasonable expectation, we note that the European Court of Human Rights (hereinafter ECtHR), in its decisions has rendered several opinions clarifying this matter. Regarding this issue, the Republic of Kosovo, respectively the Constitution of Kosovo, has determined as follows: “Human rights and fundamental freedoms guaranteed by this Constitution are interpreted in harmony with the judicial decisions of the European Court of Human Rights.” (Constitution, 2008, article 53). In this regard, the ECtHR decisions, not only help the Constitutional Court during decision-making process, but also help other bodies and public offices on how fundamental rights and freedoms in Kosovo should be interpreted and applied. Therefore, bearing in mind this constitutional guarantee, we consider that the evaluation of legitimate expectation concept should be based on findings according to the ECtHR decisions.

According to this assessment, it may be concluded that the concept of legitimate and reasonable expectation in terms of protecting subjective rights is a comprehensive concept of interpretation in international judicial practice. According to the ECtHR (case of. *Kopecky v. Slovakia*, application no. 44912/98, date 28. 9. 2004, § 45-52; case of. *Gratzinger and Gratzingerova v. Czech Republic*, application no. 39794/98, § 73), “legitimate expectation” should be of a concrete nature and must be based on legal provisions and legal acts. In the current case, the legitimate expectation of persons who have acquired a right through the contentious procedure or are in the process of realizing their right through the enforcement procedure, before the Law no. 05/L-118, is based on the right acquired by the Law no. 03/L-006 respectively the Law no. 04/L-139.

Moreover, the subjective rights acquired under the Law no. 03/L-006 and the Law no. 04/L-139 in the period of time before the Law no. 05/L-118 entering into force, must be conducted entirely according to the laws that existed at the time of acquiring that right, otherwise the legal certainty of norm shall be violated and the legitimate and reasonable expectation shall also be infringed.

Therefore, it is important to emphasize that when the court has rendered a decision according to a certain law, in the concrete case according to the Law no. 03/L-006, and that the implementation of that decision has commenced under the Law no. 04/L-139, however the enactment of the Law no. 05/L-118 has established new rules which shall negatively affect the economic interest of the parties to court procedure, the violation of legitimate and reasonable expectations comes to expression, because the party has not been able to realize his/her right that has acquired under the law. In other words, this entire procedure is identified with the right to due process.

Concerning the issue of the right to a due process, we can point out that the European Convention on Human Rights, in Article 6 [Right to a Due Process], and the Constitution in Article 31 [Right to a Fair and Impartial Trial], protect the implementation of final and enforceable court decisions (case of *Scordino v. Italy*, application no. 36813/97, Judgment of the Constitutional Court of the Republic of Kosovo KI 65/15, dated October 25, 2016). This right to the execution of final and enforceable decisions is included in the domain of rights in

court. When it comes to the matters of executing enforceable decisions, the ECtHR has found that the state remains ultimately responsible for ensuring compliance with a judgment and maintaining the rule of law (case of *Immobiliare Saffi v. Italy*, Application No. 22774/93, § 66). Also, the state enjoys considerable freedom regarding the organization of a system for the execution of final and enforceable decisions, hence this system must be effective according to the law, however in practice as well must be ensured the implementation of final and enforceable decision without unnecessary delays (case of *Immobiliare Saffi v. Italy*, Application No. 22774/93, §66).

According to these definitions, the state's right to enact new laws cannot be contested, however the state must enact laws that increase the efficiency of judicial procedures, and not having a negative impact in that direction, by reflecting also on legitimate and reasonable expectation.

We may consider that the enactment of such laws, which do not contain any guarantee for the rights of the parties that were acquired by previous laws and that are involved in the enforcement procedure, also affects the delay of procedures when it comes to execution of those decisions. Such phenomenon only establishes a bad and inefficient practice in the Republic of Kosovo judiciary, which is also currently facing the problem of court procedures procrastination.

Regarding the issue of court proceedings procrastination, it is important to emphasize that, in addition to the cases of court proceedings procrastination before the final decision is being rendered in a particular case, the ECtHR has concluded that the procrastination of executing such decision after being rendered, it may also present a violation of the right to a trial within a reasonable time. For example, the ECtHR has found that *“the right to trial guaranteed by Article 6 would be illusory, if the national legal system of a Contracting State would allow a final and binding court decision to remain ineffective, to the detriment of a party”* and that *“effective access to court includes the right to have a court decision executed without unreasonable delay”* (case of *Yuriy Nikolayevich Ivanov v. Ukraine*, Application No. 40450/04, October 15, 2009, § 51, citing *Hornsby v. Greece*, Application No. 18357/91, 19 March 1997, § 40 and *Immobiliare Saffi v. Italy*, Application No. 22774/93, § 66).

Hence, according to the ECtHR findings, we may draw the conclusion that the state must be very careful when it comes to enacting laws for the establishment of certain systems, in the concrete case of creating and advancing the enforcement system, because the frequent amendment of legal norms must also include the guarantee that guarantees to the parties the rights that they have acquired according to other laws. Such an action by state institutions shall guarantee an efficient legal system, including the legal certainty of a norm as well as the legitimate and reasonable expectation.

From all that was emphasized above, we consider that the state has a positive obligation to establish norms that efficiently regulate the enforcement system as the final system of the judicial system in general, however, the state must be responsible for creating guarantees during the establishment of norms for individuals who have acquired subjective rights according to other laws and have commenced realizing those rights before the new legal norm

enters into force. In this manner, the state, in addition to fulfilling its positive obligation, at the same time positively affects the preservation of norm legal certainty as well as the preservation of legitimate and reasonable expectation of the parties.

CONCLUSION

From the analyzes conducted in this scientific paper, it may be concluded that the state is responsible for enacting and amending rules when it considers necessary.

However, in this process, the state remains responsible for guaranteeing legal certainty as well as legitimate and reasonable expectation for those persons when their rights have been acquired by other laws, which were applicable, before the new legal norms entered into force.

In this concrete case, the Republic of Kosovo by the Law no. 05/L-118 has failed to preserve the legal certainty of norm nor to preserve the legitimate and reasonable expectation because it has not established a provision which would guarantee the persons that the procedures commenced before the entry into force of the Law no. 05/L118, to continue according to the laws that initiated those procedures. Therefore, due to the lack of such provision, the legal uncertainty of the norm has been appeared as well as legitimate and reasonable expectation has also been violated. We state that the legal uncertainty of norm has been appeared because the amendment of the Law no. 04/L-139 through the Law no. 05/L-118, without establishing any provision which shall guarantee the continuity of cases that have commenced according to the Law no. 04/L-139, makes the law uncertain and establishes a bad practice which may also occur in the future, or in other words the laws could be amended at any time, and that the effect of procedures that have commenced under those laws shall not remain anywhere.

Whereas, concerning the violation of legitimate and reasonable expectation concept, we consider that in the case of amendment of the Law no. 04/L-139 by the Law no. 05/L-118, without establishing a provision which shall guarantee the continuation of cases that have commenced according to the Law no. 04/L-139, it prevents individuals from realizing their rights according to the law by means of which the procedures for the realization of those rights have commenced. In other words, individuals shall not be able to realize their rights according to the laws that have commenced the procedures, consequently they must obey the rules established by the Law no. 05/L-118, which are less favorable for them in economic terms.

Therefore, in the questions raised above that:

What happens in those cases when the subjects have acquired a right and have commenced the procedure for realization of that right before the Law no. 05/L-118 entered into force? Which norm should be applied in this particular case? AND

Where does the legal certainty of norm remain, specifically the legitimate expectation of the party in the case of realizing his/her right through the enforcement procedure?

Regarding the first question, it may be concluded that the legal amendments should not interfere in cases that commenced to be processed before the Law no. 05/L-118 entered into force. In such cases, the rules according to the Law no. 04/L-139 should be applicable.

Concerning the second question, it could come to the conclusion that in the specific case of amendment of the Law no. 04/L-139 by the Law no. 05/L-118, the legal certainty of the norm has been violated and the legitimate and reasonable expectation of the party has also been infringed, because the norm has amended without a guarantee that the initiated cases shall continue according to the previous laws, and the parties have also been prevented from realizing their rights according to legal provisions, by means of which the enforcement procedures have commenced. We consider that the Republic of Kosovo should strictly adhere to such rules because the establishment of such practices has negative impacts with wide reflections that are related to human rights but also to the efficiency of judiciary entirely, and to the efficiency of the state in general.

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