REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 25 January 2023
Ref. no.: MK 2320/23

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CONCURRING OPINION

of Judge

REMZIJE ISTREFI PECI

in

case no. KO55/23

Applicant
President of the Assembly of the Republic of Kosovo
Assessment of the proposed constitutional amendments, referred by the President of the Assembly of the Republic of Kosovo on 2 March 2023, by letter no. 08/3509/Do/1493/1

Expressing from the beginning my respect and agreement with the opinion of the majority of judges, that the case is admissible for review, and that that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of Article 104 [Appointment and Removal of Judges] and paragraph 6 of Article 109 [State Prosecutor] of the Constitution, with the wording "*has been continuously evaluated with insufficient performance*" or "*has committed serious disciplinary violations",* do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution; (iii) that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of Article 104 [Appointment and Removal of Judges] and paragraph 6 of Article 109 [State Prosecutor] of the Constitution, with the wording "*has been proven to have unjustifiable assets*", established by a final court decision, do not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution; (iv) that the proposed constitutional amendments no. 27 and no. 28, proposing the supplementation of the constitutional criterion for the dismissal of judges and prosecutors due to "*serious neglect of duties*", as stipulated by paragraph 4 of Article 104 [Appointment and Removal of Judges] and paragraph 6 of Article 109 [State Prosecutor] of the Constitution, with the wording "*has vulnerable integrity*", diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution.

I also express my respect and agreement with the opinion of the majority of judges that the proposed constitutional amendment no. 29, proposing the transitory/provisional control of the integrity of *„[…] the members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the*

candidates for these positions […]" by the Integrity Control Authority (Authority], does not diminish the fundamental rights and freedoms guaranteed by Chapter II of the Constitution. However, I, as an individual judge, based on the importance and complexity of the case under the consideration, respectively the assessment of the proposed amendments, if the latter reduce/diminish any of the rights or freedoms guaranteed in Chapter II [Fundamental Rights and Freedoms] of the Constitution (the subject matter), but also the implications in the future, I have a concurring opinion regarding: **(I) the scope of assessment of the proposed constitutional amendments no. 27, no. 28 and no. 29; and (II) the manner of treatment of the exclusionary determination *"Notwithstanding other provisions of this Constitution,[…]"*,** established in the proposed Amendment no. 29, specifically in Article 161 A(1) [Integrity control] based on the following reasoning:

I. Regarding the scope of the constitutional assessment of the proposed constitutional amendments no. 27, no. 28 and no. 29.

First, I express my partial agreement with: **"I. The scope of the constitutional assessment"** of the proposed amendments (see specifically paragraphs 136-8 of this Judgment), **because I consider that unlike the case law of this Court, the majority of judges have narrowed the scope, respectively the bases of constitutional review.**

I emphasize that I am aware of the essential constitutional determination in paragraph 3 of Article 144, [Amendment] of the Constitution, which represents the basis for the material assessment of the power of the constitutional amendment by defining the imperative requirement to assess the constitutionality of an amendment proposal before entering into force, respectively that paragraph 3 of Article 144 [Amendments] of the Constitution defines the filter of the proposal of constitutional amendments in relation to the diminishing or not of any rights and freedoms established in Chapter II of the Constitution.

However, I recall that this Court in its practice, regarding the assessment of the proposed amendments related to the scope of the constitutional review, had assessed that:

- *"[…] as to the constitutional review of any proposed amendment to the Constitution under Article 144.3, such amendment must be considered in light of Chapter II [Fundamental Rights and Freedoms] of the Constitution, which by virtue of its Article 21 [General Principles], consists of the human rights and fundamental freedoms which are the basis of the legal order of the Republic of Kosovo"* (See cases: no. K029/12, and K048/12, Applicant *the President of the Assembly of the Republic of Kosovo*, Judgment of 20 July 2012 (paragraphs 62-4); KO44/14, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 3 April 2014, (paragraphs 24-8); KO13/15, Applicant *President of the Assembly of the Republic of Kosovo*, (paragraphs 23-4); KO26/15, Applicant *the President of the Assembly of the Republic of Kosovo*, Judgment of 15 April 2015, paragraph 22);
- "[…] *Chapter III [Rights of Communities and Their Members] and other rights may be applicable in this process, since the specific rights set forth therein are an extension of the human rights and freedoms provided in Chapter II of the Constitution, in particular, of those laid down in Article 24 [Equality before the Law]",* (See cases: no. KO29/12 and KO48/12 cited above (paragraph 62); KO44/14(paragraph 26) KO13/15 (paragraph 23); KO26/15 (paragraph 22).
- *"[…] in light of the provisions of Article 21.2 of the Constitution, which provides that the Republic of Kosovo shall protect and guarantee human rights and fundamental freedoms as provided by the Constitution, not necessarily those contained in Chapter II alone, but also all human rights and freedoms guaranteed by the Constitution and contemplated by the letter and spirit of the constitutional order of the Republic of Kosovo".* (See cases: no. K029/12 and K048/12, Applicant *President of the Assembly*

of the Republic of Kosovo, Judgment of 20 July 2012 (see in particular paras 62,63,64); KO44/14, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 3 April 2014, (see in particular paragraph 28); KO13/15, Applicant *President of the Assembly of the Republic of Kosovo*, (see in particular paragraphs 23 and 24); KO26/15, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 15, April 2015, paragraph 22).

- "[...] *The Court also considers that Article 21 [General Principles] of the Constitution should be read in conjunction with Article 7.1 of the Constitution that defines the values of the constitutional order of the Republic of Kosovo that is based "on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of the law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers and a market economy*" (K029/12 and K048/12, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 20 July 2012 (see in particular paras 62, 63, 64); KO44/14, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 3 April 2014, (see in particular paragraph 28); KO13/15, Applicant *President of the Assembly of the Republic of Kosovo*, (see in particular paragraphs 23 and 24); KO26/15, Applicant *President of the Assembly of the Republic of Kosovo*, Judgment of 15, April 2015, para. 22), and:
- *"[....] that the proposed amendments must be assessed whether they are consistent with the obligations deriving from Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, which requires that human rights be interpreted in accordance with the case law of the European Court on Human Rights." (*KO13/15, paragraph 24; KO162/18, paragraph 25-6; KO 207/22, paragraphs 32-3).

From the above, it can be noted that in the case law, the Court in the assessment of the proposed constitutional amendments, beyond the definition in paragraph 3 of Article 144, has expanded the bases of the constitutional review based, among others, on articles (7, 21, 24, and 53), including Chapter III, resulting in the assessment of the proposed constitutional amendments, not only that they diminish the fundamental rights and freedoms included in Chapter II, but all the rights and freedoms guaranteed by the Constitution and provided by the letter and spirit of the constitutional order of the Republic of Kosovo as an organic and coherent constitutional entity, as well as in accordance with case law of the European Court of Human Rights.

Such a practice of constitutional review of the proposed amendments, through implicit unamendbility of the constitutional courts (and courts with similar jurisdiction), beyond those explicit unamendability specified in the Constitution, it is known and widely applied in the constitutional adjudication.[1] Beyond the doctrine of constitutional amendment as well as the academic debate, the constitutional review of the proposed amendments based on the implied (implicit) norms of unamendability through the case law of the Constitutional Courts (and courts with similar jurisdiction) it is considered a practice of extraordinary importance as a manner of protecting material constitutional essence. Therefore, the case law of the Constitutional Courts has resulted and continues with the gradual identification of other constitutional norms that belong to and serve the protection of the constitutionally implied material essence. [2]

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[1]Richard Albert Constitutional Amendments, Making, Breaking, and Changing Constitutions, Oxford University Press (2019);Yaniv Roznai, Unconstitutional Constitutional Amendments, The Limits of Amendment Powers Oxford Constitutional Theory, Oxford University Press (2016),; Yaniv Roznai, *Unconstitutional constitutional amendments: a study of the nature and limits of constitutional amendment powers*. PhD thesis, London School of Economics and Political Science (2014), available online at: https://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf; Richard Albert, *'Counterconstitutionalism'*, 31 Dalhousie Law Journal (2008), 1.

[2] See e.g. *inter lia*: Everett V. Abbot, *'Inalienable Rights and the Eighteenth Amendment'*, 20 Columbia Law Review (1920), 183; Mathew Abraham, 'Judicial Role in Constitutional Amendments in

Although, in the present case within the framework of the scope of the assessment of the referral, I bear in mind that the Court has acted within its constitutional obligation - which specifically states that the assessment is done in the light of Chapter II, respectively that the Court basing the assessment in Chapter II acted within its own jurisdiction. Moreover, Chapter II, in conjunction with article 22 [Direct Applicability of International Agreements and Instruments] ensures the application of the guarantees of all international instruments, including the Framework Convention of the Council of Europe for the Protection of National Minorities.

However, the case law of further identification of the material essence of the constitution (such as the above-mentioned case law of this court) by expanding the bases of constitutional review through implicit norms such as "*expansion of human rights and freedoms defined in Chapter II of the Constitution, in particular, those rights defined in Article 24 [Equality before the Law]*", should not result in divergent practice, in such a way that a constitutional article or Chapter is defined as the basis of the assessment of the proposed constitutional amendments (element of the implied material essence), and later in another assessment, not to be considered as basis of the constitutional review of the proposed constitutional amendments. Such a way of acting, respectively the constitutional review where in one/or several cases the assessment bases are expanded, respectively the scope of the constitutional review and in the other case/s the bases/scope of the constitutional review of the proposed amendments are narrowed, would be incompatible with the request of legal certainty, and at the same time with the rule of law principle, which is a constitutional principle and value in the Republic of Kosovo.[3]

Based on its case law, in the circumstances of the present case, the logical continuation of the constitutional review by the Court, based on the importance and circumstances of the present case, would be the assessment of the proposed amendments and their compliance with the implied material focus of the Constitution[4], respectively (i) with the human rights defined in

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India: The Basic Structure Doctrine', The Creation and Amendment of Constitutional Norms (Mads Andenas ed., BIICL, 2000), 195; Bruce Ackerman, '*The Storrs Lectures: Discovering the Constitution*', 93 Yale Law Journal (1984), 1013.

[3] In this context, and as far as it is applicable in the circumstances of the present case, the ECtHR in the interest of the principle of legal certainty and foreseeability, had emphasized "The Court is not bound by its previous decisions; indeed, this is confirmed by Rule 51 paragraph. 1 of the Rules of the Court. However, the ECtHR usually follows and applies its own precedents, such a course being in the interest of legal certainty and the orderly development of Convention jurisprudence. However, this would not prevent the Court from departing from an earlier decision if it was satisfied that there were compelling reasons to do this (Cossey v. UK, Judgment of 27 September 1990, para. 35); The ECtHR also emphasized that "While it is in the interest of legal certainty, predictability and equality before the law that the Court does not depart, without good reason, from the precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would endanger being an obstacle to reform or improvement '(Demir and Baykara v. Turkey, judgment of 12 November 2008, paragraph 138). See also, Case K079/18, Applicant *President of the Republic of Kosovo*, Resolution on Inadmissibility, of 3 December 2018, where the court had clarified "the previous case law of the Court in relation to handling the referrals applying the broader understanding of the notion of "constitutional questions", as well as the "limits" of the respective article (in this case, article 113; see in particular the paragraphs 69-73).

[4] The practice of constitutional courts in the assessment of constitutional amendments emphasizes the constitutional essence, as the basis of the assessment of the proposed amendments, considering the possibility of identifying other constitutional articles/chapters - based on the content of the proposed amendment/s - as implicit norms of constitutional assessment: See more about this: Yaniv Roznay, Richard Albert cited above. See also: Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, in Comparative Constitutional Law, Tom Ginsbourg and Rosalidn Dixon (eds), Research Handbook in Comparative Law, Edward Elgar 2011, available online at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1070&context=public_law_and_legal_theory , pp. 77-96.

Chapter II of the Constitution, and (ii) with all other rights (Articles and Chapters) identified and anchored in its case law during the assessment of proposed amendments, respectively based in the letter and spirit of the Constitution, including Chapter III *"expansion of human rights and freedoms defined in Chapter II of the Constitution, in particular, those rights defined in Article 24 [Equality before the Law]"*, as a basis for constitutional assessment.

II. Regarding the treatment of the exclusionary definition *"Notwithstanding other provisions of this Constitution,[...]"*, established in the proposed Amendment no. 29, article 161A(1) [Integrity control]

Initially, and in the circumstances of the present case, I consider it essential to emphasize that the Constitution of the Republic of Kosovo expressly does not contain notwithstanding/overriding clauses, as contained in some respective constitutions giving the authority to the legislative and government institutions to (i) exclude the application of some constitutional provisions/rights, but based on (ii) precisely defined procedures, and (iii) only for precisely defined time periods.[5] (clarification "*notwithstanding clause*" or "*overrriding clause"* , differs from the limitation of human rights during the state of emergency).

Despite the fact that exclusionary provisions have appeared in the respective chapters of the Constitution of the Republic of Kosovo (see the final provisions [Chapter XIII] and transitional [Chapter IV] included in the Constitution, in articles 143, 146, 147, 148, 149, 150, 153, already repealed through constitutional amendments no. I-XII), as well as appearing in a specific circumstance (see constitutional amendment no. XXIV), the further use of such a definition in concrete circumstances, as well as considering the complexity and the importance of proposed amendment no. 29, I consider that the exclusionary definition "*Notwithstanding other provisions of this Constitution"* should have been a matter of review by the Court.

For me, as an individual Judge of this Court, the further use of exclusionary definitions "*Notwithstanding other provisions of this Constitution*" raises the essential question: How is it possible that such a wording with prevailing power/overriding the constitutional provisions in the Constitution of the Republic of Kosovo is applied in an amendment proposal since the Constitution of the Republic of Kosovo does not expressly contain notwithstanding clauses? How is it possible that such a clause appears to exist (see the reasoning given in paragraphs 314-317 of this judgment), and does not exist in an explicit way at the same time?
In the following, and in the circumstances of the present case, it was noted that in terms of the wording of the definition in paragraph 1 of article 161A of the proposed constitutional amendment no. 29,"*Notwithstanding other provisions of this Constitution [...]",* the Court emphasized :

- *"[....] such wording refers to the temporary transfer of a constitutional competence for the purposes of the establishment and operation of the Authority established outside the justice system for the purposes of implementing the aforementioned amendment", (*paragraph 314 of this Judgment); that
- *"The wording "notwithstanding other provisions of this Constitution [...]", cannot imply in any way the restriction or diminishing of the fundamental rights and freedoms established in Chapter II of the Constitution or even the content of other*

[5] This clause is typical for Canada, but its existence is also argued in the USA and other countries such as Israel, subject to the exact procedures defined in the constitutional documents of the exclusion of certain rights from the respective legislation. Specifically, e.g. Section 33 of the Canadian Charter of Rights and Freedoms is a provision of the Constitution Act, 1982 that allows a parliament to avoid the application of certain rights and freedoms set out in the Canadian Charter of Rights and Freedoms. For more on "*Notwithstanding Clouse*" and its application, see: Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada, 41 Queen's Law Journal 143 (2015), available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649447, pp. 180-1.

constitutional provisions and which do not directly serve the limited and temporary purpose of the proposed amendment no. 29. Any position to the contrary would constitute an extremely formalistic and isolated interpretation of a formulation of the norm" (paragraph 316 of this Judgment).

Based on the above, and while the treatment given in the context of the concrete reference, and the specific definition of the amendment proposal no. 29, which determines the creation of the concrete mechanism of temporary control of integrity, the question arises: if the interpretation of the wording "*Notwithstanding other provisions of this Constitution"* in this specific case will be applicable even in possible exclusionary provisions (if used) in the future proposal amendment that may have other content and specifications?

I recall that the subject of review of the referral referred by the applicant is whether the proposed constitutional amendments no. 27, no. 28 and no. 29 diminishes human rights and freedoms defined by Chapter II of the Constitution.

In the context of my concurring opinion, and specifically in relation to the treatment of the proposed amendment no. 29, by the majority, respectively the notwithstanding clause in Article 161 A(1) I note **that while the majority, the assessment of whether the proposed constitutional amendments no. 27 and no. 28**, diminish/reduce the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, based on:

- ***"[...] the sense of the principle of legal certainty****, this principle also embodied in the constitutional provisions of Chapter II of the Constitution and those of the ECHR*" (paragraph 223 of this Judgment);
- *"[...] in terms of constitutional changes,* ***the proposed constitutional amendments must respect the principle of legal certainty, in terms of the requirement for "predictability" and "clarity"" of the norm*** **[...]** (paragraph 225 of this Judgment);
- **"The court recalled the obligation of the proposer and the drafter of the constitutional amendments, that during the drafting of the proposed constitutional amendments, take into account the relevant aspects of the principle of legal certainty, including *"foreseeability"*** *of the constitutional norm, so that they do not result in the diminishing of the rights and freedoms guaranteed by Chapter II of the Constitution" (paragraph 225 of this Judgment*);
- "***The Court assesses that any supplementation or the amendment of the constitutional norm, which, moreover, when it affects fundamental rights and freedoms, must be characterized with clarity and precision, have a relevant justification, be proportional and, as such, guarantee the necessary level of "foreseeability" for all individuals,*** *who may be affected by the change of a constitutional norm and its implementation in the future*." (paragraph 226 of this Judgment).

However, in the assessment of the amendment proposal no. 29, specifically in relation to the notwithstanding clause "*Notwithstanding other provisions of this Constitution"* defined in article 116A (1) the majority **did not apply this assessment standard.**

I consider that the Court should also evaluate the wording of the notwithstanding clause defined in Article 116 A (1) in the context of the rule of law and legal certainty by applying the standard of foreseeability, concretely, and specifically if by **not specifying exactly that "notwithstanding" what constitutional provisions, is legal certainty violated as a constitutional principle, and as a right of integrity control subjects.**

This is for the essential reason that, taking into account that through paragraph 1 of Article 116A, the creation of the transitory/temporary process of integrity control is foreseen "of the

members of the Kosovo Judicial Council, the members of the Kosovo Prosecutorial Council, the presidents of all courts and all chief prosecutors, as well as the candidates for these positions", namely the vetting process in the justice system (proposed constitutional amendment no. 29), and consequently such a mechanism affects the rights of subjects subject to this assessment.

The Court instead of dealing with what the wording "Notwithstanding other provisions of this Constitution [...]" "cannot mean", (see paragraph 316 of this Judgment) in the specific case, the Court would have to assess whether the amendment proposal in question meets the requirement of being "clear and foreseeable" both in terms of form and content.

Referring to its case law, the case law of the ECtHR as well as the Rule of Law Checklist of the Venice Commission, CDL-Ad (2016)007, this Court has reiterated that "prescribed by law" requires that, in addition to the measure taken having a legal basis in state legislation, it also requires that the relevant provisions of the law be "clear, accessible and predictable". "Foreseeability requires that the law must be formulated with appropriate precision and clarity to enable legal subjects to regulate their behaviour (KO216/22 and KO220/22, paragraph 227Rule of Law Checklist of the Venice Commission, CDL-Ad (2016)007, Strasburg, 18 March 2016, paragraphs 58 and 59; KO100/22 and KO101/22, paragraph 347) (See among others: cases no. KO216/22 and KO220/22 Applicants KO216/22, Isak Shabani and 10 (ten) other deputies of the Assembly of the Republic of Kosovo; KO220/22, Arben Gashi and 9 (nine) other deputies of the Assembly of the Republic of Kosovo, Constitutional review of articles 9, 12, 46 and 99 of Law No. 08/L-197 on Public Officials, on 12 September 2023, paragraph 235; KO219/19, Applicant: the Ombudsperson, Constitutional review of Law no. 06/L-111 on Salaries in the Public Sector, paragraph 269 and 271).

Furthermore, the principle of legal certainty also implies that the effects of the law must be 'foreseeable', in the sense that legal provisions must be written in an intelligible manner and formulated with sufficient precision and clarity to enable people and legal entities to regulate their behavior in accordance with the requirements of the law (the quality aspect of the law). The clarity and foreseeability of legal acts are important not only for enabling individuals to regulate their behavior, but also for the separation of powers. In this respect, "legal provisions must be clear and intelligible to enable the executive power to exercise discretion only in the areas where this is intended and not simply because the law is uncertain or unclear." (see, Opinion DL-AD(2019)025-eKosovo of the Venice Commission on the Draft Law on Legal Acts, 11-12 October 2019, paragraphs 20-22).

Finally, I consider the Court had the opportunity to assess the proposed amendment to establish the constitutional standard that (i) can it; (ii) when it can; and (iii) under what standards can the exclusionary determinations "notwithstanding other constitutional provisions" be used in proposed constitutional amendments, bearing in mind the criteria of the rule of law as a constitutional principle and human right, specifically equality before the law.

Respectfully submitted by,

Remzije Istrefi Peci
Judge

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