



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

Prishtina, on 25 January 2024
Ref. no.: MK 2321/24

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DISSENTING OPINION

of Judge

RADOMIR LABAN

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 in this case with paragraph I of this judgment that the case is admissible for review, as well as with the decision in paragraphs III, IV and V whereby the court found as follows:

- III. TO HOLD, unanimously, 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 [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;
- IV. TO HOLD, unanimously, 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*”, and that it is based on a final court decision, do not diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;
- V. TO HOLD, unanimously, 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 [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;

As a judge of the Constitutional Court, I do not agree with the court's conclusion from paragraph II of the enacting clause of this judgment regarding the constitutional review of amendment 29, where the court concluded the following

- II. TO HOLD, by majority, that the proposed constitutional amendment no. 29, proposing the 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, does not diminish the fundamental rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo.

As a judge, I agree with the factual situation as stated and presented in the judgment and I accept the same factual situation as correct. I also agree with the way the

Applicant's allegations were stated and presented in the judgment, as well as comments of various interested parties.

For the above, and in accordance with Rule 57 of the Rules of Procedure of the Constitutional Court, I will present My dissenting opinion in writing.

Assessment of the constitutionality of the proposed constitutional amendment no. 29

First of all, I consider that amendment no. 29 consists of 6 separate articles that aim to implement the vetting process in the judicial system of the Republic of Kosovo.

1. Following the consideration and assessment of the proposed constitutional amendment no. 29, I refer to Article 161A [Integrity control] of this proposed amendment, which establishes:

- 1. Notwithstanding other provisions of this Constitution, the integrity control 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, excluding the president of the Constitutional Court, is carried out by the Integrity Control Authority.*
- 2. The mandate of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The mandate of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the deputies of the Assembly.*
- 3. The integrity control from paragraph 1 of this Article is carried out only once for the subject of the control and includes the wealth check, as defined by law.*
- 4. Appeal proceedings against integrity control are not counted in the terms prescribed in paragraph 2 of this Article”.*

2. I note that Article 161A [Integrity control] of the proposed constitutional amendment no. 29 defines (i) the positions of the judicial and prosecutorial system that are subject to integrity control and the mandate of the Integrity Control Authority, specifying that (ii) the members of the Kosovo Judicial Council, members of the Kosovo Prosecutorial Council, presidents of all courts and all chief prosecutors, as well as candidates for these positions are subject to the Integrity Control Authority, (iii) the mandate of the Integrity Control Authority lasts 2 (two) years from the election of all members of the Authority and can be extended for a maximum of 1 (one) more year, if decided by a law adopted with 2/3 votes of all deputies of the Assembly; and (iv) the integrity control for the above-mentioned positions in the judicial system is performed only once for the subject of the control and includes the wealth check, as stipulated by law, and appeal proceedings against the integrity control are not counted within the aforementioned deadlines.
3. Exceptionally and only in the context of the vetting process, according to the provisions of the proposed constitutional amendment no. 29, I note that the purpose of the integrity check process by the Integrity Control Authority [on the basis of Article 161A] is a special process, which is proposed to be conducted outside the provisions of Chapter VII of the Constitution, that is, without the participation of the KJC and KPC.

4. However, amendment no. 29, namely Article 161A [Integrity control] begins with the sentence “*Notwithstanding other provisions of this Constitution*” which in my legal opinion, excludes all the provisions of the Constitution and even those from Article 56 [Fundamental Rights and Freedoms During a State of Emergency], I consider that this sentence is in direct contradiction with this Article 56 of the Constitution and therefore with paragraph 2 of this Article which foresees “*2. Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances*”.
5. I am convinced that the proposer did not intend to diminish human rights from Chapter II and Chapter III of the Constitution, but that the proposer's intention is that the derogations refer to Chapter VII of the Constitution, namely the Judicial System, that is, to Articles 102 to 110 of the Constitution.
6. This wording of amendment no. 29, namely Article 161A [Integrity control] which begins with the sentence “*Notwithstanding other provisions of this Constitution*” was used in Amendment no. 24. I, as a single judge, honestly think that any wording that excludes all Constitutional norms is unconstitutional in itself because this wording puts itself above the Constitution itself, I think it is an obligation to react to this kind of wording in order not to create a wrong practice for the future, especially in this case because the intention of the proposer is obvious.
7. I consider that the proposer has an obvious intention and that the wording “*Notwithstanding other provisions of this Constitution from Chapter VII concerning the judicial system*” and which, in my opinion, would be fully constitutional and would enable the achievement of the same goal that the proposer wanted to achieve, at the same time avoiding a wording that, in my opinion, is unconstitutional and which sooner or later will not stand the test of time.
8. Furthermore, amendment no. 29, namely Article 161A [Integrity control] which begins with the sentence “*Notwithstanding other provisions of this Constitution*” which, in my legal opinion, excludes all the provisions of the Constitution, in my opinion, it also contradicts Article 108 [Kosovo Judicial Council, which provides for personal guarantees for non-majority communities in Kosovo, but also with Article 161B, the Integrity Control Authority, which provides for the following;
 1. *In order to carry out the integrity control from Article 161A, the Integrity Control Authority is established. The composition, selection, organization, functioning, competencies and immunity of the Authority are determined by law and in accordance with this Constitution.*
9. I am convinced that the proposer did not intend to reduce human rights from Chapter II and Chapter III of the Constitution, but that the proposer's intention is that the derogations refer to Chapter VII of the Constitution, namely the Judicial System, that is, Articles 102 to 110 of the Constitution. But I consider

that we as the Court, were obliged to establish that the rights of representation of non-majority communities and gender equality established in Article 108 of the Constitution cannot be reduced to rights established by law, and that their derogation from the Constitutional norm on rights established by law represents a violation of Chapter III of the Constitution as well as Article 108 of the Constitution.

10. Protecting the rights from Article 108 of the Constitution, which concern the right to represent non-majority communities in Kosovo, is a Constitutional obligation in accordance with Chapter III of this Constitution, but at the same time it would help the proposer to implement his intention of vetting in the Assembly of Kosovo, where for the passing of these amendments, is necessary to secure 2/3 of the votes of non-majority communities.
11. It is unclear that if, Article 161A [Integrity control] which begins with the sentence "*Notwithstanding other provisions of this Constitution*" how will the formation of the Integrity Control Authority on the basis of the Constitution take place when the norms of the Constitution, which foresee the key to the representation of non-majority communities, have been put out of legal force.
12. Furthermore, I consider that the wording from paragraph 2 of Article 161A [Integrity control] also contradicts Article 6 of the ECHR and Article 31 of the Constitution because it provides for different parliamentary majorities for the establishment and extension of the mandate of the Integrity Control Authority as follows;

2. The mandate of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The mandate of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the deputies of the Assembly.
13. I consider that this formulation, which foresees different parliamentary majorities for the formation and extension of the mandate of the Integrity Control Authority, is not in accordance with the principle of legal certainty and that the proposer could have very simply foreseen that the duration "*The mandate of the Integrity Control Authority is 3 (three) years from the election of all members of the Authority. The Authority's mandate cannot be extended*". The proposer would get the same effect and there would be complete legal certainty regarding the duration of the mandate and the method of its election.
14. I consider that as a Court we must be aware that there is a great possibility of the Republic of Kosovo to quickly become a member of the Council of Europe and that the Republic of Kosovo can very soon be part of the European Court of Human Rights, where the decisions of state authorities will be subject to review and assessment by the European Court of Human Rights, taught by the experience of countries in the region that implemented vetting processes and then lost all disputes before the European Court of Human Rights, I consider that it is in the general interest to avoid the above-mentioned violations in the vetting process and ensure full legal certainty for all participants in this process.

Conclusion regarding the proposed constitutional amendment no. 29

15. Based on the above, and taking into account the above reasoning:

- I. I CONSIDER THAT THE Court should have FOUND THAT the proposed constitutional amendment no. 29, which proposes a transitional integrity control in the wording “*Notwithstanding other provisions of this Constitution*” diminishes the fundamental rights and freedoms guaranteed by Articles 56 and 108 of the Constitution of the Republic of Kosovo, and that the latter is in conflict with Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo;.
- II. I CONSIDER THAT THE Court should have FOUND unanimously/by majority, that the proposed constitutional amendment no. 29, which proposes a transitional integrity control in the wording “*2. The mandate of the Integrity Control Authority is two (2) years from the election of all members of the Authority. The mandate of the Authority can be extended for a maximum of one (1) more year, if it is decided by a law adopted by 2/3 of the votes of all the deputies of the Assembly*” diminishes the fundamental rights and freedoms guaranteed by Article 31 of the Constitution of the Republic of Kosovo and Article 6 of the ECHR, and that the latter is in contradiction with Chapter II [Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo;.

Dissenting Opinion is submitted by Judge;

Radomir Laban, Judge

On 22 December 2023 in Prishtina

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