



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

Pristine, 31. October 2012
Ref. No.:MMP304/12

CONCURRING AND DISSENTING OPINION OF JUDGE ROBERT CAROLAN

in

Case No. KO61/12

**Assessment of proposed constitutional amendments submitted by
the President of the Assembly of the Republic of Kosovo on 22 June 2012**

On 22 June 2012 the President of the Assembly of the Republic of Kosovo, pursuant to Articles 113.9 and 144.3 of the Constitution, submitted to this Court the following proposed amendments to the Constitution requesting the Court to assess whether any of the proposed amendments diminished any of the rights and freedoms set forth in Chapter II of the Constitution:

The Proposed Amendments

Amendment 1 – Amnesty

By amnesty, persons to be designated by name shall be, partly or fully, released from criminal prosecution, their sentences shall be substituted with a more lenient sentence, or the sentence of such persons shall be omitted from the evidences on convicts.

The Assembly of the Republic of Kosovo shall adopt the respective law on awarding amnesty.

The Law on amnesty shall be approved with 2/3 of the votes of all members of parliament.

Amendment 2 – Amendment of the Article 108 – Kosovo Judicial Council

Article 108, paragraph 6, sub-paragraph 1 and 2 of the Constitution of the Republic of Kosovo, are amended to the following:

- (1) seven (7) members shall be judges elected by the members of the judiciary;*
- (2) two (2) members shall be elected by deputies of the Assembly holding seats attributed during the general distribution of seats and at least one (1) of the two shall be a judge.*

The Authority of the Assembly

The authority to amend the Constitution is vested solely in the Assembly pursuant to Article 65 of the Constitution which provides:

“The Assembly of the Republic of Kosovo:

- (1) adopts laws, resolutions and other general acts;*
- (2) decides to amend the Constitution by two thirds (2/3) of all of its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;*

The Authority of the Constitutional Court

The Constitutional Court’s authority is derived from the Constitution because:

- (1) Article 16 of the Constitution specifically provides that: “The power to govern stems from the Constitution.”*
- (2) Article 4.6 of the Constitution provides that the Constitutional Court “...is the final interpreter of the Constitution.”*

The Court’s Review Authority

The Court’s authority to issue a judgment as an advisory opinion to this question is prescribed in Articles 113.9 and 144.3 of the Constitution.

Article 113.9 provides:

The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

(Emphasis added.)

Article 144.3 provides:

Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution. (Emphasis added.)

The Court’s authority to render an opinion on the proposed Constitutional amendments is limited to assessing whether they diminish any of the rights and freedoms set forth in Chapter II (Articles 21 -56) of the Constitution.

Proposed Amendment 2 and Part of Amendment 1

The majority concluded that proposed amendment 2 did not diminish any rights or freedoms set forth in Chapter II of the Constitution. I concur with the majority’s conclusion with respect to proposed amendment 2.

The majority concluded that the following part of proposed amendment 1 did not diminish any rights and freedoms set forth in Chapter II:

The Assembly of the Republic of Kosovo shall adopt the respective law on awarding amnesty.

The Law on Amnesty shall be approved with 2/3 of the votes of all members of parliament.

I concur with the majority's conclusion that this proposed amendment does not appear to diminish any rights and freedoms set forth in Chapter II.

The First Sentence of Proposed Amendment 1

The majority concludes that the following first sentence of proposed amendment 1 violates the Constitution:

By amnesty, persons to be designated by name shall be, partly or fully, released from criminal prosecution, their sentences shall be substituted with a more lenient sentence or the sentence of such persons shall be omitted from the evidences on convicts.

The majority's conclusion is both erroneous and unauthorized. To the extent that it relies upon Article 24 of the Constitution its conclusion is based upon an erroneous interpretation of Article 24. To the extent that the majority's conclusion is based upon articles of the Constitution outside of Chapter II or other principles of law, foreign or domestic, it is unauthorized commentary.

The majority reasons that because the proposed amendment would authorize some governmental authority, presumably the Assembly, to grant amnesty or a pardon to "... persons designated by names...." that: (1) it is not, in reality, a grant of amnesty as that term is used in many jurisdictions throughout the World; (2) that it infringes upon the constitutional power of the President of the Republic to grant pardons as set forth in Article 84(29) of the Constitution; and, (3) that it violates the authority in Article 65 of the Constitution with respect to the Assembly's legislative authority. The majority further concludes that it would violate the equality provisions of Article 24 of the Constitution because certain named individuals might receive the benefit of a grant of amnesty while others might not.

Even if the proposed amendment would violate other articles of the Constitution outside of Chapter II or even if the proposed amendment attempts to create a new or different legal mechanism to be applicable in Kosovo, this Court does not have the authority, at this time, to comment upon those aspects of the proposed amendment in the context it is addressed to the Court because the Court's review, pre-adoption, of any Constitutional amendment is confined to whether it would diminish any rights or freedoms under Chapter II of the Constitution. Except for the concerns of the majority with respect to the rights and freedoms set forth in Article 24 of the Constitution, the objections raised by the majority are beyond the scope of Chapter II of the Constitution. Therefore, those aspects of the assessment are unauthorized.

Generally, many jurisdictions in the World deem "amnesty" to be a sovereign act of pardon and oblivion for past acts, granted by a government to all persons or to certain groups of persons who have been found guilty of a crime or political offense. A "pardon" is distinguishable from a grant of amnesty because a pardon usually only applies to an individual for his or her specific offense, but it does not affect the criminality of the same or similar acts when committed by other persons or repeated by the same person. "Amnesty" denotes an act of grace, extended by the government to all persons who may come within its terms, and which obliterates the criminality of past acts and declares that they shall not be treated as punishable. See Black's Law Dictionary, 4th ed., 108.

Article 24 of the Constitution[Equality Before the Law] provides:

- 1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
- 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
- 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

This article provides for equal treatment of all persons who are in equal positions. It specifically prohibits discrimination amongst people on the basis of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, economic or social condition, birth, disability, sexual orientation or other personal status. It does not require that everybody treated absolutely equally or receive identical compensation as long as there is a rational, non-discriminatory reasons for the differing equal treatment. Indeed, paragraph 3 of Article 24 specifically authorizes certain unequal treatment as long as it is done on a rational non-discriminatory basis.

The majority erroneously concludes that because the proposed amendment would authorize a government authority or institution to list the names of certain persons who would be eligible for amnesty that it would result in unequal treatment of other people. It implies that if this amendment was adopted the Government would apply it in a discriminatory manner. There is no evidence to support that conclusion just like there is no evidence to infer that the pardon power set forth in Article 84 (29) of the Constitution violates the equal treatment provisions of Article 24.

In assessing whether this proposed amendment would violate Article 24 of the Constitution the majority concludes that it would allow an impermissible different treatment of persons relying upon the case of D.H.and Others v. the Czech Republic,(GC), no 57325/00, 175 ECHR 2007. This reliance is misplaced. In that case between 1996 and 1999 the applicants, all Czech nationals of Roma origin, had been placed in “special schools” rather than the ordinary elementary schools in the Czech Republic. They complained that this practice violated Article 14 of the Convention. In rejecting the applicants’ complaint of an Article 14 violation the Court acknowledged that under Article 14 different persons may be treated differently as long as it is done on a rational basis and not solely against persons specifically protected under Article 14. It found that there was no evidence in the applicants’ case that the practice was applied in a discriminatory manner.

Similarly, this Court cannot presume that if the proposed amendments were adopted they would be applied in a manner that violated either Article 14 of the Convention or Article 24 of the Constitution. Should the amendment be adopted and if it is then applied in an illegal discriminatory manner in violation of the Constitution, any authorized party could then bring a claim in the appropriate courts of Kosovo, including the Constitutional Court.

The majority also concludes that the proposed amendment would be unlawfully discriminatory reasoning that it would have no objective and reasonable justification because it did not pursue a legitimate aim or have a reasonable relationship or proportionality between the means employed and the aim sought to be realized. It is speculative to conclude that the proposed amendments do not have objective and reasonable justification or a legitimate purpose.

Therefore, I conclude that all of the proposed amendments of the Constitution appear to be compatible with Chapter II (Articles 21 – 56) of the Constitution of the Republic of Kosovo and would not diminish any rights or freedoms protected by those articles of the Constitution. Because of the restrictions in Articles 113.9 and 144.3 of the Constitution with respect to the authority of the Court to render an advisory opinion on the proposed amendments at this time before they are actually adopted and enforced, I render ~~no~~ opinion with respect to any other aspects of the proposed amendments.

Respectfully submitted,



Robert Carolan

Judge of the Constitutional Court of the Republic of Kosovo