



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

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Pristine, 31 October 2012  
Ref. No.: AGJ303/12

## JUDGMENT

in

Case KO 61/12

**Confirmation of proposed constitutional amendments submitted by  
the President of the Assembly of the Republic of Kosovo on 22 June 2012  
by letter Nr. 04-DO-1095**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President  
Ivan Čukalović, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Kadri Kryeziu, Judge  
Arta Rama-Hajrizi, Judge.

#### The Applicant

1. The President of the Assembly of Kosovo, in accordance with Article 144.3 of the Constitution, referred to the Constitutional Court the Government's proposal of constitutional amendments.

#### Subject Matter

2. The subject matter of the Referral is two (2) constitutional amendments of the Constitution of the Republic of Kosovo, which were adopted on 12 June 2012 by Decision Nr. 03/78 of the Government of the Republic of Kosovo.

#### Legal Basis

3. The Referral is based on Articles 113.9 and 144.3 of the Constitution, Articles 20 and 54 of the Law (No. 03/ L-121) on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter, the "Law"), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the "Rules of Procedure").

### **Proceedings before the Court**

4. On 22 June 2012, the President of the Assembly of Kosovo referred to the Constitutional Court the Government's proposal of constitutional amendments requesting it to assess whether the amendments proposed by the Government would diminish any of the rights and freedoms as provided by Chapter II of the Constitution.
5. On 26 June 2012, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (presiding), Snezhana Botusharova and Ivan Čukalović.
6. On 9 July 2012, the President of the Assembly was informed that the Court registered the Referral.
7. On the same day, a copy of the Referral was delivered to the President of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo and the Ombudsperson.
8. On 20 September 2012, after considering the report of Judge Altay Suroy, the Review Panel made a recommendation to the Court on the admissibility of the Referral.

### **Reply of the Ombudsperson**

9. As far as Amendment 1 – Amnesty is concerned, the Ombudsperson in his reply presented the following opinion:

*"This amendment does not diminish human rights and freedoms guaranteed by Chapter II of the Constitution of the Republic of Kosovo, on the contrary, it enriches the range of human rights and freedoms of persons, who at certain periods of time have come into conflict with the criminal law of the country.*

*The Ombudsperson, based on his legal competencies, defined in the Article 16, paragraph 6 of the Law on Ombudsperson, inspects places/prisons where detained people with restricted freedom of movement are held.*

*From the meetings with the detainees/prisoners, the Ombudsperson has received several complaints with the request that pardon, as a legal institution, is included in the constitutional amendments and a special law on pardon is adopted.*

*The Ombudsperson, based on his mandate and work experience from inspections of prisons as well as the contacts and requests of persons that are in prison, supports this amendment of the Government of Kosovo."*

### **Summary of Facts**

10. The Assembly approved the text of the Constitution of the Republic of Kosovo, which entered into force on 15 June 2008. In its Chapter XIII [Final Provisions], paragraph 1 of Article 144 [Amendments] establishes that "The Government, the President or one fourth (1/4) of the deputies of the Assembly of Kosovo as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution".

11. On 12 June 2012, the Minister of Justice, “pursuant to Article 92.1, 92.2, and 92.4, Article 93.9 and Article 144. 1 of the Constitution of the Republic of Kosovo”, submitted to the Government two “Proposals for Amendments to the Constitution of the Republic of Kosovo”.
12. On 12 June 2012, the Government, “pursuant to Article 92. 4, and Article 93.4 of the Constitution of the Republic of Kosovo”, adopted Decision No. 03/78 “approving the proposal of the Ministry of Justice for amending the Constitution of the Republic of Kosovo” (hereinafter, the “Government’s Proposals for Amendments of the Constitution”).
13. On 22 June 2012, the President of the Assembly of Kosovo submitted to the Court “the amendments proposed by the Government of Kosovo to the Constitution of the Republic of Kosovo (...) to assess whether the amendments proposed limit [in Albanian, “nuk pakeson”] any of the rights and freedoms as provided by Chapter II of the Constitution”.

### **Admissibility of the Referral**

14. The Court must first examine whether the admissibility requirements are met as laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
15. In this connection, Article 113.9 of the Constitution stipulates that:
 

*“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”.*
16. The Court notes that, on 22 June 2012, the President of the Assembly submitted to it the request for a prior assessment of the proposed amendments of the Constitution. Therefore, by virtue of Article 113.9 of the Constitution, the President of the Assembly is an authorized party to refer this case to the Court.

### **Scope of the constitutional review**

17. The President of the Assembly submitted two (2) amendments proposed by the Government of the Republic of Kosovo.
18. The confirmation of the constitutionality of the proposed amendments by this Court will be made not only by taking into account the human rights and freedoms contained in Chapter II, but also the entire letter and spirit of the constitutional order of the Republic of Kosovo, as further explained under paragraphs 56 to 71 of the Judgment delivered in Cases K.O. 29/12 and K.O. 48/12 (Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, respectively), dated 20 July 2012.

### **Constitutionality of the proposed constitutional amendments**

#### **I. Proposed Amendment 1: Amnesty**

19. The Court notes that Amendment 1 proposes adding to the Constitution of the Republic of Kosovo a new article, which reads as follows:

*“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.”*

20. Thus, the proposed amendment suggests adding to the existing competencies of the Assembly a new competence, namely, the competence to adopt a Law on Amnesty.
21. The Court further notes that the proposed Amendment does not contain any indication where in the Constitution it would fit and is silent as to the question which public authority would be tasked to grant amnesty, obviously leaving it to the legislature to make the choice in the future Law on Amnesty.
22. In this connection, the Court refers to Article 84.29 of the Constitution where it is clearly established that the President of the Republic of Kosovo “grants individual pardons in accordance with the law”.
23. The Court is cognizant that many European Constitutions provides for both amnesty and pardon. For instance, Article 16 of the Albanian Constitution defines that *“The People’s Assembly has the following main competences: [...] 6. It grants amnesty [...]”*, while Article 28 stipulates that *“The following are the main competences of the President of the Republic: [...] 14. He exercises the right of pardon”*.
24. Article 84 of the Constitution of Bulgaria foresees that one of the competencies of the National Assembly is to grant amnesty, while Article 98 establishes that one of the functions of the President of the Republic is the right to pardon.
25. Similarly, Article 80 of the Constitution of Croatia establishes the competence of the Croatian Parliament to grant amnesty for criminal offenses, while Article 97 prescribes that the President of the Republic shall grant pardons.
26. Unlike the above mentioned Constitutions that do not define amnesty other than prescribing that it falls under the scope of the legislative prerogatives of the respective Parliaments, the Constitution of Greece defines both amnesty and pardon in its Article 47 as follows:

*“Article 47 [Pardon and Amnesty]:*

*(1) The President of the Republic shall have the right, following a proposal by the Minister of Justice and having consulted the opinion of a council which contains a majority of judges, to pardon, commute, alter, or reduce sentences pronounced by the courts of law and to lift legal consequences of any kind emanating from sentences which have been pronounced and served.*

*(2) The President of the Republic shall have the right to grant a pardon to a minister sentenced according to Article 86 only with the consent of Parliament.*

*(3) Amnesty may only be granted in cases of political crimes, by a law voted in Plenary Session of the Parliament by a majority of three fifths of the total number of deputies.*

*(4) Amnesty in the cases of common crimes may not be granted even by law”.*

27. Moreover, Article 79 of the Italian Constitution, with regard to amnesty and pardon, reads as follows:

*“ [Amnesty and Pardon]:*

*(1) Amnesties and pardons may be granted by a law which must be adopted both article by article and in its entirety by two thirds of the members of each chamber.*

*2) A law granting amnesty or pardon has to establish time limits for its enforcement.*

*(3) In no instance may amnesty or pardon be extended to offences committed after the bill has been introduced.”*

28. Furthermore, Article 87 of the Italian Constitution provides that one of the duties of the President is “[...] (11) ... to grant pardons and commute punishments.”
29. Finally, Article 164 of the Constitution of Portugal provides that “*the Assembly of the Republic shall have the following powers: [...] g) To grant amnesties and general pardons*”, while Article 137 prescribes that “*The President of the Republic has the following powers :[...] f) To grant pardons and commute sentences, after having heard the Government*”.
30. In the Court’s view, the above mentioned examples show that there is a clear distinction between (1) competencies to grant amnesty and general pardons usually exercised by a general act of the respective parliaments, i.e. by law, and (2) competencies to grant individual pardons that are exercised by the heads of state.
31. Indeed, the majority of states in their legislation define the concept and applicability of amnesty and pardons. For example, Croatia’s General Amnesty Law (1996) “[...] grants general amnesty from criminal prosecution and proceedings to perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts and in connection [therewith] in the Republic of Croatia”.
32. However, the Court notes that Article 3 of this Law establishes that “*the amnesty for criminal acts (...) excludes perpetrators of the most serious violations of humanitarian law*”, namely perpetrators of crimes of genocide, crimes against humanity and war crimes.
33. This exemption in the Croatian Law is in conformity with international law and *jus cogens*, where international crimes are not subject to a statute of limitations.
34. As to the proposed Amendment 1, the Court notes that Amnesty is defined in the first paragraph as follows: “*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.*”
35. Amendment 1 prescribes that by law “*persons to be designated by name*” are entitled to be released from criminal prosecution; whose [individual] sentences shall be substituted by a more lenient sentence; or whose sentence shall be omitted from the evidences on convicts.

36. In order to confirm whether the proposed Amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution, the Court has to assess the way in which the Amendment proposes the amnesty to be granted.
37. In this connection, the Court emphasizes that, pursuant to Article 65 [Competencies of the Assembly] of the Constitution, “*The Assembly of the Republic of Kosovo:(1) adopts laws, resolutions and other general acts*”. The question, therefore, arises whether a Law on Amnesty can prescribe a list of “*persons to be designated by name*”, since a law must possess the quality of a general norm, abstract in nature for the purpose which it intends to regulate and be accessible and foreseeable in its application and consequences for all persons.
38. In this respect, the Court refers to the case law of the ECtHR, where the requirements for the classification as a law have been established in relation to complaints under those Articles of the ECHR and its Protocols which incorporate the “lawfulness” requirements: Articles 5(1), 7, 8, 9, 10 and 11 ECHR, Article 1 of Protocol No. 1, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7.
39. These requirements have been restated many times in a formula that, by now, has become standard and was recently repeated in *Centro Europa 7 S.R.L. and di Stefano v. Italy* ([GC] no. 38433/09, paras. 141-142, 7 June 2012):

*“[...] a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends on a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.”*

40. The Court considers that, if a list of “*persons to be designated by name*” is established by law, such a law will not satisfy the above quoted standard of the ECtHR, since its consequences will not be foreseeable to a degree which is reasonable in the circumstances.
41. Furthermore, the establishment of a list of “*persons to be designated by name*” that are subject of amnesty would also allow for an issue to arise under Article 24 [Equality before the Law] of the Constitution and Article 14 [Prohibition of discrimination] ECHR, since a clear difference would be created between the treatment of the “*persons to be designated by name*” and of persons in similar situations who are, however, not listed.
42. Article 24 [Equality Before the Law] of the Constitution, reads as follows:

*“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.”*

43. In the Court’s view, the difference of treatment of “*persons to be designated by name*” and of persons in similar situations who are not listed is discriminatory, since it has no objective and reasonable justification; in other words, since it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.
44. As to Article 14 ECHR, the Court refers to the case of *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, para. 175, ECHR 2007-IV), which is – quite regardless of its context and the particular facts on which it is based – the authority for the proposition that even indirect discrimination may be in breach of Article 14 ECHR. In re-stating the general principles, the Court [ECtHR] stated that: “...a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination, potentially contrary to the Convention, may result from a *de facto* situation.”
45. In these circumstances, the Court considers that establishing a list of “*persons to be designated by name*”, under a Law on Amnesty to be adopted by the Assembly, would be also discriminatory and, thus, contrary to Article 24 of the Constitution and Article 14 ECHR.
46. Accordingly, taken into account all above considerations, the Court confirms that paragraph 1 of Amendment 1: Amnesty diminishes the rights and freedoms set forth in Chapter II of the Constitution.
47. As to paragraphs 2 and 3 of proposed Amendment 1, reading “*The Assembly of the Republic of Kosovo shall adopt the respective Law on awarding Amnesty*” and “*The Law on Amnesty shall be approved with 2/3 of the votes of all members of Parliament*”, the Court confirms that they do not diminish the rights and freedoms set forth in Chapter II of the Constitution.

## **II. Proposed Amendment 2: Amendment of Article 108 [Kosovo Judicial Council]**

48. Proposed Amendment 2 reads as follows: “*Article 108, paragraph 6, sub-paragraphs 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.”*
49. Thus, Amendment 2 proposes the deletion of Articles 108.6 (1) and 108.6 (2) of the Constitution and their replacement by new Articles 108.6 (1) and 108.6 (2).
50. The terms of the current Articles 108.6 (1) and 108.6 (2) are as follows:
  - (1) *five (5) members shall be judges elected by the members of the judiciary;*
  - (2) *four (4) members shall be elected by deputies of the Assembly holding seats attributed during the general distribution of seats; at least two (2) of the four (4) must be judges and one (1) must be a member of the Kosovo Chamber of Advocates;”.*

51. According to the proposed Amendment 2, the new Articles 108.6 (1) and 108.6 (2) would read as follows:

*“(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;”*

52. The Court recalls that Article 108 [Kosovo Judicial Council], under paragraphs (1) and (2), states that *“The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system”* and it is *“a fully independent institution in the performance of its functions”*. In addition, it is the task of the Kosovo Judicial Council to *“ensure that the Kosovo courts are independent, professional and impartial.”*
53. The Court considers that the proposed changes in the composition of the Kosovo Judicial Council do not affect its character as an independent institution and, thus, does not deem it necessary to further review the constitutionality of the proposed Amendment.
54. Therefore, the Court confirms that proposed Amendment 2: Amendment of Article 108 [Kosovo Judicial Council] of the Constitution does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution.



### FOR THESE REASONS


The Constitutional Court, pursuant to Article 113.9 and Article 144.3 of the Constitution, Article 20 of the Law and Rule 56(1) of the Rules of Procedure, in its session held on 20 September 2012,

### DECIDES AS FOLLOWS

- By unanimity
- I. The Referral submitted by the President of the Assembly on 22 June 2012 containing proposed amendments to the Constitution of the Republic of Kosovo is admissible;
- By majority
- II. The new proposed Amendment 1 – Amnesty, first paragraph in respect to “*persons designated by name*”, diminishes human rights and freedoms set forth in Chapter II of the Constitution;
- By unanimity
- III. The new proposed Amendment 1 – Amnesty, second and third paragraphs, does not diminish human rights and freedoms set forth in Chapter II of the Constitution;
  - IV. The proposed Amendment 2 - Article 108 [Kosovo Judicial Council] of the Constitution does not diminish human rights and freedoms set forth in Chapter II of the Constitution
  - V. This Decision shall be notified to the Parties and, in accordance with Article 20.4 of the Law, shall be published in the Official Gazette; and
  - VI. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**



Altay Suroy




Prof. dr. Enver Hasani