



The Jurisdiction of Constitutional Court of Kosovo to Assess the Constitutionality of Constitutional Amendments

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Abstract: The Constitutional Court of Kosovo has been established in 2009. From its establishment until now, the Constitutional Court has, in several occasions, dealt with the assessment of constitutional amendments. Concretely, there were 7 attempts for the amendment of the Constitution, however not all of them succeeded. The Constitutional Court played an active role in the constitutional review of the constitutional amendments in these processes, finding in several occasions that the proposed constitutional amendments were in violation of *the letter and spirit* of the Constitution. This paper examines the jurisdiction of the Constitutional Court for the review of constitutional amendments. Further, this paper examines the reasons provided by the Court in cases when it exercised jurisdiction for constitutional review of constitutional amendments. This paper examines and provides answers in the following research questions: what aspects of the Constitution have been challenged by unconstitutional amendments; has the Constitutional Court expanded its constitutional competences for constitutional review of constitutional amendments beyond Chapter II of the Constitution. This paper employs and uses comparative research methods by looking at other countries and regions as well, such as Germany and Colombia. This paper concludes by looking at whether the expansion in constitutional review competences has been adequate and in service of more efficient protection of the constitutional values.

Keywords: Constitutional assessment; constitutional amendment; human rights; unconstitutional amendment

Introduction

We find Kosovo among the states where the Constitutional Court has authorizations of specific nature in regards to the constitutional review of the amendments to the Constitution. Specifically, the Constitutional Court of Kosovo may only assess the constitutionality of the proposed amendments only from the prism or context of

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human rights and freedoms set forth in Chapter II of the Kosovo Constitution (Article 113, par 9)

A more or less similar practice as mentioned in the procedural part above, is also found in the Constitution of Ukraine (Article 157). However, we will see what the role of the Constitutional Court has been in exercising this competence. We will see at whether the Court has remained self-contained within an original and textual interpretation by assessing the constitutionality of the proposed amendment only in the context of Chapter II of the Constitution. Or if the Constitutional Court has used this constitutional competence to expand the constitutional review of constitutional amendments, assessing whether the proposed amendments are in line with other constitutional values and principles that are not necessarily outlined in the Chapter II of the Constitution.

Constitutional Assessment of Constitutional Amendments in Kosovo

In its 10-year history, the Constitutional Court of Kosovo has, for the first time, been faced with a request to review the constitutional amendments in the constitutional reform process aimed at amending the Chapter on the President (Cases K.O. 29/12 & K.O. 48/12).

This case will be examined in three aspects. At the outset, the procedure which resulted in this case will be briefly analyzed. Then, being the first case, we will analyze the scope of the jurisdiction of the Constitutional Court and in the third part we will analyze the assessment made by the Court in relation to the amendments referred for constitutional review by the Speaker of the Kosovo Assembly.

In 2012, based on a political agreement between the leaders of the political parties: the Alliance for New Kosovo, the Democratic League of Kosovo and the Democratic Party of Kosovo (AKR, LDK and PDK), the Kosovo Assembly had established a commission for drafting constitutional amendments. The political agreement in question defined the constitutional changes to be made, through which the procedure for electing the President of Kosovo would be changed. According to the agreement, the leaders agree to immediately establish a “Commission for the Presidential Election Reform” that will draft constitutional amendments and other necessary legislation to ensure that the President of Kosovo is directly elected by the people, and that direct presidential elections in Kosovo will be held no later than six months from the date on which such necessary amendments and amendments to the Constitution and the legislation enter into force (Case K.O. 29/12).

After the drafting of the amendments, based on the constitutional definition of the procedure, the proposed amendments were signed by at least one quarter (1/4) of the Members of Assembly (Article 144). On 23 March 2012, the Speaker of the Kosovo Assembly filed a request with the Constitutional Court asking the Court to review whether the proposed amendments by 31 members of the Assembly diminish or limit any of the rights and freedoms set forth in Chapter II of the Constitution (Cases K.O. 29/12 and K.O. 48/12).

For the procedural aspect, it is important to clarify that the Speaker of the Assembly had also referred a second set of amendments on the same issue. This in turn obliged the Constitutional Court to ask the Speaker of the Assembly to clarify and specify about which amendments the Constitutional Court is asked to review. The Speaker of the Assembly explained that the second package of amendments represents the final version for which the Assembly requested a constitutional review. On the basis of this response, the Constitutional Court decided to join these two requests because of their nexus with each other as to the subject-matter of the case and the authorized parties making the request (Constitutional Court's Rules of Procedure. Article 37, 2009).

In the procedural aspect, amendments in relation to the election of the President are of great importance, since it represents the first case of the constitutional review of constitutional amendments, thus laying out the standards and principles of review of the Court in regards to future constitutional amendments.

That said, despite the procedural importance, the Case K.O. 29/12& K.O. 48/12 is of great importance also in terms of defining in practice the jurisdiction of the Constitutional Court. It is important, therefore, that through this case, the Court has clarified what its jurisdiction is in assessing the constitutional amendments and the extent to which this jurisdiction may be expanded. Following the procedural clarifications on the referral of the proposed amendments, the Court continued to clarify or assess its jurisdiction.

The Court, having regard to Article 113, paragraph 9 of the Constitution of Kosovo, which provides the Court's jurisdiction to assess the constitutional amendment, if the amendments diminish or limit the freedoms and human rights set forth in Chapter II of the Constitution. The Court has clarified that: "Regarding the constitutional review of any proposed amendment to the Constitution under Article 144.3, such amendment should be considered in the light of Chapter II (Basic Rights and Freedoms) of the Constitution, which, according to Article 21 (General Principles)

consists of basic human rights and freedoms, which are the basis of the legal order of the Republic of Kosovo.”

Thus, the Court extends its jurisdiction for constitutional review beyond Chapter II, by reasoning that it has competences to review the amendments also for their conformity with Chapter III of the Constitution, which deals with the rights of communities and their members. According to Case. K.O. 29/12 & K.O. 48/12, the Court considers that Chapter III (Rights to Communities and their Members) and other rights may be applicable in this process, as the specific rights set forth are an extension of the defined human rights and freedoms in Chapter II of the Constitution, in particular those rights set forth in Article 24 (Equality before the Law) (Case K.O. 29/12).

In support of this extension of jurisdiction to the Chapter III of the Constitution, the Court further clarifies that: “This is especially so also from the point of view of the provisions of Article 21.2 of the Constitution, which stipulates that the Republic of Kosovo will protect and guarantee human rights and fundamental freedoms as envisaged by the Constitution, not necessarily only those contained in Chapter II.”

However, the extension of the jurisdiction of the Constitutional Court of Kosovo in the review of constitutional amendments does not end with the extension only to Chapter III of the Constitution, which guarantees the rights of communities and their members. Following the clarification of its jurisdiction, the Constitutional Court further clarifies in the form of conclusion that: “when assessing the constitutionality of the proposed amendments, this Court will not only consider the human rights and freedoms contained in Chapter II, but also all the human rights and freedoms guaranteed by the Constitution and envisaged in the letter and spirit of the constitutional order of the Republic of Kosovo” (Case K.O. 29/12).

The Court justifies this extension of the jurisdiction for constitutional review of constitutional amendments beyond Chapter II and III to the entire Constitution, by stating that: “The Court considers that Article 21 of the Constitution dealing with general principles must be read in conjunction with Article 7.1 of the Constitution which defines the values of the constitutional order of the Republic of Kosovo based on” principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, property rights, environmental protection, social justice, pluralism, the separation of powers, and market economy (Cases K.O. 29/12 & K.O. 48/12).

This explanation provided by the Constitutional Court is of mutual importance. Firstly, the fact that the Constitutional Court consolidates its jurisdiction in the process of constitutional review of constitutional amendments. Secondly, because this expansion of jurisdiction has laid the foundations for the review and interpretation of the constitutionality of the amendments in the future. Thus, in the subsequent case, in Case K.O. 61/12, when the Constitutional Court was asked to review two amendments with respect to adding amnesty as a constitutional competence of the Assembly, the Court clarified: “Confirmation of the constitutionality of the proposed amendments will not be done by this Court, taking into account only the human rights and freedoms included in Chapter II, but also the entire letter and spirit of the constitutional order of the Republic of Kosovo, as further explained in paragraphs 56 to 71 of the Judgment issued in cases K.O.29/12&K.O.48/12”. Thus, in the case concerning amendments related to amnesty, the Court referred to the previous Judgments justifying its jurisdiction. Clarifying similarly as in the first two verdicts concerning amendments, the Court will not only stop in Chapter II in exercising its jurisdiction for constitutional review, but the amendments will be reviewed for their compliance with the spirit and letter of the Constitution.

While a more concrete reference to the non-constitutionality of a proposed amendment as a result of the non-compliance with the spirit and the letter of the Constitution is found three years later, concretely in Case K.O. 13/15.

This case refers to a proposal for constitutional amendments to Article 96 (Ministries and Communities Representation). The amendment referred by the Speaker of the Assembly, upon the proposal of a number of Members of the Assembly, proposed adding a paragraph (adding paragraph 8) which read: “None of the sexes can be represented less than 40% in posts of ministers and deputy ministers in the Government of the Republic of Kosovo” (Case K.O. 13/15).

This initiative was taken in order to increase the representation of women in executive power, *i.e.*, in the government cabinet. The Constitutional Court, having provided a number of arguments on the determination of equality before the law and the values of the Constitution of Kosovo, set forth outside Chapter II, has issued a judgment deciding and declaring that: “The proposed amendment reduces the human rights and freedoms set forth in Chapter II and Chapter III of the Constitution, as well as *its letter and spirit*, as defined in the case law of the Court”.

Thus, as can be seen from this case, the extension of the powers of the Constitutional Court beyond Chapter II, referring in its entirety to the spirit and letter of the

Constitution, is materialized in practice and has resulted to be an argument that in one form or another is related to the doctrine of the basic structure.

At the theoretical level, this extension of the jurisdiction of the Constitutional Court of Kosovo is related to elements that have been dealt with especially by German and Indian practices. Even in Germany, the Constitutional Court, calling on the protection of human rights and freedoms, especially in human dignity, has managed to link these rights with the principles and spirit of the Basic Law as a whole. Similarly, it has also been seen in Indian practice, where the Court is interconnected with the doctrine of the basic structure, thus extending its interpretative authority in defence of constitutional values. While in the practical aspect, more or less similar elements of extending the Constitutional powers or constitutional authority of the Court in reviewing the constitutionality of proposed amendments can be found in Colombia as well. The Colombian Court, in Case C-551/03, in its opinion clarified the extension of its powers. This extension refers to an overrun of the Court's powers, from the constitutional definition contained in the 1991 Constitution, which stipulated that the Court has the power to assess the constitutionality of the amendment in procedural terms.

According to the Colombian Court, the procedural error in amending the Constitution may also reflect on substance, so the procedural aspect is closely related to the content of the amendment. Based on this method of interpretation, the Colombian Court had gained ground in the process of reviewing the amendment by expanding its jurisdiction in assessing also the content of the amendment (Case C-551/03). This extension of Court's jurisdiction got respect later and materialized in practice. This was confirmed two years later when the Court in the other case (C-1040/05) had offered an opinion in the amendment process related to the presidential elections. In this judgment, the Supreme Court in Colombia referred to the previous case (Case C-551/03. 2003) from which it had established jurisdiction to evaluate the amendment in substance. Further, the opinion of the subsequent Judgment (Case C-551/03. 2003) dealt as well with substantive aspects of the constitutional amendment and not simply procedural.

However, in the comparative aspect between practices in Kosovo and Colombia, it is important to note that these two Courts are not part of the same model of constitutional control. While in Kosovo the expansion of powers is made by a Constitutional Court which exercises control of the abstract model. In Colombia, this expansion of powers in the area of assessing constitutional amendments is made by

a Court exercising concrete control and is part of the judiciary, and not as a separate Court.

The Impact of the Extension of Constitutional Court's Jurisdiction in the Identification of Unconstitutional Amendments

Being faced with the process of amending the Constitution seven times in a relatively short period (10 years), the Constitutional Court of Kosovo has built a sensational practice regarding the constitutional review of amendments.

Since the concentration of the Constitutional Court to identify the unconstitutionality of constitutional amendments has surpassed Chapter II and extended to the principle of the spirit and the letter of the Constitution, this has led the Court to have more work in protecting the Constitution from amendments that may be unconstitutional. If we appraise the principle of separation and balance of powers as a principle embedded in the spirit and letter of the Constitution, then we can say that the Constitutional Court has created the ground to evaluate the amendments from this point of view as well.

However, despite a number of proposed amendments that have rebalanced the powers of the President in relations with the Government and the Assembly, there is only one opinion offered by the Court regarding the violation of the principle of separation and balance of powers. Here we are referring to the amendment of Article 104, paragraph 1. This Article specifies that: "Judges shall be appointed, renamed and dismissed from the President of the Republic of Kosovo, with the proposal of the Kosovo Judicial Council" (Constitution of the Republic of Kosovo 2008), while the new amendment proposed this content:

"The judges shall be appointed, renamed and dismissed by the President of the Republic of Kosovo, with the proposal of the Kosovo Judicial Council. The President may return the proposed candidate for reconsideration to the Kosovo Judicial Council. This right can only be exercised one time for one candidate. The Kosovo Judicial Council may propose the same candidate if it provides the support of 2/3 (two-thirds) of the members of the Council" (Cases K.O. 29/12 & K.O. 48/12).

While assessing the constitutionality of this amendment, among others, the Constitutional Court emphasized that "there exists the risk to violate this Article of the Constitution by not appointing the judges on time." Both Articles 32 and 54 repeat the principle of separation of powers to the extent that they repeated that the

exercise of judicial powers and access to legal remedies are the cornerstones of one of those pillars, namely the judiciary branch of the state. Therefore, any possible violation of access to the courts, and consequently of the judges who make decisions in courts, diminishes the rights and freedoms guaranteed by Chapter II of the Constitution.

This is the only case when the Court, while assessing the constitutionality of the amendments, also related to the principle of the separation of powers as a constitutional value outside the second Chapter. Outside this opinion, in the remained part of the verdict, the Court offered its opinion regarding these amendments, maintaining an interrelationship mainly focused within the second Chapter, namely human rights and freedoms (Cases K.O. 29/12 & K.O. 48/12).

Conclusions

The frequent proposal of amendments in Kosovo's Constitution has led the Constitutional Court of Kosovo to create a unique experience regarding the review of constitutional amendments. The reason why this experience of the Constitutional Court of Kosovo can be considered as unique is related to the nature of the amendments it has so far reviewed. So, first of all, the Constitutional Court, considering the constitutional amendments for the conclusion of the supervised independence, has created a special precedent, because other constitutional courts did not have the chance to evaluate amendments of such nature. Furthermore, the constitutional review of constitutional amendments that aimed at changing the election of the President, from a parliamentary President to a President elected by the people, has paved the way for the Constitutional Court to exercise review also outside the second Chapter, thus outside the scope of human rights and freedoms. This variety of constitutional amendments influenced the extension of the Constitutional Court's jurisdiction, which, as has been said, although not in many cases, provided opinions on the non-constitutionality of the amendments beyond the assessment of the second Chapter. One of the important issues in the methodology of the work of the Constitutional Court regarding the review of amendments remains the non-specification of the violation of human rights and freedoms by constitutional amendments. So, the Constitutional Court, during the evaluation of constitutional amendments, in cases when it found non-constitutional amendments, did not make any connection with the constitutional Article which the Court claims that is violated by the proposed amendment. This is especially noticed in the constitutional

amendments that the Court has assessed as amendments that reduce human rights and freedoms. Thus, there are cases when the Court has evaluated that a particular amendment reduces human rights and freedoms, without specifying which Article within the second Chapter is challenged by the amendment in question.

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