THE EXTENSION OF THE JURISDICTION OF CONSTITUTIONAL COURT IN ASSESSING THE CONSTITUTIONAL AMENDMENTS – THE CASE OF SLOVAKIA AND KOSOVO

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BALAJ, Luz; MUÇAJ, Florent. The Extension of the Jurisdiction of Constitutional Court in Assessing the Constitutional Amendments – the Case of Slovakia and Kosovo. *International and Comparative Law Review*, 2020, vol. 20, no. 2, pp. 239–253. DOI: 10.2478/iclr-2020-0027

Summary: This paper examines the jurisprudence of the constitutional courts of Slovakia and Kosovo regarding their assessment of the constitutionality of constitutional amendments. The rationale for the selected countries stands behind the practices of their Constitutional Courts of, in terms of the jurisdiction expansion in assessing constitutional amendments. Considering the fact that these courts have been recently established, the Slovak Constitutional Court with the Constitution of 1992 and the Constitutional Court of Kosovo with the Constitution of 2008, it is the purpose of this paper to further analyze their initial work in assessing the constitutionality of constitutional amendments in the light of the impact of the German jurisprudence. Regardless the lack of experience in this regard, these courts have shown an interesting correlation between scientific doctrines and jurisprudences, which have served the judges to justify their decisions. In this direction, this paper frames its discussion in two key segments. Firstly, is the manner in which these courts have expanded their jurisdiction, an expansion that provided an assess to the constitutionality of constitutional amendments that goes beyond confronting the amendment with the explicit nature of the unamendability of the constitution. Secondly, on the impact of the German jurisprudence, especially in the case of the Slovak Constitutional court.

Keywords: Constitutions, Amendments, Constitutional Court, Constitutional doctrine, Amendment power.

1 Introduction

Today, the most of modern constitutions that have been adopted after the fall of communist regimes in Europe, are aware of the concept of Eternity Clause. Nevertheless, the adoption of this clause in different constitutions appeared in two ruling ways. Firstly, some constitutions explicitly displayed the nature of the

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limitations regarding changes of certain articles, and secondly other constitutions employed the implicit nature. Significantly, Roznai's¹ concept for constitutional unamendability emerged. According to Roznai the judicial enforcement for constitutional unamendability rests on the fundamental distinction between primary constituent (constitutional making) power and secondary constituent (constitution amending) power.² Thus, the primary constituent power explicitly limits certain changes, while the secondary constituent power implicitly. To be precisely concrete for the distinction that Roznai speaks of, between the primary constituent power and the secondary constituent power, he raises two main questions. The first questions forming a new constitution and the second questions the amendment of the existing one. A practical example of this debate can be found in the process of the drafting of a new constitution in 2011 in Turkey. The Speaker of Parliament, before convening the first meeting of the commission for drafting the new constitution, had invited professors and experts, that precisely raised the question:³ "If the parliament possessed the constituted power to make a new constitution or if it was limited to the amending power to revise the constitution?"⁴ The second question deals with the change of the constitution, respectively with the constitutional power of the amendment: what can be changed through the amendment and what cannot.

Contemporary constitutions have provided various examples.⁵ Some explicitly provide their unamendability as is the case with the German Basic Law, where Article 1 is explicitly protected by the procedure of amendment,⁶ or with the Constitution of Kosovo and its Second Chapter, which will be addressed in the second part of the paper. In the framework of the second question about the

- 1 For a more detailed view about Roznai's scientific contribution on the topic, see: ROZNAI, Yaniv. *Unconstitutional Constitutional Amendments (The Limits of Amendment Powers)*: Oxford University Press, 2017.
- 2 ROZNAI, Yaniv. Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability. In ALBERT, Richard, ODER, Bertil, Emrah (eds). *An Unamendable Constitution? Unamendability in Constitutional Democracies*. Dordrecht: Springer, 2018, pp. 29.
- 3 For a more detailed view on the nature of unamendability of the Turkey Constitution see: OLCAY, Tarik. The Unamendability of Amendable Clause: The case of the Turkish Constitution. In ALBERT, Richard, ODER, Bertil, Emrah (eds). *An Unamendable Constitution? Unamendability in Constitutional Democracies*. Dordrecht: Springer, 2018, pp. 313–343.
- 4 YEGEN, Oya. Debating Unamendability: Deadlock in Turkey's Constitution-Making Process. In ALBERT, Richard, ODER, Bertil, Emrah (eds). *An Unamendable Constitution? Unamendability in Constitutional Democracies*. Dordrecht: Springer, 2018, pp. 281–311.
- 5 For a more detailed view see: KÖYBAŞI, Serkan. Amending the Unamendable: the Case of Article 20 of the German Basic Law ("The privilege of the Will of the Founders and the Importance of the Derived pouvoir Constituant: The example of 4th paragraph of article 20 of the German Basic Law"). In ALBERT, Richard, ODER, Bertil, Emrah (eds). *An Unamendable Constitution? Unamendability in Constitutional Democracies*. Dordrecht: Springer, 2018, pp. 259–280.
- 6 See: ALBERT, Richard. *Constitutional Amendments Making, Breaking, and Changing Constitution*: Oxford University Press, 2019, pp. 53.

constitutional power of the amendment, we have two particular situations related to the nature of the unamendability of the constitutional norm: the explicit approach which implies a clear constitutional language about unamendability and the implicit nature of unamendability, which is usually identified by a court competent to interpret and assess the constitutionality of the constitutional amendment. In terms of the explicit nature, the paper will address the German model from two perspectives. The first, is the constitutional language of the Basic Law as one of the basic models in terms of the eternity of the norm. The second, is the influence of the German jurisprudence, particularly in the case of Slovakia, with its recent judgment, that clearly employed the German model of controlling the constitutionality of amendments. In the part on the frozen issues, the jurisprudence of the Constitutional Court of Kosovo will also be analysed, where both the explicit and implicit nature of the constitution will be evidenced, based on the judgments of the constitutional court.

2 The Unamendability of the German Basic Law: The influence of the eternity clause in the jurisprudence of Constitutional Courts

Studying the unamendable norms within the German Basic Law can only make sense, if the historical context is also part of the study. The history of the German Basic Law rules on the limitation of the amending power dates to the Weimar Constitution,⁷ which in many aspects has served as a negative paradigm for the design of the Basic Law after World War II.⁸ In this direction, Albert, one of the constitutional theorists, states that: “The Basic Law’s drafters intended to make human dignity its primary constitutional value. The protection of human dignity as an unamendable rule was meant to be a real constraint on conduct and was designed to convey its importance at once internally to those bound by the Basic Law and externally to the wider world”.⁹ Albert relies the central

7 PREUSS, Ulrich. The Implications of Eternity Clauses: The German Experience. *Israel Law Review*, 2017, vol. 44, no. 3, pp. 436: “The history of the German Basic Law’s rules on the limitation of the amending power dates to the Weimar Constitution, which in many respects has served as a negative paradigm for the design of the Basic Law after World War II Article 76 of the Weimar Constitution stipulated that constitutional amendments could be performed by legislation and that they required the presence of two-thirds of the members of the Reichstag (Diet) the popularly elected house of parliament and the approval of two-thirds of the members present. As a consequence, less than 50% of the members of the Reichstag could amend the constitution. The role of the Reichsrat (the body in which the German Länder (states) were represented) in this regard was negligible. These relatively undemanding preconditions for a constitutional amendment were exceptional but not unique at the time. The Polish Constitution of 1921 was even less demanding, in that the constituent Sejm required no more than the presence of at least 50% of its members and the approval of two-thirds, and the next Sejm elected according to the rules of that constitution required no more than three-fifths of the votes.”

8 Ibid, pp. 429.

9 ALBERT, Richard. *Constitutional Amendments Making, Breaking, and Changing Constitution*: Oxford University Press, 2019, pp. 53.

role of human rights and freedoms, led by human dignity as an unamendable norm, on the theoretical argument by linking it to the leading English-language scholars of the Basic Law, Donald Kommers and Russell Miller, the Basic Law “has placed human dignity at the core of its value system,” and they note that the Basic Law’s human dignity clause “expresses the highest value of the Basic Law, informing the substance and spirit of the entire document.”¹⁰

Beyond the theoretical aspect of the importance of Article 1 as a fundamental value of human rights and freedoms, this article is also defined in the practice of the German Constitutional Court, as an indisputable and indistinguishable value. In 1975 the Constitutional Court, faced with the question: “Does the reformed abortion statute violate the right to life of the life developing in the mother’s womb”, among others had answered: Yes, it does, because it is the duty of the state to protect every human life. [This duty] also arises from Article 1.1. second paragraph of the Basic Law; for the developing human life is included in the protection of human dignity¹¹ which is granted by Article 1.1. of the Basic Law.” Where human life exists it merits human dignity; it is not decisive whether the holder of this human dignity knows of it and is able to maintain it by himself. The potential capabilities lying in human existence from its inception on are sufficient to justify human dignity.¹² A few years later, the German Constitutional Court, in the Eppler Case, would define human dignity as the supreme value of the fundamental law.¹³ According to Albert, this fact also legitimizes the judicial review of the constitutionality of the articles of the Basic Law.

Another case from the jurisprudence of the Federal Constitutional Court of Germany is Aerial Security Law, Case No. 1 BvR 357/05. 115 BVerfGE 118. On 15 February 2006, the Federal Constitutional Court of Germany (Bundesverfassungsgericht) held the Aerial Security Act to be unconstitutional. This act authorized the use of military force against any aircraft intended to be used for the killing of human beings, if the use of such force was the only means to avert an immediate danger. The Court based its ruling on two grounds: first, that the federal level of government had no legislative power to enact such a law, and second, that the act’s authorization of military force infringed upon the guarantee of human dignity as embodied in Article 1(1) of the German Constitution,

10 See KOMMERS, Donald P, MILLER, Russell A. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press, 2012, 3rd ed, pp. 44.

11 For a more detailed view on the nature of the concept of (Human Dignity) on the German Basic Law, See: ENDERS Christoph. The Right to have Rights: The concept of human dignity in German Basic Law. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* (RECHTD), 2010, vol. 2, no. 1, pp. 1–10.

12 39 BVerfGE 1 (1975).

13 ALBERT, Richard, op. cit. (fn. 9), pp. 44; For a more detailed view see: EBERLE, Edward. Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview. *Liverpool Law Review*, 2012, vol. 33, pp. 201–233.

or Basic Law (Grundgesetz).¹⁴ From this combination of the explicit nature of the Basic Law and the practice of the Federal Constitutional Court, the eternal clause – as it is known today – has taken shape in Germany.

But Article 1 is not the only unamendable article. Another article, which has a great influence outside of Germany as well, is Article 79, paragraph 3¹⁵, for which Preuss states that: “it incorporated Schmitt’s idea that certain core elements of the constitution should remain unamendable, even by supermajorities in both houses.”¹⁶ According to Preuss, “the unamendable stipulations of the constitution were designed to exist forever, which is why Article 79 §3 is usually called the eternity clause of the Basic Law.”¹⁷ What makes this law exceptional is the influence it has had on other models for defining constitutional unamendability.

Preuss, while analysing the case Pl. ÚS 27/09 of 2009 of the Constitutional Court of the Czech Republic argued that the judges were motivated by a comparative approach largely dominated by the German model set out in Article 79, paragraph 3.¹⁸ In this judgment, the constitutional court addressed for the first time the question of whether, as a body for the protection of constitutionality, it is competent to review an act designated as a constitutional act. It stated that the protection of the Constitution’s material core, i.e. the essential requirements for a democratic state governed by the rule of law under Art. 9 par. 2¹⁹ of the Constitution is not a mere slogan or proclamation, but an actually enforceable constitutional provision.²⁰

However, the influence of the German model of norm unamendability does not end with the Czech Republic,²¹ given that, as it will be further seen

14 BONDANSKY, Daniel, NASKE, Nina, NOLTE, Georg. *American Journal of International Law*, vol. 101, no. 2, Bundesverfassungsgericht, 2006, 115 BVerfGE 118, [online]. Available at: <http://www.bundesverfassungsgericht.de> Accessed 20.01.2021

15 Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

16 PREUSS, Ulrich, op. cit. (fn. 7), pp. 429.

17 *Ibid.*

18 *Ibid.*

19 Czech Republic’s Constitution of 1993, Article 9, paragraph 2. Any changes in the essential requirements for democratic state governed by the rule of law are impermissible.

20 2009/09/10 – Pl. ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, <https://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1/>.

21 PREUSS, Ondřej. The Eternity Clause as a Smart Instrument – Lessons from the Czech Case Law. *Hungarian Journal of Legal Studies*, 2016, vol. 57, no. 3, pp. 289–304. For a more detailed view of the Czech Constitution and the eternity clause, see: VYHNÁNEK, Ladislav. The Eternity Clause in the Czech Constitution as Limit to European Integration. *ICL Journal*, 2015. vol. 9, no. 2.

in this paper, many other constitutions²² and constitutional courts have also been guided by the spirit of German Basic Law, or the practice of the Federal Constitutional Court.²³

3 Implicit limitations from the perspective of the Slovak Constitutional Court

3.1 Introduction

From January 2019, Slovakia has entered the map of countries that have had to deal with unconstitutional amendments. In spite of the fact that, the Slovak Constitutional Court in this judgment treats the separation of powers, it is however related to the German jurisprudence, because it takes into consideration its jurisprudence and the German Basic Laws explicit nature to rationalize its decision. In contrast to the German model, with an explicit nature of unamendability, in Slovakia, it is the Constitutional Court the one that has found the unamendability of constitutional norms, after assessing the constitutionality of the proposed amendment, despite the fact that the court itself finds the lack of the constitutional definition of unamendability in an (expressive) explicit way.²⁴

Although, the fact that the German Basic Law carries its explicit nature, the Slovak jurisprudence of the constitutional court will show how it has managed to support their arguments on the German model. It is worth noting how the Slovak Constitutional Court made possible the recognition of unamendable implicit norms. The latter, on a recent judgment has identified some articles of the constitution as essential elements of the constitution,²⁵ and therefore, by being essential, they cannot be subject to any changes through an amendment. The manner of identifying the essential elements that are not explicitly stated in the constitution, the Court has assessed as an essential implicit basis.²⁶ According to the Court, the recognition of this implied substance is highly important, and it is

22 Another example is the Croatian Constitution, Article 17, para. 3, which says that: Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or unusual treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion. For a more detailed view, see: VUKOVIĆ, Ana, Horvat. U Ime Ustava – materijalne granice promjene Ustava. *Zbornik Pravnog fakulteta u Zagrebu*, 2015, vol. 65, br. 3–4, pp. 481–503.

23 For a more detailed view, see FRIEDMAN, Andrew. Dead hand constitutionalism: The danger of eternity clause in new democracies. *Mexican Law Review*, 2011, vol. 4, no. 1, pp. 78–96. Friedman: By creating an eternity clause, the constitutional drafter, reduce “pragmatic innovation” of the country’s future leaders.

24 PL. ÚS 21/2014-96 (52) – In the historical-political context, it would be justified for the 1992 Constitution of the Slovak Republic to express itself explicitly in the unamendability of certain constitutional norms, guaranteeing them with the clause of eternity. But that did not happen.

25 PL. ÚS 21/2014-96 (169.i, ii, iii).

26 Ibid. (93).

moreover also important to preserve this qualification. Nevertheless, in parallel with this finding, the Constitutional Court of Slovakia also draws attention to the fact that the more the constitutional norms will be included within this implied constitutional essence, the more rigid the constitution will become.²⁷

3.2 The spirit (nature) of the unamendability of the Slovak Constitution

Before analyzing the content of the judgment issued by the Slovak Court, it is worth noting that throughout the 100 pages of treatment, the Court is *inter alia* related to the German jurisprudence built upon the German Basic Law. In paragraph 59 of its judgment, the Slovak Court relates precisely to the jurisprudence established by the German Basic Law.

The essential argument of the court is Article 1 of the Slovak constitution which promptly states that: “The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion.”²⁸ According to the Court, this article is in itself of foundation that clearly confirms the existence of a constitutional essence. This is also the starting point of the discussion on constitutional unamendability in Slovakia, as the Constitutional Court relates this essence of the Slovak constitution with jurisprudences from other countries, such as Germany, Greece, and Portugal. Thus, in a single judgment, the Slovak Constitutional Court mentions the German Federal Constitution no less than 30 times, or the jurisprudence of the Federal Constitutional Court.

Beyond that, within the model of constitutional control of amendments and the restriction of the constitutional power of the amendment, the Slovak Constitutional Court, also brings the doctrinal contribution of scholars related with the German context of the unamendability of the norm.²⁹ Both views – the practical one of the German Federal Court and the scientific doctrine, have helped the Slovak judges in specifying the elements that constitute the core of the Slovak constitution. Regarding the theoretical aspect, the Court additionally clarifies in the text of the judgment the need for theoretical preparation. While for the practical aspect, among other things, the court emphasizes that: “the exercise of the clearly defined jurisdiction of the Constitutional Court is, in the vast majority of cases, a mean of enforcing the Constitution by the Courts judges.

On the other hand, as it will be further seen, in terms of qualifying the core of the constitution, such articles that have received the epithet of the core of the constitution in Slovakia, in Kosovo, these articles have been named differently according to the constitutional court of Kosovo, namely: “Articles that define

²⁷ *Ibid.*

²⁸ Constitution of Slovakia, Article 1, para. 1.

²⁹ *Ibid.*; See BRÖST, A. O ústavnosti ústavných zákonov, in: *Metamorfózy práva ve střední Evropě*. Praha – Plzeň, 2008, pp. 11–24.

the spirit and soul of the constitution”.³⁰ Thus, forming a distinction between the Slovak and Kosovar practice. Therefore, what is at the core of the Slovak constitution, has been seen by the court more narrowly than what constitutes the spirit and soul of the Kosovo constitution. Nevertheless, the case of Kosovo will be separately discussed in the second part, it is important here to address the Slovak jurisprudence. It should be firstly clarified that the proposed amendment to the Slovak constitutional court, declared as unconstitutional, concerned security clearance by the national security authority of judges and judicial candidates. The appellant in this case claimed that any legislation that allows the intervention of the security authorities to intervene and affect the status of a judge, jeopardizes the principle of separation of powers.³¹ Hence, according to the appellant, the Constitution has created a power imbalance between the government and the judiciary, allowing the former to intervene in the judiciary power through security mechanisms.³²

The Slovak Constitutional Court took this view towards these allegations. It firstly clarified that: Changes in the Constitution should not be made (only) with the explanation that it is the will of the parliamentary majority. The compatibility of such an action with the demand of the democratic rule of law state is essentially composed from the established constitutional regime. The triumph in parliamentary elections is not a coup, and therefore its legal effect should not be an arbitrary deliberate blow to the constitution. The only legal protection against such exercise of parliamentary power is the possibility of a legally binding review to see if the constitutional amendment made does not impair constitutionality.³³ This initial finding of the Court, while in a way justifies its authority to evaluate the constitutionality, is a finding that in the first place argues the impact of the theory of the constitutionality of the constitutional amendment. Thus, in the very first sentence where the Court states that “amendments to the Constitution should not be made (only) with an explanation, that it is the will of the parliamentary majority” is not a revelation of the court, but is an argument defended by scientific doctrine, where the contribution of Richard Albert and Yaniv Roznai stands out.³⁴ An important continuation here would perhaps be if the court would emphasize the principle of the supremacy of the constitution, thus building the strongest argument, from which a subordination of other arguments would rise as to why a constitutional change is not enough if it only meets a formal-procedural criterion, of a majority as defined in the constitution. However, in an indirect way, the Court clarifies the need for each institution to

30 Judgment KO 29/12 and KO 48/12, point 260.

31 PL. ÚS 21/2014-96 (5).

32 *Ibid.*

33 PL. ÚS 21/2014-96 (80).

34 Both these authors address constitutional protection from changes that may come from parliamentary majorities. These treatments relate either to the case law of the Supreme Court in India, which relates to the doctrine of the basic structure, or to the case law of the Colombian Court, but also that of other countries.

act in accordance with its competence.³⁵ In this regard, this finding of the Court which are based on the second Article of the Constitution,³⁶ implies a two-sided message: the Court must act in accordance with the capacity and competence defined by law, but the Assembly must as well ensure, that when proposing the amendment, it will not undergo only with a formal criterion, the proposal should remain within the defined competencies.

In fact, the jurisdiction of the court to interpret the constitutionality of the amendment is one of the reasons for comparing the case of the Slovak and Kosovo Courts. Both of these courts exhibit a kind of extension of their interpretive jurisdiction, but in different forms.³⁷

4 The extension of the jurisdiction of the Slovak Constitutional Court in assessing the constitutionality of the amendments – similarities and differences with the Constitutional court of Kosovo

The Slovak Constitutional Court

The Slovak Constitutional Court gradually empowered itself since its inception. The Constitutional Court had the starting point of the extension and consolidation of its jurisdiction in 2005. According to the Court through the judgment (PL. GJK 27/05), the Court expanded its jurisdiction, when accepted the interpretation of the constitution at the request of the national council, although formally this council was not recognized the right to refer such a request to the Constitutional Court.³⁸ Among many activities that have followed the consolidation of the interpretative powers are also the constitutional amendments and amendments to the law on the Constitutional Court in 1993, when the court added jurisdiction to individual appeals by enabling individuals to overcome claims by public authorities.³⁹ All these steps have enabled the Constitutional

35 PL. ÚS 21/2014-96 (81).

36 State bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law.

37 For a more detailed view regarding the influence of Eternity Clause in post conflict countries or new established democracies, see SUTEU, Silvia. Eternity clauses in post-conflict and post-authoritarian constitution-making: Promise and limits. *Cambridge University Press*, 2017: "The article explores the distinctive role and problems posed by eternity clauses in transitional constitution-building, as guarantees of the pre-constitutional political settlement in such fragile periods."

38 *Ibid.*

39 *Ibid.* The Constitutional Court continued to grant jurisdiction over this type of process for the second time in 2005. On the other hand, the National Council, which may enter into disputes over the interpretation of the Constitution with another state body, has no right to file a claim with the Constitutional Court to initiate procedures for the interpretation of the Constitution. The Constitutional Court again informally concluded its jurisdiction to initiate proceedings for the interpretation of the Constitution even after a proposal of the National Council (PL. GJK 27/05). The Constitutional Court acted similarly in the case of constitutional appeals of persons, made not only against public authorities, when the scope

Court, to assess the constitutionality of the constitutional amendment. The protection of constitutionality is precisely the key word in the reasoning used by the Slovak court. According to the latter, the Court is allowed any interpretive jurisdiction, if the purpose of this interpretation is the protection. The significant certitude here, is the fact that the Court, in order to defend such findings reverts to the doctrine, after quoting the author Brösl. A. and his publication entitled “On the constitutionality of constitutional laws” in: *The Metamorphoses of Law in Central Europe* (Praha – Plzeň, 2008. pp. 11 –24), according to which: The protection of constitutionality is the protection of its “core substance”. The Constitutional Court fully agrees with the view that “if constitutionality is at stake, respectively, unconstitutionality and the constitutional court only looks at it and does not protect it, perhaps there is a constitutional disorder.”⁴⁰

The Slovak Constitutional Courts jurisprudence sparks a “sui generis” advancement to review the constitutionality of constitutional amendment. Nonetheless, the Constitutional Court, on matters relating to the material core, defined itself to have more authority than the National Council, which is defined by the Constitution as a legislative and constitution-making authority. If this trend of empowerment of the Constitutional Court and its judicial activism should continue, one could legitimately ask whether the commitment to democracy is really still being honoured. It might, in fact, be a case of the commitment to democracy being undermined in favour of the principle of rule of law, which is also expressed in article 1(1) of the Constitution.⁴¹

4.2 *The Constitutional Court of Kosovo*

After the Republic of Kosovo declared its independence in February 2008, it adopted a new Constitution on April 9, 2008 which came into effect on June 15, 2008. The Constitution established a parliamentary system,⁴² but explicitly

of protection given to individuals for violations of fundamental rights and freedoms was significantly expanded by amending Article 130, para. 3 of the Constitution, for another type of procedure – the procedures for the initiative. By defending the constitutionality in the petition procedures, the Constitutional Court initially forced the completion of the law in the Constitutional Court, when it was amended by the law of the National Council of the Slovak Republic no. 293/1995 L. I. amending and supplementing the law of the National Council of the Slovak Republic no. 38/1993 L. I. on the organization of the Constitutional Court of the Slovak Republic, on matters before it and on the status of its judges, and subsequently caused the amendment of the Constitution in the current form of appeal cases under Art. 127.

40 PL. ÚS 21/2014-96 (88).

41 DOMIN, Marek. A Part of the Constitution is Unconstitutional, the Slovak Constitutional Court has ruled. IACL-AIDC Blog (6 February 2019) <https://blog-iacl-aidc.org/2019-posts/2019/2/5/a-part-of-the-constitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled>. Accessed: 19.01.2021.

42 MUČAJ, Florent, MUČAJ, Avdykader. Appointing a President that Represents the Unity of the People in Kosovo. *International and Comparative Law Review*, 2017, vol. 17, no. 1, pp. 193–210.

promoting the separation of power. In contrast to the practice of the Slovak Constitutional Court, the Constitutional Court of Kosovo has managed to extend its jurisdiction within a judgment, namely, in the first case of assessing the constitutionality of constitutional amendments. (Cases K.O. 29/12 and K.O. 48/12). Through this case, the Court has clarified what its jurisdiction is in the evaluation of amendments and to what extent can this jurisdiction be extended. Following procedural clarifications on the referral of amendments, the Court has continued to clarify or address its jurisdiction.

The Court, by addressing Article 113 paragraph 9 of the Constitution of Kosovo, which gives the Court jurisdiction to assess the constitutional amendment if the amendment diminishes the human rights and freedoms as set forth in Chapter II of the Constitution,⁴³ the Court clarified that: “As regards the evaluation of the constitutionality of any proposed amendment to the Constitution, according to Article 144.3, such amendment shall be considered in light of Chapter II [Fundamental Rights and Freedoms] of the Constitution, which according to its Article 21 [General Principles], consists of fundamental human rights and freedoms, which are the basis of the legal order of the Republic of Kosovo.”

Unlike the Slovak practice, where we saw a gradual process of expanding or consolidating the jurisdiction of the Constitutional Court, in Kosovo, the court reaches this point in the first judgment. Thus, the Court initially does the expansion of jurisdiction outside the second Chapter by justifying the competence of assessing the constitutionality of the constitutional amendment to the third Chapter as well, which deals with the rights of communities and their members. According to Judgment no. K.O. 29/12 and K.O. 48/12, the Court considers that Chapter III [Rights of Communities and their Members] and other rights may be applicable in this process, as the specifically defined rights that are an extension of the human rights and freedoms in Chapter II of the Constitution, in particular those rights set out in Article 24 [Equality before the Law].⁴⁴

In support of this extension of jurisdiction over the Third Chapter, the Court continues to further clarify that: “This is especially true also from the point of view of Article 21.2 of the Constitution, which provides that the Republic of Kosovo will protect and grant fundamental human rights and freedoms as provided by the Constitution, and not necessarily only those included in Chapter II.”⁴⁵

43 The President of the Assembly of Kosovo shall refer the proposed constitutional amendments before approval by the Assembly, in order to determine whether the proposed amendment reduces the rights and freedoms guaranteed by Chapter II of the Constitution.

44 Judgment no. K.O 29/12 and K.O. 48/12, point 63.

45 For an opinion supporting the idea that unamendability can be found and should be enforced by Constitutional Court, see OROSZ, Fruzsina, Gardos. Unamendability as a Judicial Discovery? Inductive Learning Lessons from Hungary. In ALBERT, Richard, ODER, Bertil, Emrah (eds). *An Unamendable Constitution? Unamendability in Constitutional Democracies*. Dordrecht: Springer, 2018, pp. 231–258.

However, the extension of the jurisdiction of the Constitutional Court of Kosovo⁴⁶ in the assessment of constitutional amendments does not end with the justification of including only Chapter III of the Constitution which guarantees the Rights of Communities and their Members. In continuing to clarify its jurisdiction, the Constitutional Court further clarifies in the form of the conclusion that: “when assessing the constitutionality of the proposed amendments, this Court will not only consider the human rights and freedoms included in Chapter II, but also all human rights and freedoms guaranteed by the Constitution and provided by the letter and spirit of the constitutional order of the Republic of Kosovo.”⁴⁷

The Court justifies this extension of the jurisdiction to evaluate the constitutional amendment beyond Chapters II and III, towards the entire Constitution, by clarifying that: “The Court considers that Article 21 of the Constitution, which deals with general principles, should be read in conjunction with Article 7.1 of the Constitution which defines the values of the constitutional order of the Republic of Kosovo, which is based on the “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, separation of powers and the market economy.”⁴⁸ This clarification provided by the Constitutional Court is of double importance, primarily due to the fact that the Constitutional Court consolidates its jurisdiction in the process of assessing the constitutionality of constitutional amendments. Secondly, due to the fact that this extension of jurisdiction has laid the foundations for the interpretation of the constitutionality of future amendments. In this direction, in the following case, in Judgment K061/12, when the Constitutional Court assessed two amendments referred to in connection with amnesty as a constitutional competence of the Assembly, the Court had clarified: “The confirmation of the constitutionality of the proposed amendments will not be undertaken by this Court only taking into account 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 is further explained in paragraphs 56 to 71 of Judgment issued in cases K029/12 and K048/12.” So, in the case of amendments related to amnesty, the Court had referred to the preliminary judgment as regards its powers,⁴⁹ by explaining that similar to the first judgment of the amendments, the

46 For a more detailed view on the nature of unamendability of Kosovo Constitution see: BALAJ, Luz. Explicit and Implicit Unamendable Constitutional Provisions from the Perspective of the Kosovo Constitution. *Perspectives of Law and Public Administration*, 2020, vol. 9, no. 1, pp. 44–53.

47 Judgment no. K.O. 29/12 and K.O. 48/12, point 64.

48 Ibid.

49 For a more detailed view as regards the nature of the expansion of competences by the Constitutional Court of Kosovo, see BALAJ, Luz. The Jurisdiction of Constitutional Court of Kosovo to Assess the Constitutionality of Constitutional Amendments. *Acta Universitatis Danubius*, 2018, vol. 14, no. 3, pp. 149–157.

Court will not only dwell on the second Chapter, but will evaluate the amendments in accordance with the whole spirit and letter of the Constitution. This confirmation of the extension of jurisdiction is important, given that the Court has built a standard through which it clarifies the two categories of unamendability, both the explicit one which is Chapter II but also the implicit one, which in these cases are Chapter III and other included articles. From this point of view, if we compare the case of Kosovo with the one of Slovakia, then it will be of particular interest to see the next case in Slovakia, as to how the Court will confirm this form of expansion of jurisdiction, having in mind the fact that there, this expansion reflected a continuous work of the Court.

Conclusion

The confrontation of the constitutional courts with the doctrine of the constitutionality of the constitutional amendment, has paved the way for the new constitutional courts to expand their jurisdiction. This extension of jurisdiction has been manifested and continues to grow in various forms. The manner in which this jurisdiction is extended depends on the form in which the judges issue questions from a proposed amendment. If the question will be like the case of Turkey, as discussed at the beginning of the paper in the sense of what an amendment can change and what it cannot, then the answer will impose a response of the Court that would pave the way for a chain effect of constitutional unamendability. In such questions, the courts will no longer suffice with the text of the constitution, because it may be silent about the change, but may refer to other sources. As was seen from this paper, for courts that do not have a long constitutional tradition and a large jurisprudence, there are two alternative sources. The first is the influence of the German doctrine and the spirit of the unamendability of the German Basic Law, and the second is the influence of scientific doctrine related to the rapid development of the doctrine of the constitutionality of the constitutional amendment. The reliance of the constitutional courts on these elements has increased the chances for strong and unamendable constitutions, and has, on the other hand, greatly reduced the constitutional power of the amendment. Cases such as Slovakia and Kosovo have a great influence here, where despite the silence of the constitution, the courts have identified the unamendability of an implicit nature. What this extension of the jurisdiction of the constitutional courts will produce in the future will be the making of rigid constitutions in the sense of unamendability. But on the other hand, this situation will raise a new question: Nonetheless, was the real purpose of the drafters of the constitution, the protection of unamendability to the extent that the courts are doing it by relying on the implicit nature of unamendability?

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