

EXPLICIT AND IMPLICIT UNAMENDABLE CONSTITUTIONAL PROVISIONS FROM THE PERSPECTIVE OF THE KOSOVO CONSTITUTION

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Abstract

This paper reviews the debate over the power of the constitutional amendment in Kosovo, by primarily dealing with two forms via which it is manifested: namely, norms that explicitly define their unamendability and norms that the court of constitutional jurisdiction has identified as unamendable in their implicit nature. To reach that objective, the paper proceeds as following: it first reviews the jurisdiction of the Constitutional Court to review draft-constitutional amendments, and the criteria on which it may rule. Thereafter, the paper explains how certain amendments conform to the explicit prohibitions on amendability present in the constitution. The paper then continues further by deconstructing the constitutional court's contribution in identifying the unamendability of the constitutional norm with an implicit nature. This is primarily considered from the perspective of landmark judgments of the Constitutional Court, which, as will be seen, have contributed to the expansion of the Court's review power as well as the material criteria governing the limitations on the power of constitutional amendment.

Keywords: unconstitutional amendments, explicit-implicit unamendability, constitutional court, constitutional jurisdiction, human rights.

JEL Classification: K30, K38

1. Introduction: an overview on Kosovo's constitutional system and the clause governing constitutional amendment

The Republic of Kosovo adopted its Constitution on April 9, 2008, which tasks the Constitutional Court with jurisdiction for the final interpretation of the Constitution.² Among many bases, the Court has also been tasked with the jurisdiction to review the constitutionality of draft-constitutional amendments. The Constitution establishes that the Court should undertake the review of draft-constitutional amendments on the basis of two material restrictions:

- first, “the compatibility of a proposed constitutional amendment with binding international agreements³ ratified under the Constitution, and the constitutional review of the followed procedure”⁴;
- and, second, “[t]he President of the Assembly of Kosovo should refer the proposed constitutional amendments before the adoption in the Assembly, in order to ascertain whether the proposed amendment reduces the rights and freedoms guaranteed by Chapter II of the Constitution.”⁵

With regard to the first material restriction, one wonders what is the scope of review the Court should take into consideration when considering whether a constitutional amendment contradicts with binding international agreements. In this direction, the commentary on the Constitution of Kosovo – e good reference document relating to issues under discussion – notes that: “Initially, it is important to argue that, except that the Constitution does not confer jurisdiction on the Court to control the constitutionality of international treaties (especially before ratification), this paragraph builds the Court's positive obligation to evaluate the conformity of constitutional amendments with the binding international treaties to which Kosovo is a party.”⁶

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²The Constitution of the Republic of Kosovo (2008), Article 4 which deals with the separation of powers, in paragraph 6 states that: „The Constitutional Court is an independent body for the protection of constitutionality and makes the final interpretation of the Constitution”.

³See Dren Doli& Fisnik Korenica Kosovo Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses-German Law Journal, Vol. 11 No. 08. What is the meaning of (binding international agreements)

⁴The Constitution of the Republic of Kosovo (2008), article 113, para. 3, point (4).

⁵ Ibid, article 113, para. 4, point (4).

⁶ Enver Hasani, Ivan Čukalović, *Commentary of the Constitution of the Republic of Kosovo*, 1st Edition, December 2013, p. 581.

According to the commentary "this jurisdiction produces the positive obligation that constitutional amendments cannot violate international obligations taken under international law, which is in accordance with article 56 of the Vienna Convention on the Law of Treaties, which stipulates that States may not use domestic remedies to waive their international obligations".⁷

It is clear-cut fact that the jurisdiction of the court has been drawn from a respectful position in the face of international law, therefore prohibiting possible use of domestic law as means to invalidate international obligations of Kosovo. From the standpoint of the rapports determined by the Constitution of Kosovo, this competence of the Constitutional Court places the mechanism of control of the amendments as an instrument that serves to clarify the supremacy of international law in relation to domestic law. Also, this mechanism further prevents state institutions to hinder international obligations by means of passing constitutional amendments, therefore placing the Court at the centre of this insistence to respect obligations undertaken internationally. Another fact that justifies such scrutiny of amendments is closely linked to binding international agreements and to the responsibilities of the state of Kosovo to abide by these agreements. In this regard, the Constitutional Court through this amendment control is transformed into an institution that guarantees international partners of Kosovo that international agreements will not be violated, by guaranteeing it with internal constitutional norms.⁸ While it seems illogical for the Court to play that role actively, one can go further by maintaining that this positive obligation could be extended further by applying to laws and other legal acts because, as one could argue, of this principle applies on constitutional amendments then it should also apply to all other acts submitted to the Constitution. It should be noted that the Constitutional Court of Kosovo has not yet faced such a request for evaluation of the amendments so far, while those who are entitled to submit the request for such an assessment to the Constitutional

Court are: the Assembly, the President and the Government.⁹ On the second point, it is the intention of this paper to further analyze the second material restriction on the basis of which the President of the Assembly is *ex officio* obliged to submit any proposed amendment to the Constitutional Court for review whether it reduces the rights and freedoms guaranteed by Chapter II of the Constitution.¹⁰ Otherwise, this jurisdiction, known as *ex-ante* review, grants the Constitutional Court the jurisdiction to review the constitutionality before it enters into force.¹¹ The Commentary has clarified the role of the President of the Assembly by using the term "*should* refer the proposed constitutional amendments before being adopted by the Assembly",¹² considering this competence of the Court as a mandatory jurisdiction that puts the Constitutional Court in move.¹³ Interestingly enough, the Commentary refers to a case of the Constitutional Court of the South African Republic, which had refused to certify the Constitution of the South African Republic of 1996 as a number of provisions were inconsistent with the Constitutional Principles of the Constitution contained in the (provisional) Constitution of the South African Republic of 1993.¹⁴ Likewise, the South African Court had relied on an unamendable provision (or basic structure norm) of the previous legal regime, using that as a backdrop on which legality is examined.

The two instances described above (the scrutiny of amendments in relation to binding international treaties and in relation to the reduction of human rights and freedoms) are primarily different bases of examination. They target different backgrounds, and refer to different aims: the first insists on building a respectful relationship with VCLT and contracted international law at large, while the second insists on ensuring that minimum human rights law is not undermined by constitutional amendments.

⁷ Ibid, further see Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980, Art. 56. Webpage: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969 (accessed on January 10, 2020).

⁸Ibid.

⁹Constitution of the Republic of Kosovo, article 113, para. 3.

¹⁰Ibid, article 113, para. 4, point (4).

¹¹An accurate explanation of the nature of this jurisdiction is found in the first judgment of the Constitutional Court for the assessment of constitutional amendments. Further see: case No Ko 38/12 Ko 29 and 48/12 point 66.

¹² Emphasis added;

¹³Enver Hasani, Ivan Čukalović, *Commentary of the Constitution of the Republic of Kosovo*, 1st edition, December 2013, p. 598.

¹⁴Ibid (Judgment of the Constitutional Court of the South-African Republic CCT 23/96 i datës 6.9.1996); Footnote 838.

It is important to mention that, initially, in the procedural aspect, in assessing the constitutionality of amendments in terms of compliance with binding international agreements and the followed procedure, there are three privileged applicants that could trigger the review before the Court: the Assembly, the President and the Government. While when assessing the constitutionality of the proposed amendments in terms of whether the proposed amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution, the jurisdiction of the Court need not be triggered by a party, rather the President of Assembly is obliged to file it for review, therefore making the procedure automatic – as opposed to one which results from the will of an applicant. On this basis, one can argue that the first instance of review is less imperative, because it results from the manifest expression of the will of the parties. Whereas the second refers to a minimum protection policy, in the form of a imperative unamendable provision, for which the constitution forces automatic, involuntary review by the Court.

The second difference between these two instances lies in the way in which the Court is involved. In assessing the compatibility of the amendment with binding international agreements, the Assembly, the President and the Government may request such an assessment, but the Constitution has not specified this as a mandatory step in the procedure, but has left it to the discretion of the authorized parties. Whereas, in assessing the constitutionality of the amendments in terms of whether they diminish human rights and freedoms, the constitutional language implies an authorization of a binding nature for the Head of the Assembly to proceed the proposed amendments. This is also supported by the fact that as regards the assessment of the amendments related to the reduction of human rights, the Constitution has been clearer in terms of the procedural aspect as well, by specifying the time when the Head of the Assembly should proceed the amendments.¹⁵

Despite the differences between these two forms or procedures of exercising control, they both remain within the explicit nature of constitutional control, thus making the Constitution of the Republic of Kosovo one of the 735 constitutions (former and present) containing restrictions of an explicit nature.¹⁶

Before analyzing the concrete situation in Kosovo, it is very important to mention here the theoretical aspects of how unamendability of constitution can be classified. In an important contribution to the study of unamendability, Melissa Schwartzberg's classification turns on two inquires: whether entrenchment is temporally limited or unlimited, and whether it is formally specified or implicitly enforced.¹⁷

According to Roznai – a well known author on the topic – the existence of restrictions of an explicit nature present the various motives of constitutional drafters; they chose different aspects to form the core of the constitution. This has allowed constitutional drafters to define an identity of the state they want to build. It has thus prevented some basic principles from being violated, despite the majority's willingness to change it. According to Roznai, this is so because the identity and constitutional narrative of a nation cannot be subjected to the wishes of a majority.¹⁸ In the same vein, it is evident that two basis form Kosovo's limitations on the power of constitutional amendment: one, the fundamental human rights law which has an imperative nature, and, two, the international agreements in the light of Art. 56 VCLT, which has a less imperative nature due to the voluntary nature of triggering the review procedure.

¹⁵Before being adopted by the Assembly, it is the sentence that defines and clarifies the procedural aspect of the obligation of the Head of the Assembly to submit the proposed amendment to the Constitutional Court.

¹⁶To see more on the explicit nature of the constitutional control of amendments, see Yaniv Roznai - Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers - A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, February 2014 - Chapter 2 (Explicit limitations) p. 22.

¹⁷ Richard Albert&Bertil Emra, Oder an Unamendable constitution (Unamendability in Constitution democracies) *Ius Gentium: Comparative Perspectives on law and justice* 68, p. 4.

¹⁸Yaniv Roznai - Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers - A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, February 2014 - page 24. See Weintal (2005, 11, 28). For example, the unamendability of fundamental rights reflects the idea that 'unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority. 13

One may argue that the main rationale for this was the aim of constitutional drafters to provide explicit restrictions on the process of constitutional amendment relates to the international obligations that Kosovo has undertaken during the state-building process. The first is an obligation to comply primarily with the stipulations arising from the Comprehensive Plan for the Settlement of Kosovo's Final Status known as the Ahtisaari Plan,¹⁹ and agreements following that event. And, second, the constitutional obligation to protect and guarantee human rights and freedoms, in line with the practice of the European Court of Human Rights,²⁰ the latter being a fundamental minimum for interpretation of human rights law in Kosovo.

2. The jurisprudence of the Court of Kosovo in construing further explicit restrictions on the power of constitutional amendment

The Constitution of the Republic of Kosovo entered into force on 15 June 2008 and has so far been amended with 25 amendments. The Constitutional Court has also declared ten amendments to be in violation of the Constitution, in three different legal initiatives.²¹

The first amendment found incompatible with the unamendable constitutional provisions was the one relating to the mode of election of the president of republic. A majority which was also backed by opposition parties had agreed reached a political consensus to elect a consensual president for a transition period, while a constitutional commission, composed of all parliamentary political entities, would propose amendments that would enable the president to be directly elected.²² After 9 months, the Committee submitted the amendments to the Assembly, which, based on the constitutional obligation, were referred to the Court to for a compatibility review. The package consisted of eleven amendments, primarily affecting the procedure for a directly elected president, and the clause terminating earlier the mandate of the then incumbent president of Republic, MS. Atifete Hahjaga. The Court issued Judgment K.O. 29/12 and K.O. 48/12 and found that 8 of the 11 proposed amendments diminished human rights and freedoms, therefore calling them incompatible with the unamendable provisions of the constitution.²³ Through this judgment, the Court begins a new phase as it practically implements the restrictions of an explicit nature identified in the first part of this paper. The Court found a violation of Chapter Two, precisely because these 8 amendments aimed at reducing the freedoms and human rights set forth in Chapter Two.²⁴ One of the violations found was that relating to the termination of the mandate of the president duly elected by parliament through the new elections that would take place six months after the amendment was approved.²⁵ The Court had held that "[t]he nature of the President's mandate is also of a political nature stemming from the President's passive right to be elected, guaranteed by Article 45 [Voting and Participation Rights],

¹⁹In April 2007, UN Special Envoy Martti Ahtisaari submitted to the UN Security Council his Comprehensive Proposal for the Kosovo Status Settlement (the "Ahtisaari Plan"). The Ahtisaari Plan includes a main text with 15 articles that set forth its general principles, as well as 12 annexes that elaborate upon them. The Ahtisaari Plan is primarily focused on protecting the rights, identity and culture of Kosovo's non-Albanian communities, including establishing a framework for their active participation in public life. Special Envoy Ahtisaari also proposed that Kosovo become independent, subject to a period of international supervision.

²⁰Constitution of the Republic of Kosovo (2008) article 53.

²¹Through judgment K.O. 29/12 dhe K.O. 48/12, it declared 8 amendments as unconstitutional. Through judgment K061j12, it declared 1 amendment unconstitutional. Through judgment K013/15, it declared 1 amendment unconstitutional.

²²See the Assembly's decision to set up a commission for the amendment of the constitution dated 22 April 2011 04-V-277.

²³The following proposed amendments reduce the human rights and freedoms set forth in Chapter II of the Constitution: 1. The newly proposed Article 85.2 (concerning the limitation of the right to be a candidate for president only to the citizens who have been permanent residents of the Republic of Kosovo for five years); 2. Newly proposed Article 86.3 (concerning proposals for the post of president of Kosovo - as it only relates to parliamentary political entities that have crossed the election threshold in recent elections); 3. Newly proposed Article 90.5 (2) (concerning the restriction of the Acting President's powers to declare a state of emergency); 4. Newly proposed Article 90.5 (3) (concerning the restriction of the Acting President's powers to appoint judges and prosecutors); 5. Newly proposed Article 90.5 (5) (concerning the restriction of the Acting President's powers to announce pardons); 6. Newly proposed Article 104.1 (concerning President's suspensive veto for the appointment of judges of the regular courts); 7. Newly proposed Article 114.2 (Concerning President's suspensive veto for the appointment of judges of the Constitutional Court); 8. New Proposed Article 162.1 (concerning the early termination of the Republic of Kosovo President's mandate).

²⁴Judgment K.O. 29/12 and K.O. 48/12 (III) 1, 2, 3, 4, 5, 6, 7, 8.

²⁵Ibid, point 247 (1).

and in particular Article 45.1, i. which says that all citizens enjoy the right to be elected.”²⁶ Therefore, it was argued that as long as the incumbent president’s ability to exercise her mandate for a five year term is affected by the passage of the amendment, that amounts to a violation of her right to be elected and the public’s expectation that that mandate will be fully utilized.

The Court thus practically renders the second chapter of the constitution as unamendable, insofar as the amendments aim to diminish the rights and freedoms set forth in this Chapter. This kind of interpretation by the Constitutional Court reinforces the view that the drafters of the constitution had intended to protect certain parts of the constitution which, if opened to a political debate, could harm society.²⁷ In this way the Court clarifies that the second chapter is *inter alia* an important international obligation and any political will to change this chapter challenges the constitutional order and the spirit and letter of the constitution.²⁸ The Court, therefore, for the same proposed amendment clarifies that: *“International instruments having a direct impact in Kosovo under Article 22 [Direct Implementation of International Agreements and Instruments] include the International Covenant on Civil and Political Rights (hereinafter: the ICCPR), where the same right has been emphasized in article 25, which provides: Every citizen has the right and opportunity, that without any of the differences mentioned in Article 2 and without unreasonable limitation:*

- (a) *To participate in the conduct of public affairs, either directly or through freely elected representatives;*
- (b) *To vote and to be elected in genuine periodical elections, by universal and equal suffrage and by secret ballot, which ensure the free expression of the will of the electorate;*
- (c) *To be admitted, on conditions of general equality, to exercise public functions in his country.”*²⁹

In support of this international obligation, in a subsequent judgment, while assessing the constitutionality of a proposed amendment,³⁰ the Constitutional Court notes the importance of Article 22 (“The human rights and freedoms guaranteed by the following international treaties and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and have priority, in case of conflict, over the provisions and laws and other acts of public institutions”).³¹ Within the explicit nature or what the second chapter of freedoms and human rights contains, the Court has continued to argue their violation with its judgments, evidencing in Judgment K.O. 29/12 and K.O. 48/12, that the proposed amendment to exclude the acting president from the right to appoint regular court judges leads to the blocking of an important state body, also greatly affecting the exercise of rights and freedoms guaranteed by the Constitution, as this could cause constitutional paralysis that would prevent the Court from exercising its functions because of the lack of competence of the Acting President to appoint judges.³² Insofar as the Constitutional Court finds a draft-amendment incompatible with the unamendable clause by finding grounds that it diminishes human rights and freedoms, whether determined by the Constitution or by other incorporated

²⁶Ibid, point 260.

²⁷Yaniv Roznai - Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers - A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, February 2014, page 25.

²⁸Judgment K.O. 29/12 and K.O. 48/12, point 61.

²⁹Ibid, point 260 (a) (b) (c).

³⁰The amendment proposes for there to be a new paragraph after paragraph 7 of Article 96 [Ministries and Representation of Communities] of the Constitution, which reads: “8. No gender shall be less than 40% represented in the posts of ministers and deputy ministers of the Government of the Republic of Kosovo.”

³¹Judgment K.O 13/15, point 41, also see Prof. Dr. Enver Hasani/Prof. Dr. Ivan Čukalović, Commentary of the Constitution of the Republic of Kosovo, 1st Edition, December 2013, page 83 (The most important fact is the that these rights and freedoms prevail in the event of conflict against all legal provisions and other acts of public institutions. These international agreements and instruments include: the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the Council of Europe Framework Convention for the Protection of National Minorities, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, known as the CEDAW Convention, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³²Judgment K.O. 29/12 and K.O. 48/12, point 156.

international acts, the Court seems to become an extensive interpreter of the constitutional unamendability norm and the consequences resulting in its application.

But has the Constitutional Court of Kosovo remained within such an interpretation? In the following section we will see the contribution of the Constitutional Court to the identification of unamendable norms of an implicit nature.

3. The Court's contribution in developing implicit unamendable norms in the constitution

Identifying the existence of implicit limitations is a much more complicated process than identifying and interpreting explicit unamendable norms. As Roznai emphasizes, it is easier for a Court to enforce restrictions on amending the constitution when the restrictions are clear than in cases where the constitution is silent.³³ The genesis of the debate about implicit limitations is related to the identification of key provisions in a constitution, those presupposed to be the basis of a constitution's validity. The existence or designation of certain provisions as crucial makes it inevitable to debate whether by being crucial they are to be respected during a process of amendment. In fact, that is how the debate started. In the US House of Representatives in 1826, Edward Everett had stated in his speech that, to "amend" implies making changes, *but in accordance* with the main provisions of the constitution.³⁴ From this debate onwards, many institutions, especially courts vested with the power to interpret the constitution, have offered different approaches to the question of what is a core constitutional norm? How to classify one norm as more crucial than another if the constitution is silent? In these circumstances the burden has fallen on the courts which, as in the case of explicit norms, have come up against various majorities, defending fundamental constitutional principles and values. But in regard to implicit norms, the battle is even fiercer with other institutions, especially with the legislative body. The Constitutional Court of Kosovo has been involved in such a debate; it ruled in some of its judgments that the weight of some articles in the constitution which, though silent as regards their unamendability, nevertheless constitute the spirit of constitution. The Court thus stated in Judgment No. K.O. 29/12 and K.O. 48/12, while describing its jurisdiction to interpret the constitutionality of the proposed amendment pursuant to Chapter II, that: "*The process of constitutional scrutiny should also include Chapter III [Rights of Communities and their Members] and other rights which may be an extension of the freedoms and rights set forth in Chapter II and in particular the rights set forth in Article 24 (equality before the law)*".³⁵

According to the Court's interpretation of the material restriction on the basis of which compatibility of draft-amendments is to be assessed, the extension of review of the amendment beyond the second chapter expressly provided for in the constitution stems from the General Principles on the protection of human rights and freedoms. Such Principles stipulate that the Republic of Kosovo protects and guarantees fundamental human rights and freedoms set forth in this Constitution.³⁶ Therefore, in assessing the constitutionality of the proposed amendments, this Court will take into account not only the human rights and freedoms contained in Chapter II, but all the human rights and freedoms guaranteed by the Constitution and provided by the letter and spirit of the constitutional order of the Republic of Kosovo.³⁷ This finding of the Constitutional Court for this type of interpretation has two important implications for the constitutional amendment process. At first, it extends the jurisdiction of the constitutional court in reviewing constitutional amendments.³⁸ At second, the Court implies that the basic structure norms of the constitution provide an additional,

³³Yaniv Roznai - Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers - A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, February 2014, p. 48.

³⁴Ibid, p. 49; emphasis added.

³⁵Judgment K.O. 29/12 and K.O. 48/12, points 61, 62, 63.

³⁶Constitution of the Republic of Kosovo (2008) article 21, para. 2.

³⁷Judgment K.O. 29/12 and K.O. 48/12, point 64.

³⁸See Luz Balaj, *The jurisdiction of the Constitutional Court of Kosovo to assess the constitutionality of constitutional amendments*, „Acta Universitatis Danubius”, Vol. 14, No. 3 (2018).

more important criterion against which review is to be exercised. This requires an evaluation of what falls within the spirit and letter of the constitution, so that the Court can conclude that an amendment is unconstitutional as it infringes this spirit. It therefore extends the basis of review far beyond to what has already been explicitly prescribed in the letters of Art. 113.

Furthermore, the attention remains to the third chapter (the rights of communities and their members) for which the Constitution remains silent as regards the control of amendments if the proposed amendment infringes or diminishes any rights under this chapter. From the first judgment which also set the precedent for the inclusion of Chapter III within the control of the amendments, we note that the main reasoning of the Court is that the rights provided for in Chapter III are a continuation or extension of the rights and the freedoms set forth in Chapter II. In the Commentary, one finds the explanation that “these are the communities which, in addition to the fundamental human and citizens’ rights and freedoms (defined by a separate chapter of the Constitution of the Republic of Kosovo), enjoy certain specific rights, which are guaranteed by the Constitution itself”. In this sense, the constitutional provisions provide for the prohibition of any discrimination if a member of the community, i.e. of the national, ethnic, linguistic or religious group, at his/her free choice, decides to act or not to act, as with the member of the national community.³⁹ So while the Constitution remains silent as to the involvement of Chapter III in the constitutional review process of proposed amendment, the Court has incorporated Chapter III through its practice; considering it as a structural part of the human rights and freedoms guarantees, related to Chapter II. Hence, the Constitutional Court has ruled the protection of the rights of communities and their members from the possibility that these rights be reduced by a constitutional amendment, as an appropriate action in accordance with the spirit and letter of the constitution. In order to argue this position, the Court has referred to another constitutional principle, namely equality before the law. The Court engaged with this principle when it dealt with the part of the amendment that determined that parliamentary political entities that have crossed the electoral threshold, by law, may nominate candidates for the post of President, and political entities holding guaranteed seats in the Assembly designating at least 15,000 eligible voters, through a petition submitted with its own signatures. The Court found that this proposal constitutes a diminution of human rights and freedoms and a violation of multiethnic diversity values and other values protected by the Constitution, such as defined in Article 3.⁴⁰ As far as this principle is concerned it is necessary to clarify that this principle is found in two dimensions in the text of the Constitution. Initially we find the principle of equality in Article 3 of the Constitution and this fact is important since Article 3 is outside of Chapter II; so, this fact adds a new norm of implicit nature as regards the assessment of the amendment. This is because equality before the law as defined in Article 3 of the Constitution serves precisely to the protection of human rights and freedoms, with a particular emphasis on equality before the law of all citizens, including members of minority communities.⁴¹ Thus, Article 3 becomes the first article, after Chapters II and III, that falls under the spirit and letter of the constitution, therefore implicitly developed as an unamendable implicit norm of the constitution.⁴²

Another principle which the practice of the Court developed as part of the spirit and letter of the constitution, by challenging the proposed constitutional amendments, is Article 7 (values). According to the Constitutional Court, all human rights and freedoms guaranteed by the Constitution should be read in the spirit of Article 7 which sets forth the values of the constitutional order of the Republic of Kosovo 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

³⁹Enver Hasani, Ivan Čukalović, *Commentary of the Constitution of the Republic of Kosovo*, 1st edition, December 2013, p. 236.

⁴⁰Judgment K.O. 29/12 and K.O. 48/12, point 132.

⁴¹See article 3 of the Constitution of Kosovo [Equality before law]: 1. The Republic of Kosovo is a multi-ethnic society, consisting of Albanians and other communities and it is governed in a democratic manner, with full respect for the rule of law, through its legislative, executive and judicial institutions. 2. The exercise of public authority in the Republic of Kosovo shall be based on the principles of equality before the law of all individuals and on the full respect of internationally recognized fundamental human rights and freedoms, as well as on the protection of rights and participation of all communities and their members.

⁴²The Constitutional Court also refers to the principle of equality before the law within the second chapter (Article 24 which, unlike Article 3, relates mainly to the equality of citizens with regard to legal protection). See also Article 24 of the Kosovo Constitution.

protection, social justice, pluralism, separation of state power and market economy.⁴³ From this model of interpretation the Court also brings a new standard of constitutional interpretation, restricting the power of amendment in relation to the values of the constitutional order set forth in Article 7. Inclusion of Art. 7 in the unamendable norm goes much deeper than simply too far, therefore significantly reducing the power of amendment. From what one learned from judgment K.O. 29/12 and K.O. 48/12, constitutional values also constitute the spirit of the constitution and that these values are closely linked to the human rights and freedoms set forth in Chapter II.

The third article which, according to the Court, constitutes the spirit and letter of the constitution and restricts the constitutional power of the amendment, is Article 4 [Form of Governance and Separation of Powers]. The Court has included this in the scope of unamendable norm through two judgments declaring various amendments to be unconstitutional. Initially against the proposed amendment to terminate the term of the then president and to announce the first presidential election 6 months after the amendment came into force, thus shortening the term of office of the president in office elected by the Assembly. Among the justifications, the Court uses precisely Article 4 (Form of government and the separation of powers). The court in this case was referring to one of its previous judgments in which it interpreted the immunity of senior public officials.⁴⁴ In that judgment, the Court had stated that "the Republic of Kosovo is defined by its Constitution as a democratic Republic based on the principle of separation of powers and control and balance between them. The separation of powers is one of the foundations that guarantees the democratic functioning of the state. The essence of the independent and effective functioning of these branches is the immunity granted to the people who embody these powers".⁴⁵ In this respect, the Court clarifies that the tendency to shorten the presidents' mandate through the constitutional amendment is, inter alia, a violation of the principle of separation of powers. This finding is supported by the fact that the Constitution has given the president the power to guarantee the constitutional functioning of the institutions designated by this Constitution.⁴⁶ We find a similar position in the Commentary which precisely in relation to the post of the president states: "*In democratically organized states, all citizens may directly participate in the election of the president of the republic, or he/she may be elected by the "representatives" directly elected by the people, or by the highest representative body, such as the parliament. In any case, there is a fixed term, that is, the period for which the head of state is elected.*"⁴⁷

The separation of powers as set in Article 4 of the Constitution was also used in another judgment of the Court in interpreting the constitutionality of the amendment.⁴⁸ It is the verdict through which the Constitutional Court had assessed the proposed constitutional amendment, which sought to create a gender balance in the body of the executive power - the Government. This amendment proposed that no gender shall be less than 40% represented in the posts of ministers and deputy ministers in the Government of Kosovo. In assessing the constitutionality of this amendment, among its arguments, the Court also referred to Article 4 of the Constitution which defines the separation of powers where paragraph 4 states that: "[t]he Government of the Republic of Kosovo is responsible for the implementation of state laws and policies and is subject to parliamentary control." Based on this article, the Court notes that the responsibility for implementing the Law No. 2004/2 on Gender Equality lies with the Government which is subject to parliamentary control, but it reiterates that it is the Assembly the one that votes and elects the Government.⁴⁹

By incorporating the separation of powers, namely Article 4 in the reasoning of the unconstitutionality of the amendment, the Court has elevated the separation of powers as a separate principle in the scope of unamendable norm. Thus, the Court has constructed a category of articles to

⁴³Judgment K.O. 29/12 and K.O. 48/12, point 68.

⁴⁴See judgment No. KO 98/11.

⁴⁵Ibid.

⁴⁶The Constitution of the Republic of Kosovo (2008) article 84 – The competences of the President, para. 2: Guarantees the constitutional functioning of the institutions set for in this Constitution.

⁴⁷Enver Hasani, Ivan Čukalović, *Commentary of the Constitution of the Republic of Kosovo*, 1st edition, December 2013, p. 28.

⁴⁸Judgment KO 13/15.

⁴⁹Ibid.

which the constitution is silent as to their unamendability, but despite their implicit nature or the silence of the Constitution, for the Constitutional Court these articles also constitute what Roznai calls “[t]he purposes of the drafters that some issues constitute the substance of the constitution”, but that it is up to the court to identify, develop and enlighten these norms.

4. Conclusions

Based on what has been dealt with so far, especially analyzing the approach of the Constitutional Court of Kosovo as regards the restriction of amendment power, it is important to note the contribution parties arguments in evidencing the unamendability of the constitution. The absence of the Court’s jurisdiction to assess the constitutionality of international agreements, constitutional amendment remains the strongest opportunity for the Court to determine unamendable constitutional norms and to thus determine the constitutional power of the amendment.

With regard to the practice followed by the Court in its current judgments in which it assessed the constitutionality of the amendments, we can draw these conclusions.

The first is that Kosovo’s Constitutional Court has followed a progressive pace of evaluating constitutional amendments. This has prompted the Constitutional Court to firstly broaden its jurisdiction in interpreting the constitutionality of the amendment.

Second, the Constitutional Court has argued that the extension of its powers to interpret the constitutionality of amendments helps in evidencing the unamendability of constitutional norms despite the implicit nature of these norms. This, according to the Court, helps maintain Kosovo's constitutional order and strengthens the capacities to guarantee human rights and freedoms.

Third, through this model of constitutional interpretation and going beyond the second chapter, first with the third chapter on the rights of minority communities and their members and then with Article 3 (Equality before the law), Article 4 (Separation of powers) and Article 7 (Values), the Constitutional Court of Kosovo has also made a great contribution to the establishment of Kosovo's constitutional identity. Hence, by increasing the focus on these 2 chapters and the other 3 articles, or by diluting the constitutional power of the amendment on them, the Court has indirectly determined which articles of the Constitution represent the identity of the Constitution of Kosovo.

Finally, it should be clarified that the marking of these articles with an implicit nature by the Court does not imply that these are the only articles that the Court considers to constitute the spirit and letter of the constitution. These articles are evidenced based on the content of the constitutional amendment and what these proposed amendments violate. This paper therefore draws another conclusion that it is the content of the proposed amendment, which defines or directs the court in determining the unamendable articles of the constitution.

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