

## QUASI-CONSTITUTIONAL AMENDMENTS AS A SOLUTION FOR “CONSTITUTIONAL CHANGES” IN COUNTRIES WITH ETHNIC DISPUTES. THE CASE OF KOSOVO

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**Abstract:** *As the title shows, this paper tries to answer the question of whether the reasons which are used for deviating from formal constitutional changes can also be related to ethnicity issues.*

*Through a norm of a general constitutional nature, Kosovo has, through the constitution, included non-majority communities in the process of amending the constitution, as a necessary element for creating the needed majority in order to go through with the amendment. This standard has led to several processes of amending the constitution having failed.*

*The constitutional quasi-amendment, from what has been so far treated in constitutional theory and practice, has been seen as an opportunity to avoid formal constitutional changes for several different reasons. The authors who have dealt with the quasi-amendment distinguish some of the main reasons: the lack of political power to achieve the necessary majority for constitutional changes, the long procedural path of a constitutional amendment, especially in federal states, etc.*

*The paper aims at bringing a study for a new reality, which highlights a new reason for using the constitutional quasi-amendment that has to do with countries where minority communities are involved in the process of constitutional changes.*

*More specifically, this paper identifies the important role that the quasi-amendment plays in important changes of the constitutional structure, in cases where formal changes are blocked as a result of ethnic differences and disagreements. The constitutional quasi-amendment as treated by this paper has also found application in Kosovo, conditioned by the lack of a majority in the parliament for constitutional changes, circumstances which are conditioned by the ethnic factor that makes the procedures for changing the Kosovar constitution rigid.*

**Keywords:** *Constitution of Kosovo, amendment, quazi-constitutional amendments, constitutional changes*

### INTRODUCTION

The fact that formal constitutional changes appear as a complex process followed by a set of strict rules and standards has had an impact in “constitutional changes” being realised in several alternative manners, but which in essence achieve almost the same result as the one deriving by formal or procedural change through amendment.

Given that today these strict rules for changing the constitution are also supported by both constitutional and judicial control, in many countries, including those with consolidated democracies, the quasi-amendment<sup>1</sup> is seen as a new path for changing the constitutional reality.

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<sup>1</sup> A quasi-constitutional amendment is a sub-constitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function though not the formal status of constitutional law over time as a result of its subject-matter and importance – making it just as durable as a constitutional amendment; see: ALBERT, R. Quasi-Constitutional Amendments. *Buffalo Law Review*. 2017, Vol. 65, No. 4, p. 740.

Depending on the model of constitutional control that the states have installed, many courts that carry out constitutional control, in particular those in the centralized model,<sup>2</sup> are equipped with constitutional power to control and validate the process of amending the constitution.<sup>3</sup> The increase and expansion of courts' jurisdiction, which is mainly a result of the surge in the rules related to amending the constitution, has made the process of constitutional amendment in the 21<sup>st</sup> century a very convoluted process. In this situation, political actors, respectively the representatives of the people, have tried to achieve constitutional changes by avoiding the procedures of a formal amendment process, but to nevertheless attain a result as acceptable as the one achieved by the power of a constitutional amendment.

In this direction, this paper opens the discussion of whether the expansion of the courts' jurisdiction as a result of the surge in the rules for amending the constitution is the sole reason for the appearance of quasi-amendments. The answer is undoubtedly complex and can only be found by analyzing the real context based on the concrete practices of some countries, such as Kosovo in this case.

Among others, the object of analysis in this paper are the additional reasons or motives to avoid the rules of amending the constitution. As will be seen, Kosovo has experienced a substantial change of the constitutional matter by only changing some of its laws.

## 1. THE GENERAL CONCEPT OF THE CONSTITUTIONAL QUASI-AMENDMENT

Before analyzing concrete cases that happened in Kosovo, it is important to see the general context on the emergence of the concept of the quasi-amendment. Richard Albert, one of the most prominent scholars of the quasi-amendment, attributes its emergence to several reasons. According to him, the lengthy procedures with ratifications in federal states are one of the many reasons that put a quasi-amendment at an advantage.<sup>4</sup> This can be related in terms of timelines in two ways: firstly, a constitutional amendment may take much time by following the formal path from the proposal up to its approval, and secondly because some states have set specific deadlines in terms of the entry into force of some constitutional amendments.<sup>5</sup> Such difficulties in the process of amending the constitution pointed out by Albert have made the question of whether the constitution can really be changed without a formal-procedural amendment even more serious.

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<sup>2</sup> MAZÁK, J. The European model of constitutional review of legislation. "Centralisation means that only the constitutional court is empowered to hold that a statute or a piece of ordinary law is unconstitutional." In: *Venice Commission* [online]. [2023-01-10]. Available at: <[https://www.venice.coe.int/SACJF/2006\\_02\\_Venice\\_Strasbourg/report\\_mazak.htm](https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm)>.

<sup>3</sup> Federal states such as Germany, India, but also unitary states, especially in Europe – Slovakia, among them Kosovo as well, have stopped constitutional amendments through their constitutional courts, respectively their supreme courts.

<sup>4</sup> ALBERT, R. *Quasi-Constitutional Amendments*. p. 742.

<sup>5</sup> See the case of the Kingdom of Holland: "Chapter 8 – Additional articles – Article I Articles 57a and 129, paragraph 3, second sentence, shall enter into force only after four years or on such earlier date as may be prescribed by or pursuant to Act of Parliament. Article II The amendment to Article 54, paragraph 2 shall enter into force only after five years or on such earlier date as may be prescribed by or pursuant to Act of Parliament. This period may be extended for up to five years by Act of Parliament."

If this remains the question, “no” would be the answer accepted in principle by the proponents of the formalist concept. Hence, there is no amendment of the constitution if there is not a procedure for its change. However, the quasi-amendment as a concept practically challenges this question today, since it brings up the change of the constitutional reality by enabling a deviation from the established constitutional procedure. How this deviation occurs and what motivates such a deviation are among the two fundamental questions in the new debate regarding the quasi-amendment. In this debate, Kosovo brings a completely new dimension regarding the reasons for deviating constitutional amendment procedures. Unlike Kosovo, if we take a look at the American example, the Supreme Court there has often changed course in terms of focus, by carefully analyzing federal laws in the period of the 80s, precisely as a result of the change in the spirit and reality of the constitution by federal laws.<sup>6</sup> However, the question of whether such non-formal constitutional changes modify the basic concept (constitutional structure) is seen differently by researchers.

Oran Doyle, in an essay on non-formal constitutional changes, as a response to Albert states that: “*We should recognize the two overlapping but competing senses of the word “constitution”: (1) the set of laws and practices that constitute the governance structure of the state; versus (2) the written master-text constitution. Informal changes to constitutional laws and practices can alter the operation of the master-text constitution without amending it in any sense – whether formal, informal or quasi. This conceptualization is significant. The phrase “informal constitutional amendment” implies an improper subversion of formal processes. However, if the master-text constitution is supplemented and surrounded by a broader set of constitutional law and practices, we have no general reason to maintain that constitutional law and practice should only be changed through the mechanism prescribed for the formal amendment of the master-text constitution itself. Instead, we need an open-ended assessment of whether, in a particular case, formal amendment or informal change is more appropriate.*”<sup>7</sup> On this approach of Doyle, dilemmas remain big on the weight of non-formal changes and especially on the raised qualifications. Yet, when we look at this issue in a practical field, the constitutional changes that took place in an informal process are related to the findings of Albert, who, among other things, specifies that “*the quasi-amendment as an informal change, suits the political actors to whom a formal change would cause frustrations and problems in achieving their political goals.*”<sup>8</sup>

From this finding we gradually overcome the argument that the quasi-amendment is only a response to the complicated amendment procedure as may be the case in the United States and other mainly federal states, which have set rigorous amendment procedures.

Nowadays, the quasi-amendment began to also appear as an alternative or instrument in the hands of political leaders for accomplishing constitutional changes in a *silent* form that does not recognize constitutional procedures. Although we are not sure whether the

<sup>6</sup> ESKRIDGE, W. FIRCKEY, P. P. Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking. *Vanderbilt Law Review*. 1999, Vol. 45, pp. 596–597.

<sup>7</sup> DOYLE, O. Informal Constitutional Change. *Buffalo Law Review*. 2017, Vol. 65, No. 4, p. 1021. In response to ALBERT, R. *Quasi-Constitutional Amendments*. p. 1022.

<sup>8</sup> ALBERT, R. *Quasi-Constitutional Amendments*. p. 742.

word “*silent*” is the best description, we must however agree that the achievement of a political goal or objective that requires constitutional changes, without these changes occurring through a constitutional amendment process, tends to be called a *silent* change.

## 2. THE CASE OF KOSOVO IN RELATION TO THE CONCEPT OF THE CONSTITUTIONAL QUASI-AMENDMENT

Kosovo is precisely the selected example to look at the findings of Richard Albert from several points of view. First, to see how in the absence of consensus for constitutional changes as a result of ethnic differences, legal routes are used to achieve a change that essentially changes constitutional segments.

In order to analyze the case of Kosovo in the light of the quasi-amendment one should note that Kosovo was part of the group of states that have a rigid constitution when it comes to changing it. This fact is related to the finding of Sergio Verdugo, who in his paper “*How to identify quasi-constitutional legislation?*” states that “*CCL could arguably only exist in countries that possess a supreme constitution in the context of a jurisdiction that recognizes legal hierarchy among sources of law.*”<sup>9</sup> Thus, unlike the countries mentioned by Verdugo, such as England or New Zealand, where the lack of a codified constitution makes the analysis of quasi-amendments impossible, Kosovo meets the standard and creates the ground for the existence of opportunities to create special laws that have a constitutional weight.

Moreover, the special aspect of analyzing Kosovo is linked with a two-dimensional context. First, to take a look at how a change that should have been brought through constitutional changes was actually brought through a quasi-amendment, respectively through three laws. The second and equally important issue refers to the new standard that these three laws have built for the creation of the Kosovo army. Being changed through quasi-amendment, these laws<sup>10</sup> have correctly received the epithet of quasi-constitutional laws, since, as will be seen below, they are now laws that regulate crucial constitutional matters in the Republic of Kosovo. Through the examples illustrated by the cases in the Republic of Kosovo, it will be possible to contribute to the answer of how a law managed to gain constitutional weight, by regulating or even changing an important reality, which in a normal situation would have to be done through constitutional amendment.

## 3. THE CONTEXT OF DEVELOPMENTS THAT PRECEDED THE CREATION OF KOSOVO’S ARMY

With the declaration of independence on February 17, 2008, Kosovo was proclaimed a democratic, secular and multi-ethnic republic, guided by the principles of non-discrim-

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<sup>9</sup> VERDUGO, S. How to identify quasi-constitutional legislation? An example from Chile. In: R. Albert – J. I. Colón-Ríos. (eds.). *Quasi-Constitutionality and Constitutional Statutes Forms, Functions, Applications*. Abingdon: Routledge, 2018, p. 45.

<sup>10</sup> Law No. 06/L-122 on Ministry of Defense.

ination and equal protection under the law. Among other things, point 2 of the Declaration states that “*we will protect and promote the rights of all communities in Kosovo and create the necessary conditions for their effective participation in political and decision-making processes*”.<sup>11</sup>

With the Declaration of Independence, Kosovo was established as a republic based on multi-ethnic functioning, with expanded constitutional rights of non-majority communities, Serbian and non-Serbian. This was made possible by the Comprehensive Plan for the settlement of the final status of Kosovo, known as the Ahtisaari plan, which, similar to the Declaration of Independence, defines Kosovo as a multi-ethnic society.<sup>12</sup> What connects the Ahtisari Plan with this analysis of the circumstances that create the emergence of the quasi-amendment, refers to the genesis of granting a very special constitutional position of the Serbian community, including the requirement for the votes of the non-majority communities in order to make changes to the constitution.

This position has also been reflected in the Constitution of Kosovo, as well as in its structure, which, in addition to human rights and freedoms, has a special chapter that refers to the rights of non-majority communities.<sup>13</sup> Moreover, what represents the axis of this study refers to the right of the Serbian community to play an important role in the process of amending the constitution through their representatives in the parliament. More precisely, the Constitution of the Republic of Kosovo, when dealing with the aspect of constitutional amendments, in a permanent provision specifies that “*any amendment will require the approval of two-thirds (2/3) of all deputies of the Assembly, including two-thirds (2/3) of all the deputies of the Assembly who hold seats reserved or guaranteed for representatives of non-majority communities in the Republic of Kosovo*.”<sup>14</sup>

This form of constitutional amendment will later be seen as a complicated mechanism given that the constitution does not specify the areas of constitutional amendment which would require for the minority communities to be included, but as can be seen from its content, any constitutional amendment in the entirety of the constitution requires the approval of also 2/3 of the non-majority communities.

Such an important constitutional role of the non-majority communities has led to certain constitutional issues when there is disagreement between the non-majority community and the Albanian majority community, the latter finding ways and mechanisms to achieve their constitutional goals. In this direction, issues such as the army pose a very complex problem when it comes to constitutional changes in this direction. The case of Kosovo and ethnic disagreements in this process, which will be analyzed below, shows best how complex such constitutional changes can be.

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<sup>11</sup> Declaration of the Independence of Kosovo, 17. 2. 2008, point 2.

<sup>12</sup> Comprehensive Plan for the settlement of the final status of Kosovo. 26. 3. 2007. General provisions, Article 1.1.1.

<sup>13</sup> MARKO, J. The new Kosovo Constitution in a regional comparative perspective. *Review of Central and East European Law*. 2008, Vol. 33, p. 443.

<sup>14</sup> The Constitution of Kosovo [2008], Article 144, paragraph 2.

#### 4. KOSOVO'S CONSTITUTIONAL TRANSITION IN THE SPHERE OF DEFENSE

Among the many constitutional institutions that were established after the declaration of Kosovo's independence and the entry into force of the Constitution on June 15, 2008,<sup>15</sup> the Kosovo Security Force was also founded. The Constitution of Kosovo of 2008, which was drawn up largely adhering to the Ahtisaari Plan, in its transitional provisions determined that the Kosovo Defense Troops should be disbanded within one year after the entry into force of the Constitution. Kosovo Defense Troops were practically the predecessor troops of the Kosovo Security Force (KSF) and the same had to be disbanded by June 15, 2009.<sup>16</sup>

The founding of the KSF was intended for it to be a multi-ethnic force, which had no powers to protect the territory and sovereignty of Kosovo, but only responsibility in responding to crises. Meanwhile, in a long-term process, it was planned for the KSF to be reconstructed and prepared for the fulfillment of other security missions as well.<sup>17</sup>

Regarding the establishment of the Kosovo Security Force as a multi-ethnic force, Article 5.1 of Annex VIII of the Ahtisaari Plan determined:

*“A new Security Force (KSF) will be established in Kosovo, which will be professional and multi-ethnic.”*

The spirit of the Ahtisaari Plan for the creation of the KSF as a multi-ethnic force was also reflected on Article 126 of the Constitution of Kosovo, which implies that the KSF is created and functions as a force with an ethnic composition and that its composition reflects the ethnic diversity of the people of Kosovo.<sup>18</sup> Although the protective character of the KSF is not defined according to the Constitution and the Ahtisaari Plan, the protective duty of the KSF is implicitly accepted in Article 131 of the Constitution, when the State of Emergency is declared and for the purposes of emergency protection measures.<sup>19</sup>

In addition to constitutional and legal guarantees, the fact that the KSF was established and would function as a force that had seats reserved for non-majority communities in its composition is also proven through the reflection of the factual situation on the occasion of its establishment where, among others, communities had also applied, notably one hundred and one members from the non-majority communities in Kosovo, including 6 Serbs.<sup>20</sup>

#### 5. FAILED ATTEMPTS TO TRANSFORM THE KSF INTO KOSOVO'S ARMY THROUGH CONSTITUTIONAL CHANGES

As mentioned, Kosovo, as a constitutionally multi-ethnic state, has had reserved and guaranteed seats in the composition of its parliament since the entry into force of the Con-

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<sup>15</sup> The Constitution of Kosovo [2008], Article 162.

<sup>16</sup> *Ibid.* Article 154.

<sup>17</sup> Comprehensive Plan for the settlement of the final status of Kosovo, March 26, 2007, Annex VIII, Article 5.

<sup>18</sup> The Constitution of Kosovo [2008], Article 126.

<sup>19</sup> KESSELRING, A. The formation and role of the Kosovo Security Force. *National Defence University, Department of Strategic and Defense Studies*. 2010, Vol. 4, No. 35, p. 42.

<sup>20</sup> *Ibid.*, p. 17.

stitution. This possibility was designed by Marti Ahtisari in his plan, with which the independence of Kosovo was announced. According to this logic, for the first two mandates after the entry into force of the constitution, the Serbian community in Kosovo had ten guaranteed seats plus reserved seats if they participated in the elections.<sup>21</sup> This decision was made in order for Kosovo Serbs to integrate into the institutional life in Kosovo and participate in the elections.

After the entry into force of the constitution, during the time that Kosovo Serbs and other communities were exercising their second mandate in the Assembly, during the 2011-2014 legislature, the first attempt was made to transform the KSF into the army of Kosovo through changes to the Constitution. On March 11, 2014, the President of the Assembly presented to the Constitutional Court of Kosovo the proposed amendments for the transformation of the KSF into the armed forces of Kosovo.<sup>22</sup> According to the amendments proposed in 2014, the KSF was named as the Armed Forces of Kosovo and became a military force tasked with protecting the sovereignty and territorial integrity of Kosovo.<sup>23</sup>

At the time when the constitutional amendments were made for the transformation of the KSF into an army, the Assembly of Kosovo and the government coalition in general were in crisis. On May 5, 2014, the vote on the constitutional amendments that would transform the KSF into an army was put on the agenda for approval, but this point of order was postponed to the next session of the Assembly of Kosovo, due to the fact that additional consultations were required for this point, without disclosing the nature of these consultations. The Assembly of Kosovo took the decision to postpone this point with 83 votes in favor, 1 against and 2 abstentions.<sup>24</sup> However, in the next session of the Assembly, on May 7, 2014, when the constitutional amendments for the establishment of Kosovo's army had to be voted on, the deputies voted to dissolve the Assembly with 90 votes in favor and 4 against.<sup>25</sup> In these circumstances, the first attempt to establish Kosovo's army through constitutional changes had failed. At this point it is important to emphasize that as an attempt to change the constitution, this one failed as a result of political problems between the political subjects of parties coming from the Albanian majority community and we cannot therefore prejudge on the potential position of the representatives of the non-majority communities in the parliament.

Immediately after the elections of June 8, 2014, in December 2014, the new government of Kosovo was established.<sup>26</sup> One of the priorities of the new government was the transformation of the KSF into the army of Kosovo. The draft law for the amendment of the laws which would enable the transformation of the KSF into armed forces, respectively into the army of Kosovo was also part of the legislative program of the new government.

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<sup>21</sup> Comprehensive Plan for the settlement of the final status of Kosovo, March 26, 2007, Annex I, Article 3.2.

<sup>22</sup> Constitutional Court of Kosovo, Judgment in case No. K/044/14 Review of constitutional amendments proposed by the Government, brought by the Speaker of the Assembly of the Republic of Kosovo on March 11, 2014, with letter No. 04-DO-2186, paragraph 6.

<sup>23</sup> Draft amendment No. 35, which amended Article 126 of the Constitution of Kosovo of 2008.

<sup>24</sup> Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 5 and 6 May 2014, p. 38.

<sup>25</sup> Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 7 May 2014, p. 32.

<sup>26</sup> ZOGIANI, N. Kosovo Parliament Approves New Government. In: *BalkanInsight* [online]. 9. 12. 2014. [2022-01-02]. Available at: <<https://balkaninsight.com/2014/12/09/kosovo-elects-central-institutions/>>.

The procedure for approval in the Government of Kosovo of the law enabling the creation of the Kosovo army was set right at the beginning of 2015.<sup>27</sup> However, due to circumstances completely unknown to the public, the Government at that time did not also proceed the constitutional amendments that would create the Kosovo army from the KSF. The proceeding of constitutional amendments by the government was done a few months later than the proceeding of the law, namely on May 27, 2015.<sup>28</sup> The constitutional amendments that would enable the creation of the Kosovo army were not put to a vote in the Assembly in 2015 either, as there were dilemmas whether these amendments would be voted by the Serbian representatives in the Assembly, bearing in mind that in consonance with the Constitution of Kosovo, in order for the amendments to pass there is the need to also have 2/3 of the seats held by the non-majority communities, including the Serbian community.<sup>29</sup> These dilemmas are related to the developments of that time, during which the creation of an association of municipalities with a Serbian majority in Kosovo was persistently demanded.

As will be understood later, at the end of 2015, the agreement that was reached in Brussels for the establishment of this association was sent for review by the Constitutional Court, and initially on November 10, a temporary measure<sup>30</sup> was granted related to the establishment of the association. Later, on December 23, 2015, the Constitutional Court issued a judgment stating that “*the principles, as elaborated in the “Association/Community of municipalities with a Serbian majority in Kosovo - General principles/Main elements”, are not entirely compatible with the spirit of the Constitution, with Article 3 [Equality before the Law], paragraph 1, with Chapter II [Fundamental Rights and Freedoms] and with Chapter III [Rights of Communities and their Members] of the Constitution of the Republic of Kosovo.*”<sup>31</sup> After all these developments, the voting of the constitutional amendments that would transform the KSF into an army, was of course most likely an impossible mission as the vote of the non-Serb majority community was related to the developments related to the association.

This entire process brings back to attention what Albert calls the *frustration* of the political elite, which emerges from the strict rules defined in a process of amending the constitution. In the circumstances addressed from the context of Kosovo, another dimension is added to the *frustration* mentioned by Albert, because this frustration does not appear between the majority and the opposition in a political context, but between the majority

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<sup>27</sup> The observer of Kosovo's Security Sector. *KIPRED*. 2016, Vol. 1, No. 3, p. 17.

<sup>28</sup> Decision of the Government of the Republic of Kosovo, No. 01/31, dated 27. 5. 2015.

<sup>29</sup> Constitution of Kosovo of 2008, Article 144.

<sup>30</sup> Regarding the association, the Constitutional Court of Kosovo had issued a decision for a temporary measure related to the assessment of the compatibility of the “Association/Community of municipalities with a Serbian majority in Kosovo – General principles/Main elements” with the spirit of the Constitution, Article 3 [Equality before the Law], paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo. (Decision for temporary measures, Case No. K0130/15).

<sup>31</sup> Judgment in Case No. K0130/15: Applicant – President of the Republic of Kosovo, regarding the assessment of the compatibility of the principles contained in the document entitled “Association/Community of municipalities with a Serbian majority in Kosovo – General principles/Main elements” with the spirit of the Constitution, with Article 3 [Equality before the Law], paragraph 1, with Chapter II [Fundamental Rights and Freedoms] and with Chapter III [Rights of Communities and their Members] of the Constitution of the Republic of Kosovo.

and the minority in an ethnic sense. Here it is important to emphasize the fact that the expression “*frustration*” is used to relate to the language used by Albert and does not imply any kind of perception regarding the position of the parties in the failed process of constitutional changes.

As a result of this *frustration*, the third attempt to transform the KSF into an armed force took place in a different form and circumstances. Given that by then the constitutional amendments had failed twice in a row, the creation of Kosovo’s army was now to be done through law, even though constitutional amendments were needed for this as well.

Subsequently, pursuing such a path evoked strong reactions from the international community, including NATO. Regarding this initiative, the Secretary General of NATO, Jens Stoltenberg, among other things, said: “*Today I talked with Hashim Thaçi and Isa Mustafa to convey to them the serious concerns of NATO allies about the latest proposal of the authorities of Kosovo to transform the Kosovo Security Force into an armed force, without constitutional changes. I have made it clear that unilateral steps such as these are useless and I call on the Kosovo authorities to be in close contact with Belgrade*”.<sup>32</sup> Thus, as can be seen, NATO only supported the creation of the armed forces of Kosovo through constitutional changes. There was a reaction to this initiative by the United States of America as well, which also did not support President Thaçi’s initiative to change the mission of the KSF and create the Kosovo army by law.<sup>33</sup> As part of this attempt, the proposed law was never proceeded for a vote in the Assembly of Kosovo.

After three failed attempts to transform the KSF into an army, two constitutional attempts and one by the president through law, the fourth attempt to create the army of Kosovo was successful.

However, even in this case, the change of the mission from the KSF to an army was not made through constitutional changes, but through a package of laws that would completely change the mission and powers of the KSF and hence enable it to function as an army. The draft laws were voted by the government on December 13, 2018 and were then adopted by the Assembly of Kosovo on December 14, 2018.

## 6. THE CONSTITUTIONAL QUASI-AMENDMENT AND THE CREATION OF THE KOSOVO ARMY

The internal political problems between the political subjects of the majority Albanian community that resulted with the dissolution of the Assembly, and later the lack of cooperation between the majority Albanian community and the non-majority communities, were some of the issues that made it impossible to change the constitution of Kosovo in order to create the army. Specifically, such a thing became unachievable due to the failure of two initiatives and the failure to reach an ethnic consensus in the parliament to vote on the changes to the constitution for the transformation of the KSF into an army. This situation

<sup>32</sup> Statement by the NATO Secretary General on the Kosovo Security Force (KSF). In: *NATO* [online]. 8. 3. 2017 [2022-01-02]. Available at: <[https://www.nato.int/cps/en/natohq/news\\_142022.html/](https://www.nato.int/cps/en/natohq/news_142022.html/)>.

<sup>33</sup> U.S. Embassy Statement on Kosovo Security Force Transformation Process. In: *U.S. Embassy Prishtina* [online]. 8. 3. 2017 [2022-01-02]. Available at: <<https://xk.usembassy.gov/statement-by-the-u-s-embassy-pristina/>>.

pushed the political actors in Kosovo to find other courses to create the army and these courses were found by using sub-constitutional (legal) mechanisms, which actually affect the constitutional matter that had to do with the KSF. In essence, this example clearly illustrates Albert's finding that the quasi-amendment as a non-formal change suits political actors, to whom a formal change would cause frustration and problems in achieving their political goals.<sup>34</sup> Hence, Kosovo chose the path of changing the constitutional matter through law, due to the lack of unity for constitutional changes, conditioned by ethnic issues.

In this direction, on December 14, 2018, the Assembly of Kosovo, unable to change the constitution, adopted three laws that enabled the transformation of the KSF into the army of Kosovo. The adopted laws which were approved with 106 votes in favor and 1 abstention were: the Law on the Kosovo Security Force, the Law on the Ministry of Defense and the Law on Service in the Kosovo Security Force.<sup>35</sup> After the creation of the Kosovo army by law, a mild support came from NATO, and regardless of all the expressed reservations, NATO conveyed its readiness to support the development of the Kosovo Security Force.<sup>36</sup>

The Law on the Kosovo Security Force mostly affected the constitutional matter related to the KSF due to the changes in the competences of the latter. In particular, Article 4 of the Law on the Kosovo Security Force has affected and practically changed Article 126 of the Constitution, which refers to the KSF.<sup>37</sup>

Article 126 of the Constitution defines the KSF as a national security force for the Republic of Kosovo, which can send its members abroad in full compliance with its international responsibilities and which protects the citizens and communities of the Republic of Kosovo based on the powers defined by law.<sup>38</sup> While the constitution defines that the KSF is a “national force”, on the other hand, the Law on the Security Force, in its Article 5 defines that the KSF is a “military force”. In this case, the law has given the KSF the mandate of a military force, regardless of the fact that the constitution does not say so. Therefore, as can be seen, the Law has changed the constitutional status of the KSF, from a national force, to a military force (army).

On the other hand, the Law on the Security Force, approved on December 14, 2018, had also changed the mandate of the KSF, thereby amending and supplementing the constitution and especially its Article 126. While the constitution of Kosovo stipulates that the KSF has a mandate for the protection of citizens and non-majority communities, the law on the other hand gives an additional mandate to the KSF to protect the sovereignty, territorial integrity, citizens and interests of the Republic of Kosovo, a mandate which, as elaborated, is not found in the text of the Constitution.<sup>39</sup>

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<sup>34</sup> ALBERT, R. *Quasi-Constitutional Amendments*. p. 739.

<sup>35</sup> Kosovo legislature approves creation of national army. In: *DW* [online]. 14. 12. 2018 [2021-01-09]. Available at: <<https://www.dw.com/en/kosovo-legislature-approves-creation-of-national-army/a-46734640>>; BRITTON, B. Kosovo lawmakers approve army, as tensions with Serbia rise. In: *CNN* [online]. 14. 12. 2018 [2022-01-02]. Available at: <<https://edition.cnn.com/2018/12/14/europe/kosovo-approves-law-army-serbia-opposition-intl/index.html>>.

<sup>36</sup> Statement by the NATO Secretary General on the adoption of the laws on the transition of the Kosovo Security Force. In: *NATO* [online]. 14. 12. 2018 [2022-01-02]. Available at: <[https://www.nato.int/cps/en/natohq/news\\_161631.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/news_161631.htm?selectedLocale=en)>.

<sup>37</sup> Law No. 06/L-123 on Kosovo Security Force, Article 5.

<sup>38</sup> Constitution of Kosovo [2008], Article 126, paragraphs 1 and 2.

<sup>39</sup> *Ibid.* Law No. 06/L-123 on Kosovo Security Force, Article 5.

The fundamental change of the constitutional matter regarding the KSF can be seen when comparing the constitutional norm, defined in Article 126 of the Constitution and Article 5 of the Law on the KSF. Article 5 of the Law has clearly changed the mandate of the KSF into a military force with a completely different mandate that is not defined by the constitution. This change in the mandate of the KSF and its competences, without the same being defined in the constitution, clearly constitutes a constitutional quasi-amendment, a typical case where the constitutional matter is explicitly changed through law.

Another important issue which constitutes a supplement to the constitution is the creation of the Ministry of Defense. The Ministry on the Kosovo Security Force was established in order to manage the Kosovo Security Force, and with the transformation of the KSF into an army, this ministry was transformed into the Ministry of Defense.<sup>40</sup> The Ministry of Defense and its establishment by law was a reflection of the new mandate and powers of the KSF. However, the creation of this ministry for the first time gives the KSF its defense mission, an attribute which is not mentioned anywhere in the constitution in matters related to the KSF.

Furthermore, the constitution does not stipulate anywhere that the KSF is managed and controlled – in civil terms – by an institution to which the word *defense* is attributed in the sense of the function that it has, as is the case of the Ministry of Defense. What remains open for discussion here is the question of whether defense, in this case the army, is part of a special-fundamental structure of the constitution? If yes, then we can easily build the argument that now the Law on the Ministry of Defense, besides being a law with constitutional weight, also regulates a matter that is part of the very structural issues of the constitution, that is, that exceed the structure of the Constitution of Kosovo.

It is important to note that the laws approved for the transformation of the KSF into an army that entered into force in January 2020 have never been constitutionality contested in the Constitutional Court of Kosovo, in order to prove whether the substance of the laws is in contradiction to the constitution.

## 7. CONCLUSIONS

Constitutional changes that avoid the rules predetermined by the constitution itself, i.e. those that affect a certain value of the constitution, occur for several reasons. Among them, the impossibility of a federal consensus in cases where the constitutional change involves federal units was mentioned. Likewise, non-formal constitutional changes are achieved faster, thus avoiding long procedures and being at the service of a political structure which tries to achieve an important result by changing the constitution silently. These are some of the now consolidated arguments in the theory of constitutional quasi-amendment.

Yet, as can be seen from this paper, the constitutional quasi-amendment today serves to building laws with constitutional power (quasi-constitutional laws), which not only regulate a constitutional matter, but can also affect very specific and structural issues of the constitution. The changes that have occurred in Kosovo through the laws addressed

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<sup>40</sup> Law No. 06/L-122 on Ministry of Defense.

in this paper, reflect new but very necessary dimensions on the existence of quasi-amendments. Moreover, they bring into focus a very special reason for the need for the existence of quasi-amendments, as an instrument that appears like the most stable solution to serve a new social reality in situations where constitutional change is almost impossible. Thusly, the quasi-amendment in the case of Kosovo has enabled a social progress of a new and developing state, which would have otherwise been impossible to happen for the time being by formal and procedural changes to the Constitution, mainly due to the problems of an ethnic nature transmitted with the votes against by the non-majority Serbian community, in relation to the change of the constitution.

What comes to light as a conclusion from this study refers to another important fact, which is: The informal change of the constitution through constitutional quasi-amendments makes it possible to keep the constitution alive, the principle otherwise known as *living constitutions*, considering that in the opposite, the constitution of Kosovo, or the constitutional matter, would lag behind in relation to social developments, respectively the need for the creation of the Kosovo army.

In the end, as can be clearly observed from the analysis, the case of Kosovo includes two dimensions in itself: the quasi-amendment *as a form* and quasi-constitutional laws *as a goal*. In this regard, these laws that were created through constitutional quasi-amendments and their content meets all the standards for the theory of constitutional law to recognize them as quasi-constitutional laws.