



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

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Prishtina, 14 July 2014  
Ref. no.: RK 672/14

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KO59/14**

Applicant

**Hilmi Hoxha**

**Constitutional review of  
Articles 29.2 and 38.2 of the Criminal Procedure Code  
and  
Articles 11.1 and 39.2 of the Law on Courts**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

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

#### **Applicant**

1. The Referral was filed and signed by Mr. Hilmi Hoxha, who introduced himself as Presiding Judge of the Department for Serious Crimes of the Basic Court in Gjakova (hereinafter, the Applicant).

2. The Applicant challenges the constitutionality of some legal provisions of the Criminal Procedure Code (hereinafter, the CPC) and of the Law on Courts.

### **Subject matter**

3. The subject matter is the constitutional review of Articles 29.2 and 38.2 of the CPC and Articles 11.1 and 39.2 of the Law no. 03/L-199 on Courts, due to an alleged collision in relation to territorial competence of courts on criminal liability.

### **Legal basis**

4. The Referral is based on Article 113.8 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 51 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

### **Proceedings before the Constitutional Court**

5. On 31 March 2014, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 1 April 2014, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
7. On 3 April 2014, the Court requested the Applicant to clarify and complete the Referral, answering the questions that follow.

- a). *What is the question of compatibility of these legal provisions with the Constitution?*
- b). *What is the legal provision of the Constitution which is not compatible?*
- c). *What is the uncertainty as to the compatibility of the contested laws with the Constitution?*
- d). *How the court's decision on the pending case depends on the compatibility of the law at issue with the Constitution?*
- e). *Is there any decision of the President of Basic Court in Gjakova and/or of its serious crime panel, requesting the assessment of the constitutional compatibility of the relevant provisions of the Criminal Procedure Code and of the Law on Courts?*

8. On 3 April 2014, the Court also requested the President of Basic Court in Gjakova to submit:

- a). *the case file PKR No.317/2013 that is under consideration by the Basic court in Gjakova;*
- b). *any decision of the Basic Court in Gjakova and/or its serious crimes panel, raising or requesting the assessment of constitutional compatibility of the abovementioned provisions of the Criminal Procedure Code and Law on Courts with the Constitution;*
- c). *comments on the Referral, if any.*

9. On 15 April 2014, the Applicant answered the questions put by the Court and submitted the case file PKR no. 317/2013.
10. On 7 May 2014, the Court further requested the Basic Court in Gjakova to inform whether the President and/or the Presiding Judge of the serious crimes panel took any decision, raising the requesting the assessment of constitutional compatibility of the challenged laws and, if any, to send a copy.
11. On 27 May 2014, the President of the Basic Court in Gjakova answered the questions put by the Court.
12. On 26 June 2014, the Judge Kadri Kryeziu notified in writing the Court of the request for his recusal from the session for the period June-July 2014, until the Court decides on the allegations raised against him.
13. On 26 June 2014, the President of the Court, by Decision no. KSH. KI59/14, replaced Judge Kadri Kryeziu with Judge Ivan Ćukalović as a member of the Review Panel.
14. On 26 June 2014, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of Referral.

### **Summary of facts**

15. On 17 February 2004, the Public District Prosecutor in Peja charged (Indictment PP. no. 68/2004) a defendant with the criminal offences of the attempted murder and unauthorized possession of weapons and ammunition.
16. On 20 October 2011, the District Court in Peja (Judgment P. no. 154/10) found the accused guilty and sentenced him for the criminal offenses as per the indictment.
17. On 16 April 2013, the Court of Appeal (Decision PAKR. no. 899/2012) approved the appeal of defense counsel of the accused, annulled Judgment of the District Court in Peja (P. no. 154/2010, of 20.10.2011), and remanded the case for retrial to the Basic Court in Peja.
18. Meanwhile, on 22 July 2010, the Law No. 03/L-199 on Courts has been approved. Article 43 (Entry into Force) foresees that *“This Law shall enter into force on January 1, 2011 for Articles 29, 35, 36 38 and 40, while for other Articles it shall begin to be implemented from January 1, 2013.*
19. In accordance with that Law, the new Basic Court was established in Gjakova and, under Article 39.2, all cases which were not resolved by final decisions until 31 December 2012, should be treated as cases of the Basic Court holding respective territorial jurisdiction as of 1 January 2013.
20. On 22 October 2013, the Department for Serious Crimes of the Basic Court in Peja (Decision P. no. 270/13) *“declared itself territorially incompetent”* to

adjudicate the criminal matter and forwarded the case to the Department for Serious Crimes of the Basic Court in Gjakova.

21. On 23 October 2013, the Presiding Judge of the Department for Serious Crimes of the Basic Court in Gjakova filed with the Court of Appeal a request to resolve the territorial jurisdiction conflict, proposing that the Basic Court in Peja be found to have territorial jurisdiction for adjudicating the criminal matter.

22. On 25 October 2013, the Court of Appeal decided (Decision PN. no. 670/2013):

*“The Basic Court in Gjakova, Department for Serious Crimes is rendered competent to adjudicate the criminal matter upon the indictment of the District Public Prosecution in Peja (hereinafter: DPP) PP. no. 68/04 of 17.02.2004, against the accused, due to the grounded suspicion that he has perpetrated the criminal offense of attempted murder pursuant to Article 30, paragraph 1 of the Criminal Code of Kosovo (CCK) in conjunction with Article 19 of the CLY, and the criminal offense of unauthorized possession of weapon and ammunition pursuant to Article 8.3 punishable pursuant to Article 8.5 of UNMIK Regulation no.2001/7 on the Authorization of Possession of Weapons in Kosovo”.*

23. On 15 January 2014, the Presiding Judge of the Department for Serious Crimes of Basic Court in Gjakova filed with the Supreme Court a request for protection of legality.

24. On 28 January 2014, the Supreme Court of Kosovo decided (Decision PML. no. 16/2014) to reject as inadmissible the request for protection of legality, reasoning as follows:

*“Moreover, the request for protection of legality was submitted by a Judge – Presiding Judge, who is not legally authorized to submit this legal remedy, because pursuant to the provision of Article 433, paragraph 1 of the CPCK, the request for protection of legality can be submitted by the Chief State Prosecutor, the defendant and his defense counsel, and upon death of the defendant the request can be submitted by the persons listed in the final sentence of Article 424, paragraph 1 of the present Code”.*

25. On 14 April 2014, the Applicant answered the questions put by the Court as follows:

a). *“The provisions of Article are legal provisions in compliance with the Constitution, while Article 39 of the Law on Courts is legal provision that is in contradiction to the abovementioned Articles of CPC”;*

b). *“The legal provisions of the Constitution are not challenged, but perhaps I made a change, when I filed the Referral regarding the constitutionality of Articles 29 para. 2, Article 38 para.2 of the CPC, (...) it should have been stated the legality of the CPC articles mentioned above”;*

c). *“Article 39 para.2 of the Law on Courts, in my opinion is not an article that determines the territorial jurisdiction of the criminal present cases, but determination of the territorial jurisdiction of each specific criminal case should be based on Article 29 para. 2 and Article 38 para. 2 of the CPC”;*

d). *“The decision of the Court, pending the case depends a lot, since (...) all these cases are sent to the Basic Court in Gjakova, only by a simple letter, by referring to Article 39 para. 2 of the Law on Courts, without decision on declaration of territorial incompetence and this is special burden for the Basic Court in Gjakova, which has only 3 judges of serious crimes or 12 Judges in total”;*

e). *“There is no decision of the Basic Court in Gjakova or of the panel of this Court of serious crimes that has requested the assessment of the constitutional compliance of the respective provisions of the Criminal Procedure Code and the Law on Courts”.*

26. On 14 April 2014, the Applicant further attached the case file PKR. no. 317/2013, *“since this case was assigned to the Presiding Judge and not to the President of the Basic Court in Gjakova”.*
27. On 27 May 2014, the President of the Basic Court in Gjakova informed that *“neither the President of the Basic Court in Gjakova, nor the Presiding Judge of the serious crimes panel have rendered any decision that sought the Constitutional review of Articles 29.2 and 38.2 of the Criminal Procedure Code, as well as Articles 11.1 and 39.2 of Law no.03/L-199 on the Courts”.*

### **Applicant’s allegations**

28. The Applicant claims that Articles 11.1 and 39.2 of the Law no. 03/L-199 on Courts *“are in collision with the Code of Criminal Procedure”*, namely with Articles 29 (2) and Article 38 (2), which provide on territorial jurisdiction of courts.
29. The Applicant alleges *“individual uncertainty”* on decisions on territorial jurisdiction. He further says:
- In every meeting, seminar or panel, I have objected the manner of forwarding criminal cases, (...) and I have tried to raise this matter, but my opinion only reached deaf ears (...).*
30. The Applicant is *“still unsure of the constitutionality of Article 11, paragraph 1, and Article 39, paragraph 2 of the Law on Courts, for determining territorial jurisdiction on concrete cases”.*
31. Finally, the Applicant requests from the Court *“clarification of constitutionality of incidental jurisdiction in the present criminal case”.*

### **Relevant provision of the Constitution on courts**

Article 102 [General Principles of the Judicial System]

1. *Judicial power in the Republic of Kosovo is exercised by the courts.*

(...)

3. *Courts shall adjudicate based on the Constitution and the law.*

4. *Judges shall be independent and impartial in exercising their functions.*

(...)

## **Relevant provisions of the Law no. 03/L-199 on Courts**

### Article 3

- 1. The Courts established by this Law shall adjudicate in accordance with the Constitution and the Law.*
- 2. Judges during exercising function and taking decisions shall be independent, impartial, uninfluenced in any way by no natural or legal person, including public bodies.*

### Article 11.1

- 1. The Basic Courts are competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.*

### Article 12

- 1. The following Departments shall be established within the Basic Courts for the purpose of allocating cases according to subject matter:*

...

- 1.3. a Department for Serious Crimes operating at the principal seat of each Basic Court;*
- 2. Each Basic Court shall have a President Judge responsible for the management and operations of the Basic Court. Each branch of the Basic Courts shall have one (1) Supervising Judge responsible to the President Judge of the respective Basic Court for the operations of the branch.*

### Article 15

- 2. All cases before the Serious Crimes Department of the Basic Court shall be heard by a trial panel of three (3) professional judges, with one (1) judge designated to preside over the trial panel.*

Article 39.2

*2. All cases which, on 31 December 2012, are first instance cases of the Supreme Court, District Court, District Commercial Court, Municipal Court or the Municipal Courts for Minor Offences and have not been concluded with final decisions, shall on 1 January 2013, be treated as cases of the Basic Court which has the appropriate territorial jurisdiction.*

**Relevant provisions of the Criminal Procedure Code, No. 04/L-123**

Article 29.2

*2. If a criminal offence was committed or attempted or its consequence occurred in the territory of more than one court or on the border of those territories, the court which first announced proceedings in response to the petition of an authorized state prosecutor shall be competent, but if proceedings have not been initiated, the court at which the petition for initiation of proceedings is first filed shall have jurisdiction.*

Article 38.2

*2. After the indictment becomes final, the court may not declare that it does not have territorial jurisdiction, nor may the parties raise the objection of lack of territorial jurisdiction.*

**Comparative law background**

32. Before entering the assessment of the admissibility of the Referral, the Court considers it is useful to bring into consideration some background on comparative law and jurisprudence.
33. The Court notes that the large number of the European states has foreseen the so-called “preliminary ruling procedure”: a regular court brings a preliminary question before the Constitutional Court when it has doubts on whether a law is compatible with the Constitution.
34. The preliminary ruling procedure is also known as judicial referral, indirect individual access, concrete control, indirect control or incidental control of constitutionality. It appears that the Kosovo legal community is more familiar with the term incidental control of constitutionality.
35. Thus, the regular courts of the majority of states are authorized to submit the request for constitutionality of legislation. It exists in Albania, Armenia, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Hungary, Italy, Macedonia, Romania, Slovenia, Spain, Turkey, etc. However, in some states such as Bulgaria, Greece and Latvia, only the highest courts are authorized to initiate the incidental control before the constitutional courts.
36. On the other side, in Germany, all competent panels of all courts in all instances are entitled to make use of judicial referral, in accordance with Article

100 (1) of the Basic Law. The Federal Constitutional Court also performs the review *ex officio*.

37. Pursuant to Article 100.1 of the Basic Law, all entitled panels may use the judicial referral. Then, a majority of the panel members must vote to refer the question. The petition must be signed by the judges who voted in favor of the referral and must be accompanied by a statement of the legal provision at issue, the provision of the Basic Law implicated, and the extent to which a constitutional ruling is necessary to decide the dispute.
38. The Federal Constitutional Court will dismiss the case if the referring judges demonstrate less than a genuine conviction that a law or provision of law is unconstitutional or if the case can be decided without settling the constitutional question.
39. In Hungary, in accordance with Article 24.2 b) of the Constitution, the Constitutional Court “*reviews immediately but not later than thirty days any piece of legislation applied in a particular case for conformity with the Fundamental Law at the proposal of any judge*”.
40. According to the Law of the Hungarian Constitutional Court, regular courts shall initiate proceedings with the Constitutional Court if, in a case pending before them, they should apply legal rules or other legal instruments of public administration which they deem unconstitutional.
41. Similar procedure also exists in Turkey. In fact, Article 152 of the Constitution of Turkey reads:

*If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue.*

*If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal.*

*The Constitutional Court shall decide on the matter and make public its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions. However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it.*

*No allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.*

42. In addition, Article 156 of the Slovenian Constitution provides:

*If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be*



*continued after the Constitutional Court has issued its decision.*

43. More precisely, the Special Act (of 6 January 1989) on the Belgian Constitutional Court provides:

*Art. 27.*

*§ 1. Preliminary questions shall be referred to the Constitutional Court by communication of a certified true copy of the referral decision signed by the president and registrar of the court of law.*

*§ 2. The referral decision shall state the provisions of the statute, decree or rule referred to in Article 134 of the Constitution in respect of which the question is referred; where appropriate, it shall also specify which articles of the Constitution or of the special laws are relevant in that respect. The Constitutional Court, however, may reformulate the preliminary question referred.*

*Art. 28.*

*The court of law which posed the preliminary question and any other court of law passing judgment in the same case shall comply with the ruling given by the Constitutional Court in the settlement of the dispute in connection with which the questions referred to in Article 26 were posed.*

*Art. 29.*

*§ 1. No legal remedy shall lie against a decision of a court of law insofar as it refers a question to the Constitutional Court for a preliminary ruling.*

*§ 2. Any decision whereby a court of law refuses to refer a question for a preliminary ruling shall state the reason for the refusal. No separate legal remedy shall lie against the decision of a court of law that refuses to refer such a question.*

*Art. 30.*

*A decision to refer a question to the Constitutional Court for a preliminary ruling shall have the effect of suspending the proceedings and the time limits for proceedings and limitation periods from the date of that decision until the date on which the ruling of the Constitutional Court is notified to the court of law that posed the preliminary question. A copy of the ruling shall be sent to the parties.*

44. The Court considers that it is a fair summary of the comparative view saying that, in the majority of the European states, the regular courts may use the judicial referral. Then, a decision needs to be made, voted and signed, on referring the constitutional question. The referral must be signed by the judges who voted in favor and must be accompanied by a statement of the legal provision at issue, the provision of the Constitution implicated, and the extent to which a constitutional ruling is necessary to decide the dispute. In addition, that decision duly signed by the Judge or the Judges is addressed to the Constitutional Court by the President of the Court or by the Registrar.

## Admissibility of the Referral

45. The Court now assesses whether the Applicant has met the admissibility requirements, as established by the Constitution and further specified by the Law and the Rules of Procedure, namely if the Applicant is an authorized party.
46. The Court recalls that the Applicant filed and signed the Referral “*pursuant to Article 113, item 8 of the Constitution of Kosovo*”, willing to “*refer the matter of constitutional review of these articles – laws mentioned above, and we request clarification of constitutionality of incidental jurisdiction in the concrete criminal case*”.
47. In this regard, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:
1. *The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*  
(...)
  8. *The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue.*
48. The Court also refers to Article 51 (Accuracy of referral) of the Law, which provides:
1. *A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.*
  2. *A referral shall specify which provisions of the law are considered incompatible with the Constitution.*
49. In addition, the Court refers to Rule 75 of the Rules of Procedure (Filing of Referral), which foresees:
- (1) *Any Court of the Republic of Kosovo may submit a Referral to the Court pursuant to Article 113.8 of the Constitution, ex officio, or upon the request of one of the parties to the case.*
  - (2) *The referral shall state why a decision of the court depends on the question of the compatibility of the law to the Constitution. The file under consideration by the court shall be attached to the referral.*
  - (3) *Any Court of the Republic of Kosovo may file a referral to initiate the procedure pursuant to Article 113. 8 of the Constitution regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.*

50. The Court observes that the Applicant refers to Article 113.8 of the Constitution as being the legal basis for filing the Referral.
51. The Court recalls that it had so far only one case submitted in accordance with Article 113.8 of the Constitution. (See Constitutional Court case KO04/11, Judgment dated 6 March 2012).
52. In that case, the general session of the Supreme Court deliberated to submit a request for the assessment of the constitutionality, in conformity with Article 113.8 of the Constitution.
53. The Referral was submitted to the Court on behalf of the Supreme Court by its President, Mr. Fejzullah Hasani.
54. At the outset, the Court recalls that the Applicant, Judge Hilmi Hoxha, informed that there is no judicial decision made by the President of the Basic Court in Gjakova or by the panel of serious crimes, requesting to the Constitutional Court the assessment of the constitutional compliance of the challenged legal provisions.
55. The Court notes that the Constitution (Articles 102) and the Law on Courts (Article 3) make a distinction in between “courts” and “judges”. On the other side, the comparative law, the Constitution (Article 113.8), the Law on Constitutional Court (Article 51) and the Rules of Procedure (Rule 75), when dealing with the incidental control, always refer to a “court”.
56. Thus, the Court considers that the Referral submitted by the Applicant cannot be taken as a referral submitted by a “court”, as specified in the legislation mentioned above and, more precisely, in Article 113.8 of the Constitution.
57. Consequently, the Court concludes that the Applicant is not an authorized party to file that Referral and, therefore, the referral is inadmissible.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.8 of the Constitution, Article 51 of the Law and Rule 75 (2) of the Rules of Procedure, on 26 June 2014, unanimously:

### DECIDES

- I. TO DECLARE the Referral Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO RETURN the case file to the Basic Court in Gjakova
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- V. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Prof. Dr. Enver Hasani