



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

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Pristine, 10 December 2012  
Ref. No.: VTK327/12

## **DECISION TO STRIKE OUT THE REFERRAL**

in

**Case KO 63/12**

**Request of Alma Lama and 10 other Members of the Assembly of the Republic  
of Kosovo for constitutional assessment of Articles 37, 38 and 39 of the  
Criminal Code No. 04/L-82 of the Republic of Kosovo**

### **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  
Kadri Kryeziu, Judge  
Arta Rama-Hajrizi, Judge.

#### **The Applicants**

1. The Applicants are the deputies of the Assembly of Kosovo Alma Lama, Visar Ymeri, Rexhep Selimi, Afrim Kasolli, Albulena Haxhiu, Albana Fetoshi, Albana Gashi, Glauk Konjufca, Albin Kurti, Florin Krasniqi and Afrim Hoti.

## **Subject matter**

2. The Referral is on the constitutionality of Articles 37, 38 and 39 of the **Criminal Code No. 04/L-82 of the Republic of Kosovo** (hereinafter referred as “the Criminal Code”) adopted by the Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.
3. More precisely, the Applicants specifically put the following question to the Constitutional Court: “*Do Articles 37, 38 and 39 of the Criminal Code No. 04-/L-82 of the Republic of Kosovo violate the rights and fundamental freedoms guaranteed by Articles 40 and 41 of the Constitution of the Republic of Kosovo, as well as by Article 10 of the European Convention on Human Rights and its Protocols.*”

## **Legal Basis**

4. The Referral is based on Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 20 and 43 of the Law on the Constitutional Court of the Republic of Kosovo, of 15 January 2009, (No. 03/L-121), (hereinafter, the Law), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, Rules of Procedure).

## **Proceedings before the Court after the Decision on Admissibility and Adjourning , Ref. No.:VP318/12, published on 29 October 2012**

5. On 18 October 2012, the Constitutional Court decided to declare the Referral as admissible, adjourn the decision on merits of the referral until 15 December 2012 and remain seized of the case.
6. In addition, the Court requested the Assembly of Kosovo information about the status of legislative procedure with regard to elimination of Articles 37, 38 and 39 of the Criminal Code, Law No. 04/L-82 of the Republic of Kosovo.
7. On 12 November 2012, the Constitutional Court received a letter of the Speaker of the Assembly of the Republic, informing the Court that “*the Assembly of the Republic of Kosovo, in the plenary session held on 19 October 2012, has adopted the Law nr. 04/1-129 on amending and supplementing the Criminal Code of Kosovo, Law No. 04/L-082. With the adoption of the Law nr. 04/1-129 are abrogated Articles 37,38, 39 of the Criminal Code of the Republic of Kosovo*”. Furthermore, the Decree DL-048-2012 for promulgation of the Law No. 04/L-129 on the Amendment and Supplementation of the Criminal Code of the Republic of Kosovo of 2 November 2012 signed by the President of the Republic of Kosovo, has been attached to the letter of 12 November 2012.
8. On 15 November 2012, Alma Lama submitted letter to the Court requesting some clarifications of the Decision on Admissibility and Adjourning.
9. On 5 December 2012, the Court deliberated the merits of the Referral.

## **Summary of facts after the Decision on Admissibility and Adjourning**

10. On 19 October 2012, the Assembly of Kosovo approved the Law No. 04/L-129, on amending and supplementing the Criminal Code of Kosovo, Law No. 04/L-082, establishing that:

*Article 1  
Purpose*

*This Law aims to remove Articles 37, 38 and 39 of the Criminal Code of the Republic of Kosovo.*

*Article 2  
Repeal in the Criminal Code of the Republic of Kosovo*

*Articles 37, 38 and 39 of the Criminal Code of the Republic of Kosovo shall be deleted.*

*Article 3  
Entry into force*

*This Law shall enter into force on January 1, 2013.*

11. On 29 October 2012, the President of the Assembly of the Republic of Kosovo submitted that law to the President of the Republic of Kosovo for promulgation.
12. On 2 November 2012, the President of the Republic of Kosovo, by Decree No: DL-048-2012, promulgated the Law No. 04/L-129 on the Amendment and Supplementation of the Criminal Code of the Republic of Kosovo.

**Assessment of the Merits of the Referral**

13. The Criminal Code of Kosovo is supposed to enter into force on 1 January 2013, as it was adopted by the Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.
14. The Court, in its decision on admissibility and adjourning took into account that the challenged Articles 37, 38 and 39 of the Criminal Code were adopted by the Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.
15. However, the contested provisions by the Applicants were subject of further legislative initiative, debate and approval by the Assembly of Kosovo. Indeed, that legislative process was concluded on 2 November 2012 by the promulgation of the Law no. 04/L-129.
16. Article 2 of that Law no. 04/L-129 stipulates that "*Articles 37, 38 and 39 of the Criminal Code of the Republic of Kosovo shall be deleted*" and Article 3 states that "*This Law shall enter into force on January 1, 2013*".
17. Therefore, the elimination of Articles 37, 38 and 39 from the Criminal Code is guaranteed by the simultaneous entering into force of the Criminal Code, Law No. 04/L-082, and the Amendment and Supplementation of the Criminal Code of the Republic of Kosovo, the Law No. 04/L-129.
18. Consequently, the Court notes that the legislative process is a supervening fact which is relevant and impacts substantially on the Referral of the Applicants and its grounds and foundations.

## **Decision on striking out**

19. The Court considers that the supervening legislative event indicate that the Applicants' position has significantly changed. The current position is that the Referral is without rationale and the aim sought by them was completely attained. In light of this, the Court considers that there is no merit in further pursuing the matter.
20. However, the Court has the power and the duty to address this question particularly in view of the Court's own Rules of Procedure.
21. In fact, Rule 32 (4) of the Rules of Procedure of the Constitutional Court states that the Court may dismiss a Referral when it determines that a claim is moot or when it does not otherwise present a case or a controversy anymore. The Rule, to the extent relevant, provides as follows:

### *Rule 32*

#### *Withdrawal of Referrals and Replies*

*(4) The Court may dismiss a referral when the Court determines a claim to be moot or does not otherwise present a case or controversy.*

*(5) The Secretariat shall inform all parties in writing of any withdrawal, of any decision by the Court to decide the referral despite the withdrawal, and of any decision to dismiss the referral before final decision.*

22. Also, the European Convention on Human Rights provides, to the extent relevant, the following:

#### **Article 37. Striking out applications**

*1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that*

- a) the applicant does not intend to pursue his application; or*
- b) the matter has been resolved; or*
- c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.*

23. As a general procedural principle, Courts should not make decisions on cases where the issue is no longer a live one and the case becomes moot. Courts do not deal with hypothetical or academic cases. This is a generally accepted principle of behavior of courts and it is analogous to the principle of judicial restraint.
24. Furthermore, the Court has already established (in Case 11\_09, Decision No. VHL112/11, of 30 May 2011, paragraph 46) that "*the concept of mootness is a well recognized legal concept. It can arise where a case, in an abstract or hypothetical issue, presents itself for decision by a Court. There are good grounds for a Court not dealing with hypothetical situations. Without a real, immediate or concrete issue to be decided upon, the Court might stray into making decisions that will bind itself and the public without there being good cause to do so. Any decision that the Court would now make in relation to this Referral would have no practical effect*".

25. Taking into account the supervening legislative events that have occurred and all the forgoing, the Court concludes that the Applicants now have no case or controversy pending in relation to the constitutionality of Articles 37, 38 and 39 of the Criminal Code. The issue is effectively moot.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Rule 32 (4) of the Rules of Procedure, unanimously:

### DECIDES

- I. TO STRIKE OUT the Referral, pursuant to Rule 32.4 of the Rules of Procedure of the Constitutional Court of Kosovo.
- II. This Decision shall be notified to the Parties and, in accordance with Article 20.4 of the Law, shall be published in the Official Gazette.
- III. This Decision is effective immediately.

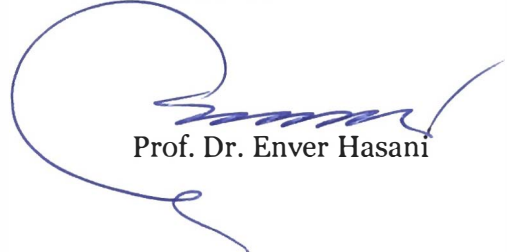
**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Prof. Dr. Enver Hasani