

## **Decision 3055/2019 (III. 25.) AB of the Constitutional Court of Hungary**

### **On the dismissal of a constitutional complaint**

In the matter of a constitutional complaint, , with the dissenting opinion of Dr. István Balsai, Justice of the Constitutional Court, the Constitutional Court, sitting as the Full Court, rendered the following

decision:

The Constitutional Court hereby dismisses the constitutional complaint seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the order of the Curia No Bfv.I.830/2017/16.

### Reasoning

I

[1] 1. The petitioner, through his legal representative (Dr. Judit Soós, attorney at law, Soós Attorneys at Law, H-1067 Budapest, Teréz krt. 37., II/18.) filed a constitutional complaint with the Constitutional Court pursuant to Section 27 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") for the declaration of the violation of the Fundamental Law of the order of the Curia No Bfv.I.830/2017/16.

[2] The Regional Court of Veszprém, by its judgement No 12.B.1018/2014/36 of 1 June 2016, found the petitioner guilty of the misdemeanour of unlawful appropriation committed as a coactor [Section 325 (1) of Act IV of 1978 on the Criminal Code (hereinafter referred to as the "former Criminal Code")]. The petitioner was placed on probation for two years for the criminal offence committed.

[3] The Regional Court of Appeal of Győr, as the court of second instance, by its judgement No Bf.79/2016/6., which became final on 15 February 2017, reversed the first instance judgement and sentenced the petitioner to ten months' imprisonment and HUF 49 million in confiscation of property. The court suspended conditionally the execution of the term of imprisonment for a probationary period of 2 years.

[4] The Curia sustained the judgement of the second instance by its order No Bfv.I.830/2017/16 of 28 November 2017.

[5] 2. On 12 June 2018, the petitioner filed a constitutional complaint with the Constitutional Court under Section 27 of the Constitutional Court Act, seeking a finding of unconstitutionality by non-compliance with the Fundamental Law and annulment of the Curia's order No

Bfv.I.830/2017/16. In its view, the contested decision of the Curia infringed its rights under Article XXVIII (1) and (7) and Article XXIV (1), Article XV (1) and Article 28 of the Fundamental Law.

[6] According to the petitioner, his right to a fair trial under Articles XXVIII (1) and XXIV (1) of the Fundamental Law was violated by the fact that the public prosecutor supervising the investigation and the other prosecutor who brought the indictment were, according to him, relatives of one of the officers or employees of the company named as the victim, and that the public prosecutor who brought the indictment participated in sports competitions as a competitor representing that company during the criminal proceedings. According to the petitioner, the information in that regard only came to his knowledge after the final conclusion of the criminal proceedings and he could therefore only challenge it in his request for review.

[7] According to the petitioner, the participation in the criminal proceedings of a public prosecutor who is subject to disqualification is an absolute ground for setting aside the judicial decision, the lack of legality of the prosecution. According to the petition, the names of both prosecutors and the indication of the relationship between them were mentioned at the public hearing held during the review, but no further questions were raised by either the court or the public prosecutor clarifying the disqualification objection. According to the petitioner, a procedure which ignores this circumstance cannot be impartial and fair.

[8] The petitioner considers the fact that the Curia did not consider the merits of the confiscation of his property as a violation of his right to legal remedy under Article XXVIII (7) of the Fundamental Law. According to the order under consideration, the confiscation of property cannot be challenged in the review proceedings. Pursuant to Section 416 (4) (c) of the former Code of Criminal Procedure, review is precluded if the violation of the law can be remedied under a special procedure (Act XIX of 1998 on Criminal Procedure, hereinafter referred to as the "the former Code of Criminal Procedure" Chapter XXIX, Titles I-II thereof). Under Section 570 (1) (a) of the former Code of Criminal Procedure, a special procedure applies if the court has not made a final decision on the confiscation of property in its final decision on the case or has not made such decision in accordance with the law. The Curia therefore considered that a review on the merits of the order for the confiscation of property was precluded (order under consideration, p. 10, paragraphs 5-8).

[9] According to the petitioner, his right to legal remedy was violated because the accused and the defence counsel cannot initiate the special procedure indicated, but can only submit a motion to the public prosecutor, who is entitled to do so. In his view, the fundamental right to a remedy ensures the direct enforceability of the remedy, but in the present case this is not the case because a "filter" - the public prosecutor - intervenes.

[10] The petitioner argued that the decision of the acting panel of the Curia was contrary to the practice of another panel of the Curia on the same subject. He supported this finding with reasoning taken from the decision No Bfv.III.1.216/2016/7 cited by him. In the petitioner's view, the requirement of a fair hearing was infringed by the existence of different, expressly contrary decisions on the same subject, since that requirement must ensure that the arguments put

forward by the petitioner are considered in the same proceedings as those of others. This circumstance, he claimed, also infringed his right under Article XV (1) of the Fundamental Law.

## II

[11] 1. The provisions of the Fundamental Law affected by the petition read as follows:

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act.."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

[...]

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

"Article 28 In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good. "

[12] 2. The provisions of the former Code of Criminal Procedure:

"Section 31 (1) No one may act as a public prosecutor in criminal proceedings,

(a) who has acted as a judge in the case, or a relative of a judge acting or having acted in the case,

(b) who is or has been involved in the case as a defendant or a counsel for the defence, or a victim, a private prosecuting party, a substitute private prosecuting party, private party, person reporting the crime or the representatives thereof, further, the relatives of the above,[...]

(d) who cannot be expected to form an unbiased opinion for other reasons.

[...]

Section 32 (1) The public prosecutor affected by a ground for disqualification shall immediately notify the head of the public prosecutor's office thereof. From the time of the notification of a ground for exclusion, the prosecutor may not act in the case."

"Section 373 (1) The court of second instance

I. shall set aside the judgement of the court of first instance and terminate the procedure,

[...]

(c) if the court of first instance has acted in the absence of the legality of the charge,

II. shall set aside the judgement of the court of first instance and order the court of first instance to reopen the proceedings if

[...]

(b) the judgement was delivered with the participation of a judge disqualified therefrom by law [...]"

"Section 416 (1) The final conclusive decision by the court may be subject to judicial review, if

[...]

(c) the court adopted its decision by a procedural irregularity specified in Section 373 (1) (I) (b) or (c) or in one of the points II to IV, [...]

(4) No judicial review shall apply if

[...]

(c) if the violation of the law can be remedied by a special procedure (Chapter XXIX, Titles I-II), [...]"

"Section 570 (1) If

(a) the court has not or not in accordance with the law provided in its final decision on the case for confiscation, confiscation of property or for irreversibly rendering electronic information inaccessible, or

(b) as a result of the asset recovery proceedings, the confiscation or confiscation of property must not be imposed on the person against whom the confiscation or confiscation of property was imposed in accordance with Section 74 (2) or (3) of the (former) Criminal Code, the court shall decide on the motion of the public prosecutor or ex officio afterwards.

### III

[13] The Constitutional Court first considered whether the constitutional complaint fulfilled the statutory conditions for admissibility.

[14] 1. Pursuant to Section 30 (1) of the Constitutional Court Act, a constitutional complaint based on Section 27 of the Constitutional Court Act may be filed within sixty days of the notification of the decision complained of, addressed to the court of first instance. The contested order of the Curia was received by both the petitioner and his legal representative on 16 January 2018. The constitutional complaint was posted by the petitioner through his legal representative on 17 March 2018. The Constitutional Court found that the constitutional complaint had been lodged within the statutory time limit.

[15] 2. The constitutional complaint has partially complied with the provisions of the. 52 (1) and (1b) of the Constitutional Court Act, regarding the criteria for the submission of the

constitutional complaint, because it indicated the statutory provision on which the Constitutional Court's jurisdiction is based (Article 27 of the Constitutional Court Act); the provisions of the Fundamental Law that are alleged to be violated [Article XV (1), Article XXIV (1), Article XXVIII (1) and (7), Article 28 of the Fundamental Law]; the challenged court decision (Curia order No Bfv.I.830/2017/16); and an express request for a declaration that the court decision is unconstitutional and for its annulment. The Constitutional Court established that pursuant to Section 27 (a) of the Constitutional Court Act, the petitioner can be considered entitled to lodge a complaint and is considered to be concerned, since he was charged in the underlying criminal case and fulfilled his obligation to exhaust legal remedies under Section 27 (b) of the Constitutional Court Act {see, for example, Order No 3314/2017 (XI. 30.) AB, Reasoning [22]}.

[16] However, the constitutional complaint did not meet the following requirements:

- Article XXIV (1) of the Fundamental Law lays down the requirement of a fair procedure in relation to administrative proceedings before a public authority; therefore, no connection exists between the court decisions challenged in the complaint and this provision of the Fundamental Law. In line with the practice of the Constitutional Court, this element of the complaint cannot be considered on the merits {e.g. Order 3179/2013 (X. 9.) AB, Reasoning [6], Order 3122/2017 (V. 30.) AB, Reasoning [12] and Order 3124/2017 (V. 30.) AB, Reasoning [13]}.

- The petitioner has not submitted any justification of constitutional value with regard to Article XV (1) of the Fundamental Law. In accordance with the consistent practice of the Constitutional Court, in the absence of such justification, the petition element is not suitable for consideration on the merits {Decision 3075/2016 (IV. 18.) AB, Reasoning [19]; Decision 3231/2016 (XI. 18.) AB, Reasoning [26]}.

[17] 3. The Constitutional Court then considered the existence of further conditions for the admission of the petition in Section 29 of the Constitutional Court Act.

[18] Pursuant to Section 29 of the Constitutional Court Act, the admissibility of a constitutional complaint is subject to the condition that it raises infringement of the Fundamental Law or a constitutional law issue of fundamental importance that substantially affects the judicial decision. These two conditions are of an alternative nature; therefore, the existence of one of them in itself justifies the Constitutional Court's proceedings on the merits {Decision 3/2013 (II. 14.) AB, Reasoning [30], and Decision 34/2013 (XI. 22.) AB, Reasoning [18]}. It is within the discretion of the Constitutional Court to assess whether the conditions are met.

[19] In the Constitutional Court's view, the question of whether the challenged court decision restricted the petitioner's right to legal remedy in a manner contrary to the Fundamental Law, and whether the alleged bias of the public prosecutor violated his right to a fair trial, requires a substantive assessment.

[20] On the basis of the above, the Justice-Rapporteur submitted to the Constitutional Court a draft decision on the merits of the complaint, pursuant to Section 31 (6) of the Rules of Procedure, instead of a decision on the admission of the complaint.

[21] The constitutional complaint is unfounded.

[22] 1. The Constitutional Court first considered whether the challenged Curia order restricted the petitioner's right to legal remedy under Article XXVIII (7) of the Fundamental Law in violation of the Fundamental Law.

[23] The petitioner considered the fact that the Curia did not consider the merits of the confiscation of property provision of the final judgement on the grounds that its assessment was subject to the special procedure for the confiscation of property to be a violation of his right to legal remedy under Article XXVIII (7) of the Fundamental Law.

[24] In previous decisions, the Constitutional Court has stated that the legislative obligation to ensure the mandatory provision of the possibility of review cannot be derived from Article XXVIII (7) of the Fundamental Law. The legislator has a wide discretion as to the cases in which it provides for the possibility of review proceedings and the manner in which it determines its content and limits. Accordingly, the institution of review in our current law is an extraordinary remedy against a final decision, which is available within a limited scope. {More recently, e.g. Decision 3245/2018 (VII. 11.) AB, Reasoning [27], Decision 3025/2016 (II. 23.) AB, Reasoning [22], originally Decision 1/1994 (I. 7.) AB, ABH 1994, 29, 38; Decision 42/2004 (XI. 9.) AB, ABH 2004, 551, 571}.

[25] The legislator designed the review system of the former Code of Criminal Procedure in such a way that - pursuant to Section 416 (4) (c) of the former Code of Criminal Procedure - review is excluded if the violation of the law can be remedied by conducting a special procedure (Chapter XXIX, Titles I-II of the former Code of Criminal Procedure). Pursuant to Section 570 (1) (a) of the former Code of Criminal Procedure, a special procedure is available if the court has not made a final decision on the confiscation of property in its final decision on the case or has not made a decision in accordance with the law.

[26] The interpretation of these statutory provisions was laid down by the Curia in its decision of principle No EBH2017.B.23. Under this decision, "[t]here is no room for review if the violation of the law can be remedied in a special procedure. The court shall decide on the confiscation of property in a special procedure if it has not made provision for it in its decision on the merits or has not made provision for it in accordance with the law. Since the law makes no distinction between special procedures, the prohibition quoted applies to all special procedures governed by Titles I to II of Chapter XXIX [, Section 416 (4) (c), as well as Titles I to II of Chapter XXIX, Section 570 (1) (a) Act XIX of 1998]."

[27] The decision of principle is binding not only on the panel of the Curia whose decision is contained in a decision of principle, but also on other panels. Pursuant to Section 32 (1) (b) of Act CLXI of 2011 on the Organisation and Judicial Administration of Courts (hereinafter referred to as the "Courts Organisation Act"), a panel may only deviate from the position set out in the decision of principle if the Curia conducts a legal uniformity procedure on the disputed question of law. Failing that, as in the present case, the panel must uphold the position set out in the decision of principle.

[28] In the contested order, the Curia followed the position adopted in the decision of principle No EBH2017.B.23., on the basis of which it held that the petitioner has the possibility of legal remedy, but that he may exercise it not by filing a request for review, but by initiating the special procedure.

[29] However, in his constitutional complaint, the petitioner not only complained that his request concerning confiscation of property was not considered on the merits during the review proceedings, but also doubted that he could directly initiate the review of the confiscation of property order in the special procedure for this purpose of his own volition, since according to the statutory provision such proceedings can only be initiated on the motion of the public prosecutor or *ex officio*. The petitioner submits that his legal remedy was restricted by the court's decision to refer the request to a special procedure, since he was not entitled to initiate such a procedure.

[30] The Constitutional Court has stated in previous decisions that the fundamental right to legal remedy is guaranteed if the law guarantees the person concerned that his or her case will be judged by a body other than the body acting in the main case {Decision 513/B/1994 AB, ABH 1994, 731, 734; reaffirmed by Decision 14/2015 (V. 13.) AB, Reasoning [30]}. The effectiveness of the legal protection afforded by the right to legal remedy requires that it be effective and capable of redressing the harm caused by the decision {Decision 22/2013 (VII. 19.) AB, Reasoning [26]}. The essential element of any remedy is the possibility of "redress", that is, the remedy conceptually and substantively includes the possibility of remedying the harm {Decision 23/1998 (VI. 9.) AB ABH 1998, 182, 186, reaffirmed by Decision 3064/2014 (III. 26.) AB, Reasoning [15] and Decision 14/2015 (V. 13.) AB, Reasoning [29]}.

[31] However, the effective and efficient exercise of the right to legal remedy is not only a requirement of the legislator (with regard to the content of legislation), but also an obligation of the courts (in the interpretation of legislation) under Article 28 of the Fundamental Law. Article 28 of the Fundamental Law states, in relation to the application of the law by the courts, that the text of the legislation must be interpreted in accordance with the Fundamental Law. According to Article 28, the interpretation of the law in accordance with the Fundamental Law is not only a right, but also an express obligation for the judge: If the judge is able to apply the text of the law in accordance with the Fundamental Law by means of the interpretation, he is obliged to act accordingly {Decision 3146/2018 (V. 7.) AB, Reasoning [25]; Decision 28/2013 (X. 9.) AB, Reasoning [29]}.

[32] The Curia construed the statutory provision set out in Section 570 (1) of the former Code of Criminal Procedure, as set out in its decision of principle EBH2017.B.23 as meaning that "[i]f the defendant or his defence counsel submits a motion challenging the unlawful provisions of confiscation of property, the public prosecutor or the court must consider the merits of the motion in the light of Section 6 (1) of the (former) Code of Criminal Procedure, and if the conditions for a special procedure are met, the public prosecutor is obliged to initiate such proceedings and the court is obliged to conduct the proceedings of its own motion, that is, even in the absence of a motion by the public prosecutor. In addition, subject to Section 570 (1) and Section 569 (3), which is referred to therein, although no appeal shall lie from the court's decision, the public prosecutor and the person against whom the decision is made may request

a hearing within eight days of service of the order. The hearing shall be governed by the provisions of Chapter XXVII of the (old) Code of Criminal Procedure, *mutatis mutandis*, pursuant to Section 570 (2). It follows that the special procedure under Section 570 of the (former) Code of Criminal Procedure is suitable for remedying any breach of the law and that there is no room for review on this ground" (Reasoning [13] to [15]).

[33] In the order under consideration, the Curia also pointed out - in addition to the reasons set out in the cited EBH (decision of principle) - that Section 43 (2) (d) of the former Act provides for the fundamental right of the defendant to submit motions and observations at any stage of the proceedings. If the defendant or his or her defence counsel submits a motion challenging the unlawful provisions of the confiscation of property order, this creates an obligation to initiate the redress proceedings in view of Section 6 (1) of the former Code of Criminal Procedure (order under review, page 11, paragraphs 2-5).

[34] Thus, in accordance with the interpretation of the Curia, in the present case the review of the confiscation of property order should have been initiated under the special procedure provided for in Section 570 (1) of the former Code of Criminal Procedure, the initiation of which is mandatory even if it is initiated by the defendant or his defence counsel.

[35] The Constitutional Court notes that, as a result of the entry into force of Act XC of 2017 on Criminal Procedure (hereinafter referred to as the current "Code of Criminal Procedure") on 1 July 2018, the adjudication of this issue no longer belongs to a special procedure under Section 570 (1) of the former Code of Criminal Procedure, but to the simplified review proceedings provided for in Chapter XCIV of the current Code of Criminal Procedure.

[36] On the basis of the above, the Constitutional Court held that the Curia, in interpreting the statutory provision, had identified the legal context in which the petitioner could have recourse to the appropriate legal remedial forum. The decision of the Curia is thus in accordance with the principles of the right to legal remedy enshrined in Article XXVIII (7) of the Fundamental Law, as it informed the petitioner of the appropriate and effective legal remedy, which was suitable for the review of the unlawful confiscation of property order under the former Code of Criminal Procedure in force at the time of the notification of the Curia's decision, and which the defendant and the defence counsel could directly use of their own free will. In the Constitutional Court's view, for all these reasons, the contested decision of the Curia did not unconstitutionally restrict the petitioner's right to legal remedy as to be in violation of the Fundamental Law.

[37] 2. The Constitutional Court further considered whether the contested order of the Curia was in accordance with the right to a fair trial enshrined in Article XXVIII (1) of the Fundamental Law.

[38] According to the petitioner, his right to a fair trial under Article XXVIII (1) of the Fundamental Law was violated by the fact that the criminal proceedings against him were supervised by a public prosecutor who could be considered biased because of his relationship with the victim, and by a public prosecutor who was a relative of the victim's senior officer. The petitioner raised the disqualification objection in the course of the review because he claimed that he had only become aware of it after the decision at second instance had become final.



The petitioner also complained that when he disclosed the specific name and his claim of being a relative in the record of the public sitting held during the review, "no clarification was provided by either the public prosecutor or the court."

[39] 2.1 The Constitutional Court first of all reviewed the principles established in its previous decisions on the constitutional assessment of prosecutorial bias. Article XXVIII (1) of the Fundamental Law formulates impartiality as a requirement not for the public prosecutor but for the court acting in the case. In the Constitutional Court's view, the purpose of impartiality is to ensure that the judge sitting in the case judges the case and reaches his decision without bias or prejudice against the parties to the case. In the specific case, the judge is not only required to judge objectively, but also to preserve the appearance of impartiality {Decision 25/2013 (X. 4.) AB, Reasoning [26], hereinafter referred to as the "2013 Court Decision"}.

[40] Public prosecutors are also subject to high legal and ethical standards, which are also set out in international documents. In its Opinion No 9 of 17 December 2014, the Consultative Council of European Prosecutors of the Council of Ministers of the Council of Europe (hereinafter referred to as the "CCPE") set out a set of principles known as the "Rome Charter". In accordance with the Charter, public prosecutors should adhere to the highest ethical and professional standards, always behaving impartially and with objectivity. They should thus strive to be, and be seen as, independent and impartial, should abstain from political activities incompatible with the principle of impartiality, and should not act in cases where their personal interests or their relations with the persons interested in the case could hamper their full impartiality [CCPE Opinion No. 9 (2014) on "European norms and principles concerning prosecutors", point VI.]. The organisation of most prosecution services is based on a hierarchical structure. Relationships between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations. The assignment and the re-assignment of cases should meet requirements of impartiality [CCPE Opinion No. 9 (2014) point XIV].

[41] All these principles are also present in the practice of the Constitutional Court and are also applied in the rules of criminal procedure. The Constitution does not explicitly and textually provide for impartiality with regard to the public prosecutor, and Article 29 only establishes independence and the monopoly of the exercise of public prosecution with regard to the Prosecutor General and the prosecution service as a whole. The independence and impartiality of the public prosecutor can be understood in the light of the role of the public prosecutor in the administration of justice. The public prosecutor, in accordance with the principle of the separation of functions, does not pronounce the final decision, but is responsible for ensuring and disposing of the legality of the charge, that is, for exercising the monopoly of the prosecution. He must perform this function in accordance with constitutional requirements. In representing the public interest, the public prosecutor must act in accordance with the rules of professional responsibility. {More recently, e.g. Decision 3090/2016 (V. 12.), Reasoning [35]; Decision 42/2005 (XI. 14.), ABH 2005, 504, 519, etc.} The rules of the public prosecutor's professional responsibility include the mandatory objectivity, which is manifested, for example, in the obligation to take into account the circumstances mitigating the criminal responsibility and exculpating the defendant [Section 28 (1) of the former Code of Criminal Procedure], may,

in his or her pleading, make a motion for the acquittal of the accused [Section 315 (3) of the former Code of Criminal Procedure], and has a right of appeal in favour of the accused [Section 324 (1) (b) and (2) of the former Code of Criminal Procedure] {Decision 15/2016 (IX. 21.) AB, Reasoning [60]}.

[42] The former (and the current) Code of Criminal Procedure also lays down disqualification rules for the public prosecutor. Accordingly, a person who has acted as a judge in the case or another person involved in the proceedings, or their representative or relative, as well as a person who has acted as a witness, expert or consultant in the case, and a person from whom an impartial assessment of the case cannot be expected for other reasons [Section 31 (1) of the former Code of Criminal Procedure] {Decision 3072/2015 (IV. 23.) AB, Reasoning [53] to [55]}.

[43] On the basis of the above, it is clear that prosecutorial bias can affect the fairness of criminal proceedings. Therefore, the Constitutional Court went on to consider whether the public prosecutorial bias alleged by the petitioner in the present case violated the constitutional requirements of a fair trial.

[44] 2.2 Rules of criminal procedure aimed at eliminating prosecutorial bias facilitate the objective conduct of proceedings and the objective decision of the judiciary. However, from a constitutional point of view, fair trial is a complex requirement, the implementation of which is considered by the Constitutional Court not only from the point of view of the violation of a single provision, but also from the point of view of the procedure as a whole, that is, from several perspectives.

[45] In line with the consistent practice of the Constitutional Court, a fair trial is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, despite the absence of some details, as well as the observance of all the rules of detail, a procedure may be "inequitable", "unjust" or "unfair". [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 266, originally Decision 6/1998 (III. 11.) AB, ABH 1998, 91]. Any error of fact or law by a judge does not automatically render the whole procedure unfair, as such errors can never be completely eliminated {Order 3352/2012 (XI. 12.) AB, Reasoning [14] and [15]}. It is not the task of the Constitutional Court to consider the legality of the proceedings, such as the legality of the public prosecutor's supervision of the investigation or the existence of the conditions for the legality of the charge, because this is a matter for the courts acting in the case. In assessing the details of the criminal proceedings, the Constitutional Court considers only whether any breach of the law has caused a level of harm to the fundamental rights which are the subject of the criminal proceedings. In order to assess this, however, a substantive assessment is required in each case, in the course of which the Constitutional Court analyses the legislative context and the judicial decision leading to the alleged violation of a fundamental right, the purpose of the legislation and the facts of the specific case, and then - as a result of the assessment - draws conclusions from all of these with regard to the violation of fundamental rights considered in the specific case {Decision 20/2017 (VII. 18.) AB, Reasoning [17], Decision 3102/2017 (V. 8.) AB, Reasoning [18]}. The Constitutional Court followed the same practice in the present case and therefore requested the court of first instance to provide the full investigative and judicial file of the criminal case. On the basis of these documents, the

Constitutional Court considered whether the proceedings in the petitioner's case complied with the constitutional requirement centred on the right to a fair trial.

[46] The Constitutional Court found that no objection of bias against the prosecution had been recorded in the documents (record) during the first and second instance court proceedings. The objection of bias against the public prosecutor who supervised the investigation and filed the indictment was first raised on page 8 of the request for review of the case filed by the petitioner's counsel before the Curia on 20 June 2017 (second indent of point V/b of the request). In the record of the public sitting of the Curia held on 28 November 2017, the defendant's counsel for the first defendant stated, naming the public prosecutor supervising the investigation, that her husband was the chief executive officer of the victim company (page 4, paragraph 3 of the record).

[47] In the grounds of its contested order, the Curia stated that the petitioner had not submitted an application for disqualification during the criminal proceedings, on the grounds of bias of the person supervising the investigation and the county public prosecutor, and that on the basis of the available documents, no objective or subjective grounds for exclusion could be established. No concrete information was provided in the case concerning the relationship with the victim and the participation in a sporting event organised by the victim did not in itself constitute grounds for a finding of bias. The Curia is therefore of the opinion that no procedural violation justifying the setting aside of the judgement and the ordering of a new trial can be established (order under consideration, p. 6, paragraphs 7 to 8, p. 5).

[48] In line with the interpretation of the Constitutional Court, the petitioner, by alleging the bias of the public prosecutor who supervised the investigation and filed the indictment, sought to prove that the courts in charge of the case could not make a proper decision on the merits, because the prosecution unilaterally influenced the evidence and the fairness of the proceedings, thus finding him guilty of an act he did not commit or suffered a disadvantage in the imposition of the sentence.

[49] From this point of view, the Constitutional Court considered the whole of the criminal proceedings on which the constitutional complaint was based.

[50] It can be established from the documents that the prosecution's position regarding the petitioner's guilt, as developed during the investigation and represented in the indictment, was that the defendant had not only committed the misdemeanour of unlawful appropriation, but also a much more serious crime, the crime of money laundering. However, this prosecution position was not upheld in the first instance proceedings and the first instance conviction was based solely on the misdemeanour of unlawful appropriation.

[51] With regard to the sentence imposed, it can be stated that in the indictment the prosecution proposed the imposition of a custodial sentence to be served, but the court of first instance applied a measure with significantly less severe legal consequences, probation. The court of second instance increased the petitioner's sentence and imposed a custodial sentence, but execution of the term of imprisonment was suspended conditionally (on probation).

[52] The court of first instance also did not consider the imposition of the fine proposed by the prosecution in the indictment justified, either. The court of second instance ordered the confiscation of property, which, in view of the amount of the confiscated property, is a measure of considerable gravity in the present case, not on the basis of a motion by the prosecution, but on the basis of a mandatory provision of law, as it stated in the grounds of its judgement (judgement under consideration, p. 13, paragraph 3).

[53] The Constitutional Court also considered the constitutionality of the procedure concerning the objection of bias recorded in the record of the public sitting held during the review. The petitioner claimed that his right to a fair trial was violated by the fact that no further questions were posed after the objection had been raised, neither by the court nor by the public prosecutor.

[54] In the statement of reasons of its contested decision, the Curia stated that the announcement for the disqualification of both the judge and the public prosecutor must be supported by a well-founded and specific reason (page 7, paragraph 1 of the contested order). The Curia also referred to the decision of the Constitutional Court of Decision 25/2013 (X. 4.) AB, under which the procedural law allows the enforceability of the relative ground for disqualification against the judge, that is, the ground for disqualification based on bias, within further strict limits. According to these limits, a relative ground for disqualification may be asserted after the commencement of the hearing only if the petitioner proves that he became aware of the ground for disqualification after the commencement of the hearing and that there was no delay in asserting it, that is, he immediately disclosed the ground of bias of which he became aware [Section 23 (3) of the former Code of Criminal Procedure]. The decision of the Constitutional Court makes the assessment of judicial bias at a later stage of the proceedings dependent not on a mere announcement, but on proof of knowledge.

[55] In the Constitutional Court's view, due to the high standards of judicial impartiality and prosecutorial impartiality (detachment) and objectivity, the petitioner must also clearly prove that he became aware of the grounds for disqualification only at a later stage of the proceedings. In view of the fact that the petitioner failed to do so, the Constitutional Court is of the view that, having considered all the circumstances of the case and having regard to the reasoning in the contested order of the Curia, no infringement of the right to a fair hearing under Article XXVIII (1) of the Fundamental Law can be established.

[56] 3. In summary, the Constitutional Court held that the grounds put forward by the petitioner - neither with regard to the violation of the right to a fair trial under Article XXVIII (1) of the Fundamental Law, nor with regard to the restriction of the right to remedy under Article XXVIII (7) - do not support an infringement of the Fundamental Law affecting the merits of the underlying criminal case, and therefore dismissed the constitutional complaint.

Budapest, 12 March 2019

Dr. Tamás Sulyok, sgd.,  
Chief Justice of the Constitutional Court

Dr. István Balsai, sgd.,  
Justice of the Constitutional Court

Dr. Ágnes Czine, sgd.,  
Justice of the Constitutional Court, Justice  
-Rapporteur

Dr. Egon Dienes-Oehm, sgd.,  
Justice of the Constitutional Court

Dr. Attila Horváth, sgd.,  
Justice of the Constitutional Court

Dr. Ildikó Hörcher-Marosi, sgd.,  
Justice of the Constitutional Court

Dr. Imre Juhász, sgd.,  
Justice of the Constitutional Court

Dr. Béla Pokol, sgd.,  
Justice of the Constitutional Court

Dr. Balázs Schanda, sgd.,  
Justice of the Constitutional Court

Dr. István Stumpf, sgd.,  
Justice of the Constitutional Court

Dr. Marcel Szabó, sgd.,  
Justice of the Constitutional Court

Dr. Tamás Sulyok, sgd.,  
Chief Justice of the Constitutional Court,  
on behalf of Dr. Péter Szalay, sgd.,  
Justice of the Constitutional Court  
prevented from signing

Dr. Mária Szívós, sgd.,  
Justice of the Constitutional Court

Dr. András Varga Zs., sgd.,  
Justice of the Constitutional Court

Dissenting opinion of *Dr. István Balsai*, Justice of the Constitutional Court

[57] I agree with the statements made in the reasoning of the majority decision in relation to Article XXVIII (7) of the Fundamental Law (IV.1, Reasoning [22] to [36]), but due to my concerns about the part of the decision relating to Article XXVIII (1) (IV.2, Reasoning [37] to [55]), I cannot support the operative part of the decision either.

[58] I share the majority decision's finding that it is clear that prosecutorial bias may affect the fairness of the criminal proceedings.

[59] The 2013 Court Decision, which was also referred to by the order under consideration - and thus also considered relevant by the Curia in the question of prosecutorial impartiality - stated with regard to motions of bias that "[t]he need to enforce impartiality is more acute in criminal cases, since a final conviction means the rebuttal of the presumption of innocence, and the retributive sanction system of criminal law severely restricts the fundamental rights of the convicted person. The Constitutional Court, precisely because of the interest in concealing the reason for the bias, does not consider it unrealistic that such a reason should only come to the attention of the defendant after the final conviction. It is therefore incompatible with the right to an impartial judicial procedure deriving from Article XXVIII (1) of the Fundamental Law if the practice of the Curia excludes from the possibility of asserting certain grounds of impartiality in the review the plea of bias raised for a well-founded reason and in due time, that is to say, refuses to consider the merits of a review application based on such a ground" (Reasoning [48]).

[60] Although a plea of bias may lead to a result by stating a specific and well-founded reason, in my view, the interpretation of those conditions cannot be narrowed in the application of the law by the courts to the point of depriving the guarantee of impartiality of the proceedings.

[61] On the basis of the documents available in the specific case, I am concerned that the Curia did not even attempt to clarify the objection raised by the petitioner at the hearing, even though the petitioner had provided information on the alleged grounds for disqualification, in line with the position of the defendant.

[62] In his motion for review, the defendant, although not naming the public prosecutor who supervised the investigation and who presented the indictment, clearly identified him as biased and referred to the reasons for his alleged bias in relation to the victim company. This was clarified by the petitioner's counsel at the public hearing held by the Curia, according to the record of the hearing.

[63] Taking also into account that the parties concerned have an interest in the secrecy of the circumstances giving rise to the bias (see 2013 Court Decision, Reasoning [38]) and that the defendant can hardly provide clear evidence of the subsequent knowledge of the reason for the bias, in my view, this circumstance alone cannot be an obstacle to the merits of the objection.

[64] In the present case, the objecting petitioner could not have been in a position to disclose in full the facts which might have been the basis for the bias of specific persons (family relationships of senior prosecutors, employment relationships with the plaintiff's business company), since these data are, of course, in the possession of the persons concerned.

[65] In my view, having considered the circumstances of the case, the Curia would have fulfilled its obligation under Article XXVIII (1) of the Fundamental Law if it had subjected the motion on the bias of the public prosecutors to a substantive assessment, otherwise the possibility of submitting a motion on bias would have become formal.

Budapest, 12 March 2019

Dr. István Balsai, sgd.,  
Justice of the Constitutional Court