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THE IMPLEMENTATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE SLOVENIAN CONSTITUTIONAL CASE -LAW

by
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Abstract:

In addition to that an interference with human rights can only be based on a legitimate, sound and reasonable, aim, according to the established Slovenian constitutional case-law, it is always necessary to evaluate whether such is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with the one of these principles which prohibits excessive state interferences also when a legitimate aim is pursued (the general principle of proportionality). The Slovenian Constitutional Court introduced the evaluation whether there was a too excessive interference on the basis of the so-called strict test of proportionality. This test includes the review of three aspects of the interference:
(1) Whether the interference was necessary (needed) for reaching the aim pursued;
(2) Whether the evaluated interference was appropriate to reach the aim pursued, in the sense that the aim is possible to be achieved by the interference;
(3) Whether the weight of consequences of the evaluated interference with an affected human right is proportional to the value of the aim pursued, or to the benefits that will occur due to the interference (the principle of proportionality in the narrower meaning). Only if the interference stands all three aspects of the test, it is constitutionally admissible.

The constitutional authority vested in the legislature to limit constitutional rights also does not entail that the legislature can determine limitations or interferences at its free will. The general constitutional principle of proportionality must be considered in every limitation of human rights and fundamental freedoms, irrespective of the basis of the legitimacy of interference.

I HISTORY

Elements of the principle of proportionality were not unknown in the Slovenian legal theory and not unknown in several specific legal provisions in force as well[2]. Furthermore, this principle is indirectly based on the Slovenian 1991 Constitution in force, because the unwritten general constitutional principles as a basis for the constitutional review may be indirectly derived from the Constitution's spirit conveyed from its contents as well as from its structural elements. Among such unwritten general constitutional principles - derived from several even more general legal principles, determined by the Constitution and/or derived from generally accepted principles of constitutionally protecting free democratic order - the principle of proportionality may be considered as well.

Dealing with virtual authority's measures, the Slovenian legal theory even in the sixties of the past century stated that such measures may be only admissible when they should be necessarily taken in favor of such general social benefits which are more important in comparison with interferences of social and individual importance which must be accepted by the affected individual or legal entity[3].

When dealing with the adjudication on the basis of free discretion in the forties of the past century, the Slovenian legal theory discussed the limitations of authority's interferences by rights of citizens. Accordingly, the administrative authority may be authorized to take such measures only due to "public reasons". Taking the respective measures, the authority shall weigh whether by implementation of the respective measures particular individual interests can be affected, furthermore, whether the public interest (which was a reason for measures taken by the public authority) anyway exceeds (personal) interests of one or of other party or of the

[2] Šturm, p. 2.
[3] Šturm, p. 3.

participating individual.

The principle of implementation of the most lenient legal remedy was already introduced into the Slovenian legislation by the General Administrative Procedure Act of the Kingdom of Yugoslavia (Official Gazette, No. 271/1930, Act No. 571). By the later General Administrative Procedure Act of the Republic of Yugoslavia (Official Gazette SFRY, No. 47/86) the mentioned principle was adopted as well and further amended too. Additionally, by changes and amendments of the former Slovenian Internal Affairs Act (Official Gazette SRS, No. 28/80 with amendments) several elements of the principle of proportionality were gradually introduced.

From old, the principle of proportionality was implemented in the Slovenian penal law, for example as concern the review of justification of self-defence as well as in case of determination of penalty. Furthermore, the elements of the principle of proportionality were directly incorporated into the later Penal Procedure Act (Official Gazette RS, No. 63/94 with amendments), in particular by a general provision (which was obligatory implemented in all procedural stages): more rigorous measures shall not be taken if the same goal can be reached by less rigorous measures.

The Slovenian constitutional case-law in abstract review domain gradually introduced the principle of proportionality at the beginning of 90th of the past century (in particular by Decision No.U-I-135/92)[4]. Such practice followed by the explicitly short formulation in Decision No.U-I-47/94[5]. **Furthermore, the (first) systematic formulation of the principle of proportionality was given by the reasoning of Decision No.U-I-77/93**[6].

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[4] *Decision No. U-I-135/92 of 30 June 1994, Official Gazette RS, No. 44/94*
The fact that the Deputies Act grants to deputies of the National Assembly more favourable possibilities for acquiring and asserting the rights arising from old-age insurance is not unconstitutional in itself.
For such benefits not to be contrary to the constitutional provision concerning Slovenia as a state governed by the rule of law and a social state, they should be based not only on the fact of deputy mandate, but primarily on specificities and duration of such mandate; they should be proportionate to these factors and may depart from the rules of general insurance system only to the degree mentioned, also taking into consideration general social circumstances.

[5] *Decision No. U-I-47/94 of 19 January 1995, Official Gazette RS, No. 13/95*
In Article 90.5 of the Constitution, that referendums shall be arranged by law, the Constitution does not give authority for restricting the constitutional right to demand the holding of a referendum, such that this right would be removed in relation to specific types of law, because the Constitution itself determines in Article 90.1 the extent of this right with the provision that referendums may be held on (all) matters regulated by law.
The restriction of the right under Article 90 of the Constitution indirectly also limits the constitutional right under Article 44 of the Constitution (the right to participate in the administration of public affairs directly or indirectly, thus also by referendum decision). The provision of Article 44 of the Constitution, that this right shall be exercised "in accordance with the law", also does not give the legislature the authority to restrict it (according to the second paragraph of Article 15 of the Constitution), but only the authority to regulate the way of its implementation (by the third paragraph of the same article). The law, in accordance with the provisions of Article 15.3 of the Constitution, may only restrict a constitutional right when this is crucial to the protection of the rights of others (in accordance with the principle of proportionality), or in cases in which the Constitution determines - with a so-called legislative proviso (with the formulations "under conditions defined by law", "in cases which are defined by law", "within the boundaries of the law", "restricted by law" etc). When the content and extent of a right is already determined in the Constitution, the constitutional formulation that this right shall be exercised "in accordance with the law" or that it "shall be regulated by law" means only the authority of the legislature that (in accordance with Article 15.2 of the Constitution) he prescribe the way of exercising this right, and not the authority to restrict it.

[6] *Decision No. U-I-77/93 of 6 July 1995, Official Gazette RS, No. 43/95*
The provision of Article 5.1 of the Ownership Transformation (privatisation) of Companies Act, according to which the agricultural lands of companies which have been privatised under the cited law become the property of the state or municipalities, means an encroachment on the specifically constitutionally protected position of those companies which used such agricultural lands as assets in social ownership. However, such an encroachment is in accordance with the principle of proportionality, appropriate and necessary to achieve the legitimate aims of the legislature and for the protection of the public interest and is thus in accordance with the Constitution.

On the other hand, the principle of proportionality was implemented by the Slovenian Constitutional Court as a criterion in concrete review domain (review of individual acts - the Up-cases in the field of the protection of human rights and fundamental freedoms), for the first time in the reasoning of Case No.Up-74/95[7]. A similar primary definition was given by Case No.Up-

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If in the judgment of the Constitutional Court there was an encroachment on the constitutionally protected rights of subjects, the further question is raised as to whether the encroachment was constitutionally permissible or not. It is thus necessary to respect constitutionally envisaged legitimate restrictions on relevant constitutional rights, first the general limitation by the rights of others, the legality of prescribed ways of exercising these rights and, especially, with the limitation of concrete rights and corresponding entitlements of subjects because of the social or public good permitted by the Constitution.
On this point the constitutional judgment begins the test of proportionality or the ban on excessive encroachments and suitable weighing of whether the measures determined in the law are in accordance with its intention. A measure must be based on the aim that it infringes as little as possible on the rights and interests of affected subjects.
Measures must be suitable for achieving the legislature's aims, necessary for their implementation in relation to the objective interests of citizens and may not be out with any understandable proportion to the social or political values of these aims.
That is to say, the legislature may also encroach on the constitutionally protected position of proponents and initiators if it thus realises some other constitutionally permissible aim. In this, it may encroach on this position only insofar as this is unavoidable for implementing the legislative aims. In regulating the relation between constitutionally protected benefits which are mutually incompatible, the legislature must respect the principle that the means chosen to achieve legitimate ends must be both legally permissible and suitable for achieving these ends. Further, the chosen means for achieving the aim must be necessary, that is that the aim cannot be achieved in a manner that would encroach less into constitutionally protected positions, and finally, that the encroachment, that is the extent of the effect on protected benefits must be in (political values) proportion to the value of the established legislative aim.
The aims of the legislature must be defined, understandable and constitutionally legitimate.

[7] *Decision No. Up-74/95 of 7 July 1995, OdlUS (Official Digest of the Constitutional Court) IV, 131*

The perpetration of the criminal offence of unlawful manufacture and trade of narcotic drugs (Article 196 of the Criminal Code of the Republic of Slovenia may represent the danger for public safety, health and even lives of the people.
Yet, this does not necessarily mean that the circumstances of the case allow the conclusion that the imposition (or extension) of detention was indispensable to ensure public safety. In deciding on the detention because of the danger of iteration, the Court should have considered the principle of proportionality and established whether in the present case the threatening of public safety, which might have resulted from the defendant's release from detention, did constitute an encroachment upon the constitutional right of the public to safety of such extent or significance, that it compensated for the encroachment upon the defendant's right to personal liberty, also considering the facts that the defendant had not yet been found guilty of having committed the indicted criminal offence, and that the defendant's reiteration of such criminal offences at large could not have been 'predicted' with certainty. The application of the principle of proportionality involves the consideration of three issues prior to the ordering of any measure encroaching upon a constitutional right : firstly, whether the measure in question is an adequate one to achieve the selected, constitutionally permissible objective (in the judicial ordering of detention, this standard initial step in the consideration of the permissibility of measures can be omitted, since it has already been carried out by the legislature); secondly, whether the measure is urgent ('indispensable') such that the selected objective cannot be achieved in any other manner, i.e. by a more lenient means (of all preventive measures referring to the danger of iteration that are prescribed in Article 192 of the Criminal Procedure Act, the release on bail - although intended 'to ensure the defendant's presence and the successful conduct of proceedings' - is the only one that could be applied as a more lenient measure, at least in some types of criminal offences); and, thirdly, whether the selected measure is in a reasonable proportion with the objective, i.e. with that which is to be protected by the application of the measure, and with the reasonably expected effect of such protection (i.e. proportionality *stricto sensu*).
With respect to the above considerations, the Constitutional Court found that the courts of original jurisdiction did not decide in compliance with the conditions defined by Article 20 of the Constitution and Article 201.2.3 of the Criminal Procedure Act, or that, at least, this is not apparent from the challenged decrees. Thereby, the courts violated the constitutional right of the complainant from Article 25 of the Constitution which, according to the established constitutional case-law, should be construed to mean a right to effective legal remedy (which is violated if a particular decision does not contain a definite explanation of reasons forming the basis of that decision). The issue of whether the potentially unjustified extension of the detention also infringed the complainant's right to personal freedom is capable of resolution when, in further consideration of the case and observations of the reasons of the present decree, the courts have decided upon the extension of the detention or the release of the defendant.

164/95[8].

Afterwards, similar issues were discussed in Cases No.U-I-201/93 [9]and No.U-I-4/99[10];

The question whether or not the complainant's right to personal liberty was violated during the judicial consideration of the case, as conducted so far, has been decided in the light of the facts that the deficient legislative regulation so far has failed to provide the courts with sufficiently clear criteria according to which they are to consider the justification of detention, and that such criteria were not established until the present judgement. However, this decision is without prejudice to any later conduct of the Constitutional Court in the area of constitutional complaints concerning cases of detention.

[8] *Decision No. Up-164/95 of 7 December 1995, OdlUS (Official Digest of the Constitutional Court) IV, 138*
According to the provisions of Article 19.2 of the Constitution, the liberty of no-one may be taken away except in cases and according to the procedure determined by law. According to the provisions of Article 20.1 of the Constitution, a person of whom there exists the well-founded suspicion that he has committed a criminal offence, may only be detained on the basis of court decision, when this is unavoidably required for the course of the criminal proceedings or for the safety of people. The Criminal procedure Act determines in Article 201.2.3 that detention may be ordered if particular circumstances justify the fear that the person will repeat the criminal offence, finish an attempted criminal offence or commit a criminal offence which he has threatened.
In constitutional complaints to date on detention because of so-called danger of repetition, above all in decisions no. Up-57/95, Up-74/95 and Up 75/95, all of 7/7-1995, the Constitutional Court reasoned the courts should use the cited constitutional and legally determined conditions in such a way that there are sufficient constitutionally defined exceptions for encroachment on the personal liberty of an individual. The court must judge these conditions both on the ordering of detention as well as on each occasion of the extending of detention. According to the provisions of Article 200.2of the Criminal Procedure Act, detention must last for the shortest possible time necessary, and according to the provisions of Article 207.2 of the Criminal Procedure Act, a senate must, on the lodging of an appeal, after two months from the last resolution on detention, examine whether reasons for detention are still given.
A senate ex-hearing of the court of first instance, as is clear from the reasoning of the impugned decision, established that the criminal proceedings against the appellant had not yet been concluded, so it had to examine whether reasons for detention existed. From the reasoning of the decision it is evident that the court justified why it considered that the well-founded suspicion of the committal of a criminal offence was given, and it considered the appellant's aggressive behaviour and threats as such circumstances as presented a real danger that the appellant would repeat or complete the criminal offence. **Since it is only the existence of the danger, and not a certainty in the behaviour, in compliance with the third paragraph of article 15 of the Constitution, and by the use of the principle of proportionality, the court had to weigh even more carefully between two constitutionally protected entitlements, that is the liberty of the appellant and the life and health of the injured party. From the reasoning of the decision it is evident that the court weighed this and judged why it considered that detention of the appellant was unavoidably required. The court of appeal, as is evident from the reasoning, in relation to the reasons for the appeal, examined whether the court of first instance had properly established the existence of all constitutionally and legally determined conditions and in the reasoning of their decision, had answered both to the appellant's statements in relation to the grounds for the suspicion, and in relation to the question of why detention of the appellant was unavoidably required. Both courts provided grounds for their judgment, so no violation of the right to judicial review under Article 25 of the Constitution is shown.**

The courts judged everything which is important for deciding on the constitutionally permissible encroachment on the appellant's right to personal liberty, including the circumstance that the appellant had been on hunger strike for an extended period, because of which his life and health was threatened. The court judged whether the hunger strike provided circumstances which could effect the decision on proportionality between the encroachment on the appellant's constitutional rights and the existence of a danger of encroachment on the human rights and fundamental freedoms of the injured party. Also in the opinion of the Constitutional Court, a hunger strike is not a legally founded reason whereby in a state committed to the rule of law it should be possible to achieve a change of decision by an organ of authority adopted in a legal manner. A violation of the appellant's right to personal liberty is thus also not given.

[9] *Decision No. U-I-201/93 of 7 March 1996, Official Gazette RS, No. 24/96*

The provision of the Act on the Bar which prescribes restrictions concerning the selection of the place of lawyer's office as a measure which should ensure unprejudiced decisions on the part of judges and state prosecutors is not in accordance with the Constitution because this is not an appropriate measure for reaching the said objective.

The freedom of work as defined in Article 49 of the Constitution is, in accordance with Article 15 of the Constitution, exercised directly on the basis of the Constitution. The manner of exercising the said right can be prescribed by the statute when this is authorized by the Constitution, or whenever such regulation is necessary by reason of the particular nature of the right (Paragraph 2 of the Constitution). It may only be limited in such cases as are (expressly) determined by the Constitution, and by the rights of others (Article 15.3 of the Constitution). As in reference with the freedom of work Article 49 does not

however, Case No. U-I-18/93 concerns the Penal Procedure Act[11].

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prescribe "statutory reservations" (that is, express a constitutional possibility of restricting by the statute), the only restrictions that are constitutionally admissible are such as are necessary because of protection of the rights of others. The Constitutional Court has already pointed out on several occasions that such restricting is only admissible on the basis of the principle of proportionality. According to this principle, for such interference to be constitutionally admissible, it must: (a) be appropriate for reaching a constitutionally admissible legislative aim, b) indispensable (the aim cannot be reached by means of a milder measure), and c) proportionate with the "weight" of one and the other constitutional right (proportionality in the narrower sense).

Authorization, that the bar, which is autonomous and independent activity within the administration of justice, may be regulated by the statute, is granted in Article 137 of the Constitution. In restricting the right to practice at the bar by the disputed provision, the legislature has taken as the basis the right of others, which is granted under Article 23 of the Constitution and which, inter alia, provides that each person shall be entitled to have his rights and obligations, and any criminal charges laid against him decided by an impartial court. The purpose of the restrictive provisions is not evident from the statutory text, it is true, but it follows from the materials and discussions that accompanied the procedure of adoption of the statute. Thus, we are dealing with a conflict of two rights, which are both included in Part II of the Constitution on human rights and fundamental freedoms.

As in the case under consideration impartial judicial decisions and protection of them are supposedly jeopardized, the first question that arises within the framework of evaluation of proportionality is, whether the measure taken in this case in accordance with Article 28 of the Act on the Bar is at all suitable (appropriate) for reaching the designed aim. There is no doubt that such a supposed threat to the impartiality of courts of the first instance would be eliminated if none of the judges and state prosecutors became either practising lawyers nor candidates for practising lawyers. In such a case, the situation, when a lawyer can represent a party before the court where he had formerly held the office of a judge or prosecutor could not even arise. It turns out to be essential for the protection of the above mentioned interest that a person has the possibility of representing a party before a particular court, while it is less important whether he will do this as a practising lawyer (with his own office in this or that place), or as a candidate for practising lawyer. As the possession of own lawyer's office is necessary only in the case of a practising lawyer, it is, having regard to the realization that for reaching the designed aim the possibility of representation as such is more important, it is quite irrelevant where the office of the person who represents a party is located. From the viewpoint of reaching the designed aim, this measure is then quite unsuitable (inappropriate). One should also take into consideration the relatively short distances between towns in Slovenia, which allows that many people daily commute to their work from various places and that the mandatory requirement, that the office should be located in some other place, in itself, regardless of its asserted uneconomic nature, objectively cannot hinder the lawyers from representing the parties also before the court where they held the office of a judge or prosecutor. The disputed provision of Article 28, which the legislature has prescribed as a means for reaching his designed aim, is not in a logical relation with the said aim, because by such means the said aim cannot be reached. This feature of the disputed measure is sufficient reason for adjudicating that Article 28 of the said statute is not in agreement with Article 49 of the Constitution. Further examination of such inappropriate measure from the viewpoint of constitutional jurisprudence, taking into consideration the criteria of a need for it or its necessity, and of balance between the set aim and the weight of the measure, is thus not necessary. For the same reason, the Constitutional Court also did not decide to take a position on the asserted disagreement of the said provision with the Constitution from the viewpoint of the applicability of the same solely to judges and state prosecutors who have held their office in courts of first instance.

[10] *Decision No. U-I-4/99 of 10 June 1999, Official Gazette RS, Nos. 12/99 and 59/99*
The challenged regulation interferes with the rights of individual municipalities to which they have been entitled since their foundation, or deprives them of the right to participation in management and the exercise of the rights to foundation in the final phase of agreement-making. The matter thus concerns the violation of the principles of a State governed by the rule of law, in particular the principle of trust in the law. The principles of a State governed by the rule of law do not allow the legislature to change the legal positions of subjects during agreement-making procedures, which are in the case of a majority of municipalities in their final phase, or, in this respect, the agreements concerning a certain part of property were already reached, without having justified reasons for such interferences.
The Constitutional Court has already pointed out on several occasions that such restricting is only admissible on the basis of the principle of proportionality. According to this principle, for such interference to be constitutionally admissible, it must: (a) be appropriate for reaching a constitutionally admissible legislative aim, b) indispensable (the aim cannot be reached by means of a milder measure), and c) proportionate with the "weight" of one and the other constitutional right (proportionality in the narrower sense – See, *Decision No. U-I-201/93 of 7 March 1996, Official Gazette RS, No. 24/96*).

[11] *Decision No. U-I-18/93 of 11 April 1996, Official Gazette RS, No. 25/96*

The Constitution stipulates an additional restriction: detention must be absolutely unavoidable for the protection of

In the reasoning of Decision No.U-I-107/96 the Constitutional Court carried out the strictest constitutional review when it had implemented the principle of proportionality: The Denationalisation Act as a law of transitional character is - considering its aim - a systemic act which clearly determined all basic principles of the denationalization process; in accordance with the Rule of Law the mentioned basic principles could be changed only under conditions and in circumstances which are consistent with the criteria of the strictest constitutional review[12].

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society. **Article 20 introduces the principle of proportionality into the Constitution, which is otherwise recognized as a general constitutional principle derived form the principle of a state governed by the rule of law. This demands that when setting out the conditions for the ordering of detention, the legislature enables the courts on the one hand to assess whether intervention is necessary because there is no milder measure available to achieve the desired objective, and on the other hand, it imposes upon the legislature to restrict the possibility of ordering detention to cases where such intervention is reasonably proportionate to the objective, i.e. the goods that are to be protected by such intervention, and with the reasonably anticipated effect of this protection.**

At the declaratory level, the legislature embraced the principle that the competent body for deciding on which of the measures to apply in order to ensure the presence of the defendant and in order to successfully carry out the criminal proceedings must follow the principles determined for individual measures and make sure that a measure stricter than necessary is not used if the same purpose may be achieved by applying some milder measure (Article 192 of the Criminal Procedure Act).

The legislature did not follow this principle in the statutory determination of measures. In the chapter entitled "Measures Aimed at Ensuring the Presence of the Defendant for the Successful Implementation of Criminal Proceedings" it sets out several possible measures for the enactment of these procedural requirements, in order from the mildest (invitation) to the most severe (detention), and it explicitly provides that individual stricter measures, in addition to the general provision in Article 192, are to be used in a subsidiary manner insofar as the same objective could not be achieved with some milder measure.

The chapter referred to also regulates the issue of detention due to the hazard of reiteration. This reason for detention does not belong in the chapter on measures to ensure the presence of the defendant and to successfully carry out criminal proceedings. And while this erroneous classification of the contested provisions is not unconstitutional in itself, as far as its content is concerned it means that in regard to this measure the provision contained in Article 192 of the Criminal Procedure Act is not applicable, as neither this chapter nor any other provision of the Criminal Procedure Act provides the court with any milder measure for the same purpose, i.e. the removal or lessening of the hazard of reiteration.

The legislature therefore violated the principle of proportionality that requires that when pursuing a constitutionally-permitted objective (in this case the protection of society) he chooses such remedies that will intrude upon human rights following proportional criteria of absolute necessity. An assessment in accordance with the principle of absolute necessity demands that the legislature makes possible those alternative measures that are known to professional circles, which are in compliance with the principle of proportionality and which are suitable for achieving a particular legislative objective. In so doing it has to establish whether the desired objective might e achieved by applying milder measures, restricting human freedom as little as possible. Such milder measures, which in certain cases might even be used to achieve protection of society and at the same time have as little effect on the personal freedom of the defendant as possible, are widely known in theory and established in certain other legislations. These include the obligation to report to the police, a ban on leaving town without court permission, a restraining order, supervision and assistance by a body appointed by the court, house arrest and other measures which might reduce the hazard of reiteration and at the same time less seriously intrude upon the freedom of the defendant.

[12] *Decision No. U-I-107/96 of 5 December 1996, Official Gazette RS, Nos. 1/97 and 41/97*

Since the challenged measures interfere with the constitutionally protected entitlements of denationalization claimants ensuing from an important transitional statute, the reasons, motives, purposes and goals of the legislature should be not only definable, factually justifiable and constitutionally legitimate but the measures based on these premises should be in a democratic society inevitable, for they are dictated by necessary public needs. Yet the legislature's interferences and statutory solutions respectively should be pursuant to the principle of proportionality appropriate and unavoidably required to meet the legislature's objective, and in accord with the value of legislative aims.

It is within the legislature's competence to follow the implementation of rules that he enacted, and in the case when substantial and more severe problems occur to take appropriate measures. The principles of justice, legal certainty and the trust in law require that statutes as general and abstract rules should be enacted applying to a longer period of time. As to its purpose the Denationalization Act is a systemic statute. In that statute all basic principles governing the process of denationalization were defined.

By suspending the denationalization of agricultural lands and woods exceeding 200 ha, the legislature without a justifiable reason caused discrimination among denationalization claimants and thereby beside the principle of a state

Considering the mentioned historical overview of presence of particular elements of principle of proportionality in the former legislation as well as in the legislation in force as well as considering findings of the former Slovenian legal theory, it is possible to reasonably conclude [13] that the principle of proportionality has been traditionally implemented in the Slovenian law for a longer time. However, by introduction of new constitutional principles of a free democratic legal order as well as of the principle of the Rule of Law through a new democratic Constitution and through the case-law of the Slovenian Constitutional Court in after years, the principle of proportionality acquired a constitutional position of a general constitutional principle which bounds all state authorities and bearers of public authority, not only in sphere of their actual activities and interferences, but also in case of issuing of general regulations or individual acts.

II CURRENT LEGAL THEORY

No legal argument may be considered as an independent argument in such a manner that it would be the only basis for any legal decision[14]. Any argument shall be presented in the context and in relation to other arguments. If any argument has to be taken as explicitly dependent, the principle of proportionality may be used as such an argument. The principle of proportionality is based on the appropriate extent between "too many" and "too little"; there is a basic issue, how to come to such appropriate extent between rights and legal duties, between goods and obligations and/or between goals and remedies which are in conflict. There is the main problem how to find an appropriate criterion, how to substantially determine the rights in conflict, how to limit such rights and how to divide them in such a manner. Accordingly, it is a task of (constitutional) case-law to create typical standards through such cases; the creation of typical standards should express an appropriate extent between two rights in mutual confrontation; the extent can be appropriate in case of successful establishment of a quantitative proportionality which makes possible the co-existence of the both rights from the as for their quality.

Mutatis mutandis it is possible to say as concern fundamental (constitutional) rights [15] with which the state authority can interfere and the state authority can limit them; the same it is possible to say as concern the legislative which should not proceed to unfounded reduction of rights and extension of legal duties. Furthermore, in the foreign (constitutional) case-law (in the national case-law as well as in the case-law of the European Court of Justice and the European Court for Human Rights) the principle of proportionality has been enforced- what was accepted by the Slovenian Constitutional Court as well. This principle has two stages: on the first stage, it is necessary to determine whether a goal (the aim) of a normative legal act and a measure (a remedy) for achievement of such goal are lawful (especially, whether a goal and a measure are constitutional and legal). The mentioned process has to be the so-called test of legitimacy which should examine whether the goal - pursued by the State - is legitimate, that means whether it is really justified; and whether the respective measures taken by the State are legally

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governed by the rule of law (Article 2 of the Constitution) violated also the general principle of equality before the law under Article 14.2 of the Constitution. Nevertheless, treating individual denationalization claimants differently or even avoiding to recognize the denationalization right to certain groups of former owners would be constitutionally admissible only under conditions and circumstances stated in Point 15 of this decision.
The legislature had enough defined, factually justified and constitutionally legitimate reason to suspend the implementation of Article 27 of the Denationalization Act, as to cases arising under Article 1.1.4 of the challenged statute, and to interfere with the constitutionally protected positions of denationalization claimants. Moreover, suspension is also an appropriate and inevitably necessary measure for reaching a legislature's objective.
The principle of a state governed by the rule of law requires the measures, by which the legislature interferes with the implementation of a certain statute leaving those who claim certain rights upon such a statute in uncertainty, to be limited to the shortest time possible. Therefore, the Constitutional Court abrogated the three-year time limit that was set without any specially defined reason and was un-proportionate with the established objectives of the challenged statute.

[13] Šturm, p. 3
[14] Pavčnik, p. 44.
[15] Pavčnik, p. 44.

admissible. Further, the second stage follows: to check the quality of the mentioned measures and to determine whether between the goal and measure an appropriate (legally correct) proportionality exists (the so-called principle o proportionality in narrower meaning). The quality of measures has to be checked by criteria of suitability and necessity.

The principle of proportionality has been playing an important part in the Slovenian case-law, particularly in the Slovenian constitutional case-law; implementing this principle, the Slovenian Constitutional Court reached many precedents. However, the implementation of the so-called test of legitimacy could involve some misleading. The misunderstanding [16] could be in case when that the Constitutional Court takes the role of the legislature to review whether the legislature's goal was legitimate. Nevertheless, the Constitutional Court does not have such power; it is only empowered to determine whether the legislature's goal was constitutional (and/or legal when the Court exercises the constitutional review of by-law).

The Slovenian Constitutional Court already defined its position to all elements of proportionality. Accordingly, the legitimate (substantially founded) goal shall be achieved by a legal (constitutional, lawful) way. In several decisions the Slovenian Constitutional Court speaks more explicitly about the constitutionally admissible goal. The next element relates to the constitutionality (legality) of measure (remedy) which purpose is to achieve the constitutional (legal) goal. Additionally, the Constitutional Court determined by its decision that the measure (remedy) is inappropriate…or that the measure (remedy) is necessary. In certain decision the Constitutional Court said that the appropriate extent requests the balance among the goal and the measure; furthermore, the Court explained when such balance is not poised any more….

The Slovenian Constitution of 1991 does not directly regulate essential elements of the Rule of Law: the general Principle of Proportionality, the principle of Trust in Law and the Principle of Clarity and Precision of Legal Provisions. However, the Slovenian constitutional case-law gave to these elements the constitutional rank[17].

Therefore, by the constitutional case-law the prohibition of excessive state interferences and/or the principle of proportionality got a constitutional rank - a rank of general constitutional principle which bounds all state authorities: the legislature, the executive, the judiciary and other bearers of public authority, not only as concern their actual activities and interferences, but also relating to their general legal acts and their individual legal acts.

The Constitution allows the possibility of the regulation of constitutionally protected rights and duties by law (Article 15.2 of the Constitution) as well as some limitations (Article 15.3 of the Constitution). Such limitations may be imposed only by law, however considering already legally determined substantial criteria (a clear determination of contents, of aim and extent); moreover, the additional request is based on the consideration of principle of proportionality by law itself. Such request originates from the principle of the Rule of Law and restrains the legislature's limitations of human rights and fundamental freedoms; additionally, such request establishes a qualified connection between the legislature's motive and aim (what should be achieved) on one hand, and – on the other hand - remedies (measures) and normative regulations used by the legislature for this purpose.

The general **principle of proportionality emphasizes primarily the test of legitimacy**:
- whether the goal - pursued by the state - is legitimate - really justified,
- whether remedies (measures) - used by the state - are legally admissible.

Further, the (narrower) test of proportionality follows:
- whether the chosen remedies (measures) are appropriate for the achievement of one's end -

[16] Pavčnik, p. 45.
[17] Komentar, p. 55 to 69.

whether they are sensible (reasonable), usable and possible and whether such remedies are acceptable,
- whether the accepted remedies for the achievement of one's end are necessary and/or urgent, - whether the chosen remedies are not outside the reasonable relation to the social or individual value of the (end) goal and/or whether the proportional relation was established (**the principle of proportionality in the narrower sense of meaning and/or the principle of proportionality**) between the affection of individual's constitutional right what is a consequence of the usage of remedy (measure) and the appropriate benefit achieved by the usage of remedy (measure) for the protection of rights of other persons and - in a such manner - in favor of the whole society.

The legislature my limit the constitutionally protected individual rights only by rights of other subjects and - within this scope - also due to the public interest. The interference with the fundamental right must be based on a real and reasonable weigh of constitutionally protected goods; the legislature's legal power shouldn't be misused for the purpose of aims which are not really justified. The legislature's goals must be suitable for determination; they must be reasonable and constitutionally legitimate[18].

Remedies (measures) used by the legislature must be sensible and necessary for the purpose of the pursued goal. A remedy (measure) is sensible and/or appropriate when by its usage the pursued result can be achieved. The remedy (measure) is necessary and/or urgent when the legislature didn't have an opportunity to choose some other equally effective remedy which wouldn't limit fundamental rights or which would limit them in a less sensitive manner (the principle of the mildest and/or of the least burdening remedy). A remedy (measure) must be well founded by a goal - in such a way that it influences rights and interests of affected subjects in the least possible extent.

In case of balance in a whole between the intensity of interference and intensity of urgency of reasons which justify the interference, the border of doubtful review shall be respected. Inasmuch as many holders are affected in their right rather stronger shall be interests for the protection of rights of other persons and - within this scope - a public benefit what shall be brought into effect on the basis of law.

In such situations the principle of proportionality - as a derived principle from the Rule of Law - shall be always respected. From this point of view, the mentioned principle shall be considered as a general guideline in cases of limitations of human rights – namely as an order for weighing between the individual's rights and freedoms and rights of other subjects which limit the aforementioned rights and freedoms. The value of interference (the extent of affect of the protected good) must be proportional with the value of pursued legislature's goals. The intensity of the legitimate legislature's interferences shall be reduced to the extent which just still assures the achievement of the pursued goals; in such a way a reasonable balance between the value of goals and the intensity of interferences must be established. The legislature can interfere also with constitutionally protected positions of individuals if in such a way - due to the rights of other subjects - some other constitutionally admissible goal can be achieved. Accordingly, the legislature may interfere with such positions only in case when this is unavoidable necessary for the achievement of the legislature's goal. Regulating a relation between the constitutionally protected goods, which are mutually in collision as well as in case of their mutual weighing, the legislature must respect the principle of proportionality[19].

III CONSTITUTIONAL CASE-LAW

Considering the fact that the legislature had a constitutionally admissible goal, it is

[18] Komentar, p. 56.
[19] Šturm, p. 56.

necessary to evaluate whether the limitation is in conformity with the general principle of proportionality. The Constitutional Court evaluates whether an interference was excessive or not on the basis of the so-called test of proportionality. This test encompasses the review of three aspects of the interference: (1) whether the interference was necessary at all in order to achieve the pursued goal; (2) whether the evaluated interference was appropriate for reaching the pursued goal in the sense that it is actually possible to achieve this goal by the interference; and (3) whether the weight of the consequences of the evaluated interference with the affected human right is proportional to the value of the pursued goal or the benefits which will ensue due to the interference (the principle of proportionality in the narrow sense). Only if the interference passes all three aspects of the test is it constitutionally admissible[20].

A THE INTERFERENCE IS CONSTITUTIONALLY ADMISSIBLE

Decision No. U-I-276/96 of 10 February 2000, Official Gazette RS, No. 24/2000

The challenged Article 12.a of the Referendum and Popular Initiative Act, which excludes the statutory referendum on questions relating to National Assembly elections to be held within one year prior to regular elections, entails the limitation imposed on the right to referendum decision making determined in Article 90 of the Constitution and the right to participation in the management of public affairs determined in Article 44 of the Constitution, which citizens exercise directly through their vote cast at a referendum.

The right to referendum decision making provided by Article 90 of the Constitution and the right to participation in the management of public affairs determined in Article 44 of the Constitution are the rights for which the Constitution does not determine statutory provision. This means that they may be restricted only when necessary for the protection of the rights of others (Article 15.3 of the Constitution). On the basis of Article 15.3 of the Constitution, constitutional rights may only be restricted if in conformity with the so-called principle of proportionality, which means that three conditions must be fulfilled for such restrictions or interferences to be allowed: necessity, appropriateness and proportionality in the narrower sense.

Since the challenged provision restricts the constitutional rights determined in Articles 44 and 90 of the Constitution in a constitutionally permissible manner (Article 15.3 of the Constitution) and in conformity with the principle of proportionality, the Constitutional Court did not find it in violation of the Constitution.

Decision No. U-I-371/98 of 24 May 2001, Official Gazette RS, No. 48/01

The legislature's goal cannot be achieved by prescribing only expert conditions. For achieving this goal it was necessary to determine also the condition that the attorney's activity can be performed by persons for whom it is possible to determine that they will perform this profession in conformity with the Codex of Attorney's Professional Ethics. This requires from attorneys respect for ethical principles, truth, humanity, human dignity, principles of the Constitution and statutes, rules of good manners etc. The establishment of the mentioned conditions means the establishment of certain facts and circumstances from the personal life of the candidate who wants to perform the attorney's profession. **The finding that the candidate doest not fulfil the mentioned conditions means also the restriction of the right to the free selection of employment that is the restriction of performing this profession. However, the interference with the mentioned constitutional rights is in proportion with the protected**

[20] *Decision No. U-I-18/02 of 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS (Official Digest of the Constitutional Court) XII, 86.*

constitutional rights of other persons to be guaranteed legal assistance by attorneys whom they can trust that they will perform their work professionally and in conformity with certain ethical principles. Thus the condition (determined by the Attorneys Act) that an attorney can only be a person for whom it is possible to conclude, on the basis of their behavior and actions, that they will perform the attorney's profession in a fair manner and scrupulously, in conformity with Article 15.3 of the Constitution.

Decision No. U-I-141/97 of 22 November 2001, Official Gazette RS, No. 104/01

Pursuant to Article 15.3 of the Constitution, human rights and fundamental freedoms are limited only by the rights of others and in such cases as provided by the Constitution. When the Constitution does not envisage the limitation of human rights or fundamental freedoms it is necessary to evaluate whether the interference is admissible to protect the constitutional rights of others or a public benefit. As follows from the established case-law of the Constitutional Court (see, e.g., Decisions No. U-I-137/93, dated 2 June 1994, Official Gazette RS, No. 42/94 and OdlUS (Official Digest of the Constitutional Court) III, 62 and No. U-I-290/96, dated 11 June 1998, Official Gazette RS, No. 49/98 and OdlUS (Official Digest of the Constitutional Court) VII, 124), **it is admissible to limit constitutional rights in order to protect the constitutional rights of others only if such limitations satisfy the principle of proportionality. For a limitation to be admissible a constitutionally admissible goal must be given (the protection of the rights of others or also a public benefit - when the protection of the public benefit is a constitutionally admissible goal either directly or indirectly - so that through it the rights of others are protected). In addition three conditions must be fulfilled: (1) the interference must be necessary - this means that the goal cannot be achieved by a milder interference with the constitutional right or even without such (other possible measures with the same goal cannot replace such); (2) the interference must be appropriate to achieve the desired constitutionally admissible goal; and (3) the so-called proportionality in the narrower sense must also be considered.**

This means that, in evaluating the necessity of the interference, the importance of the interference with the constitutional right must be weighed against the importance of the constitutionally admissible goal, which is to protect or ensure other constitutionally protected values, and determine the necessary interference in proportion to the weight of consequences.

Concerning the last mentioned element, i.e. the proportionality in the narrower sense, following the position of the Constitutional Court, what needs to be weighed in evaluating the necessity of interference is also the importance of the right affected by the interference against the importance of the right that wishes to be protected by such interference. In this context, a starting-point is that the weight of the interference with the protected right must be in proportion to the importance of the other protected right (or a public benefit), due to which the first is interfered with. In case the protected right, which is the reason for interfering, must have the absolute priority due to its significance, according to the Court, a very strong interference with the first right may also be admissible (see Decision No.U-I-137/93).

The prohibition or restriction of advertising tobacco products determined in Article 10.1 of the Act on Restriction of the Use of Tobacco Products interferes with the petitioner's right under Article 39.1 of the Constitution; however, the Constitutional Court **established that the interference was not excessive**. A degree of the admissible limitation of the freedom of expression in the area of economic advertising may be greater than in the case of the freedom of expression in other areas.

Decision No. U-I-92/01 of 28 February 2002, Official Gazette RS, No. 22/02

Collecting data on the religious beliefs of citizens by the state is not inconsistent with the principle of the separation of religious communities and the state (Article 7 of the Constitution). The principle of the separation of religious communities and the state in particular concerns the autonomy of the religious communities (in their field), the secularization of public life and the impartiality of the state toward religious communities.

The Act on the Census of the Population, Households, and Housing in the Republic of Slovenia in the Year 2001 ensures that the persons counted freely declare their religion, or decide whether at all to answer such question. The Act precisely determines which data may be collected and processed, and for which purpose it may be used. Furthermore, the supervision of their collection, processing, and use, and the protection of the confidentiality of the collected personal data, is foreseen. **Interference with the right to freedom of conscience is admissible as it is in compliance with the principle of proportionality. Thus, the challenged provisions of the Act on the Census of the Population, Households, and Housing in the Republic of Slovenia in the Year 2001 (Article 6.14) which refer to posing questions on a person's religion, are not inconsistent with the right to freedom of conscience (Article 41 of the Constitution).**

Decision No. U-I-397/98 of 21 March 2002, Official Gazette RS, No. 35/02

The right to the equal protection of rights is interfered in cases in which the admissibility of evidence is limited in such a manner that only a particular kind of evidence is allowed. **Such interference is allowed if it is necessary, adequate and proportional in accordance with the principle of proportionality in a narrower sense.**

The limitation of evidence only to documentation or documentary evidence (Article 45.2 of the Personal Income Tax Act) in cases in which a tax authority establishes income which a taxpayer did not declare is the necessary consequence of the regulation according to which it is not possible to account tax liability without such documentation and consequently to assess tax. Furthermore, the interference is adequate as documentary evidence allows for a prompt and reliable finding of relevant facts. Thereby, prompt and effective proceedings of the competent authorities in assessing and collecting tax are ensured, which consequently guarantees a current inflow of payments and secures budgetary means. **Moreover, the interference is proportional in the narrower sense, as the legislature had foreseen such limitation only for cases in which the tax authority establishes income that the taxpayer failed to declare.**

Decision No. U-I-190/00 of 13 February 2003, Official Gazette RS, No. 21/03

The Criminal Procedure Act is not inconsistent with the Constitution, although it does not regulate a special legal remedy against a search warrant.

A person against whom a search warrant was issued has various legal remedies which they could use if they believed that their rights were violated by ordering and/or carrying out a search warrant.

The non-existence of a legal remedy with a suspenseful effect is an interference with the right to legal remedies determined in Article 25 of the Constitution, which is nevertheless permissible, as it is an adequate, necessary and inevitable means for reaching a constitutionally admissible goal – to provide evidence for the needs of criminal proceedings –furthermore, a proportion between the limitation of a right and the protection of other right or public interest (proportionality in a narrower sense) is given.

Decision No. U-I-127/01 of 12 February 2004, Official Gazette RS, No. 25/04

In addition to that an interference with human rights can only be based on a legitimate, sound and reasonable, aim, according to the established constitutional review, it is always necessary to evaluate whether such is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with the one of these principles which prohibits excessive state interferences also when a legitimate aim is pursued (the general principle of proportionality). The Constitutional Court evaluates whether there was a too excessive interference on the basis of the so-called strict test of proportionality. This test includes the review of three aspects of the interference:
(1) whether the interference was necessary (needed) for reaching the aim pursued;
(2) whether the evaluated interference was appropriate to reach the aim pursued, in the sense that the aim is possible to be achieved by the interference;
(3) whether the weight of consequences of the evaluated interference with an affected human right is proportional to the value of the aim pursued, or to the benefits that will occur due to the interference (the principle of proportionality in the narrower meaning). Only if the interference stands all three aspects of the test, it is constitutionally admissible. The constitutional authority vested in the legislature to limit constitutional rights (in this case the authority to determine exceptions from voluntary undergoing medical treatment) also does not entail that the legislature can determine limitations or interferences at its free will. The general constitutional principle of proportionality must be considered in every limitation of human rights and fundamental freedoms, irrespective of the basis of the legitimacy of interference.

In the case of Article 22.1.1 of the Infectious Diseases Act (compulsory vaccination) it is an interference with certain human rights - the right of individuals to decide on themselves, the right to the protection of their physical integrity (Article 35 of the Constitution), and the right to voluntary medical treatment (Article 51.3 of the Constitution).

The goal which the legislature followed in determining compulsory vaccination is the prevention of spreading infectious diseases. Thereby, the protection of an individual from infections should be to the highest degree possible ensured and the outburst of epidemics prevented which in the past caused a damage to health, and in some cases even the death of a large number of the population.

As the Constitution itself in Article 51.3 allows that statute may determine health measures also without the consent of an individual, the legislature could, as a means for reaching a goal which it followed, regulate compulsory vaccination. As by vaccination the collective protection of the population against infectious diseases is ensured, by exercising their right to decide on themselves the individual cannot appeal to the fact that the protection against spreading infectious diseases (and thereby also the protection against infections) will be attended by others who will subject themselves to vaccination.

Vaccination has importantly contributed to raising the level of health of the population and has to a great extent contributed to decreasing the number of ill and deceased persons due to infectious diseases or to the fact that for several years there were no epidemics or even individual cases of certain infectious diseases. Compulsory vaccination, which the legislature determined in Article 22.1.1 of the Infectious Diseases Act, is thus in the opinion of the Constitutional Court an adequate measure for reaching the followed legitimate goal, i. e. the prevention and control of infectious diseases.

Furthermore, the Constitutional Court finds that the benefit brought by vaccination for the health of individuals and a broader community exceeds the possible damage which may occur to individuals due to the side effects of the above-discussed measure. According to experts, the risk for an individual to suffer damage to their health due to vaccination is substantially smaller than the risk which the disease itself would pose to them, and could cause more severe consequences than vaccination. In cases in which vaccination would be too great of a risk for

the health of an individual, the Act enables finding (permanent) justified reasons for omitting vaccination.

The omission of compulsory vaccination would mean a great risk that, in cases if the level of vaccination of the population dropped under the critical limit, there would be re-occurrence of infectious diseases and epidemics. These consequences would be for the health or lives of the people un-proportionally larger than the risk for the occurrence of health difficulties which only exceptionally occur after vaccination. Thus, the Constitutional Court finds that benefits brought by compulsory vaccination to the health of individuals and the members of the broader community exceed the consequences of the interference with the constitutional rights of individuals. Therefore, the compulsory vaccination, as determined by the Infectious Diseases Act, is not an excessive measure.

Decision No. U-I-296/02 of 20 May 2004, Official Gazette RS, No. 68/04

An act which regulates an individual restrictive measure must definitively and in conformity with the Constitution regulate the substantive conditions and procedures for deciding on the order, duration and termination of such measure. The Constitution does not directly regulate the measure of temporarily securing a claim for the deprivation of pecuniary advantage, and thus it does not directly regulate substantive conditions for ordering such. However, this does not mean that there does not follow from the Constitution important conditions which statutory regulations must fulfill in order to be consistent with the Constitution. Temporarily securing a claim for the deprivation of pecuniary advantage is an interference with human rights and fundamental freedoms. The rules of the Criminal Procedure Act which allow temporarily securing a claim for the deprivation of pecuniary advantage are an interference with the right to private property determined in Article 33 of the Constitution. The first condition of the admissibility of an interference with human rights and fundamental freedoms is, according to established Constitutional Court case-law, that the interference must be based on a legitimate, objectively justified goal. Furthermore, according to established Constitutional Court case-law it must always be decided whether such is consistent with the principles of a State governed by the rule of law (Article 2 of the Constitution), and thus with the principle which prohibits excessive interferences by the State also in cases in which a legitimate goal is pursued (the general principle of proportionality). **An evaluation of whether there may be a case of excessive interference is carried out by the Constitutional Court on the basis of the test known as the strict test of proportionality. The mentioned test includes a review of three aspects of the interference:**

1) whether the interference is at all necessary (needed) in order to reach the pursued goal;

2) whether the evaluated interference is appropriate for achieving the pursued goal in the sense that this goal can in fact be achieved by this interference;

3) whether the weight of the consequences of the evaluated interference with the affected human right is proportionate to the value of the pursued goal, *i.e.* to the benefits which will result thereof (the principle of proportionality in a narrower sense or the principle of proportionality). Only if the interference passes all three aspects of the test is it constitutionally admissible.

The admissibility of a restriction of human rights and fundamental freedoms by means of repressive measures before the pronouncement of a judgment is judged in criminal procedural law in light of the probability that a person whose right is to be restricted has committed a criminal offence. A balance of proportionality between the right which is interfered with, and the goal which the interference pursues, is instituted by a standard of proof. This standard is as strict as the interference is intensive, and as important as the right with which it interferes. It is a fundamental condition for cases in which the presumption of innocence is withdrawn to such an extent so as not to prevent a repressive interference with the right of an individual. Therefore, The Criminal Procedure Act is inconsistent with the Constitution, as it does not determine the

standard of proof nor the degree of probability that a criminal offence was committed by which pecuniary advantage was unlawfully obtained, as a substantive condition for ordering the measure of temporarily securing a claim for the deprivation of pecuniary advantage already in a pre-trial procedure.

In a review of proportionality in the narrower sense within the scope of a review of the constitutionality of the substantive conditions of restrictive measures in criminal procedure, what is fundamental, besides the standard of proof, are also conditions which restrict the scope of restrictive measures in order for such not to become disproportionate. As a measure of temporarily securing a claim for the deprivation of pecuniary advantage is a lasting restrictive measure, it is necessary to definitively restrict its duration already on the statutory level. The Criminal Procedure Act does not contain any such explicit provisions and therefore enables excessive interferences with the right to property determined in Article 33 of the Constitution. A court may order the measure of temporarily securing a claim in cases in which it is possible to deprive pecuniary advantage, and therefore such temporarily securing must correspond to the evaluated value of the pecuniary advantage which was allegedly obtained by the criminal offence. Thereby, the objective scope of the temporarily securing of the claim is appropriately restricted in relation to the allegedly obtained pecuniary advantage.

Furthermore, the petitioners challenged the constitutionality of Article 506.a.1 of the Criminal Procedure Act, which regulates the manner of treating property which is the subject of a measure of temporarily securing a claim for the deprivation of unlawfully obtained pecuniary advantage. With reference to such, especially accelerated deciding by the court is required. Furthermore, it is required that the property be treated with the diligence of a good manager. The provision of accelerated deciding is a requirement for courts to act in accordance with Article 23.1 of the Constitution on deciding without undue delay. The provision that a court is obliged to treat property as a good manager would introduce a civil standard which attempts to moderate the intensity of the interference with the right to private property (Article 33 of the Constitution), such that this not be any graver than absolutely necessary. **Thereby, the discussed provision is consistent with the principle of proportionality.**

Decision No. U-I-321/02 of 27 May 2004, Official Gazette RS, No. 62/04

By the statutory regulation (the Medical Services Act) of the right of doctors to strike the legislature pursues a legitimate, i.e. objectively justified goal, and the interference is in accordance with the general principle of proportionality. Within the scope of the review of the proportionality of the interference in a narrower sense, the Constitutional Court evaluates the importance of the right affected by the interference compared to the right which is to be protected by this interference, and determines the importance of the interference proportionately to the importance of the affected rights. If it established that the importance of the right which is to be secured by the interference overweigh the importance with the interference affected right, the interference stands this aspect of the test of the proportionality, independently of the fact whether the affected persons are ensured an adequate financial compensation due to the interference with their constitutional rights.

Decision No. U-I-220/03 of 13 October 2004, Official Gazette RS, Nos. 117/03, 16/04, 123/04 and 11/06

The provisions of the Securities Market Act which regulate the reasons for the withdrawal of a license to hold office as a member of a board of directors or to act as a stockbroker are not inconsistent with the principle of proportionality.

The fact that the legislature did not regulate measures by which it would ensure lawful

conduct and that it would regulate also a withdrawal of a licence only as an extreme measure, does not yet violate the principles of a state governed by the rule of law, neither it substantiates the allegation that the provisions of the Securities Market Act violate the general principle of proportionality.

The statutory provisions which exclude an appeal against the decisions of the Securities Market Agency regarding a withdrawal of a licence and allow special judicial protection before the Supreme Court is not an inadmissible interference with the right to legal remedies and **is not inconsistent with the general principle of proportionality as one of the principles of a State governed by the rule of law.**

Decision No. U-I-84/03 of 17 February 2005, Official Gazette RS, No. 24/05

Data in the annual report which the sole traders submit for publication (in accordance with the Companies Act) cannot in general be considered personal data, since they do not refer to a natural person as an individual, but to the natural person as a sole trader. However, due to the fact that from the data contained in the annual report, personal data may be distinguished; its publication is an interference with the right to protection of personal data. **However, the interference is not inconsistent with the Constitution, as it follows an objective and is consistent with the principle of proportionality.**

Decision No. U-I-277/05 of 9 February 2006, Official Gazette RS, No. 21/06

The authority granted to the legislature to determine the manner of the exercise of a certain right does not mean that it was given the possibility to limit such right. As the boundary between the limitation of constitutional rights and the prescribing of their exercise is not always easily determinable, in disputed cases it is first necessary to evaluate whether the prescribing of the manner of the exercise of the right has already become its limitation. Even when the legislature determines the conditions for carrying out commercial activities it is bound by the general principle of proportionality, which allows it to limit the constitutional right only to the extent that is necessary to protect the public interest. This entails that in the enactment of the limitation it must select a measure such that will enable the effective protection of the public interest while at the same time not disproportionably limiting constitutional rights. From this aspect the Constitutional Court reviewed some of the challenged provisions of the Health Care and Health Insurance Act.

From Article 74.3 of the Constitution there follows the right to such conditions of competition practices as are provided by law. A regulation which would excessively limit competition cannot entail inconsistency with Article 74.3 of the Constitution, but could only interfere with Article 74.1 of the Constitution. As explained above, the determination of conditions for providing supplemental health insurance, also including the mandatory inclusion of insurance companies which provide supplemental health insurance in the balancing scheme of supplemental health insurance, is not an interference with free economic initiative as determined in Article 74.1 of the Constitution, but the determination of the manner of the exercise of this constitutional right. Thus, the Constitutional Court should only answer the question whether the mandatory inclusion of insurance companies in the balancing scheme of supplemental health insurance is proportional in view of the intention pursued or the benefits that ensue due to such limitation.

The consequences or effects of the challenged mandatory inclusion of insurance companies in the balancing scheme system for insurance companies which provide supplemental health insurance entail a transition to a systemically new manner of providing supplemental health insurance which replaces the previous obligations of the insurance companies (the creation of reserves) with other obligations (the balancing of differences in the costs of medical services that originate from different structures of persons insured by individual insurance companies

with regard to their age and gender). This already in itself cannot be disproportional. Additional obligations are of an auxiliary character and serve in the functioning of the new balancing scheme system (e.g., the obligation to maintain the auditing records on the costs of medical services, the payment of compensation for providing data for the functioning of the balancing scheme to the performers of medical services, etc.). Thus, the consequences that occur due to the introduction and carrying out of the balancing scheme are comparable to the previous regulation. As the matter concerns the determination of basic mechanisms for the performance of a certain commercial activity without which the aims of this activity cannot be achieved (the interests of insured persons would not be equally ensured), **the measure of mandatory inclusion in the balancing scheme cannot be considered to be disproportional.**

Decision No. U-I-40/06 of 11 October 2006, Official Gazette RS, No. 112/06

The interference with the right to private property is allowed in the cases determined in Article 15.3 of the Constitution. Under Article 15.3 of the Constitution, it is possible to limit human rights only in cases as are provided by the Constitution and when such are limited by the rights of others. According to established case-law, a human right or fundamental freedom may be limited if the legislature has followed a constitutionally admissible goal and if the limitation is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with one of such principles which prohibits excessive interferences by the state (the general principle of proportionality).

On the basis of Articles 5 and 70 of the Constitution, the legislature is obliged to determine by law the conditions under which natural resources may be exploited, the conditions for the use of land, the conditions and the manner of carrying out economic and other activities with the intention to fulfill its obligation to promote a healthy living environment, etc. Therefore, on the basis of the constitutional provisions, the legislature had to determine by law the manner and conditions for the management of game such that a healthy living environment is thereby ensured. The legislature had a constitutionally admissible goal in interfering with the right to private property.

Considering the fact that the legislature had a constitutionally admissible goal, it is necessary to evaluate whether the limitation is in conformity with the general principle of proportionality. The Constitutional Court evaluates whether an interference was excessive or not on the basis of the so-called test of proportionality. This test encompasses the review of three aspects of the interference: (1) whether the interference was necessary at all in order to reach the pursued goal; (2) whether the evaluated interference was appropriate for reaching the pursued goal in the sense that it is actually possible to achieve this goal by the interference; and (3) whether the weight of the consequences of the evaluated interference with the affected human right is proportional to the value of the pursued goal or the benefits which will ensue due to the interference (the principle of proportionality in the narrow sense). Only if the interference passes all three aspects of the test is it constitutionally admissible (Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS (Official Digest of the Constitutional Court) XII, 86).

Game by its nature is always present on some land. Since it moves freely it cannot be restricted to a certain property with regard to the boundaries of individual property. Although game is an independent movable thing, it is not possible to manage such (i.e. by exercising the hunting right) without the use of such property and forests. As bearers of the hunting right also have the [narrower] right to hunt, by which the population of game is interfered with through the use of firearms, the carrying out of hunting cannot be left to the will of the owner of the land, but must be regulated by law and controlled. The exercise of the [broader] hunting right encompasses numerous professional tasks for which special knowledge regarding game is needed. Without the cooperation of qualified persons having appropriate knowledge about game and the

environment, it is impossible to manage game effectively. Thus, the Constitutional Court evaluates that the obligations of owners of land to allow the use of their land so that qualified persons may exercise the [broader] hunting right, and the limitations imposed on owners in the use of their land and forests for the exercise of the [broader] hunting right, are a necessary and appropriate measure for achieving constitutionally protected goals.

In the review of proportionality in the narrow sense the Constitutional Court balanced the need to exercise the [broader] hunting right for the preservation of the natural resource against the weight of the interference with the right to private property. On the basis of Article 72.2 of the Constitution, the state is obliged to promote a healthy living environment. It must encourage social development such that it enables the long-term conditions for people's physical and mental well being, quality of life, and the preservation of biological diversity. The goal of environmental protection is *inter alia* also to ensure the sustainable use of natural resources. According to the principle of sustainable development determined in Article 4 of the Environmental Protection Act, the state is obliged to encourage such economic and social development of the society which in satisfying the needs of the present generation considers the equal possibilities of satisfying the needs of future generations and enables the long-term preservation of the environment. The purpose of the exercise of the [broader] hunting right is to ensure a healthy living environment by protecting game, which is a natural resource. Thus, in weighing the proportionality of the interference with the right to private property of the owners due to their obligations (e.g. to allow non-owners to use the land, to respect the life rhythm of game concerning certain parts of forests, to use preventive means and work methods in order to prevent the loss of game in breeding places and nests), which are imposed on land owners due to the exercise of the [broader] hunting right, the protection of game needs to be given priority. If due to the special measures for the protection of game a land owner incurs damage which exceeds general limitations regarding environmental protection, they are entitled to damages according to the rules on the expropriation of real estate (Article 36.5 of the Game and Hunting Act). The owners of land have the right to compensation for damage caused by game, and for damage caused by hunting and the management of hunting grounds and hunting grounds with a special purpose. A special chapter of the Game and Hunting Act (Part IX: Prevention and Compensation for Damage Caused by and to Game) regulates types of damage, liability for damage, the amount of damage, and the manners of claiming compensation. The petitioner also erroneously opines that the challenged decision enables anyone to hunt on land they do not own and to freely appropriate game. Game as a natural resource is managed by the Republic of Slovenia, which may transfer part of its powers by granting a concession to qualified legal entities in the form of the [broader] hunting right (Article 1.3 of the Game and Hunting Act). A private subject may acquire the [broader] hunting right only by following a special procedure (the granting of a concession according to a public tender procedure) and by an act of public law (an administrative decision). The bearer of the hunting right may not entirely transfer such to other subjects. They may, however, use individual parts of the hunting right (including the right to hunt) and may under the conditions determined by statute transfer such to other persons. The right to participate in hunting is only enjoyed by persons who fulfill statutory conditions, and only to the extent which is necessary for the effective management of game as a natural resource. On their land owners cannot entirely freely hunt the game which is present there. However, they have the right to participate in hunting under the conditions determined in Article 60 of the Game and Hunting Act. On the basis of Article 65.5 of the Game and Hunting Act, they also have the right to be members of a hunting society if they have registered their basic agricultural and forest activities concerning the respective hunting ground, and if they are owners of at least 15 ha of forest or agricultural land. The owners of land may on the basis of Article 65 of the Game and Hunting Act establish a hunting society which may by participating in a public tender acquire a concession for the sustainable management of game and the right to exercise the [broader] hunting right. A hunting society most of whose members are the owners of land and forests in the area of the hunting ground, and most of whose members have permanent residence in that area, has priority in the acquisition of such license in relation to other hunting societies (Article 26 of the

Game and Hunting Act), except in the first procedure for the acquisition of the license, wherein the hunting organization which until the call for public tenders managed the hunting ground (Decision No. U-I-98/04, dated 11 October 2006) has priority. From the above-mentioned, it follows that the owners of the land may on their land hunt under the conditions determined by law. If land owners join an organizational form envisaged by the Game and Hunting Act they may within this form acquire the hunting right. **Concerning such, in the review of proportionality in the narrow sense, the Constitutional Court established that the benefits brought by the exercise of the hunting right in the manner determined by the Game and Hunting Act, by which the protection of natural resources is ensured, outweighs the interference with the right of the owners of land and forests.**

Decision No. U-I-98/04 of 9 November 2006, Official Gazette RS, No. 120/06

Considering the fact that the legislature had a constitutionally admissible goal, it is necessary to evaluate whether the limitation is in conformity with the general principle of proportionality. The Constitutional Court evaluates whether an interference was excessive or not on the basis of the so-called test of proportionality. This test encompasses the review of three aspects of the interference: (1) whether the interference was necessary at all in order to reach the pursued goal; (2) whether the evaluated interference was appropriate for reaching the pursued goal in the sense that it is actually possible to achieve this goal by the interference; and (3) whether the weight of the consequences of the evaluated interference with the affected human right is proportional to the value of the pursued goal or the benefits which will ensue due to the interference (the principle of proportionality in the narrow sense). Only if the interference passes all three aspects of the test is it constitutionally admissible (Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS (Official Digest of the Constitutional Court) XII, 86).

The Constitutional Court, in applying the test referred to as the test of proportionality, established that the benefits brought by exercising the right to hunt in a manner such as determined in the Game and Hunting Act, outweigh the gravity of the interference with the rights of land and forest owners. Therefore a regulation is not inconsistent with the Constitution when the legislature followed a constitutionally admissible goal and the limitation is consistent with the principles of the Rule of Law (Article 2 of the Constitution), in particular with one of these principles which prohibits excessive interferences of the state (the general principle of proportionality).

B THE INTERFERENCE IS NOT CONSTITUTIONALLY ADMISSIBLE

Decision No. Up-16/92 of 25 November 1992, Official Gazette RS, No. 57/92, OdlUS (Official Digest of the Constitutional Court) I, 95

The decisions of the electoral commissions and the judgments of the Supreme Court, or the rejection of the candidate lists of the party in individual electoral units with the simultaneous acceptance of the candidate lists of the same party in the remaining electoral units violated equality before the law, and at the same time, the active voting rights of potential voters for these lists and the passive voting rights of the candidates on these lists.

The Constitutional Court does not agree with the opinion of the Supreme Court in the judgment by which the request of the public prosecutor for the protection of legality was rejected, that the competent electoral commission could not on the basis of Article 56.3 of the Law on Elections to the State Assembly, consent to the proposal of the exclusion of the name of the SOPS party from the name of the group list. This provision expressly in fact enables only the rejection of the candidate list in its entirety or rejection only in respect to individual candidates - however it is necessary to interpret it sensibly so that in addition to the rejection of the list as a whole, it also allows the partial rejection of a list. It is true that legislatures expressly envisaged as a possible

form of the partial rejection of a list only rejection "in respect of individual candidates themselves" - but there is no reason why other possible kinds of partial rejection should be considered impermissible because legislature did not expressly envisage them. The concept "rejection in respect to individual candidates themselves" must, therefore, on the basis of a sensible interpretation, be understood more widely, with an interpretational extension from the only expressly cited case to similar but incited cases. Because of the protection of constitutional voting rights, which also include the rights, to stand as candidate, it is necessary to interpret the legislative provisions on this widely, so as to maintain the extent of these rights intact, and not restricted. Article 56.3 of the Law on Elections to the State Assembly, namely, is not a provision which limits rights and should thus be interpreted narrowly or literally, but on the contrary: this provision allows an encroachment on electoral rights or to the rights to stand as candidate, when this is urgently required for the protection of the legality of an election.

According to the generally accepted and strongly emphasized understanding in European constitutional-legal theory and case-law, encroachments on constitutional rights, when they are permitted, must be in accordance with the intention of the allowed restriction and in accordance with the principle of proportionality; the limitation must therefore be to the extent which is urgently required to achieve this intention - excessive encroachment is not allowed. If every uncorrected formal deficiency which does not refer only to individual candidates were necessarily to lead to the rejection of the entire list, although it also would have been possible to correct by the rejection of part of the list, which at the same time does not mean the rejection, this would mean an unnecessary restriction of electoral rights or an unnecessary and excessive encroachment on them.

Decision No. U-I-137/93 of 2 June 1994, Official Gazette RS, No. 42/94

In accordance with the established and generally accepted notions prevailing in the world, restricting of constitutional rights is only allowable if in conformity with the so called principle of proportionality, which means that such restrictions or measures can be allowed under three conditions (necessity, appropriateness and proportionality in the narrower sense): 1.) a measure must be necessary - in the sense that the objective can not be reached by any other milder interference with a constitutional right, or even without it; 2.) the measure must be appropriate for achieving the desired, constitutionally admissible objective (for example, to protect the rights of other persons or, also, public interest, when protection of public interest is a constitutionally admissible objective directly or indirectly - in that the public interest serves as a protection for the rights of other persons) - appropriate in the sense that the objective can be reached by it; and 3.) consideration should also be paid to the so called proportionality in the narrower sense, which means that in assessing the urgency of a measure the importance of the right injured by such a measure should also be assessed in comparison with the right to be protected by such a measure, and the urgency of the measure should be determined in proportion to the gravity of the injuries resulting from it: only when a protected right is entitled to absolute priority on the basis of its importance, a major encroachment upon the former right may also be allowed - in other cases the extent and importance of encroachment upon such a right must be proportionate to the importance of the other protected right, or, in other words, no measure is a priori admissible with a view to fully protecting a protected right, even though necessary, when the other right is also entitled to the same degree of protection; in the case of conflicts between such rights the level of interference with one such right should not be allowed to ensure absolute protection of the other right but should be proportionate to the first right (with both rights thus mutually limiting one another).

In the case of compulsory association in the Chamber of Social Security under consideration, the Constitutional Court finds that such encroachment upon the general freedom of action of

people is not indispensable, and this in spite of the presence of public interest in connection with the implementation of the programme of social security and the delivery of social security services within its framework. The Chamber may perform its duties, including those defined as public powers, regardless of the obligations of its members. This is why the Constitutional Court found the disputed provision of the Social Security Act to be in conflict with Article 35 of the Constitution, and, in this connection, did not even consider the evaluation of appropriateness and proportionality of the measure. Article 76.1 of the Social Security Act, which provides for compulsory association of professional workers in the Chamber of Social Security, is not in conformity with the Constitution, because such interfering with the general freedom of action of people is not necessary in the exercising of the powers of such workers.

Decision No. U-I-287/95 of 14 November 1996, Official Gazette RS, No. 68/96

Constitutional rights and freedoms may only be limited when this is necessary for the protection of the rights of others. If the protection of the rights of others dictates that the rights and freedoms of particular legal entities be restricted, and when such restrictions have not been regulated by statute, the Constitutional Court shall on the basis of Article 48 of the Constitutional Court Act establish the existence of a gap in the law and set a time period in which the legislature shall have to eliminate such gap in the law (Article 2 of the Constitution).

A tax imposed (by the Tariff of Taxes and Recompense for Deciding Cases Concerning the Issuance of Permits, Approvals and Other Matters) **for services of government authorities must be reasonably proportionate to the services rendered by government authority. Substantial exceeding of the so defined tax may imply secret taxation, which can restrict access to the acquisition of a right. A different regulation would be a violation of principles of a state governed by the rule of law (Article 2 of the Constitution).**

Decision No. U-I-121/97 of 23 May 1997, Official Gazette RS, No. 24/05

The constitutionality of the contents of the referendum question was assessed by the Constitutional Court based on the position adopted in Resolution No. U-I-107/96 of 5 December 1996, pursuant to which, as far as its purpose is concerned, the Denationalisation Act, as a transitional law, is **a system law which clearly defines all the fundamental principles of the denationalisation process which, in compliance with the principles of the rule of law, may only be altered if the conditions and circumstances satisfying the criteria of the strictest Constitutional Court review have been met. The conditions and circumstances of this strictest Constitutional Court review are: (1) the legislature's reasons, motives and objectives for changing the Denationalisation Act must be materially justifiable and constitutionally legitimate (not only definable); (2) the envisaged measures must be unavoidable in a democratic society, being dictated by urgent public need; (3) the legislature's interference (measures, legal solutions) must be in compliance with the principle of proportionality, inevitable in order to meet the legislature s objectives and proportionate to the value of the pursued objectives.** The Constitutional Court is bound by these criteria in the assessment of this particular referendum question as well.

The reasons dictating point 1 of the referendum question are materially justifiable and constitutionally legitimate and are dictated by compelling public need. Insofar as it permits the restitution of estates of feudal origin, the Denationalisation Act has been contrary to the principle of constitutional regulations, according to which Slovenia is a democratic country (Article 1 of the Constitution) from the very start of its validity. The restitution of estates of feudal origin is not in compliance with the system embraced by Slovenia with its independence acts, i.e. the Basic Constitutional Charter on the Independence and Sovereignty and the Declaration of Independence, nor with the new Constitution which was just about to be adopted at the time of the adoption of the Denationalisation Act.

Decision No. U-I-25/95 of 27 November 1997, Official Gazette RS, No. 5/98

The Constitution protects that part of personality which refers to free communication twice: in Article 35, in which it sets the rule that everyone has the right to privacy and personal integrity, and especially in Article 37, whereby the privacy of post and other forms of communication is guaranteed. Conditions for restricting these rights are contained in the second paragraph of Article 37 of the Constitution.

Since (secret) listening and especially listening in premises with technical equipment is an extreme encroachment on the constitutional right to privacy, it must be based on particularly precise arrangement with clear and detailed rules. These rules guarantee a citizen on the one hand the certainty of measures and situations in which the measure may be used, and on the other hand effective judicial control and effective remedy against the abuse of such measures.

By the "necessity" of the infringement, the principle of proportionality is explicitly built into the Constitution, which is also recognised as a general constitutional principle, derived from the principle of a state ruled by law. This demands of the legislator that in determining the conditions for an encroachment it enables a judgement of whether the encroachment is necessary, such that the desired aim cannot be achieved by less extreme means. At the same time, it imposes on the part of the legislator the responsibility that the possibility of encroachment on the right to privacy be restricted only to cases in which such an encroachment would be in understandable proportion to the aims, thus to those benefits which are claimed to be protected by the encroachment, and with understandable anticipated effects of such protection. Only in a case that concerns rights for the protection of which the encroachment is permitted because of their importance, absolute priority, may be permitted also very powerful infringements on the first rights, but the seriousness of the infringement of them must be in proportion to the importance of protecting the other rights. In other words, any infringement which is necessary is not a priori allowed if protected rights are to be protected as a whole, when the first right also deserves the same powerful protection. In a collision of such rights, it is necessary to allow only an infringement on one which other rights will not protect absolutely, but only proportionately with the first (the rights will therefore mutually restrict each other).

Thus when individual statutory conditions for ordering the measure of listening in premises are not sufficiently defined and in conformity with the requirement of proportionality, which as a "necessary" encroachment is contained especially in the second paragraph of Article 37 of the Constitution, the legal text which determines the conditions is in conflict with the Constitution. Insofar as specific groups of conditions are determined in Article 150.1 of the Criminal Procedure Act, the law is in this part undefined and unconstitutional also in relation to other measures, until with a specific definition of individual conditions and with the same gravity as with listening in premises (i.e. between the gravity of the encroachment on a protected right and the right for the protection of which the encroachment is permitted) it does not set a suitable hierarchy also among the measures themselves.

The "necessity" of use of the measure of listening in premises which is the constitutional condition for an encroachment on privacy, must be shown not only on a statutory level but also in each concrete case. In order to guarantee the right to effective legal remedy, which includes the requirement for a court decision under the second paragraph of Article 37 of the Constitution , an order whereby a court orders the measure must also contain the grounds from which it derives that the execution of the measure is urgently necessary in a concrete case and what are the circumstances which prevent the court or the organ for internal affairs from collecting evidence in a way

which does not encroach or encroaches in a less intensive way on the constitutional rights of the person affected.

Decision No. U-I-39/95 of 23 September 1998, Official Gazette RS, No. 68/98

Deciding the respective case, in accordance with the principle of proportionality, the Constitutional Court weight two goods – on one hand, the trust in law all those persons who were elected as mayors or members of municipal councils and who at the same time exercised also some other office or duty which by later changes and amendments of the law became incompatible with the office of a member of municipal council or mayor - and on the other hand – the public interest for implementation of the mentioned new legal provisions on incompatibility also for these.

The new provisions of the Act on the Amendments to the Local Self-Government Act on the incompatibility of the offices of member of a municipal council and mayor came into force without the legislature having regulated a specific transitional period for all those who had, relying on the existing statutory regulation, besides the office of councillor or mayor also discharged some other office or duty which would not be compatible with the office of councillor or mayor under the subsequent provisions. Thereby the legislature interfered with the legal positions which had been created in the past, at the time when the original regulation had been effective. Such a case of the retroactive application of a regulation is in theory called irregular retroactivity, which is in principle not banned by the Constitution except when it interferes with the principle of trust in the law as one of the principles of a State governed by the rule of law (Article 2 of the Constitution). The provisions on incompatibility, applying to the legal positions created on the basis of the previous statutory regulation which did not prescribe incompatibility, are not grounded on such a strong public interest that would justify an interference with the protection of trust in the law of those persons who have acquired municipal office yet who have at the same time, relying on the then existing statutory regulation, kept their previous offices or have even acquired new ones, or have begun to carry out different activities which however ceased to be compatible with the office of municipal councillor or mayor because a new statutory regulation came into force. Therefore, the Constitutional Court abrogated Article 37 a.1.4 of the Local Self-Government Act, in the said part.

Decision No. U-I-68/98 of 22 November 2001, Official Gazette RS, No. 101/01

The Constitutional Court reviewed the question of whether the exclusion of denominational activities from the premises of public and licensed kindergartens and schools, outside the scope of performing their public service, admissibly interferes with the positive aspect of the freedom of conscience of an individual (determined in Article 41.1 of the Constitution), the right of parents determined in Article 41.3 of the Constitution and the right of parents determined in Article 2 of Protocol No. 1 to the**(European) Convention for the Protection of Human Rights and Fundamental Freedoms**, **on the basis of the so-called strict test of proportionality, which derives from Article 15.3 of the Constitution. In accordance with this provision, human rights and fundamental freedoms are limited only by the rights of others and in such cases as determined by the Constitution. Since the Constitution does provide such limitations as included in the challenged statutory regulation, it was necessary to review whether the interference with the positive aspect of the freedom of conscience of an individual determined in Article 41.1 of the Constitution, the right of parents determined in Article 41.3 of the Constitution, the right of parents determined in Article 41.3 of the Constitution, and the right determined in Article 2 of Protocol No. 1 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, is admissible to ensure the protection of the constitutional rights of others.**

In the concrete case, this means that the weight of the consequences of interfering with the positive aspect of the freedom of religion and the rights of parents determined in Art. 41.3 of the

Constitution is not proportionate to the necessity of ensuring the negative aspect of freedom of religion of others, as this can be successfully protected by a milder measure than the one included in the statutory regulation. Therefore, the challenged provision is inconsistent with Art. 41 of the Constitution in the part relating to licensed kindergartens and schools outside the scope of performing a public service.

Decision No. U-I-288/00 of 21 March 2002, Official Gazette RS, No. 32/02

The provision of Article 74 of the Constitution guarantees free economic initiative. The second sentence of Article 74.2 of the Constitution determines that commercial activities may not be pursued in a manner contrary to the public interest. The above stated provision not only allows but also imposes on the legislature the obligation to regulate the conditions under which certain activity may be pursued, and consequently assures the consideration of the public benefit and establishes the appropriate equilibrium between freedom and the interests of others. However, the legislature''s freedom is not absolute and unlimited. The legislature may prescribe the conditions to pursue certain activities and within this framework also the conditions to perform certain work, service, which constitute this activity, if this is necessary for the protection of a public interest or public benefit. Thereby, the legislature has a large field of discretion.

The Constitutional Court's review of such statutory regulation is therefore restrained. However, the legislature must thereby follow the legitimate goals, which are in the public interest, and the measures applied must be in the reasonable connection with these goals. As the challenged measure did not even fulfill the criterion of reasonableness, it is inconsistent with Article 74 of the Constitution.

The provision of Article 49 of the Constitution guarantees the freedom of work and, within this framework, also the free choice of employment (Paragraph 2), and access under equal conditions to any position of employment to everyone (Paragraph 3). The cited constitutional provision relates not only to workers which perform their work in employment relation but also to self- employed, who independently perform their work as a profession, i.e. economic activity, etc.

The free choice of employment and access under equal conditions to any position of employment must be guaranteed to them, as well. The Constitution does not explicitly provide the statutory limitation of the right to freedom of work determined in Article 49 of the Constitution, therefore, pursuant to Article 15.3 of the Constitution, only the limitations due to the protection of rights of others are allowed. The limitations are allowed only in accordance with the principle of proportionality.

As the Constitutional Court established that the challenged regulation is not reasonable regarding the pursued goals of the Act Determining Special Conditions for the Registration of Ownership of Individual Parts of Buildings in the Land Register, it was not necessary to perform the whole test of proportionality and, consequently for this reason alone, it considered the challenged regulation inconsistent with Article 49 of the Constitution.

Decision No. U-I-272/98 of 8 May 2003, Official Gazette RS, No. 48/03

The provision of the Police Act is inconsistent with the requirement of the definiteness of a statute, due to the fact that it only names the measures (secret police operations and cooperation and the use of arranged documents and identification marks) that the police may use under certain conditions, which are neither in this place or anywhere else in the Act defined such that it would be clear which police activities are allowed and where the limit between the allowed and the prohibited is.

Broad police powers granted by the Police Act provision concerning the ordering of the mentioned measures for all criminal offenses that are prosecuted ex officio, is inconsistent with the principle of proportionality.

Inconsistent with the principle of proportionality is also the Police Act provision according to which the mentioned measures may be ordered for three months with the possibility of multiple extension every time for three months, as the effectiveness of police authority for the disclosure and prosecution of criminal offenses can be achieved by a milder interference with the constitutional right.

Decision No. U-I-346/02 of 10 July 2003, Official Gazette RS, Nos. 11/03 and 73/03

The Constitution does not contain explicit provisions which would determine additional conditions regarding the universal right to vote in addition to those determined in Article 43.2 of the Constitution. The Constitution provides a statutory proviso in the sense of Article 15.3 only for the right to be elected deputy of the National Assembly. For the right to vote the Constitution does not determine any statutory provisions, as not for the right to be elected except for the above mentioned exception (election to the National Assembly). **Therefore, an interference with the right to vote and the right to be elected for the election of other state or local authorities (National Council, President of the Republic, mayor, municipal council) is only allowed if it is necessary for the protection of the rights of others or the protection of the public interest provided that thereby the rights of others are protected (Article 15.3 of the Constitution). However, in both cases it must be established for a concrete statutory regulation whether it is consistent with the principle of proportionality.**

The limitation of the right to vote by determining the condition of mental capacity (sound mind) means the deprivation of the right to vote. A person who does not have such capacity does not have the right to vote. Therefore, the criteria for the deprivation of the right to vote must be determined precisely and in a manner such that they at least as possible interfere with the universal right to vote. The criteria determined for the deprivation of contractual capacity by the Marriage and Family Relations Act and the Non-Litigious Civil Procedure Act, and which regarding the challenged provisions of the election acts also apply to the deprivation of the right to vote, excessively interfere with the right to vote.

When regulating the reasons for the deprivation of the right to vote the legislature is obliged to observe that it does not interfere with the right to vote excessively. **It may only regulate reasons which are proportionate and necessary for reaching a legitimate goal.** Furthermore, it must determine proceedings in which it will be evaluated what effect has a certain mental (intellectual) state of an individual on their capacity to understand the meaning and effect of elections. The right to vote should only be limited of those individuals for whom it is established that they are truly not capable of understanding the meaning, purpose and effects of elections. Consequently, the proceedings must be regulated in a manner such that it is established in every individual case whether a person who is being deprived of the contractual capacity or extended the parental right is also incapable of exercising the right to vote. Thereby, the legislature may prescribe various limitations to the right to vote or the right to be elected.

Therefore, the statutory regulation of the right to vote is inconsistent with the Constitution, as it deprives the right to vote of an 18 years old citizen if they were deprived of their contractual capacity or their parents were extended the parental right.

Decision No. U-I-18/02 of 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS (Official Digest of the Constitutional Court) XII, 86

Considering the fact that the legislature had a constitutionally admissible goal, it is

necessary to evaluate whether the limitation is in conformity with the general principle of proportionality. The Constitutional Court evaluates whether an interference was excessive or not on the basis of the so-called test of proportionality. This test encompasses the review of three aspects of the interference: (1) whether the interference was necessary at all in order to reach the pursued goal; (2) whether the evaluated interference was appropriate for reaching the pursued goal in the sense that it is actually possible to achieve this goal by the interference; and (3) whether the weight of the consequences of the evaluated interference with the affected human right is proportional to the value of the pursued goal or the benefits which will ensue due to the interference (the principle of proportionality in the narrow sense). Only if the interference passes all three aspects of the test is it constitutionally admissible.

In accordance with established constitutional case-law, interferences with human rights or fundamental freedoms are allowed if they are in conformity with the principle of proportionality. The review whether an interference with a human right is admissible is carried out by the Constitutional Court on the basis of the so-called strict proportionality test The Constitutional Court must thus first establish (evaluate) whether the interference pursues a constitutionally admissible aim. Thereby it considers that, in accordance with Article 15. 3 of the Constitution, human rights and fundamental freedoms may be limited due to the rights of others or due to a public benefit. In addition to determining that the interference pursues a constitutionally admissible aim and is from this aspect not inadmissible, it is always necessary to evaluate whether such is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with that principle which prohibits excessive interferences. This entails that the restriction must be (needed) necessary and appropriate for achieving the pursued constitutionally admissible aim and in proportion with the importance of this aim (the principle of proportionality in the narrow sense). The principle of a state governed by the rule of law, which originates from Article 2 of the Constitution, also contains the requirement that regulations must be clear and definite. In conformity with the constitutional requirement that a statute must be definite, interferences with constitutional rights must be regulated precisely and unambiguously. If a norm is not clearly defined there is the possibility of the different application of the statute and the arbitrariness of state authorities or other authorities exercising public authority that decides on the rights of individuals. This must also be considered.

Decision No. U-I-60/03 of 4 December 2003, Official Gazette RS, No. 131/03

The Constitutional Court carries out the assessment of whether interference is excessive on the basis of the so-called strict test of proportionality. This test comprises the weighing of three aspects of the interference: 1) whether the interference is urgent (necessary) at all, in the sense that the goal cannot be achieved without (any) interference, or that the goal cannot be achieved without the evaluated (particular) interference, or some other interference that would be milder; 2) whether the evaluated interference is appropriate for achieving the pursued goal in the sense that the pursued goal can actually be achieved with the interference; if this goal cannot be achieved, the interference is not appropriate; 3) whether the gravity of the consequences of the evaluated interference for the affected human rights is proportional to the values of the pursued goal or to the benefits that will occur as a result of this interference (the principle of proportionality in the narrower sense).It is only when the interference passes all three aspects of the test that it is constitutionally admissible. This also applies when the interference is admissible due to the rights of others or for the public good, as well as when the limitation of the human right is explicitly allowed by the Constitution. Even the constitutional authorisation of the legislature to limit a human right (in this case the authorisation to limit the individual's right to personal liberty and the definition of exemptions from voluntary treatment) does not entail that the legislature may determine limitations or interferences arbitrarily. The general constitutional principle of proportionality must be considered in every limitation of

human rights and fundamental liberties, irrespective of the basis on which the legitimacy of the limitation rests.

Compulsory detention in closed wards of psychiatric hospitals is severe interference with human rights and fundamental freedoms of patients particularly with the right to personal liberty (Article 19.1 of the Constitution), the right to protection of mental integrity (Article 35 of the Constitution) and the right to voluntary medical treatment (Article 51.3 which guarantees not only the right to medical treatment but also the right to reject medical treatment). The purpose of a statutory regulation is to regulate compulsory detention of mental patients in closed wards of psychiatric hospitals in a manner such that the effective realization of a legitimate purpose which justifies such measure is guaranteed (i.e. averting danger which the patient due to mental illness causes either to others or to themselves, and suppressing reasons which cause such danger), and simultaneously to guarantee the respect for human rights and fundamental freedoms of patients in accordance with international standards of the protection of human rights and regarding the adequate solutions in comparable European legislations.

Compulsory detention in closed wards of psychiatric hospitals is a measure which should be used only in cases in which danger cannot be suppressed with other measures outside (of the closed ward) of a psychiatric hospital. As the legislature (by the Non-litigious Civil Procedure Act), beside the possibility of passing compulsory detention in a closed ward of a psychiatric hospital, did not provide courts with other measures, it thereby interfered contrary to Article 2 of the Constitution with personal liberty which is guaranteed by the provision of Article 19.1 of the Constitution.

Decision No. Up-472/02 of 7 October 2004, Official Gazette RS, No. 114/04

An interference with the right to privacy is admissible under certain conditions; however, there need to exist especially substantiated circumstances in order to take evidence obtained by a violation of the right to privacy. The taking of such evidence should have a special purpose for the exercise of a constitutionally protected right. **In such a case, the court must consider the principle of proportionality and carefully evaluate which right must be given priority. The challenged ordinary court decision was based on the position that the taking of evidence by examining the witness who had listened to a telephone conversation, and by listening to the recording of the conversation, did not interfere with the right to privacy. Due to this fact, the court did not establish the circumstances which would justify the interference in the concrete case. Accordingly, the complainant's right to privacy and the right to the privacy of correspondence and other means of communication were violated.**

Decision Nos. Up-724/04 and U-I-322/05 of 9 March 2006, Official Gazette RS, No. 30/06

The interference with the right to private property is allowed in the cases determined in Article 15.3 of the Constitution. Under Article 15.3 of the Constitution, it is possible to limit human rights only in cases as are provided by the Constitution and when such are limited by the rights of others. According to established case-law, a human right or fundamental freedom may be limited if the legislature has followed a constitutionally admissible goal and if the limitation is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. **with one of such principles which prohibits excessive interferences by the state (the general principle of proportionality)**.

In execution proceedings as well the debtor should be protected against excessive intervention into his affairs, even though in such proceedings the creditor is the one with the priority because of the executable legal title. This is particularly evident in the present case, where the debtor is deprived of a legal remedy due to the acceleration of the proceedings. The right to judicial protection represents one of the crucial legal guarantees and implementing provisions of the principle of a state governed by the rule of law (Article 2 of the Constitution). The right to appeal

is also one of the fundamental individual rights which evidences a state governed by the rule of law. Because of this, **the interference of the legislature which amounts to the deprivation of both rights is at first sight manifestly disproportionate to the benefit, i.e. the acceleration of proceedings that may occur as a consequence.** The Constitutional Court has therefore established that the provision of the first sentence of Article 97.3. of the Execution of Judgments in Civil Matters and Insurance of Claims Act is incompatible with Article 25 of the Constitution.

Decision No. U-I-152/03 of 23 March 2006, Official Gazette RS, No. 36/06

In accordance with established constitutional case-law, interferences with human rights or fundamental freedoms are allowed if they are in conformity with the principle of proportionality. The review whether an interference with a human right is admissible is carried out by the Constitutional Court on the basis of the so-called strict proportionality test (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS (Official Digest of the Constitutional Court) XII, 86). The Constitutional Court must thus first establish (evaluate) whether the interference pursues a constitutionally admissible aim. Thereby it considers that, in accordance with Article 15. 3 of the Constitution, human rights and fundamental freedoms may be limited due to the rights of others or due to a public benefit. In addition to determining that the interference pursues a constitutionally admissible aim and is from this aspect not inadmissible, it is always necessary to evaluate whether such is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with that principle which prohibits excessive interferences. This entails that the restriction must be (needed) necessary and appropriate for achieving the pursued constitutionally admissible aim and in proportion with the importance of this aim (the principle of proportionality in the narrow sense). The principle of a state governed by the rule of law, which originates from Article 2 of the Constitution, also contains the requirement that regulations must be clear and definite. In conformity with the constitutional requirement that a statute must be definite, interferences with constitutional rights must be regulated precisely and unambiguously. If a norm is not clearly defined there is the possibility of the different application of the statute and the arbitrariness of state authorities or other authorities exercising public authority that decide on the rights of individuals. This must also be considered.

The purpose of the provision of Article 35.1 of the Police Act, which regulates police authority concerning the establishment of identity and which entails an interference with Article 35 of the Constitution, is to ensure the effective implementation of the tasks of the police in accordance with Article 3 of the Police Act. From this view the challenged provision pursues a constitutionally admissible aim, and the exercise of police authority is also a necessary and appropriate measure for ensuring such an aim. **However, due to its indeterminacy (Article 2 of the Constitution) the challenged provision the Police Act does not stand the test of proportionality in the narrow sense and as such does not meet the requirements of foresee ability.** The circumstances or criteria which enable a police officer to conclude that "it is suspected that a person will perpetrate, is perpetrating, or has perpetrated a minor or criminal offence" are not sufficiently defined in particular when such concerns "appearance" and "being situated in a certain place". Thus, due to its indeterminacy the challenged provision allows excessive interferences with the right to the inviolability of privacy protected by Article 35 of the Constitution.

Decision no. U-I-57/06 of 29 March 2007, Official Gazette RS, Nos. 100/05, 46/06 and 33/07

Article 38.1 of the Constitution ensures the protection or personal data as a special aspect of privacy. In order to prevent the danger of spreading information concerning a certain individual without the individual's approval, particularly in the era of developed information technology, the

Constitution: (1) prohibits the use of personal data contrary to the purpose for which it was collected, (2) determines the collection, processing, designated use, supervision and protection of the confidentiality or personal data as a subject to be regulated by law, and (3) grants everyone the right of access to the collected personal data that relates to him or her and the right to judicial protection in the event of any abuse of such data. **An interference with this constitutional guarantee of personal data protection is allowed in cases determined by Article 15.3 of the Constitution. On the basis of Article 15.3 of the Constitution, it is possible to limit human rights only in cases as are provided by the Constitution and by the rights of others. In accordance with the established case-law of the Constitutional Court it is possible limit a human right or fundamental freedom if the legislature pursued a constitutionally admissible aim and if the limitation is in conformity with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with the one of the principles which prohibits excessive state interferences (the general principle of proportionality).**

From the legislative documents it follows that the public access to data on the incomes and property of officials was introduced due to the transparency of performing public offices and due to the prevention of manipulation with such data. This is an expression of the general principle of legality of the operation of state authorities and their officials. Thus, by determining the public character of the data on property of officials the legislature pursued a constitutionally admissible aim. The public interest in the transparent operation of public offices is also recognized in certain other states.

In the continuation it is necessary to evaluate whether the interference with the right to the constitutional protection of personal data of officials is in conformity with the general principle of proportionality. Concerning such, it is necessary to consider that the criteria in this case must be milder than in the event of other individuals. However, also in this case the interference with personal data protection must be limited by the extent that suffices for the achieving of a constitutionally admissible aim. The data on property that officials must submit to the National Assembly Commission are very detailed and also refer to the circumstances and periods of time which are not connected with the performance of the public office or do not depend on such. Thus, to realize the goal of corruption prevention the publication of certain such data is not necessary. The public character of all these data on the property of an official does not contribute to the transparency of performing the public office. This data are only needed by the National Assembly Commission as they enable a comparison with the data on property from the time when the office was performed and thereby a control over incompatibilities. According to the nature of things, only the publication of data on property and income of an individual – public official –which were acquired during the period of the performance of the public office or during a certain period of time after the termination of such would contribute to the transparency of performing the public office. There seems to be no sound reason, however, connected with the constitutional aim to publish a greater extent of data. According to the Constitutional Court, the publication of certain data on property even excessively endangers the right to personal safety determined in Article 34 of the Constitution. It can namely contribute to the fact that persons whose data are published become targets of criminal (theft, blackmailing, etc.). Therefore, the Constitutional Court established that the matter in this part concerned an un-proportionate and thus constitutionally inadmissible interference with personal data protection. Concerning the above-mentioned, Article 5.3 and Article 9.3 of the Incompatibility of Holding Public Office with Profitable Activity Act, in so far as they refer to the data on property and incomes of an official determined in Article 10.5–10 of the Incompatibility of Holding Public Office with Profitable Activity Act also for the period which is not connected with the performance of the public office, are inconsistent with Article 38.1 of the Constitution, and the Constitutional Court annulled such.

In this case, the Constitutional Court didn't implement the **so-called test of proportionality** in a whole because it established that the legislature's limitation of the right to the personal data protection was not pressing.

Decision No. Up-406/05 of 12 April 2007, Official Gazette RS, No. 35/07

A constitutionally admissible reason for the interference of courts with the [constitutional] complainant's right to freedom of artistic endeavor may exist in the fact that by her short story the [constitutional] complainant interfered with the human rights of others (i.e. the personality rights of the plaintiffs which are protected by Articles 34 and 35 of the Constitution).

However, the interference [of the courts] is constitutionally admissible only if it is proportional with the aim pursued by the court. Regarding such, the gravity of the interference with the [constitutional] complainant's right to freedom of artistic endeavor, on one hand, and the gravity of the [constitutional] complainant's interference with the personality rights of the plaintiffs, on the other, must be weighed against each other. The latter depends on the degree of the offensiveness of the [constitutional] complainant's writing and the plaintiffs' feeling of being offended. The Constitutional Court reviewed whether the reasons which were stated by the courts are sufficient for the courts to justify their interference with the [constitutional] complainant's right.

However, such aim by itself does not suffice for concluding that the courts admissibly interfered with the [constitutional] complainant's right to freedom of artistic endeavor. In order for such to be constitutionally admissible, the interference must be proportional with the aim pursued by the court. In Decision No. Up-422/02, dated 10 March 2005 (Official Gazette RS, No. 29/05 and OdlUS XIV, 36), the Constitutional Court established the fundamental criteria which must be regarded when the above-mentioned human rights are weighed in each individual case. It adopted the standpoint that in the collision of two equal rights (e.g. two rights that are both constitutionally protected), a limitation regarding their content is necessary for both rights and not only for one of them. Also the European Court of Human Rights (hereinafter referred to as the Court) in such cases reviews the interference in the light of the case as a whole and determines whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national courts to justify their interference are "relevant and sufficient." Regarding such, the gravity of the interference with the [constitutional] complainant's right to freedom of artistic endeavor, on one hand, and the gravity of the [constitutional] complainant's interference with the personality rights of the plaintiffs, on the other, must be weighed below. The latter depends on the degree of the offensiveness of the [constitutional] complainant's writing and the plaintiffs' feeling of being offended.

As regards the above-mentioned, the Constitutional Court first reviewed the standpoint of the courts regarding the degree of offensiveness of the [constitutional] complainant's writing. Offensiveness is a legal standard, i.e. a legal term for which the legislature determined only a framework, whereas it left it to the person who will apply the particular legal norm, thus to a judge, to determine its more precise content. Considering the existing standards of civilization and the social circumstances in general, a judge must decide in the individual case whether the [constitutional] complainant in exercising her rights (in the present case the right to freedom of artistic endeavor) acted in accordance with her duties and responsibilities. The courts decided that the personality characteristics which the [constitutional] complainant attributed to the main character (e.g. desire for profit, for the fulfillment of which she was willing to violate laws, "sell" herself to sailors, comply with the requests of her spouse for intimacy, exploit her children) are unacceptable already from a general perspective. Therefore, the courts assessed as convincing the statements contained in the action that such characteristics of a wife and a mother of seven children, who raised a family in the first half of the past century in a predominantly rural environment with deeply rooted Christian values, are in this environment perceived as disgraceful and are condemned.

The Constitutional Court assesses that there are not enough arguments supporting such standpoint of the courts. As follows from the previous item of the reasoning, the courts entirely recognized the plaintiffs' subjective feeling of being offended by certain descriptions in the disputed book. In determining the (un)offensiveness of the descriptions of the events and acts of literary figures what is more relevant than the subjective perception of the plaintiffs is whether the descriptions of events and acts of literary characters could be perceived as offensive from an objective point of view. In the assessment of the Constitutional Court, the very concept of the [constitutional] complainant's short story indicates to an average reader that it is not a description of reality which by itself requires a certain restraint of the reader to understand the described events and acts as literal. The Constitutional Court assesses that the descriptions of the acts and events in the disputed book are, objectively speaking, not offensive and also do not indicate the offensive intent of the [constitutional] complainant. This holds true not only for the description of the main character, whom the [constitutional] complainant in her short story depicted as an exceptional woman who is determined and self-confident in her business and in her home, but also for the description of the literary character Minka, who found herself in prison in war circumstances and whom the [constitutional] complainant mentioned in her short story only when telling a story of how the main character went to save one of the prisoners from the prison in V. Thus, the manner of the [constitutional] complainant's writing (which is not mocking or degrading) as well as the aim which the [constitutional] complainant pursued by writing the disputed short story (i.e. the creation of a fictitious story about fictitious literary characters) indicate that the [constitutional] complainant did not have the intent to offend anyone. **Therefore, in the opinion of the Constitutional Court the reasons by which the courts reasoned their standpoint regarding the offensive nature of the [constitutional] complainant's writing does not suffice for the courts to justify the interference with the [constitutional] complainant's right to freedom of artistic endeavor.**

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