

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1), (2) and (3) and Articles 60 and 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Zlatko M. Knežević, President,

Mr. Mato Tadić, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Angelika Nußberger, and

Ms. Helen Keller

Having deliberated on the request filed by **Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request**, in case no. **U 5/16**, at its session held on 26 March 2021, adopted the following

SECOND PARTIAL DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by **Borjana Krišto**, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request, for review of constitutionality of the provisions of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13),

it is hereby established that the second sentence of paragraph 1 and paragraph 2 of Article 109 of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13), are inconsistent with the provisions of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, pursuant to Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to harmonise the second sentence of paragraph 1 and paragraph 2 of Article 109 of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05,

46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13), with the provisions of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, not later than six months after publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the time limit given in the preceding paragraph, about the measures taken to enforce this Decision, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

It is hereby established that the first sentence of paragraph 1 of Article 109 of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05 , 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) is consistent with the provisions of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the provisions of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of*

Bosnia and Herzegovina, the Official Gazette of the Republika Srpska and the Official Gazette of the Brčko District of Bosnia and Herzegovina.

REASONING

I. Introduction

1. On 27 June 2016, Borjana Krišto, Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of filing the request (“the applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for the review of constitutionality of the provisions of Article 84(2), (3), (4) and (5), Article 109(1) and (2), Article 117(d), Article 118(3), Article 119(1), Article 216(2), Article 225(2) and Article 226(1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09, 93/09 and 72/13; “the Code”) with the provisions of Article I(2), II(3)(b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 1 July 2016 to submit their respective replies to the request.

3. The House of Representatives and the House of Peoples submitted their replies to the request on 1 August and 28 July 2016.

4. Pursuant to Article 90(1)(b) of the Rules of the Constitutional Court, the Constitutional Court, at the session held on 30 and 31 March 2017, decided that, at the time, the President of the Constitutional Court Mirsad Ćeman and Judge Seada Palavrić would not participate in the work

and decision-making in the present case as they had participated as representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina in enacting the Code, the provisions of which are contested.

5. At the plenary session held on 1 June 2017, the Constitutional Court took a partial decision (“The First Partial Decision”) pursuant to Article 60 of the Rules of the Constitutional Court, wherein it established that the provisions of Article 84(2), (3) and (4) of the Code were not compatible with Article I(2) of the Constitution of Bosnia and Herzegovina, that Article 117(d) of the Code was not compatible with Article I(2) in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina, that Article 118(3) of the same Code was not compatible with Article I(2) in conjunction with Article II(3)(f) of the Constitution of Bosnia and Herzegovina, that Article 225(2) of the Code was not compatible with Article I(2) in conjunction with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and that Article 226(1) of the Code was not compatible with Article I(2) of the Constitution of Bosnia and Herzegovina.

6. In the same decision, the Constitutional Court established that Article 84(5) of the same Code was compatible with Article I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, that Article 119(1) of the same Code was compatible with Article I(2) and II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and that Article 216(2) was compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and Article 13 of the European Convention.

7. On that occasion, the Constitutional Court postponed the adoption of a decision on the part of the request relating to the compatibility of the provisions of Article 109(1) and (2) of the Code with the provisions of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

III. Request

a) Allegations stated in the request

8. The applicant complains that the provisions of Article 109(1) and (2) of the Code are in contravention of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

9. In support of the mentioned complaints the applicant alleges that the mentioned provisions prescribe the taking of blood samples and other medical procedures, and criteria according to which, against the will and without consent of accused and other persons, they may be subjected to such medical treatments, which may raise the issue of inhuman and degrading treatment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. The applicant refers to the case-law of the European Court of Human Rights (“the European Court”), according to which the right to private life is narrowly connected to the term of personal integrity, and any interference with the physical integrity must be prescribed by law and must be proportionate to the legitimate aim for which it is exercised and for which the consent of the given person is required. In the light of the case-law of the European Court (the applicant specifies the judgments of the European Court) any performance of coercive medical procedure with the aim of collecting evidence must be convincingly justified by the facts of the present case, whereby it is necessary to be mindful of the severity of the criminal offence concerned, and it must also be shown that the alternative methods of gathering evidence were considered. Besides, the procedure must not be followed by any risk of permanent damage to the suspect’s health. The provisions of Article 109(1) and (2), from the aspect of Article 3 of the European Convention, do not specify the degree to which coercive medical procedure is necessary for obtaining evidence, the risk to the suspect’s health, the manner in which the procedure is performed and the physical pain and mental suffering the procedure inflicts, the degree of available physician’s (medical) supervision and the effects on the suspect’s health.

b) Reply to the request

10. The House of Representatives, Constitutional-Legal Committee, indicated that it had considered the respective request and that, with six votes “in favour”, one vote “against” and one

“sustained” vote, it had adopted a conclusion reading as follows: “The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of BiH considered the request of the Constitutional Court of BiH [...] and adopted the conclusion that the Parliamentary Assembly of BiH had adopted the Criminal Procedure Code of Bosnia and Herzegovina”.

11. The House of Peoples, Constitutional-Legal Committee, indicated that it had considered the respective request and that the Constitutional Court, in accordance with its competence, should decide on the harmonization of the Code with the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

12. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13¹), in its relevant part, reads as follows:

Article 109

Physical Examination and Other Procedures

(1) *A physical examination of a suspect or the accused shall be performed, even without his consent, if necessary, to determine the facts important for criminal proceedings. A physical examination of other persons may be performed without their consent only when it has to be established that a specific trace or other consequence of a criminal offence may be found on their body.*

(2) *In accordance with the rules of medical science, blood and other medical procedures may be taken for analysis and determination of other facts important to criminal proceedings even without the consent of the person*

¹The Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 65/18) while the proceedings before the Constitutional Court were pending.

being examined, if it would not pose any harm to the health of person examined.

(3) *Physical examination of the suspect or the accused and other related procedures shall be ordered by the Court, and if the delay poses a risk then it shall be ordered by the Prosecutor.*

(4) *It shall not be allowed to perform a medical intervention on the suspect, accused or witness or to administer to them agents that would affect their will in giving testimony.*

(5) *If actions are taken contrary to the provisions of this Article, the decision of the Court may not be based on the evidence obtained in this manner.*

V. Admissibility

13. In examining the admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

14. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

15. The Constitutional Court notes that the respective request was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time when the request was filed. In the case at hand, this is a part of that request that was not decided in the First Partial Decision. In that decision, the remaining part of the request was declared admissible in the light of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 19 of the Rules of the Constitutional Court. Given the aforementioned, the Constitutional Court concludes that this part of the request is also admissible.

VI. Merits

16. The applicant complains that the provisions of Article 109(1) and (2) of the Code are inconsistent with Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

17. The Constitutional Court states that the provisions of Article 109 of the Code prescribe as follows: *A physical examination of a suspect or the accused shall be performed, even without his consent, if necessary, to determine the facts important for criminal proceedings. A physical examination of other persons may be performed without their consent only when it has to be established that a specific trace or other consequence of a criminal offence may be found on their body. In accordance with the rules of medical science, blood and other medical procedures may be taken for analysis and determination of other facts important to criminal proceedings even without the consent of the person being examined, if it would not pose any harm to the health of person examined. Physical examination of the suspect or the accused and other related procedures shall be ordered by the Court, and if the delay poses a risk then it shall be ordered by the Prosecutor. It shall not be allowed to perform a medical intervention on the suspect, accused*

or witness or to administer to them agents that would affect their will in giving testimony. If actions are taken contrary to the provisions of this Article, the decision of the Court may not be based on the evidence obtained in this manner.

18. The Constitutional Court observes that the legislator has stipulated by the challenged provisions that a physical examination of a suspect or the accused is performed, even without his consent, if necessary, to determine the facts important for criminal proceedings. In addition, a physical examination of other persons may be performed without their consent only when it has to be established that a specific trace or other consequence of a criminal offence may be found on their body. The challenged provisions also allow for, in accordance with the rules of medical science, other medical actions important to criminal proceedings even without the consent of the person being examined, if they would not pose any harm to the health of person examined.

19. Therefore, the impugned provisions, on the one hand, prescribe the possibility of physical examination or medical intervention of the suspect/accused without his/her consent (Article 109, paragraph 1, first sentence and paragraph 2 of the Code). On the other hand, they prescribe a physical examination and medical intervention in relation to other persons (Article 109, paragraph 1, second sentence and paragraph 2 of the Code).

20. The Constitutional Court notes that the European Court of Human Rights, in the case of *Y.F. v. Turkey* (see European Court, *Y.F. v. Turkey*, judgment of 22 July 2003, Application no. 24209/94, paragraph 33), reiterated in this connection that a person's body concerns the most intimate aspect of private life. Thus, a physical examination as well as a compulsory medical intervention, even if they are of minor importance, constitute an interference with this right. It is clear that the provisions of the Code therefore allow an interference with the right to private life. The Constitutional Court reiterates that such interference is justified in the light of Article 8(2) only if it is "in accordance with the law", if it pursues one or more legitimate goals adduced in paragraph 2 and is "necessary in a democratic society" in pursuit of that goal or goals. Furthermore, pursuant to Article 8(2), "in accordance with the law" requires in principle, firstly, for the disputable measure to have a certain foundation in domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to a person concerned who must, additionally, be able to anticipate the circumstances

for oneself, and that the measure must be in accordance with the rule of law (see, European Court, *Kruslin v. France*, judgment of 24 April 1990, Application no. 11801/85, paragraph 27, Series A no. 176-A). Furthermore, Constitutional Court reiterates that an interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued (see, European Court, *Coster v. the United Kingdom*, judgment of 18 January 2001, application no. 24876/94, paragraph 104).

As to paragraph 1, first sentence and paragraph 2 of Article 109 of the Code (in relation to suspects/ accused persons)

21. The Constitutional Court observes that the legislator has prescribed that a physical examination of a suspect or accused person may be ordered without his/her consent if it is necessary to establish the facts relevant to the criminal proceedings. As regards the taking of blood samples and other medical procedures, the legislator has prescribed as a condition that these actions should be taken in accordance with the rules of medical science, without the consent of the persons being examined, in order to establish the facts relevant to the criminal proceedings, provided that such actions would not pose any harm to the health of person examined. Therefore, it follows from the above provisions that the only condition in the first case prescribed by the legislator is that it be necessary to determine the facts important for criminal proceedings. In relation to medical procedures to be taken, the legislator prescribed as a condition that such taking of medical procedures would not pose any harm to the health of the person examined and, furthermore, that they are accomplished in accordance with the rules of medical science. In this regard, the Constitutional Court recalls that the European Court considers that there may be provisions framed in rather broad terms that introduce elements of uncertainty, but that this may be necessary if it is intended to lay down rules of general application (see: *Ahmed et al. v. the United Kingdom*, para. 45 no. 22954/93 of 2 September 1998) and to avoid excessive rigidity (see *Kokkinakis v. Greece*, 25 May 1993, para. 40, Series A no. 260-A).

22. In the present case, the Constitutional Court notes that the Code of Criminal Procedure defines rules of general application. The legislator prescribed general conditions under which a

suspect/accused person would be subject to the measures referred to in the impugned provisions. The Constitutional Court finds that it does not ensue from the impugned provisions that the persons (suspect/accused) to whom these provisions apply cannot clearly and specifically know their rights and duties and anticipate the consequences which a given action may entail for them. In this context it is understood that “in accordance with rules of medical science” means that only medically trained staff is allowed to take the measures. If interpreted like that the impugned provisions satisfy the condition “in accordance with the law” of Article 8 of the European Convention. As to the question whether the restrictions prescribed by the challenged provisions have a legitimate aim, the Constitutional Court observes that the issues encompassed by the challenged provisions pursue a legitimate aim reflected in the collection of evidence for the purpose of resolving a criminal matter and uncovering objective truth. In this connection, the Constitutional Court recalls the case of the European Court *Schmidt v. Germany* (see, *Schmidt v. Germany*, judgment of 16 August 2002, no. 32352/02), which states: “The Court further considers that the taking of a blood and saliva sample was ordered in order to determine the applicant’s authorship for a criminal offence. This offence, which consisted in casting false suspicion on a third person, forgery and defamation, was of a severe nature in the light of the particular circumstances of the case and was connected with the investigation of a fatal attack on a Turkish family which caused nationwide public attention. Therefore, the order served a legitimate aim, namely the interests of national security and public safety.” The case law of the European Court of Human Rights thus shows that there always has to be a reasonable relationship of proportionality between the public interest in prosecution of a crime and the rights of the person concerned. The impugned provision does not mention that explicitly, but has to be interpreted in that way in light of the direct applicability of the European Convention of Human Rights in Bosnia and Herzegovina (Article II (2) of the Constitution of Bosnia and Herzegovina).

23. The Constitutional Court further observes that actions taken in the light of the mentioned provisions can also give rise to the issue of inhuman and degrading treatment. In this connection, the Constitutional Court refers to the judgment of the European Court in case *Jalloh v. Germany* (see European Court, judgment of 11 July 2006, Application no. 54810/00, para. 70), which stressed that Articles 3 and 8 of the European Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Obtaining evidence in this manner does

not in itself represent violation of these Articles of the European Convention. However, any recourse to a coercive medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case (see European Court, see *Jalloh v. Germany*, judgment of 11 July 2006, Application no. 54810/00, para. 71). This is of particular importance for the proceedings in which evidence must be obtained from the body. The intervention must not attain the minimum level of severity that would bring it within the scope of Article 3. The procedure must therefore not represent any risk of damage to the health of a suspect and must not involve great physical suffering, Furthermore, it must be shown that other methods of obtaining evidence had been taken into consideration. Due attention must be given to the severity of the offence. In addition, it has to be considered whether the coercive medical procedure was ordered and carried out by the doctors, whether the person was under continuous medical supervision and whether coercive medical procedure caused deterioration of his/her health or had permanent consequences for his/her health. Therefore, the European Court demands that any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny (see, also, European Court, the case of *Salikhov v. Russia*, judgment of 3 May 2012, application no. 23880/05, para. 75).

24. The Constitutional Court has already concluded that the legislator has elaborated a clear general legal framework and that it has prescribed the conditions under which suspects/accused would be subjected to the measures referred to in the challenged provisions with sufficient clarity and foreseeability. The Constitutional Court has also concluded that the actions in light of the mentioned provisions can give rise to the issue of inhuman and degrading treatment and referred to the standards established in the case-law of the European Convention. The provisions of Article 109 regulate the issue of obtaining evidence found on or in human body. *Inter alia*, the legislator stipulated that physical examination of a suspect or accused and other related procedures shall be ordered by the Court, and if the delay poses a risk then it shall be ordered by the Prosecutor. The Constitutional Court finds nothing in the challenged provisions that could prevent application of the referenced standards arising under the case-law of the European Court. The Constitutional Court reiterates that Article II(2) of the Constitution of Bosnia and Herzegovina reads that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina and the provision of the European Convention shall have priority over

all other law. Therefore, in this manner, an obligation is determined that the human rights and fundamental freedoms standards are applied in the proceedings and adopted decisions. If considered that the rights and freedoms arising under the European Convention and its Protocols are applied directly in Bosnia and Herzegovina and that they have priority over all other law, then it is clear that the provisions of the Code and, in particular, the challenged provisions of Article 109 paragraphs 1 and 2 of the Code, in the part relating to a suspects/accused, are to be interpreted in accordance with the provisions of the European Convention and case-law of the European Court. In this connection, the Constitutional Court refers to an obligation of applying the standard of human rights and fundamental freedoms in the process of taking action in the light of the challenged provisions. If the challenged provisions are applied contrary to these standards, then the adequate protection may be secured before the courts and the Constitutional Court as the final instance.

25. In view of the aforementioned, the Constitutional Court finds that the paragraph 1, first sentence and paragraph 2 of Article 109 of the Code (in relation to suspects/accused) are not inconsistent with Article II(3)(b) and (f) and Articles 3 and 8 of the European Convention.

As to paragraph 1, second sentence and paragraph 2 of Article 109 of the Code (in relation to other persons)

26. The Constitutional Court notes that the legislator prescribed by the impugned provisions the possibility of physical examinations of other persons without their consent only when it has to be established that a specific trace or other consequence of a criminal offence may be found on their body (second sentence of paragraph 1 of Article 109 of the Code). In addition, the Constitutional Court notes that in Article 109, paragraph 2 of the Code, the legislator prescribed that blood samples and other medical procedures may be taken and carried out for analysis and determination of other facts important to criminal proceedings even without the consent of the person being examined, if it would not pose any harm to the health of the person examined. The Constitutional Court notes that this paragraph is not sufficiently precise in its wording, but that it is obvious that it relates to both suspects/accused and other persons. In this connection, the Constitutional Court will analyse the constitutionality of paragraph 2 in relation to other persons, and the second sentence of paragraph 1 of Article 109 of the Code.

27. The Constitutional Court reiterates that such interference is to be analysed in light of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention and is justified only if it is “in accordance with the law”, if it pursues one or more legitimate goals adduced in paragraph 2 and is “necessary in a democratic society” in pursuit of that goal or goals (see above).

28. In the present case, the legislator *a priori* provided that all persons who are not suspected of any wrongdoing (other persons) may be subjected to a physical examination and the taking of blood samples and other medical procedures without their consent if there is a specific trace or other consequence of a criminal offence on their body or for the purpose of analysing and establishing other facts important for criminal proceedings. The wording of the provision is thus very broad, especially in respect to “other medical procedures” that can be anything from DNA testing to a gynaecological examination. The only precondition for such an interference is that it is “necessary to establish the facts important to criminal proceedings”.

29. According to the jurisprudence of the European Court of Human Rights, as a rule, consent is required for any interference with the bodily integrity of a person who is not suspected of a crime, but only accidentally linked to it. Thus, it has held in the above cited case of *Y.F. v. Turkey*, para. 43: *Finally, while the Court accepts the Government's submission that the medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment, it considers that any interference with a person's physical integrity must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts.* The Court acknowledges in its jurisprudence that there may be exceptions to this rule in case of minor interferences such as taking the cellular material by means of a buccal swab or DNA testing (see European Court, *Romina Caruana v. Malta*, para. 29, 30, Application no. 41079/16). It should, however, be made clear in the law that medical interventions of persons who are not accused of any crime are only allowed without the consent of the person concerned under narrowly defined conditions and have always to be considered as an exception, and not as the rule. The relevant preconditions for such a broad spectrum of medical interventions has to be clearly defined in the law.

30. The Constitutional Court reiterates that the legislator provided that all persons who are not suspected (other persons) may be subjected to a physical examination and the taking of blood samples and other medical procedures without their consent if there is a specific trace or other consequence of a criminal offence on their body or for the purpose of analysing and establishing other facts important for criminal proceedings. It notes that the wording of the provision does not specify what is meant by “other medical procedures”. Given the insufficient precision and the lack of additional safeguards for performing “other medical procedures” on “other persons” the Constitutional Court holds that this part of the provision does not comply with the principle of legality.

31. In addition, the Constitutional Court notes that the legislator distinguished throughout the text of Article 109 between the rules applied to „suspect and accused persons“ and to „other persons“. A literal reading of the text of Article 109 para. 3 thus suggests that a Court order replaced by an order by the prosecutor in case of urgency, is only required for the physical examination of the suspect or the accused. The paragraph also mentions „other related procedures“, i.e. those mentioned in Article 109 para. 2, but not the application of this specific safeguard to „other persons“.

32. Therefore, according to these provisions, it is not possible to carry out a physical examination of a suspect or accused and other actions without a court order, while a physical examination and other actions in respect of “other persons”, according to the provisions of Article 109 of the Code, can be carried out without a court order.

33. In view of the above, by prescribing the provisions in question in this manner, the legislator did not regulate the preconditions for the interference into the bodily integrity of “other persons” in a sufficiently clear manner and thus failed in this part of the regulation to meet the condition “in accordance with the law” under Article 8 of the European Convention, *i.e.* did not ensure that the interference with the right referred to in Article 8 was only to the extent that was strictly necessary for safeguarding the democratic institutions. It is not within the jurisdiction of the Constitutional Court how the legislator will regulate this issue; however, the legislator must comply with the requirements of Article 8 of the European Convention, *i.e.* satisfy the condition “in accordance with the law” *i.e.* limit itself to what is necessary in a democratic society. In this part, the Constitutional Court recalls that the issue of constitutionality is not an inappropriate

implementation of certain legal solutions if those solutions are, in themselves, consistent with the Constitution. In such situations, in case of abuse regarding the implementation of legal provisions, there are other appropriate protection mechanisms. However, in the case at hand, it is not such a situation but a situation where the impugned provisions, in themselves, are obviously contrary to the Constitution of Bosnia and Herzegovina, as regards their implementation.

34. The Constitutional Court concludes that the second sentence of paragraph 1 of Article 109 of the Code is in contravention of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In addition, the Constitutional Court concludes that paragraph 2 of Article 109 of the Code, in relation to other persons, is in contravention of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

35. Having regard to its previous conclusion with respect to a violation of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the Constitutional Court will not consider the violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

VII. Conclusion

36. The Constitutional Court concludes that the second sentence of paragraph 1 of Article 109 of the Code read in conjunction with paragraph 3 is in contravention of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention. In addition, the Constitutional Court concludes that paragraph 2 of Article 109 of the Code, in relation to other persons, is in contravention of Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

37. In addition, the Constitutional Court concludes that the first sentence of paragraph 1 and paragraph 2 of Article 109 of the Code (in relation to suspects/accused) are not in contravention of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention, as interpreted and applied by the European Court of Human Rights.

38. Having regard to Article 59(1), (2) and (3) and Articles 60 and 61(4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of the present Decision.

39. Pursuant to Article 43 of the Rules of the Constitutional Court, Judge Miodrag Simović gave a statement of dissent.

40. Pursuant to Article VI(5) of the Constitution of BiH, decisions of the Constitutional Court shall be final and binding.

Zlatko M. Knežević
President
Constitutional Court of Bosnia and Herzegovina