

## **The Constitutional Court: judges may not be unreasonably singled out from society and have a privilege prohibited under the Constitution**

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By its ruling adopted today, the Constitutional Court has recognised that Paragraph 2 of Article 47 of the Law on Courts is in conflict with Paragraph 2 of Article 109 and Paragraph 2 of Article 114 of the Constitution, as well as with the constitutional principle of a state under the rule of law. In addition, Paragraph 4 of Article 8 of the Law on the Constitutional Court has been found to be in conflict with Paragraphs 1 and 4 of Article 104 of the Constitution and the constitutional principle of a state under the rule of law.

The Seimas applied to the Constitutional Court requesting it to interpret whether Paragraph 2 of Article 47 of the Law on Courts is not in conflict with the Constitution insofar as, under this paragraph, entry into the residential or office premises of a judge, an inspection or a search of or making a seizure in such premises, an inspection or a search of or making a seizure in a personal or service car or other personal means of transport of a judge, an inspection or a search of a judge, or an inspection or making a seizure of the items or documents of a judge is prohibited, except in cases provided for by law.

The Constitutional Court has previously noted that the Constitution consolidates such a concept of a democratic state under the rule of law according to which the state not only seeks to protect and defend a person and society against crimes and other dangerous violations of law, but is also able to do this effectively; in addition, the Constitution gives rise to the obligation of the state to ensure the security of each person and all society against criminal attempts. The Constitutional Court has also noted that the purpose of the independence of judges and courts, entrenched in Paragraph 2 of Article 109 of the Constitution, is to ensure the administration of justice, which is the exclusive function of the judiciary. One of the guarantees of the independence of judges is the immunity of judges, consolidated, among others, in Paragraph 2 of Article 114 of the Constitution, under which judges may not be held criminally liable or be detained, or have their liberty restricted otherwise, without the consent of the Seimas or, in the period between the sessions of the Seimas, without the consent of the President of the Republic. The Constitutional Court has held that immunity means additional guarantees for the inviolability of the person that are necessary and indispensable for the proper performance of the duties of that person.

In this ruling, the Constitutional Court emphasised that, under the Constitution, among other things, under Paragraph 2 of Article 114, if it is interpreted in conjunction with Paragraph 2 of Article 109 of the Constitution, the immunity of judges is not an objective in itself and is functional in nature: its purpose is to guarantee the independence of judges, so that the administration of justice is ensured. Only such a concept of the immunity of judges is compatible with the obligation, stemming from the Constitution, for a democratic state governed by the rule of law to ensure the security of each person and all society against criminal attempts, including with the duty of the legislature to create, by means of legal regulation, the preconditions for the speedy disclosure and thorough investigation of criminal acts and other violations of law, as well as the preconditions for the fair solving of the question concerning the legal responsibility of persons having committed these criminal acts or other violations of law. Thus, in Paragraph 2 of Article 114 of the Constitution, the immunity of judges is not entrenched for the purpose

of creating the preconditions for judges to avoid criminal or other legal responsibility for criminal acts or other violations of law.

It should be emphasised that a different interpretation of the immunity of judges, including that, purportedly, the legislature may provide for the broader immunity of judges than that entrenched in Paragraph 2 of Article 114 of the Constitution, would be incompatible with the constitutionally consolidated concept of a democratic state under the rule of law, among other things, it would be incompatible with the above-mentioned constitutional obligation of the state to ensure the security of each person and all society against criminal attempts; the said different interpretation of the immunity of judges would also unreasonably single out judges from society and would imply a privilege, prohibited under Paragraph 2 of Article 29 of the Constitution.

The Constitutional Court pointed out that the requirement, under Paragraph 2 of Article 114 of the Constitution, that judges may not be held criminally liable or be detained, or have their liberty restricted otherwise, without the consent of the Seimas or the President of the Republic is consolidated for the purpose of enabling the maximum protection of judges against unfoundedly being held criminally liable, being detained, or having their liberty restricted otherwise in cases where it would thereby be sought to influence the decisions of judges. The said consent of the Seimas or the President of the Republic may be given only in cases where, in accordance with the procedure prescribed by law, sufficient data are collected to suspect the judge concerned of having committed a criminal act; this consent is required only for such restriction of the physical liberty of a judge that is aimed at providing the preconditions for holding the judge criminally liable or otherwise legally responsible for having committed criminal acts or other violations of law; among other things, this consent is required for apprehension, detention, or the deprivation of liberty otherwise. However, under Paragraph 2 of Article 114 of the Constitution, no consent of the Seimas or the President of the Republic is required for such procedural measures provided for by law that, in themselves, do not restrict the physical liberty of the person and that are necessary for the speedy disclosure and thorough investigation of criminal acts and other violations of law, including for collecting evidence and identifying persons having committed criminal acts or other violations of law (among other things, for carrying out a search or seizure or an inspection).

The Constitutional Court underlined that a different interpretation of Paragraph 2 of Article 114 of the Constitution, including that, purportedly, the consent of the Seimas or the President of the Republic is necessary for any procedural measures that, in themselves, do not restrict the physical liberty of the person but are related to performing the person's duties prescribed by law in applying these measures, would create the preconditions for persons, including judges, having committed criminal acts or other violations of law to avoid criminal or other legal responsibility, while the requirement that the above-mentioned consent be given would be incompatible with the obligation, stemming from the Constitution, for a democratic state governed by the rule of law to ensure the security of each person and all society against criminal attempts, among other things, to fairly solve the question concerning the legal responsibility of persons, including judges, having committed these criminal acts or other violations of law.

The requirement, consolidated under Paragraph 2 of Article 114 of the Constitution, to receive the consent of the Seimas or the President of the Republic in order to apprehend a judge may not be

interpreted as precluding the apprehension of a judge, in accordance with the procedure prescribed by law and if necessary, where the judge is found in the act of committing a crime or another violation of law. A different interpretation, including that, purportedly, the absence of the consent in question would preclude the restriction of the liberty of a judge where the judge is found in the act of committing a crime or another violation of law would be incompatible with the obligation, stemming from the Constitution, for a democratic state governed by the rule of law to ensure the security of each person and all society against criminal attempts, since it would create the preconditions for the judge to avoid legal responsibility for the committed criminal act or another violation of law. However, in cases where a judge is found in the act of committing a crime, under Paragraph 2 of Article 114 of the Constitution, it is necessary, without undue delay, to receive the consent of the Seimas or, in the period between the sessions of the Seimas, the consent of the President of the Republic for holding the judge criminally liable.

The Constitutional Court is part of the judiciary; it is an autonomous and independent court, which administers constitutional justice, guarantees the supremacy of the Constitution in the legal system, and ensures constitutional lawfulness. The immunity of the justices of the Constitutional Court is consolidated in Paragraph 4 of Article 104 of the Constitution, under which the justices of the Constitutional Court have the same rights concerning the inviolability of their person as the members of the Seimas. According to Paragraph 1 of Article 104 of the Constitution, while in office, the justices of the Constitutional Court are independent of any other state institution, person, or organisation and follow only the Constitution of the Republic of Lithuania. Thus, the immunity of the justices of the Constitutional Court, as consolidated in Paragraph 4 of Article 104 of the Constitution, is the guarantee of their independence while they are in office.

It should be noted in this context that, under Article 62 of the Constitution, the person of a member of the Seimas is inviolable; a member of the Seimas may not be held criminally liable or be detained, or have his/her liberty restricted otherwise, without the consent of the Seimas. In view of this, the Constitutional Court noted that, under Paragraph 4 of Article 104 of the Constitution, a justice of the Constitutional Court may not be held criminally liable or be detained, or have his/her liberty restricted otherwise, without the consent of the Seimas. The Constitutional Court also noted that the immunity of the justices of the Constitutional Court, in the same way as the immunity of judges as entrenched in Paragraph 2 of Article 114 of the Constitution, is functional in nature: its purpose is to guarantee the independence of the justices of the Constitutional Court, so that the administration of constitutional justice is ensured and the supremacy of the Constitution in the legal system, as well as constitutional lawfulness, is guaranteed. Thus, there are no constitutional grounds for the scope of the immunity of the justices of the Constitutional Court, which is consolidated in Paragraph 4 of Article 104 of the Constitution, to be interpreted differently from the scope of the immunity of judges, which is entrenched in Paragraph 2 of Article 114 of the Constitution. However, differently from Paragraph 2 of Article 114 of the Constitution, Paragraph 4 of Article 104 of the Constitution does not provide for the possibility for holding a justice of the Constitutional Court criminally liable, detaining him/her, or restricting his/her liberty otherwise with the consent of the President of the Republic in the period between the sessions of the Seimas.

Assessing the compliance of the impugned Paragraph 2 of Article 47 of the Law on Courts with the Constitution, the Constitutional Court noted that, under Paragraph 2 of Article 47 of the Law on Courts, if it is interpreted in conjunction with the provisions of the Code of Criminal Procedure and Paragraph 1 of Article 47 of the Law on Courts, without the consent of the Seimas or, in the period between the sessions of the Seimas, without the consent of the President of the Republic, a judge may not be subject to procedural coercive measures that, in themselves, do not restrict the liberty of the judge (inspection or a search of the judge; a seizure of the items or documents of the judge; a search of or a seizure in the residential or office premises of the judge or in a personal or service means of transport of the judge); nor is it allowed to make an inspection of the items or documents of the judge or carry out other pretrial investigation actions, among them, those that include as a constituent part entry into the residential or office premises of the judge. Under the legal regulation laid down in Articles 145–147 of the Code of Criminal Procedure, in the same way as other persons, judges may be subject to procedural coercive measures – such as a search, a search of the person, or a seizure – by an order of the pretrial investigation judge.

Thus, although these procedural coercive measures and the indicated pretrial investigation actions, in themselves, do not restrict the liberty of a judge, under the impugned legal regulation, in order to apply the said measures and carry out the indicated actions, it is necessary to receive the consent of the Seimas or, in the period between the sessions of the Seimas, the consent of the President of the Republic for holding a judge criminally liable (i.e. considering a judge a suspect), detaining him/her, or restricting his/her liberty otherwise. In addition, the consent of the Seimas or the President of the Republic for restricting the liberty of a judge is also required in order to apply, to a judge, those coercive measures that ensure the proceedings of administrative offences and are not restrictive in themselves with regard to the liberty of a judge (inspection of the judge; checking his/her items; taking his/her items and documents; or a seizure of his/her items and documents). The purpose of all these measures is not to restrict the physical liberty of judges, but to collect data, or to take items or documents that can be significant for an investigation of a criminal act or other violations of law.

In view of this, the Constitutional Court drew the conclusion that, having established the impugned legal regulation in Paragraph 2 of Article 47 of the Law on Courts, the legislature consolidated the broader immunity of judges than that entrenched in Paragraph 2 of Article 114 of the Constitution. Having established this legal regulation, the legislature did not observe the requirement, stemming from Paragraph 2 of Article 109 and Paragraph 2 of Article 114 of the Constitution, that a legal regulation may not create the preconditions for judges to avoid criminal or other legal responsibility for criminal acts or other violations of law; thereby, in addition, the legislature did not observe the obligation, stemming from the constitutional principle of a state under the rule of law, for the state to ensure the security of each person and all society against criminal attempts; thus, the legislature disregarded the constitutional concept of the immunity of judges.

Having held this, based essentially on the same arguments, the Constitutional Court also declared Paragraph 4 of Article 8 of the Law on the Constitutional Court to be in conflict with Paragraphs 1 and 4 of Article 104 of the Constitution and the constitutional principle of a state under the rule of law.

In the context of this constitutional justice case, the Constitutional Court mentioned that, the Supreme Court of Lithuania, which develops the case law of the courts of general competence, in its order of 25 November 2019 adopted in a criminal case, among other things, interpreted that Articles 145, 146, and 149 of the Code of Criminal Procedure lay down the general rules of procedural coercive measures – a search, as well as a search of a person, while Article 32 of the Code of Criminal Procedure and Paragraphs 1 and 2 of Article 47 of the Law on Courts regulate the special conditions for the application of criminal procedure, among others, procedural coercive measures, to judges; the Supreme Court of Lithuania provided such an interpretation of the legal regulation laid down in Articles 145, 146, and 149 of the Code of Criminal Procedure according to which a search, as well as a search of a person, restricts (limits) the liberty (possibility) of the person of choosing a desired behaviour, as well as his/her freedom to act (or not to act) in a particular way, and this, according to the Supreme Court of Lithuania, in principle, means the restriction of the liberty of such a person.

The Constitutional Court has held that court precedents may not be in conflict with the official constitutional doctrine. It was held in this ruling of the Constitutional Court that, among other things, the procedural coercive measures – a search, as well as a search of a person – laid down in Articles 145 and 146 of the Code of Criminal Procedure, in themselves, do not restrict the liberty of the person and that Paragraph 2 of Article 47 of the Law on Courts, insofar as under this paragraph, among other things, a search in the residential or office premises of a judge, or a search in a personal or service car of a judge, as well as a search of a judge, is prohibited, is in conflict with Paragraph 2 of Article 109 and Paragraph 2 of Article 114 of the Constitution, as well as with the constitutional principle of a state under the rule of law.

In view of this, the Constitutional Court held that the above-mentioned order of the Supreme Court of Lithuania of 25 November 2019 should not be considered a court precedent to the extent that this order provided the interpretation of Paragraph 2 of Article 47 of the Law on Courts, which was found to be in conflict with the Constitution by this ruling of the Constitutional Court.

The separate opinion by Justice Danutė Jočienė was submitted in this case.