

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1) and (3) 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. Mato Tadić, President

Mr. Miodrag Simović, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Ms. Seada Palavrić,

Mr. Zlatko M. Knežević,

Ms. Angelika Nußberger,

Ms. Helen Keller, and

Mr. Ledi Bianku

Having deliberated on the request filed by the **Municipal Court in Srebrenik (Judge Alen Lukač)**, in the case no. *U-12/21*, at its session held on 24 March 2022, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

In deciding the request filed by **the Municipal Court in Srebrenik** (Judge Alen Lukač) for review of constitutionality of Article 105 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14),

it is hereby established that Article 105 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14) is compatible with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4(1) of Protocol No. 7 to 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*.

## **R E A S O N I N G**

### **I. Introduction**

1. On 27 October 2021, the Municipal Court in Srebrenik (Judge Alen Lukač; the “applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (the “Constitutional Court”) for review of constitutionality of Article 105 of the Law on Misdemeanours (*Official Gazette of the Federation of Bosnia and Herzegovina*, 63/14; the challenged provision) with the Constitution of Bosnia and Herzegovina.

### **II. Procedure before the Constitutional Court**

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina and the Office for Cooperation and Representation of the Government of the Federation of Bosnia and Herzegovina before the Constitutional Court of Bosnia and Herzegovina (the “Government of the Federation of BiH”) were requested on 2 November 2021 to submit their replies to the request.

3. The Legislative Commissions of the House of Peoples and House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina submitted their replies to the request on 7 December 2021, respectively. The Government of the Federation of BiH submitted its reply through the Office for Cooperation and Representation before the Constitutional Court of Bosnia and Herzegovina on 18 November 2021.

### **III. Request**

#### **a) Allegations stated in the request**

4. The applicant deems that the provision of Article 105 of the Law on Misdemeanours is unconstitutional, as it is not compatible with the provisions of the Constitution of BiH and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”). Specifically, it is not compatible with the provisions of Article II(3)(d) and (e) of the Constitution of Bosnia and Herzegovina and Articles 5 and 6 of the European Convention and Article 4(1) of Protocol No. 7 to the European Convention.

5. In support of his allegations in the request regarding the incompatibility of the provision of Article 105 of the Law on Misdemeanours with the right to liberty under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(b) of the European Convention, the applicant stated the following: the mentioned provisions regulate the issue of deprivation of liberty for non-compliance with a lawful court order for the purpose of securing the enforcement of an obligation prescribed by law; the provisions on the deprivation of liberty have to be accessible, precise and foreseeable in its application; the quality of the law includes the existence of clear provisions of law; deprivation of liberty has to be lawful within the meaning of domestic law; a fair balance between securing compliance with the lawful court order in a democratic society, on the one hand, and the right to liberty, on the other hand; the conditions for the measure of deprivation of liberty have to be clear, specific and determined, in order to avoid any arbitrariness. According to the allegations of the applicant, the challenged provision does not meet the mentioned criteria and upsets a fair balance between securing the compliance with the lawful court order and the right to liberty. He indicates that the challenged provision does not contain clear and determined conditions for the application of the mechanism of the deprivation of liberty and it does not regulate a procedure and an obligation of the court to hear the punished person in an adversarial procedure. The application of the mechanism of the deprivation of liberty (as referred to in the challenged provision of Article 105 of the Law on Misdemeanours) leaves the punished person with unpaid fine in the same amount in which it existed before the very deprivation of liberty. That means that the fine was neither reduced nor calculated in the punishment, proportionate to the period spent in prison. The measure prescribed by the provision of Article 105 of the Law on Misdemeanours is more severe than the fine prescribed in the Criminal Code of the Federation of Bosnia and Herzegovina (“the FBiH Criminal Code”). In a criminal procedure, when substituting a fine with the punishment of deprivation of liberty, a formula is applied where one day of prison equals BAM 100, whereby, upon the release from prison, the fine is considered to be settled.

6. Regarding the incompatibility of the provision of Article 105 of the Law on Misdemeanours with the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, the applicant alleged the following: the present case concerns the misdemeanour procedure; the condition of existence of “criminal charges” was fulfilled considering the classification under the national legislation, the nature of misdemeanour and the nature and severity of punishment; the name of the mechanism “deprivation of liberty for non-payment” indicates that it concerns the charges of criminal nature; the mentioned provision does not guarantee the right of access to court, i.e. the hearing before a court; the punished persons were

denied the right to defence (adversariness, equality of arms, a reasoned decision). The applicant deems that it is within the competence of the Constitutional Court to examine the quality of the law, which, in the present case, implies the examination of whether the law sufficiently prescribes “the scope of discretion bestowed upon the competent bodies”. The authorization to impose the measure of deprivation of liberty for non-payment of a fine, under the challenged provision, is left to “an unlimited and legally uninhibited discretion of a judge’s will”.

7. In the opinion of the applicant, the implementation of Article 105 of the Law on Misdemeanours leads to the activation of the prohibition of double punishment under Article 4(1) of Protocol No. 7 to the European Convention. In this connection, the following was stated: the provision of Article 105 of the Law on Misdemeanours is applied to the punished persons who fail to pay, within a deadline, in full or in part, a fine imposed on them by a misdemeanour warrant; these are the punished persons against whom a procedure of enforced payment had already been conducted as prescribed under the provisions of the Law on Misdemeanours; the fine imposed on the punished persons had already been registered in the Register of Fines and recorded as a debt (Article 102 of the Law on Misdemeanours); because of the failure to pay the fine certain prohibitions/bans have been imposed on the punished persons (Article 103 of the Law on Misdemeanours), such as the prohibition to register a motor vehicle, to participate in a public tender, the blocking of their respective bank account. The applicant indicated that the justification of the mentioned measure was lost when considering paragraph 2 of the provision of Article 105 of the Law on Misdemeanours, which prescribes that “The time period during which the punished person is deprived of liberty will not affect the payment of the amount owed”. The applicant deems that the legislator prescribes a special measure of the deprivation of liberty for non-payment (whereas the possibilities of enforced collection were previously exhausted, as referred to in the provisions of Articles 102, 103 and 104 of the Law on Misdemeanours), while the punished person, although deprived of liberty for up to 15 days, after being released, still continues to owe the amount of money in the amount of the imposed fine.

8. The applicant deems that the legislator, through unclear regulation of the mechanism of the deprivation of liberty, failed to perform its duty regarding the precision of the legal norm, which will sufficiently clearly determine the scope of discretion of the competent bodies, which should be general, determined, clear and equal to everyone. The proposal was made for the Constitutional Court to grant the request for the review of constitutionality of the provision of Article 105 of the Law on Misdemeanours and to establish that the mentioned provision is in contravention of the mentioned constitutional principles.

**b) Facts of the case, as submitted by the applicant, regarding which the request was filed**

9. It was stated that there was a misdemeanour procedure pending before the said court regarding the proposal put forth by the FBiH Administration for Inspection Affairs Sarajevo (“the FBiH Administration”), seeking the deprivation of liberty of E.O. (“the punished person”) for the failure to pay a fine. The fine for BAM 500.00 was imposed on the punished person for the misdemeanour referred to in Article 31, paragraph 1, item 4 of the Law on the Protection of Population against Infectious Diseases of the FBiH. The fine imposed was based on the misdemeanour warrant, which became final and enforceable, which the punished person failed to pay. The FBiH Administration proposed that the applicant, pursuant to Article 105 of the Law on Misdemeanours, impose the deprivation of liberty against the punished person, deeming it the only reasonable and efficient way to force the punished person to pay the amount of money referred to in the misdemeanour warrant. Upon the court summons, the punished person appeared before the Municipal Court on 17 June 2021 in order to be served with the request of the FBiH Administration and to submit the information about the property. He failed to submit the information about the property since the said date, neither did he submit a proof to this court that he was not in a position to pay the fine imposed on him under the misdemeanour warrant. The applicant emphasized that there was a pending request of the FBiH Administration for the deprivation of liberty of the punished person and that the punished person failed to submit information about his financial situation to the court. Therefore, in this procedural situation, the only remaining option for the court was to render a decision on the deprivation of liberty of the punished person for the failure to pay the fine imposed based on the misdemeanour order, while applying the provision of Article 105 of the Law on Misdemeanours. However, as to this provision, there is a doubt as to it being compatible with the Constitution of BiH.

**b) Reply to the request**

10. The Legislative Commission of the House of Representatives of the Parliament of the Federation of BiH, the Legislative Commission of the House of Peoples of the Parliament of the Federation of BiH and the Government of the Federation of BiH submitted identical replies regarding the request for the review of constitutionality of the provision of Article 105 of the Law on Misdemeanours. They stated as follows: the measure of deprivation of liberty for non-payment of a fine may be imposed as the consequence of responsibility for the perpetrated misdemeanour, in case when the court deems that to be the only reasonable and effective way to force the punished person to pay the amount he/she was obliged to pay; the deprivation of liberty is imposed only in

the event that the same purpose cannot be achieved by any other measure; the challenged provision of Article 105 of the Law on Misdemeanours should be considered in the context with other provisions of the Law on Misdemeanours, in particular Articles 4, 5, 16, 17 and 19 of the Law on Misdemeanours. The provision of Article 105 of the Law on Misdemeanours fulfils all requirements and standards within the meaning of constitutional guarantees and guarantees under the Convention of the right to liberty, the right to a fair trial and the prohibition of double punishment. Thus, it was proposed that the request be dismissed as ill-founded.

11. The Government of the FBiH submitted its reply to the request through the Office for Cooperation and Representation before the Constitutional Court of BiH, alleging as follows: The filed request does not raise the issue of the right to a fair trial, as it concerns a misdemeanour and not a criminal offence; the deprivation of liberty within the meaning of Article 105 of the Law on Misdemeanours is initiated by a body possessing legal authorization for coercive enforcement of a final decision, thus referring to the judgment of the European Court of Human Rights (the “European Court”) in the case of *Benham v. the UK* (paragraph 56); the purpose of the deprivation of liberty within the meaning of Article 105 of the Law on Misdemeanours is to protect the general interest of the society and to deter the punished person from not paying the fine; the requirement for the application of the mechanism of the deprivation of liberty within the meaning of Article 105 of the Law on Misdemeanours are clear and may be sublimed as follows: the punished person fails to pay a fine, the court deems that to be the only reasonable and effective way to force the punished person to pay the fine imposed and the punished person fails to prove that he/she is not in a position to pay the fine; Article 105 of the Law on Misdemeanours allows the punished person to participate in the proceeding as the court summons him to submit evidence about property if he is unable to pay the fine; the scope of discretion of the competent bodies, of the court in particular, is clearly prescribed; the requirement for the deprivation of liberty is previous exhaustion of all other possibilities prescribed in the Law on Misdemeanours (Articles 102, 103 and 104 of the Law on Misdemeanours). As to the unfoundedness of the allegations about the prohibition of double punishment, under Article 4(1) of Protocol No. 7 to the European Convention and the rule *ne bis in idem*, the following was stated: this does not concern double punishment for the same misdemeanour but the deprivation of liberty of the punished person, the purpose of which is to ensure the payment of the fine that was imposed on the punished person; as soon as the fine has been paid, the basis for deprivation of liberty ceases to exist (op. cit. *Vasileva v. Denmark*, paragraph 36); the protection of general interest of the society and the deterrence of the punished person from not paying the fine imposed cannot be disregarded, which is the legitimate right of

every state. As to the unfoundedness of the allegations about the violation of the right to liberty under Article II(3 (d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the following was stated: Article 105 of the Law on Misdemeanours meets the criterion referred to in Article 5(1)(a) of the European Convention as the deprivation of liberty is imposed by the competent court; deprivation of liberty within the meaning of item (b) of the same provision is authorized as it secures the fulfilment of the obligation prescribed by the law; as soon as the relevant obligation has been fulfilled, the basis for detention ceases to exist (op. cit. *Vasileva v. Denmark*); the deprivation of liberty in the present case (Article 105 (2) of the Law on Misdemeanours) aims to secure the payment of the imposed fine and, therefore, the measure is not punitive in character; the mentioned provision meets the requirement referred to in Article 5(1)(b) of the European Convention and is in accordance with the mentioned case law of the European Court; the punished person is afforded an opportunity before the deprivation of liberty to pay the fine or to provide evidence about poor financial situation, which is additionally indicative of the respect for the aforementioned standards (the European Court, *Beiere v. Latvia*, paragraph 49); the mentioned provision allows for the competent court to strike a fair balance between the respect for a lawful decision of the court and the right to liberty; the competent court first establishes the impossibility to enforce the decision imposing the fine and then enforces the decision by protecting the general interest of the society; (also) the measure of the deprivation of liberty in duration of up to 15 days has as a goal the protection of the general interest of the society. The issue of proportionality assumes particular significance through the right of the state to protect its interests and secure the enforcement of the decision imposing the fine (the European Court, *Gatt v. Malta*, paragraph 40). The mechanism of the deprivation of liberty is used after all the previously given possibilities for the enforcement of the decision have been exhausted, with a possibility for the punished person to avoid paying a fine by submitting a proof of his/her poor financial situation to the court. It was proposed that the request for the review of constitutionality of the provision of Article 105 of the Law on Misdemeanours be dismissed as ill-founded.

#### **IV. Relevant law**

12. The relevant provisions of the **Constitution of Bosnia and Herzegovina** read as follows:

##### *Article II*

##### *Human Rights and Fundamental Freedoms*

##### **3. Enumeration of Rights**

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights*



*and fundamental freedoms referred to in paragraph 2 above; these include:*

*d) The rights to liberty and security of person.*

*e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

13. The **European Convention for the Protection of Human Rights and Fundamental Freedoms**, Rome, 4 November 1950 (*Official Gazette of BiH*, 6/99) as amended by Protocol No. 11 (date of entry into force 1 November 1998), reads in its relevant part as follows:

*Article 5*

*Right to liberty and security*

*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(a) the lawful detention of a person after conviction by a competent court;*

*(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

*(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

*(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

- (e) *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

14. **The Law on Misdemeanours** (*Official Gazette of the Federation of BiH*, 63/14), in so far as relevant, reads as follows:

*Article 18*

*Application of the provisions of the Criminal Code and the Criminal Procedure  
Code of the Federation of Bosnia and Herzegovina*

(1) *Unless otherwise provided under the provisions of this Law, the following provisions of the Criminal Code will be applied mutatis mutandis to misdemeanours: Articles 26 and 27 entitled "Self-Defence" and "Extreme Necessity"; Articles 31, 32 and 33 entitled "Co-perpetration", "Incitement" and*

*"Accessory"; Article 36 entitled "Mental Capacity"; Article 37 entitled "Intent"; Article 38 entitled "Negligence"; Article 39 entitled "Mistake of Fact"; Article 40 entitled "Mistake of Law and Chapter XIV entitled "Liability of Legal Persons".*

*(2) Unless otherwise provided under the provisions of this Law, the following provisions of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH", 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09 and 12/10 – "the Criminal Procedure Code") will be applied mutatis mutandis in a misdemeanour procedure: Chapter I entitled "**Basic Principles**"; Chapter III entitled "Legal Assistance and Official Cooperation"; Chapter IV Section 2 entitled "Territorial Jurisdiction" and Section 3 entitled "Merger and Separation of Proceedings"; Chapter V entitled "Disqualification"; Chapter VII entitled "Defence Attorney"; Chapter VIII Section 1 entitled "Search of Dwellings, Premises and Persons"; Chapter VIII Section 2 entitled "Seizure of Objects and Property"; Chapter VIII Section 4 entitled "Questioning of the Suspect"; Chapter VIII Section 5 entitled "Examination of Witnesses"; Chapter VIII Section 6 entitled "Crime Scene Investigation and Reconstruction of Events"; Chapter VIII Section 7 entitled "Expert Evaluation"; Chapter XI entitled "Submissions and Records"; Chapter XII entitled "Deadlines"; Chapter XVI entitled "Costs of Criminal Proceedings"; Chapter XVII entitled "Property Claims"; Chapter XXI entitled "The Main Trial"; Chapter XXIII Section 1 entitled "Appeal against the First Instance Verdict"; Chapter XXIV entitled "Extraordinary Legal Remedies"- "Reopening the Criminal Proceedings"; Chapter XXVII entitled "Juvenile Procedure", Chapter XXVIII entitled "Proceedings against Legal Persons for Criminal Offenses" and Chapter XXIX entitled "Procedure for Application of Security Measures, Forfeiture of Property Gain and Revocation of Suspended Sentence".*

*(3) In the event of inconsistencies between the provisions of the Criminal Code referred to in paragraph (1) of this Article and the provisions of the Criminal Procedure Code referred to in paragraph (2) of this Article and this Law, the provisions of this Law will apply. References to the provisions of the Criminal Procedure Code pertaining to the plaintiff will be applied accordingly to every authorized authority.*

### *Types of sanctions*

*(1) The following sanctions may be pronounced against the person responsible for the misdemeanour perpetrated:*

- 1) fine;*
- 2) suspended sentence;*
- 3) reprimand, and*
- 4) protective measures.*

*(2) The following measures may be pronounced as a consequence of liability for the perpetrated misdemeanour:*

- 1) forfeiture of property gain;*
- 2) obligation to compensate damage;*
- 3) penalty points, and*
- 4) deprivation of liberty for the purpose of collecting the fine.*

## *XIV. EXECUTION OF PUNISHMENTS*

### *Article 102*

#### *Entry of data about punishments into the register of fines*

*(1) All fines and costs of proceedings imposed on the basis of the final and enforceable misdemeanour warrant or the legally binding and enforceable decision on misdemeanour will be registered into the Register of Fines and will be recorded as a debt that the punished person owes to the relevant level of authority collecting the fine.*

*(2) After the misdemeanour warrant has become final and enforceable or the decision on misdemeanour has become legally binding and enforceable, the authorized authority or the court will enter the data on the fine and the costs of proceedings into the Register of Fines.*

*(3) The manner and procedure of entry of data about the fine and costs of proceedings into the Register of Fines referred to in paragraph (2) of this Article*

*will be established by the FBiH Ministry of the Interior within three months from the day of entry into force of this Law.*

*(4) The fines and costs of the proceedings will be recorded as a debt in the Register of Fines until the punished person has paid the full amount of the fine and the costs of the proceedings. The fine and the costs of the proceedings will be deleted in any case from the Register of Fines upon the expiry of five years from the day on which the misdemeanour warrant has become final and enforceable, or the decision on misdemeanour has become legally binding and enforceable.*

*(5) The court will render a decision, on the proposal of the authorized authority or ex officio, suspending the procedure of enforcement of fines and costs of proceedings in the event of a death or permanent mental illness of the punished person, whereafter the fine and the costs of the proceedings will be deleted.*

#### *Article 103*

##### *Consequences of the registration of the fine in the Register of Fines*

*Until all fines and costs recorded in the Register of Fines have been paid, the punished person will not be allowed to do the following:*

- 1) to register or extend the validity of the registration of a motor vehicle;*
- 2) to be issued or to extend the validity of their driver's license;*
- 3) to participate in a public tender;*
- 4) to register as a legal person, to change the registration of a legal person or the registration of an autonomous business activity – business craft, or*
- 5) to change the ownership of a motor vehicle.*

#### *Article 104*

##### *Procedure of enforced collection*

*(1) Every authorized authority has responsibility to monitor the execution of the fines and other measures pronounced under the misdemeanour warrant or by means of an agreement about the sanction.*

*(2) Courts will monitor the execution of the fines and other measures pronounced under the decision on misdemeanour.*

(3) *AN authorized authority or court imposing the fine will request from the competent court the forced collection by blocking the account of a physical or legal person, in accordance with the provisions of the Law on Enforcement Procedure (Official Gazette of the Federation of BiH, 32/03, 52/03, 33/06, 39/06, 39/09 and 35/12) in the following cases:*

1) *if it has been established that the punished person avoids to pay the fine, or*

2) *if there is a threat that the statute of limitations will expire concerning the enforcement of the fine.*

(4) *Notwithstanding the provisions of paragraph (3) of this Article, the forced collection may be enforced also by the authorized authority, if so prescribed by the special FBiH law.*

#### *Article 105*

##### *Deprivation of liberty for non- payment*

(1) *A punished person who fails to pay a fine in full or in part within the deadline as set in the decision on misdemeanour or in the misdemeanour warrant shall be forced to make the payment through the deprivation of liberty, if a court finds that to be the only reasonable and effective way that will force the punished person to pay the amount imposed. The court shall make a decision on the deprivation of liberty for failure to pay the fine by rendering a decision, which may be passed only once against the punished person for the respective misdemeanour. The deprivation of liberty may be imposed by the court ex officio or on a proposal of the authorized body or the Taxation Authority of the Federation of Bosnia and Herzegovina. The court will inform the proponent of its decision and of the enforcement of the deprivation of liberty.*

(2) *The court may impose the deprivation of liberty for up to 15 days. The period for which the punished person has been deprived of liberty will not affect the payment of the amount owed. The punished person will be released forthwith following the payment in full of the amount of the fine.*

*(3) The deprivation of liberty, according to the provisions of this Article, may not be imposed on a punished person who can prove that they are not in a position to pay the fine.*

*(4) A punished person may lodge an appeal against the decision on the deprivation of liberty with the second instance court within eight days from the day of receiving the decision on the deprivation of liberty. The first instance court is obliged to communicate the appeal to the second instance court within three days from the day of receiving the appeal. The second instance court has to render a decision on the appeal within 15 days from the day of receiving the case file. The appeal does not stay the enforcement.*

*(5) Before the start of the enforcement of the decision on the deprivation of liberty a punished person may put forth a proposal to the court to perform community service as a substitute for the payment of the fine. The court will keep the list of such services in cooperation with the competent authorities. When deciding on the proposal the court will consider all the circumstances of the case, as well as financial conditions and a possibility for the punished person to pay the fine, as well as the type of the misdemeanour perpetrated, the age, physical and work capacity, mental qualities, education, inclinations and other special circumstances pertaining to the personality of the perpetrator.*

*(6) If the court grants the proposal referred to in paragraph (5) of this Article, an order for suspension of the enforcement of the deprivation of liberty will be issued for the time period until the deadline for the performance of such service has expired. If the punished person has performed the planned service, the deprivation of liberty will not be enforced and the fine will be deleted from the Fines Register and will not be collected. If the punished person fails to perform the planned service, the decision on the deprivation of liberty will be enforced, and if performed only in part, the court will assess whether it is purposeful to enforce the decision on the deprivation of liberty and issue a relevant order on it.*

*(7) In the event where the court or an authorized body establishes that it is not possible to enforce the fine imposed on the basis of the final and enforceable misdemeanour warrant or the legally binding decision on misdemeanour, by applying the provisions of Articles 103 and 104 of this Law and paragraphs (1),*

*(2) and (3) of this Article, the court will render, ex officio or on the proposal of the authorized body, a decision on the enforcement of the fine ordering the punished person to perform community service as a substitute for the payment of the fine. If the punished person has performed the planned service, the fine will be deleted from the Fines Register.*

*(8) The procedure and conditions for the enforcement of the court decision on the deprivation of liberty of the punished person for the failure to pay the fine, as well as the procedure and conditions for the performance of community service and the manner for keeping records on the performance of such services, will be regulated by the FBiH Minister of Justice by means of bylaws, in cooperation with the competent cantonal ministries within six months from the day of entry into force of this Law.*

15. **The Criminal Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH*, 36/03, 37/03 - Corrigendum, 21/04 - Corrigendum, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17). Unofficial revised text, prepared at the Constitutional Court of BiH, will be used for the purpose of this decision, and it reads as follows:

#### *Article 48*

##### *Substitution of fine*

*(1) Fine shall not be collected by force.*

*(2) If a fine is not paid in full or in part within the period determined in the judgement, the court shall, without delay, bring a decision to substitute the fine by imprisonment.*

*(3) The fine shall be substituted by imprisonment in such a way that each daily amount started, or if the fine was imposed in one fixed amount, each BAM 100 started, is substituted by one day of imprisonment, whereby the imprisonment may not exceed one year it may not exceed the prescribed punishment for that offence.*

*(4) If the convicted person has only paid a portion of the fine, the remaining amount will be proportionally converted into imprisonment and if he then pays the remaining amount, the execution of imprisonment ceases.*



## V. Admissibility

16. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(c) of the Constitution of Bosnia and Herzegovina reads as follows:

*c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.*

17. The request for review of constitutionality was filed by the Municipal Court in Srebrenik (Judge Alen Lukač), which means that it was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see Constitutional Court, Decision on Admissibility and Merits no. U 5/10 of 26 November 2010, paras 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, 37/11). In view of the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 19(1) of the Rules of the Constitutional Court, the Constitutional Court concludes that the request in question is admissible as it was filed by the authorized person. Also, there is not a single formal reason under Article 19(1) of the Rules of the Constitutional Court that would render the request inadmissible.

## VI. Merits

18. The applicant requests the Constitutional Court to decide, within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, on the compatibility of the provision of Article 105 of the Law on Misdemeanours with the provisions of Article II(3)(d) and (e) of the Constitution of Bosnia and Herzegovina, Articles 5 and 6 of the European Convention, as well as Article 4(1) of Protocol No. 7 to the European Convention.

19. The Constitutional Court notes that it considers the review of constitutionality, i.e. compatibility of a law/provision of a law in a general sense (*erga omnes*), and not concerning this specific case (*inter partes*), which was the reason for filing the request (see Constitutional Court, Decision no. U 15/11 of 30 March 2012, paragraph 63). Thus, the Constitutional Court will not deal with the specific case pending before the Municipal Court in Srebrenik; neither will it deal with the

manner in which the ordinary courts and other competent authorities applied the contested provision of the law. That remains within the competence of ordinary courts. The Constitutional Court will review only the compatibility of the contested provision in an abstract manner, bearing in mind the allegations stated by the applicant – judge.

20. The applicant requests the review of constitutionality of the provision of the law, which prescribes “the deprivation of liberty for non-payment of a fine”. Therefore, the Constitutional Court will examine the contested provision primarily in relation to the right to liberty and security of person.

### **The right to liberty and security of person**

21. The right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above, these include:*

*d) The right to liberty and security of person. [...]*

22. The Constitutional Court recalls that Article 5(1) of the European Convention, in its relevant part, reads as follows:

*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; [...]*

23. According to the content of Article 5 of the European Convention, it clearly follows that everyone has the right to liberty and security of person. Exceptions to the rule that everyone has this right are prescribed in items a) through f) of Article 5, paragraph 1 of the European Convention, whereby every deprivation of liberty has to be subsumed under the corresponding basis referred to in the mentioned provision. These bases are the permitted exceptions to the rule prohibiting the deprivation of liberty contained in the first sentence. Otherwise, the deprivation of liberty that is not in conformity with the procedure prescribed by law and based on one of the bases referred to in items a) through f) is not compatible with Article 5 of the European Convention.

24. The Constitutional Court recalls that, by upholding the case law of the European Court, it clearly noted in its numerous decisions that the term “lawful” is a crucial circumstance, which is required when it comes to every deprivation of liberty of an individual. The significance that is attributed to the term “lawful” clearly follows from the content of the provision of Article 5 of the European Convention, which requires in every case of exception to the right to liberty that the deprivation of liberty is carried out “in a proceeding prescribed by law”, “in accordance with law” etc. Therefore, the basic purpose of Article 5 of the European Convention is to protect every individual from unlawful deprivation of liberty (see Constitutional Court, Decision on Admissibility and Merits, no. *AP-498/11* of 15 July 2011).

25. The European Court developed the meaning of the notion of “lawful” within the autonomous meaning of the European Convention. The starting basis is domestic, i.e. national law, which prescribes an obligation for deprivation of liberty to be in accordance with domestic law, its substantive and procedural rules. However, as the European Court stated, compliance with the national law is not sufficient. The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the European Convention, including the general principles expressed or implied in it (ECtHR, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, of 20 December 2020, paragraph 311; *S., V. and A. v. Denmark* [GC], nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, paragraph § 73; *Velinov v. the Former Yugoslav Republic of Macedonia*, no. 16880/08, of 19 September 2013, paragraph 53). The general principles, which are implied in the European Convention, and referred to in the case law related to Article 5 (1), include the principle of the rule of law and, in connection thereto, the principle of legal certainty, as well as the principle of proportionality and the principle of protection from arbitrariness, which, as a matter of fact, is the very goal of Article 5 of the European Convention. (*S., V. and A. v. Denmark* [GC], mentioned above, paragraph 74).

26. Firstly, the Constitutional Court deems that it is necessary to consider the relevant case law of the European Court, which, among other things, was pointed out in the reply to the request. The aim of the analysis of the existing case law of the European Court (mentioned in the reply) is to make comparison and possibly find a similar case (with the facts presented in the request) from different legal systems of member states that recognize “deprivation of liberty for non-payment”. The facts essentially concern force/coercion against the punished person from the misdemeanour proceeding to pay the fine voluntarily and the consequences of failure to pay.

27. The Constitutional Court recalls that the European Court analysed in numerous decisions, depending on specific circumstances, different situations of deprivation of liberty that fall under the first or second part of Article 5(1)(b) of the European Convention.

28. The first part of the mentioned article pertains to the lawful arrest or detention of a person for non-compliance with the lawful order of a court (failure to enforce a court decision), while the second part of this article pertains to securing the fulfilment of any obligation prescribed by law. The first part of Article 5(1)(b) of the European Convention presumes that the person arrested or detained must have had an opportunity to comply with such an order and have failed to do so. All safeguards under Article 5 of the European Convention must be guaranteed to a person being deprived of liberty for non-compliance with a court decision in order for the deprivation of liberty not to be arbitrary and, hence, unlawful (see, European Court, *Beiere v. Latvia*, application no. 30954/05, of 29 November 2011, paragraph 49). As it follows from the facts of the mentioned case, the criminal proceedings were initiated against the applicant in that case, because she refused to undergo voluntarily a psychiatric assessment. The court ordered the applicant's placement in a psychiatric hospital for assessment. The applicant (where she was for about twenty days) was informed for the very first time in the hospital of the existence of a court order and that her appeal against that order was unsuccessful. Criminal proceedings against the applicant were terminated eventually because of her mental incapacity. In this case, the European Court, despite the claim of the Government that the applicant refused to comply with the court order, took into account the crucial circumstance according to which the applicant was informed of the existence of a court order only after she was brought into a psychiatric hospital. Therefore, it was concluded that the applicant had never had a chance to voluntarily comply with a court order, that it remained unclear whether she was informed of the criminal charges against her, that detention was ordered in her absence, as she neither was summoned to the hearing nor was she informed that a hearing would take place. In such circumstances, the European Court concluded that the proceedings before a domestic court did not secure to the applicant sufficient protection against a potentially arbitrary deprivation of her liberty. For that reason, a detention order issued in the said proceedings cannot be considered "a lawful order of a court" within the meaning of Article 5(1)(b) of the European Convention.

29. In the case of *Velinov* (see ECtHR, *Velinov v. Former Yugoslav Republic of Macedonia*, application no. 16880/08 of 19 September 2013), the applicant was convicted of a minor offence for driving an un-roadworthy bus and ordered to pay a fine; the applicant did not pay the fine, therefore the fine was converted into a two-day prison sentence; after the detention order was served on the

applicant, he paid the fine, but did not inform the court thereof. Thereafter he was arrested and released from prison the next day, after he had submitted a copy of the payment slip about the paid fine. In the mentioned case, the European Court took into account the fact that the applicant did not notify the trial court of the payment of the fine, but that there was no provision in the domestic law requiring the applicant to notify the court of the payment of the fine. The European Court established in that case that the non-existence of exchange of information between the trial court and the Ministry of Finance that the fine had been paid and the applicant's failure to notify the trial court that he had paid the fine, could not release the respondent State from the obligation to have in place an efficient system of recording the payment of court fines. In that case, among other things, a conclusion was reached that a decision-making procedure where a person's liberty was at stake should take into account all the relevant circumstances of the case. The importance of the applicant's right to liberty required the respondent State to take all necessary measures in order to avoid his liberty being unduly restricted (paragraph 56 of the cited decision).

30. The second part of Article 5(1)(b) of the European Convention allows the deprivation of liberty for securing the fulfilment of any obligation prescribed by law. This part of Article 5 implies the existence of an unfulfilled obligation incumbent on the person concerned, where the securing of the fulfilment of the obligation can be achieved by force (deprivation of liberty). The purpose of the arrest and detention must be securing the fulfilment of the relevant obligation and not punishment, for as soon as the relevant obligation has been fulfilled, the basis for detention ceases to exist. The European Court indicated in the case of *Vasileva* (see, *Vasileva v. Denmark*, application no. 52792/99, of 25 September 2003, paragraph 36) that the request for the removal of arbitrariness follows from the principle of proportionality. According to that requirement, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty, whereby the important factor for striking that balance is the length of the deprivation of liberty. The facts of the case read as follows: the applicant refused to disclose her personal details to the ticket inspector in a public transport; for that reason she was called to the police where she refused to disclose her name and address to the police; she was arrested and detained for thirteen and a half hours (from 21.30 to 11.00 hrs) whereafter she disclosed her identity; the refusal to disclose identity constituted a misdemeanour punishable exclusively by a fine. The European Court concluded in this case that the conversion was performed in accordance with the Administration of Justice Act, which prescribes an obligation for every person to disclose his/her name, address and date of birth to the police upon request, for the purpose of "securing the fulfilment" of this obligation in accordance with Article 5(1)(b) of the

European Convention. A question arose whether the authorities, by securing the obligation of revealing a person's identity, had struck a fair balance. The European Court agrees that it is a fundamental condition for the police in order to carry out their tasks, that they can establish the identity of citizens, as well as that it is legitimate for companies providing public transportation to involve the police in disputes concerning the validity of a bus ticket. Therefore, detention was in accordance with Article 5(1)(b) of the European Convention. However, the deprivation of the applicant's liberty for thirteen and a half-hour exceeded a period proportionate to the cause of her detention, given that efforts aimed at establishing her identity had not been undertaken throughout the period of her detention. In brief, the authorities failed to strike a fair balance between the need to ensure the "fulfilment of the obligation prescribed by law" and the right to liberty, which is the reason why a violation of Article 5(1)(b) of the European Convention was found in that case.

31. In the case of *Benham* (see ECtHR, *Benham v. UK*, application no. 19380/92, of 10 June 1996), the European Court considered the detention of the applicant within the meaning of Article 5(1)(b) of the European Convention, given that the purpose of the detention was for the applicant to fulfil the obligation of paying the municipal tax he owed. In the mentioned case, the applicant complained about unlawful detention, because of the fact that the decision on detention was repealed following an appeal. However, in the mentioned case, the European Court found that there was no violation of Article 5(1)(b) of the European Convention.

32. Bearing in mind the aforementioned case law and the allegations of the applicant, according to which, essentially, the provision of Article 105 of the Law on Misdemeanours does not meet the criteria of accessibility, precision and foreseeability, it does not contain clear conditions for the application of the mechanism of the deprivation of liberty for the purpose of securing the fulfilment of an obligation prescribed by law and it upsets the balance between the compliance with a lawful court order and the right to liberty, the Constitutional Court will examine the constitutionality of the challenged provision in conjunction with the second limb of Article 5(1)(b) of the European Convention, which allows the deprivation of liberty for the purpose of securing the fulfilment of the obligation prescribed by law. In doing so, the Constitutional Court recalls on one hand, the margin that the legislative authorities enjoy when passing a law, and on the other that the "lawful" deprivation of liberty (for non-compliance with a court decision/order or for securing any obligation prescribed by law) is provided as an exception allowed in accordance with the European Convention, more precisely Article 5(1)(b) of the European Convention.

33. The Constitutional Court indicates that the Law on Misdemeanours, in the first part, which pertains to the types of sanctions for a misdemeanour referred to in Article 21 of the Law on

Misdemeanours, prescribes the types of sanctions that may be imposed on a person liable for the perpetrated misdemeanour and the measures that may be pronounced as a consequence of liability for the perpetrated misdemeanour. Those measures, in paragraph 2, item 4 of Article 21 of the Law on Misdemeanours, include the deprivation of liberty for the collection of a fine. The second part of the Law on Misdemeanours regulates misdemeanour proceedings (Articles 53 through 101), whereas the third part regulates the execution of penalties under final and enforceable misdemeanour orders or decisions on misdemeanours. The Law on Misdemeanours is structured in three sections and XVI chapters, while Chapter XIV regulates the execution of penalties.

34. In the applicant's opinion, the provision of Article 105 of the Law on Misdemeanours does not contain clear and determined conditions for the application of the mechanism of the deprivation of liberty; it does not regulate sufficiently clearly and precisely the procedure of the deprivation of liberty (access to court, adversarial proceeding, equality of arms, right to defence); does not prescribe the bringing of the punished person before a competent judicial authority before the issuance of a decision on the deprivation of liberty; leaves the punished person with an unpaid fine even after the enforcement of the decision on the deprivation of liberty; the purpose of the deprivation of liberty is left to "an unlimited and legally uninhibited discretion of a judge's will".

35. Based on the content of Article 105(1) of the Law on Misdemeanours it follows that the "institution of proceedings" for the deprivation of liberty for non-payment of a fine may be double - *ex officio* by a court or on a proposal of the authorized bodies to be decided by a court. This provision clearly determined the persons concerned – punished persons who failed to pay a fine within a deadline (in full or in part), which they were obliged to under a legally binding decision of a court or a misdemeanour warrant. It follows from the mentioned provision that the punished persons will be forced to pay a fine by imposing the deprivation of liberty on them, if the court deems that the only reasonable and efficient way to force the punished person to fulfil the obligation. The assessment made by the court regarding the "reasonableness and effectiveness" of the deprivation of liberty, as a coercion to fulfil an obligation, depends on the circumstances of every specific case and depends on the effectiveness of the measures prescribed under other articles of the Law on Misdemeanours. In that context, references are made to the provisions that precede structurally Article 105 of the Law on Misdemeanours (Article 103 and 104) and concern the consequences of the registered fines in the Register of Fines. The consequences, among other things, concern the registration or the extension of registration of a motor vehicle, the issuance or extension of validity of a driver's license, the registration of a legal person etc., which the punished person will not be allowed to do because of an unpaid fine. The fact that the "reasonableness and

effectiveness” of the measure of the deprivation of liberty remains within the exclusive sphere of assessment of a judge who is making a decision on it does not give, as the applicant claims, unlimited and legally uninhibited discretion of a judge’s will, but to establish, within the free margin of appreciation, the facts and circumstances that precisely the deprivation of liberty is the only possible and reasonable measure.

36. The margin of appreciation of a court extends also to the length of the measure of the deprivation of liberty of “up to 15 days” as prescribed in paragraph 2 of Article 105 of the Law on Misdemeanours. It follows from that provision that the deprivation of liberty for non-payment has a time limit (of up to 15 days) and that a judge, in the circumstances of every specific case, appraises the time period required within the clearly prescribed duration of the deprivation of liberty limited by time.

37. Paragraph 3 of Article 105 of the Law on Misdemeanours prescribes that the deprivation of liberty cannot not be imposed on a punished person who can prove that they are not in a position to pay the fine. This provision practically resolves the dilemma of the applicant about the lack of procedure, specifically the denial of access to court to the punished person. In that context, the Constitutional Court notes that when securing a procedure to the punished person, Article 105 of the Law on Misdemeanours should be considered as a whole. It follows clearly from a provision that before (*de facto*) deprivation of liberty, the punished person has a chance to prove that he is not in a position to pay a fine, while the exercise of that right is secured precisely by way of paragraph 1 of the mentioned article through the principle of “reasonableness and efficiency”. Paragraph 3, in connection with paragraphs 1 and 4 of the challenged provision, might raise the issue whether the punished person may (or should) prove that he is not in a position to pay the fine. The reason being that paragraph 1 of Article 105 of the Law on Misdemeanours reads that the court informs the proponent of its decision and of the enforcement of the deprivation of liberty (and not the punished person). However, paragraph 4 of Article 105 of the Law on Misdemeanours prescribes that a punished person may lodge an appeal to be decided by the second instance court, whereby the appeal has a suspensive effect (it postpones the deprivation of liberty). Thus, it is undisputed that the punished person is allowed access to court and that the basic guarantees referred to in Article 5 of the European Convention have to be observed – that a judicial authority decides on the deprivation of liberty, with a possibility for the punished person to state his/her opinion about it, whereby paragraphs 1 through 4 of Article 105 of the Law on Misdemeanours have to be considered as a whole. The fact whether it will be before the issuance of a decision or as part of a procedure on an appeal is completely irrelevant, as the punished person cannot be deprived of



liberty before providing evidence of inability to pay a fine (paragraph 3), or before his/her appeal has been decided (paragraph 4).

38. Paragraph 5 of the provision of Article 105 of the Law on Misdemeanours introduces the notion of “before the start of the enforcement of the decision on the deprivation of liberty”, which indicates that the decision on the deprivation of liberty was issued but that the punished person failed to use the opportunity referred to in paragraph 3, or that his appeal, if lodged, was effective (paragraph 4). This provision regulates that, at this stage, the punished person has an opportunity to “avoid the deprivation of liberty” and put forth a proposal to perform community service as a substitute for the payment of the fine. The court decides on the proposal of the punished person while considering all the specific circumstances of the case, concerning objective and subjective abilities and features of the punished person. Paragraph 6 of Article 105 of the Law on Misdemeanours pertains to the consequences of the already issued decision on the deprivation of liberty if the proposal of the punished person referred to in the foregoing paragraph is accepted – the suspension of the enforcement of the deprivation of liberty or the enforcement thereof.

39. It follows from paragraphs 5, 6 and 7 of Article 105 of the Law on Misdemeanours that, at the stage at which the decision on the deprivation of liberty has already been issued, the punished person is afforded an opportunity to avoid the deprivation of liberty in such a way as to propose to the court the performance of community service as a substitute for the payment of the fine. The same may be proposed by a court or by an authorized authority if they establish that the fine cannot be enforced in any of the ways prescribed in the provisions of Articles 102, 103 and 105, paragraphs 1, 2 and 3 of the Law on Misdemeanours. Therefore, the free appreciation of the court as to whether the punished person would be deprived of liberty extends to a possibility afforded by law to order to the punished person to perform specified community service (*ex officio* or on a proposal of the authorized authority, paragraph 7), thus “compensating” the fine with community service and a possibility to delete the fine from the Register of Fines if the punished person has performed the planned service.

40. Based on the aforementioned analysis, according to the assessment of the Constitutional Court, it follows that Article 105 of the Law on Misdemeanours does not bring into question the standard of the quality of the legal norm from a procedural aspect, as it is clear, specified and precise. Article 105 of the Law on Misdemeanours, as a mechanism *sui generis*, which exists only in the provisions of the Law on Misdemeanours, when considered as a whole, offers all necessary guarantees against arbitrary deprivation of liberty. It follows that the deprivation of liberty for non-payment is a measure of special type of coercion, for fulfilling an obligation, which possesses a

necessary quality regarding specification, clarity and precision from a procedural aspect of this article. The Constitutional Court emphasizes that this measure of coercion avoids a lengthy procedure aimed at fulfilling the obligation (payment of a fine), with guarantees ensuring that the deprivation of liberty is not arbitrary.

41. The Constitutional Court next observes that apart from the procedural aspect the provision of Article 105 of the Law on Misdemeanours also contains the substantive aspect reflected in the fact that paragraph 2 of Article 105 of the Law on Misdemeanours prescribes that the period for which the punished person has been deprived of liberty will not affect the payment of the amount owed. The applicant compared the mentioned situation with criminal proceedings indicating that the criminal legislation in BiH, unlike the specific provision, which concerns the misdemeanour proceedings and the punishment, provides a possibility to substitute a fine with imprisonment. A day spent in prison equals the amount of BAM 100, whereby the fine is considered paid upon leaving the prison.

42. In this connection, considering the very essence of the challenged provision, the Constitutional Court indicates that this is the “mechanism of coercion”. The comparison with criminal legislation (substitution of a fine with imprisonment) is, therefore, unfounded, as in criminal proceedings the substitution is a way to enforce the punishment and not a coercion for the failure to fulfil an obligation, as regulated in the Law on Misdemeanours. In addition, as mentioned above the “mechanism of coercion” is allowed in a democratic society, under the guarantees, though, prescribed by the European Convention of Human Rights (*Christakis v. Cyprus*, no. 34399/98, Commission decision of 21 May 1997).

43. In the applicant’s opinion, the provision of Article 105(2) of the Law on Misdemeanours is not proportionate, as “the period for which the punished person has been deprived of liberty will not affect the payment of the amount owed”. In this connection, the Constitutional Court recalls the case law from the already cited case of *Velinov* (paragraph 30 of that judgment), in which the fine of the applicant from the misdemeanour proceedings was substituted with two days of imprisonment. The European Court concluded in this case, among other things, that the decision-making procedure about the issue of the liberty of a person should take into account all the relevant circumstances of the case, whereby the importance of the right to freedom implies for a state to undertake all necessary measures with a view to avoiding unfair restrictions of freedom (paragraph 56 of the cited decision). Bearing in mind the wide margin of appreciation that a state enjoys when passing a law, in the present case a question arises whether excessive burden was placed on the punished person, because of the period of time for which he was deprived of liberty (which may last

for up to 15 days), as the fine remains recorded as unpaid following the completion of the measure of deprivation of liberty.

44. The Constitutional Court indicates that the European Court, in the decision of *Gatt v. Malta* (see ECtHR, *Gatt v. Malta*, application no. 28221/08, of 27 October 2010), pointed out that the principle of proportionality implied the striking of a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court and the importance of the right to liberty. The European Court concluded in the mentioned case that when deciding about a fair balance (proportionality) between the right to liberty and the need to secure the “fulfilment of an obligation prescribed by law”, the issues such as the purpose of the order, the feasibility of compliance with the order and the duration of the detention are matters to be taken into consideration. Also, the European Court concluded that the deprivation of liberty was allowed in accordance with item (b) of Article 5(1) only in order to “secure the fulfilment” of any obligation prescribed by law. It follows that there must be an obligation that a person concerned has failed to fulfil and that the arrest and detention must be for securing its fulfilment and not punitive in character.

45. The collection of fines based on misdemeanour warrants and imposed fines in misdemeanour proceedings certainly constitutes a substantial share of revenues in a budget of a state. Misdemeanour warrants and penalties play a corrective role, as they establish discipline and order in many social spheres. From that aspect, there is a justified interest of a state to act and, eventually, once it has exhausted all means of coercion, to “threaten” a person with the deprivation of liberty. Particularly in cases where the payment is not possible to be realized by good will of the punished person, or in other ways prescribed in Articles 103 and 104 of the Law on Misdemeanours (prohibition of registration of a vehicle, prohibition of registration of a legal person, blocking accounts). Nevertheless, the challenged provision prescribes that after the punished person has been deprived of liberty, (and) has hypothetically spent 15 days in prison, his monetary obligation remains in entirety the same.

46. The Constitutional Court recalls that a measure of the deprivation of liberty for non-payment of a fine imposed by a court solely for securing the collection of the debt (a fine) which the punished person has failed to fulfil, has been accepted, in principle, as being in compliance with the European Convention on Human Rights (see *Benham v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, pp. 752-753, §§ 40 and 42; *Velinov*, cited, §§ 50-52). In this connection, deprivation of liberty is the ultimate measure undertaken by a competent court, the reason being that the previous measures have not been efficient (Articles 103 and 104 of

the Law on Misdemeanours). This means that Article 105 of the Law on Misdemeanours does not require a mandatory and automatic detention (compare and contrast with the Constitutional Court's Decision on Admissibility and Merits no. *AP-573/07* of 29 April 2009, and Decision on Admissibility and Merits No. *AP-498/11* of 15 July 2011). However, a question arises as to how the deprivation of liberty affects the payment of the amount that the punished person owes, which "remains outstanding" following the deprivation of liberty, and what is the true rationale of having the fine continue to exist?

47. Considering the fact that before the deprivation of liberty the means of coercion failed to yield the results, namely the settlement of an obligation (the payment), the question arises whether the deprivation of liberty upset the balance between the right to liberty and the fulfilment of the obligation, bearing in mind that the fine, after the deprivation of liberty, remained recorded as the amount owed, under paragraph 2 of Article 105 of the Law on Misdemeanours.

48. In this connection, the Constitutional Court first takes into account that the amounts of fines in misdemeanour proceedings are regulated in Article 22 and that they may be prescribed in a certain range or in a fixed amount, depending on whether the obligation is to be fulfilled by a natural or legal person and depending on the type of misdemeanour. These amounts range from BAM 30.00 to BAM 200,000.00. In addition, the provision of Article 102, paragraph 4 of the Law on Misdemeanours prescribes that a fine will be deleted in any case from the Register of Fines upon the expiry of five years from the day the misdemeanour warrant/court decision has become final and enforceable. It follows from the aforementioned that the punished person who would be deprived of liberty for the failure to fulfil an obligation would not have the fine recorded permanently. Contrary to the aforesaid, the fine is deleted after the expiry of the period of five years, during which period the competent authorities undertake all necessary measures prescribed by law, including the deprivation of liberty, in order to force the punished person to fulfil an obligation. The amount of money owed, as mentioned above, depends on the type of misdemeanour. In addition, the amount of money owed, determines the type of misdemeanour. In this context, an unquestionable interest of the state comes to the fore to secure the collection of the imposed fines that may range from minor to very large amounts of money. Therefore, the deprivation of liberty for the failure to fulfil an obligation is not a penalty but a means of coercion for fulfilling an obligation. The circumstance that the fine remains recorded as unpaid following the deprivation of liberty in such a situation is neither vital nor crucial, bearing in mind that it will be deleted from the records after a clearly determined period. According to the assessment of the Constitutional Court, different interpretation might have a motivational effect on the punished

persons with very high fines, as they would compensate the existing debt with the deprivation of liberty of up to 15 days, which, in no case whatsoever, is the purpose of the mentioned provision. Its purpose is coercion and not punishment (see *Raimondo v. Italy*, application no. 12954/87, Decision of the European Commission of Human Rights, of 6 December 1991, paragraph 3).

49. The Constitutional Court holds that the challenged provision of Article 105(2) of the Law on Misdemeanours meets the requirement of proportionality, as a fair balance was struck between securing the fulfilment of an obligation and the right to liberty. Therefore, it is justified that the deprivation of liberty for non-payment in misdemeanour proceedings does not affect proportionately the pronounced punishment, as different interpretation would result in losing the purpose of coercion for paying a fine.

50. The Constitutional Court concludes that the provision of Article 105 of the Law on Misdemeanours is compatible with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention.

### **Right to a fair trial**

51. During the decision-making of the Constitutional Court in the cases from within abstract jurisdiction, where examination is restricted solely to the wording of the challenged provision, it is very difficult to examine whether a violation of the right to a fair trial has occurred, because compliance or (non)compliance with Article 6 of the European Convention, which prescribes in detail a number of procedural guarantees, may be efficiently examined only upon the completion of proceedings as a whole. The only thing that the Constitutional Court may examine, within abstract jurisdiction, is whether the challenged provision explicitly rules out any of the principles contained in Article 6 of the European Convention (see Constitutional Court, Decision on Admissibility and Merit, no. *U-16/18* of 28 March 2019, paragraph 65, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)).

52. The applicant alleged that the provision of Article 105 of the Law on Misdemeanours was not compatible with the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the reason that, *inter alia*: it concerns misdemeanour proceedings; a condition of existence of a “criminal charge” has been met; the name of the mechanism of “deprivation of liberty for non-payment” indicates that it concerns a charge punitive in character; it does not guarantee the right of access to court and hearing before a court; the punished persons are denied the right to defence; “the scope of discretion of the competent bodies” is not limited, while the authorisation to impose the deprivation of liberty for non-payment of a fine is left to an unlimited discretion of a judge’s will.

53. The guarantees of Article 6 of the European Convention apply to a person facing a “criminal charge”. Here, the Constitutional Court recalls that the concept of a “criminal charge” has an autonomous meaning according to Article 6(1) of the European Convention, which guarantees that “In the determination (...) of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Therefore, it is applied not only in the proceedings which the domestic/national authorities claim to be criminal, but in other proceedings as well (misdemeanour, customs, administrative etc.) in accordance with the principles established in the case of *Engel* (see ECtHR, *Engel v. The Netherlands* (no. 1), judgment of 8 June 1976, Series A, no. 22; *Oztürk v. Germany*, judgment of 27 May 1984, Series A, no. 73, paras 46-50), which are to be taken into account when determining whether a “criminal charge” exists. The first of the so-called “Engel criteria” is the legal classification of offences in the domestic law, the second is the very nature of an offence, while the third is the severity of a sanction that a person concerned is exposed to.

54. Based on the contents of the provision of Article 105 of the Law on Misdemeanours, it does not follow that it raises the issue of determination of liability for the misdemeanour committed, including, consequently, the issue of a “criminal charge”. The mentioned provision raises exclusively the issue of the deprivation of liberty for the failure to fulfil an obligation – non-payment of a fine. Only in the event of a failure to fulfil the previously established obligation does the deprivation of liberty get activated for its non-fulfilment under Article 105 of the Law on Misdemeanours as a means of coercion for the purpose of fulfilment of the obligation concerned. In addition, the Constitutional Court will examine whether the provision of Article 105 of the Law on Misdemeanours explicitly rules out some of the principles referred to in Article 6 of the European Convention, bearing in mind the allegations of the applicant (the challenged provision does not guarantee the right of access to court and a hearing before a court; the punished persons are denied the right to defence; “the scope of discretion of the competent bodies” is not limited, while the determination of deprivation of liberty for non-payment of a fine is left to an unlimited discretion of a judge’s will).

55. In this connection, the Constitutional Court holds that the guarantee of access to court and hearing before a court is ensured under the provisions of paragraph (3) of Article 105 of the Law on Misdemeanours, which prescribes: “the deprivation of liberty may not be imposed on a punished person who can prove that he/she is not in a position to pay the fine”. Therefore, it is apparent that the punished person in these proceedings too has the right of access to court, through his right to try to prove that he is not in a position to pay the fine, and thereby to avoid the deprivation of liberty

for non-payment of the fine. As far as the right to defence is concerned, the Constitutional Court is of the opinion that the right to defence is guaranteed under the provisions of paragraph (4) of Article 105 of the Law on Misdemeanours, which prescribe: *A punished person may lodge an appeal against the decision on the deprivation of liberty with the second instance court.* In the appeal the punished person may present his defence (i.e. provide the reasons which he deems to be in his favour) in relation to the imposed measure of the deprivation of liberty for non-payment of the fine. The punished person must not be deprived of liberty until the second instance court has delivered a final decision on the appeal, given that the provisions of the same paragraph (4) of Article 105 of the Law on Misdemeanours prescribe that “an appeal stays the enforcement”; As regards the “scope of discretion of the competent bodies” and the discretion of a judge’s will, the Constitutional Court refers to the previous part of the reasoning for this decision (which analyses this issue in more detail). In brief, the Constitutional Court holds that the discretion of a judge’s will in the application of the provision of Article 105 of the Law on Misdemeanours is not unlimited, as the applicant alleged. Quite the contrary, the scope of discretion under paragraph (1) of Article 105 of the Law on Misdemeanours is limited, as the deprivation of liberty for non-payment of a fine is the ultimate measure undertaken by a competent court in the event that the previous measures referred to in Articles 103 and 104 of the Law on Misdemeanours did not prove to be efficient. In addition, paragraph (1) of Article 105 provides that deprivation of liberty *may be passed only once against the punished person for the respective misdemeanour.*

56. In view of the aforementioned, the Constitutional Court concludes that the provision of Article 105 of the Law on Misdemeanours is compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

### **Right not to be punished twice**

57. As regards the prohibition of double punishment under Article 4(1) of Protocol No. 7 to the European Convention, the applicant pointed out the following: Article 105 of the Law on Misdemeanours results in the “activation” of the prohibition to punish a person twice, as it is applied against punished persons who fail in full or in part to pay within the given time limit the fine imposed under a misdemeanour warrant. In addition, the applicant pointed out that the period for which the punished person is deprived of liberty does not affect the payment of the amount owed and that the fine is already entered in the Register of Fines and recorded as a debt.

58. Article 4 of Protocol No. 7 to the European Convention, in so far as relevant, reads as follows:

*1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*

59. Based on the content of the aforementioned provision it follows that it is prohibited that a person is being tried and punished twice concerning an offence for which a person had already been acquitted or convicted of by a legally binding decision.

60. The applicant implies that the application of the provision of Article 105 of the Law on Misdemeanours results in the punished person being punished again and more severely so. However, by making a connection with everything that has been mentioned in this decision above, the Constitutional Court indicates that the application of Article 105 of the Law on Misdemeanours does not result in the punished person being tried again, nor is the punished person being punished again, as his liability has already been established in misdemeanour proceedings. Article 105 of the Law on Misdemeanours is activated solely in case that the obligation of the punished person has remained unfulfilled. Therefore, the Constitutional Court holds that the provision of Article 105 of the Law on Misdemeanours does not bring about punishment of the punished person “for the second time”, but, as mentioned above, it concerns a forced fulfilment of the previously (once) established obligation arising from a misdemeanour proceeding/warrant. Therefore, in such a case we do not have a *bis* (see *A and B v. Norway*, [G.C.] nos. 24130/11 and 29758/11, judgment of 15 November 2016, paragraphs 133 and 144-147).

61. The Constitutional Court concludes that the provision of Article 105 of the Law on Misdemeanours does not raise any separate issue under Article 4(1) of Protocol No. 7 to the European Convention.

## **VII. Conclusion**

62. The Constitutional Court concludes that the challenged provision of Article 105 of the Law on Misdemeanours is compatible with Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1) of the European Convention. The mentioned provision satisfies the standards of the right to liberty of person, for the reason that it is sufficiently clear and precise from the procedural aspect and, when considered as a whole, it satisfies all the necessary guarantees, which ensure that the deprivation of liberty is not arbitrary. In addition, the challenged provision satisfies the standard of proportionality, as its purpose is not a punishment but a coercion to secure the payment of a fine. Also, the circumstance that, even after the deprivation of liberty (for up to 15 days), it remains recorded in the Register of Fines, is justified from the aspect of the duration



thereof. This is so, as it is deleted in any case upon the expiry of the period of five years from the day the decision of a court/ misdemeanour warrant has become legally binding.

63. The Constitutional Court concludes that the provision of Article 105 of the Law on Misdemeanours is compatible with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention as it does not raise the issue of establishment of liability for the perpetrated misdemeanour, including, accordingly, the issue of establishment of “a criminal charge. It exclusively raises the issue of the deprivation of liberty for the failure to fulfil the obligation, which was established previously. In addition, the challenged provision does not bring into question the principles referred to in Article 6 of the European Convention, such as the right of access to court, the right to defence and the remainder that the applicant pointed out.

64. The Constitutional Court concludes that the provision of Article 105 of the Law on Misdemeanours is not incompatible with Article 4(1) of Protocol No. 7 to the European Convention, as the punished person is not being punished again. It rather concerns a coercion in fulfilling the previously (once) established obligation arising from a misdemeanour proceedings/warrant.

65. Having regard to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this Decision.

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