



**THEMIS Grand Final Competition**  
(6–10 December 2021)

**TEAM SERBIA I**

**vs.**

**TEAM FRANCE**

On March 9, 2021, the Northern Regional Prosecutor's Office of the Motherland Republic sent defendant X to trial for the alleged crime of rape of the victim M.

The case was assigned to a panel of judges in the Northern Regional Court of the Republic of Motherland. The victim M. became a civil party requesting moral damages and material damages.

By an `unconstitutionality exception` raised *ex officio* by the court, The Northern Regional Tribunal has asked the Constitutional Court to rule on the constitutionality of texts of the Criminal Code and the Code of Criminal Procedure of the Republic of Motherland, related in particular to the admissibility of material and moral damages in criminal proceedings by the victim of the crime, or if such a request is to be formulated separately, in front of a civil court.

Under the legal procedure in such cases, when the Constitutional Court is notified, the Tribunal has given a summary of the subject-matter of the dispute and of the relevant facts as established by the Tribunal, as well as an account of the factual circumstances on which the exception is formulated. In essence, the Tribunal held that it was not possible in the criminal proceedings to make a claim for compensation by the victim of the crime.

The Tribunal also referred in its own *ex officio* request to the Constitutional Court to the national provisions which might be applied in the present case and also referred to the relevant national case-law.

By law the criminal proceedings could not be stayed during the time period of pending referrals to the Constitutional Court. Furthermore, by law judges are bound to decisions of the Constitutional Court. Not following a decision of the constitutional court might constitute a disciplinary offence for a judge.

Following this objection, the Northern Regional Tribunal continued to try the case, administering evidence in accordance with the legal provisions.

The Victim M. requested the recusal of the panel that made the *ex officio* request on the grounds that by the statement made in the *ex officio* request the Tribunal, regarding the factual and legal framework of the case, expressed its opinion on issues of fact and law before the case is heard.

Another panel of the same court, which heard the request for recusal under the provisions of the Code of Criminal Procedure of the Republic of Motherland, dismissed this request as being made by a person who has no procedural capacity, without ruling on the merits of the request for recusal, arguing instead that the victim cannot make a recusal request because it has no capacity in the process in which he is accused X of committing the crime of rape.

Furthermore, during these pending criminal proceedings, a new law was enacted. This law provides that every judge must meet the criteria to be a „competent judge” who „performs the judicial office properly”. This meant a de facto lustration also of judges with tenure. The law stipulates that information and material of the national secret service about the respective judge of the last 5 years must be used and requested in the course of this lustration process and lustration proceedings.

The panel of judges judging the main case finalized the trial and sentenced defendant X to 5 years in prison. By the same sentence, the request of the victim M. to oblige the defendant to moral and material damages was rejected as being made by a person who does not have procedural capacity, the motivation of the Tribunal containing practically the same factual and legal framework, as well as the jurisprudential practice indicated in the *ex officio* request addressed to the Constitutional Court.

Subsequently, after delivering the sentence, the Constitutional Court ruled that it is possible to constitute a civil party in such situations in the criminal proceedings.

According to the Code of Criminal Procedure of the Republic of Motherland, it is possible to review when the ruling was grounded on a legal provision that was declared unconstitutional after the ruling had become final, but only on the criminal side of the case, not on the civil side as this is the case for civil damages. Also, this ground for review can be requested only if it is in favour of the convicted person.

Because of statutory limitations victim M. Could no longer sue X before civil courts.

Ms. M. lodged a claim to ECHR. In this complaint the applicant raised the following arguments:

- The panel of judges did not refrain from judging the case, although it was prejudged by the *ex officio* request formulated at the Constitutional Court;
- She did not have the right of access to justice due to the fact that her request for recusal was rejected on the grounds that she did not have the procedural capacity in question;
- Although the Constitutional Court ruled that the victim could have procedural capacity in the case, after the Northern Regional Tribunal ruled in its final decision, Ms. M has no recourse to request a review of the judgment given in respect of the rejection of its claim for damages.
- The panel of judges was not independent because of the new lustration laws

**TEAM SERBIA I**: support the arguments of representatives of the applicant, Ms. M

**TEAM FRANCE**: present the position of the defending state Motherland

*Background:*

**The Republic of Motherland ratified the European Convention on Human Rights in 1984. It is not an EU member state.**