BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

p-ISSN 2585-7088
e-ISSN 2644-6359

ECtHR: BĂDESCU AND OTHERS v. ROMANIA (Application No. 22198/18, 15 April 2025): Criminal Liability of Judges for the Interpretation of the Law in the Exercise of Judicial Functions

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Abstract: *The criminal liability of judges is significantly limited by judicial independence, of which the criminal immunity of judges constitutes one of its facets. The judicial reform introduced by the 2020 amendment to the Constitution of the Slovak Republic created a framework for criminal prosecution of judges for so-called "bending of the law". Given the lack of practical experience with its application, it is important to examine the decision of the European Court of Human Rights in Bădescu and Others v. Romania. In this case, an analysis was made of what constitutes judicial decision-making and what constitutes preparation for it. Preparation for the issuance of a judicial decision enjoys a lower level of criminal immunity than the actual judicial decision-making itself.*

Key words: *Judicial Independence; Exercise of Judiciary; Criminal Immunity of Judges; Criminal Prosecution of Judges; ECtHR*

Suggested citation:
Svák, J. (2025). ECtHR: Bădescu and Others v. Romania (Application No. 22198/18, 15 April 2025): Criminal Liability of Judges for Interpretation of Laws in the Exercise of Judiciary. *Bratislava Law Review*, 9(2), 309-320. https://doi.org/10.46282/blr.2025.9.2.1130

Submitted: 1 September 2025
Accepted: 25 November 2025
Published: 30 December 2025

1. INTRODUCTION

When judicial reform was introduced through the 2020 amendment of the Constitution of the Slovak Republic by Constitutional Act No. 422/2020 Coll. as part of the government's program declaration in the section entitled "*Restoring trust in the rule of law and ensuring that the law and justice apply to everyone*", it was the judges themselves who expressed the strongest dissatisfaction. Among other things, the reform affected their decisional immunity, because, as the explanatory report stated, it „*began to be perceived not as a necessary institutional safeguard of judicial independence, but as an abused privilege of individual judges who, invoking independence, render decisions based on an arbitrary interpretation of the law bordering on the abuse of power.*" These harsh words triggered a negative reaction, especially within the judicial community, which was further intensified by the introduction of a new criminal offense of bending the law under Section 326a of the Criminal Code, the application of which also met with negative reactions stemming from the fear of misapplication of the law precisely under this criminal provision (Šamko, 2022; Šamko, 2021). Slovakia thus joined the group of states that have tightened the accountability of judges; however, such tightening is not without limits under international law. The criminal liability of judges is addressed in international

forums[1] by both professional literature[2] and international organisations, with the decisions of the European Court of Human Rights (hereinafter also referred to as "**ECtHR**") being particularly influenced by the advisory *Venice Commission* (European Commission for Democracy through Law)[3] and the independently operating *Consultative Council of European Judges* (hereinafter also referred to as "**CCJE**"), which recently submitted a summary Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.[4]

2. ECTHR CASE-LAW ON JUDICIAL CRIMINAL LIABILITY: THE *BĂDESCU AND OTHERS V. ROMANIA* CASE IN CONTEXT

To date, the ECtHR has not addressed the criminal liability of judges for specific judicial decisions, which does not mean that judges have not been subjected to vexatious criminal prosecutions, often used as retaliatory measures for their political activities and frequently described as "professional" in nature, with delays in court proceedings most often serving as the stated reason (pretext).[5] Disciplinary liability was mainly imposed on the incriminated judges.

[1] Suffice to say
- The UN's „Basic Principles on the Independence of the Judiciary" (1985),
- Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges,
- European Charter on the statute for Judges (1998) (DAJ/DOC(98)23),
- Code of Judicial Conduct (Bangalore draft).

[2] Most recently Aravena et al. (2025).

[3] A compilation concerning the status of judges, including their immunities and responsibilities, was published by the Venice Commission on 7 January 2025 under no. CDL-PI(2025)003: *Compilation of Venice Commission opinions and reports concerning judges*.

[4] Regarding the criminal liability of judges, it stated: *„Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long). Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.*
The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has became common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge." Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002, paras. 52-54.

[5] In this regard, a relevant precedent is the decision in *Miroslava Todorova v. Bulgaria (19 October 2021, no. 40072/13)*, in which the applicant was held accountable for delays identified following targeted reviews of her judicial decision-making. According to the ECtHR, the predominant purpose of the disciplinary proceedings was not to ensure compliance with deadlines in criminal proceedings but rather to sanction and intimidate the applicant, as vice-president of a professional association of judges, for her active public criticism of executive interference in the judiciary. Consequently, there was a violation of Article 18 of the Convention in conjunction with Article 10.

The ECtHR was given a relatively rare opportunity to express its opinion on the criminal liability of judges in the case of ***Bădescu and Others v. Romania (15 April 2025, No. 22198/18 and others),*** in which three judges challenged the alleged lack of foreseeability of the legal basis for their conviction for abuse of power in the exercise of judicial functions, thereby violating the principle of *nullum crimen sine lege* protected by Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as "**the Convention**"). The exceptional status of this principle is further highlighted by Article 15 of the Convention, which prohibits its derogation even in times of war or other public emergencies threatening the life of the nation.

2.1 Facts and Procedural Background of the Bădescu Case

From a simplified journalistic perspective, the case of the three convicted Romanian judges can be summarised as follows. A person lawfully convicted of an economic offence met with Judge C. and agreed with him that, if he gave him EUR 630,000, the judge would arrange for his extraordinary appeal to be heard by his chamber at the Supreme Court and would find a way, together with his colleagues, to have the extraordinary appeal granted. This is how Romanian media presented the case, monitoring it closely after the suspicious decision of the Supreme Court regarding the extraordinary appeal. For them, the case was simple and clear from the outset, reinforcing the public's belief in the corruption of judges.

Everything (?) pointed to this. On April 4, 2011, the convicted Mr. SD filed two extraordinary appeals against the final judgment. The first was formally invalid, and the second was withdrawn by SD. Only the third appeal reached the competent judge, namely the chamber composed of Judge C. and two other judges, A. and B. The story then unfolded on three levels.

The first level occurred within the framework of disciplinary proceedings. Following a series of media articles published after the decision on SD's extraordinary appeal, disciplinary proceedings were initiated against Judges C., A., and B. (all three of whom are also the applicants in this case). The competent judicial inspectorate filed a proposal for disciplinary proceedings, stating that it was not targeting the applicants for their interpretation of the law but rather for the manner in which the extraordinary appeal had been reviewed. The Romanian Superior Council of Magistracy (hereinafter referred to as "**CSM**"), acting as the disciplinary authority, dismissed the proposal, reasoning that it concerned sanctions for interpretation of procedural legal rules and that the applicants (Judges C., B., and A.) had not demonstrated "*serious negligence*", let alone arbitrariness in their legal interpretation. This decision was subsequently upheld by the Supreme Court of Cassation.

At the second level, the National Anti-Corruption Directorate initiated criminal proceedings against the applicants on 28 February 2012 in connection with the judgment on SD's extraordinary appeal, on the grounds that they had knowingly exceeded their powers in the proceedings leading to this decision. After a few months, on 7 August 2012, these criminal proceedings were discontinued. The reason was that judges cannot be held criminally liable for abuse of power in the exercise of their judicial functions for decisions adopted in the course of performing judicial duties.

The third level, unfolding several years after the previous two, concerned the criminal prosecution of Judge C., who had been under investigation for corruption offences since 2013 and was sentenced by the Court of Appeal in Constanța on 2 June

DOI: 10.46282/blr.2025.9.2.1130

2016 to seven years' imprisonment. Judge C. served this sentence until 17 October 2017, when he was released on parole.

A new phase in the case of the extraordinary appeal was initiated by the Attorney General, who on 29 January 2014 ordered the reopening of criminal proceedings against all three applicants. The testimony of witnesses and other evidence confirmed the journalists' initial view of the case. The three applicants were charged with abuse of power for issuing a decision allegedly influenced by an external factor, namely the bribe received by Judge C. from SD. By the judgment of 19 May 2016, all three applicants were acquitted of the charges. In the same judgment, the legal action against Judge C. was referred to a separate proceeding.

After the prosecutor's appeal, the Supreme Court, in its final judgment of 14 June 2017, sentenced judges A. and B. to four years and four months of imprisonment. In its very extensive 180-page judgment, it drew a distinction between the court decision itself and the conduct leading to its adoption. It explicitly emphasised that it did not assess the content of the decision or the manner in which the judges interpreted the law, but rather the way in which they deliberately altered the factual circumstances of the case so that the principle of *ne bis in idem* could be applied, thereby ensuring the success of SD's extraordinary appeal. According to the Romanian Supreme Court, the applicants modified certain existing or easily identifiable facts relating to the factual situation without any objective justification, thereby deliberately ignoring the relevant and substantial arguments presented by the prosecution. This was demonstrated in particular by the questions they asked the parties to the proceedings at the public hearing and by the manner in which Judge A., as presiding judge of the chamber, conducted the proceedings in question. Judges A. and B. lodged an extraordinary appeal against this judgment, which, however, was dismissed by the Romanian Supreme Court on 7 November 2019.

From this story of the criminal prosecution of the three Romanian judges, in my opinion, three interesting questions arise, namely

- ***a)*** the manipulability of case assignment to a "lawful" judge;
- ***b)*** the foreseeability of the criminality of conduct as an element of the principle of *nullum crimen sine lege*;
- ***c)*** what is and what is not the exercise of judicial functions from the perspective of a judge's criminal liability.

2.1.1 Manipulability of Case Assignment

The manipulation of case assignment in this instance appeared primarily to demonstrate the fact that, without it, achieving the desired decisions would be difficult. The fact that the ECtHR did not notice it in this case does not mean that it will not be confronted with this issue in other similar cases in the future. On the contrary, it constitutes the first and necessary precondition for later "bending the law" to obtain a desired judicial decision. It serves as a "gateway" mechanism granting access to the court, as well as an instrument for influencing the exercise of judicial power, particularly from the vantage point of the executive, which is responsible for the effective functioning of the judiciary and, consequently, for the balanced allocation of cases to individual judges. At the same time, it is also a dividing criterion for distinguishing between two state regimes, namely democratic and totalitarian. In the former, the right to an independent and lawfully established court is respected, whereas in the latter, such a right is unheard of.

By a way of a comparative illustration drawn from the Slovak context, shortly after the establishment of the democratic Slovak state in 1993, I stated with regard to this right that it belongs to the principles which

a) "*form the foundation of the independent exercise of the judiciary,*
b) *were absent from our legal system for a long period,*
c) *now occupy a firmly established place within the judicial system*" (Svák, 1993, p. 22).

At that time, I still had "vivid" memories of how the presiding judge would assign "sensitive" cases to reliable judges. This practice was particularly prevalent in the context of criminal liability proceedings (the main purpose of which was the confiscation of property) against those who irreversibly fled from the "fortunate socialism" to the bourgeois world. I would not have imagined back then that Slovakia, still accustomed to this system, would later become a member state of the Council of Europe, that would enable the ECtHR to deliver a precedent-setting decision criticising the manipulation of the allocation of court cases, including even situations of the presiding judge assigning cases to himself.

The same was done by the presiding judge of the district court, Mr. C., who in 1998 prepared the work schedule of this court for 1999. However, in 1999, Judge D. was appointed as the presiding judge of the court and drew up an addendum to the work schedule in a very general form, which he then frequently changed. This enabled him, in June 1999, to assign to himself a case concerning the enforcement of a claim (in the amount of EUR 2,500,000). The matter gave rise to a complaint in the case of *DMD GROUP, a. s. v. Slovak Republic (of 5 October 2010, No. 19334/03)*, which enabled the ECtHR to set an important transnational precedent on the right to a court established by law. The applicant company argued that Judge D., acting as a presiding judge, had arbitrarily removed the case from the judge who was supposed to handle it according to the schedule and assigned it to himself in order to rule on it expeditiously on the same day.[6] Furthermore, the applicant company also argued that "*the relevant period was marked by a substantial number of chaotic and confusing changes*" to the court's work schedule.

My historical memory allows me to share the response of the Ministry of Justice to this ECtHR judgment leading to the introduction of a modular case-allocation system called "*Súdny Manažment" <Court Management>*, still in operation today. An integral part of this system is the so-called random generator, representing Slovakia's response to the ECtHR decision in *DMD GROUP*, with the purpose of "randomly" allocating each case to the competent judge. This system is based on the use of a general algorithm using a combined multiple recursive pseudo-random generator with a long repetition period, with specific requirements entered into it for each court individually on the basis of an approved work schedule. The system has repeatedly withstood a constitutional review carried out by the Constitutional Court of the Slovak Republic. From today's optimistic perspective, this modular system could be subsumed under the term "AI system". However, this does not affect its validity but, on the contrary, it raises new questions, such as why precisely judge *XY* or judicial chamber *Z* is assigned to decide cases that attract public attention.

[6] It is further interesting about the case that the Slovak Constitutional Court concluded that the contested reassignment occurred in the context of the district court's caseload schedule for 1999, and that the speed with which the judge decided had no particular legal significance. Therefore, there was no violation of the right to a lawful judge.

DOI: 10.46282/blr.2025.9.2.1130

For the time being, a sufficient warning may be the reference for a preliminary ruling lodged in the case *Rowicz*, pending before the Court of Justice of the European Union under No. C-159/25. The issue arose when, following the transfer of a judge, one hundred of her unfinished cases were to be reassigned among the other judges. This task fell to an AI system similar to the one in Slovakia, which assigned 56 cases to one judge and none or only two or three to the others. Of particular interest is the opinion of the Advocate General, who stated, among other things, in his opinion: „*The complexity of the RNG system, combined with the potential for human error, makes the system vulnerable to manipulation, and the ambiguity of the applicable laws creates the risk that legal regulations may be incorrectly translated into the automatic operation of the program. System errors, in turn, may result in violations of the right to a court established by law. The parameters of the system remain unknown, and actions such as increasing or decreasing a specific judge's caseload on a one-off basis leave no trace in the generated reports, while some parameters established by law are not taken into account at all.*"

Apart from the potential manipulability by those with access to the "source codes" of this "random number generator", other negative aspects also arise. This system does not ensure compliance with the principle of an even distribution of the court's caseload, thereby violating both the principle of efficiency of proceedings and the requirement of hearing cases without undue delay under Article 47(1) of the Charter, as well as the principle of equality before the law. There is no doubt that the guarantee of an even distribution of caseload is as important as the guarantee of random case allocation, since it affects the length of proceedings without undue delay and thus the Union citizen's right to a fair trial and effective judicial protection. In the present case, the technical tool assigns 56 cases to one judge in a single night, while in the same draw, other judges received none or only a few cases. Such case allocation is discriminatory in effect as it leads to significant delays in the judge's agenda, which is reflected in the waiting time for a case to be heard. As a result, the waiting time for the hearing of a case before the court depends on random factors, which, although they may simulate the "lottery" of judges deciding specific cases, at the same time create new risks, including the possibility that the draw is carried out within one and the same judge/chamber. With the passage of time since the introduction of the electronic filing system, we may now be approaching another precedent-setting decision, this time of the Court of Justice of the European Union.

2.1.2 Foreseeability and *the Nullum Crimen Sine Lege* Principle

The principle of *nullum crimen sine lege* contains two intertwined fundamental rights in the form of

- the prohibition of retroactivity in criminal law, and
- the foreseeability of criminal liability.

In the case of *Bădescu*, the ECtHR was confronted with the applicants' arguments that their criminal conviction violated the right to foreseeability of criminal liability for acts performed in the exercise of judicial functions. They saw nothing wrong in developing their legal reasoning during deliberations following the hearing, while assessing the evidence. Judicial practice existing at the time of their decision-making excluded the possibility of prosecuting judges for the manner in which they assessed a case. The threshold beyond which judges may be held liable for acts performed in the exercise of judicial functions is set at a very high level.

The Government pointed out that, at that time, the case-law of the Romanian courts was stable, and according to it, a judge could not be prosecuted for the manner in

which he or she applied the law unless it was proven that those judicial functions had been exercised in bad faith. The Government emphasised that judges, as professionals, were aware of this judicial practice.

Having set out the arguments of both parties, it is important, for the purpose of understanding the ECtHR's reasoning, to recap the fundamental principles which the Court has developed in its case-law when assessing the applicability of Article 7 of the Convention from the perspective of the foreseeability of criminal liability. The basis for the foreseeability of criminal liability is the state's obligation to ensure that criminal law clearly and comprehensibly defines criminal offences and the penalties for them. This principle was already articulated by the ECtHR in the landmark judgment in *Kokkinakis v. Greece (25 May 1993, no. 14307/88)*, which concerned the interpretation of the term "proselytism" in connection with the criminalisation of "missionary" activities affecting the *forum internum* of another believer or non-believer. But where is the line between permissible missionary activity and violent (albeit not of a physical but of a psychological) conversion of a person to a faith or rather other religion? Similarly to the case in question, the issue lies in determining the line between the exercise of justice and preparation for it. When it remains a permissible form of religious conversation combined with moral support, and when does it constitute an "indirect" interference with the religious freedom of another that is criminalised? When does it constitute "genuine evangelism" and when does it amount to "religious corruption"? Such corruption may "*take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need*",[7] which can even take on a violent character or amount to "brainwashing".[8] In this regard, the interpretation of criminal law is necessary, as the ECtHR held in paragraph 52 of the *Kokkinakis* judgment that, when interpreting criminal law concepts,

- it must not be extensively construed to an accused's detriment, for instance by analogy,
- the individual must be able to know "*from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.*"

In this case, however, the Greek courts merely reproduced the wording of the relevant provision of the criminal code and "*did not sufficiently specify in what way the accused had attempted to convince his neighbor by improper means.*"[9]

What is important in the context of the *Bădescu* case is that the ECtHR expressly emphasised the significance of judicial interpretation of the law, which it justified in paragraph 125 of that judgment by stating that „ *it is firmly established in the legal tradition of the States parties to the Convention that case-law necessarily contributes to the progressive development of criminal law.*"

The Court later emphasised this principle in rather complex cases concerning the prosecution of criminal offences related to the shooting of East German citizens attempting to flee to the Federal Republic of Germany. In paragraph 50 of the judgment in *Streletz, Kessler and Krenz v. Germany (22 March 2001, no. 34044/96 and others)*, the ECtHR stated that Article 7 of the Convention cannot be interpreted as prohibiting the gradual clarification of the rules on criminal liability through judicial interpretation from case to case, provided that the outcome is consistent with the essence of the offence and is reasonably foreseeable.

[7] ECtHR, Kokkinakis v. Greece, app. no. 14307/88, 25 May 1993, para. 48.
[8] For more on this judgment, see Svák (2021).
[9] ECtHR, Kokkinakis v. Greece, app. no. 14307/88, 25 May 1993, para. 49.

DOI: 10.46282/blr.2025.9.2.1130

The significance of judicial interpretation of criminal codes is further reinforced by two additional fundamental principles important for the assessment of the *Bădescu* case, namely that

- the interpretation and application of domestic law is primarily the task of domestic authorities, in particular, the courts,
- the concept of foreseeability largely depends on the content of the relevant text, the area which it concerns, as well as the number and "quality" of its addressees, whereby in regard to this "quality" the ECtHR specifically emphasises lawyers, and in particular judges, who are "*accustomed to exercising great caution in the performance of their duties*".[10]

The first fundamental principle can be illustrated by the interpretation of the term "genocide," which, like the concept of judicial independence in the exercise of judicial functions, has a close connection with international law. In the case of *Jorgic v. Germany (12 July 2007, no. 74613/01)*, the applicant argued that the German courts did not have the authority to convict him of genocide by broadly interpreting the term without support in either German or international law. In 1992, the applicant established a paramilitary group and participated in ethnic cleansing ordered by Bosnian-Serb political leaders in the Doboj region. After analysing the case-law of German and international courts, the ECtHR concluded that „*while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts*".[11] Therefore, according to the ECtHR, the applicant could reasonably have foreseen, even with the assistance of a lawyer, that he risked being convicted of genocide for his actions. In paragraph 114, the Court further emphasised that "*the interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time*."

However, a situation may arise where, at the relevant time, case-law is lacking. The ECtHR had to address this question in the case of *Soros v. France (6 October 2011, no. 50425/06)*, which concerned the uncertainty of the factual elements of the criminal offence of insider trading. The problem was that the applicant was convicted for purchasing shares of a company with which he was not directly professionally or contractually connected, and he had obtained the information for the purchase "second-hand". Ultimately, what was important for the ECtHR was that he was "a professional investor" who was „*familiar with the business world and accustomed to being contacted to participate in large-scale financial projects. Given his status and experience, he could not have been unaware that his decision to invest in the securities of Bank S. could make him liable to the offence of insider trading provided for in the aforementioned Article 10-1*.[12] *Thus, knowing that there was no comparable precedent, he should have exercised greater caution when he decided to invest in the securities of Bank S.*"[13]

[10] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 124. (Original French wording: "*…habitués à devoir faire preuve d'une grande prudence dans l'exercice de leur métier.*").
[11] ECtHR, Jorgic v. Germany, app. no. 74613/01, 12 July 2007, para. 113.
[12] It is a provision of the French Monetary and Financial Code that allows for the imposition of sanctions (by a way of a fine or imprisonment for two months) on anyone who uses information relating to financial transactions for personal gain before such information becomes available to the public.
[13] ECtHR, Soros v. France, app. no. 50425/06, 6 October 2011, para. 59. (Original French wording: "*…un « investisseur institutionnel », familier du monde des affaires et habitué à être contacté pour participer à des projets financiers de grande envergure. Compte tenu de son statut et de son expérience, il ne pouvait ignorer que*

The case in question also gives rise to a second basic principle based on the condition of predictability of the law, namely that professional experts in a particular field are less protected by this requirement than others. From the perspective of the *Bădescu* case, it follows that judges exercising judicial functions are considered "professional experts" even when determining the conditions for criminal prosecution, such as statutes of limitation[14] or the application of the principle of *ne bis in idem*, including in cases where relevant case-law does not exist.

2.1.3 What is the Exercise of Judicial Functions?

In the course of judicial activity and the hearing of cases, a judge is compelled to interpret the law in order to apply it to the facts of the case even before issuing a judicial decision. It is evident that, when issuing judgments, judicial immunity is broader than in other judicial activities due to both international and constitutional guarantees of judicial independence. In such cases, lifting a judge's immunity requires proof of bad faith on the part of the judge and an intentional interpretation of the law *contra legem*, whereby *lex* also encompasses the case-law of the courts.

When interpreting the constitutional immunities of constitutional officials, which include judges, the ECtHR decision in *Haarde v. Iceland (23 November 2017, no. 66847/12)* may serve as a precedent, where the Icelandic Prime Minister was criminally prosecuted for failing to fulfil his constitutional duties. Specifically, the case concerned the failure to prevent the financial collapse of Icelandic banks in 2008 and the accusation that the former prime minister had failed to convene the government to address "important government matters" under Article 17 of the Icelandic Constitution. The applicant argued that the government is obliged to discuss only those "important matters" which, under Article 16(2) of the Icelandic Constitution, must be submitted to the President, based on "a century-long practice". However, the Icelandic courts took a different view, and the ECtHR essentially held that what constitutes an "important matter" had been sufficiently determined by the domestic courts and, therefore, that "*the offence for which the applicant was convicted was sufficiently defined* ". Thus, in the light of the *Bădescu* case, it follows that what constitutes the exercise of judicial functions is, in principle, for the domestic court to decide.[15]

sa décision d'investir dans les titres de la banque S. pouvait le faire tomber sous le coup du délit d'initié prévu par l'article 10-1 précité. Ainsi, sachant qu'il n'existait aucun précédent comparable, il aurait dû faire preuve d'une prudence accrue lorsqu'il a décidé d'investir sur les titres de la banque S.").

[14] In this context, it is worth recalling one of the first Advisory Opinions of the Grand Chamber of the ECtHR under Article 16 of the Convention, issued at the request of the Armenian Court of Cassation, no. P16-2021-001, dated 26 April 2022. Regarding the application of Article 7 of the Convention, the Grand Chamber stated that „*where criminal responsibility has been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality (nullum crimen, nulla poena sine lege) and foreseeability enshrined in Article 7…It follows that where a criminal offence under domestic law is subject to a statute of limitation, and becomes time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting "the retrospective application of the criminal law to an accused's disadvantage*".

[15] In the majority vote of the ECtHR, it is also necessary to highlight the dissenting opinion of Judge *Wojtyczek*, who pointed out that the case involved a very complex constitutional issue where the rule of law was at stake. He aligned himself with the opinion of five judges of the Court for Impeachment, who, although aware of the public pressure and anger directed against the government, remained faithful to the principle of the rule of law and the separation of powers within it.

DOI: 10.46282/blr.2025.9.2.1130

3. CONCLUSION

On the basis of these considerations, the ECtHR ruled that in the *Baděscu* case there had been no violation of Article 7 of the Convention in terms of

- the distinction between the exercise of judicial power and other judicial activities,
- the foreseeability of the law, and
- the professional expertise of judges.

The domestic courts examined in considerable detail the manner in which the applicants prepared the judicial proceedings so that, by subsequently exercising their judicial functions, they could decide in favour of the convicted SD. In other words, the courts sought a specific legal outcome that could not have been achieved without their manipulation of the facts of the case. According to the domestic courts, the applicants deliberately altered the factual basis established by the lower courts in order to develop a legal argument aimed at invoking the principle of *ne bis in idem.* The applicants modified certain already existing or easily identifiable facts relating to the case without any objective justification and deliberately ignored relevant and significant arguments presented by the prosecution, as evidenced by the questions they asked the parties during the public hearing and the manner in which the first applicant, as presiding judge, conducted the proceedings. According to the ECtHR, the aim of the criminal proceedings against the applicants was not to examine the legality and validity of the judicial decision itself, but to "*identify, beyond that decision, conduct contrary to the duties of the office and corresponding to the material element of the offence, as well as the motive for the act in question, such conduct being sometimes able to influence the outcome to be reached*".[16] Therefore, they were prosecuted for abuse of public office, not for "bending" the law in the exercise of judicial functions, which is specifically constitutionally protected by judicial independence. Even though "*the factual context in which the acts alleged against the applicants took place overlapped to a certain extent with the main activity of a judge's duties, namely that of rendering judicial decisions… the legal provisions prohibiting abuse of office at the time of the events, together with the interpretative case-law, were worded in a sufficiently precise manner to enable the applicants, themselves judges, to discern, to a reasonable extent in the light of the circumstances, that their actions risked leading to a criminal conviction, without calling into question the guarantee of judicial independence*".[17]

The final part of the *Bădescu* judgment concentrates on the main message of the precedent, which can also be considered as relevant case-law in the Slovak context. Manipulation of case allocation, the subsequent purposeful handling of evidence, and distortion of the facts of the case result in a judgment that is formally lawful, yet…

[16] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 140. (Original French wording: "*…mais d'identifier, au-delà de cette décision, un comportement contraire aux devoirs relevant de la fonction et correspondant à l'élément matériel de l'infraction, ainsi que le mobile de l'acte en question, pareil comportement pouvant, parfois, exercer une influence sur la solution à retenir…*").

[17] ECtHR, Bădescu and Others v. Romania, app. no. 22198/18 and others, 15 April 2025, para. 148. (Original French wording: "*…le contexte factuel dans lequel s'inscrivaient les faits reprochés aux intéressées se superposait dans une certaine mesure à l'activité principale des fonctions d'un juge, à savoir celle de rendre des décisions de justice. Toutefois, les considérations qui précèdent suffisent à la Cour pour conclure que les articles de loi réprimant l'abus de fonctions au moment des faits accompagnés de la jurisprudence interprétative étaient formulés de manière suffisamment précise pour permettre aux requérantes, elles-mêmes juges, de discerner dans une mesure raisonnable au regard des circonstances que leurs actes risquaient de leur valoir une condamnation pénale, sans que la garantie d'indépendance de la justice soit remise en cause.*").

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