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Mandatory Administrative Confiscation, Proportionality, and Incidental Constitutional Review under the European Convention on Human Rights

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ABSTRACT

Mandatory administrative confiscation is among the most intrusive forms of state interference with property. This article examines the constitutionality of mandatory confiscation under Article 92(6/1) of the Albanian Road Traffic Code, focusing on proportionality, property rights, effective judicial protection, and incidental constitutional review. The central argument is that the constitutional difficulty does not arise from confiscation as a legal institution or from the legitimacy of road-safety objectives, but from a statutory structure that makes confiscation automatic and excludes individualised judicial assessment. Using doctrinal, jurisprudential, and comparative methods, the study analyses the Albanian Constitution, the European Convention on Human Rights, the case law of the Constitutional Court of Albania and the European Court of Human Rights, and selected decisions of the Italian Constitutional Court. Particular attention is given to the autonomous criminal limb of Article 6 ECHR, the fair-balance requirement under Article 1 of Protocol No. 1, and the constitutional limits of legislation that predetermines serious proprietary consequences. The article argues that, where constitution-conforming interpretation is unavailable, incidental constitutional review provides the appropriate institutional mechanism for testing whether legislative automatism is compatible with constitutional guarantees. It concludes that a constitutionally sustainable confiscation regime should preserve effective judicial scrutiny of necessity and proportionality and permit legally relevant individual circumstances to be considered.

Keywords: *mandatory administrative confiscation, proportionality, incidental constitutional review, property rights, European Convention on Human Rights, judicial review, constitutional adjudication, Road Traffic Code*

I. INTRODUCTION

The protection of fundamental rights constitutes one of the defining characteristics of the modern constitutional state. Within European constitutional systems, limitations on individual

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rights are regarded as legitimate only where they are prescribed by law, pursue a legitimate public interest, and satisfy the principle of proportionality.¹ These requirements have acquired particular significance in cases involving interferences with property rights, an area in which domestic constitutional guarantees increasingly interact with the standards developed by the European Court of Human Rights.

Against this constitutional background, mandatory administrative confiscation raises questions that extend well beyond the legality of administrative sanctions. The issue concerns the constitutional limits of legislative power itself. More specifically, it concerns whether the legislature may require confiscation automatically, without allowing either the administrative authority or the reviewing court to assess whether the measure is proportionate in the circumstances of the individual case.

The present study examines this question through the example of Article 92(6/1) of the Albanian Road Traffic Code,² which provides for the mandatory confiscation of an armoured vehicle circulating without the authorisation required by law. The constitutional controversy does not concern the legitimacy of confiscation as an instrument for protecting public safety, nor does it challenge the legislature's objective of preventing serious threats to public order. The constitutional difficulty arises instead from the statutory elimination of individualised judicial assessment. By making confiscation mandatory in every case, the provision excludes any possibility of balancing the public interest against the specific burden imposed upon the owner.

Recent developments in European constitutional and Convention jurisprudence demonstrate an increasing emphasis on individualised proportionality review whenever state measures seriously interfere with fundamental rights. The jurisprudence of the European Court of Human Rights has consistently required domestic authorities to maintain a fair balance between the general interest of the community and the protection of individual rights.³ Similarly, several European constitutional courts have rejected legislative mechanisms that replace judicial balancing with irrebuttable statutory presumptions.⁴

¹ ROBERT ALEXI, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2002); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

² Ligj nr. 8378, datë 22.7.1998, "Kodi Rrugor i Republikës së Shqipërisë" [Law No. 8378 of July 22, 1998, on the Road Traffic Code of the Republic of Albania] art. 92(6/1), i ndryshuar (Alb.) [hereinafter Kodi Rrugor]. Paragraph 6/1 was inserted by Ligj nr. 63/2021, datë 7.5.2021 (Alb.).

³ *G.I.E.M. S.r.l. and Others v. Italy* [GC], App. Nos. 1828/06, 34163/07 & 19029/11, § 293 (Eur. Ct. H.R. June 28, 2018); Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. No. 9, 213 U.N.T.S. 262 [hereinafter Protocol No. 1].

⁴ Corte cost., 9 dicembre 2022, n. 246 (It.); Corte cost., 28 marzo 2024, n. 52 (It.).

This article argues that the constitutional defect of mandatory administrative confiscation lies not in confiscation itself, but in the legislative elimination of individualised judicial proportionality review. The exclusion of judicial discretion transforms proportionality from a constitutional standard into an irrebuttable legislative presumption, thereby preventing courts from performing their constitutional function as guarantors of fundamental rights.

The originality of the study lies in connecting three strands of constitutional analysis that are usually examined separately: mandatory administrative confiscation, incidental constitutional review, and the European standards governing proportionality and effective judicial protection. While Albanian legal scholarship has analysed administrative sanctions, constitutional review, and property rights independently, limited attention has been devoted to the interaction between these concepts where legislation removes every possibility of individualised judicial assessment.

Methodologically, the article employs doctrinal, jurisprudential, and comparative analysis. It examines the Albanian Constitution,⁵ the European Convention on Human Rights,⁶ the jurisprudence of the Constitutional Court of Albania, and the case law of the European Court of Human Rights. It also draws upon the jurisprudence of the Italian Constitutional Court as a comparative constitutional model, reflecting both the close relationship between the Albanian and Italian legal traditions and the persuasive authority of Italian constitutional jurisprudence in the development of Albanian public law.

The article proceeds in four substantive parts. It first examines the legal nature and constitutional functions of administrative confiscation. It then analyses incidental constitutional review as a mechanism for protecting fundamental rights where constitution-conforming interpretation is unavailable. The third part considers the autonomous criminal nature of administrative confiscation under the jurisprudence of the European Court of Human Rights. Finally, the article applies the principle of proportionality to Article 92(6/1) of the Albanian Road Traffic Code and evaluates its compatibility with the Albanian Constitution and the European Convention on Human Rights.

⁵ ALB. CONST. arts. 17, 41, 42, 122, 145 (Kushtetuta e Republikës së Shqipërisë, 1998, as amended).

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

II. ADMINISTRATIVE CONFISCATION IN THE ALBANIAN LEGAL SYSTEM: LEGAL NATURE, FUNCTIONS, AND DISTINCTION FROM CRIMINAL CONFISCATION

A. Confiscation as an institution of public law

Confiscation constitutes one of the most intrusive forms of public interference with the exercise of property rights. Unlike ordinary administrative restrictions, which merely limit the use or enjoyment of property, confiscation results in the permanent deprivation of ownership and the transfer of the asset to the State. The owner is therefore definitively deprived of the proprietary entitlements attached to the asset.

For this reason, contemporary legal scholarship generally treats confiscation as one of the most severe instruments available to public authorities and, consequently, as a measure requiring particularly rigorous constitutional and Convention scrutiny.⁷

Historically, confiscation developed primarily within criminal law, where it served to deprive offenders of the instrumentalities or proceeds of criminal activity. The expansion of the modern regulatory state, however, has progressively extended confiscatory measures beyond the traditional sphere of criminal justice. Confiscation is now encountered in several areas of public law, including customs, taxation, environmental regulation, competition law, and road traffic enforcement.

Domestic legal systems may classify confiscation as criminal, administrative, or, in certain circumstances, civil. Yet formal classification does not alter its essential effect: the permanent loss of private ownership as a consequence of state intervention. From the perspective of constitutional law and the European Convention on Human Rights, the decisive consideration must therefore be the substantive nature and practical effects of the measure rather than the terminology chosen by the domestic legislature.⁸

This substantive approach is particularly important because Convention guarantees could otherwise be circumvented through legislative classification. If the applicability of fundamental procedural safeguards depended exclusively upon whether national legislation labelled a measure “administrative” or “criminal”, States could reduce the scope of Convention protection merely by reclassifying sanctions whose purpose and severity are essentially punitive.

⁷ ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* (7th ed. 2013).

⁸ ECHR, *supra* note 6, art. 6; Protocol No. 1, *supra* note 3, art. 1.

The European Court of Human Rights has sought to prevent precisely such formalism through its autonomous interpretation of Convention concepts.⁹ Consequently, the constitutional assessment of administrative confiscation cannot be confined to its classification under Albanian law. It must also consider the purpose of the measure, its severity, its consequences for the owner, and the procedural safeguards governing its imposition.

This distinction is particularly relevant to Article 92(6/1) of the Albanian Road Traffic Code. Although the measure prescribed by that provision is formally classified as a supplementary administrative measure, its permanent impact upon ownership requires an examination extending beyond domestic legal classification.

B. The functions of confiscation

The legal nature of confiscation cannot be determined without examining the function it performs. Legal scholarship generally distinguishes three principal functions: preventive, restorative, and punitive.¹⁰

The preventive function is directed towards eliminating a danger to the public interest. Confiscation may therefore be justified where the object itself, because of its characteristics or intended use, represents a continuing threat to public safety, public health, or public order. In such circumstances, the primary purpose of the measure is not to punish past conduct but to neutralise a continuing source of risk.

The restorative function, by contrast, seeks to re-establish legality by eliminating the consequences of an unlawful situation. In this context, confiscation operates principally as a mechanism for restoring the lawful state of affairs rather than as punishment for the offender.

The legal position becomes more complex where confiscation follows the finding of an administrative offence and simultaneously performs punitive and deterrent functions. A measure intended to sanction unlawful conduct and discourage its repetition may possess characteristics traditionally associated with criminal punishment, notwithstanding its formal classification as an administrative sanction.

This distinction is essential because the function attributed to confiscation affects the procedural guarantees that must accompany its application. A purely preventive measure does not necessarily raise the same concerns as a sanction that is punitive in substance. Conversely, where confiscation serves punitive and deterrent purposes and produces particularly serious

⁹ *Engel v. Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72, § 82 (Eur. Ct. H.R. June 8, 1976).

¹⁰ ASHWORTH & HORDER, *supra* note 7.

consequences for the owner, its administrative classification cannot, by itself, justify a lower level of procedural protection.

It is within this latter context that the mandatory confiscation provided for by Article 92(6/1) must be examined. The measure is imposed as a consequence of an administrative offence and permanently deprives the owner of the vehicle. The question of its substantive character therefore becomes central to determining the constitutional and Convention guarantees applicable to the proceedings.

C. Administrative and criminal confiscation: the limits of formal classification

Under the traditional distinction, criminal confiscation is imposed within criminal proceedings and forms part of the legal consequences arising from criminal responsibility. As such, it is accompanied by the procedural safeguards applicable to criminal proceedings. Administrative confiscation, on the other hand, is formally imposed within administrative proceedings as a consequence of an infringement classified by domestic law as administrative. The European Convention on Human Rights, however, does not permit this distinction to be treated as conclusive.

The European Court of Human Rights has consistently held that the concept of a “criminal charge” under Article 6 of the Convention possesses an autonomous meaning. Whether proceedings are criminal for Convention purposes therefore does not depend exclusively on the classification adopted by national law.

The foundations of this approach were established in *Engel and Others v. the Netherlands*, where the Court identified three criteria relevant to determining the criminal character of proceedings: the classification of the offence under domestic law, the nature of the offence, and the nature and degree of severity of the sanction.¹¹ The first criterion constitutes the starting point rather than the conclusion of the analysis. The second and third criteria permit the Court to look beyond national classifications and assess the substantive characteristics of the measure. Accordingly, an administrative sanction may fall within the criminal limb of Article 6 where its nature, purpose, or severity so requires.

The importance of this doctrine for confiscation is evident. A measure that permanently deprives an individual of valuable property and operates as punishment or deterrence may engage Convention guarantees irrespective of the legislature’s decision to classify it as administrative.

¹¹ *Engel, supra* note 9, § 82.

The autonomous Convention approach therefore performs an important rule-of-law function. It prevents States from circumventing procedural guarantees through the formal reclassification of sanctions and ensures that the level of protection corresponds to the substantive nature of state interference with individual rights.

D. Individualisation as a requirement of proportionality

The individualisation of serious measures affecting fundamental rights is closely connected with the principle of proportionality. In constitutional law, proportionality requires an assessment of whether the interference imposed upon the individual is justified in light of the legitimate objective pursued.¹² In the field of sanctions, individualisation similarly requires the competent authority to consider the circumstances that distinguish one case from another.

Where legislation imposes confiscation automatically, this individual assessment disappears. A mandatory confiscation regime may prevent the administrative authority and the reviewing court from considering factors such as the gravity of the infringement, the degree of culpability, the actual danger created by the conduct, the value of the property, the owner's good faith, or the consequences that permanent deprivation will produce for the individual concerned.

The resulting constitutional difficulty is not merely that the sanction may prove severe. The deeper problem is that the statutory framework may make it legally impossible to determine whether that severity is justified in the particular case.

The jurisprudence of the European Court of Human Rights under Article 1 of Protocol No. 1 is especially relevant in this regard. The Court's proportionality analysis requires a "fair balance" between the demands of the general interest and the protection of the individual's fundamental rights. An interference that imposes an individual and excessive burden upon the person concerned may upset that balance.¹³

Such an inquiry is necessarily contextual. It cannot be meaningfully undertaken where the law predetermines the outcome and excludes consideration of the circumstances of the individual case.

Accordingly, the constitutional question raised by Article 92(6/1) is not whether Parliament may employ confiscation in pursuit of road safety and public security. Those objectives are capable of justifying significant restrictions upon property rights. The central issue is instead whether Parliament may make confiscation mandatory in a manner that excludes the individualisation required for a genuine proportionality assessment.

¹² ALEXU, *supra* note 1; BARAK, *supra* note 1.

¹³ G.I.E.M., *supra* note 3, § 293.

This distinction forms the conceptual bridge between the legal nature of confiscation and the mechanism of incidental constitutional review. If the statutory language makes individualised proportionality review impossible and cannot reasonably be interpreted otherwise, the ordinary court faces not merely a problem of statutory interpretation but a question concerning the constitutionality of the applicable legal rule itself.

III. INCIDENTAL CONSTITUTIONAL REVIEW AS AN INSTRUMENT FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

A. The role of ordinary courts in constitutional review

The principle of constitutional supremacy requires all public authorities to exercise their powers in conformity with the Constitution. In the Albanian constitutional system, the review of the constitutionality of legislation is concentrated in the Constitutional Court, which is entrusted with safeguarding the supremacy of the Constitution over all other normative acts.

This centralised model of constitutional review does not, however, exclude an active constitutional role for ordinary courts. On the contrary, Article 145(2) of the Constitution expressly provides that where judges consider that a law is incompatible with the Constitution, they shall refrain from applying it, suspend the proceedings, and refer the question to the Constitutional Court.¹⁴ The mechanism is further regulated by Law No. 8577 of 10 February 2000 on the organisation and functioning of the Constitutional Court of the Republic of Albania.¹⁵

Incidental constitutional review therefore constitutes a form of institutional cooperation between ordinary courts and the Constitutional Court. The referring court does not itself declare the applicable statutory provision unconstitutional. Rather, when the resolution of the dispute depends upon a provision whose compatibility with the Constitution is seriously in doubt, it activates constitutional review by the institution vested with the power to determine that question authoritatively. Ordinary courts consequently perform an important filtering function within the constitutional system. Because constitutional issues often arise in the context of concrete disputes, the ordinary judge is frequently the first judicial authority required to identify a potential conflict between legislation and constitutional rights. Incidental constitutional

¹⁴ ALB. CONST. art. 145(2) (“When judges find that a law comes into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the case to the Constitutional Court. Decisions of the Constitutional Court are binding for all courts.”).

¹⁵ Ligj nr. 8577, datë 10.2.2000, “Për organizimin dhe funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë” [Law No. 8577 of Feb. 10, 2000, on the Organisation and Functioning of the Constitutional Court of the Republic of Albania] art. 68, i ndryshuar (Alb.). Article 68 requires the referring court to establish a direct connection between the impugned law and the resolution of the concrete case, and to identify both the provisions said to conflict with the Constitution and the grounds on which their repeal is sought.

review should therefore not be understood merely as a procedural mechanism governing relations between courts. It also constitutes a substantive guarantee for the protection of fundamental rights.

B. The conditions for incidental constitutional review

The jurisprudence of the Constitutional Court of Albania has developed specific requirements governing referrals by ordinary courts. Three cumulative conditions are particularly relevant: the contested provision must be directly applicable to the pending dispute; the constitutional doubt must be serious and adequately reasoned; and the ordinary court must first examine whether the conflict can be avoided through an interpretation consistent with the Constitution.¹⁶

These requirements reflect an important balance within a system of centralised constitutional review. Constitutional adjudication leading to the removal of a legislative provision is a measure of last resort rather than the first interpretative response to a possible conflict.

They are particularly important in cases of mandatory confiscation. The referring court must not ask the Constitutional Court to resolve an abstract policy disagreement. It must show that the mandatory provision governs the concrete dispute, that its wording prevents the ordinary court from conducting the constitutionally required assessment, and that the constitutional doubt cannot be removed through a permissible interpretation of the statute.

Recent Albanian constitutional jurisprudence confirms these cumulative requirements. In Judgment No. 69 of 27 December 2023, the Constitutional Court reiterated that a referring court must identify the statutory provision applicable to the pending dispute and establish a direct connection between that provision and the constitutional question; provide convincing reasons for the alleged unconstitutionality; and demonstrate that a constitution-conforming interpretation is unavailable.¹⁷ The same approach is reflected in Judgment No. 20 of 3 April 2024, in which the Court treated the referring court's reasoned explanation of the impossibility of a constitution-conforming interpretation as a component of admissibility.¹⁸

C. The limits of constitution-conforming interpretation

Constitution-conforming interpretation cannot become a means by which courts rewrite legislation. Its legitimate scope exists only where the statutory wording permits more than one

¹⁶ Vendim nr. 69, datë 27.12.2023, §§ 17-18 (Gjykata Kushtetuese) (Alb.); Vendim nr. 20, datë 3.4.2024, §§ 16, 26-28 (Gjykata Kushtetuese) (Alb.). The third requirement, that the referring court first attempt an interpretation consistent with the Constitution, is developed in the case law of the Constitutional Court rather than stated in Article 68 of Law No. 8577.

¹⁷ Vendim nr. 69, *supra* note 16, § 18.

¹⁸ Vendim nr. 20, *supra* note 16, §§ 26-27.

reasonable interpretation. Article 92(6/1) illustrates this problem with particular clarity. The provision states that the supplementary administrative measure of confiscation of the vehicle shall be imposed.¹⁹ Interpreting that wording as though it authorised optional confiscation would fundamentally change the normative content of the provision. If Article 92(6/1) prevents individualised proportionality review and its mandatory wording cannot be reconciled with the Constitution through interpretation, the appropriate judicial response is not to rewrite the provision. It is to activate incidental constitutional review.

D. Incidental review and the effectiveness of Convention rights

Article 1 of the Convention requires Contracting States to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.²⁰ Domestic courts therefore play an essential role in ensuring that Convention rights are practical and effective. In the context of mandatory confiscation, the measure directly engages the right to property protected by Article 41 of the Albanian Constitution and by Article 1 of Protocol No. 1.²¹ Where confiscation possesses a punitive character or judicial review is restricted to formal legality, questions may also arise under Article 42 of the Constitution and Article 6 of the Convention.²² Incidental constitutional review consequently performs a dual protective function: it safeguards the substantive right to property while preserving the effectiveness of judicial protection.

E. Incidental constitutional review as a constitutional safeguard against legislative automatism

Mandatory legislative measures are not necessarily unconstitutional merely because they restrict judicial discretion. The constitutional difficulty arises when a statutory mechanism affecting a fundamental right is structured in such a way that the individual circumstances relevant to proportionality can never be judicially considered. Incidental constitutional review provides the institutional mechanism through which the relationship between legislative determination and judicial protection can be preserved. Where mandatory legislation makes individualised proportionality review legally impossible, incidental constitutional review becomes the constitutionally appropriate means of restoring effective judicial protection without transforming the ordinary judge into a substitute legislator.

¹⁹ Kodi Rrugor, *supra* note 2, art. 92(6/1) (“zbatohet masa administrative plotësuese e konfiskimit të mjetit”).

²⁰ ECHR, *supra* note 6, art. 1.

²¹ ALB. CONST. art. 41; Protocol No. 1, *supra* note 3, art. 1. Under ALB. CONST. art. 122, ratified international agreements form part of the internal legal system and prevail over incompatible domestic laws.

²² ALB. CONST. art. 42; ECHR, *supra* note 6, art. 6.

IV. ADMINISTRATIVE CONFISCATION AND THE AUTONOMOUS CRIMINAL LIMB OF ARTICLE 6 ECHR

A. The autonomous concept of a criminal charge under Article 6 ECHR

The concept of a “criminal charge” under Article 6 possesses an autonomous meaning. National classification is only the starting point and cannot by itself determine whether criminal procedural guarantees apply.²³

This approach ensures that Convention protection cannot be circumvented by formally reclassifying punitive sanctions as administrative.

B. The *Engel* criteria

In *Engel and Others v. the Netherlands*, the European Court of Human Rights identified three criteria: domestic classification, the nature of the offence, and the nature and degree of severity of the sanction.²⁴ Domestic classification is only a starting point. The second and third criteria allow the Court to look beyond national terminology and are alternative rather than necessarily cumulative, although a cumulative approach may be adopted where separate analysis of each criterion does not yield a clear conclusion.²⁵

Jussila v. Finland confirms both the autonomous reach of the criminal limb and an important qualification: administrative or fiscal penalties may fall within Article 6 even when they do not belong to the “hard core” of criminal law, and the procedural guarantees applicable under the criminal head need not in every such case operate with identical stringency.²⁶

The present article therefore does not assume that the supplementary administrative confiscation imposed under Article 92(6/1) is automatically “criminal” for Convention purposes. That conclusion depends upon the application of the *Engel* criteria to the nature, purpose, and severity of the particular measure.

C. A. Menarini Diagnostics and the requirement of full jurisdiction

*A. Menarini Diagnostics S.r.l. v. Italy*²⁷ is significant not merely for the characterisation of a punitive administrative fine, but for the relationship between administrative enforcement and subsequent judicial control. The Court held that Article 6 does not preclude a penalty from being imposed initially by an administrative authority, provided that the resulting decision is

²³ ECHR, *supra* note 6, art. 6; *Engel*, *supra* note 9, § 82.

²⁴ *Engel*, *supra* note 9, § 82.

²⁵ *Jussila v. Finland* [GC], App. No. 73053/01, § 31 (Eur. Ct. H.R. Nov. 23, 2006).

²⁶ *Jussila*, *supra* note 25, § 43.

²⁷ *A. Menarini Diagnostics S.r.l. v. Italy*, App. No. 43509/08 (Eur. Ct. H.R. Sept. 27, 2011).

subsequently subject to review by a judicial body with full jurisdiction. Such a body must be able to examine the questions of fact and law relevant to the dispute and to quash the challenged decision.²⁸ In the circumstances of *Menarini*, the domestic administrative courts exercised sufficiently extensive review of the factual and legal basis of the penalty and of the sanction itself. *Menarini* should therefore be used here as a procedural benchmark for effective judicial control, not as authority for the proposition that Article 6 invariably requires a domestic court to substitute a different sanction whenever legislation fixes one in mandatory terms.

The relevance of *Menarini* to mandatory confiscation is consequently narrower but important. Where proportionality is itself a legally relevant component of the protection afforded to the affected right, judicial review cannot be described as fully effective merely because the court may verify formal legality while being legally prevented from examining circumstances that bear on the proportionality of the interference. Whether Article 92(6/1) creates such a limitation must, however, be established through the combined analysis of domestic constitutional law and Article 1 of Protocol No. 1 rather than inferred from *Menarini* alone.

D. Confiscation in *G.I.E.M. S.r.l. and Others v. Italy*

G.I.E.M. confirms that the legal characterisation of confiscation cannot be determined exclusively by the domestic label.²⁹ Its purpose, context, and practical consequences must be examined.

The judgment also demonstrates the close relationship between procedural guarantees and property protection: confiscation may simultaneously engage Article 6 of the Convention and Article 1 of Protocol No. 1.

This reasoning supports an individualised inquiry without establishing that every mandatory confiscation is prohibited by the Convention. The Convention question remains whether, in its statutory and factual context, the measure preserves a fair balance and affords the affected person a meaningful opportunity to challenge the justification and proportionality of the interference.

For present purposes, the property-rights analysis in *G.I.E.M.* is especially significant. The Grand Chamber reiterated that proportionality under Article 1 of Protocol No. 1 requires a reasonable relationship between the means employed and the aim pursued, and that the fair balance is upset where the person concerned bears an individual and excessive burden. In assessing the proportionality of confiscation, the Court identified as relevant the availability of

²⁸ *Id.* §§ 59, 63-67.

²⁹ *G.I.E.M.*, *supra* note 3, §§ 251-252.

less restrictive alternatives, the breadth of the confiscatory measure, and the degree of culpability or negligence of the persons affected, or at least the relationship between their conduct and the offence.³⁰

E. *Varvara v. Italy* and the requirement of individual responsibility

Varvara v. Italy concerned planning confiscation imposed after the underlying criminal proceedings had been discontinued as time-barred. The Court treated the confiscation as a “penalty” for the purposes of Article 7 and found its imposition incompatible with the principle of legality where criminal liability had not been established in a verdict as to guilt.³¹ Its relevance to the present inquiry is therefore conditional rather than general: *Varvara* does not establish that every administrative confiscation is criminal, or that every automatic confiscation violates the Convention. It demonstrates that, once a confiscatory measure qualifies as a penalty in Convention terms, formal domestic classification cannot displace the substantive guarantees attached to legality and personal responsibility.³²

F. The emerging Convention standard: effective judicial review of confiscatory measures

Taken together, *Engel*, *Jussila*, *Menarini*, *G.I.E.M.*, and *Varvara* support a differentiated Convention analysis.³³ First, domestic classification is not conclusive where a measure is punitive in nature or severity. Second, the application of the criminal limb of Article 6 depends on the *Engel* criteria and should not be presumed merely from the administrative label or from confiscation as such. Third, where Article 6 applies to an administrative sanction, effective judicial control remains central, although the intensity of particular procedural guarantees may vary outside the hard core of criminal law. Fourth, independently of the Article 6 classification, confiscation interfering with possessions remains subject to the fair-balance and proportionality requirements of Article 1 of Protocol No. 1.

The absence of individualised and effective judicial scrutiny becomes constitutionally significant when the measure is severe, punitive in character, and substantially interferes with property.

³⁰ *G.I.E.M.*, *supra* note 3, §§ 293, 300-303.

³¹ *Varvara v. Italy*, App. No. 17475/09, § 72 (Eur. Ct. H.R. Oct. 29, 2013).

³² *See also G.I.E.M.*, *supra* note 3, §§ 251-252.

³³ *Engel*, *supra* note 9; *Jussila*, *supra* note 25; *Menarini*, *supra* note 27; *G.I.E.M.*, *supra* note 3; *Varvara*, *supra* note 31.

V. PROPORTIONALITY AS A CONSTITUTIONAL LIMIT ON MANDATORY ADMINISTRATIVE CONFISCATION

A. Proportionality as a constitutional principle

Proportionality is a central mechanism through which contemporary constitutional systems control interferences with fundamental rights. Article 17 of the Albanian Constitution requires restrictions to be prescribed by law, to pursue a legitimate objective, and to remain proportionate to the circumstances that justified them.³⁴

The proportionality analysis comprises legitimate aim, suitability, necessity, and proportionality *stricto sensu*. These stages are cumulative.³⁵

The Constitutional Court of Albania likewise treats proportionality as a constitutional requirement governing restrictions of fundamental rights under Article 17. Its case law examines whether the interference is justified by a legitimate public interest and whether the relationship between the means chosen and the protected interest remains proportionate. This domestic constitutional framework is important because the Convention standard does not replace Article 17; the two operate together in assessing the justification of serious interferences with property and judicial protection.

B. Property rights and the fair-balance requirement under the Convention

Article 1 of Protocol No. 1 requires a fair balance between the general interest and the protection of individual property rights. That balance is disturbed where the individual bears an excessive burden.³⁶

A fair-balance analysis necessarily requires attention to the circumstances of the individual case, particularly where confiscation permanently extinguishes ownership.

Accordingly, where national legislation leaves the court able to review only formal legality while excluding legally relevant circumstances bearing on necessity and excessive burden, the limitation concerns not only the severity of the property interference but also the effectiveness of the judicial process through which proportionality is supposed to be secured.

The procedural dimension of Article 1 of Protocol No. 1 reinforces this conclusion. Although the provision contains no express procedural clause, the Court requires domestic proceedings to afford the affected person a reasonable opportunity to put his or her case before the competent

³⁴ ALB. CONST. art. 17 (“A limitation shall be in proportion with the situation that has dictated it.”).

³⁵ ALEXU, *supra* note 1; BARAK, *supra* note 1.

³⁶ Protocol No. 1, *supra* note 3, art. 1; *G.I.E.M.*, *supra* note 3, § 293.

authorities and to challenge the interference effectively. In confiscation cases, the quality of the domestic decision-making process therefore forms part of the fair-balance assessment.³⁷

C. Mandatory confiscation and the elimination of individualised proportionality review

Article 92(6/1) prescribes confiscation as a mandatory legal consequence.³⁸ This transforms proportionality into an irrebuttable legislative presumption, eliminates individualisation, and restricts the quality of judicial review.

The legislature has not merely selected confiscation as a permissible sanction; it has predetermined the outcome of the proportionality assessment.

D. Comparative constitutional perspectives: the Italian Constitutional Court

The jurisprudence of the Italian Constitutional Court offers a particularly useful comparative perspective because it distinguishes between constitutionally problematic sanctioning automatism and legislative choices that may legitimately remain mandatory. The comparison must therefore be used with precision: Italian constitutional case law does not establish a general rule that every mandatory administrative consequence is incompatible with proportionality.

In Judgment No. 246 of 2022, the Italian Constitutional Court examined Article 213(8) of the Italian Road Traffic Code, which provided for the automatic revocation of a driving licence where the custodian of a seized vehicle unlawfully placed that vehicle in circulation.³⁹ The Court held that the principle requiring proportionality between an administrative sanction and the seriousness of the unlawful conduct applies to administrative sanctions generally. It found the automatic revocation constitutionally defective because neither the administrative authority nor the reviewing judge could take account of the concrete gravity of the breach, or of the serious consequences that revocation could have for the individual's working, personal, and social life.⁴⁰ The Court therefore replaced the mandatory formula with a discretionary one, permitting rather than requiring revocation.⁴¹

Judgment No. 52 of 2024 developed the same reasoning in relation to Article 214(8) of the Italian Road Traffic Code, which governs the administrative impoundment (*fermo*

³⁷ *G.I.E.M.*, *supra* note 3, § 302.

³⁸ Kodi Rugor, *supra* note 2, art. 92(6/1).

³⁹ Corte cost. n. 246/2022, *supra* note 4 (concerning art. 213(8) of Decreto Legislativo 30 aprile 1992, n. 285 (Nuovo codice della strada), as amended by art. 23-bis of Decreto-Legge 4 ottobre 2018, n. 113, converted by Legge 1 dicembre 2018, n. 132).

⁴⁰ *Id.* pts. 9.1, 10.2, 11 (*considerato in diritto*).

⁴¹ *Id.* (*dispositivo*) (declaring art. 213(8) unconstitutional in so far as it provides that the accessory administrative sanction of revocation of the driving licence “is applied” rather than “may be applied”).

amministrativo) of a vehicle.⁴² The Court again declared unconstitutional the automatic revocation of the driving licence, emphasising that a rigid sanction prevented consideration both of the seriousness of the particular breach of custody duties and of its consequences for the custodian. Importantly, however, the Court left the automatic confiscation of the vehicle intact: the formula it substituted made revocation discretionary while restating confiscation in mandatory terms.⁴³ That distinction is significant for the present analysis. It shows that Italian jurisprudence cannot be read as treating automatism, in itself, as unconstitutional; the constitutional inquiry remains connected to the nature of the particular measure, the protected interest, the severity of the interference, and the possibility of maintaining a reasonable relationship between the legislative consequence and the conduct concerned.

The relevance of these judgments to Article 92(6/1) of the Albanian Road Traffic Code is therefore persuasive rather than mechanically transferable. Judgment No. 246 of 2022 is especially important because the Italian Constitutional Court derived the proportionality requirement from the constitutional guarantee of equality read together with the constitutional provisions protecting whichever right the sanction affects, drawing on earlier case law in which that right was the constitutional protection of property.⁴⁴ Judgment No. 52 of 2024, by preserving mandatory confiscation in the statutory context before it, supplies an important limiting principle: a comparative argument against Albanian mandatory confiscation must demonstrate why the specific confiscatory regime at issue produces an excessive or insufficiently individualised interference, rather than relying on the mere existence of legislative automatism.

Accordingly, the comparative lesson is not that mandatory confiscation is necessarily unconstitutional. It is that the constitutionality of rigid administrative consequences depends upon whether the legislative framework preserves a proportionate relationship between the public objective pursued and the burden imposed in the relevant class of cases. Where the consequence is permanent deprivation of ownership, that inquiry requires particularly careful scrutiny.

⁴² Corte cost. n. 52/2024, *supra* note 4 (concerning art. 214(8) of Decreto Legislativo 30 aprile 1992, n. 285, which governs the administrative impoundment of vehicles).

⁴³ *Id.* (*dispositivo*) (substituting a formula under which revocation of the driving licence “may be applied” while confiscation of the vehicle “is applied”).

⁴⁴ Corte cost. n. 246/2022, *supra* note 4, pt. 9.1 (*considerato in diritto*) (citing Corte cost. nn. 112/2019 and 212/2019).

E. Applying the proportionality test to Article 92(6/1)

The objective pursued by Article 92(6/1) is legitimate. The provision penalises the circulation of an armoured vehicle for which the authorisation of the competent body is absent, and it thereby protects road safety and public order; confiscation is in principle suitable for advancing that objective.⁴⁵ The mandatory structure becomes problematic at the necessity stage, because it excludes examination of less restrictive alternatives. It also frustrates proportionality *stricto sensu*, because materially different cases receive the same permanent legal consequence without individual balancing.

At the necessity stage, the decisive question is whether the legitimate objectives of road safety and public security require permanent deprivation of ownership in every case covered by the provision. A genuine necessity analysis should allow consideration of whether the same objective could be achieved through less restrictive measures, including temporary seizure, a pecuniary sanction calibrated to the seriousness of the infringement, restrictions on the use of the vehicle, or confiscation reserved for aggravated, repeated, or demonstrably dangerous conduct.

At the stage of proportionality *stricto sensu*, relevant circumstances may include the seriousness and duration of the infringement, the actual danger created, the relationship between the vehicle and the unlawful conduct, the degree of responsibility of the owner, the owner's good faith where ownership and use are separated, the value of the vehicle, the consequences of permanent deprivation, recidivism, and the availability of alternative measures. These factors do not predetermine the outcome. Their constitutional significance lies in permitting the competent authority and the court to determine whether permanent deprivation imposes an individual and excessive burden in the particular case.

F. The constitutional defect lies in automatism, not in confiscation

Confiscation is not inherently unconstitutional, and mandatory legal consequences are not unconstitutional merely because they restrict discretion. The constitutional defect arises where the absolute and automatic structure of the measure makes it impossible to determine whether permanent deprivation of ownership is necessary and proportionate in the circumstances relevant to the individual case.

⁴⁵ Kodi Rugor, *supra* note 2, art. 92(6/1) (punishing circulation of an armoured vehicle for which the authorisation of the competent body is absent with a fine of 100,000 to 200,000 lekë together with the supplementary administrative measure of confiscation of the vehicle, and applying the same measures to an owner who entrusts the vehicle to an unauthorised driver).

Where statutory language is unequivocally mandatory, constitution-conforming interpretation cannot adequately solve the problem; incidental constitutional review is the appropriate mechanism.

G. Interim conclusion: proportionality and the constitutional function of the court

Proportionality is meaningful only if a body capable of applying it can examine the circumstances relevant to the balance between public and private interests. Legislative discretion is not constitutional immunity.

Proportionality supplies the substantive standard; incidental review supplies the institutional mechanism through which that standard can be protected.

VI. CONCLUSIONS

A. Mandatory confiscation and the constitutional function of judicial review

The constitutional problem raised by Article 92(6/1) does not arise from confiscation as a legal institution. It arises from the combination of a severe and irreversible interference with property and a mandatory statutory structure that, on the interpretation examined in this article, prevents genuine individualised proportionality review.

Parliament possesses democratic legitimacy to define unlawful conduct and sanctions, but legislative discretion remains subject to constitutional limits. The issue concerns the effectiveness of judicial protection itself.

B. The role of incidental constitutional review

Where a statutory provision admits a constitutionally compliant interpretation, the ordinary court should adopt it. Where mandatory wording makes such an interpretation impossible, incidental constitutional review reconciles respect for the legislative function with constitutional supremacy.

C. The European dimension

The autonomous approach of the European Court of Human Rights and its case law on full jurisdiction, confiscation, and fair balance reinforce the conclusions reached under Albanian constitutional law. Mandatory confiscation sits at the intersection of substantive property protection and procedural judicial protection.

VII. PROPOSALS FOR LEGISLATIVE REFORM

A. Replacing automatic confiscation with individualised decision-making

Article 92(6/1) should be amended so that confiscation is no longer imposed automatically. The competent authority and the reviewing court should be able to determine whether confiscation is necessary and proportionate under statutory criteria.

B. Establishing statutory criteria for proportionality

Relevant criteria should include the nature and seriousness of the infringement, the actual danger created, the relationship between the vehicle and the unlawful conduct, the responsibility and good faith of the owner, the value of the vehicle, the economic and social consequences of the measure, and the availability of less restrictive measures.

C. Ensuring effective judicial review

Administrative courts should possess sufficient jurisdiction to review not only formal legality but also proportionality and, where legislation so provides, to annul confiscation or substitute a less restrictive consequence.

D. Developing a coherent constitutional standard for mandatory administrative sanctions

Albanian constitutional jurisprudence would benefit from a general standard distinguishing legitimate legislative standardisation from constitutionally problematic automatism. The decisive question is whether serious interferences remain necessary, proportionate, and subject to effective judicial protection.

VIII. FINAL REMARKS

Mandatory administrative confiscation illustrates a broader transformation in contemporary European constitutionalism. Proportionality increasingly operates as a substantive constitutional limitation upon public power.⁴⁶

A democratic state governed by the rule of law is distinguished not merely by its capacity to protect public safety, but by its commitment to pursuing that objective through measures that preserve proportionality, allow legally relevant individual circumstances to be considered, and remain subject to effective judicial scrutiny.

Where legislation imposes a serious interference with a fundamental right, the complete exclusion of individualised judicial proportionality review requires particularly compelling

⁴⁶ DIETER GRIMM, *CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE* (2016).

constitutional justification. The more severe and irreversible the interference, the stronger the requirement for effective judicial scrutiny.

Incidental constitutional review provides the institutional bridge between legislative authority and constitutional protection. Ultimately, it is the balance between effective public regulation and effective judicial protection that defines the legitimacy of public power in a constitutional democracy.
