



INTERPRETATION OF THE CONSTITUTION IN PROTECTING HUMAN RIGHTS AND FREEDOMS

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Dear Mr. President, Dear Colleagues,

On behalf of the President of the Constitutional Court of Bosnia and Herzegovina and all judges and employees of the Constitutional Court of Bosnia and Herzegovina, please allow me to greet you at today's conference and to address you sincere expressions of congratulations on your anniversary.

The Constitutional Court of the Republic of Turkey has a true friend in the judges of the Constitutional Court of Bosnia and Herzegovina, and our professional cooperation and relationship provide a successful example of how collaboration and friendship should be developed and advanced.

Introduction

In terms of history and issue of transition from a socialist system, Bosnia and Herzegovina provides a rare example of a country in transition from a socialist system. Nevertheless, it has a history of having a constitutional court, since the former Yugoslavia was the only country, which had a system of the constitutional courts already in socialist regime. The first Constitutional Court in former Yugoslavia was created as early as 1963 and that date coincided with the starting point of the history of a constitutional judiciary in this country.

The Constitution of Bosnia and Herzegovina (Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina), which entered into force on 14 December 1995, now provides the legal framework for the organization and functioning of the Constitutional Court. In addition to the Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") applies directly in Bosnia and Herzegovina and has priority over all other law.

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The Constitutional Court of Bosnia and Herzegovina (“Constitutional Court”) commenced its operations following the election and appointment procedures in May 1997 when the first session of the Court was held. This ensured the continuity of constitutional judiciary of BiH as it succeeded the Constitutional Court of the Republic of BiH. The Constitutional Court was established based on Article VI of the Constitution of Bosnia and Herzegovina. It stipulates, in addition to its jurisdiction, the organisation, procedure and final and binding character of the decisions of the Constitutional Court. The issues related to the position, jurisdiction, procedure and decisions of the Constitutional Court are prescribed by the Constitution of Bosnia and Herzegovina and Rules of the Constitutional Court, which are adopted by the Court itself and which have the force of organic law. The Constitution of Bosnia and Herzegovina provides a special position to the Constitutional Court in terms of its independence from three branches of government, i.e. legislative, executive and judicial, and makes it the highest legal authority. Its basic function is to protect the Constitution of Bosnia and Herzegovina and constitutional order as a whole, and to ensure consistent respect for human and constitutional rights in accordance with international conventions and other international documents.

Relationship between the Jurisdiction of the Constitutional Court and Other Courts

Given the provision of Article VI(3) of the Constitution of Bosnia and Herzegovina, we could say that the relationships between the Constitutional Court and other courts are established on two bases:

- a) The first one is the appellate jurisdiction¹ over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI(3)(b) of the Constitution of the Constitution of BiH). It makes the Constitutional Court the highest institutional guarantor of the protection of human rights and fundamental freedoms under the Constitution and European Convention.

The appellate jurisdiction of the Constitutional Court under Article VI(3)(b) of the Constitution of Bosnia and Herzegovina does not mean that the Constitutional Court has jurisdiction to act as a court of “fourth

¹ Appellate jurisdiction is identical to the constitutional appeal in the same or similar legal systems.

instance” and review the same complaints as those dealt with by the previous instances. Quite the contrary, within the scope of the appellate jurisdiction, the Constitutional Court deals exclusively with the issue of alleged violations of constitutional rights or rights under the European Convention during the proceedings before the ordinary courts and the issue whether the ordinary courts’ decisions have been in violation of the constitutional rights. The Constitutional Court does not have jurisdiction to review the established facts, nor does it have jurisdiction to review the interpretation or application of the laws applied by the lower instance courts, unless the decisions of the lower instance courts have amounted to a violation of constitutional rights. This is the case when the decisions of the ordinary courts have been based on erroneous views on the meaning and extent of constitutional rights, when constitutional rights have been disregarded, when the application of a law has been manifestly arbitrary, when the law itself is unconstitutional or when fundamental human rights have been violated. If the Constitutional Court finds that the appeal is well-founded, it may, in accordance with Article 64(1) and (5) of the Rules of the Constitutional Court, refer the case back to the court which rendered the judgment for new proceedings. The court, the decision of which has been quashed, is to take a new decision in accordance with the legal view expressed by the Constitutional Court regarding the violation of the appellant’s human rights and freedoms under the Constitution.

Every person under the jurisdiction of Bosnia and Herzegovina is entitled to file an appeal to seek protection of his/her constitutional rights and freedoms provided that he/she meets the prescribed formal requirements. In addition to natural persons, the protection may be requested by legal persons and governmental authorities, because the protection *ratione personae* is interpreted differently, when compared to the European Court, and the State of Bosnia and Herzegovina, but also its entities and cantons, may request protection of their constitutional rights before the Constitutional Court.

It should be noted that all these cases are considered in terms of constitutional rights, not the rights under the European Convention.

Substantive constitutional law protecting the constitutional rights and freedoms includes:

- The catalogue of human rights referred to in the Constitution of Bosnia and Herzegovina, with special provisions related to the

prohibition of discrimination and protection of the rights of refugees and displaced persons (Articles II(3), II(4), II(5) of the Constitution of BiH);

- The European Convention, which has a special place in the Constitution of Bosnia and Herzegovina (Article II (2) of the Constitution of BiH) as it applies directly and has priority over all other law.

International standards

The rights and freedoms referred to in the European Convention for the Protection of Human Rights and its Protocols apply directly in Bosnia and Herzegovina. These have priority over all other law.

Annex I to the Constitution of Bosnia and Herzegovina consists of 15 international instruments for the protection of human rights and freedoms.

The second basis for the establishment of relationship between the Constitutional Court and other courts is referral of issues by other courts (Article VI(3)(c) of the Constitution of BiH) concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision. Thus, this relates to the initiative by the ordinary courts, but also to their constitutional obligation, given the supremacy of the European Convention in domestic law.

The fact that the Constitutional Court of Bosnia and Herzegovina is the only constitutional court at the level of Bosnia and Herzegovina has a special impact on the tasks and jurisdiction of the Constitutional Court, as well as on its relationship with other courts. As a result, we have a situation where the entire responsibility for ensuring the rights and freedoms guaranteed by the Constitution falls exclusively on the Constitutional Court.

Theoretical Models of Interpretation of Constitutionality in Protecting Human Rights and Freedoms

The *Kelsenian*² model of constitutional court is at the same time a model of review of constitutionality. In the pure model, there is a constitution, which is **the final act** and, as such, is **only applied in the interpretation**

² Hans Kelsen.

of its norms. In such a model, the constitutional court is **the interpreter** of the existing constitutional norm and the relation of the norm of lower rank (law) to the constitution. Therefore, in a pure model, the review of constitutionality is a mechanical action³ that can be compared to other sociological theories and schools. However, as elsewhere, the review of constitutionality is certainly neither simple nor embedded in a clearly limited model.

One of the key views that has become the **standard** is the relatively long-established conclusion of the European Court in the case of *Tyrer v. The United Kingdom*⁴, establishing that “the Convention is a living instrument which, [...], must be interpreted in the light of present-day conditions [...].” Therefore, the *teleological* approach is used today in the practice of all constitutional courts where interpreting a constitutional norm in relation to the norms of the European Convention and the obligation to apply it in the national system.

Nevertheless, interpretation only through expediency limits the giving of the review of constitutionality as a review but also an instruction. It should be briefly mentioned that the result of legal-philosophical reflection is the Italian doctrine of *additional interpretation*,⁵ which enables the constitutional judiciary **to react actively** to the unconstitutional behaviour of the legislator (non-implementation of the decision of the Constitutional Court or a failure to pass a law that would fill a legal gap after the decision of the Constitutional Court).

We also stress the reactions of the European Court or the German Federal Constitutional Court, which in their decisions (some of the important decisions) **directly influence the reaction of the legislator**⁶. However, this practice has become general, with various forms of action by the constitutional judiciary towards the legislature.

Based on this brief overview of theoretical models (which is only partial since there are many more), we can conclude that constitutional courts are in a similar situation, when interpreting constitutional norms that guarantee the protection of basic human rights and freedoms. This

³ Mechanism in a sociological sense.

⁴ *Tyrer versus UK* no. 1474/62, July 1968.

⁵ A very considerable practice of the Italian Constitutional Court, which is a reaction to a legislator's failure to act following the decision of the Constitutional Court.

⁶ For illustration purposes only, *Marckx v. Belgium*, June 1979; *Karlheinz Schmidt v. BRD*, July 1974.

situation is partly made complicated by the obligation of convention law to apply the norms of the European Convention, but also of other international conventions or treaties to which States have committed themselves to apply them in domestic law.

Same as legal principles, legal standards, as an abstract type of best “practice” (and especially norms) of law throughout the world, are therefore only a source of law in the substantive and not in the formal sense. Therefore, for the reasons already mentioned, it is necessary briefly to review the application/impact of the decisions of the European Court in relation to national law and constitutionality when it comes to the protection of fundamental rights and freedoms.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is, at its core, the most important legal instrument in the recent history of law in general. Its emergence is linked to the organizational form of the new European architecture after the end of World War II through the organization of the Council of Europe as a form of mutual communication and cohabitation of states in Europe divided by an ideological fence or curtain. The starting point of the European Convention is in Article 3 of the Statute of the Council of Europe, which speaks of the obligation of members to accept the principle of the rule of law and to protect everyone, regardless of their nationality, to enjoy all human rights and freedoms, on an equal footing, on European soil⁷.

It is certain that the rule of law as a universal principle and the principles of determining, guaranteeing and implementing human rights and fundamental freedoms are not identical in the modern world. However, it is indisputable that the European Convention is the basis for the operationalization of these principles. If three principles respect for human rights, pluralistic democracy and the rule of law are a condition of democracy in modern society, then the European Court is a mechanism or tool by which these principles, especially the rule of law and respect for human rights, are harmonized in the area of the Council of Europe. When we compare it with national law, the European Court has the role of a kind of regulator of the interpretation of the highest national courts.

In its case law, the Constitutional Court of Bosnia and Herzegovina firmly and fully applies the standards used by the European Court, but at the same time harmonizes the case law of ordinary courts.

⁷ Russo, *The Drafting History of the European Convention on Human Rights and Fundamental Freedoms*, 1999.

Dear Colleagues,

Given the time limit for presentations, I did not engage in a discussion on the contribution of the classical review of constitutionality in terms of the protection of fundamental rights and freedoms. Above all, the national constitutional court always has the task, where reviewing the constitutionality of a particular law, to review its compliance with the constitution of the country, as well as with international documents that are either an integral part of the national constitutional order or are superior to national legislation.

Therefore, this decision is always related to one term of international law “within the national context”, and represents a general review of constitutionality for a given state, but also a consequence for an individual who benefits from such a review.

Thank you for your attention!