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Constitutional Justice: Doctrine and Case-Law of the Constitutional Court of Bosnia and Herzegovina¹

I - INTRODUCTION

The history of constitutional justice in Bosnia and Herzegovina dates back to the middle XX century. In 1963, in the Socialist Federal Republic of Yugoslavia (SFRY), as well as in its federal units - republics², the enactment of a new Federal Constitution and of the constitutions of republics resulted in the setting up of constitutional courts – the Federal Constitutional Court and those of the republics alike. Up until 1992, when, in the process of the dissolution, that is to say break-up of the SFR Yugoslavia, it gained the independence and the international personality as 177th member of the United Nations Organization, Bosnia and Herzegovina was one of the six republics/federal units making up SFRY. Since the first Constitutional Court of Bosnia and Herzegovina commenced operating effectively already in the next year, 1964 that is, it follows that the tradition of constitutional justice in Bosnia and Herzegovina has lasted for over half a century now. In 2014, the Constitutional Court of Bosnia and Herzegovina marked the 50th anniversary of constitutional justice in Bosnia and Herzegovina, and, at the end of May this year, the 20th anniversary of the activity of the Constitutional Court under the applicable Constitution³ of Bosnia and Herzegovina. In addition to the Constitution of BiH, which regulates fundamental issues, the Rules of the Constitutional Court regulate other issues of relevance to the work and procedure before the Constitutional Court⁴.

The hitherto development of constitutional justice in Bosnia and Herzegovina may be split, roughly, into two key periods:

The first being the period of the socialist political-legal and constitutional law system, within the scope of the Constitution of BiH dating from the socialist period, i.e. dating back to 1964.

The second period being post-Dayton period since 1995, that is to say since 1997 when the Constitutional Court has started to operate effectively, within the scope of the presently applicable “Dayton” Constitution.

The first period is characterized by social and political relations and the system of “unity” of the legislative, executive and judicial authority. The post-Dayton period, however,

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² SFRY, up until the dissolution during the nineties of the last century, had been composed of six republics (SR) and two autonomous provinces (SAP), as follows: SR of Slovenia, SR of Croatia, SR of Bosnia and Herzegovina, SR of Serbia, which comprised SAP of Vojvodina and SAP of Kosovo, and SR of Montenegro and SR of Macedonia. All six former Yugoslav republics are not internationally recognized states, members of UN.

³ **The applicable Constitution of Bosnia and Herzegovina** is actually an Annex of the General Framework Agreement for Peace in Bosnia and Herzegovina (**Annex 4**), which was initialed on 21 November 1995 in Dayton/USA and signed on 14 December 1995 in Paris/France. In March 2009 the Constitution was amended introducing the Brčko District of Bosnia and Herzegovina into the Constitution as a constitutional category (prior to that there were a number of other attempts to amend the Constitution, particularly through the so-called 2006 April Package, however none of them received the support at the Parliamentary Assembly of Bosnia and Herzegovina). Amendment I has been, for now, the sole amendment to the applicable Constitution of Bosnia and Herzegovina.

⁴ **Within the scope of its constitutional responsibilities**, the Constitutional Court adopted, on the basis of the principle of self-regulation, its Rules regulating a procedure before the Constitutional Court, financial and administrative autonomy, the basis of organization and other issues of relevance to the work of the Constitutional Court. The first Rules/Rules of Procedure were adopted in 1997, then in 2005, and in 2014, which are applicable at present /Official Gazette of BiH, No. 94/14-Revised Text/. When considered in entirety, these rules have been prepared after the rules of procedure before the European Court of Human Rights in Strasbourg and the former Human Rights Chamber in BiH.

is characterized by social and political relations and the system of strict “separation” of power into legislative, executive and judicial.

The specific features of these two concepts have substantially affected, and still do, the responsibility, role and mission of the Constitutional Court, before and now.

II – DAYTON PERIOD - Doctrine and Case-Law of the Constitutional Court of BiH

The present day Constitutional Court of Bosnia and Herzegovina has been established under the 1995 Constitution of Bosnia and Herzegovina, it has been constituted on 22 May 1997, and this year, it shall reach 20 years of its work and activity as one of the five institutions of the state of Bosnia and Herzegovina (Presidency, Parliamentary Assembly, Council of Ministers, Central Bank and Constitutional Court).⁵

Operating as an independent guardian of the Constitution of Bosnia and Herzegovina and as an institutional guarantor of the protection of human rights and fundamental freedoms laid down under this Constitution and instruments of Annex I to the Constitution⁶, then, considering that it is neither part of legislative, nor executive, nor ordinary judicial authority (according to the position it has been assigned under the Constitution of Bosnia and Herzegovina), the Constitutional Court has acted all this time as a special, autonomous and independent authority and *correctional factor for the remaining three segments of the authorities* in Bosnia and Herzegovina. In this way, as one of the key state institutions of the state of Bosnia and Herzegovina, the Constitutional Court *has contributed to the promotion of democracy, rule of law and affirmation of the legal state, particularly in the initial years of its constituting* when it was necessary to protect the foundations of a democratic state and tackle a number of issues that remained, in a way, incomplete, or rather generally formulated, in the applicable Constitution of Bosnia and Herzegovina.

Going through various periods, starting from organizational structuring (at the initial stage) to the stage where it has encompassed through its work all the responsibilities laid down by the Constitution and started functioning in full capacity, the Constitutional Court of BiH has become simultaneously a respectable entity of the protection of constitutional order and human rights in Bosnia and Herzegovina and an object that is subject to observations, expectations, criticism and even questioning.

The Constitutional Court of Bosnia and Herzegovina as the supreme interpreter and guardian of the Constitution of BiH⁷ has a specific position and role precisely because of specific features embedded in the very Constitution of BiH. Namely, unlike the constitutions of other states:

⁵ **The original text of the Constitution, as a matter of fact, explicitly recognizes six mechanisms.** The provision of Article V(3) provides for the Standing Committee on Military Matters, which was transformed in the process of reforms in the area of defense.

⁶ **Annex I to the Constitution - Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina:** 1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 4. 1957 Convention on the Nationality of Married Women; 5. 1961 Convention on the Reduction of Statelessness; 6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 8. 1966 Covenant on Economic, Social and Cultural Rights; 9. 1979 Convention on the Elimination of All Forms of Discrimination against Women; 10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 12. 1989 Convention on the Rights of the Child; 13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 14. 1992 European Charter for Regional or Minority Languages; 15. 1994 Framework Convention for the Protection of National Minorities. **They shall be applied irrespective of whether or not they have been ratified.**

⁷ **Under Article VI(3) of the Constitution** of BiH “The Constitutional Court shall uphold this Constitution”.

- The applicable Constitution of Bosnia and Herzegovina is part of an international agreement (created during the peace process⁸) widely known as “the Dayton Agreement”, which, according to the widespread belief, falls under the so-called “octroyed constitutions”;

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is an integral part of the Constitution, is directly applied and has priority over all other law in BiH. ECHR has a double binding effect in Bosnia and Herzegovina: as a ratified international document through the membership of Bosnia and Herzegovina in the Council of Europe, and as an integral part of the Constitution of BiH⁹;

- International human rights agreements referred to in Annex I of the Constitution of BiH are also directly applied (see footnote No. 6);

- Prior to the entry into force in 1995, the Constitution of Bosnia and Herzegovina had neither been considered nor adopted by the Parliament of Bosnia and Herzegovina (as a constituent and legislative body of the state of BiH);

- There is no official translation of the Constitution of BiH to local, official languages (Bosnian language, Croatian language and Serbian language), and the text thereof has not been published in the official gazettes¹⁰;

- When it comes to the interpretation of the Constitution, there is a pronounced reliance of the Constitutional Court of BiH on the case-law of the ECtHR in Strasbourg in the application of ECHR¹¹.

⁸ **From the end of 1991 to the end of 1995** there was an armed conflict, a destructive war that is, in Bosnia and Herzegovina (as part of a wider war fire in the territory of the former SFR Yugoslavia), with enormous consequences to its citizens and society as a whole in every respect (immeasurable human casualties and suffering, enormous number of refugees and displaced persons, great pecuniary damage, etc.). There has been no and still there is no agreement in political or academic circles, or among the general public, regarding the character of the war in BiH (and, according to the current state of affairs, it will continue to be so for a long time) hence, the Preamble of the Dayton Peace Agreement reads that the "Parties" signatories to the Agreement (the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia – made up of Serbia and Montenegro at the time), by entering into this Agreement, were motivated, i.e. they “recognized the need for a comprehensive settlement to bring an end to the tragic conflict in the region” (...).

⁹ **Bosnia and Herzegovina ratified the Convention on 12 July 2002** thereby accepting the jurisdiction of the European Court of Human Rights. However, Article II(2) of the Constitution of BiH explicitly provides that the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina. **This is to say that the provisions of the European Convention in Bosnia and Herzegovina have the force of constitutional norms ever since 1995.** According to the established and, on a number of occasions, upheld case-law of the Constitutional Court, the European Convention and its Protocols have supremacy, i.e. priority over all other law. **Direct application of ECHR means** that in the event where a right and/or freedom safeguarded under the ECHR are not regulated, or safeguarded under the domestic regulations, the European Convention will be apply directly. **To have priority means** that in the event of a difference between domestic legislation, i.e. regulations, and the ECHR, the European Convention will be applied. (European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with Protocols - Rome 1950. In 1948 the Congress of Europe took place in The Hague where a conclusion was reached to start a process of setting up the Council of Europe. The Statute of the Council of Europe was signed on 5 May 1950. Ten member states of the Council of Europe signed on 4 November 1950 the Convention, which has been applied since 3 September 1953. ECHR was inspired by the Universal Declaration of Human Rights, which was proclaimed by the United Nations General Assembly on 10 December 1948).

¹⁰ The translation rendered by the OHR /Office of the High Representative in BiH from 1996 is in use **as an official text**. The Constitutional Court of BiH too uses this translation in its work.

¹¹ **By ratifying the Convention in 2002** Bosnia and Herzegovina undertook to subject itself to the final judgment of the European Court of Human Rights in any dispute in which it partakes as a party. Prior to that, the mandatory application (without a possibility of protection of rights before the ECtHR though) arose from the provision of Article II(2) of the Constitution of BiH providing for the following: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.” **The European Court of Human Rights (ECtHR)** was set up in 1959 under Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and operates within the Council of Europe, the oldest European organization. The Court is based in Strasbourg, in France, the official languages are English and French. The Rules of Procedure - regulated by the Rules of the Court and the Convention (three institutions existed initially: European Commission of Human Rights, European Court of Human Rights and Committee of Ministers). The European Commission of Human Rights and the European Court of Human Rights were replaced since 1 November 1998 (Protocol No. 11 came into force) by a single European Court of Human Rights – permanent court.

In addition to the foregoing, particularly the fact that the Constitution of Bosnia and Herzegovina was, *de facto*, created, for the major part, after the model of Anglo-Saxon/American legal thought, nomotechnics and experience (without addressing on this occasion other aspects and other specific features), has realistically had and still has significant consequences. That is, first and foremost, reflected in the foundation and possibility for a more extensive understanding and interpretation of the constitutional text and its key mechanisms, *particularly in the issues of abstract constitutional review, settlement of disputes between certain levels of authority, etc.* Although it is not possible to draw a parallel entirely, the centuries-long experience of the interpretation of the US Constitution (seven, more or less extensive, Articles and 27 amendments, with over 200 years of application) by the US Supreme Court, appears rather interesting and suggestive. It was precisely the US Supreme Court (which plays the role of a constitutional court) that assigned to the Constitution (the basic text and amendments) of that complex state and society, by virtue of its decisions, *such meanings and breathing into it the content and life over time* that would have made (without such an approach) such a complex organization of the state inefficient, thus denying certain fundamental rights and freedoms to the millions of people. *The Constitutional Court has faced similar challenges all along, as it has had to and it has to, considering very complex relations in the society and the state, while upholding the Constitution, identify, recognize and defend the true “normative capacity” of the Constitution of Bosnia and Herzegovina; not more not less.* That has been possible solely and precisely through a necessary dose of constitutional judicial activism and courage, the results of which are the decisions disputed at times and under different pretexts, especially in certain parts of the fragmented BiH society, depending on a constitutional issue addressed in them.

The same goes for the application of standards (“letter and spirit”) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). *The key provisions of this convention establishing or guaranteeing human rights and fundamental freedoms are also rather general, however they have been ascribed complete sense, content and meaning through decades-long case-law of the European Court of Human Rights in Strasbourg (the European Court), which the Constitutional Court has followed consistently.* Within the scope of its constitutional responsibilities and position¹² the Constitutional Court of BiH has adopted numerous decisions¹³. Each one of them has been and is a contribution to

12 Article VI(3) of the Constitution - Jurisdiction: The Constitutional Court shall uphold this Constitution.

(a) **The Constitutional Court shall have exclusive jurisdiction** to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- **Whether an Entity's decision** to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- **Whether any provision** of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

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

¹³ **In the post-Dayton period, as of 31 December 2016,** the Constitutional Court of BiH adopted 27,813 decisions and resolved 55,594 cases. That number is substantially higher now, as the Constitutional Court, thanks to the organizational enhancements of its work, in the meantime, has continued to tackle, dynamically and efficiently, a constantly high number of cases, which inflow, particularly since 2008 onwards, has not stagnated. Relevant statistics show that 99.55 % of the received cases are cases that fall within the appellate jurisdiction. **On the other hand,** within the scope of the appellate jurisdiction the most represented issues are those relating to the right to a fair trial (Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention), the right to property (Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention), the right to home (Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention). Since the beginning of its operation to this day the Constitutional Court has conscientiously and courageously used its constitutional powers to protect human rights

the constitutional and legal development in BiH, particularly to the strengthening of the functionality of the state and its constitutional and legal system and order, legal certainty and the protection of everyone's rights without discrimination.

By incorporating the European Convention (ECHR) into its constitutional and legal order, Bosnia and Herzegovina has committed itself to adjusting and harmonizing its legislation and case-law with the protection of human rights and freedoms under the European Convention. The European Convention has set forth for Bosnia and Herzegovina, and for all the governments signatory to the European Convention alike, a common minimum standard of rights and freedoms of individuals in its legal system. However, within the legal system of BiH the legal force of the norms of the Constitution prevails. *In carrying out this assignment, Bosnia and Herzegovina has incorporated into its legal system, inter alia, the legal standards ensuring the right to a fair trial, i.e. the equality of arms of the parties before a tribunal, the right to attend a trial, the right to be heard in oral proceedings, the adversarial principle and the principle of publicity of trials, trial within a reasonable time, etc.*

In these circumstances the interpretation of the Constitution of BiH greatly depends on the relationship and attitude of the Constitutional Court of BiH to its specific position and role. In a post-war, transitional period, at the outset of the democratization process and in the situation of chronic dysfunctionality of the political system, the Constitutional Court of BiH had to be, at the same time, proactive and advocate the doctrine of judicial activism as well as to make sure not to exceed one's constitutional responsibilities. That, certainly, is by no means a simple position.

III – CASE-LAW OF THE CONSTITUTIONAL COURT OF BiH¹⁴

In its twenty decades long practice in “the post-Dayton” period, the Constitutional Court has come across a series of complex constitutional issues, e.g. the division of responsibilities among the institutions of Bosnia and Herzegovina, Entities and other administrative units in Bosnia and Herzegovina; the issue of equality of the constituent peoples, ethnic segregation, and such like; the jurisdiction of the Constitutional Court with respect to the international treaties; relationship between the laws of the State and those of the Entities’; “positive obligation” of the competent authorities in relation to the settlement of certain issues, and such like.

To provide an illustration several key decisions may be singled out, by means of which the Constitutional Court showed *dynamic and evolutionary interpretation* of the Constitution of BiH given the *antinomies that the constitutional text contains* as well as the fact that *a substantial number of constitutional norms are insufficiently specific and unclear*. Precisely these features are the basis of the constitutional text for a progressive, conditionally speaking, activist approach and are not, *actually they do not need to be*, an obstacle to future constitutional and legal development in Bosnia and Herzegovina (albeit there are

and fundamental freedoms guaranteed under the Constitution, and the total number of decisions in such cases makes the actual contribution of the Constitutional Court to the protection and promotion of the rule of law in Bosnia and Herzegovina. That this court is an efficient mechanism for the protection of human rights of citizens at the domestic level, i.e. where the protection of human rights and freedoms is most efficient, can be corroborated not only by the mentioned but also by other decisions of the Constitutional Court.

¹⁴ There are but a few examples noted here. We refer to the publication “Digest” – second amended edition, 2016, with a rather extensive overview of the case-law of the Constitutional Court of BiH classified according to Articles of the Constitution of Bosnia and Herzegovina, Rules of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms (available on the website of the Constitutional Court www.ccbh.ba) – according to keywords for each article of the Constitution, Rules and ECHR.

disagreements in the political arena, even in the academic community, with such an approach of the Constitutional Court, namely with *the activist interpretation and the evolutionary interpretation of the Constitution in particular*).

First and foremost, a decision to be mentioned by all means is the Decision adopted in the Case No. U-5/98, the so-called “decision on the constituent status of peoples” (four partial decisions were adopted). That decision, *inter alia*, established that *the territorial distribution of the Entities "must not serve as an instrument of ethnic segregation"*, and that the constitutional principle of “collective equality of constituent peoples”¹⁵ prohibits any special privileges of one or two of those peoples, prohibits any domination within the structures of the government and any ethnic homogenization through the segregation based on territorial separation¹⁶.

Through dynamic and evolutionary interpretation of the Constitution, the Constitutional Court has contributed to consistent guarantees of *equality and constituent status of peoples throughout the territory of BiH*, security of sovereignty, territorial integrity and international personality of the state and the strengthening of legal certainty and of the rule of law in general. This interpretation of the Constitution and the activities of the Constitutional Court within the scope of its jurisdiction made it possible for more efficient functioning of the established (requisite) state authorities not explicitly mentioned in the state Constitution, which establishment, prescribed jurisdiction and operation though are not contrary to the provisions and spirit of the Constitution of BiH, since the Constitution leaves a possibility to set up such authorities and institutions for the purpose of exercising the responsibilities of the state of Bosnia and Herzegovina and tackling significant systemic issues by the setting up thereof. This, naturally, implies the observance of the responsibilities of the Entities, as well as a possibility to transfer the responsibilities from an Entity’s level to the State authorities and institutions, to a certain extent and in certain cases (e.g. defense, indirect taxes and such like).

Innovativeness in the case-law of the Constitutional Court, when it comes to the cases from within the so-called “abstract jurisdiction” is apparent for instance also in the Case No. U 7/15 wherein the applicant challenged the provision of an Entity’s Constitution on the grounds that the said provision did not state explicitly that the language of the Bosniac people (one of the three constituent peoples in BiH) is named “the Bosnian language”. The Constitutional Court did not establish a violation in the present case i.e. incompatibility of the disputed norm with the Constitution of BiH, because it assessed that *the challenged provision was neutral in itself*. However, in this very decision the Constitutional Court offered the so-called interpretative and binding interpretation of the challenged provision – in the reasoning

¹⁵ The Preamble of the Constitution of BiH states the following **as constituent peoples**: Bosniacs, Croats, and Serbs. The Constitution, however, recognizes the category of “citizens” as well which includes all citizens of BiH (irrespective of ethnic affiliation), and the category of “Others” which includes all citizens of BiH who do not identify themselves with any of the constituent peoples.

¹⁶ **Under Article I(3) of the Constitution, BiH shall consist of the two Entities**: the Federation of Bosnia and Herzegovina and the Republika Srpska. Republika Srpska is a centralized Entity, while the Federation of BiH is a highly decentralized Entity made up of ten cantons (In addition to cantons, as administrative territorial units, the Federation of BiH has municipalities and cities/towns as units of local self-government and administration. The Republika Srpska does not have cantons, but it has municipalities and cities/towns). Besides, Amendment I to the Constitution of BiH from 2009 established the existence of the **Brčko District of Bosnia and Herzegovina** “under the sovereignty of Bosnia and Herzegovina and is subject to the responsibilities of the institutions of Bosnia and Herzegovina, as those responsibilities derive from this Constitution”. The territory of the District is “held in condominium by the Entities”. The District is a unit of local self-government with its own institutions, laws and regulations, and with powers and status definitively prescribed by the awards of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brčko Area. Brčko is a pre-war municipality in the north of BiH along the Sava River.

thereof the Constitutional Court explained that the challenged provision of the Entity's Constitution should be construed and applied in practice in order for such a challenged constitutional norm and the practical application thereof to be in conformity with the fundamental human rights guaranteed under the Constitution thereby protecting the rights of the national group that the challenged provision applies to.

On the other hand, the protection of fundamental rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina and by the European Convention (ECHR) is ensured through the *appellate jurisdiction* under which the Constitutional Court of BiH shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment "of any other court in Bosnia and Herzegovina", which implies possibilities to review court decisions on the basis of an individual appeal (in other states known as "constitutional complaint") if a final decision of an ordinary court has violated the appellant's human rights and freedoms guaranteed under the Constitution. *Appellate jurisdiction is one of the important and most frequently used jurisdictions of the Constitutional Court of BiH comprising the protection of constitutional rights and freedoms of individuals, including the rights and freedoms referred to in the European Convention.* The exercise of this jurisdiction makes the Constitutional Court of BiH the strongest mechanism for the protection of human rights and fundamental freedoms in Bosnia and Herzegovina.

Namely, every person who is within the jurisdiction of Bosnia and Herzegovina shall have the right, having met formal conditions, to lodge an appeal for the protection of constitutional rights and freedoms. Apart from natural persons, legal persons may seek protection as well, as well as state subjects, since the Constitutional Court of BiH has interpreted the *ratione personae* protection differently from the European Court of Human Rights in Strasbourg (ECtHR). That practically means that the state of Bosnia and Herzegovina, its Entities (Federation of BiH and the Republika Srpska), the Brčko District of Bosnia and Herzegovina and the Cantons in the Federation of BiH may seek protection of their respective constitutional rights before the Constitutional Court. Through the evolutionary interpretation of the Constitution and the ECHR the Constitutional Court took a position that, bearing in mind that "*state bodies*" (*at any level*) are parties to many judicial proceedings (property disputes, the right to a fair trial...), it follows that they too are afforded the right by the Constitution of BiH to lodge an appeal with the Constitutional Court as the Constitution of BiH does not divide constitutional rights according to the nature of the parties to the proceedings.

The Constitutional Court applies broadly the principle *iura novit curia*, which means that *the Constitutional Court is not bound by the legal qualification referred to in an appeal or request for the review of constitutionality.* Namely, under its Rules, the Constitutional Court is strictly bound by the facts related in an appeal/request, however it did take a position that it may, for the purpose of as efficient protection as possible of the appellant's rights or those of the applicant, qualify their allegations in relation to the law enshrined in the Constitution of BiH or in the European Convention, even if the parties to the proceedings before the Constitutional Court did not refer to it (the law concerned). This principle, as is well-known, has been followed for a long time by the European Court of Human Rights (ECtHR). The Constitutional Court of BiH applies the principle *iura novit curia* precisely for the purpose of as comprehensive protection as possible of the parties to the proceedings. The Constitutional Court, namely, holds that it (the Court) knows best what law to apply in relation to the facts of the case (*iura novit curia*).

It is important, also, to mention the recent case-law of the Constitutional Court of BiH with respect to the standard of “a reasonable time” (the session of the Grand Chamber¹⁷ of 10 May 2017). This case-law is indicative of an active approach of the Constitutional Court in cases/appeals raising the issue of “a reasonable time” (as part of the right to a fair trial referred to in Article II(3)(e) of the Constitution of BiH and Article 6 paragraph 1 of the ECHR). Namely, the Constitutional Court observed that the length of proceedings (particularly appellate proceedings) before ordinary courts has already become a systemic problem in BiH, for which the judges assigned to work on specific cases are no longer the only ones who bear the exclusive responsibility. That is why in its most recent decisions, the Constitutional Court ordered the competent presidents of ordinary courts, the competent Government and the High Judicial and Prosecutorial Council of BiH (HJPC of BiH) as an independent regulatory authority for the judiciary, to undertake immediately, in accordance with this decision, each within the scope of their respective jurisdictions and responsibilities, appropriate measures aimed at removing systemic violations of the right to a fair trial within a reasonable time and measures aimed at finalizing proceedings before ordinary courts. This is to say that the order is addressed to those subjects that are responsible in general for the situation in the judiciary.

The Constitutional Court has based its practice of decision-making on appeals on the case-law and standards of the former European Commission of Human Rights and the European Court of Human Rights, as well as on the case-law of constitutional courts of the majority of the European countries. *Nevertheless, it should be emphasized that the case-law of the Constitutional Court of BiH has been motivated, first and foremost, by the need and obligation to bring down its activity within the scope of its constitutional jurisdiction, i.e. to the protection of constitutional, and not subjective rights of citizens.*

The Constitutional Court of BiH, as a rule, does not address the issue as to whether courts have correctly and completely established the facts of the case, it does not address the assessment of evidence either, or the legal assessment made by the courts. For the Constitutional Court the facts that are relevant are such facts on which existence the assessment of the violation of constitutional right depends, and the erroneous application of the substantive law is not, in itself, a valid reason to lodge an appeal. The Constitutional Court, generally speaking, is not called upon to examine the establishment of facts, or to reinterpret the decisions of the ordinary courts, unless decisions of ordinary courts are in violation of constitutional rights. That happens in a case where a decision of an ordinary court does not include or erroneously applies constitutional rights, and in a case where the relevant law is unconstitutional in itself, or where a violation of fundamental procedural rights has occurred (fair proceedings, access to court, efficient legal remedies and in other cases...). As the Constitutional Court is not a court of “fourth instance”, the jurisdiction of the Constitutional Court of BiH is limited solely to “the issues contained in the Constitution”, and when it comes to decision-making, as a rule, it examines the existence of only such violations as presented in a request/appeal.

¹⁷ Under Article 8 of the Rules of the Constitutional Court, the Constitutional Court shall take decisions sitting in sessions, as follows: the Plenary Court and the session of the Grand Chamber and the session of the Chamber. The Plenary Court shall be composed of all the judges – six “national” and three “international” judges appointed by the President of the ECtHR in accordance with the Constitution, the Grand Chamber shall be made up of six “national” judges, while the Chambers shall be composed of the President of the Constitutional Court and two Vice-Presidents elected from among the “national judges”. The Rules of the Constitutional Court precisely establish the competence for each of these “formations”.

However, unlike the European Court of Human Rights, which decisions are declaratory by nature, the fact that the Constitutional Court of BiH has a power to set aside a decision of an ordinary court (including decisions of supreme courts as well) and to remit it back to the competent court for reconsideration, or, as a last resort, to leave in effect the existing lower-instance decision, raises an issue as to whether the Constitutional Court brings itself, through such conduct, into a position of a supra-appellate court and whether that interferes with the autonomy, or independence of judicial authority (ordinary courts). Although the power to set aside judgments is a judicial power *par excellence*, that does not mean that the Constitutional Court thus becomes part of judicial authority, rather it only means that the constitution maker authorized the Constitutional Court to exercise to a limited extent a specific function of the control of respect for the rights and freedoms guaranteed by the Constitution.

Thus, judicial activism, principled and courageous search for and backing of normative capacity, the true extent and possible meaning of the constitutional text, have been recognizable in the work of the Constitutional Court of BiH in the hitherto period, are immanent to the responsibilities, role and mission of the Constitutional Court, as well as to that of the constitutional justice in general. That is sometimes overlooked (and not understood), and so it happens that the purposefulness, quality or need to resolve socially important issues and relations in Bosnia and Herzegovina (which come in some form as constitutional issues before the Constitutional Court), are confused with standards, criteria and parameters of constitutionality as such. Namely, something can be a constitutional solution, but, for other reasons, not necessarily a good or acceptable solution. Therefore, the search for good, better or optimum solutions mainly falls within the domain of a wide margin of appreciation, powers and activities of public authorities and not of the Constitutional Court. The Constitutional Court is exclusively and solely obliged “to uphold” the Constitution of Bosnia and Herzegovina (Article VI(3)), which it does through the reasoned decisions, and is limited solely by the constitutional norm, morality and professionalism of its members-judges.

While basing its hitherto rich case-law on the consistent application of the standards referred to in the Convention and on the case-law of the ECtHR it should be mentioned that, the case-law and experience of the Human Rights Chamber (established by Annex 6 of “the Dayton Agreement”), which also applied directly the ECHR and its protocols, was of great significance for the Constitutional Court of BiH particularly in the initial stage.

IV – IN LIEU OF A CONCLUSION

The Constitutional Court of BiH operates as a special, autonomous and independent authority and a corrective factor for the other three segments of authority in Bosnia and Herzegovina. In this way the Constitutional Court, as one of the key state institutions of the State of Bosnia and Herzegovina, contributed to the advancement of democracy, rule of law and affirmation of the legal state, particularly during the initial years following its set up when it was necessary to protect the foundations of the democratic state and resolve a number of issues that, in a way, remained insufficiently specified in the applicable Constitution of Bosnia and Herzegovina, that is to say very generally formulated.

The Constitutional Court of BiH interprets the rights referred to in the Constitution of Bosnia and Herzegovina and in the European Convention dynamically, evolutionary and affirmatively, i.e. in a way that is the most favorable for the parties to the proceedings. In that sense, the Constitutional Court goes beyond the scope of grammatical interpretation of a legal

norm applying teleological or end-driven interpretation of a legal norm, searching in that way for a solution that guarantees to the parties to the proceedings the highest level of protection of their rights.

The Constitutional Court of BiH has consistently relied on the rich case-law of the European Court of Human Rights in Strasbourg, which, through decades-long application and interpretation of the European Convention has ascribed the meaning and sense to the provisions thereof, thus establishing standards that have become *acquis communautaire* not only of the countries of the Council of Europe, but beyond.

The Constitutional Court is not a court of “fourth instance”, its jurisdiction is limited solely to “the issues under the Constitution”, and when it comes to decision-making, as a rule, it examines the existence only of such violations as presented in a request/appeal.

Sarajevo/Saint Petersburg, May 2017