MEĐUNARODNA KONFERENCIJA

ODNOSI IZMEĐU USTAVNIH SUDOVA I DRUGIH SUDSKIH INSTANCI

Sarajevo, 18. i 19. 3. 2000. godine

CONFERENCE INTERNATIONALE

RELATIONS ENTRE LES COURS CONSTITUTIONNELLES ET LES AUTRES JURIDICTIONS

Sarajevo, les 18 et 19 mars 2000

INTERNATIONAL CONFERENCE

RELATIONS BETWEEN CONSTITUTIONAL COURTS AND OTHER JUDICIAL INSTANCES

Sarajevo, 18-19 March, 2000

Sarajevo. 2001

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IZDAVAČ
USTAVNI SUD BOSNE I HERCEGOVINE
Sarajevo, Ulica Reisa Džemaludina Čauševića 8

ZA IZDAVAČA
Prof. dr. KASIM BEGIĆ

UREDNIK - LEKTOR:
Mr. MARIJA KOVAČIĆ

IZVRŠNI UREDNIK
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IZDAVAČKE USLUGE I GRAFIČKA OBRADA
»MAGISTRAT«, Sarajevo, Ulica Hamdije Kreševljakovića 33

ŠTAMPA
ŠIP "BORAC" Travnik

SPEAKERS

U Č E S N I C I

Kasim Begić,
Président de la Cour constitutionnelle de Bosnie-Herzégovine

DISCOURS D'OUVERTURE

Mesdames et Messieurs, chers collègues,

J'ai l'honneur et le grand plaisir d'avoir l'occasion d'ouvrir cette conférence et de vous souhaiter, au nom de la Cour constitutionnelle et au nom du programme PHARE, organisateurs, un bon travail à la conférence.

En premier lieu, je voudrais vous souhaiter la bienvenue et vous remercier d'avoir accepter de prendre part à cette conférence en espérant que vous passerez un bon séjour à Sarajevo et en Bosnie-Herzégovine. Je voudrais également souligner que votre présence ici à cette conférence ne confirme pas que la légitimité de cette réunion dans le sens de l'importance des représentants des cours constitutionnelles des pays européens, mais aussi un véritable soutien à la Cour constitutionnelle de Bosnie-Herzégovine.

Comme vous en êtes informés, la Cour constitutionnelle de Bosnie-Herzégovine est une jeune cour ayant une expérience modeste malgré le fait que la juridiction constitutionnelle date de 1963 dans cette région. Pourtant, son rôle est d'une grande importance dans la transition générale de notre société et de notre droit, ainsi que dans la nouvelle structure intérieure de la Bosnie-Herzégovine.

Dans un tel contexte, cette Conférence a pour but de considérer les relations mutuelles des cours constitutionnelles avec les autres institutions judiciaires de manière à échanger et à comprendre les expériences des juridictions constitutionnelles des autres pays, ainsi que de faire remarquer le rôle important de la Cour constitutionnelle dans la protection de la constitutionnalité qui représente le fondement de l'Etat juridique.

Les mots "la compréhension" et "la confirmation" ne doivent pas être pris que dans le contexte de l'expérience modeste mentionnée de cette Cour, mais aussi à la lumière du fait que la Constitution de Bosnie-Herzégovine assure à la Cour constitutionnelle une position spéciale soit par rapport à son devoir essentiel qui est "la protection de la Constitution" qui lui permet l'indépendance, soit par rapport à son organisation et à ses compétences. En d'autres termes, ce ne sont que les normes adoptées hors de la Cour constitutionnelle qui déterminent la position de cette dernière et rendent de cette façon opérationnelle son organisation, ses compétences, ses procédures, et le caractère de ses décisions etc.

Le but de cette conférence est donc de considérer les solutions dans ce domaine, surtout en ce qui concerne le Règlement intérieur de la Cour constitutionnelle de Bosnie-Herzégovine, d'évaluer les décisions précédentes du point de vue des standards de jurisprudence, ainsi que du point de vue de la confirmation de la Cour constitutionnelle de Bosnie-Herzégovine et des cours constitutionnelles en Bosnie-Herzégovine.

Le programme de cette conférence a été établi, bien qu'il y ait eu des changements dus aux circonstances, pour répondre aux buts fixés.

Pour conclure, je voudrais souhaiter la bienvenue aux journalistes et aux représentants des médias qui suivent le travail de cette conférence qui est d'une grande importance pour les experts, mais aussi pour le public.

J'invite Monsieur Nicolas Maziau à nous adresser la parole au nom du programme PHARE en tant que co-organisateur de cette conférence.

En conclusion, je voudrais vous remercier pour votre participation et votre présence à cette conférence.

Kasim Begić,
Predsjednik Ustavnog suda Bosne i Hercegovine

POZDRAVNA RIJEČ

Uvažena gospodo, cijenjene kolegice i kolege,

Čast mi je i zadovoljstvo što mogu da otvorim ovu konferenciju, i ujedno, da u ime Ustavnog suda BiH i PHAR-e programa, kao organizatora, poželim njen uspješan rad.

U prvom redu, želim da izrazim zahvalnost i dobrodošlicu svim prisutnim, a posebno onim kolegama koji su prevalili dugi put do Sarajeva. Želim vam da se prijatno osjećate, u gradu i u Bosni i Hercegovini. Isto tako, želim istaći, da vaše prisustvo i odziv na ovu konferenciju, ne samo da potvrđuje legitimitet ovog skupa u smislu relevantnog saziva predstavnika ustavnih sudova evropskih zemalja, nego predstavlja i istinsko ohrabrenje za Ustavni sud BiH.

Kao što Vam je poznato Ustavni sud BiH je, neovisno o činjenici da ustavno sudstvo na ovim prostorima datira od 1963. godine, zapravo novi sud, sa skromnim iskustvom. Ali, istovremeno, u sveukupnoj tranziciji društva i prava, kao i u inoviranoj unutrašnjoj strukturi BiH, njegova je uloga nezaobilazna i iznimno važna.

U ovom kontekstu je i namjera ove konferencije, a to je da se razmjenom mišljenja i sagledavanjem bogatih

iskustava ustavnog sudstva u drugim državama, razmotre međusobni odnosi ustavnih sudova i drugih sudskih instanci, i ukaže na značajnu ulogu Ustavnog suda i u odnosu na "zaštitu ustavnosti" - što je pretpostavka pravne države, i naspram njegove zadaće da bude institucionalni garant ljudskih prava i sloboda iz Ustava BiH i iz Evropske konvencije za zaštitu prava i sloboda, kao pretpostavke demokratske države, uz istovremenu potvrdu njegovog mjesta u sistemu sudova i ustavnog sudstva BiH.

Zapravo, riječi "sagledavanje" i "potvrda" treba razumijevati ne samo u kontekstu pomenutog skromnog iskustva ovog Suda, već i zbog činjenice da Ustav BiH osigurava Ustavnom sudu posebno mjesto, kako u odnosu na temeljni zadatak "zaštite Ustava" i pritom neovisnosti o ostalim ustavnim organima i tijelima, tako i u pogledu njegovog ustrojstva i nadležnosti, čime je u potpunosti onemogućena dekonstitucionalizacija, odnosno da se zakonima ili na drugi način definira nadležnost i ustrojstvo Ustavnog suda. Drugim riječima, jedino ustavne norme koje se donose izvan Ustavnog suda predstavljaju granice u određenju položaja Suda, te operacionalizaciju i bliže uređivanje organizacije, nadležnosti, postupaka i karaktera odluka po osnovu Poslovnika vrši se samostalno Sud.

Stoga je i značaj ove konferencije da se u ovom domenu sagledaju rješenja, odnosno odredbe u Poslovniku Ustavnog suda BiH i procijene dosadašnje odluke sa aspekta standarda ustavno-sudske prakse, kao i potvrđivanja kroz Ustavni sud sudova i ustavnih sudova u BiH.

Upravo temeljna namjera ove konferencije je determinirala i Program konferencije koji ste dobili, s

tim da će biti nekih malih izmjena uzrokovanih okolnostima kolje su se u međuvremenu dogodile.

Na kraju ove dobrodošlice, želim da pozdravim i prisutne novinare i djelatnike medija koji prate rad ove konferencije, tim prije što ona osim stručnog ima i širi značaj za javnost BiH.

U okviru dobrodošlice, pozivam prof. Nicolasa Maziaua da nam se obrati u ime PHAR-e programa kao suorganizatora ove konferencije.

Na kraju, još jednom se zahvaljujem na prisustvu i učešću u radu ove konferencije.

Nicolas Maziau
Professeur à l'université de Nancy II
Conseiller de la Cour constitutionnelle de Bosnie-Herzégovine

INTRODUCTION

Mme le Ministre d'Etat,
Messieurs les présidents,
Mesdames et messieurs les juges.
Chers collègues,

La Cour constitutionnelle de Bosnie-Herzégovine a souhaité organiser cette conférence, avec le soutien du programme PHARE, pour se faire mieux connaître des Cours constitutionnelles européennes qui, pour la plupart, ne la connaissent probablement pas. Pour certains d'entre vous, c'est même la première visite à Sarajevo et je suis très heureux de voir que vous êtes venus nombreux pour participer à notre colloque.

Dans le cadre du programme PHARE, la Commission européenne a décidé en 1998 de soutenir le développement de cette Cour en lui fournissant une assistance technique principalement par la mise à disposition de juristes, d'interprètes et de traducteurs. L'aide de la Commission européenne a permis aussi le rééquipement et la rénovation de ses locaux. En outre, nous organisons des séminaires qui sont destinés à améliorer la formation des conseillers juridiques de la Cour. Les conférences comme celle d'aujourd'hui permettent de mettre en contact les

juges de la Cour constitutionnelle de Bosnie-Herzégovine avec d'autres juges, des professeurs de droit et des praticiens du pays et de toute l'Europe pour échanger et débattre sur les questions constitutionnelles d'intérêt commun. Nous organisons également des voyages d'étude. La Cour constitutionnelle a ainsi eu l'honneur d'être reçue par le Conseil constitutionnel français au début de l'année 1999. Elle a aussi effectué la même année une visite auprès de la Cour de justice des Communautés européennes de Luxembourg et de la Cour d'arbitrage de Belgique. Elle espère pouvoir continuer ces visites au cours de l'année 2000 pour encore renforcer les liens déjà noués.

J'espère que ces travaux seront fructueux. Le programme que nous vous proposons est le fruit d'une large concertation entre nous. Il nous a semblé que la question des relations du juge constitutionnel avec les autres juridictions, les juridictions ordinaires, mais aussi la Cour européenne des droits de l'homme pouvait être intéressante pour la Bosnie-Herzégovine, mais devait également permettre de confronter les pratiques dans les différentes juridictions constitutionnelles européennes.

Je vous souhaite à tous un agréable moment dans nos murs et à Sarajevo.

Kasim Begić,
President of the Constitutional Court of Bosnia and Herzegovina

RELATIONS OF THE CONSTITUTIONAL COURT OF BIH WITH OTHER JURIDICAL INSTANCES

The introductory nature and the broad topic of this report determined the methodological approach that understands a wider context of the relations of the Constitutional Court with other court instances on the one hand, and a report that contains not only assertions but also a number of dilemmas and questions on the other hand. Thereby, the general frame of reference consists of the common denominators of constitutional judiciary in the world, and the provisions of the BiH Constitution.

Why the wider context, and why the dilemmas?

The wider context is simply unavoidable, bearing in mind numerous relevant facts relating to the constitutional organization: Bosnia and Herzegovina is still shaping its innovated constitutional system founded on the General Framework Agreement for Peace, which was signed in December 1995 during the peace negotiations under the auspices of the international community. Besides having an extremely elaborated internal state structure, the relations between the State and the Entities of Bosnia and Herzegovina are rather complex, and the Entities themselves have heterogeneous inner organizations. Bosnia and Herzegovina is a state whose economy and society are going through the process of

transition, and it is still in the first half of this process, including the process of transition of the legal system, with the focus on the overall internationalization of the domestic law, in accordance with the constitutional provisions. Lastly, the wider context relates also to the recent tragic experiences here and in the region, and to the major discrepancy between the norms and the factual situation, especially in the sphere of human rights and fundamental freedoms.

Bearing in mind the background i.e. this wider context, the answer to the question 'Why dilemmas?' is imminent. In fact, the Court, with its two and a half years of experience, is still affirming its exceptional role, trying to accomplish its immanent task both as the 'guardian of the Constitution' and as an institutional safeguard of the human rights and fundamental freedoms provided by the Constitution and the international conventions that are the integral part of the Constitution, and, in this way, to affirm the constitutional and judicial system from the top of the pyramid, harmonizing the standards and the practice, especially in view of the mentioned internationalization of the domestic law.

In the above efforts, realized primarily through the Rules of Procedure, which have been amended twice since the initial text, the basis consists in the adherence to the provisions of the Constitution of BiH. However, the constitutional provisions themselves provide clear arguments for the opinions found in the literature that the framers of the Constitution, at the time of the adoption of regulations or provisions on the Constitutional Court, could not have foreseen all aspects of its functions, which, along with the

aforementioned wider context of the Constitutional Court's role, generates the dilemmas as to whether and to what extent we have set adequate norms in the Rules of Procedure specifying our immanent tasks i.e. the jurisdiction under the Constitution of BiH.

This issue should be regarded from several aspects. First, the Constitution of BiH provides a special position for the Constitutional Court, both in regard to independence with respect to other authorities and in regard to the principle of deconstitutionalization, according to which it is rendered impossible for laws (even a constitutional law) to define the jurisdiction and organization of the Court, and according to which the constitutional provisions are the only ones adopted outside the Constitutional Court that set the limits in the determination of the organization and jurisdiction of the Court.

Secondly, besides from its independence, in one part of its jurisdiction the Court appears as a specific inter-authority, with a certain supervision of both the legislative and the executive branch, especially in view of the jurisdiction to decide any dispute that arises between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, as well as an original kind of jurisdiction in case of a 'blockade' of the Parliamentary Assembly when the issue is of a vital national interest.

Thirdly, the character of the constitutional norms, with its wide and even open-ended solutions, or with ambiguous specifications, actually implicitly incorporated elements of the so-called creative interpretation in the operationalization of these provisions.

Fourthly, the fact that the Constitutional Court is the only judicial body at the State level of Bosnia and Herzegovina, the Constitution not providing directly for the establishment of a Supreme Court (there are presently some initiatives, and, according to my knowledge, the Draft Law on the State Court of BiH is in procedure) is of a particular importance. In this way, the responsibility of Bosnia and Herzegovina in the sphere of safeguarding the rights and freedoms guaranteed by the Constitution and in the sphere of court protection is directed to the Constitutional Court.

Notwithstanding the atypical wider context and the constitutional definition of the Constitutional Court, including the determinants of the wider approach of the Court in the operationalization of the provisions of the Constitution through the Rules of Procedure, the Court applied the principle of so-called self-restraint. This is primarily confirmed in the sphere of protection of constitutionality (abstract constitutional review), where the Court limited itself to being a passive 'safeguard of the Constitution', although there are no obstacles in the constitutional provisions for the Court to act *ex officio* in this domain. There have not been any constitutional obstacles as to the so called preventive action by way of giving a response or an opinion to questions referred by the relevant institutions, in particular by the parliaments and governments whose actions could potentially appear as a subject of "disputes".

It could be concluded that with the existing solutions of the Rules of Procedure, the self-restraint is in the function of sparing the Court of'dealing with politics' and that it does not represent a restriction of competences.

especially with respect to safeguarding the Constitution. But, at the same time, the broadly defined competences of the Court in the Constitution of BiH cause the dilemma on the intention of the framers of the Constitution to make the Constitutional Court of BiH, at this time of true formation of the federal and complex State of BiH and the overall transition of society, bear a weight that is much heavier than it is usual for these sorts of institutions in stable countries (as did the Federal Constitutional Court of Germany 50 years ago). The intensification of this dilemma is to be found in the composition of the Constitutional Court, in which, besides the local judges, one third of judges are international.

But, unlike the protection of constitutionality, or, in other words, being a passive safeguard of the Constitution, in the field of protection of human rights and freedoms, the Constitutional Court of BiH acted in a completely different manner, giving the advantage between the two principles of, on the one hand, the independence of judiciary (and the specifically closed ordinary judicial systems within the Entities), and, on the other, the effective protection of the catalogue of rights and freedoms, to the need for the Constitutional Court to be an institutional safeguard of rights and freedoms. In other words, there are no self-restraints in this domain as to the general approach provided in the Rules of Procedure.

Following the provisions of the Constitution, there are two foundations on which adequate relations between the Constitutional Court of BiH and other court instances are established. The wider context, in this sense, explains the variations as to procedures

and the specific decisions of the Court, as it is elaborated by the Rules of Procedure.

The first foundation is the appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina (Article VI.3 (b) of the Constitution of BiH).

The second foundation is the jurisdiction over issues referred by any court in Bosnia and Herzegovina (Article VI.3 (c) of the Constitution of BiH).

As regards to the appellate jurisdiction, the constitutional provision, with its broad definition, has left a space for a creative interpretation within the framework of the Rules of Procedure of the Constitutional Court. Two dilemmas were present in the discussions on the operationalization of this constitutional provision, which lasted for months: first - whether this provision refers only to ordinary courts or to the constitutional courts of the Entities as well, and secondly - whether this field understands only 'constitutional complaints' or the Court can act as a 'court of full jurisdiction', which means deciding cases on the merits.

In the last ten months, the Court had three cases where decisions of Entities' constitutional courts were contested. In one case the challenged decision was confirmed, while the other two appeals were rejected for procedural reasons.

As regards the second dilemma, i.e. the scope of the appellate jurisdiction of the Constitutional Court of BiH, the Rules of Procedure operationalized this constitutional provision in such a way that the Court, deciding on an appeal, may, if it finds the appeal well-founded, act in two ways: as a court of full jurisdiction

it can decide the case on its merit§, or it can quash the contested judgment and refer the ease back to the lower court for a retrial if the case itself does not concern only constitutional issues, but requires the examination of other facts on which the evaluation of constitutionality depends. The Court whose judgment was thus quashed is obliged to adopt a second judgment in an expedited procedure, whereby it is bound by the legal opinion of the Constitutional Court on the violation of constitutional rights and fundamental freedoms of the appellant. If that court fails to act in accordance with the decision of the Constitutional Court, the appellant may file a new appeal, and in this case the Constitutional Court decides on the merits.

The arguments for the acting of the Constitutional Court as a "court of full jurisdiction" were based on the following facts: the Court decides in each case on which sort of action to take: such cases, where the facts are indisputable, represent flagrant violations of rights and freedoms: presently, the protection of rights in Bosnia and Herzegovina is far below the European standards: the international mechanisms of protection of these rights are affirmed in this way: and finally, at the State level of Bosnia and Herzegovina there is no supreme court or any other judicial body.

Our modest experience of less than one year shows that among approximately thirty appeals that had been submitted, 21 appeals were put on the list of cases for decision, out of which in seven cases the appeal was rejected on procedural and formal grounds (in most cases because of lack of exhaustion of Entities' legal remedies), in eight cases the Court found no violation of Constitutionally guaranteed rights and freedoms, while

in six cases the Court granted the appeal. Out of the latter six cases, four were decided on the merits, while the Court quashed the challenged judgment and referred the case back for a new procedure in two cases.

Unlike the appellate jurisdiction, within which the Court adopted a series of decisions and in which we have some experience, when it comes to the referring of preliminary questions, the Court has practically not had any cases of that kind.

According to the Constitution of Bosnia and Herzegovina, the Constitutional Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the 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.

It follows from this constitutional provision that the initiative in these cases is in the hands of ordinary courts, which is even their constitutional obligation. In view of the direct application and superposition of the European Convention and the overall internationalization of the domestic law, it is difficult to explain why there have been no referred questions yet. The only explanation could be the general attitude and opinion on the lack of a constitutionally defined functioning judicial system in Bosnia and Herzegovina, and the fact that the Constitutional Court has not yet established itself as a serious institution.

Regardless of some linguistic ambiguity, the aforementioned constitutional provision raises at least two questions: first, whether the list of authorized initiators of constitutional disputes is extended with the courts, since the referred question and the "reply" of the Constitutional Court obviously have certain legal consequences: and secondly, whether elements of an indirect review of constitutionality of laws are introduced in this way. These two questions illustrate the fact that the Rules of Procedure have not yet clearly defined the scope of jurisdiction and the manner of acting of the Constitutional Court in this domain.

It is precisely the intention of this conference that this eminent gathering, through reflections and presented rich and diverse experiences, encourages the young Court in its pioneer task, and helps in the resolution of some of the questions and dilemmas. Of course, new dilemmas may appear today or tomorrow, but even their detection is again a path that indicates in which way should the Constitutional Court of Bosnia and Herzegovina, in the adequate relations with the other court instances, fulfill its fundamental tasks, including the shaping of the constitutional and legal system and the affirmation of the judicial system in Bosnia and Herzegovina.

Kasim Begić,
Predsjednik Ustavnog suda Bosne i Hercegovine

ODNOSI USTAVNOG SUDA BOSNE I HERCEGOVINE SA DRUGIM SUDSKIM INSTANCAMA

Uvodni karakter, kao i široka tema referata, determinirali su metodološki pristup koji podrazumijeva, na jednoj strani širi kontekst sagledavanja odnosa Ustavnog suda sa drugim sudskim instancama, a na drugoj strani, i izlaganje u kojem sadržinski, pored tvrdnji, ima i niz dilema i pitanja. Pritom, opći okvir razmatranja čine zajednički imenitelji ustavnog sudstva u svijetu, i odredbe Ustava BiH.

Zašto širi kontekst i zašto dileme?

Širi kontekst je naprosto neminovan ako se ima u vidu niz relevantnih činjenica koje se odnose na ustavno ustrojstvo: BiH još uvijek oblikuje svoj inovirani ustavno-pravni sistem utemeljen u okviru Općeg okvirnog sporazuma za mir. potpisan u decembru 1995. godine tokom mirovnih pregovora pod patronatom međunarodne zajednice. BiH, pored iznimno razuđene ukupne državne strukture, ima, isto tako, i dosta složene odnose između države i entiteta, kao i heterogeno unutrašnje ustrojstvo u okviru entiteta. To je država u tranziciji privrede i društva, zapravo još uvijek u prvoj polovini ovog procesa, uključujući i tranziciju pravnog sistema, sa težištem, ukoliko se slijede ustavne odredbe, na sveukupnoj internacionalizaciji domaćeg prava. Napokon, širi kontekst se svakako odnosi i na donedavna

tragična iskustva ovdje i u širem regionu, i na izuzetni debalans - raskorak između normativnog i faktičkog, pogotovo u domenu ljudskih prava i osnovnih sloboda.

Ako se imaju u vidu naznake pozadine, odnosno šireg konteksta, onda se sam po sebi nameće i odgovor na pitanje zašto dileme. Zapravo, Sud sa svojim dvoipogodišnjim iskustvom još uvijek potvrđuje svoju iznimnu ulogu, odnosno nastoji ispuniti svoju imanentnu zadaću, i kao "čuvar Ustava" i kao institucionalni garant ljudskih prava i osnovnih sloboda utvrđenih Ustavom i međunarodnim konvencijama koje su sastavni dio Ustava, i da slijedom ovoga, sa vrha piramide, potvrdi i ustavno-pravni i sudski sistem, uključujući i ujednačavanje standarda i prakse, pogotovo naspram pomenute tzv. internacionalizacije domaćeg prava.

U spomenutim nastojanjima, u prvom redu preko Poslovnika koji je već u odnosu na prvobitni tekst u dva maha mijenjan i dopunjavan, osnovu predstavlja slijed odredbi Ustava BiH. Međutim, i same ustavne odredbe pružaju vrlo jasno argumente za mišljenja u literaturi kako ustavotvorac ih zakonodavac nije mogao u vrijeme donošenja propisa ili odredbi o ustavnom sudu predvidjeti sve aspekte njegovih funkcija, što zajedno sa iznesenim, širim kontekstom uloge Ustavnog suda BiH, upravo generira dileme o tome da li smo i u kojoj mjeri na adekvatan način normirah u Poslovniku naše imanentne zadatke odnosno nadležnosti iz Ustava BiH.

Ovo pitanje treba razumijevati sa više aspekata. Prvo, Ustav BiH osigurava Ustavnom sudu posebno mjesto, kako u odnosu na neovisnost naspram drugih vlasti, tako i u pogledu principa dekonstitucionalizacije po kojem je onemogućeno da se zakonima (pa i ustavnim zakonom) definira nadležnost i ustrojstvo Suda i da

jedino ustavne odredbe koje se donose izvan Ustavnog suda predstavljaju granice u određenju položaja organizacije i nadležnosti Suda.

Drugo, osim neovisnosti, u dijelu svojih nadležnosti Sud figurira i kao svojevrsna međuvlast, sa stanovitim nadzorom i zakonodavne i izvršne vlasti, pogotovo ako se imaju u vidu i nadležnosti koje se odnose na sporove između entiteta, između BiH i jednog ili oba entieta, između institucija BiH, kao i osoben vid nadležnosti u slučaju "blokade" Parlamentarne skupštine po pitanju vitalnog nacionalnog interesa.

Treće, i karakter ustavnih normi, sa širokim pa i otvorenim rješenjima, ili pak sa višeznačniin određenjem, zapravo je prilikom operacionaliziranja ovih odredbi neminovno ugradio i elemente tzv. kreativnog tumačenja.

Četvrto, od posebnog značaja je i činjenica da je Ustavni sud jedina sudska instanca na nivou BiH, i da Ustavom BiH nije neposredno predviđeno formiranje Vrhovnog suda (trenutno postoje inicijative i koliko znam u proceduri je prednacrt zakona o sudu BiH), čime je i odgovornost BiH u domenu osiguranja Ustavom garantiranih prava i sloboda, u domenu sudske zaštite, naprosto upućena na Ustavni sud.

Unatoč atipičnog šireg konteksta, kao i ustavnog određenja Ustavnog suda, uključujući i determinante šireg pristupa Suda prilikom operacionalizacije ustavnih odredbi preko Poslovnika, Sud je primijenio princip tzv. samoograničenja. Ovo se u prvom redu potvrđuje u domenu zaštite ustavnosti (apstraktna ustavna kontrola), i samosvođenje Suda na pasivnog "čuvara Ustava", iako ustavne odredbe ne predstavljaju zapreke u pogledu postupanja Suda "ex offo" u ovom domenu. Isto tako, nije bilo ustavnih zapreka i za tzv. preventivno djelovanje

preko odgovora - mišljenja na upit relevantnih institucija, u prvom redu parlamenata i vlada čije djelovanje se može potencijalno pojaviti kao predmet "sporova".

Može se ustvrditi da je, postojećim rješenjima u Poslovniku, samoograničenje ipak u funkciji da se Sud poštedi "bavljenja politikom" i da to ne znači reduciranje nadležnosti, pogotovo naspram zaštite Ustava. Ali, isto tako, široko definirane nadležnosti Suda u Ustavu BiH otvaraju dilemu o namjerama ustavotvorca da, u aktualnom istinskom oblikovanju savezne i složene države BiH i tranzicije društva, Ustavni sud BiH ponese znatno veći teret nego što je to uobičajeno za ove instance u stabilnim državnim zajednicama (kao što je recimo Savezni ustavni sud Njemačke imao prije 50 godina). Osnaženje ove dileme treba tražiti i u sastavu Ustavnog suda, u kome pored domaćih sudija jednu trećinu čine i internacionalne sudije.

Ali, za razliku od zaštite ustavnosti, odnosno pasivnog čuvara Ustava u pogledu zaštite ljudskih prava i sloboda, Ustavni sud BiH je postupio sasvim drugojačije, i između dva principa - neovisnosti sudstva (i svojevrsna zaokruženost redovnog sudstva u okviru entiteta) i efektivne zaštite kataloga prava i sloboda, prednost je data upravo potrebi da Ustavni sud bude institucionalni garant prava i sloboda. Drugim riječima, u ovom domenu Poslovnikom nisu predviđena nikakva samoograničenja na razini općeg pristupa.

Slijedom odredbi Ustava, dva su osnova po kojima se uspostavljaju odgovarajući odnosi između Ustavnog suda BiH i ostalih sudskih instanci. Naznake šireg konteksta, u ovom smislu, samo upućuju na različite varijacije u pogledu postupaka i specificiranih odluka Suda, što se razrađuje Poslovnikom Ustavnog suda.

Prvi osnov jeste apelaciona nadležnost za pitanja iz Ustava koja se pojave na temelju presude bilo kojeg suda u BiH (član VI/3,(b) Ustava BiH).

Drugi osnov jeste prosljeđivanje pitanja od drugih sudova (član VI/3.(c) Ustava BiH).

U pogledu apelacione jurisdikcije, ustavna odredba je, sa širokim definiranjem, ostavila prostor za kreativno tumačenje u okviru Poslovnika Ustavnog suda. Dvije su dileme bile prisutne u višemjesečnim raspravama prilikom operacionaliziranja ove ustavne odredbe: prvo, da li se ova odredba odnosi samo na redovne sudove ili i na ustavne sudove entiteta i drugo, da li se u ovom domenu radi samo o "ustavnoj tužbi" ili Sud može djelovati kao "sud pune jurisdikcije", odnosno odlučiti u meritumu.

Prva dilema je otklonjena time što se pod sudovima podrazumijevaju i entitetski ustavni sudovi, uz preduvjet da se apelacija po presudi ili odluci entitetskog ustavnog suda veže ili odnosi na "pitanja iz Ustava BiH". Argumentacija u ovom smislu je nedvojbena, ne samo u pogledu zadatka Ustavnog suda BiH da štiti Ustav BiH nego i radi supremacije Ustava BiH nad ustavima entiteta, pri čemu se ipak u međusobnim odnosima više radi o saradnji i koordinaciji naspram zaštite Ustava BiH i entitetskih ustava, u odnosu na klasičnu nadređenost.

U proteklih deset mjeseci Sud je imao tri predmeta koja su se odnosila na odluke entitetskih ustavnih sudova, pri čemu je u jednom predmetu potvrđena odluka, a dvije su apelacije odbačene iz proceduralnih razloga.

U pogledu druge dileme, odnosno dometa apelacione jurisdikcije Ustavnog suda BiH, Poslovnikom je ova ustavna odredba opcracionalizirana tako da u povodu

apelacije Sud, pored odbijanja apelacije kao neosnovane, može ukoliko utvrdi da je apelacija osnovana, dvojako djelovati: kao sud pune jurisdikcije, odnosno odlučiti u meritumu slučaja, ili ukinuti osporenu presudu i slučaj vratiti sudu koji je donio tu presudu na ponovni postupak ako taj slučaj nije vezan samo za ustavna pitanja, nego iziskuje i ispitivanje drugih činjeničnih pitanja od kojih zavisi ocjena ustavnosti. Sud čija je presuda ukinuta dužan je po hitnom postupku donijeti drugu, pri čemu je vezan pravnim shvatanjem Ustavnog suda o povredi Ustavom garantiranih prava i osnovnih sloboda podnosioca apelacije. Ako taj sud ne postupi po odluci Ustavnog suda, podnosilac apelacije može podnijeti novu apelaciju, i u ovoj situaciji Ustavni sud odlučuje u meritumu.

Argumentacija u pogledu djelovanja Ustavnog suda u nekim slučajevima kao "suda pune jurisdikcije" je bila na slijedu činjenica: da Sud u svakom konkretnom slučaju odlučuje na koji način će djelovati: da se radi o flagrantnom kršenju prava i sloboda uključujući i neosporno činjenično stanje; zatim, daje u BiH trenutno zaštita prava daleko ispod evropskih standarda: da se afirmiraju međunarodni mehanizmi zaštite ovih prava; te, da na nivou BiH nema ni vrhovnog suda, niti nekog drugog sudskog tijela.

Dosadašnja skromna iskustva od nepunu godinu dana kazuju da je od podnesenih tridesetak apelacija na listu za odlučivanje stavljena 21 apelacija, pri čemu je u sedam predmeta odbačen zahtjev iz proceduralnih i formalnih razloga (najčešće neiscrpljivanjc entitetskih pravnih lijekova), u osam predmeta Sud je našao da ne postoji povreda Ustavom garantiranih prava i sloboda, dok je u šest predmeta Sud usvojio apelaciju i pritom u

četiri slučaja riješio u meritumu, a u dva ukinuo presudu i slučaj vratio na ponovni postupak.

Za razliku od apelacione jurisdikcije, o čemu je Sud donio niz odluka, i gdje postoje neka iskustva, kod prosljeđivanja pitanja Ustavni sud, zapravo, i nije imao predmet ove vrste.

Po Ustavu BÎH. Sud je nadležan u pitanjima koja mu je proslijedio bilo koji sud u BiH u pogledu toga da li je zakon, o čijem važenju njegova odluka ovisi inkompatibilan sa Ustavom, sa Evropskom konvencijom o ljudskim pravima i njenim osnovnim protokolima, ili sa zakonima Bosne i Hercegovine; ili u pogledu postojanja ili domašaja općeg pravila međunarodnog javnog prava koje je bitno za odluku suda.

Slijedom ove ustavne odredbe, radi se o inicijativi koja je u rukama redovnih sudova, dakako i njihova ustavna obaveza, i ako se ima u vidu ne samo neposredna primjena i nadređcnost Evropske konvencije već i ukupno “internacionaliziranje domaćeg prava", teško je objasniti zbog čega nije bilo do sada prosljeđivanja pitanja, izuzev općeg stava i mišljenja o odsustvu ustavno definiranog funkcionirajućeg sistema sudstva u BiH, pa i da se Ustavni sud još nije nametnuo kao ozbiljna institucija.

Inače, neovisno o izvjesnim jezičkim nedorečenostima, pomenuta ustavna odredba, u prvom redu, otvara najmanje dva pitanja: prvo. da li se na ovaj način proširuje krug ovlaštenih pokretača sporova o ustavnosti i sa sudovima, jer očigledno je da proslijeđeno pitanje i "odgovor” Ustavnog suda ima neke pravne posljedice; i drugo, da li se na ovaj način uvode elementi posrednog, akcesornog ispitivanja ustavnosti zakona. Ova dva pitanja, drugim riječima, kazuju da Poslovnik nije, još uvijek,

decidnije utvrdio domete, kao i način djelovanja Ustavnog suda u ovom domenu.

A upravo i namjera ove konferencije jeste da ovaj eminentni skup, slijedom promišljanja i prezentiranja iskustava koja su bogata i raznovrsna, ohrabri mladi Sud u njegovom pionirskom poslu, i da svakako pomogne u razrješavanju nekih od pitanja i dilema. Naravno, moguće da se danas ili sutra otvore i nove dileme, ali i njihovo otkrivanje je opet put koji ukazuje na koji način će Ustavni sud BiH, u odgovarajućim odnosima sa drugim sudskim instancama, odgovoriti svojim temeljnim zadacima, uključujući i oblikovanje ustavnopravnog sistema, kao i potvrdu sistema sudova u Bosni i Hercegovini.

Franco Bile,
Juge à la Cour constitutionnelle d'Italie

LES RELATIONS ENTRE LA COUR CONSTITUTIONNELLE ET LA COUR DE CASSATION DANS LE SYSTEME JURIDIQUE ITALIEN

Mon intervention porte sur les rapports qui existent au sein de l'organisation constitutionnelle italienne entre la Cour constitutionnelle et les autres juridictions, et particulièrement la Cour de cassation.

La Constitution italienne, entrée en vigueur en 1948, distingue le contrôle de constitutionnalité du contrôle de légalité. Le premier est confié à la Cour constitutionnelle dans son aspect le plus important, c'est à dire le contrôle de conformité à la Constitution des normes de rang primaire, en fait les actes ayant force de loi. Au contraire, pour les normes de rang secondaire, en particulier les règlements le contrôle de constitutionnalité n'est pas concentré au sein de la Cour constitutionnelle, mais est diffus au sein des juridictions ordinaires. Il est confié à tous les juges, qu'ils soient juges administratifs (qui peuvent annuler les règlements considérés comme étant inconstitutionnels) ou juges judiciaires (qui peuvent ne pas les appliquer). En revanche, le contrôle de légalité est dévolu de façon générale à la Cour de cassation et concerne l'interprétation exacte de la loi, effectuée à l'occasion d'un recours soulevant la mauvaise interprétation de la loi par les juges du fond. On peut dire que ce contrôle est concentré auprès de la Cour de cassation (exception

faite des autres juridictions: le Conseil d'Etat et la Cour des comptes), soit parce que la Cour de cassation est l'organe le plus élevé dans le système hiérarchique des recours soit parce que l'organisation judiciaire italienne lui attribue la fonction spécifique de *nomofilachia,* c'est à dire la tâche d'assurer l'observation exacte et l'interprétation uniforme de la loi.

Le système procédural au sein duquel s'effectue le contrôle de constitutionnalité et le contrôle de légalité est bien différent. Le premier se greffe par voie incidente sur le procès ordinaire. Il arrive parfois que le juge - d'office ou à la suite de l'intervention des parties - doute de la constitutionnalité d'une disposition de loi qu'il doit appliquer. En ce cas, il ne peut pas refuser l'application de cette disposition qu'il considère, par hypothèse, inconstitutionnelle; en revanche, il peut suspendre le procès et saisir la Cour constitutionnelle afin quelle se prononce sur la constitutionnalité de la norme. Il faut pour cela que la question posée soit déterminante et non manifestement non fondée. Le contrôle de légalité se déroule, par contre, à différents niveaux du procès. En effet, tout juge est appelé à interpréter la loi et si sa décision est attaquée, le juge du degré supérieur peut rectifier l'interprétation affectée d'un vice de violation de la loi. Dans ce système procédural de hiérarchisation des recours, c'est à la Cour de cassation qu'il appartient de prendre la décision définitive, parce que sa décision n'est plus susceptible de recours ordinaire.

L'efficacité des décisions rendues en matière de contrôle de constitutionnalité et celles rendues en matière de contrôle de légalité est assez différente. Les décisions de la Cour constitutionnelle, lorsque celle-ci

prononce l'inconstitutionnalité d'une loi, impliquent la caducité ou la modification de la norme avec effet contraignant pour tous les juges. En revanche, les arrêts de la Cour de cassation n'ont d'effet obligatoire que pour les seuls jugements rendus: c'est l'autorité relative de la chose jugée. Ils ne lient pas les autres juges qui sont soumis seulement à la loi et pourraient, par hypothèse, ne pas partager l'interprétation de la loi faite sienne par la Cour de cassation. Bien que l'ordre juridique italien ne soit pas inspiré - à la différence des systèmes anglo-saxons par un système de «Case-Law», les juges du fond tendent à appliquer la loi conformément à l'interprétation rendue par la Cour de cassation, surtout lorsque la jurisprudence devient consolidée. La norme vit dans l'ordre juridique en prenant la signification que lui a donné la jurisprudence. On parle alors de droit vivant. Cette doctrine du droit vivant constitue un point de rapprochement avec la doctrine de « Common Law » dite du précédent.

Bien que le contrôle de constitutionnalité et de légalité soient conceptuellement des notions bien distinctes, on trouve néanmoins des points de contact qui font naître des problèmes dans les rapports entre les deux Cours. D'une part, en effet, la Cour constitutionnelle pour effectuer sa mission de vérification de la conformité d'une loi à la Constitution ne peut faire moins que procéder tout d'abord à l'interprétation de la norme susceptible d'être censurée. Il faut dire qu'elle peut aussi adopter une décision interprétative de rejet plutôt qu'une décision d'inconstitutionnalité. La disposition censurée, qui serait inconstitutionnelle selon le juge qui a soulevé la question, peut être interprétée différemment et cette lecture différente ne recèle plus de vice d'inconstitutionnalité. C'est à ce type de décision

que la Cour constitutionnelle recourt de plus en plus fréquemment à tel point que l'année passée le rapport entre décisions interprétatives et décisions d'inconstitutionnalité a été presque de 1 à 2. Par ailleurs, ces décisions ne lient pas les juges, mais concrètement, et ce surtout dans les dernières années, ils s'y conforment. D'autre part, la Cour de cassation en exerçant l'activité de *nomofilachia* qui lui est dévolue ne peut pas ignorer la Constitution et doit toujours préférer l'interprétation de la norme qui la rende conforme à la Constitution. C'est sur cette ligne qui trace les frontières des compétences respectives des deux Cours que se situent deux occasions possibles de conflit. D'un coté, la Cour constitutionnelle interfère dans le processus d'interprétation de la loi, parce qu'elle interprète la disposition assujettie au contrôle de constitutionnalité et parce quelle prononce parfois des décisions interprétatives. De l'autre, la Cour de Cassation, comme d'ailleurs tout juge ordinaire, peut, et même doit, interpréter la loi selon la Constitution. Cela pourrait être considéré comme un contrôle diffus de constitutionnalité qui existe aux côtés du contrôle concentré opéré par la Cour constitutionnelle. Dans ce cadre général, il s'est historiquement vérifié dans les premières années un conflit entre les deux Cours. On rappelle surtout la polémique relative à l'article 392 du vieux code de procédure pénale qui était interprété par la Cour de cassation comme excluant l'application à l'instruction sommaire des droits de la défense en vigueur pour l'instruction formelle. La Cour constitutionnelle appelée à vérifier la constitutionnalité de cet article tel qu'interprété par la Cour de cassation déclara (dans sa décision n. 11 de 1965) que cette question n'était pas fondée après avoir réinterprété la norme dans un sens

contraire, c'est à dire dans l'application naturelle de ces garanties qui avaient été considérées de façon erronée comme inapplicables à l'instruction sommaire. La Cour de cassation ne s'estima pas être liée par cette décision interprétative et cela impliqua en conséquence le maintien, de la part de la magistrature pénale de l'interprétation précédente. Alors la Cour constitutionnelle saisie une nouvelle fois de la question - acte étant pris de l'opposition persistante de la magistrature, et surtout de la Cour de Cassation, à appliquer les garanties de la défense à l'instruction sommaire, - adopta finalement une décision d'inconstitutionnalité ce qui mit ainsi fin au conflit (décision n 52 de 1965). La décision d'inconstitutionnalité, en effet à la différence de la décision interprétative, était obligatoire pour tous les juges y compris la Cour de Cassation. Cette situation initiale de conflit s'est apaisée au cours du temps et on est désormais parvenu à un équilibre institutionnel entre les deux Cours qui offre souvent l'occasion d'une synergie fructueuse. Plusieurs fois, en effet, dans les dernières années, la Cour de Cassation a rendu des décisions qui se conformaient à des décisions interprétatives de la Cour constitutionnelle prononcées peu de temps avant. Il faut, par ailleurs ajouter que la Cour constitutionnelle a bien clarifié les frontières de son intervention dans le champ de l'interprétation de la loi. D'une part en effet, la Cour se limite à vérifier que l'interprétation accueillie par le juge qui a proposé la question soit plausible, d'autre part si le juge pose comme fondement à la question une interprétation de la disposition en cause différente de celle exprimée par le droit vivant la Cour rend habituellement une ordonnance établissant le caractère non fondé ou bien manifestement non fondé de la question. Un cas

symptomatique de ce nouveau type de rapports entre la Cour constitutionnelle et la Cour de cassation réside dans la décision n. 232 de 1998 qui concerne la garantie fondamentale de la liberté personnelle et le droit pour celui qui en est privé de recourir à un tribunal pour que l'on décide dans des délais brefs ou sans délai de la légalité de la détention. La disposition contestée qui est l'article 309 du nouveau code de procédure pénale telle quelle était interprétée par la Cour de cassation, présentait un problème grave en ce quelle prévoit la caducité automatique de la mesure coercitive dans des délais péremptoires tout en ne fixant pas en réalité de durée maximale entre la présentation de la requête de réexamen et la décision du juge. La Cour constitutionnelle a opéré au regard de cette interprétation une correction des normes par voie interprétative. Elle a affirmé ouvertement être « bien consciente que l'interprétation proposée par elle ne coïncide pas avec celle que la jurisprudence a suivie jusque là » et cependant elle a fixé le début du délai de façon telle que le détenu ait la garantie que le Tribunal de réexamen se prononce dans les 15 jours de la requête sous peine de remise en liberté immédiate. De sa part, la Cour de Cassation s'est par la suite conformée à cette décision en modifiant son interprétation précédemment contraire.

Pour conclure, une nette distinction de rôles se dégage désormais entre les deux Cours même sur le terrain commun de l'interprétation de la loi. De façon générale, c'est à la Cour de cassation qu'il appartient de dégager la signification exacte de la norme. Mais dès lors que sont enjeu des valeurs de rang constitutionnel, la Cour constitutionnelle peut bien déclarer l'inconstitutionnalité de la disposition ou bien en corriger

l'interprétation pour la rendre conforme à la Constitution. Cette interprétation conforme va se superposer à l'interprétation éventuellement contraire de la Cour de Cassation. Et même si elle n'a pas de force obligatoire particulière, elle induit de fait une modification de cette jurisprudence. Mais il faut reconnaître que la Cour de cassation - surtout dans les dernières années - a été soucieuse de donner une suite cohérente et conforme aux décisions interprétatives de la Cour constitutionnelle. C'est de cette façon que les deux Cours contribuent ensemble chacune dans le cadre de leurs attributions à la réalisation pleine et concrète des principes contenus dans la Constitution de la République italienne.

Francisco Rubio Llorente,
Vice-President *emeritus* du Tribunal constitutionnel espagnol

LA PROCEDURE D'AMPARO

Tout d'abord, je dois vous proposer d'établir une correction dans le titre de mon intervention. On parle ici, dans le texte français, du contrôle direct par le Tribunal constitutionnel de la violation des droits fondamentaux par les autres juridictions, à vrai dire le recours d'*amparo* dont je vais parler n'est pas un moyen spécifique pour corriger les violations des droits fondamentaux par les autres juridictions, mais simplement un système de juridiction en appel pour porter remède aux violations des droits fondamentaux commises par tous les organes des administrations publiques, et tenant compte évidemment des violations que l'on peut attribuer directement aux organes des autres juridictions.

Je commencerai par faire une esquisse générale de la juridiction constitutionnelle en Espagne et de la division entre juridiction constitutionnelle et juridictions ordinaires. Dans un deuxième temps, j'exposerai ce que signifie le recours *d'amparo* dans la loi du tribunal constitutionnel, et en troisième lieu je vous donnerai quelques données sur la pratique du recours d'amparo. Enfin je poserai quelques questions à propos du rapport entre juridiction constitutionnelle et juridictions ordinaires dans la perspective du recours *d'amparo.*

I - Le système juridictionnel espagnol.

En Espagne, nous avons une justice ordinaire qui comprend divers ordres: civil, criminel, social, administratif et militaire couronnés par un Tribunal suprême qui, selon l'art. 117 de la Constitution, est l'organe juridictionnel suprême dans tous les ordres, sauf en ce qui concerne les droits fondamentaux. En fait, ce Tribunal suprême est divisé en 6 sections différentes: Une section civile, une section criminelle, 2 sections administratives, une section sociale et 1 section militaire.Le Tribunal suprême tient lieu de structure commune. Outrela justice ordinaire ainsi organ isée. il y a la justice constitutionnelle qui est confiée au Tribunal constitutionnel. Celui-ci est composé de 12 membres. Il tient des sessions plénières pour l'exercice de certaines compétences. Il est divisé en 2 sections de 6 membres chacune pour les recours d'*amparo.* Il y a aussi des formations plus petites, des sections corn posées de 3 membres dont la compétence la plus importante est constituée par les décisions d'admissibilité ou inadmissibilité des recours *d'amparo.*

Le Tribunal constitutionnel a des compétences assez larges. Il est compétent pour les recours directs d'inconstitutionnalité qui peuvent être initiés par le Gouvernement de l'Etat, les Gouvernements des régions, le Parlement national ou les Parlements des régions et surtout par des groupes de 50 députés ou 50 sénateurs. Ce recours direct doit être soumis, à la différence de ce qui se fait en Allemagne, dans un délai de 3 mois après l'approbation de la loi. En second lieu, le Tribunal Constitutionnel est compétent pour les questions d'inconstitutionnalité, c'est-à-dire les questions posées au Tribunal par n'importe quel juge du pays qui

doit appliquer une loi dont il soupçonne l'inconstitutionnalité. Le juge qui doit appliquer la loi qu'il estime inconstitutionnelle ne peut pas en éviter l'application mais il doit poser la question au Tribunal constitutionnel qui, dans son arrêt, devra décider de la constitutionnalité ou de l'inconstitutionnalité de la loi ou, ce qui est le cas le plus souvent, la constitutionnalité sous réserve. Ainsi, la plupart des décisions du Tribunal constitutionnel pour les recours d'inconstitutionnalité est constituée de décisions interprétatives. Le Tribunal constitutionnel est également compétent pour connaître des conflits de compétence qui opposent l'Etat et les régions et les régions entre elles. En quatrième lieu, le Tribunal constitutionnel est compétent pour les recours *d'amparo.*

Le poids de ces différentes compétences dans la charge de travail du Tribunal constitutionnel s'est reflété dans les statistiques des cinq dernières années, c'est à dire de 1995 à 1999. Durant ces années, le Tribunal constitutionnel a reçu 26.014 requêtes, sur ces 26.014 requêtes, 25.472 ont été des recours *d'amparo.* Il y a eu ainsi durant ces années: 138 recours en inconstitutionnalité, 357 questions préjudicielles en inconstitutionnalité, 46 conflits de compétence entre l'Etat et les régions et 25.472 recours *d'amparo.*

Quel genre de recours est le recours *d'amparo?* D'abord c'est un recours qui protège les droits fondamentaux, mais pas tous les droits fondamentaux. Le régime des droits fondamentaux en Espagne n'est pas uniforme et le recours *d'amparo* ne protège que les droits fondamentaux énoncés dans la section première du chapitre 2, comprenant des droits essentiels tels que, le droit à la vie, la liberté personnelle, la liberté de

communication ou au secret des communications, la liberté d'expression, d'association, etc... Il y a d'autres droits fondamentaux qui ne sont pas protégés par le recours *d'amparo,* notamment le droit de propriété et la liberté d'entreprise bien que dans le système espagnol ils aient le statut de droits fondamentaux. Les actes contre lesquels on peut invoquer le recours *d'amparo* sont les actes de tous les pouvoirs publics en général, dans la mesure où ils violent ces droits fondamentaux protégés. Le recours *d'amparo* ne peut pas porter directement contre une loi, mais contre l'acte d'application de la loi. La jurisprudence du Tribunal constitutionnel a élargi l'idée d'organe de pouvoir de telle façon qu'on peut invoquer le recours *d'amparo* contre les actes d'entités de droit privé, dans la mesure où ces entités appartiendraient à l'Etat ou à une institution publique, à l'exemple de la radiotélévision de l'Etat qui a la forme d'une société de droit privé. Sont considérées comme légitimes pour déposer un recours *d'amparo* toutes les personnes qui ont un droit ou un intérêt légitime lésé par un acte du pouvoir. La procédure exige qu'avant d'arriver devant le Tribunal constitutionnel la personne lésée dans ses droits par l'acte du pouvoir épuise tous les recours existant devant les juridictions ordinaires. Le requérant doit avoir épuisé les voie des recours, mais il doit avoir également invoqué dans ses recours devant la juridiction ordinaire le ou les droits fondamentaux qu'il estime avoir été violés. La procédure devant le Tribunal constitutionnel est très simple: il faut une requête écrite, la procédure est gratuite et le premier acte est d'examiner l'admissibilité du recours. Si le recours est admis, le Tribunal peut suspendre l'exécution de l'acte qui a fait l'objet du recours et si le Tribunal octroie l'*amparo,* il doit rétablir le requérant dans la plénitude de ses droits.

La pratique du recoursd*'amparo:* D'abord la masse énorme des recours pose un problème parc qu'avidement il n'y a pas de Tribunal ou monde qui puisse se débrouiller avec agilité dans une telle masse de recours, donc ça détermine un certain délai dans les décisions des recours. Nous ne sommes pas encore arrivés ou délai de la Cour de Strasbourg, ni même de la Cour de Luxembourg, mais l'attente moyenne dans un recours d*'amparo* doit être entre 1 an et demi et 2 ans ce qui est un délai regrettable

Qui demande l'amparo? La plus part des recoursd'amparo sont posés par les particulières, mais dans les statistiques de l'année dernière on a posé 100150 et dans ce ensemble considérable près que 400 ont été dépose par des organes du pouvoir, les Communes, les administrations a personnalité juridique séparé etc. parc que les administrations publiques ne sont couvertes par les droits fondamentaux et parmi les droits fondamentaux couverts par le recours d*'amparo* il y a le droit a l'accès à la justice. De ce point de vue l'établissement public peut être lacé dans ce droit par la procédure administrative ou outre. Les droits fondamentaux invoqués dans le recours d'amparo sont surtout les droits garantis a l'art. 24 de la Constitution sur l'ensemble de 5000 recoursd'amparo 4601 avait comme fondement la lésion d'un des droits garantis a l'art. 24 de la constitution cet article a un contenu plus ou moins semblable a ceux des articles 102 et 103 de la constitution allemande, s'est le droit au juge, le droit au due proces of law, le droit a la présomption d'innocence. Ces sont les droits garantis aux art. 102, 103 de la constitution allemande et aux articles 5 et 6 de la Convention européenne de droits de l'homme et le 80% des recours se fond sur la lésion de ces articles.

Deuxièmement le droit a l'égalité, l'art. 14 de la Constitution, le principe d'égalité serve comme fondement ou 20% des recours déposés et comme dans les recours on invoque souvent plus d'un droit il y a encore des invocations des sortes de droits fondamentaux dans le 20% des cas. Une foi déposée le recours devant la Cour, la première décision de la Cour est la décision sur l'admission ou inadmissibilité. Cette décision est réservée à cette section de 3 juges et de ce point de vue on pourrait dire du recoursd'amparo espagnol comme que les possibilités d'amission sont très réduites puisque les chiffres concernent l'année dernière de 4936 recours-d'amparo seulement 221 ont été résolus par un arrêt définitif, tous les autres ont été éliminés dans la phase d'admission. Si on a la chance de dépasser cet obstacle d'admission on a une chance d'avoir succès dans le recours parc qu'au peu prés la moitié des arrêts prononcés chaque année sont des arrêts d'estimation. L'existence du recoursd'amparo implique une différence substantielle entre le système espagnol et pour exemple le système italien ou d'outres systèmes européennes et le système espagnol est très proche de ce point de vue au système allemand et ce système s'éloigne de la conception dite européenne de la juridiction constitutionnelle du schéma kelsenian et s'approche beaucoup a mon avis au système Nord américain parc qu'évidemment il n'y a prés que des problèmes juridiques pour les quels on ne puisse pas établir un lien avec un des droits fondamentaux, dont n'importe quel problème juridique un litige peut être porté devant le Tribunal Constitutionnel comme a travers le recoursd'amparo. Cette structure fait que le Tribunal constitutional agisse dans une certaine mesure comme tribunal suprême comme une Cour Suprême en

Espagne. Ca pose avidement des problèmes de relation. La juridiction ordinaire est tenue d'après la loi de la juridiction ordinaire, art. 5 de la loi organique du pouvoir judiciaire, de suivre l'interprétation de la constitution établie par le tribunal constitutional. Mais en principe elle n'est pas obligée de suivre l'interprétation des lois. Seulement d'après mon expérience de 12 ans comme juge et d'après aussi les réflexions théoriques que je peux faire comme professeur l'idée qu'on peut établir une distension rigide entre les questions de constitutionnalité et les questions de légalité s'est une pure illusion. Les instances du droit fait impossible séparer les questions de légalité et les questions de constitutionnalité on ne peut pas juger une loi sans l'interpréter et donc le tribunal constitutionnel est bien forcé d'interpréter non seulement la constitution, mais aussi les lois. On général cette interprétation des lois faite par le tribunal a était accepté par la juridiction ordinaire le problème vient, quand il se produit, se pose d'une outre façon et ses sont des problèmes entre le Tribunal constitutionnel et la Cour suprême parc que très suivant quand une affaire arrive devant le tribunal constitutionnel a travers le recours d'amparo dans les cours de ces litiges devant la juridiction ordinaire il y a divers arrêts des tribunaux des différentes nivaux. Très souvent le tribunal suprême a délai par exemple la décision du tribunal supérieur ou du tribunal qui a connu en deuxième instance et en annulant l'arrêt du Tribunal Suprême le Tribunal constitutionnel redonne sa force a la décision du tribunal inférieur ce qui le Tribunal supérieur accepte avec difficulté. Jusqu'au présent il n'y a jamais eu des problèmes sans solution il y a eu des critiques un certain malais, mais jamais les problèmes n'ont pas éclater dans des

guerres entre les Cours et si vous voulez connaître mon avis se système espagnol est un système qui devrait aboutir a l'unification des juridictions. Je ne voix pas très claire comme on peut à long terme avoir une juridiction ordinaire et une juridiction constitutionnelle dans un système juridique dont le centre est occupé par les droits fondamentaux, je ne suis pas très sure que le rôle que la cassation a joué pendant le XIX siècle n'a pas perdu son sens dans les XX siècles dans des systèmes juridiques qui ont suivi une transformation profonde.

En ce qui touche le problème qu'on a discuté ici ce matin est que le tribunal constitutionnel doit agire comme un tribunal de Cassation en annulant et en renvoyant la décision au tribunal ordinaire, ou doit prendre lui-même la décision la pratique espagnole n'est pas uniforme. Je vous parle de ma propre expérience comme juge. La première fois qu'un problème de ce gendre s'est posé s'était un problème de liberté d'expression. Un journaliste d'une petite province espagnole avait était condamné à cause d'un article très critique du maire de la localité, le journaliste était arrivé devant le tribunal constitutionnel par violation de la liberté d'expression et le Tribunal constitutionnel a trouvé qu'on a violé la liberté et qui il ne pouvait être condamné à cause de cet article, mais il y a dit que le juge n'a pas tenu conte de l'importance dans notre système de la liberté d'expression, donc nous annulons l'arrêt et nous renvoyons l'affaire au juge de façon que lui si puisse après nouvelle réflexion donner un autre arrêt. Nous avons renvoyé l'affaire et le juge a fait se que on peut supposer, je vais réfléchir encore une fois sue cet affaire, la liberté d'expression mais quand même ce monsieur a dépassé les limites propres de la

liberté d'expression, donc je le condamne encore une fois. Le journaliste est revenue au tribunal constitutionnel qui a décidé d'établir par lui-même la pondération des droits et d'accorder l'annulation de l'arrêt sans renvoyer l'affaire au juge original. A la fin s'est la façon d'agir possible et s'est à cause de se la que je vous dis dans le système espagnol le Tribunal constitutionnel s'est le seul Tribunal constitutionnel réel mais il occupe une place qui est très proche a celle d'autres tribunaux suprêmes.

Nunes de Almeida,
Vice-président du Tribunal constitutionnel du Portugal

LA COMPETENCE D'APPEL DU TRIBUNAL CONSTITUTIONNEL DU PORTUGAL SUR LES DECISIONS DES COURS ORDINAIRES

Monsieur le Président, Mesdames et Messieurs je voudrais en premier lieu remercier le président de la Cour Constitutionnelle de Bosnie Herzégovine pour son invitation. En mon nom personnel et celui de ma Cour, je souhaite également saluer la Cour constitutionnelle de Bosnie Herzégovine et lui souhaiter bon travail dans l'avenir.

Il est plutôt intéressant que l'échange des expériences respectives, permet de constater qu'il existe toujours plusieurs chemins pour arriver à un même endroit. Si les données historiques et sociales diffèrent selon les pays, des questions communes à de nombreux pays existent, malgré des systèmes différents. Au Portugal, une donnée historique doit être prise en compte. Il y plus d'un siècle que dans ce pays, la première constitution républicaine a consacré le contrôle diffus de la constitutionalité des lois. C'est une caractéristique qui n'existait pas en Europe à ce moment-là. Cette spécificité s'explique par le fait que le Brésil ayant connu une révolution républicaine en 1891, il a adopté le système de *judicial review* nord-américain, ce qu'a importé à son tour la révolution républicaine portugaise au début du XX siècle. Mais, ce contrôle diffus n'a pas fonctionné, car les tribunaux

ordinaires se refusaient à un véritable contrôle de constitutionnalité. Le contrôle diffus étant consacré par la constitution républicaine, il s'est maintenu, bien qu etant limité, dans la Constitution de 1932, c'est-à-dire la constitution du régime autoritaire qui a duré jusqu'en 1974. Néanmoins, je ne suis jamais parvenu à trouver plus d'une décision de refus d'application d'une loi inconstitutionnelle par un juge ordinaire, qui je crois a été rendue à la fin des années 60. On envisageait cette modalité de contrôle comme un moyen pour les juges de contrôler le pouvoir politique. Après la révolution démocratique des années 70, il était très difficile de retirer aux juges ordinaires la possibilité de contrôler la constitutional^ des lois. Une crainte était cependant avancée, celle de voir le contrôle diffus, qui n'avait jamais marché, servir d'instrument désormais à une magistrature conservatrice pour remettre en cause les transformations démocratiques des années 70. Un système mixte a également été mis en place, différent de la pratique traditionnelle du contrôle diffus et différent du système européen de contrôle concentré. Ce système s'est définitivement mis en place en 1982 avec la création du Tribunal constitutionnel.

Le Tribunal constitutionnel exerce non seulement, de façon exclusive, un contrôle préventif et abstrait à la française, de même qu'un contrôle de constitutionnalité par omission importé de l'ancienne cour constitutionnelle yougoslave, mais également et surtout, connaît par voie d'appel, toutes les décisions rendues par les tribunaux ordinaires en vertu du système de contrôle diffus en vigueur au Portugal. Ainsi, au contrôle concret des normes effectué par tous les juges, s'ajoute un contrôle abstrait, concentré au sommet. C'est cette articulation qui est originale. Le sys-

tème portugais de contrôle diffus se distingue de la pratique espagnole, italienne ou allemande, où le juge ordinaire renvoie au juge constitutionnel lorsqu'il soulève un problème d'inconstitutionnalité. Au Portugal, le juge ordinaire résout toute question d'inconstitutionnalité, il a même le devoir de décider car la Constitution interdit au juge d'appliquer des normes inconstitutionnelles. Cette interdiction l'oblige à régler la question d'inconstitutionnalité préalablement avant de juger l'affaire au fond. Cependant, il faut souligner que l'objet d'un recours d'inconstitutionnalité devant le Tribunal constitutionnel prend toujours la forme d'une question d'inconstitutionnalité d'une norme juridique. Ici, il faut différencier ce recours avec le recours d'amparo, qui permet de mettre en cause les actes des pouvoirs publics, car le recours d'inconstitutionnalité portugais ne soulève pas forcément un moyen tiré de la violation des droits fondamentaux. Tout parti devant un tribunal ordinaire peut soulever la question d'inconstitutionnalité, non seulement en rapport avec une violation des droits fondamentaux, mais aussi, par exemple, parce qu'un acte normatif a été pris par une autorité qui n'était pas compétente, etc. La question d'inconstitutionnalité doit être tranchée en premier lieu par le juge ordinaire. Si on soulève devant le juge ordinaire, la violation d'un droit fondamental par un acte administratif, deux voies sont possibles: soit on soutient que l'acte administratif est lui-même contraire à la constitution, et dans ce cas, le juge ordinaire décide en premier et en dernier lieu, soit cet acte administratif, par exemple, est contraire à un droit fondamental, et parce qu'étant un acte d'application d'une loi, cette norme juridique applicable au cas concret est incompatible avec la constitution. Dans

ce dernier cas, la question d'inconstitutionnalité soulevée pourra, seule, faire l'objet d'un appel devant le Tribunal constitutionnel. Ainsi, sont exclus du contrôle de constitutionnalité effectué par le Tribunal constitutionnel, tous les actes juridiques, indépendamment de leur nature, qui n'ont pas de caractère normatif, par exemple, les actes de nature politique, c'est-à-dire les actes du gouvernement, les actes administratifs, les décisions juridictionnelles. On ne peut ainsi faire appel devant le Tribunal constitutionnel parce que, par exemple, le juge ordinaire aurait violé mon droit fondamental à être entendu par le juge préalablement à sa décision. Si on soulève cette question, celle-ci ne pourra être soulevée que devant le Tribunal supérieur mais non devant le Tribunal constitutionnel, sauf si l'on soutient que le juge a mis en application, pour refuser ce droit, une norme juridique. Cette interprétation de la norme juridique pourra être soulevée devant le Tribunal constitutionnel. La compétence d'appel du Tribunal constitutionnel n'a pas ainsi les contours d'un recours d'amparo. Elle ne sert pas à faire reconnaître que la décision du tribunal ordinaire a mis en cause un droit fondamental mais a pour objectif de juger de la constitutionnalité d'une norme juridique en principe applicable au cas concret.

Les cas d'espèce permettant d'interjeter appel devant le Tribunal constitutionnel se résument à trois hypothèses. En premier lieu, on peut inteijeter appel de toutes décisions juridictionnelles refusant l'application d'une norme juridique à cause de sa prétendue inconstitutionnalité, norme juridique signifiant une loi ou un règlement. Si le juge ordinaire refuse l'application d'une norme au motif qu'elle serait inconstitutionnelle, on peut immédiatement interjeter appel devant le

Tribunal constitutionnel. C'est un recours direct qui arrive devant le Tribunal constitutionnel, sans passer par les autres tribunaux de niveau supérieur. Le recours constitutionnel est même obligatoire pour le Ministère public, quand le juge ordinaire refuse l'application d'une norme juridique contenue dans un acte législatif, un règlement ou un décret réglementaire.

En second lieu, des recours sont possibles contre des décisions juridictionnelles qui appliquent une norme dont l'inconstitutionnalité a été soulevée pendant le procès. Dans ce cas, le recours ne peut être exercé que par la partie qui a soulevé la question pendant le procès. Le recours devant le Tribunal ne sera possible qu'après épuisement des voies ordinaires d'appel. Si la partie considère que cette question d'inconstitutionnalité est sa préoccupation unique, elle peut renoncer au recours ordinaire mais elle perd la possibilité d'interjeter appel devant un juge d'appel, si le Tribunal constitutionnel rejette son recours. Ce deuxième type de recours est le recours qui permet, par excellence, d'assurer la défense des droits fondamentaux. Il est généralement le fait de citoyens. Le Tribunal constitutionnel connaît une moyenne de 800 recours de ce type par an. Plus de 40% de ces recours échouent au stade de l'admissibilité, quand par exemple, la question soulevée n'est pas une question d'inconstitutionnalité normative, quand les voies ordinaires d'appel n'ont pas été épuisées, et surtout, quand la question d'inconstitutionnalité n'a pas été soulevée pendant le procès. ,

Enfin, un dernier type de recours permet d'interjeter appel à l'encontre de décisions qui appliquent une norme jugée précédemment inconstitutionnelle

par le Tribunal constitutionnel lui-même. Quand le Tribunal constitutionnel exerce un contrôle concret des normes, ses décisions ne sont valables qu'à l'égard des parties et n'ont pas de force obligatoire générale. Il faut noter qu'il est obligatoire pour le Ministère public d'interjeter appel en cette hypothèse, car il a pour mission d'unifier la jurisprudence en matière constitutionnelle. Ce recours est évidemment possible à l'encontre de décisions divergeant de l'interprétation donnée par le Tribunal constitutionnel pour assurer la constitutionnalité d'une norme. Un juge ordinaire ne peut appliquer une loi en donnant une interprétation refusée précédemment par le Tribunal constitutionnel.

Le système de contrôle concret des normes repose ainsi sur deux idées fondamentales. D'une part, l'intervention du Tribunal constitutionnel suppose toujours une décision préalablement rendue par un tribunal ordinaire relativement à une question d'inconstitutionnalité, question qui peut être soulevée d'office ou par quelques-unes des parties en conflit. D'autre part, le dernier mot en matière d'inconstitutionnalité appartient toujours au Tribunal constitutionnel. De cette façon, on obtient la combinaison originale d'un système de contrôle diffus avec un système de contrôle concentré. L'unification ne peut être que le fait du Tribunal constitutionnel car, dans le système juridictionnel portugais, il existe plusieurs cours suprêmes: pour les questions civiles, pénales, sociales, administratives, fiscales, financières et militaires (cette dernière va bientôt disparaître).

L'objet du recours devant le Tribunal constitutionnel se limite à la question d'inconstitutionnalité soulevée. On a toujours interprété le caractère restreint

de cette compétence comme étant la conséquence de la nature de juge de cassation du Tribunal constitutionnel. Le Tribunal constitutionnel ne va pas trancher le litige, mais renvoyer devant le juge du fond pour qu'il reforme sa décision antérieure si elle n'est pas conforme avec la décision du Tribunal. Cette décision a l'autorité de la chose jugée. Le juge ordinaire est obligé de mettre en oeuvre la décision du Tribunal constitutionnel en appliquant cette décision au cas concret. Cet aspect du contrôle soulève le problème le plus difficile, car au Portugal, même la Cour suprême de justice se comporte toujours comme juge de pleine juridiction. Le seul véritable recours en cassation prend donc place devant le Tribunal constitutionnel. Relativement aux décisions du Tribunal constitutionnel qui ont une nature interprétative, elles ont aussi l'autorité de la chose jugée. En cas de contrôle concret par voie d'appel, les décisions du Tribunal constitutionnel s'apparentent toujours à des décisions interprétatives, car il ne peut pas apprécier la constitutionnalité d'une norme en abstrait, mais en prenant compte de l'interprétation donnée à la norme par le tribunal ordinaire. Dans la plupart des cas, le Tribunal constitutionnel va se sentir lié par l'interprétation donnée par le tribunal ordinaire, car il n'est pas de sa compétence de décider qu'elle est la meilleure interprétation de la loi. Le Tribunal constitutionnel ne peut apprécier cette interprétation, sauf s'il y est obligé en vertu de la constitution elle-même. Les tribunaux ordinaires et surtout la Cour suprême, n'apprécient pas que le Tribunal constitutionnel fixe dans un cas concret, l'interprétation de la loi. On peut prendre l'exemple d'une affaire de 1985, dans laquelle était en cause un décret-loi du gouvernement déclarant la dissolution de deux entreprises

publiques de navigation maritime. Le texte de loi fut interprété comme n'impliquant aucune compensation pour les salariés des deux entreprises. Cette norme telle qu'elle était interprétée, fut jugée inconstitutionnelle par toutes les juridictions saisies. Le procès fut renvoyé à la Cour suprême qui jugea qu'en vertu d'un papier signé par les salariés, ils avaient renoncé ainsi à toute compensation. Un deuxième appel devant le Tribunal constitutionnel aboutit à déclarer que cette renonciation apparente des salariés était illégale, et il renvoya l'affaire à la Cour suprême pour appliquer la décision antérieure. La Cour suprême considéra que les salariés avaient droit à une compensation, mais que le délai de prescription en la matière rendait la demande caduque. Il y aura un troisième appel devant le Tribunal constitutionnel, puis un quatrième et un cinquième, jusqu'à ce que le ministre de l'économie prenne la décision de dédommager tous les salariés. Le système portugais ne permet pas, à la différence de la France, où la Cour de cassation peut renvoyer à une autre Cour d'appel si la première saisie ne met pas en œuvre sa décision, de renvoyer à une autre Cour que celle saisie en premier lieu. Les difficultés induites par ce système sont encore plus claires dans la situation où la cour constitutionnelle considère qu'il existe plusieurs solutions, mais qu'il ne lui appartient pas de donner la solution exacte. Le Tribunal constitutionnel peut juger une interprétation particulière inconstitutionnelle, mais en ce qui concerne la mise en oeuvre de la décision, il appartient au juge ordinaire de trouver une deuxième solution. Cependant, rien n'assure que cette dernière solution ne soit pas encore l'objet d'un recours d'inconstitutionnalité. Cela a pu arriver notamment en matière de décisions pénales. La loi ne prévoyant pas que la Cour

suprême doit respecter les décisions du Tribunal constitutionnel, des effets pervers étaient possibles. Il y a, par exemple, toujours une obligation pesant sur le ministère public de faire un recours quand un juge ordinaire applique une norme précédemment jugée inconstitutionnelle par le Tribunal constitutionnel. C'est aussi le cas en cas d'interprétation sous réserve. Un recours est également possible pour violation de la chose jugée, mais cette voie permet toujours de contrôler de façon détournée de contrôler la mise en œuvre par le juge ordinaire de la décision de la Cour constitutionnelle.

Pour terminer, il est très intéressant d'avoir un système mixte, un système tout à fait original, mais c'est un système qui n'évite pas les conflits. Je pense qu'il n'y a aucune façon d'éviter les conflits, sauf à établir un tribunal, réunissant les fonctions d'une Cour suprême et d'une Cour constitutionnelle. Mais, dans un pays où il existe plusieurs Cours suprêmes, il serait plutôt difficile de suivre l'opinion de Rubio Llorente. Finalement, ce qu'il importe, c'est d'être sûr que la Cour constitutionnelle trouve la meilleure façon d'assurer le respect des droits fondamentaux.

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LA COMPETENCE DES COURS CONSTITUTIONNELLES EN MATIERE DE QUESTIONS PREJUDICIELLES: APPROCHE COMPARATIVE

Etre membre de la Cour constitutionnelle de Bosnie-Herzégovine me permet de vivre une expérience tout à fait enrichissante, pour moi qui, depuis plus de trente ans, étudie les systèmes de justice constitutionnelle. La Cour constitutionnelle de Sarajevo constitue une expérience unique de collaboration entre juges internationaux, nommés par le Président de la Cour européenne des droits de l'homme, et juges nationaux, nommés par des instances nationales. Comme on le sait, le Cour de Bosnie constitue l'annexe 4 des accords de Dayton. Elle a donc été rédigée aux Etats-Unis par des experts américains mais aussi par des spécialistes européens (dont le président actuel de la Cour). Elle présente néanmoins les traits des constitutions européennes et notamment la justice constitutionnelle a été établie selon le modèle européen, elle a été confiée à une Cour constitutionnelle dont la composition est proche de celle des autres Cours constitutionnelles à l'exception de la présence de juges étrangers et elle exerce le contrôle concentré de constitutionnalité des lois. Ses attributions sont en apparence modeste, mais bien équilibrées. Elle doit régler les conflits entre organes, c'est-à-dire les conflits entre les organes de la

fédération au niveau national, mais aussi entre l'Etat de Bosnie Herzégovine et chaque entité et elle peut aussi procéder à un contrôle abstrait des normes: ainsi nous sommes actuellement saisis de la très difficile question de contrôle de compatibilité des constitutions des deux entités avec la Constitution de l'Etat.

La Cour constitutionnelle statue également en appel des décisions de toutes les juridictions de Bosnie-Herzégovine dès lors qu'est en cause la conformité à la Constitution d'un acte ou d'un comportement. Cette compétence, est exercée pleinement, puisque, comme l'a dit le Président, notre Cour constitutionnelle a accepté même de connaître des décisions des cours constitutionnelles des entités. Relativement à ce deuxième type d'attribution, un rapprochement peut être fait entre notre Cour et le Tribunal espagnol davantage qu'avec le Tribunal portugais car au Portugal, les tribunaux ordinaires ont compétence pour apprécider la constitutionnalité des lois. Ce qui n'est pas le cas ici. Comme l'a bien expliqué le Vice Président Nunes de Almeida, en réalité, c'est une compétence de cassation, tandis que dans le cas espagnol, c'est une compétence de vérification de la manière dont les juridictions ordinaires ont appliqué la Constitution en matière de droits fondamentaux. Or, c'est tout à fait ce que nous faisons. On se rapproche aussi du système allemand en ce qui concerne, pour simplifier, l'appel ou recours direct. Dans ce cas, le juge constitutionnel n'est pas juge de cassation mais juge d'appel, ce qui signifie qu'il peut évoquer l'affaire et statuer sur le fond lui-même, ce que nous avons fait donc dans plusieurs affaires à propos d'arrêts de la Cour Suprême de la République Srpska, d'où la question qui a été posée tout à l'heure. Une réponse a été apportée à la question par le Vice Président Rubio

Llorente, qui a déclaré qu'en Espagne, le Tribunal constitutionnel ne se contente pas de casser, mais statue lui-même pour imposer la décision.

Notre Cour n'a pas encore exercé sa troisième attribution, qui lui permet de statuer en matière de contrôle concret des normes, sur renvoi de questions préjudicielles de constitutionnalité de la loi par les tribunaux ordinaires. La constitution prévoit que tout tribunal de Bosnie-Herzégovine, confronté à un problème de constitutionals de la loi, a la possibilité de renvoyer la question à la Cour constitutionnelle. Cela démontre que la situation en Bosnie n'est pas comparable à celle du Portugal, car dans ce cas, les tribunaux ordinaires de Bosnie-Herzégovine pourraient statuer eux-mêmes. Cependant, ils sont obligés de renvoyer à la Cour constitutionnelle. Il y a bien sûr l'hypothèse particulière de l'intervention des deux cours constitutionnelles des deux entités, qui peuvent apprécier la conformité des lois des entités à la Constitution de chaque entité. Cependant, la compétence pour apprécier la conformité d'une loi à la Constitution de l'Etat de Bosnie est réservée à la Cour constitutionnelle. L'article 6 paragraphe 3 précise que la Cour constitutionnelle est compétente pour statuer sur les questions présentées par tout tribunal de Bosnie-Herzégovine, visant à déterminer si une loi est conforme à la présente constitution, à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et ses protocoles, aux lois de Bosnie-Herzégovine (cela signifie que la Cour pourrait être saisie de la compatibilité d'une loi d'entité avec une «loi de Bosnie-Herzégovine»). ou une règle générale de droit international public pertinente pour la Cour constitutionnelle. Cette compétence de contrôle concret des normes ou de renvoi préjudiciel de questions de

constitutionalité par les tribunaux ordinaires, est exercé par la plupart des cours constitutionnelles de l'Europe centrale et orientale ainsi qu'en Allemagne, en Italie, en Espagne, en Belgique, en Autriche. En Bosnie, cette compétence n'a pu être exercée car aucun tribunal ordinaire n'a jusqu'ici renvoyé des questions à notre Cour, mais c'est sans doute dû à une mauvaise connaissance du système de justice constitutionnelle.

Relativement aux conditions de renvoi préjudiciel, il faut d'abord que la question de constitutionnalité soit sérieuse, qu'elle n'apparaisse pas connue et qu'elle soit pertinente, c'est-à-dire que la réponse à cette question soit manifestement non fondée, à la résolution du litige dont est saisi le juge ordinaire. En France, un projet de réforme prévoyait une condition supplémentaire: que la question soulevée n'ait pas été préalablement tranchée par le Conseil constitutionnel. Cependant, en Italie par exemple, il est possible que la question ait déjà été tranchée, car il peut assurer que la juridiction ordinaire refuse d'appliquer correctement le jugement de la Cour constitutionnelle. Ce renvoi peut s'avérer être un moyen dilatoire, car en Italie, certains juges ont pris l'habitude de renvoyer des questions gênantes à la Cour constitutionnelle jusqu'au moment où la Cour italienne s'est mise à statuer très vite, en quelques mois, performance à noter. Une fois la question renvoyée devant la Cour constitutionnelle, celle-ci va devoir statuer sur la conformité de la loi à la Constitution. En Bosnie, il faudrait ajouter la conformité à la Convention européenne des droits de l'homme, de manière comparable à ce qui se passe en Autriche, car la Constitution autrichienne intègre la Convention européenne. Une fois que la Cour a tranché, le juge ayant soulevé la question doit appliquer la solution donnée. Mais, au-

delà de l'affaire particulière, la solution a un effet général, c'est-à-dire qu'une fois la loi déclarée inconstitutionnelle sur renvoi, elle devient inconstitutionnelle à l'égard de tous. En Belgique, la décision de la Cour n'a qu'une autorité relative mais c'est une « autorité relatife renforcée » car elle s'impose à toute juridiction ayant à statuer sur le même litige ou sur toute question semblable. Ce devrait être aussi le cas en Bosnie-Herzégovine. La décision déclarant une loi non-conforme à la Constitution, devra produire ses effets dans l'ensemble du pays. La question du respect de la décision par les juridictions de renvoi peut également se poser. En toute hypothèse, les juridictions ordinaires sont tenues de respecter la décision d'inconstitutionnalité et les autorités sont tenues de considérer que la loi est inconstitutionnelle. La question ne s'est pas encore posée en Bosnie, aussi il est difficile de savoir comment réagiront les autres juridictions, mais si une juridiction pose une question de constitutionnalité, c'est pour pouvoir s'appuyer sur la décision de la Cour constitutionnelle. Il est donc dans l'intérêt du tribunal ordinaire de respecter la position de la Cour constitutionnelle, afin de mieux imposer sa décision. Le renvoi préjudiciel connaît la plus grande utilisation en Italie. En Espagne, il n'est pas très utilisé parce que le recours d'amparo est la voie de recours nettement dominante. En Allemagne comme en Autriche, il n'est pas non plus très utilisé. En fait ces pays disposent d'une sorte de voie de contrôle principale, qui rend de ce fait, les autres voies de recours beaucoup moins importantes. Ainsi, il reste le cas italien, où le contrôle de la Cour constitutionnelle par renvoi des tribunaux ordinaires, permet à celle-ci d'imposer une interprétation uniforme de la Constitution et de ses valeurs. Ce

recours permet, en effet, de conforter l'importance de la norme constitutionnelle et conduit à une sorte d'unification du droit ce qui serait salutaire dans un pays comme la Bosnie où existent deux cours suprêmes pouvant appliquer des droits différents, en l'absence d'une cour suprême au niveau de l'Etat. Dans le domaine des droits fondamentaux, il est important de disposer d'une interprétation commune. Une certaine tendance se dégage qui est celle d'imposer, à l'américaine, des solutions générales. C'est particulièrement nécessaire en Bosnie dès lors que le législateur national adopte très peu de lois. En l'absence de telles lois, il revient aux arrêts de la Cour d'adopter des solutions générales, non pas comme la Cour suprême américaine qui établit les grandes bases du droit, mais en imposant un minimum de règles communes et de faciliter ainsi l'application de la loi par les juridictions et les autorités.

Il convient de revenir sur la question de l'interprétation conforme en matière de renvoi préjudiciel. En effet, si la Cour constitutionnelle est saisie sur renvoi préjudiciel, elle va interpréter la Constitution mais aussi la loi qui lui est soumise. Aussi, je pense que la Cour adoptera le système de l'affirmation de la constitutionnalité sous réserve, c'est-à-dire que la Cour conclura à la conformité de la loi à la constitution sous réserve que soit adoptée une interprétation de la loi qui soit la seule conforme à la constitution. S'il y a plusieurs interprétations possibles, la Cour choisit l'interprétation qui est conforme. Il faut donc ici que les tribunaux respectent l'interprétation de la Cour, ce qui pose le problème de la formation des juristes. Il faudra peut-être attendre l'arrivée de futures générations de juristes et de juges imprégnés par l'idée que la Constitution est la règle de

droit suprême. Cette acquisition d'un « réflexe constitutionnel » sera progressive et c'est une tâche pédagogique considérable pour les facultés de droit Ce colloque contribue à la formation et à l'information des juristes. L'évocation des expériences étrangères est très utile à cet égard, même s'il faut garder à l'esprit cet adage de droit comparé: « comparaison n'est pas raison ». Finalement, il faut signaler que la Cour de Bosnie n'a pas encore exploité toutes les possibilités qui lui sont offertes, mais que de progrès considérables depuis une année !

Robert Schick,
Judge of the Austrian Constitutional Court

RELATION OF THE CONSTITUTIONAL COURT WITH OTHER JURISDICTIONS IN AUSTRIA

I shall try to give you a short summary of the relationship between the Austrian Constitutional Court and other Austrian jurisdictions. Austria is a federal state; therefore it is necessary to clarify certain expressions. I will distinguish between the federation, federal laws, and federal authorities on the one hand, and states, state law and state authorities on the other. I will not use the German expressions. All jurisdictions in Austria are federal jurisdictions; all judges and functionaries are federal. However since about 10 years there are also the so called autonomous administrative tribunals of the state which have been introduced in order to guarantee conformity with certain provisions of the European convention of Human Rights, especially Art. 6. The members of these tribunals are state functionaries and are not regarded as judges. Since 1997 an other autonomous administrative tribunal has been created by a federal law to supervise administrative rulings in the field of refugee law. For years now there has been an intensive discussion whether these administrative bodies should be transformed to proper administrative courts of first instance, which thereby could revive the federal administrative courts in Vienna. If this

transformation takes place, we will have state jurisdiction for the first time in our histoiy. Let me now deal with the different branches of jurisdiction in Austria. I would like to start with ordinary jurisdiction, jurisdiction in the field of civil law and criminal law first. Later on I shall deal with what in Austria is called jurisdiction of public law, the jurisdiction in the field of constitutional law and administrative law.

The ordinary jurisdiction: Legislation concerning civil law and criminal law falls into the competence of the federation. Jurisdiction in this field of civil and criminal law is provided by a hierarchy of federal courts. On top of this pyramid is the Supreme Court in Vienna. It is in principle the Court of final instance in civil and criminal proceedings. However, it is not in all cases court of final instance. Normally there is no interference of any kind of other branches of jurisdiction with ordinary jurisdiction. In principle there is no appeal to the Constitutional Court against any decision of an ordinary court. There is one small exception to this rule, which deals with conflicts about the sphere of competence between different sorts of Courts or between administrative bodies and Courts. These conflicts are decided by the Constitutional Court. What does this mean for the court, especially for the court of appeal? It means that they have to make sure that no constitutional rights, including those guaranteed by the European Convention of Human Rights, are violated by an ordinary court. In other words, the ordinary courts have to answer all questions in connection with the constitution that arise in a particular case. However, they are not completely on their own. If a court has doubts regarding the application of an ordinance on the ground of its legality, it has to apply to the Consti-

tutional Court for deletion of this ordinance. Moreover, any court of second instance, or the Supreme Court provided it is competent to give judgement in a certain case, has to apply to the Constitutional Court for the deletion of a law if it has doubts regarding the application on the ground that it is unconstitutional. The term unconstitutional covers all kinds of unconstitutionality: infringement of human rights, infringements of rules about the sphere of competence between federation and states. Any constitutional question in this context can be brought before the Constitutional Court, but only the courts themselves and not the participants in a particular case are allowed to bring it to the Constitutional Court. I will deal with the application of the decisions of the Constitutional Court a little bit later.

Turning to the jurisdiction in the field of -administrative and constitutional law, there are two different courts that are competent to secure the legality or the constitutionality of all acts of administration. One is the Administrative Court of which I am a member and the other is the Constitutional Court of which I am a substitute justice. Both are situated in Vienna, in the same building. The Administrative Court established in 1876 decides complaints alleging illegality of a ruling or a decision by an administrative authority. Such a complaint can be brought by anyone, after the exhaustion of all appellate stages, who alleges that the decision of the administrative authority infringes his or her rights. In addition the Administrative Court pronounces also on complaints which allege breaches of the administrative duty to decide within a given time. Now, as I told you before there is no administrative jurisdiction by administrative courts of first instance.

This means that the first court you can reach in Austria is the Administrative Court in Vienna, which is very high up on the ladder considering that its decisions are final. As the above-mentioned administrative tribunals are themselves administrative authorities their decisions too are subject to complaint before the Administrative Court. However, the protection offered by the Administrative Court does not cover all fields of administrative law. Excluded from its jurisdiction are all matters where the final decision rests with certain administrative tribunals containing at least one federal judge. Appeal to the Administrative Court is only allowed in these cases if federal law or state law expressively say so. What we have here is a very old model of quasi jurisdiction dating back to the 19th century that has not been yet abolished and perhaps never will be. Within its sphere of jurisdiction the Administrative Court, as an ordinary court, is free from any interference of the Constitutional Court. No appeal against its decision is possible. Just like the ordinary courts, the Administrative Court, too, has to answer all questions under the Constitution, which arise in a particular case. However, like the ordinary courts the Administrative Courts too have to file an application with the Constitutional Court for the deletion of an ordinance or a law if it has doubts concerning its application for ground of illegality or unconstitutionality. Again, it is not for the participants in proceedings before an administrative court to decide whether an application should be lodged with the Constitutional Court. The participants can only suggest the filing of such an application, which is done very often. Although not obliged to reply to such a suggestion, the Administrative Court sometimes at great length explains why it

has no doubts regarding the legality or the constitutionality of an ordinance or a law. There is still a third branch of administrative jurisdiction and this seems to be a peculiarity of the Austrian Constitution. Against the ruling of an administrative authority you cannot only complain before the administrative court by alleging the illegality of that ruling, you can also file a complaint before the Constitutional Court by alleging an infringement of a constitutionally guaranteed right or the infringement of the personal right on the basis of an illegal ordinance, an unconstitutional law or even an international treaty. This peculiar form of administrative jurisdiction performed by the constitutional court covers even the rulings of tribunals that I excluded from the jurisdiction of the administrative courts. As you can imagine this specific administrative jurisdiction by the Constitutional Court is of enormous practical importance. Before the Constitutional Court enters into its proceedings, it can decide to reject any hearing of a complaint if it has no reasonable prospect of success or if the decision cannot be expected to clarify a specific constitutional problem. A rejection is nevertheless not allowed if the case is excluded from the competence of the Administrative Court, because otherwise there would be no jurisdiction at all. Neither the Administrative Court nor the Constitutional Court decides the case. They only decide whether a ruling or a decision by an administrative body has infringed the rights of a person prescribed by law, or whether the decision has infringed constitutionally guaranteed rights, especially rights guaranteed by the European Convention, or if it is itself based on illegal ordinances or on unconstitutional laws. If the Administrative Court or the Constitutional Court finds an infringe-

ment of a person's rights they eliminate the ruling. If the Constitutional Court finds that no infringement has taken place or if a hearing was rejected and if the case is not excluded from the competence of the Administrative Court, the Constitutional Court by request of the applicant must transfer the complaint to the Administrative Court which has to decide whether there was an infringement of any other right. This means that you may institute your complaint before the Constitutional Court, which decides only whether certain rights have been violated. If your complaint is unsuccessful you may then proceed further to the Administrative Court for examination of the details of the lawfulness of the same ruling.

Let us now focus on the Constitutional Court. Constitutional law in Austria has often regarded this peculiar administrative jurisdiction by the Constitutional Court as a kind of anomaly. However, it is easy to understand why the constitutional court has always defended this jurisdiction as important. You will remember that the ordinary courts as well as the Administrative Court have to apply to the Constitutional Court whenever they have doubts as to the legality or the constitutionality of an ordinance or a law in a certain case. In so far as the Constitutional Court would have to apply an ordinance or a law in a pending lawsuit, it is in power to initiate ex officio a review of that ordinance or that law as regards its legality or its constitutionality. This review ex officio is, of course, a powerful instrument as long as the Constitutional Court provides administrative jurisdiction itself. The moment all the administrative jurisdictions were transferred to the administrative courts, the Constitutional Court would always have to wait until applications were filed

by the ordinary courts or the administrative courts. It is true that constitutional review may also be initiated by certain political bodies: the federal Government, in relation to sate laws, a state government in relation to a federal law, a certain number of members of Parliament, sometimes even by a person who alleges direct infringement by a law. The Constitutional Court might simply lose contact with the mass of laws and ordinances that up to now are within the scope of its review, so it will not easily give up this competence. How does the interplay work in detail? If the Constitutional Court does not find an ordinance to be illegal or a law to be unconstitutional it declares so. The court that filed the application will have to continue its pending lawsuit. If the Constitutional Court finds an ordinance to be illegal, or a law to be unconstitutional, it does not only suspend its application, it eliminates the law ex nunc. This procedure is not unlike amendment by the Parliament, because the elimination takes effect only ex nunc. This means that all cases have to be decided on the basis of the same law that has been decided as been unconstitutional by the Court. Normally, the only exception to this elimination ex nunc is the case in point, so you have a certain advantage if your lawsuit is the case in point, because the ex nunc effect is suspended, and the unconstitutional law is not applied anymore. I did not cover all the competences of the Austrian Constitutional Court, but I hope I have given you an outline of its position in relation to other domestic jurisdictions in Austria. The Supreme Court, the Administrative Court and the Constitutional Court all three are some how Supreme Courts. However, I think it is justified to regard the Constitutional Court as a kind of primus inter partes because of its specific competence. As

regards the competence of the other courts, this view is justified only as long as you do not take in consideration the European Court of Human Rights and the Court of justice of the European Community

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RELATIONS BETWEEN CONSTITUTIONAL COURTS AND OTHER JURISDICTIONS IN FEDERAL STATES - A COMPARATIVE APPROACH

When we talk about the relationship between constitutional courts and other courts in federal systems, we have to see that this relationship can be twofold. First, this is a question about the relationship between "specialized" constitutional courts and other "ordinary" civil and criminal courts, and, secondly, a question about the relationship of courts on the federal level vis-à-vis courts on the level of the federal units regardless of whether they are called Lander like in Germany and Austria, cantons in Switzerland, or states in the USA.

Looking into the institutional setting of all of these countries, a first overview is quite confusing. In the United States, there is a parallel dual court system on state level as well as on the federal level with supreme courts on top of the respective hierarchy, but there are no separate constitutional courts since either state or federal constitutional questions can be invoked before the respective supreme courts. This institutional setting is very similar in Switzerland with the exception that, for instance, the constitution of the canton Jura provides also for a constitutional court. In Germany,

you will find constitutional courts as well as other courts again on both the federal level and the Land level. In contrast to the United States, however, most matters involving federal law are litigated initially in Land courts, subject only to ultimate federal appellate review since apart from the Federal Constitutional Court and other "supreme" courts specified by Article 95 (1) of the Basic Law (Grundgesetz), "lower" courts are predominantly courts of the Lander according to Article 92 and Article 30. In deviation from this federal model of devolving judicial power to the subnational level, in Austria all judicial power is centralized on the federal level with three "supreme" courts on top, the Supreme Court for civil and criminal matters, the Administrative Court with no other lower courts and the Constitutional Court. The Constitutional Court has no appeals jurisdiction on decisions of these two other courts, but a monopoly to review all legislation including the constitutions of the Lander in procedures of concrete or abstract review.

Taking this institutional variety in federal states into account, how is it possible then to find a general rule to determine, on the one hand, the relationship between constitutional courts on different territorial levels, as this is also the case in Bosnia and Herzegovina with the Constitutional Court of BiH and the constitutional courts of the two entities, the Republika Srpska and the Federation of BiH, and constitutional courts and "ordinary" courts on the same or different territorial levels on the other? Does such a general rule depend on theories about parallel legal systems and the question of dualism or monism which characterizes, for instance, the disputes on the relationship between the law of the European Union and national law of the

member states, hence the relationship between the European Court of Justice and supreme or constitutional courts of the member-states? Or, is it necessary to find the least common denominator as far as the competences of all of these "supreme" courts or their standards of review are concerned? In the final analysis, however, as will be demonstrated in the following, regardless of dualistic or monistic theories or the existence of a dual court system with or without separate constitutional courts, two basic problems have to be resolved in any federal system. First of all, this is the recognition of the supremacy of the federal constitution and, secondly, how this supremacy can be enforced by an appellate jurisdiction to a federal supreme court or constitutional court. These are the two basic problems, in my opinion, which follow from a comparison of various case studies, in particular from the examples of Germany and the United States.

The basic principle governing the relationship between the Federal Constitutional Court of Germany and the constitutional courts of the Lander is that of a dual constitutional protection. In scholarly articles one may read that the autonomy of the German Lander is "crowned" by their own constitution-making power and the doctrine, which was elaborated by the German Federal Constitutional Court, is that of - in principle - separated legal spheres which allow for that dual constitutional protection. Therefore, the Federal Constitutional Court does not have a general all encompassing appeals jurisdiction vis à vis all state acts and Lander constitutions are not standard of review for the Federal Constitutional Court as can be seen from the provision of Article 100 (1) of the Basic Law (Grundgesetz).

Moreover, under the German system of dual constitutional protection there is also the possibility for a dual constitutional complaint before a Land constitutional court and, at the same time, before the Federal constitutional court. However, if the appellant is successful before one of the constitutional courts, then, as a rule, he will certainly not have legal standing any longer before the other constitutional court. The same holds true for concrete judicial review where it is in particular the choice of the "ordinary" court whether it wants to refer its case to the Land constitutional court or to the federal constitutional court.

Nevertheless there are overlapping competences, in particular as far as individual complaints against the violation of human rights and judicial review of legislation are concerned. The parallel autonomy of the legal spheres of the Federation and the Lander and the dual protection mechanism might therefore lead to conflict. Just to give an example: What about "differences" in the protection of human rights? Such a difference might occur even if the Federal constitution and a Land constitution provide for the same individual right with an identical text. For instance, if you have a right to property under both constitutions, but if there is a "difference" in interpretation by the courts on the scope of that individual right. Moreover, what about human rights which are guaranteed under the Land constitution, but not under the Federal constitution? Do such rights of Lander constitutions therefore violate the Federal constitution?

In its first partial decision in case 5/98 *(Službeni glasnik BiH,* br. 11 /00 - Official Gazette of BiH, Nr. 11/00) the Bosnian Constitutional Court has already dealt with that problem. According to the

supremacy clause of Article III. 3. (b) of the Dayton Constitution, the standard of rights, which is set by this constitution, has to be followed by the Entities' constitutions. The constitution of Republika Srpska, however, contains also a bunch of socio-economic rights not included in the Dayton constitution. Does such a "difference" contradict the text of the Dayton constitution thereby violating it? Certainly not. The Bosnian Constitutional Court ruled out what is common standard for federal states, namely that a "difference" does not simply mean a violation as such. Of course, there may be similar rights guaranteed by a constitution of a federal unit which give more protection to the individual, or there may even be additional rights in a Land or Entity's constitution. However, such additional rights do certainly not contradict or violate the federal constitution insofar as the federal constitution is supposed to provide for a minimum standard of protection. In this respect you will always see that there is, as the underlying premise, a certain degree of *autonomy* of the Land constitution. Using an expression once coined by a Professor of the Law Faculty at Graz University with regard to the constitutions of the Austrian Lander, their constitutions cannot simply be regarded as "Rank Xerox"- constitutions.

Finally, there is again the question of the standard of review which might lead to conflict. If the state constitution is standard of review, the question might arise whether this could lead to a violation of the federal constitution if the state constitution itself is held not to be in conformity with the federal constitution. It might even be the case that the land constitution violates federal law which in itself violates the federal constitution. In Germany this has to be resolved, in

the final instance, by the federal constitutional court according to Article 100 (1) of the Basic Law.

In conclusion, there are two approaches as far as the concept of dual protection under the German system is concerned. If there are no overlapping spheres so that conflicts cannot arise, the Land constitutions are standard of review for the constitutional courts of the Lander without any control by the Federal Constitutional Court. However, in case of conflicts with the federal constitution, the federal constitution will prevail so that, in the final instance, all state or federal acts must be brought before the Federal Constitutional Court. The same is true as far as the interpretation of the Federal Constitution is concerned. Article 100 (3) of the Basic Law establishes the rule that if a constitutional court of a Land, in interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court. The reason for this rule is obvious, namely to avoid that the Federal Constitution will be differently applied in the Lander. There is thus an underlying need for harmonization at least in the interpretation and application of the federal constitution in federal states!

With regard to the example of the United States, the Supreme Court reviews or has appellate jurisdiction over state court decisions. However, since the original Judiciary Act was enacted in 1789, the Supreme Court's appellate review of state court judgements has always been limited to the federal questions decided by the state courts. In the landmark case Martin versus Hunter's Lessee (1816) the US Supreme

Court was confronted with the question, of whether a particular Virginia statute conflicted with a federal treaty, hence of whether the Supreme Court is constitutionally authorized to review the constitutionality of state court decisions. It was the position of the Virginia courts that if litigation was brought before state courts, then they decide on possible violations of federal law themselves, so that there is no right of the Supreme Court of the United States to review whatever conclusion the state court reached.

The US Supreme Court rejected this position and held that the Court could review the constitutionality of a decision by a state's highest court. There were two principal lines of argumentation for the Court's opinion. First, the Virginia court's assertion that it was "sovereign" was rejected. The Supreme Court argued that the federal Constitution restricted state sovereignty in numerous respects so that there is no reason why state judiciaries should be immune from these limitations. Secondly, the interpretation of the federal constitution and federal law cannot be left to the state courts alone. Why? There is a need for harmonization in decisions interpreting the Constitution. "If there were no revising authority to control these jarring and discordant judgements, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different in different states...."

Hence, in order to define on principle the relationship between the US Supreme Court and the supreme courts of the states, the Court applied the supremacy clause of the federal constitution in connection with its general appeals jurisdiction on questions of federal law.

On the other hand, the jurisprudence of the Supreme Court also provides for some autonomy of states' courts even if federal law is involved. Under the doctrine of an “independent and adequate state ground” the Supreme Court holds that if the party attacking a state statute would lose the case anyway, the Court's determination that the state statute violated the U.S. Constitution would have no effect upon the ultimate outcome of the case. Therefore the Court's opinion would, in effect, be advisory. However, since the federal judiciary may decide only on those cases presenting a “justiciable” controversy, the Supreme Court may not render an advisory opinion.

Moreover, if a state court holds that a state statute violates both the state and federal constitution, the state courts' judgement cannot be reviewed by the Supreme Court if the state court independently interpreted the state constitution without relying on federal case law construing the federal constitution. If, however, the state court interpreted the state constitution along the lines of the federal constitution following federal case law, the Supreme Court holds that an “independent and adequate state ground” does not exist. Moreover, if the “fundamental fairness” of procedural state rules is concerned, the Supreme Court might find them “inadequate”, in particular if it is motivated by a specific intent to deprive the litigant of a federal right: or it “throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights” (Williams v. Georgia, 1955).

Taken all together, in my opionion, the principal position in the landmark case Martin v. Hunter's

Lessee and the "independent and adequate state ground" doctrine are providing for a fair balance in the relationship between the U.S. Supreme Court and highest state courts on the basis of constitutional and judicial *autonomy and integration* in a federal system as such. This might be an interesting approach also for the interpretation of Article VI. 3. (b) and (c) of the Dayton Constitution providing for the appellate jurisdiction of the Constitutional Court of BiH.

Let me come to an end. From a comparative point of view, there are the supremacy of the federal constitution and the appellate jurisdiction of a federal supreme court or separate constitutional court for the adjudication of constitutional questions which serve as the basic guidelines for the determination of the relationship between constitutional courts and other courts in federal states. But how far can a federal supreme court or constitutional court go in order to enforce the supremacy of the federal constitution? This is then the question of the ambit of its appeals jurisdiction! Despite the fact that this question will be an eternal conflict over time depending on the specific requirements of the constitutional system of every federal system - as we could see from the discussions we had this morning on the various standards and objects of judicial review - there seems to be at least one clear rule: the state constitution is always the standard of review for state courts whereas the federal constitution is always the standard of review for the federal courts with or without the existence of a separate constitutional court.

In conclusion, we have to see an underlying general principle for constitutional adjudication at

work in federal states: despite the supremacy of the federal constitution there remains some room for *constitutional autonomy* of the federal entities. I think this is the basic idea, also expressed in the first partial decision of the Bosnian Constitutional Court in case 5/98. As long as there are no conflicting claims, rules or interpretations with regard to the overarching legal framework, i.e. the federal constitution, there is no ground for judicial review within the sphere of the constitutional autonomy of the federal entities. Otherwise this would no longer be a federation, but resemble much more a centralized state. On the other hand, as could be seen from the landmark decision Martin v. Hunters' Lessee, in case of conflicting rules autonomy cannot amount to "full" independence of the state judiciary since this would threaten the integration of the federal state as a legal system as such. Hence, in contrast to the opinion of the U.S. Supreme Court quoted above, I think that harmonization must not amount to uniformity, but should be restricted to provide for that minimum of integration in case of conflicting rules. However, this minimum of integration is necessary for the harmony of a legal system which is, in the words of a famous Austrian legal scholar, Hans Kelsen, nothing else but the integrity of the state as such. It remains thus an ever recurring task to find the correct balance of autonomy *and* integration between the Scylla of sovereignty and the Charybdis of domination through uniformity.

Selected Bibliography:

ERNST W. **BOCKENFORDE,** Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation, in: NJW 1999, Heft 1, insbesondere 13f.

STEVEN L. **EMANUEL,** Constitutional Law, 15th ed., 1997-98.

GERALD GUNTHER, Constitutional Law, 11th ed., 1985

HANS LECHNER/RÜDIGER ZUCK, Bundesverfassungsgerichtsgesetz. Kommentar, München 1996.

CHRISTIAN PESTALOZZA, VerfassungsprozeJSrecht. Die Verfassungsgerichtsbarkeit des Bundes und der Lander, 3. Auflage, München 1991, insbesondere 372 - 377.

MICHAEL SACHS, Grundgesetz. Kommentar, München 1996.

GUSTAV LICHTENBERGER, Das Verhàltnis der Landesverfassungsgerichtsbarkeit des bayerischen Verfassungsgerichtshofs zur Verfassungsgerichtsbarkeit des Bundes, in: **MICHAEL PIAZOLO** (Hg.), Das Bundesverfassungsgericht. Ein Gericht im Schittpunkt von Recht und Politik. Tutzinger Schriften zur Politik Bd. 3, v. Hase & Kohler Verlag, 1995, 75 - 85.

JÜRGEN SCHWARZE (Hg.), Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas, Baden-Baden 1998.

LAURENCE H. **TRIBE,** American Constitutional Law, 2nd ed., 1988.

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EXECUTION DES DECISIONS DU CONSEIL CONSTITUTIONNEL FRANÇAIS PAR LES COURS ORDINAIRES

La question soulevée ne se pose pas dans les mêmes termes selon le système de contrôle de constitutionnalité adopté.

Lorsque les juridictions constitutionnelles sont placées au sommet de la hiérarchie judiciaire comme le sont par exemple les cours suprêmes du continent américain, leurs décisions, fut ce en matière constitutionnelle, s'intégrent, malgré la spécificité de la matière, très naturellement à leur place dans l'ordonnancement juridique interne. Elles deviennent, au même titre que les autres décisions de dernière instance, source de droit et de jurisprudence.

Toute autre est la situation lorsque la Cour constitutionnelle a le monopole du contentieux constitutionnel sans être au sommet d'une hiérarchie de juridictions, La double spécificité qui, dans ce cas, caractérise la Cour de modèle kelsénien, c'est à dire à la fois la gestion exclusive des questions de constitutionnalité et l'absence de lien organique et hiérarchique avec les juridictions, peut être à l'origine d'une double marginalisation, institutionnelle et jurisprudentielle.

En ce qui concerne la France, le Conseil constitutionnel se différencie des deux modèles précédents.

D'une part, le juge ordinaire ne peut accueillir des moyens tirés de la violation de la Constitution. D'autre part, la Constitution garantit l'autorité des décisions du Conseil constitutionnel sur les juridictions ordinaires.

I La Constitution garantit la supériorité des décisions du Conseil constitutionnel

Les constituants de 1958 ont mis en place un organe de contrôle de la constitutionnalité des lois mais ses compétences ne sont pas similaires à celle des organes de contrôle de constitutionnalité dit de « modèle européenne ».

Si le Conseil constitutionnel français est le seul organe à pouvoir juger la loi à l'aune de la Constitution, il ne l'est que par la voie, étroite, d'un recours contre la loi qui vient d'être votée. Ni les justiciables, ni les juridictions n'ont la possibilité de renvoi d'une loi suspecte d'inconstitutionnalité. Seules les plus hautes autorités de l'Etat, le Président de la République, le Premier ministre, le Président de chacune des deux chambres) sont habilitées à saisir le Conseil constitutionnel d'un recours qui ne peut intervenir que dans le court laps de temps qui sépare le vote de la loi au parlement de sa promulgation par le chef de l'Etat.

L'intervention du Conseil est donc préalable à la mise en vigueur de la loi et à son application par le juge ordinaire. Quant à l'intervention du Conseil elle ne peut conduire, en cas de déclaration d'inconstitutionnalité, qu'à censurer les dispositions fautives qui, dés lors, sont réputées n'avoir jamais existé. Ainsi le Conseil se situe clairement en dehors de la hiérarchie judiciaire, il n'est aucunement relié aux juridictions et cet isolement lui vaut de se voir dénié la qualité de juridiction.

Il y a lieu cependant de préciser que le Conseil constitutionnel prononce également des décisions de qualification ou de déqualification dans le cadre de 1' art.37.2 qui, elles, ne conduisent pas à une annulation. Dans la mesure où ces décisions tranchent la nature juridique législative ou réglementaire d'un texte, elles s'imposent à tous, notamment au Conseil d'Etat qui pourrait être amené, statuant au contentieux, à se prononcer sur la même question. En son article 62, la Constitution dispose que « Les décisions du Conseil constitutionnel ne sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publics et à toutes les autorités administratives et juridictionnelles ».

La question de l'autorité des décisions se pose cependant d'autant plus aujourd'hui où les décisions du Conseil constitutionnel n'ont plus la même portée qu'initialement prévu.

II L'intervention du Conseil constitutionnel n'a plus la même portée.

Sans que les textes constitutionnels en vigueur depuis 1958, aient modifié, stricto sensu, ses compétences, le Conseil constitutionnel a été amené, du fait de l'élargissement de la saisine et de l'évolution de sa jurisprudence à intervenir beaucoup plus fréquemment, ce qui influe sur ses méthodes et le contenu de ses décisions

Le Conseil constitutionnel est né de la volonté des constituants de rompre avec la tradition légicentriste de la France.

Ainsi, pour garantir le respect de la hiérarchie des normes instituée en 1958,tendant à introduire, après quatre vingt dix ans de parlementarisme absolu,

une limitation matérielle du domaine de la loi l'article 61 de la Constitution prévoit que les lois organiques, qui mettent en œuvre certaines dispositions constitutionnelles ainsi que les règlements des Assemblées doivent, obligatoirement et systématiquement être déférées au Conseil constitutionnel. Quant aux lois ordinaires, elles ne sont soumises à un contrôle de constitutionnalité que sur une base facultative; il est donc nécessaire pour que le Conseil constitutionnel en soit saisi que les autorités qui sont habilitées à le faire usent de cette procédure.

Les titulaires de trois des autorités sur quatre ayant seuls la capacité de saisir le Conseil constitutionnel appartenant toutes à la majorité on comprend que la saisine facultative du Conseil sur les lois ordinaires ait été fort peu utilisée, jusqu'en 1974, neuf fois pendant les quinze premières années de la cinquième république.

3. Changements qualitatifs

En 1974 la réforme de la Constitution donnant à soixante députés ou soixante sénateurs la possibilité de saisir le Conseil constitutionnel sur la constitutionnalité de la loi ordinaire a[1] modifié significativement la situation. Désormais, à la seule initiative d'un groupe de parlementaires, la loi votée peut faire l'objet d'un contrôle postérieur à l'approbation de son contenu par la majorité parlementaire. Cette possibilité bien évidemment est essentiellement mise en œuvre par l'opposition, conformément d'ailleurs à ce que souhaitait Valéry Giscard d'Estaing alors Président de la République qui en fût l'inspirateur. Depuis lors, tout texte enjeu de débat de société ou de conflits entre les partis politiques est normalement déferré au Conseil.

Les chiffres sont éloquents: De 1974 à 2000, ce sont 260 lois ordinaires qui ont été déférées, soit en moyenne 10 par an. Les années d'élections législatives, se traduisant par l'arrivée à l'Assemblée nationale d'une autre majorité, se caractérisent par un nombre de lois déférées particulièrement important: 25 (en 1982), 19, (en 1989), 26 en 1993 et encore 19 en 1994 ...[2]

4. Changements qualitatifs

Cette modification de la saisine aurait pu . n'avoir que peu d'incidences sur le thème qui nous occupe, l'accueil et le respect par le juge ordinaire des décisions du Conseil constitutionnel, si elle n'était contemporaine d'un autre changement radical intervenu cette fois sans réforme de la Constitution.

Il s'agit de la jurisprudence de 1971, élaborée de façon prétorienne par le juge constitutionnel. Dans sa décision du 16 juillet 1971 le Conseil constitutionnel donne explicitement valeur constitutionnelle au Préambule de la Constitution, et, par voie de conséquence, aux textes qui s'y réfère explicitement. Le Conseil constitutionnel ne se contente plus d'examiner la conformité « externe » du texte qui lui est soumis au titre de l'article 61.1 de la Constitution, mais le confronte aux exigences contenues non seulement dans la Déclaration des droits de l'homme et du citoyen de 1789 et dans le Préambule de la constitution de 1946 mais également aux principes de valeur constitutionnelle.

En intégrant de nouvelles normes à ce qu'il est désormais convenu d'appeler le bloc de constitutionnalité cette jurisprudence étend les moyens à la disposition des requérants ainsi que les domaines dans lesquels le contrôle de constitutionnalité doit être satisfait à l'ensemble des branches du droit.

Compte tenu de la possibilité dont dispose désormais le Conseil constitutionnel, en vertu de la jurisprudence de 1971, de qualifier comme ayant valeur constitutionnelle de nouvelles règles et principes, il est désormais rare que le juge ordinaire soit saisi d'un texte récent et important qui n'ait pas fait l'objet d'une interprétation par le juge constitutionnel.

Cependant, l'obligation faite au juge ordinaire d'exécuter la décision du Conseil constitutionnel resterait relativement simple si l'intervention du juge constitutionnel s'était limité à un choix entre la confirmation de la constitutionnalité ou la suppression des dispositions jugées inconstitutionnelles.

Changement méthodologique

Les décisions du Conseil constitutionnel ne sont pas seulement plus nombreuses et plus riches de contenu, elles sont également plus diversifiées.

Au regard de la problématique de leur exécution par le juge ordinaire, deux changements majeurs dans le contenu des décisions doivent être signalés.

Le Conseil constitutionnel, adopte de plus en plus ce qu'il appelle, à l'instar d'ailleurs du juge constitutionnel italien, des « réserves d'interprétation » .[3]

De plus en plus fréquentes - ainsi la décision récente du Conseil sur le Pacs ne comporte pas moins de huit réserves d'interprétation-, les réserves d'interprétation, qui sont désormais expressément inscrites dans le dispositif de la décision s'imposent, notamment, aux juges ordinaires. L'exécution par ces derniers de la décision est de ce fait plus subtile à opérer .... et plus délicate à contrôler. Bien que les dispositions sur

lesquelles le juge constitutionnel a émis une ou plusieurs réserves soient publiées inchangées, le juge ordinaire, dans sa décision, est tenu d'adopter l'interprétation présentée par le Conseil comme une condition de sa conformité à la Constitution. Il est donc nécessaire que le juge ordinaire admette que l'interprétation retenue par le juge constitutionnel fasse corps avec la loi. Il y aurait violation de la Constitution par le juge s'il ne respectait pas les réserves.

En second lieu, le Conseil constitutionnel, dans une décision de 1985, a admis qu'il pouvait contrôler la conformité à la Constitution d'une loi, déjà promulguée, dés lors qu'il est saisi de dispositions qui « la modifient, la complètent ou affectent son domaine ».[4] Cette possibilité, fruit d'une construction jurisprudentielle peut être invoquée par le requérant et même être soulevée d'office par le juge, qui intervient alors incidemment dans le cours de la procédure. En tout état de cause, appliquée positivement en une occasion récente,[5] la censure qui en a découlé ne figurait pas dans le dispositif de la décision. Dans ces conditions, comment faire appliquer par le juge une décision qui ne figure pas dans le dispositif, qui ne vient pas à l'appui nécessaire de celui-ci et qui ne se traduit pas, en attendant, le cas échéant, l'intervention du législateur, par une modification de la disposition législative jugée inconstitutionnelle et cependant toujours en vigueur?

On ne peut donc ignorer le problème posé par le respect par le juge ordinaire des décisions du juge constitutionnel même lorsque celui-ci n'exerce qu'un contrôle préalable et abstrait, système réputé mieux à même de garantir la sécurité juridique.

Il est vrai qu'en France, l'existence de deux ordres de juridiction distinctes, soumises l'une et

l'autre au respect des décisions du Conseil constitutionnel, ne clarifie pas la situation.

III Les décisions du Conseil constitutionnel s'imposent aux deux ordres de juridiction.

La spécificité et l'indépendance des deux ordres juridiques distincts ont été consacrées par la jurisprudence constitutionnelle. A l'occasion des questions quelle a été successivement amenée à trancher, elle a fixé des blocs de compétence propres à chacune de ces deux hiérarchies juridictionnelles.

Il convient de distinguer la réceptivité des ordres juridictionnels aux décisions du Conseil (autorité de la chose jugée) de leur accueil du travail d'interprétation opéré par le juge constitutionnel (autorité de la chose interprétée).

D'une manière générale il n'est pas contestable que la juridiction administrative s'est montrée plus vite et plus ouvertement réceptive à la jurisprudence constitutionnelle et à son autorité que les juridictions judiciaires.

Si, dés le départ, les arrêts du Conseil d'Etat ont fait référence à la jurisprudence constitutionnelle, pour autant ils ne reconnaissaient pas l'autorité des décisions du Conseil constitutionnel. Celles ci ne s'imposaient pas à la cour suprême administrative même si celle-ci admettait qu'il faudrait de « bonnes raisons » pour la contredire..[6]

Le tournant explicite et définitif date du 20 décembre 1985 d'un arrêt d'assemblée du Conseil d'Etat modifiant sa jurisprudence sur une question de droit fiscal. Cet arrêt se réfère expressément à une décision

prise trois années plus tôt par le Conseil constitutionnel en matière de déclassement.[7] Dans son arrêt, le Conseil d'Etat accorde l'autorité de la chose jugée non seulement aux décisions prises dans le cadre des fonctions les moins contentieuses du Conseil constitutionnel, mais aussi aux motivations qui viennent au soutien nécessaire de la décision, comme l'avait jugé le Conseil constitutionnel plus de vingt ans auparavant.[8] Cette attitude de réceptivité générale vis à vis de la jurisprudence constitutionnelle, énoncée à l'occasion de l'examen d'un texte de loi par le juge administratif chargé de son application, s'est depuis confirmée.

En revanche, la Cour de cassation semble plus jalouse de sa liberté d'appréciation et surtout de qualification normative. Elle ne retient de la jurisprudence constitutionnelle que ce qu'elle veut. Et lorsqu'elle le fait, c'est avec une vision restrictive de la portée de l'article 62,[9] ... Elle a pu mettre du temps et choisir de ne pas assimiler (fouille des véhicules),[10] elle a pu explicitement écarter une décision récente du Conseil (liberté de conscience dans l'enseignement privé).[11]

En ce qui concerne l'autorité de la chose interprétée.

Pour les deux cours suprêmes les arrêts significatifs[12] pour les réserves d'interprétation de la loi dont on a vu l'importance croissante dans la jurisprudence constitutionnelle interviennent pratiquement au même moment.

Cependant, il convient de remarquer que les réserves d'interprétation, (ou encore les précisions interprétatives, catégorie récemment instaurée) peuvent s'adresser, avant même le juge de l'application de

la loi, au pouvoir réglementaire qui exécute la loi. Dans ce cadre, certains textes d'application nécessitent l'adoption de décrets pris en Conseil d'Etat. Ce qui fait que la haute juridiction administrative est confrontée, dans ses sections administratives du moins, plus fréquemment que son homologue judiciaire à l'autorité des réserves d'interprétation du juge constitutionnel.

Sans doute la force contraignante accordée à la « chose interprétée », lorsqu'il s'agit de textes constitutionnels, est -elle moins évidemment repérable.

Sur ce terrain, le Conseil d'Etat a pu montrer une certaine réticence à accepter la supériorité de principes auxquels le Conseil constitutionnel avait accordé valeur constitutionnelle (indépendance des professeurs d'université reconnue en 1984 par le CC)[13] alors que la Cour de cassation a su, notamment lorsque ses propres compétences étaient en jeu, (arrêt J. Vabre en 1975[14]), mais pas seulement (droit à un logement décent) tirer très rapidement les conséquences de certaines interprétations du Conseil constitutionnel des textes constitutionnels.

L'accueil plus rapide et entier par le juge administratif de l'autorité des décisions du Conseil constitutionnel s'explique aisément. Il existe entre le Conseil d'Etat et le Conseil constitutionnel plusieurs proximités: géographique mais ce n'est peut être pas la plus pertinente, de personnel, c'est déjà plus significatif, mais surtout »d'appareillage logique»; les méthodes du juge constitutionnel français s'apparentent de beaucoup à celle du contentieux de l'excès de pouvoir. Il en résulte souvent une communauté de pensée et de concepts.

Paradoxalement cette proximité pourrait aussi expliquer le constat inverse: la plus grande timidité du

juge administratif dans la reprise à son compte du travail d'interprétation du Conseil. Sur ce terrain les deux institutions se retrouvent et pourrait donc se trouver en concurrence (n'a-t-on pas pu parler à leur propos de: « droits siamois et juges janus » ?[15]).

En conclusion:

Le temps de latence qui peut être constaté entre les décisions du juge constitutionnel et leur exécution, ou entre ses interprétations et leur appropriation par le juge ordinaire ne révèle pas nécessairement une réticence du second par rapport aux premiers. On l'a vu, ceci s'explique,en France, aussi, par le temps mis par le juge constitutionnel à obtenir les moyens de produire une jurisprudence, à savoir des saisines en nombre significatif et des normes de références substantielles.

Traiter de l'exécution par le juge ordinaire des décisions du juge constitutionnel fait l'impasse sur le courant inverse, celui de l'influence des jurisprudences du juge ordinaire sur le juge constitutionnel, or il existe une véritable interactivité entre les juridictions

Les éventuelles résistances du juge ordinaire peuvent aussi provenir de ce que le juge constitutionnel opère un véritable bouleversement de sa jurisprudence habituelle; il faut alors que passe le temps nécessaire pour la persuasion.

Enfin, en France, comme dans les autres pays européens, les juges nationaux, quelle que soit leur place dans la hiérarchie juridictionnelle, sont tous confrontés à la jurisprudence internationale, notamment européenne et en particulier de Strasbourg.[16]

1 Prolongée , en 1992, par celle relative à la conformité à la constitution des engagements internationaux

2 Statistiques fournies par A. Roux à l'occasion des cinquièmes journées de droit constitutionnel franco-roumaines 1998.

3 La doctrine en distingue de plusieurs catégories, neutralisantes, constructives, directives...

4 85-187 DC du 25 janvier 1985.

5 99-410 DC du 15 mars 1999.

6 Parmi les bonnes raisons citons la non identité d'objet: dés lors qu'une décision du Conseil constitutionnel aurait été émise à propos d'une loi distincte de celle soumise au juge administratif, celui-ci ne se sentait pas lié par la jurisprudence du Conseil; lui était dénié un effet général hors l'espèce; ou encore la théorie de la loi écran. Le juge administratif ne peut pas, dans le contrôle qu'il fait de la légalité d'un règlement, se prononcer sur la constitutionnalité d'une loi, et ce même s'il existe une jurisprudence constitutionnelle pertinente.

7 82-124 L du 23 juin 1982.

8 62-18 L du 16 janvier 1962.

9 cf.H.Dontenwille in RIDC n° spécial, 9, 1987.

10 Cass.Crim. 8 novembre 1979 et 76-75 DC du 12 janvier 1977.

11 Cas, Ass, 19 mai 1978 et 77-87 DC du 23 novembre 1977.

12 Cass, 28 juin 1995, Bechta; CE .Ass. 11 mars 1994. S.A. «la cinq».

13 83-165 DC du 20 janvier 1984.

14 Cass. 25 mai 1975 Société j. Vabre.

15 O. Schrameck, in AJDA, n° spécial 1995, p.35

16 Si bien qu'à la dualité de hiérarchie qui existe en France et qui pourrait entraîner , notamment, des variations dans l'application d'un même principe constitutionnel, entre juridictions administratives et judiciaires, s'ajoute l'inégale réceptivité des juges nationaux aux exigences tirées du respect des conventions internationales.

Pavel Hollander,
Judge of the Constitutional Court of the Czech Republic

ROLE OF THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC IN THE IMPLEMENTATION OF THE CONSTITUTION BY ORDINARY COURTS

Let me make some remarks on the role of the constitutional court in the application of the constitution and about the binding nature of judgements of constitutional courts. After nearly 10 years of existence, the constitutional courts of new democracies have experienced an interesting phenomenon, which may be called the paradox of the acceptance and rejection of constitutional courts. This paradox was captured by Prof. Jupancic, former judge of the Constitutional Court of the Slovenian Republic, in his comparative studies. Speaking about the resistance to the authority of new constitutional courts he states that this resistance is coming from courts where it would be least expected. It does not come from the legislators and it does not come from the executive branches of power. It comes from the rest of the judicial branches, from the regular courts and from the supreme courts. At least three of these states have expressively announced that they do not feel bound by the interpretations of the respective constitutional courts. However, there is a real question concerning the European perception of the function of law in societies and more specifically the pure understanding of the relationship between law and democracy. The

paradox of acceptance and rejection of constitutional courts is a current problem for the Czech Republic as well. Judged by its position, the Constitutional Court of the Czech Republic is ranking among the stronger constitutional courts in Europe. Its power consists above all in abstract and concrete control of norms and in the review of the constitutionality of actions by public authorities including the fundamental rights and basic freedoms, the most important part of which is to review the constitutionality of judicial decisions. In a number of decisions it has followed the principle that the choice of a constitutionally conforming interpretation of a statute, other legal enactments or individual provisions is to be preferred to a decision to annul a legal enactment. The Court so decided for the first time in 1995 in a situation where certain provisions of a legal enactment admitted two different interpretations. One of them was to harmonise the constitutional acts and international treaties about fundamental rights and freedoms; the other was in conflict with the above-mentioned principle that no ground exists for annulling the provision. When applying such a provision it is the responsibility of the Court to interpret the provision in a constitutionally conforming manner. In my view, in cases of norm control not only the statement of judgements, but also the reasons given by constitutional courts is a sort of law. With regard in particular to judgements, which pursuant to the principle of the constitutionally conforming interpretation reject the merit petition for the annulment of legal enactment, any different interpretation would render the decision of constitutional courts superfluous. It would, in addition, force the constitutional courts to a course of action which in consequence would appeal to the absurd and unsustainable not to relay the possibility of the constitutionally conforming

interpretation to abandon the principle of judicial extent and to nullify an enactment wherever there is the least possibility of it being interpreted in a constitutionally non-conforming manner. It is obvious that not all of the reasons of a judgement are of binding nature. It should only be that part which, for example, in the German constitutional law doctrine is designated as a supporting ground. The constitutional court could also facilitate the identification of its supporting grounds by means of a more standardised structure of each individual section of its opinion. Furthermore, this identification is generally managed to the level of the legal education and cultural refinement as well as soundness of the mutual communication between the constitutional court and the ordinary judiciary.

Some remarks on the preferential nature of constitutional court judgements in cases of constitutional complaints. I am aware of the fact that in addition to the above-mentioned question of prestige we encounter a traditional understanding of the sources of law in the system of enacted law in which the case law of higher courts in general and in this instance of the the constitutional court cannot by their nature be considered a source of law, in particular in view of arguments concerning the sovereignty of the peoples. I believe that this conception, the root of which goes back to the end of 18th and the beginning of 19th century and which is read through the radical interpretation of the concept of sovereignty during the French revolution and the mistrust of courts originating during the *ancien regime,* has in the present days become updated. I am led to this position in particular by the following arguments. First, the historical experience of the possibility of non-democratic conversation of law,

the German example of which was accurately portrayed by philosopher Gustav Arbrook's positivism. It has not resolved the tension between the positive law and justice by a means generally known as the Arbrook formula. Starting from the principle forbidding the "negatio iustitiae" there is no choice but to recognise that under certain limited circumstances the judiciaiy is permitted to use a legal resolution in the case before it on the basis in particular of general legal principles both written and unwritten. An example of such an approach is the judgement of the Czech Constitutional Court of 1997, which contains the following considerations. A modern democratic written constitution is a social contract by which the peoples representing the constituent power constitute themselves in one political state body and enchain the relationship of the individual to the system of state institutions. A document institutionalising the set of fundamental generally accepted values endorsing the mechanism and process of the formation of the legitimate power cannot exist out of the context of publicly accepted values. In other words, it cannot function without a minimum consensus concerning the respect for values and institutions. The conclusion for the field of law is then that even in a system of enacted law basic legal principles and customs are out of sources of general as well as of constitutional law. In a system of enacted law a general legal rule is an independent source of the law only "prêter legem", that is unless enacted law provides otherwise. These were some short remarks to the main problems of the binding character of the judgements of the constitutional court.

Thank you very much.

Azra Omeragić,
Judge of the Constitutional Court of Bosnia and Herzegovina

RELATIONS OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA WITH THE HUMAN RIGHTS CHAMBER

Distinguished colleagues, ladies and gentlemen, it is my task today to try to maintain the level of your attention with the report entitled "The relations of the Constitutional Court of Bosnia and Herzegovina with the Human Rights Chamber".

Before I elaborate on the above topic, allow me to remark that the previous discussions were the incentive for what I want to say next. I would like to say that we are aware of the situation we are in and that we have no illusions as to the existence of an ideal model of jurisdiction, we know that we are in the process of transition, and we are aware of our need for education - until our mindset changes. We heard yesterday that Prof. Favoreu does not lecture his students on the constitutional law practised in the countries of this region because it is not law, and that in the countries of this region "there was no law before year 1989". I cannot accept that and would not comment on it today.

We have also heard yesterday that BiH is a "strange state", different evaluations of the Constitution have been presented and that is why I, as a judge of the Constitutional Court of BiH, want to emphasize that I support this Constitution in its entirety and that

the text itself contains some good solutions for the existing situation and also the means for overcoming it. To make myself more clear, I point to you that it is provided by the Constitution that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law", that it consists of the two Entities and that there is freedom of movement of goods, services, capital and persons throughout Bosnia and Herzegovina. I am of the opinion that it is a good guarantee for the future of the citizens of Bosnia and Herzegovina.

I would like to get back to the topic of my report now.

In the words of the Constitution, Bosnia and Herzegovina and its Entities are to ensure the highest level of internationally recognized human rights and fundamental freedoms as set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto that shall apply directly in Bosnia and Herzegovina. "These shall have priority over all other law."

I would like to point out that Bosnia and Herzegovina is not a member of the Council of Europe and that, as such, cannot be signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Nevertheless, the Constitution has taken over directly the catalogue of rights protected by the European Convention and its protocols and has set forth that the European Convention is to have priority over all other law, and that Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. "To that end, there shall be a Human Rights

Commission for Bosnia and Herzegovina", The Constitution emphasizes that the enjoyment of the rights and freedoms provided for in the Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. The Constitution, therefore, sets forth that there is to be a COMMISSION, and Annex 6 of the Dayton Agreement is dedicated to the organization of the Commission.

"To assist in honoring their obligations under this Agreement" is the beginning of the sentence in the paragraph that regulates the issue of the Commission for Human Rights. It clearly speaks of the times and the conditions under which the agreement was signed.

The Commission consists of two parts: the Office of the Ombudsman and the Human Rights Chamber. Both bodies have the jurisdiction to consider alleged or apparent violations of human rights and alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.

ALL PERSONS have the right to submit to the Commission and to other human rights bodies applications concerning alleged violations of human rights.

The Ombudsman shall be appointed for a non-renewable term of five years by the Chairman- in-Office of the Organization for Security and Cooperation in Europe (OSCE), after consultation with the Parties. The Ombudsman appointed after that transfer shall be appointed by the Presidency of Bosnia and Herzegovina. The Ombudsman may investigate circumstances

under which human rights are violated or discrimination done, he or she may intervene before Human Rights Chamber and regular courts and to present his findings and analyses in public. This institution in BiH plays an important role in the development of the relations defined by Dayton Peace Agreement, and the results that have been achieved are extraordinary. (Today there are three Ombudsmen, one for each Entity and one for the state of BiH). The Ombudsmen began their work on the territory the BiH Federation and with their successful work they have created a positive prerequisite for the successful work of the Human Rights Chamber.

Human Rights Chamber is composed of fourteen members, 6 from BiH and 8 from other countries, (the fact that foreigners are in majority makes it an institution sui generis). The Committee of Ministers of the Council of Europe, pursuant to its resolution (93) 6, after consultation with the Parties, appoints these 8 remaining members. All members of the Chamber are to be jurists of recognized competence. The members of the Chamber are appointed for a term of five years and may be reappointed.

After this five-year term, the Government of Bosnia and Herzegovina will take over the jurisdiction as to the continuation of the functioning of the Commission, and the members appointed after the five-year term will be appointed by the Presidency of Bosnia and Herzegovina. The agreement insists on the possibility for the Parties to decide otherwise upon this matter. I have to point out once again that the Office of the Ombudsman has been successfully operational in the Federation of BiH since 1995, and the Office of the Ombudsman in Republika Srpska became operational in 2000. This five-year period slows down the process

of successful application of the regulations that protect human rights, and the process of protection of human rights and fundamental freedoms in general.

Annex 4 of the Dayton Peace Agreement represents the Constitution of Bosnia and Herzegovina. Besides Article II. 1 of the Constitution that directly mentions the Commission on Human Rights, Article VI determines the existence, composition, procedures and jurisdiction of the Constitutional Court of BiH. As you already know the Constitutional Court of Bosnia and Herzegovina has nine members. Four members are to be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members are selected by the President of the European Court of Human Rights after consultation with the Presidency. The term of judges initially appointed is five years, and the judges initially appointed are not eligible for reappointment (this shows how difficult is the stage we are going through). Judges subsequently appointed shall serve until age 70, and the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

The Court adopts its own rules and decides by a majority of votes. It holds public proceedings and issues reasons for its decisions, which are then published. The Court has 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.

The Constitutional Court also has appellate jurisdiction over issues under the Constitution arising

out of a judgment of any other court in Bosnia and Herzegovina. The Court also has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the 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.

The decisions of Human Rights Chamber and of the Constitutional Court are final and binding.

With an intention of developing control mechanisms, numerous bodies and institutions that are to control the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms have been established. All courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms guaranteed by the Constitution, as is explicitly stated in one of the provisions of the Constitution (Article II.6).

I would like you to focus your attention on the legal system of Bosnia and Herzegovina, which is extremely complex. The Dayton Agreement determined that Bosnia and Herzegovina is to continue its existence as a state with a modified internal structure, and that it consists of two Entities (that have their Constitutions), namely Republika Srpska and Federation of BiH. The Federation of BiH consists of 10 cantons (that have their own Constitutions) so that, as we heard yesterday, we have 13 Constitutions that are operational at this moment. The courts in the Federation of BiH are organized through municipalities, cantons and the

Entity, and in Republika Srpska through municipalities, counties and the Entity itself, while we do not have any ordinary court at the State level. The preparations of the Draft Law on the Supreme Court of Bosnia and Herzegovina are underway but it is a long lasting process and at this moment we can gain nothing from it.

I repeat that all courts protect human rights.

At this juncture, there is an increase in the number of organs and regulations that deal with human rights. The issue of jurisdiction arises and it further aggravates the difficult situation for the citizens, since they just do not know whom to turn to. Bosnia and Herzegovina is the only country in Europe in which individuals can plead the rights defined in the European Convention for Protection of Human Rights and Fundamental Freedoms, but the highest authority that controls the application of this Convention, European Court for Human Rights, does not have a jurisdiction to work on the cases from BiH.

The jurisdiction of the Human Rights Chamber and the Constitutional Court overlap so much that the appellant's dilemma, when deciding whom to appeal to for protection of his fundamental rights and freedoms is enormous and it depends entirely on the appellant who is to decide upon the case.

In its decisions the Constitutional Court adopted a position that it does not consider it has the jurisdiction to decide on the appeals that contest the decisions of the Human Rights Chamber, since the provisions of Annex 4 and Annex 6 are not in opposition, rather they supplement one another. The Constitutional Court therefore is of the opinion that the authors of

the above provisions did not intend to give either institution the jurisdiction to review the decisions of the other one, but that they should function as parallel institutions, neither of them interfering with one another's decisions.

It is the right of the appellant to choose the between the institutions.

This dilemma is temporary, as the Commission for Human Rights has a five-year mandate. After five years, the Government of Bosnia and Herzegovina will take over the jurisdiction over the continuation of the functioning of the Commission, unless the Parties decide otherwise.

The above mentioned constitutional provisions (Articles II. 1, VI .3 b, c) as well as the provisions of the Annex 6 (Article 14) are the foundation for the claim that the constitutional court has the jurisdiction to decide on issues that are temporarily given to the Commission for Human Rights, and the constitutional Court has the jurisdiction to level the application of regulations over which BiH has the jurisdiction. The successful and levelled protection of human rights throughout the state means that the Constitutional Court will take over the jurisdiction from Annex 6. This paves the way for the rule of law and ensures a levelled protection of human rights throughout BiH, which is a prerequisite of the statute of the Council of Europe. When we fulfil the conditions for membership in the Council of Europe, the reasons for the existence of the Human Rights Chamber will cease to exist, and the European Court for Human Rights will take over the control of our adherence to the European Convention.

Azra Omeragić,
Sudija Ustavnog suda Bosne i Hercegovine

ODNOSI USTAVNOG SUDA BOSNE I HERCEGOVINE SA DOMOM ZA LJUDSKA PRAVA

Poštovane kolege, dame i gopodo, inoj zadatak je da danas pokušam zadržati vašu pažnju temom «Odnos Ustavnog suda BiH sa Domom za ljudska prava».

Prije nego što pređeni na temu, ponukana dosadašnjim diskusijama, želim reći da smo mi svjesni situacije u kojoj smo, da nemamo iluzija da postoji idealan model jurisdikcije, da znamo da smo u tranziciji, da smo svjesni da nam je potrebna edukacija - do promjene svijesti. Čuli smo jučer, prof. Favoreu ne predaje svojim studentima ustavno pravo zemalja ovog regiona zato što to nije pravo, kaže da na ovim prostorima »nema prava prije 1989. godine«. Ja to ne prihvatam i ne bih to danas komentarisala.

Jučer smo, također, čuli da je BiH »čudna država«, date su razne ocjene Ustava, pa zato ja, kao sudija Ustavnog suda BiH, danas želim naglasiti da ovaj Ustav podržavam u cjelosti i da u tom tekstu vidim dobra rješenja za postojeću situaciju a i način za njeno prevazilaženje. Da to bude jasnije, ukazujem d a j e Ustav odredio da je »BiH demokratska država koja funkcioniše u skladu sa zakonom«, d a j e sastavljena od dva entiteta sa slobodom kretanja ljudi, kapitala, roba i usluga na

cijelom području države. Mislim da je to dobra garancija za budućnost građana BiH.

Sada bih se vratila zadatoj temi.

Bosna i Hercegovina i njeni entiteti su, po slovu Ustava, obavezni osigurati najviši nivo međunarodno priznatih prava i sloboda predviđenih Evropskom konvencijom i njenim protokolima koji se direktno primjenjuju u BiH i »imaju prioritet nad svim ostalim zakonima«.

Odmah da naglasim da Bosna i Hercegovina nije članica Vijeća Evrope i da, kao takva, ne može biti potpisnica Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda.

Ipak, Ustav je direktno preuzeo katalog prava koje štiti Evropska konvencija, sa njenim protokolima, i odredio da će Evropska konvencija imati prioritet nad svakim zakonom, a da će država i oba entiteta osigurati najveći nivo međunarodno priznatih prava i sloboda i da će »u tu svrhu postojati komisija za ljudska prava u BiH«. Posebno je naglašeno da će se osigurati primjena zajamčenih ljudskih prava i osnovnih sloboda na području Bosne i Hercegovine i to bez ikakvih oblika diskriminacije.

Dakle, Ustav je odredio postojanje KOMISIJE, a Aneks 6 Daytonskog sporazuma je posvećen organizaciji ove komisije.

»Da bismo pomogli potpisivanje svojih obaveza prema sporazumu« je početak rečenice u odjeljku koji reguliše pitanje Komisije za ljudska prava. To jasno govori o vremenu i uvjetima pod kojim je sporazum zaključen.

Ova komisija sastoji se od Ombudsmena i Doma za ljudska prava. Oba tijela su nadležna da razmatraju

navodna ili očita kršenja ljudskih prava i navodnu ili očitu diskriminaciju po osnovu spola, rase, boje, jezika, vjere, - gdje god se tvrdi da su takva kršenja počinili ili čine zvaničnici ili organi strana, kantona, općina, ili lica koja djeluju pod ovlaštenjem takvog zvaničnika ili organa.

Komisiji, odnosno njenim tijelima, SVAKO LICE može dostaviti prijave o kršenju ljudskih prava.

Ombudsmen se bira na rok od 5 godina, postavlja ga OSCE uz konsultaciju sa stranama, bez mogućnosti reizbora. Po isteku ovog roka Ombudsmena će postavljati Predsjedništvo BiH. U njegovoj nadležnosti je da istražuje okolnosti pod kojim se krše ljudska prava ili vrši diskriminacija, da interveniše pred Domom za ljudska prava i redovnim sudovima, da javno objavljuje svoje nalaze i analize. Ova institucija u BiH ima bitnu i pozitivnu ulogu u razvoju odnosa definisanih Daytonskim mirovnim sporazumom, a postignuti rezultati su izvanredni. (Danas postoji Ombudsmen u oba entiteta i u državi.) Počeli su sa radom na području Federacije BiH i svojim uspješnim radom stvorili pozitivnu pretpostavku za uspješan rad Doma za ljudska prava.

Dom za ljudska prava sastoji se od 14 članova i to 6 domaćih i 8 stranaca. (Sama činjenica da su stranci u većini čini ga tijelom *sui generis.)* Njih imenuje Komitet ministara Vijeća Evrope u skladu sa Rezolucijom 936, a nakon konsultacija sa stranama. Svi članovi Doma moraju biti pravnici priznatih kompetencija, sa kvalifikacijama za visoke sudijske funkcije. Imenuju se na 5 godina i mogu biti ponovno birani.

Nakon isteka ovoga roka, Vlada Bosne i Hercegovine će preuzeti nadležnosti za nastavak funkcionisanja Komisije, a tada će članove imenovati Predsjedništvo.

Izričito je zadržana mogućnost da se strane mogu drugačije dogovoriti. Moram ponovo naglasiti da u Federaciji BiH postoji uspješno organizovana funkcija Ombudsmena od 1995. god., a u Republici Srpskoj je uspostavljena 2000. godine. Taj vremenski period od 5 godina bitno usporava procese uspješne primjene propisa koji štite ljudska prava i uspješne zaštite ljudskih prava i osnovnih sloboda uopće.

Aneks 4 Daytonskog mirovnog sporazuma označen je kao Ustav BiH. Pored člana II/1. Ustava, koji izravno govori o Komisiji za ljudska prava, član IV određuje postojanje, sastav, proceduru i jurisdikciju Ustavnog suda BiH. Već vam je poznato da sud ima 9 članova i to 6 domaćih (četiri člana bira Predstavnički dom Federacije, a dva člana Skupština Republike Srpske) i 3 strana člana (bira ih predsjednik Evropskog suda za ljudska prava nakon konsultacija sa Predsjedništvom). Prvi mandat sudija je 5 godina, bez prava na reizbor (što kazuje o težini faze kroz koju prolazimo). Kasniji mandati sudija Ustavnog suda su do 70 godina života, a Parlament može zakonom odrediti drugačiji metoda selekcije sudija koje bira predsjednik Evropskog suda.

Sud usvaja sopstvena pravila, odlučuje većinom glasova, vodi javne postupke, objavljuje razloge za svoje odluke. Isključivo je nadležan da odlučuje o bilo kom sporu između entiteta, između BiH i jednog ili oba entiteta, između institucija BiH, a po osnovu ovog Ustava.

Ustavni sud ima apelacionu jurisdikciju u pitanjima koja su sadržana u Ustavu kada ona postanu predmet spora zbog presude bilo koga suda u BiH. Također, Ustavni sud ima jurisdikciju nad pitanjima koje proslijedi bilo koji sud u pogledu kompatibilnosti zakona sa

Ustavom, sa Evropskom konvencijom, sa njenim protokolima ili zakonima BiH ili u pogledu postojanja i primjene nekog općeg pravila međunarodnog javnog prava koje je bitno za odluku Suda.

Odluke Doma za ljudska prava i Ustavnog suda BiH su konačne i obavezujeće.

Sa željom da se razviju kontrolni mehanizmi, uspostavljeni su brojni organi i institucije koje treba da kontrolišu primjenu Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Svi sudovi, agencije, vladini organi, te organi kojima neposredno rukovode entitetske vlasti ili koji djeluju unutar entiteta, primjenjuju ljudska prava i osnovne slobode zajamčene Ustavom, izričita je odredba Ustava (član II/6).

Moram skrenuti pažnju na sliku pravnog sistema BiH koji je kompleksan. Daytonski sporazum je odredio da će BiH nastaviti svoje postojanje kao država sa modifikovanom unutrašnjom strukturom, da se sastoji od dva entiteta, (koji imaje svoje ustave) i to Federacije BiH i Republike Srpske. Federacija se sastoji od 10 kantona (koji imaju svoje ustave) tako da danas imamo u primjeni 13 ustava, što smo i jučer čuli. Redovni sudovi u Federaciji BiH su organizirani kroz općine, kantone i entitet, a u Republici Srpskoj kroz općine, okruge i entitet, tako da danas ne postoji redovni sud na državnom nivou. Jeste u pripremi Nacrt zakona o vrhovnom sudu države, ali to dugo traje i od toga danas nemano ništa.

Ponavljam da svi sudovi štite ljudska prava.

Trenutno, u BiH je inflacija organa i propisa koji se bave zaštitom ljudskih prava. To otvara pitanje nadležnosti, i dodatno otežava tešku situaciju građana, jer

oni prosto ne znaju kome da se obrate. Bosna i Hercegovina je jedina zemlja u Evropi u kojoj se pojedinci mogu pozivati na prava definisana u Evropskoj konvenciji o ljudskim pravima i osnovnim slobodama, ali najviša vlast koja kontroliše primjenu ove Konvencije, Evropski sud za ljudska prava, danas nije nadležan da radi na predmetima iz BiH.

Nadležnosti Doma za ljudska prava i Ustavnog suda BiH u dijelu apelacione jurisdikcije se toliko preklapaju da je dilema podnosioca zahtjeva za zaštitu njegovih osnovnih prava i sloboda već u trenutku upućivanja zahtjeva ogromna i samo od podnosioca zahtjeva zavisi ko će odlučivati o zahtjevu.

Ustavni sud je u svojim odlukama izrazio stav da se smatra nenadležnim za odlučivanje po apelacijama na odluke Doma za ljudska prava jer odredbe Aneksa 4 i Aneksa 6 nisu suprotne jedna drugoj već se dopunjavaju, te Ustavni sud smatra da autori ovih odredbi nisu imali namjeru da ni jednoj od ovih institucija daju nadležnost da revidira odluke one druge, već da treba da funkcionišu kao paralelne institucije i da se ni jedna ne miješa u odluke ove druge.

Pravo podnosioca zahtjeva je da napravi izbor nadležne institucije.

Ova dilema je privremena, jer je Komisija za ljudska prava izabrana za period od 5 godina. Nakon toga roka će Vlada BiH preuzeti nadležnosti za nastavak funkcionisanja Komisije izuzev »ako se strane drugačije ne dogovore«.

Pomenute ustavne odredbe (član II/1, VI/3.b,c) te odredbe Aneksa 6 (član 14) su osnov za tvrdnju da je Ustavni sud nadležan za odlučivanje po pitanjima koja

su privremeno data Komisiji za ljudska prava, a Ustavni sud je kompetentan ujednačavati primjenu propisa koji su u nadležnosti BiH. Uspješna i ujednačena zaštita ljudskih prava na području države znači da će Ustavni sud preuzeti nadležnosti iz Aneksa 6. Time se utire put pravnoj državi i osigurava ujednačena zaštita ljudskih prava na području cijele države što je i uvjet predviđen Statutom Vijeća Evrope. Kada ispunimo uvjete za prijem u Vijeće Evrope prestat će razlozi za postojanje Doma za ljudska prava, a kontrolu primjene Evropske konvencije vršit će Evropski sud za ljudska prava.

Konrad Krais.
Judge *emeritus* of the German Constitutional Court

RELATIONS BETWEEN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE [GERMAN] FEDERAL CONSTITUTIONAL COURT

Mr. President.
Ladies and Gentlemen,

First, I wish to express the greetings of the president of the Federal Constitutional Court, Mrs. Prof. Jutta Limbach. The Federal Constitutional Court is following your work with great interest and wishes you success. Due to difficulties with the time table the attendance to this conference by an active judge was not possible; for this reason the Federal Constitutional Court is represented by me, an Emeritus.

My task is to speak about the relationship between the European court of human rights and the Federal Constitutional Court, and as such it is a rather easy task. The Grundgesetz of the Federal Republic of Germany, our German Constitution which is in force since Mai 1949, declares in Article 1, sub-section 1, that the human dignity is untouchable and that all power coming from the state must respect and defend it. Article 1, sub-section 2, contains a declaration of inalienable human rights as the basis of every human society, of peace, and of justice. Finally, Article 1 section 3 declares the basic rights contained in Articles 2

to 19 as directly binding executive power and the judiciary.

The Constitution has entrusted the Constitutional Court with defending these fundamental rights and the equally fundamental rights provided for in Articles 101 to 104 of the Constitution (the so-called "grundrechtsgleiche Rechte"). Apart from the different forms of judicial review of constitutionality ("Normenkontrolle"), a further mechanism of protection is the complaint of unconstitutionality ("Verfassungsbeschwerde"). The approximately 5000 complaints per year constitute the main part of the Constitutional Court's workload. The complaint of unconstitutionality was established already by the Constitutional Court Act ("Bundesverfassungsgerichtsgesetz"). Anybody alleging having suffered harm to his fundamental or equally fundamental rights by the public authority may submit a complaint. In 1968 the complaint of unconstitutionality before the Federal Constitutional Court was also embodied in the Constitution itself (Article 93 sub-section 1 No. 4a).

More than one year after the promulgation of the Grundgesetz in 1950 the governments and members of the European Council signed the European Convention for the Protection of Human Rights and Fundamental Freedoms. Germany ratified the convention in 1952. Article 19 of the Convention provides for the European Court of Human Rights to safeguard the rights and freedoms embodied therein. It is mainly the individual complaint ("Individualbeschwerde") which help towards this goal. It can be submitted by anyone contending that his rights granted by the Convention or its later added Protocols have been violated by a

Member to the Convention. According to Article 35 of the Convention, the complaint to the European Court of Human Rights is only admissible if the domestic legal remedies have been exhausted. In the opinion of the European Court of Human Rights, the complaint of unconstitutionality before the Federal Constitutional Court also forms part of the domestic remedies, even though it is [considered in Germany *(translators note)]* an extraordinary legal remedy.

The rights in the European Convention and the fundamental rights found in the Grundgesetz including the above mentioned equally fundamental rights - notwithstanding their different legal nature - are both intended to secure human freedom in virtually the same circumstances. Since according to the interpretation of the European Convention of Human Rights it is necessary to appeal first to the Federal Constitutional Court there have been only relatively few complaints against the German public authorities so far. The Federal Constitutional Court, by means of the complaint of unconstitutionality, has already secured the fundamental rights of those people whose fundamental freedoms had been infringed upon by the German public authority. A complaint to the European Court of Human Rights was therefore not longer necessary. The remaining complaints [which still reached Strasbourg *(translators note)]* were mainly not substantiated. This is because the complainants who were rejected with their complaint by the Federal Constitutional Court are not willing to refrain from moving on to Strasbourg.

Due to this legal situation and practice, the Federal Constitutional Court, by virtue of its interpretation and application, has up to the present day been

able to independently elaborate and enforce the fundamental rights of the German Constitution.

After the darkness of the Nazi regime and the catastrophe of the total occupation of the country, the work of the Federal Constitutional Court contributed to the growing reputation of the state amongst its citizens, and then also to make it attractive for the people in the German Democratic Republic. There is talk about constitutional patriotism. The singularity of the development in Germany is reflected in the directives - the leading decisions - of the Federal Constitutional Court. The fundamental rights and the governmental objectives ("Staatsziele") all concentrate on human dignity as the highest value of the Constitution and are thereby given their urgency. Especially the "Elfes"-decision of 1957 (Bulletin of the decisions of the Federal Constitutional Court [BVerfGE] 6, 32/41) and the decision on the KPD [German Communist Party] of 1956 (BVerfGE 5, 85/204) are notable in this respect:

> "It is contrary to human dignity to treat human beings as a mere object within the state."

The fundamental rights are not only the individual's defensive rights against state activity, but also represent an objective order of values, which stands as a fundamental constitutional guideline for all legal areas (see the "Lueth"-decision, BVerfGE 7, 198 ff.). This is the starting point for the development of objective legal duties of protection the state has to meet with, especially with regard to human life, including the unborn (BVerfGE 39, 1 ff. and 88, 203 ff.). In the "Lueth"-decision, one can find a decisive interpretation of the limitations of the fundamental rights in favour of the general laws ("allgemeine Gesetze", i.e. laws which

do not *specifically* restrict the fundamental right in question, but aim at the protection of other interests and only have side effects of on fundamental freedoms *(translators* note)]; for instance the freedom of opinion and the freedom of information in Article 5 sub-section 2 of the German Constitution are submitted to such limitations. Such general laws have to be interpreted restrictively in the light of the fundamental right concerned.

Despite all its autonomy, the court rulings of the Federal Constitutional Court regarding fundamental rights has been positively influenced by the European Convention of Human Rights and the practice of the Court in Strasbourg. This holds especially true for the equally fundamental rights in Article 101 to Article 104 of the Grundgesetz, called procedural fundamental rights ("Prozessgrundrechte"). These are rights that have been taken over by the Constitution from former German procedural law and this way have received the rank of constitutional law. In turn, the European Convention of Human Rights, in continuation of the United Nations Declaration of Human Rights of 1948, integrates legal principles of the Anglo-American procedural law. The procedural fundamental rights are for instance the right to a fair trial, the right to be presumed innocent until proven guilty, the right to a decision within a reasonable time, the right to a public trial, the protection of the private sphere, and the granting of a sufficient defence.

All these rights have been adopted by the Federal Constitutional Court, partly under the legal title of the right to be heard before the court (right of audience, Article 103 sub-section 1 of the Grundgesetz), the granting of effective legal protection (Article 19 sub-section 4 of

the Grundgesetz), or as the right to a legal procedure (Article 20 sub-section 3 in connection with Article 2 sub-section 1 of the Grundgesetz). Questions concerning the duration of a trial are dealt with under the concept the state governed by the rule of law ("Rechtsstaat").

The achievements of the rulings of the European Court of Human Rights have an influence on the decisions of the Federal Constitutional Court. Concerning the right to be presumed innocent until proven guilty, the Federal Constitutional Court has stated (BVerfGE 74, 358/370):

> "An interpretation of the Grundgesetz also must take into consideration the contents and the evolution of the European Convention of Human Rights, unless this would lead to a lower level of protection than the that provided for by the Grundgesetz: the exclusion of such consequences, though, is regulated in the European Convention of Human Rights itself (Article 60 ECHR). In this regard, also the rulings of the European Court of Human Rights serve as an instrument of interpretation for defining the contents and the scope of the [German] fundamental rights and the principles of the rule of law laid down in the Grundgesetz."

The direct effect of the European Court of Human Rights is displayed - I guess one can say so - mainly outside the jurisdiction of the Federal Constitutional Court. This is a result of the fact that the constitutions of the other countries either do not have their own catalogue of fundamental rights, that they declare the European Convention directly applicable (as does the Constitution of Bosnia and Herzegovina), or that their constitution does not include the possibility of an individual complaint.

The European Court of Human Rights is unmistakably influenced by the Federal Constitutional Court. The rulings of the Federal Constitutional Court are older than that of the Strasbourg Court. While the Federal Constitutional Court has been working since 1951, the European Court of Human Rights did not start to function properly before 1959. Until 1970, only a few complaints of human rights violations had been considered admissible. The Court in Strasbourg is developing clear analogies to the Federal Constitutional Court. To mention in this context are, amongst others, the principle of proportionality and the above mentioned rulings regarding the limitations of the restrictions on the freedom of expression. In the decisions of the Strasbourg Court one will not find any references to the Federal Constitutional Court; such references are not the custom of the Court. Only once has the European Commission [of Human Rights] referred to the practice of the United States Supreme Court and the Federal Constitutional Court.

The European Court of Human Rights has on the basis of the Convention developed a unique understanding of freedom in Europe, which has then also influenced the Court of Justice of the European Communities in Luxembourg. The European Convention of Human Rights and its interpretation by the European Court of Human Rights is today an important element of the common legal convictions on which the European Union is founded (Article 6 European Union Treaty in the version of the Amsterdam Treaty).

The Federal Constitutional Court has recognized this fact. Therefore nowadays, only by virtue of its jurisdiction does the Court ensure the guarantee of

an effective protection of the fundamental rights of the inhabitants of Germany also against the powers of the European Communities, and that this protection [by the Court of Justice of the European Communities] is essentially equal to the protection of fundamental rights declared inalienable by the Gmudgesetz, above all regarding the characteristic content of the fundamental rights ["Wesensgehalt der Grundrechte"] ("Maastricht"-decision, BVerfGE 89, 155/174, following the "Solange IF-decision, BVerfGE 73, 339/386). However, the Federal Constitutional Court currently no longer excercises its jurisdiction in this regard.

In 1994, The Grundgesetz adopted a reference to the European Convention into its renewed Article 16a on the right of asylum. Anyone who has already received asylum in a country where the Convention on the Legal Status of Refugees of 1951 and the Convention of Human Rights are applicable does not have a right to asylum in Germany.

The relationship between the European Court of Human Rights and the Federal Constitutional Court is harmonic. The only point of discussion could be found in the opinion of the European Court that an individual complaint to the Federal Constitutional Court forms part of the domestic legal remedies.

In my opinion it is desirable that Strasbourg abandons this point of view. That way, the European Court would become more effective.

The procedure of the complaint of unconstitutionality could then be understood as an extraordinary legal remedy which in the same way as the individual complaint to the Court in Strasbourg does not fall under the time-guarantee of Article 6 ECHR. The Federal

Constitutional Court would in this way be liberated from the pressure that it experiences due to the possible reproach of too long procedures; this problem frequently arises with difficult questions of fundamental importance. Insofar, the same applies for the Federal Constitutional Court as for the Court in Strasbourg; it is not really known for quick functioning either.

In view of the different sources of law, it is inconsistent to consider the complaint of unconstitutionality - being an extraordinary legal remedy - as a part of the ordinary domestic legal remedies. As the European Convention only has the status of ordinary law in Germany, i.e. sorting under the constitutional law, the Federal Constitutional Court does not control whether or not it is respected by the lower courts; that just falls within the jurisdiction of Strasbourg.

Thank you.

Hans Danelius,
Judge of the Constitutional Court of Bosnia and Herzegovina

RELATIONS OF THE EUROPEAN COURT WITH CONSTITUTIONAL COURTS

Like other courts the constitutional courts are also subject to control by the European Court of Human Rights in Strasburg and there are indeed a number of judgments in which the proceedings or decisions of constitutional courts have been examined by the European Court. Most of these decisions deal with Article 6 of the European Convention, which means that what the European Court has examined is rather the proceedings and not the substance of the decision that was eventually taken by the constitutional court. I would like to illustrate this by mentioning examples of the judgments taken by the European Court and I will start with two cases which are probably not so well known, because they are recent judgments, the first one from the end of February 2000 and the second one given only two weeks ago, on 3 March.

The first judgment of 25 February 2000 was a case against Germany. It is called the Gast and Popp case and it concerned the question of whether the length of proceedings before the Federal Constitutional Court in Germany complied with the requirement that a decision should be given within a reasonable time, which is part of Article 6 of the Convention. The

circumstances in the case were that in the first part of the 1990s there were a number of criminal prosecutions against persons who were accused of having committed espionage for the benefit of the German Democratic Republic during the time when Germany was still a divided country. The applicants in the case I am referring to, Gast and Popp, had been sentenced for spying on behalf of the German Democratic Republic and they had brought their case to the Federal Constitutional Court claiming that their sentence was not a legal decision. There were at that time many other cases of the same kind which had also been brought before the German Constitutional Court. The European Court decided that one or perhaps a few cases should be test cases which would be dealt with first and then the remaining cases would be decided on the basis of what had been found in the test cases. This meant that some cases such as the case of Gast and Popp had to wait until a decision had been taken in the first cases which were to be the model for the rest. In fact, therefore, the Gast and Popp case was pending for about three years in the Federal Constitutional Court. After three years the test cases had been decided, and the case about Gast and Popp was quickly decided after that. The question was whether the three years during which the two applicants had had to wait for a decision complied with the requirement of a judgment within a reasonable time. In this case the European Court found that there had been a special situation and that it had been natural to coordinate all the pending cases dealing with the same matter. This had as an inevitable result that there was delay in some of these cases. The European Court found that a period of three years in these circumstances was not excessive and that therefore Germany was not in breach of Article 6 of the Convention.

The second case I mentioned was given on the third of March. It is a case against the Czech Republic and is called Krčmar and others against the Czech Republic. In that case the applicants, or rather their family, had been the owner of a company which had been nationalised in the former Czechoslovakia and they asked for restitution of the nationalised company under a restitution law which was enacted in the Czech Republic. For the application of that law it was relevant when the nationalisation had taken place because the law only applied to nationalisations which had taken place after a certain date in 1948. The question was whether the nationalisation of the applicants' company had taken place earlier under a law which had been enacted already in 1945. Decisive for that question was how many employees and workers there had been in the company because the Nationalisation Law of 1945 only applied to companies having more than 150 employees. The applicants claimed that their company had had less than 150 employees and that the law of 1945 was not applicable. The case was eventually brought before the Constitutional Court of the Czech Republic. The Constitutional Court held a hearing in the case and decided to obtain certain information from ministries and authorities in order to establish what had been the number of employees at the relevant time. The Court received some information. However, that information was not communicated to the applicants and they were not given the opportunity to comment on it. The Constitutional Court then decided to reject the applicants' complaint on the basis of the infonnation obtained from the authorities. The European Court of Human Rights found that this was a violation of the principle of a fair hearing in Article 6 of the Convention because the Constitutional Court had not complied

with the principle of adversarial proceedings. This principle requires that all the elements of a case must be brought to the attention of the parties and that the parties must be given the opportunity to comment on them. Consequently, there was in the Krčmar case a violation of Article 6 of the European Convention.

These are typical examples of cases that have been brought before the European Court of Human Rights in respect of proceedings before constitutional courts. There was previously a great deal of uncertainty as to whether or to what extent Article 6 of the Convention applies to proceedings before constitutional courts. In many cases a defendant government before the European Court argued that Article 6 is not applicable to the proceedings before constitutional courts. However, the relevant criterion in Article 6 is whether a case concerns a person's civil rights or obligations or a criminal charge which is often the case when there are individual complaints before constitutional courts. In such cases, the European Court has usually found that there was a question of the applicant's civil rights, or - as in the case I mentioned about espionage which was dealt with by the German Constitutional Court - that there was a question of a criminal charge. Thus in respect of most individual cases dealt with by constitutional courts, the European Court has found that Article 6 was applicable. It is different of course when constitutional courts deal with cases regarding abstract norm control and when there is no private party whose individual rights are at issue. In such cases Art. 6 is certainly not applicable.

Most of the cases regarding constitutional courts concern the length of proceedings. There have been a few cases regarding the German Federal Constitutional Court on this issue. Sometimes they con-

cerned not only the proceedings before the Constitutional Court, but rather all the proceedings in a case, starting with the normal courts and ending in the Constitutional Court. However, sometimes the emphasis has also been on the proceedings before the Constitutional Court and in two cases, for instance, there was a question only of the length of the proceedings before the Federal Constitutional Court. In those cases, there was a matter which had been referred by a lower court on a constitutional issue to the Federal Constitutional Court for examination. The cases concerned certain property issues and are called the Probstmeier and Pammel v. Germany cases. It had taken the Federal Constitutional Court in one case about five years and in the other case almost seven years to decide on the issue which the lower court had referred to the Constitutional Court. The European Court found this to be too long and there were therefore violations of Article 6 in those cases.

Now, like in the Czech case I mentioned earlier, the question of adversarial proceedings and communication of documents has been an issue also in other cases. I would like to refer to a well known Spanish case, the Ruiz-Mateos case, which was dealt with by the European Court some years ago. It concerned a law of expropriation of a large company in Spain. The expropriation had taken place in the form of a law which had been adopted by Parliament and this was a reason for the Spanish Government to argue that Article 6 was not applicable as it concerned the legality of that law. The argument was not accepted by the European Court because the law concerning the expropriation of specific property was not a general expropriation law, but a law concerning expropriation of specific property. As a

result, the applicants' civil rights were at issue. Now there were several legal issues in the case, but one issue to which I would like to refer related to the fact that the State Advocate's statement which he had submitted to the Constitutional Court was not communicated to the Ruiz-Mateos family. Therefore there was a part of the material in the case on which the private party had not had the opportunity to comment. In the same way as in the Czech case I mentioned a few moments ago the European Court found in the Ruiz-Mateos case that in this respect the principle of adversarial proceedings, i.e. the obligation to communicate all material to both parties and to give the parties the opportunity to comment, had not been satisfied.

These are the kind of procedural problems which have arisen with regard to Article 6 concerning proceedings before constitutional courts. There have also been some cases where the substance of the case has been an issue and I would like to refer here to some decisions by the Turkish Constitutional Court by which certain political parties had been prohibited. Those decisions have been challenged before the European Court and I think that in all those cases the Court found that such a prohibition of political parties by the Constitutional Court was not in conformity with Article 11 of the Convention which guarantees freedom of association.

Finally, I should also refer to what Mr. Kruis has already mentioned, the question of exhaustion of domestic remedies. As he stated the case-law in Strasbourg is that an individual complaint should be brought also before the constitutional court as part of the process of exhaustion of domestic remedies. So in those countries where the constitutional court can be

seized by direct individual appeals, that must be done before a complaint is submitted to the European Court in Strasbourg. This will apply to Germany, to Spain under the *amparo* system and, I believe, also to the Bosnian Constitutional Court in the future once Bosnia and Herzegovina has become a member of the Council of Europe and a party to the European Convention on Human Rights.

Conclusion

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Vice-président de l'Association internationale de droit constitutionnel

RAPPORT-SYNTHESE DE LA CONFERENCE

Monsieur le Président,
Mesdames, Messieurs,

Puisque je suis le dernier orateur à prendre la parole, je voudrais d'abord, au nom de tous les participants, vous remercier pour l'accueil que vous nous avez réservé à Sarajevo. Je voudrais également vous remercier pour le grand moment d'activité intellectuelle et juridique que vous nous avez procuré.

Nous avons passé les uns et les autres l'essentiel de notre week-end à réfléchir, à échanger et à travailler sur un sujet qui n'est pas habituel: les relations entre les cours constitutionnelles et les autres juridictions. De ce point de vue, là aussi, nous vous devons de très grands remerciements. Je sais que cette conférence était la première organisée par la Cour constitutionnelle de Bosnie-Herzégovine, à ce niveau et avec un tel public. Une première conclusion s'impose: elle a été un succès, j'ai appris beaucoup de choses. Je voudrais donc, Monsieur le Président, vous demander de partager avec tous vos collègues de la Cour, nos très sincères remerciements.

Un des grands acquis de cette réunion a été le panorama comparatif qui a été présenté devant nous depuis hier matin. J'ai fait le compte. Directement ou indirectement, nous avons évoqué la situation de dix pays: la Bosnie-Herzégovine, l'Italie, l'Espagne, le Portugal, la France, l'Autriche, l'Allemagne, la République tchèque, la Slovénie, et même les États-Unis. Nous avons ainsi couvert une scène géographique extraordinairement large. Nous avons fait du comparatisme et du comparatisme sérieux, c'est-à-dire sur un sujet précis avec des éléments de comparaison valables entre tous les pays. Certes, les situations envisagées ne sont pas identiques. Mais il y a, d'un pays à l'autre, suffisamment d'éléments analogues pour qu'ils puissent se répondre et que l'exercice soit positif.

Quelles sont donc alors les conclusions que nous pouvons tirer de ces discussions, y compris des derniers débats qui viennent de se dérouler devant nous. Nous avons beaucoup appris sur le sujet lui-même, c'est-à-dire les mécanismes qui mettent en relations les cours constitutionnelles et les autres juridictions. Il s'agissait du premier objet de notre rencontre. Mais, au-delà, en tout cas pour ceux qui ne sont pas familiers de votre pays, nous avons beaucoup appris sur la Bosnie-Herzégovine.

Ce dialogue des juges était au départ consacré aux relations entre les juridictions nationales et les juridictions constitutionnelles. Ce matin il s'est élargi au dialogue entre le juge constitutionnel et un juge international, la Cour européenne des droits de l'homme. Deux observations semblent se dégager:

1) Dans la quasi totalité des pays dont nous avons parlé, il existe des liens entre le juge constitutionnel et les autres juges nationaux;

2) Il existe de ce fait une influence de la jurisprudence des juges constitutionnels sur les autres juges nationaux.

Revenons sur chacun de ces points :

Dans la quasi totalité des pays, il existe des procédures de liaison entre les juges ordinaires et le juge constitutionnel. Dans ce panorama, je laisse de côté la France car le Conseil constitutionnel ne peut pas être saisi par les juridictions ordinaires. Mais nous sommes une exception. Hier matin, un très large panorama montrant la diversité des procédures qui permet à un citoyen de faire valoir ses arguments devant le juge constitutionnel a été présenté. En général, la principale préoccupation du plaideur est de faire respecter les droits fondamentaux. Peu importe qu'il s'agisse du système allemand, du système espagnol, du système portugais ou des procédures en vigueur en Bosnie-Herzégovine. D'une manière ou d'une autre, le recours en contrôle de constitutionnalité à propos des droits fondamentaux arrive devant le juge constitutionnel. Qu'il s'agisse du recours de *amparo,* du contrôle diffus, du contrôle concentré, de la question préjudicielle, du recours contre une décision juridictionnelle, peu importe, le résultat est le même. La cour constitutionnelle nationale aura à se prononcer sur la conformité de la loi pertinente par rapport aux normes constitutionnelles applicables et le cas échéant à l'interpréter.

Tous les intervenants ont souligné qu'il existe un génie national des procédures et que chaque pays doit tenir compte de son héritage et de ses habitudes. Par exemple, nos amis portugais expliquent que depuis un siècle, il existe un contrôle diffus, mais qu'il n'a

jamais fonctionné jusqu'à une période récente et qu'il fonctionne désormais grâce au juge constitutionnel. Il aurait été possible d'étendre la comparaison, par exemple aux pays nordiques qui connaissent théoriquement les procédures de recours devant la Cour suprême, mais la fréquence de telles décisions est rare. A quelques exceptions près, il existe une pratique générale selon laquelle les affaires pendantes devant les juridictions nationales peuvent arriver dans le prétoire du juge constitutionnel pour une appréciation du contrôle de constitutionnalité, contrôle qui porte à la fois sur la forme extérieure de la norme et sur son contenu.

Ces mécanismes de liaison débouchent obligatoirement sur une influence de la jurisprudence des cours constitutionnelles sur les autres juridictions. Sinon le système n'aurait aucun sens. Ici aussi nous retrouvons une extraordinaire diversité, mais diversité qui présente également des points communs. Est-ce que la décision de la cour constitutionnelle aura un effet *erga omnes* ou un effet *inter partes*. Est-ce qu'il s'agit d'une déclaration d'annulation ou simplement d'une décision visant à écarter l'application d'une loi. Ici aussi il faut tenir compte des contextes nationaux. J'ai néanmoins le sentiment que nous avons à peu près partout les mêmes techniques de contrôle par le juge constitutionnel. Il y a des cas où le contrôle fonctionne selon le mode abstrait, d'autres où il fonctionne selon le mode concret. De ce point de vue nous pouvons maintenant réinsérer la France puisque les décisions du Conseil constitutionnel s'imposent, quelquefois avec un peu de retard, mais elles s'imposent aux autres juridictions.

J'ai été très frappé par le fait que la plupart des intervenants lorsqu'ils ont analysé les techniques du juge constitutionnel ont presque tous utilisé les mêmes mots. On trouve chez les différents orateurs des expressions quasiment identiques à celles qui étaient utilisées par le président de votre Cour à l'ouverture de cette réunion à propos de «l'interprétation créatrice». On retrouve très rapidement le débat ancestral, et certainement à venir, sur le rôle du juge. Celui-ci est-il créateur de droit ? Le constat est simple. Le juge constitutionnel est obligé de donner une réponse. Dans beaucoup de cas, à travers sa réponse, il enrichit le droit. Il s'agit donc, d'une certaine manière, d'une création. La Cour italienne est sans doute celle qui a été le plus loin dans le raffinement des techniques d'interprétation avec ce que certains ont qualifié de « sentence interprétative », de « sentence manipulatrice » ou de doctrine du « droit vivant ». Je crois que nous pourrions étendre cette analyse aux autres juridictions. Les discussions qui ont eu lieu devant votre Cour même sur la valeur des déclarations interprétatives en est une illustration.

Faut-il mieux annuler ou interpréter, c'est-à-dire faire en sorte que la loi soit mise en œuvre conformément à son interprétation la plus conforme aux droits fondamentaux, ou faut-il la renvoyer purement et simplement devant le législateur ? Il existe une tendance des cours constitutionnelles à utiliser au maximum l'interprétation positive. De ce point de vue les choses sont assez claires et rejoignent de manière intéressante le débat que nous venons d'avoir sur la Cour européenne des droits de l'homme. Plusieurs intervenants ont évoqué la marge de manoeuvre, voire l'autonomie d'une cour supranationale à l'égard des

cas qui lui sont transmis, notamment de ceux qui proviennent des cours constitutionnelles nationales. La notion de *self restraint,* évoquée par le président Rubio Llorente, fera certainement l'objet d'un accord de tous les participants, sous une réserve qui relève du principe de subsidiarité. Le *self restraint* concerne-t-il les cours constitutionnelles face aux cours nationales inférieures ou le juge supranational face au juge national. Il y a un débat sur le rôle du juge que vous avez à Sarajevo, que nous avons à Strasbourg, que nous avons à Luxembourg pour les pays membres de l'Union européenne et que nous avons dans tous les pays. Notre rencontre nous a permis de retrouver beaucoup des grands thèmes des grands débats constitutionnels sur le rôle du juge. Tout arrive devant le juge. Je crois qu'il faut en être conscient. Dans tous les pays nous entendons le raisonnement selon lequel il n'est pas normal que le juge soit amené à statuer sur tel ou tel objet. Il faudrait, selon certains, que le juge n'ait pas à s'occuper de certains aspects de la vie privée ou de certains aspects de l'évolution des bio-technologies. Mais ici comme ailleurs, le juge n'est pas libre de choisir. 11 est lié par ceux qui le saisissent. Il est logique que le citoyen essaie de faire prévaloir ses présentions, positives ou négatives, aussi longtemps qu'il le peut et avec tous les moyens juridiques qui sont mis à sa disposition. Dans ce cas et avec la prudence qui s'impose, le juge constitutionnel n'a pas d'autre solution que de statuer.

Pour la plupart d'entre nous, la venue à Sarajevo était une découverte. De ce fait, nous avons beaucoup appris sur votre ville, sur votre pays, sur votre Constitution et sur votre Cour. La Bosnie-Herzégovine nous donne un exemple extraordinaire de ce que peut

être le droit constitutionnel vivant. Je ne dis pas qu'il s'agit obligatoirement d'un modèle et me garderai bien d'entrer dans une classification. Mais en tout cas à travers à la fois la nature juridique de votre pays et le rôle de votre Cour constitutionnelle nous retrouvons beaucoup de thèmes qui nous intéressent. Je suis convaincu que ceux d'entre nous qui assurent des fonctions d'enseignement puiseront dans la richesse constitutionnelle de la Bosnie-Herzégovine beaucoup d'exemples. Nous nous sommes interrogés sur la nature juridique du système constitutionnel de votre pays et sur le point de savoir dans quelle case d'une typologie doctrinale il pouvait entrer. D'une certaine manière, cette discussion n'a guère d'importance. A mes yeux, et probablement à ceux de vos invités, l'essentiel est que la Bosnie-Herzégovine puisse être gouvernée de la meilleure manière possible et que votre Cour assure son œuvre de régulation et de conciliation.

Votre Constitution est totalement originale: elle l'est par son mode de création, elle l'est par sa structure, elle l'est par les compétences qu'elle donne à chacun des organes de votre pays. Il ne nous appartient pas de porter ici aujourd'hui un jugement de valeur sur cette Constitution, mais simplement de la prendre comme objet d'étude. Elle est un fait constitutionnel original. Il est rare que des Constitutions découlent d'un accord international. Il y en a eu dans le passé. Celui-ci est le plus récent et sans doute le plus achevé. Cette situation a certainement une influence sur la confiance que les citoyens de ce pays peuvent avoir dans leur Constitution. Le pacte fondateur n'est pas exactement de la même nature que celui qui existe aux États-Unis. Il est probable que la notion de patriotisme constitutionnel qui a été évoquée

à propos de la Loi fondamentale allemande se heurte ici à des résistances culturelles. Votre Constitution est une règle d'organisation de la vie politique, de la vie collective et de la vie individuelle dans l'espace géographique des frontières de la Bosnie-Herzégovine. Elle n'est à coup sûr qu'une étape.

A votre Cour, et à travers elle à vos concitoyens, j'adresse de sincères remerciements pour cette très enrichissante rencontre. Je forme des voeux pour le succès de vos missions.

Frank Testen,
President of the Constitutional Court of Slovenia

SHORT COMMENTS ABOUT THE QUESTION OF WHAT THE COMPETENCE OF THE CONSTITUTIONAL COURT IS

I would like to make some short comments about the question of what the competence of the Constitutional Court is and in what acts this competence has to be provided for from the point of view of the experience of the Slovenian Constitutional Court. We are a newly established democracy, learning mainly from traditional European democracies. However, I feel free to observe that the Slovenian Constitutional Court has perhaps a richer experience than the Constitutional Court of Bosnia and Herzegovina. I would, therefore make some comments about how we have developed our tools to provide legal remedies for constitutional questions.

In the Slovenian Constitution, the Constitutional Court is authorised to abrogate statutes which defines it as "a negative legislator". However, practice has showed that the Court would not be in a position to perform its constitutional role if it only adhered to the competence and to the tools given to it expressly by the Constitution. Therefore we studied the comparative legislation and jurisdictions and discovered that almost every European constitutional court has had to develop

techniques, which were not provided for expressly in the constitution and legislation. We discovered, for example, that our Italian colleagues have developed several techniques, for instance “sentenze manipolative”, “sentenze additive”, “sentenze interpretative”. We have also found certain decisions in German constitutional practice. We found certain types of decisions in the Canadian legal system. They developed techniques called “reading in” (in French this “reading in” is called “interpétation large”). We found that we cannot be satisfied with our competence to only abrogate statutes. Therefore we started to interpret them in order to add to their content. Well, we had to be restrained but still we could not refrain from adding certain interpretations and meanings to the regulations and statutes. In performing the duties of a constitutional court we naturally met certain opposition from our Government, from the Parliament. We caused some small conflicts even. However, so far we have not had any conflicts with the Supreme Court although we not only annul decisions, but also decide on the merits in certain cases. There was no strong opposition against this practice and we feel that we have performed a decisive role in making the people and the society of a former communist republic perceive that there are three separate powers in Slovenia as a democratic society. Thank you.

Janusz Trzeinski,
Vice-President, Constitutional Tribunal Poland

THE ESSENCE OF THE CONSTITUTIONAL TRIBUNAL BASIC ACTIVITY

The discussion on the constitutionality of law, starting from the establishing of the Constitutional Tribunal in Poland in 1982, up to the-passing of the new constitution of the Republic of Poland on 1997 and the new Constitutional Tribunal Act of 1997, has focussed also on the position of the Constitutional Tribunal in the political system from the viewpoint of the classification of state bodies (organs).

It is to this issue 1 wish to devote a few remarks. Hence, this will be an attempt to reply to the question as to what the Constitutional Tribunal is in comparison with other constitutional state bodies and, an attempt to answer the question on how to name its basic activity when compared with the activities of other constitutional state bodies specialy the activities of the courts.

The existing lack of uniformity of views on the nature of the Constitutional Tribunal's activity or on defining just what type of body the Tribunal is from the standpoint accepted in the constitution and the science of state bodies classification, spearheads the major troubles which science has encountered in this issue up to the our days.

Most elaborations mention that the Constitutional Tribunal is a "judicial-type" body. Standpoints are also presented there which define the Constitutional Tribunal as a "legal protection body", as a "political-judicial body", as a "control body of a judicial character", as a "quasi-judicial decreeing body", as a "body similar to a court " or as just a "court of law", while the Tribunal's activity are defined as approximating the administration of justice or as the administration of justice. Some call the Tribunal, a special type of state body". Recently the CT has been increasingly widely termed "a court on the law".

The above quoted definitions of the Constitutional Tribunal clearly display what great difficulties have existed and still exist to attempts to qualify the Constitutional Tribunal to an appropriate group of constitutional bodies and, thereby, to attempts to define the nature of its activity.

In my view, the approval of the new constitution on the 2 IV 1997 did little to clear up the issue of evaluating the place occupied by the Constitutional Tribunal in the system of state organs as well as the issue of evaluating the nature of its basic activity. Though the formulation of the provisions art. 173 of the constitution: .Courts and Tribunals are an authority separate and independent of other authorities"" and art. 10 para. 2: .Legislative authority is administered by the Sejm and Senate, the executive authority of the President of the Republic of Poland and the Council of Ministers, and judicial power by courts and tribunals" as well as art. 1 of the Constitutional Tribunal Act: The Constitutional Tribunal (.....) is a body of judicial authority (....)" - might lead to the conclusion that the Tribunal is a judicial authority. In effect that would be

a hasty conclusion since those provisions find no development either in the constitution or the Tribunal Act which would state that the Tribunal satisfies all the features of a body of judicial authority.

The attempts to qualify the Constitutional Tribunal as a court and its activity as the administration of justice have diverse grounds:

1) referring to the separation of powers when thinking of the Tribunal as a state body, as the criterion of classifying state bodies. This is inconsistent with constitutional facts,
2) granting Constitutional Tribunal members the title of judge,
3) granting Constitutional Tribunal members independence of judiciary modelled on the independence of the judiciary in the administration of justice,
4) introducing trials as the manner of conducting cases concluded with delivering a verdict,
5) performing control of the constitutionality of the law by courts in several contemporary countries,
6) the special, very wide manner of comprehending the administration of justice. 1 would like to devote a few remarks to the latter question.

In science there are, two groups of opinions on how the concept of administration of justice is comprehended. One highlights that, the administration of justice is only the activity of the courts.

The second group of opinions highlights activity consisting of deciding on legal contentions, basing on legal norms in the name of the state. According to

this standpoint the administration of justice is performed not only by courts. Those who wish to recognise the Constitutional Tribunal's activity as administration of justice are recruited from among advocates of administration of justice in the subjective expression.

An analysis of the constitution and an analysis Act of the Constitutional Tribunal do not justify the conclusion that the Constitutional Tribunal's activity consists of settling legal contentions, that is - that it tits into the concept of the administration of justice.

The latter remark also concerns proceedings initiated in the form of a question of law which, admittedly, remains in relation to specific proceedings under way, e.g. administrative or judicial, but which in essence is also a motion in abstracts since: *primo* - a question of law is examined by the Constitutional Tribunal on the principles and in the manner envisaged for recognisance motions to state that legislative acts are consistent with the constitution and that other normative acts are consistent with the constitution or with a legislative act; *secundo* - a question of law is only a pretext to initiate proceedings while the substance of the reply does not concern a concrete matter but states the conformity of legal acts with one another.

As concerns the constitutional complaint accepted in Polish constitutional law, it must be stressed that the model was accepted which consists in the complaint not against a judgement but against a normative act, on the grounds of which a court or body of public administration finally decreed on the liberties, rights or duties of the body presenting the complaint. This means that the Tribunal's judicial decision on the complaint has no direct influence on the validity in law

of an existing judicial decision. The party which wants to appeal against the decision will have to apply to a court to reopen proceedings. A constitutional complaint is, similar to a question of law, is one of the available methods to open proceedings before the Constitutional Tribunal, but is not - as in many other countries - an integral part of the system of administration of justice. Although the Tribunal's activity does not fit into the activity of any of the groups of state bodies separately mentioned in the constitution, based on the principle of the separation of powers nevertheless, the majority tend towards calling the Constitutional Tribunal a body of the judiciary power. 1 do not accept such views.

So perhaps one might accept as a starting point when considering the issues discussed here, that the entire constitutional activity of state bodies may be divided into two areas: law-making and application of the law - with the purpose of referring the Constitutional Tribunal's activities to this division. This classification of state bodies activity is known in science and does not coincide with the classification of state bodies as applied in the constitution.

Law making is based on norms of nonn-giving competence contained in the constitution and statutes. Though attempts exist to call the constitutional control of Acts by the tenn "negative" legislative activity, that concept finds no justification on the grounds of Poland's Constitutional Tribunal Act.

The activity of the Constitutional Tribunal is not based on the norms of legislative competence.

It is widely accepted that the activity of state bodies comprising the application of the law consists as

of the application of competence norms of a general nature to individual cases.'

Indubitably application of the law will be the activity of courts of justice that is administration of justice, control of the Supreme Chamber of Control and the activity of administration bodies which is not law making.

In case of activity of the CT there is no "factual state" or "fact" in the sense in which it is used when defining the concept of application of the law. It would be improper to recognise only the motion of stating the constitutionality of legal act as such a factual state.

Perhaps, were our model (in Poland) of the Constitutional Tribunal to admit a Constitutional complaint, in concrete, that is directly related to a specific factual state and with effect for the solution of legal problems related to it, then one could sensibly consider qualifying the activity of the Constitutional Tribunal to the area of application of the law. Since the activity of the Constitutional Tribunal is not application of the law in this sense, it clearly cannot be called the administration of justice.

The jurisdictional activity of the Constitutional Tribunal is, simply speaking, a specific kind of control in comparison with the general comprehension of state control, that is the control of the constitutionality of the law. One might state that this is the third type of constitutional activity of state bodies, next to the making and application of the law, consisting of the control of the constitutionality and legality of normative acts, that is controlling the making of laws.

Kasim Begić,
Président de la Cour constitutionnelle de Bosnie-Herzégovine

DISCOURS DE CLOTURE

Mesdames et Messieurs,

Permettez-moi de vous adresser quelques mots de remerciements pour votre participation au travail de cette Conférence.

En premier lieu, je voudrais dire que cette Conférence a atteint le but qu'on s'était fixé. Au cours de ces deux jours, nous avons échangé nos opinions et avons présenté des expériences relatives à la juridiction constitutionnelle surtout dans le domaine des relations entre la cour constitutionnelle et les autres juridictions. Les expériences dans ce domaine sont riches et diverses. Elles confirment assurément le fait qu'il n'y a pas un modèle qui serait optimal ou généralement accepté, ainsi que le fait que les solutions individuelles sont déterminées par un contexte plus large épar exemple, les portées des juridictions constitutionnelles sont différentes non seulement dans les pays en transition, mais aussi dans les pays ayant un système juridictionnel stable) ce que Mme Weil a mentionné en élaborant les nombreux paramètres de ces relations et, on peut dire que même les modèles indi-

viduels éprouvent des changements plus ou moins considérables avec le temps.

A part son importance théorique et experte, cette conférence avait aussi une importance pratique pour la Cour constitutionnelle de Bosnie-Herzégovine. Bien que notre expérience soit modeste, nous avions l'occasion de valoriser les solutions de notre Règlement intérieur, ainsi que les standards de l'action dans différents types de différends, surtout en ce qui concerne l'appel constitutionnel, et l'établissement des relations avec les autres juridictions de la Bosnie-Herzégovine. J'oserais même dire après cette Conférence que la Cour constitutionnelle de Bosnie-Herzégovine, étant dans un "droit constitutionnel vivant", se trouve sur la bonne voie pour établir une juridiction constitutionnelle comparable à celle de la "juridiction constitutionnelle européenne". Les expériences et les solutions présentées par les autres cours constitutionnelles nous ont assurément aidé à pouvoir trouver à l'avenir des solutions et dispositions du Règlement intérieur de la Cour surtout celles qui ne sont pas encore opérationnelles dans leur pleine capacité.

J'ai également eu un grand plaisir de pouvoir constater que cette Conférence nous a permis de prendre des contacts et j'espère que nous aurons à l'avenir des réunions similaires. Dans ce sens, je me permettrai d'espérer que vos cours et vous-même soutiendrez la Cour constitutionnelle de Bosnie-Herzégovine dans son but d'adhérer à la Conférence des cours constitutionnelles européennes en tant que membre actif. Après cette Conférence et votre participation à son travail, ce qui présente un véritable encouragement pour une cour récente, je voudrais exprimer ma conviction que la

Cour constitutionnelle de Bosnie-Herzégovine atteindra à F avenir des résultats importants pour la “famille européenne des cours constitutionnelles”.

Je vous remercie encore une fois d’avoir pris part à cette Conférence et d’avoir été hôtes de Sarajevo et de la Bosnie-Herzégovine.

Kasim Begić,
Predsjednik Ustavnog suda Bosne i Hercegovine

ZAVRŠNA RIJEČ

Uvažena gospodo, cijenjene kolegice i kolege,

Na kraju ove Konferencije, dopustite mi da se još jednom zahvalim na vašem učešću u njenom radu, i kažem nekoliko rečenica.

U prvom redu, želim da istaknem da su namjena i višestruki ciljevi Konferencije u potpunosti ispunjeni. Tokom ova dva dana mi smo razmijenili mišljenja i prezentirali iskustva ustavnog sudstva, naročito u pogledu odnosa između ustavnog suda i drugih sudskih instanci. Iskustva u ovom domenu, bogata i raznovrsna, nedvojbeno potvrđuju činjenicu da nema modela - općeprihvaćenog i optimalnog, i da su pojedinačna rješenja determinirana ne samo širim kontekstom (dometi ustavnog sudstva su različiti, primjera radi, ne samo u zemljama u tranziciji nego i drugim, ili pak u početku potvrđivanja ustavno-pravnog sistema u odnosu na zemlje sa stabilnim sistemom), a da se ne pominju brojne determinante ovog odnosa o kojima je elaborirala gosp. Weil, i da zapravo čak i pojedinačni modeli tokom vremena doživljavaju veća ili manja inoviranja.

Na ovom slijedu, Konferencija je, pored teorijskog i stručnog aspekta, imala i neposredni praktični

značaj za Ustavni sud BiH, jer iako je naše iskustvo skromno, ipak smo bili u prilici da valoriziramo i rješenja u Poslovniku, i standarde djelovanja u pojedinim vrstama sporova, pogotovo kod apelacione jurisdikcije, uključujući i uređivanje odnosa naspram drugih sudskih instanci u Bosni i Hercegovini. Usuđujem se u ovom smislu ustvrditi da je, sudeći po ovoj Konferenciji, Ustavni sud BiH, krećući se u "živom ustavnom pravu", na dobrom putu da ustanovi ustavno sudstvo komparabilno na standardima "evropskog ustavnog sudstva". Svakako da su nam prezentirana iskustva i rješenja kod drugih ustavnih sudova od neposredne pomoći za buduće oblikovanje nekih rješenja i odredbi Poslovnika Suda, pogotovo onih koja još uvijek nisu u punom kapacitetu operativna.

Želim da izrazim i zadovoljstvo što smo učinili na ovaj način kontakte, nadam se da ćemo i ubuduće imati susrete ove vrste. Mislim da, u ovom kontekstu, ne tražim previše ako vas zamolim da i vi osobno i vaši sudovi pruže podršku Ustavnom sudu BiH u pogledu sticanja punopravnog statusa u okviru Konferencije evropskih ustavnih sudova. Nakon ove Konferencije i vašeg učešća u njenom radu, što predstavlja istinsko ohrabrenje mladom sudu, mogu da iskažem obećanje da će u vremenu pred nama Ustavni sud BiH imati i rezultate relevantne za članstvo u "evropsku porodicu ustavnih sudova".

I na samom kraju, još jednom se zahvaljujem što ste uzeli učešće u radu Konferancije, i bili gosti Sarajeva i Bosne i Hercegovine.

RULES OF PROCEDURE
OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Having regard to Article VI.2 (b) of the Constitution of Bosnia and Herzegovina, at its session held on 5 November 1999, the Constitutional Court of Bosnia and Herzegovina has established the purified text of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", No. 2/97, 16/99 and 20/99).

RULES OF PROCEDURE *

of the Constitutional Court of Bosnia and Herzegovina

- Amended Text -

I - GENERAL PROVISIONS

Article 1

These Rules of Procedure shall regulate, pursuant to the Constitution of Bosnia and Herzegovina (hereinafter: the Constitution) the organization of the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Court), the proceedings before the Court and the legal character of its acts.

Article 2

The Court shall exercise its rights and obligations in accordance with the Constitution, these Rules of Procedure and other acts.

*The Rules of Procedure of the Constitutional Court were adopted in its initial form at the session of 29 July 1997. Until present day, the Rules were amended twice, on 14 August 1999 and 25 September 1999. These amendments concerned primarily the setting out and the delineation of the scope of the appellate jurisdiction of the Constitutional Court. The amended text of the Rules of Procedure was verified at the session of the Court of 5 November 1999, and it was published in *the Official Gazette of Bosnia and Herzegovina* No. 24/99.

The Court shall be independent of all State authorities.

The Court shall organize its work and carry out its activities on the basis of the principle of financial independence.

Article 3

The seat of the Court shall be Sarajevo.

Article 4

The Court shall have its seal and other symbols in accordance with the regulations of Bosnia and Herzegovina.

Article 5

Equal use of the languages and alphabets of the peoples of Bosnia and Herzegovina shall be applied in the work of the Court.

II - GENERAL RULES OF PROCEEDINGS

Article 6

The Court in session decides by a majority of votes of all members of the Court.

Article 7

The work of the Court shall be public.

Proceedings before the Court shall be made public:

1. by informing the public of the preparations and holding of sessions of the Court as well as of public hearings before the Court;
2. by providing information about the course of the proceedings;
3. by allowing the participants in the proceedings and other interested persons to inspect and get copies of the documents from the files in cases the Court is deciding on and by allowing them to be present at the sessions of the Court from which the public is not excluded under these Rules of Procedure;

4. by publishing the adopted decisions;
5. by publishing the Court's Bulletin in which the more important decisions, rulings and other acts shall be published;
6. in any other way regulated by the Court.

Article 8

The proceedings of working sessions of the Court, including deliberation and voting, are not public.

The public shall also be excluded when the Court hears and decides upon issues which are confidential according to the law, when this is required by reasons relating to the protection of morality, public order, state security, the right to privacy or personal rights.

The participants in the proceedings cannot be excluded on the basis of the previous paragraph.

Article 9

Information on sessions and public hearings of the Court (time, place and agenda) shall be announced on the notice board of the Court.

Information referred to in the previous paragraph may be announced in the media, when it is of special importance for the public.

Article 10

In proceedings before the Court, the official languages which are indicated in Article 5 of these Rules of Procedure shall be used. The Court may allow the use of another language upon the request of a participant in the proceedings who belongs to another people.

The Court shall provide the conditions for everyone to exercise his or her right in accordance with the previous paragraph.

1) Participants in the Proceedings

Article 11

The participants in the proceedings shall be:

a) initiators of disputes referred to in Article VI.3 (a) of the Constitution and the adopters of the acts which are the subject of the dispute;

b) the parties to the proceedings which ended in a decision challenged by theappeal as well as the court which rendered the appealed decision (Article VI.3 (b) of the Constitution of Bosnia and Herzegovina);

c) the chair of the House of Peoples, in case of a dispute according to Article IV.3 (f) of the Constitution;

d) the court which referred the issue to the Court and the adopter of the law on whose validity the court's decision depends (Article VI.3 (c) of the Constitution).

On a specific issue, the Court shall determine other participants in the proceedings according to the principle of an adversarial procedure.

The Court may examine an appeal only if all legal remedies which are available under the laws of the Entities against the judgment challenged by the appeal have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the final decision.

Article 12

The Court shall decide only on those appeals that were put on the list of cases for decision.

This list shall be determined by the President and the Vice-Presidents of the Court by majority vote; the President shall have the casting vote in case of a tie.

An appeal shall not be put on the case-list referred to in the previous paragraph of this Article in any of the following cases:

1. if the appeal is anonymous;

2. if the appellant has withdrawn his appeal;
3. if the time-limit for filing the appeal has not been respected;
4. if the appeal was submitted by an unauthorized person;
5. if the Court has already decided on the same matter;
6. if the appeal is manifestly ill-founded *(prima facie).*

Upon reviewing the appeals not put on the case-list, the Court may decide to put them on the list.

Where appropriate, appeals included in the list may be removed from the list by the same procedure, and if removed or originally not included in the list, they may be returned or included in the list.

In the cases referred to in paragraph 3 of this Article, the Court shall decide by rulings, and the appellant shall be informed in writing about the reasons why the appeal was not included in the case-list.

2) Rules of Proceedings

Article 13

Requests for institution of proceedings before the Court shall be delivered by mail or be brought directly before the Court.

Submissions referred to in the previous paragraph shall be deemed to have been received on the day of their receipt in the Court or on the day of delivery by registered mail.

Article 14

A request for institution of proceedings according to Article VI.3 (a) of the Constitution has to contain:

- the title of the disputed act with the title and number of the official gazette in which it was published;
- the provisions of the Constitution which are deemed to have been violated;

- assertions, facts and evidence on which the request is founded;
- the signature of an authorized person (verified with the seal of the applicant).

An appeal according to Article VI.3 (b) of the Constitution has to contain:

- the judgment of a court in Bosnia and Herzegovina;
- the provisions of the Constitution deemed to have been violated;
- assertions, facts and evidence on which the appeal is founded;
- the signature of the appellant.

A request according to Article VI.3 (c) of the Constitution has to contain:

- a specification of the law the review of whose compatibility is requested, with reference to the official gazette in which the law was published;
- a specification of the provisions of the Constitution, the European Convention on Human Rights and Fundamental Freedoms and its Protocols and the laws of Bosnia and Herzegovina in regard to which the compatibility issue arises or of the general rule of public international law whose existence or scope is pertinent to the court's decision;
- assertions, facts and evidence on which the request is founded;
- the signature of an authorized person certified with the seal of the applicant.

Article 15

When the Court reviews the procedural regularity of a proposed decision under Article IV.3 (f) of the Constitution, the ratified copy of the decision, with reasons given for the procedure, shall be enclosed with the request.

Article 16

The Court shall submit the request for institution of proceedings or the appeal to the adopter of the disputed act for the purpose of giving the latter the opportunity to respond or to submit documents.

The Court shall communicate the appeal to the other party in the proceedings leading to the decision challenged by the appeal, for the purpose of giving that party the opportunity to submit a reply.

A failure to submit a response shall not influence the course of the proceedings before the Court.

In case of rejecting of the appeal, the Court may adopt a decision without previously communicating the appeal to the other party, for the purpose of submitting a reply.

Article 17

The President of the Court and the judges shall be informed of requests for institution of proceedings or appeals.

A Judge rapporteur shall be designated for every case according to the order.

In view of the nature of the case, the Court may decide to apply an expedited procedure.

Article 18

The Judge rapporteur shall specify a deadline for submitting the replies to the allegations of the request or appeal.

Article 19

In case the request or appeal sent to the Court is incomplete or does not contain data indispensable for conducting the proceedings, the Judge rapporteur shall request the applicant to rectify the error within a specified period, which may be no longer than one month.

If the applicant fails to rectify the errors within the period, the request or appeal shall be rejected.

Article 20

Participants in the proceedings have the right to inspect the documents of the Court; this right may also be granted to other interested persons.

The request or appeal and the response to the request or appeal are sent to the participants in the proceedings.

Reports, draft decisions, draft rulings and other acts drawn up
in preparation of the decision as well as documents designated as secret under Article 8 of these Rules of Procedure may not be inspected.

The inspection of the documents shall be approved by the Secretary General of the Court and shall be carried out in the official premises of the Court and in the presence of an authorized employee of the Court.

Article 21

Participants in the proceedings and other interested persons may request copies of the documents of the case except those which may not be made available for inspection under Article 20 paragraph 3 of these Rules of Procedure.

Persons referred to in the previous paragraph shall bear the expenses for the transcripts.

Making copies of documents of a case shall be approved by the Secretary of the Court and be carried out in the official premises of the Court.

Article 22

As a rule, the Court shall deliberate and decide on the case on the basis of a written report.

The report shall contain:

1. the designation or name of the applicant,
2. the date of submission,
3. relevant statements on the requests made,
4. the contested act or provisions,

5. the established facts and legal situation, as well as the disputed issues,
6. a conclusion drawn from the established facts and legal situation and an evaluation of the validity of the application based on this conclusion,
7. a proposal for the decision,
8. supplements of importance for the decision (an overview of relevant constitutional jurisprudence, relevant scientific and expert views, a copy of the provisions of relevant regulations, etc.).

The draft of the proposed decision shall be enclosed with the report.

Article 23

Information on the course of the proceedings before the Court shall be given by the President of the Court, the Judge rapporteur or the Secretary General of the Court.

Article 24

Acts of the Court, writs of summons etc. shall be submitted to the persons concerned by registered mail or directly with a delivery slip.

Article 25

When the Court, within its competence, receives several requests on the same matter, the Court shall, as a rule, conduct one set of proceedings and adopt one decision.

Requests as referred to in the previous paragraph shall not be combined if this would prolong the proceedings considerably.

Article 26

When taking a decision, the Court shall only examine whether the existence of those violations alleged in the request.

Article 27

The Court may only evaluate the constitutionality of general acts that are in force.

Article 28

The institutions of Bosnia and Herzegovina, those of the Entities, legal and natural persons and others have, upon the request of the Court, the duty to submit data and information necessary for the work of the Court and to take, upon the directive of the Court, actions in the interest of the conduct of the proceedings.

3) Court Sessions

Article 29

A session of the Court shall be held when required.

As a rule, sessions of the Court shall be held at the seat of the Court, but the Court may decide to hold the session outside the seat of the Court.

Article 30

Sessions of the Court shall be attended by the Secretary General of the Court and the experts who worked on the cases and, when needed, by others as determined by the Secretary General of the Court.

Article 31

The President of the Court shall convene sessions, propose the agenda and chair the sessions of the Court.

The President of the Court shall convene a session when:

1. the Court has decided to hold a session;
2. a judge of the Court requests a session in order to consider matters within the jurisdiction of the Court;
3. a working body of the Court requests a session to be held.

Judges of the Court may propose amendments to the session's agenda.

The agenda of the session shall be determined by the Court.

Article 32

The summons for the session, the case-files and other materials to be discussed at the session shall be served on the judges no later than eight days prior to the day of the session.

Exceptionally, in urgent cases, the summons for the session, case-files and other materials to be discussed at the session may be served within a shorter period.

Article 33

When discussing a case on the agenda of the Court's session, the Judge rapporteur shall, prior to deliberation and voting, outline the legal issues which are relevant for the deliberation and decision, as well as the proposal for the decision.

The Judge rapporteur of the case may designate a legal advisor to give explanations on the case.

After the statements of the Judge rapporteur or the legal advisor, the floor shall be given to the judges in the order in which they request the floor.

The Secretary General of the Court and the professional employees of the Court may participate in deliberations during the session of the Court.

A judge who is prevented from attending the session may submit a written opinion on the case, which shall be read at the session in the course of the deliberations on that case.

Article 34

The Court may adjourn or discontinue the deliberations on a case in order to obtain new data and information or for other reasons.

Article 35

After the deliberations on the case have been concluded, the Court shall take a decision.

The decision shall be adopted by the majority of votes of all judges.

The voting shall be done by show of hands.

The Court may decide to adopt the decision by secret voting.

If several proposals were made on an issue, voting shall be done in the order in which the proposals were presented.

The proposal of the Judge rapporteur shall be considered the first proposal.

Article 36

Judges may not abstain from voting.

When a judge disagrees with the decision, he shall be entitled to deliver a separate opinion.

The judge has the right and obligation to submit and give reasons for his separate opinion in written form no later than within fifteen days.

Separate opinions of the judges shall be attached to the minutes of the session and enclosed with the case which they relate to; they shall be stated in the decisions and rulings passed.

A separate opinion shall be attached to the decision as an annex. The decision shall be published in the Bulletin of the Court together with the separate opinion.

On request of a judge who delivered a separate opinion, the relevant reasons for the separate opinion shall, in an abridged manner proportionally to the volume of the opinion, be included in the decision or the ruling of the Court.

Article 37

Only judges who participated in the hearing may participate in decisions of the Court.

A session of the Court shall, as a rule, be adjourned if not at least one of the judges from each constituent people is present; the following session shall be held, however, in case the same situation occurs again without justified reason.

The provision in paragraph 2 of this Article shall not be applied in cases where the request is rejected or the decision does not affect the constituent people represented by the absent judge.

Article 38

Minutes shall be drawn up at the sessions of the Court.

The Court may decide to make the record in shorthand or to record the course of the session or a part of the session by a tape-recorder. In that case, the shorthand or taped record will be attached to the minutes and is considered to be an integral part of it.

Article 39

The minutes of the Court's session shall contain:

1. the date of the session;
2. the names of present and absent judges;
3. the names of other persons present at the session;
4. the subject of discussion and decision-making;
5. the operative part (dispozitiv) of the decision;
6. the result of the voting indicating which of the judges voted against the decision or which judge delivered a separate opinion;
7. other decisions taken on the occasion of the hearing of the case.

A brief account of the hearing and the more important questions relevant to a decision in the case shall be included in the minutes.

If the public was excluded from the session or parts of it, a statement on this fact shall be included in the minutes.

Article 40

The minutes of the Court's session shall be approved at the next session of the Court.

The approved minutes shall be signed by the President or Vice-President of the Court, the Secretary of the Court, the interpreter and the recording secretary.

4) Public Hearing

Article 41

When, during the proceedings before the Court, an oral hearing of issues relevant to the decision becomes necessary, the Court shall hold a public hearing.

The Court shall decide on the need of holding a public hearing.

Article 42

The participants in the proceedings shall be summoned to the public hearing.

If necessary, the Court shall summon persons who may submit expert opinions and statements relevant to the decision.

On proposal of the Judge rapporteur, the Court shall decide which persons to summon according to the previous paragraph.

Article 43

The summons to the public hearing and the corresponding material shall be served no later than eight days prior to the public hearing.

Exceptionally, the material for the public hearing may be served within a shorter period.

Article 44

The public hearing shall be held at the seat of the Court.

For special reasons, the Court may decide to hold the public hearing cutside the seat of the Court.

Article 45

The absence of participants in the proceedings at the public hearing shall not prevent the Court from holding the public hearing and from adopting the decision.

Article 46

When necessary, the Court may adjourn or discontinue the public hearing in order to obtain necessary data and information or for other legitimate reasons.

In the cases referred to in the previous paragraph the President of the Court shall inform the participants present and other summoned persons when the public hearing shall be held or continued.

Article 47

The President of the Court shall open the public hearing and announce the subject of the hearing.

The Secretary of the Court shall inform the Court about the presence of the participants in the proceedings and of other persons summoned.

Article 48

At the public hearing, the Judge rapporteur shall outline the factual situation and the disputed legal issues insofar as they are relevant to the hearing, without stating his opinion on the decision to be taken.

After the statement of the Judge rapporteur, the participants in the proceedings shall present and explain their positions and shall give replies to the statements made at the hearing; other persons summoned shall present their opinions insofar as they are relevant to the elucidation of the factual situation.

Article 49

The President of the Court shall ensure the maintenance of peace and order at the public hearing.

To that end he may:

- warn any person who disturbs the order,
- decide that a person who insults the Court or someone else or is guilty of any other abuse when speaking shall no longer be allowed to address the Court,

- remove from the public hearing any person who, although warned, continues to disturb the course of the public hearing.

Article 50

When the submissions of the participants in the proceedings and other persons summoned are completed and there are no questions on the clarification of the factual situation, the President of the Court shall conclude the public hearing and inform the participants in the proceedings and other persons summoned about the time and manner of announcement of the Court's decision.

Article 51

The Court, as a rule, shall hold the session of deliberation and voting immediately upon the conclusion of the public hearing.

In the procedure of deliberation, the Judge rapporteur shall be the first to submit his opinion and position on the case at issue.

After the completion of the statement of the Judge rapporteur, the judges of the Court shall present their opinions and positions in the order in which they request the floor.

After the completion of the deliberation, the voting shall take place.

The sessions of deliberation and voting shall be attended by the judges of the Court who participated in the hearing.

Article 52

After completing the session of deliberation and voting, the President of the Court shall, as a rule, orally announce the decision of the Court, including its principal reasons.

The decision of the Court shall be communicated to the participants in the proceedings within 30 days from the day of its adoption.

Article 53

Minutes shall be drawn up at the public hearing.

The minutes at the public hearing shall include data on the session of deliberation and voting.

If there was no shorthand or taped record at the public hearing, the minutes shall include a summary of the statements of the participants in the proceedings and the other persons present.

The written statement of the Judge rapporteur as well as the statements of the participants in the proceedings and other persons present, who may submit their written statements to the Court, shall be attached to the minutes of the public hearing.

5) Acts of the Court

Article 54

The Court shall adopt decisions and rulings.

Decisions shall be taken when the Court decides on the merits of a case brought before it under Article VI.3 of the Constitution and in cases referred to in Article IV.3 (f) of the Constitution.

On all other issues, the Court shall decide by rulings.

Article 55

The Court shall take the decision to reject a request at a session where only the judges and the persons responsible for the minutes are present. The Court shall take such a decision if it finds that:

1. it is not competent to decide;
2. the request was submitted by an unauthorized person;
3. the applicant did not rectify the errors in the given period as requested;
4. the challenged general act is not in effect;
5. the issue in question was already decided by the Court, and it does not follow from the statements and

evidence presented in the claim that there are grounds for a new decision.

The Court may take the decision referred to in the preceding paragraph even when the procedure described in Article 16 of the Rules of Procedure has not been executed.

Article 56

The Court shall take the decision to terminate the procedure if in the course of the procedure:

1. the unconstitutionality of the challenged act has been removed;
2. the challenged general act ceased to be valid;
3. the applicant has withdrawn the request.

In case of a situation from item 3 in the preceding paragraph, the Court may resume the procedure if there is a manifest violation of the provisions of Article II of the Constitution.

Article 57

The Court shall take the decision to dismiss a request if it finds that the violation of the Constitution indicated in the request does not exist.

Article 58

The Court may adopt a partial decision if the request contains several issues and if the nature of the case makes it possible.

Article 59

When adopting a decision, the Court specifies its legal character *(ex nunc, ex tunc).*

In connection with the decision declaring an act incompatible according to Article VI.3 (a) or (c), the adopter of the act may be granted a period, not exceeding three months, within which to adapt it accordingly.

If the incompatibility was not eliminated within the set period, the Court shall, in a decision, declare that the incompatible provisions cease to be valid.

The incompatible provisions cease to be valid on the day on which the decision of the Court referred to in the previous paragraph was published in the "Official Gazette of Bosnia and Herzegovina".

Article 60

The Court shall take the decision to dismiss an appeal as ill-founded if it finds that the case does not raise issues under the Constitution, i.e. if the appellant's constitutional right for which the judgment is challenged has not been violated.

Article 61

If the Court finds that an appeal is well-founded, it may, depending on the nature of the rights and fundamental freedoms under the Constitution in question:

1. decide on the merits of the case and communicate the decision to the competent Entity authority for the securing of the appellant's constitutional rights that have been violated.

The Court may decide on the merits only if a possibility was given to the other party to the proceedings to present its views under Article 16 paragraph 2 of the Rules of Procedure.

2. annul the challenged judgment and refer the case back to the court that adopted this judgment for a new examination if the case does not involve only constitutional issues but also requires the examination of other legal issues and facts upon which the evaluation of constitutionality depends.

The court whose judgment has been annulled is obliged to adopt another one, in the process of which it is bound by the legal understanding of the Court on the violation of constitutionally established rights and fundamental freedoms of the appellant.

The procedure referred to in the preceding paragraph is expedited.

If the court referred to in item 2 of this Article fails to act accordingly to the decision of the Court, the appellant may

institute a new appeal within the time limit issued by Article 11 paragraph 3 of these Rules of Procedure, in which case the Court shall decide on the merits of the case.

Article 62

Everyone whose right is violated by an individual act of last instance or which is final and founded on provisions which ceased to be valid in accordance with Article 59 of these Rules, shall have the right to request the competent organ to alter that individual act; the competent organ has to repeat the proceedings and adapt the act in accordance with the Court's decision.

Article 63

The request to alter an individual act of last instance or which is final, according to the previous Article, may be submitted within the period of six months from the day on which the decision was published in the *Official Gazette of Bosnia and Herzegovina,* if no more than five years have elapsed from the adoption of the act to the decision of the Court.

Article 64

Decisions and rulings shall contain an introduction, the operative part and the reasons of the Court.

The introduction shall in particular indicate the constitutional basis for taking the decision or ruling and the date on which the session of the Court was held.

The operative part (dispozitiv) shall indicate the manner in which the matter was decided and the mode of announcement of the decision or ruling.

The reasons shall indicate the ascertained factual situation and the legal reasons for the decision or ruling.

Article 65

The Court may adopt a supplementary decision and ruling if not all relevant issues have been decided upon in the previous proceedings.

Article 66

The draft decision or draft ruling of the Court shall be discussed by the Court.

The professional and technical proofreading of the text of the decision and ruling shall be done by the Editorial Commission.

The president of the Editorial Commission shall certify the final text of the decision or ruling by his signature.

Article 67

Exceptionally, the Editorial Commission, as well as the judges of the Court, may propose to the Court to review the adopted decision or ruling.

A proposal to review a decision or ruling may be submitted until the decision or ruling is dispatched by the Court.

Article 68

At the request of interested participants or on its own initiative, the Court may alter its decision if new, legally relevant, facts emerge which require an essentially different decision.

The interested participant must submit the request to alter the decision of the Court not later than six months from the emergence of the new facts.

The decision of the Court cannot be altered if, after its adoption, more than five years have elapsed.

Article 69

The original of the decision or ruling shall be signed by the President and the Judge rapporteur; it shall be published only with the signature of the President.

Under original shall be understood the original of the decision of the Court, signed by the President and the Judge rapporteur.

The Secretary of the Court shall certify a dispatch note of the decision or ruling.

Article 70

If the original of the decision or ruling contains technical errors or if the published text is not identical to the original, the Secretary of the Court, on the basis of an authorization of the Court, shall make the correction.

The correction shall be submitted to the participants in the proceedings and shall be published in the same manner as the decision or ruling.

Article 71

The decisions of the Court shall be published in the "Official Gazette of Bosnia and Herzegovina" and in the official gazettes of the entities.

The Court may decide to publish rulings on issues of wider importance in the same way.

In decisions and rulings published under paragraphs 1 and 2 of this Article, only initials shall figure instead of the first and last names of the appellant and of the other party to the proceedings referred to in Article 16 paragraph 2 of the Rules of Procedure.

6) Execution of Decisions

Article 72

Every interested person or body may request the execution of a decision of the Court.

A request to undertake measures for the execution of the decisions of the Court shall be submitted to the Court.

The Court shall confirm by a ruling that the decision has not been executed.

The ruling of the Court shall be submitted to the Council of Ministers of Bosnia and Herzegovina or to the government of the Entity for the purpose of execution.

Article 73

The execution of individual acts of last instance or which are final and founded on provisions which have ceased to be valid in accordance with Article 59 of these Rules, can neither be ordered nor carried out and, in case the execution has begun, it shall be discontinued.

Article 74

If it appears that the consequences of the application of provisions which were declared incompatible, cannot be overcome by altering an individual act, the Court may, at the request of an interested person, decide that these consequences be set aside by restoration of a previously existing situation, by compensation for damage or in any other way.

7) Special Provisions

Article 75

The Court may, until the final decision has been made, fully or partially suspend the execution of decisions, laws (acts) or individual acts (temporary measures), if their execution may have detrimental consequences that cannot be overcome.

The Court shall revoke an interim measure when it has ascertained that the reasons for which it was taken have ceased to exist.

Article 76

If the summons, decisions or rulings of the Court may not be delivered to the participants in the procedure for any reason, except for the requests for reply referred to in Article 16 paragraph 2 of the Rules of Procedure, the delivery shall be effected by putting the summons, decision or ruling on the notice board of the Court.

The delivery shall be considered executed eight days after the summons, decision or ruling was put on the notice board of the Court.

Article 77

The Court shall decide in each individual case on any issue regarding the proceedings before the Court, which is not regulated by these Rules.

III - THE ORGANIZATION OF THE COURT

1) Rights and Obligations of the Court

Article 78

The Court, apart from performing the tasks in accordance with the provisions of the Constitution, shall decide on:

- the election of the President and Vice-Presidents;
- the status and immunity rights of the President and judges;
- the internal organization of the Court and the Services;
- the foundation of working bodies of the Court;
- status issues with regard to the Secretary of the Court and the advisors of the Court;
- the working schedule of the Court and its execution;
- the financial needs of the Court;
- other issues within the competence of the Court.

In the exercise of its financial independence, the Court shall:

- draw up a draft budget required for the performance of the Court's judicial tasks and submit it to the Presidency of Bosnia and Herzegovina for the purpose of having it included in the draft budget referred to in Article VIII of the Constitution;
- adopt a financial plan for the Court which sets out the expected revenues and expenditures for the current year;
- decide on the use of donations and other sources of revenues.

Article 79

The sessions of the Court at which issues according to Article 78 of these Rules of Procedure are decided, shall be attended, apart from the President and the judges, by the Secretary of the Court, and, if necessary, by other professional employees as determined by the Secretary.

Article 80

The Court shall cooperate with other constitutional courts.

The Court may organize meetings and conferences and participate in meetings and conferences where issues of interest for the work of the Court are discussed.

2) The President of the Court and the Judges

Article 81

The Court shall elect the President and Vice-Presidents of the Court among the judges.

Article 82

The President of the Court shall be elected by the Court by secret voting; he is elected if he receives the majority of votes of all judges.

If in the first round of voting none of the candidates receives the majority of votes, the voting shall be repeated with the two candidates who got the largest number of votes. The candidate is elected who receives the largest number of votes in the second round.

If none of the candidates received the majority of votes in the second round of voting, lots shall be drawn.

Article 83

The President of the Court shall be elected by rotation among the judges elected by the legislative organs of the Entities of Bosnia and Herzegovina.

Article 84

The mandate of the President of the Court shall last for 20 months and shall commence upon election.

Article 85

The President of the Court shall organize and supervise the activities of the Court, convene and chair the sessions and public hearings, represent the Court, sign the decisions of the Court, be responsible for the cooperation with other institutions, pass individual acts, and carry out other duties specified in these Rules and other acts of the Court.

Article 86

The Court, at the same session at which the President of the Court is elected, shall elect three Vice-Presidents of the Court.

The Vice-Presidents of the Court shall be elected from among all judges.

The President of the Court and the Vice-Presidents of the Court may not, at the same time, belong to the same people.

The mandate of the Vice-President of the Court shall be the same as that of the President of the Court.

Voting for the Vice-Presidents shall take place in the same manner as for the President of the Court.

Article 87

In case that he is absent or otherwise prevented, the President of the Court shall be represented by the Vice-President whom the President of the Court designates.

In case the President of the Court is not able to designate a vice-president to represent him, the Court determines which of the elected vice-presidents shall represent the President of the Court in the sense of the previous paragraph.

Article 88

The judges shall have the right and obligation to participate in the work and adoption of decisions of the Court and its working bodies whose members they are.

The judges living outside the seat of the Court work in offices established at the place of their residence. These offices shall be equipped with the necessary material-technical resources; the indispensable personnel shall work in it.

Article 89

The President of the Court or a judge shall not participate in the work and decision-making in a case initiated in the Court or brought to the Court on appeal if:

- he or she has a personal interest in the case;
- he or she was involved in the making of an enactment which is the subject of the dispute as a judge, a party in the proceedings or a representative of a party, or of a decision which is the subject of an appeal, or in the creation of a law whose compatibility with the Constitution is being challenged (Article VI.3 of the Constitution), or in dealing with a proposed parliamentary decision whose procedural regularity is the subject of review (Article VI.3(f) of the Constitution); or
- there are other circumstances which create doubts about his or her impartiality.

The judge whose non-participation is being decided upon may give a reply to the proposal for non-participation.

The decision on non-participation referred to in the preceding paragraph shall be taken by a majority of all judges, upon the proposal of the President of the Court or a judge.

Article 90

The judges shall carry out the functions of a judge conscientiously.

The judges shall uphold the reputation and dignity of the Court and the reputation and dignity of a judge.

Article 91

The judges of the Court shall have the right to propose specific issues for consideration at the sessions of the Court.

Article 92

The judges of the Court shall have the right to be regularly informed about all issues of importance for the carrying out of the functions of the Court.

The President and the Secretary of the Court shall be responsible for keeping the judges informed.

Article 93

The position of a judge is incompatible with:

- membership of a political party or a political organization in Bosnia and Herzegovina,
- membership of a legislative, executive and other judicial authority in Bosnia and Herzegovina or the Entities,
- any other position which could influence the impartiality of the Court.

Article 94

The judges, in performance of their function, are entitled to immunity.

Issues of immunity of the judges shall be regulated by a special act adopted by the Court.

Article 95

A judge may be dismissed from the function of a judge before the mandate has expired, in the following cases:

- if he requests his dismissal;
- if he is sentenced to prison;
- if he permanently loses the ability to carry out his function;

- if the circumstances indicated in Article 93 of these Rules of Procedure occur;
- if he fails to perform the function of a judge in accordance with Article 90 of the Rules of Procedure.

The Court shall ascertain the existence of reasons according to the previous paragraph, dismiss the judge on the basis of consensus of the other judges and inform the organ which elected that judge.

Article 96

The Court shall issue an official identity card to the President and judges.

The form and the mode of issuance of the official identity card shall be prescribed by the Court.

Article 97

The President and judges shall wear official attire at public hearings.

3) Working bodies of the Court

Article 98

The work of the Court shall be carried out in both permanent and *ad hoc* commissions and other bodies of the Court.

Permanent Commissions shall be:

- the Editorial Commission,
- the Commission for Administrative Affairs,
- the Commission for Publications and Information of the Court,
- the Commission for Electronic Equipment of the Court and Information Systems.

Ad hoc commissions shall be established for drafting general acts, expert documents, analyses and for other issues.

Article 99

The Editorial Commission shall designate the board for proofreading of the texts of decisions, rulings and other texts of the Court.

Article 100

The Commission for Administrative Affairs shall supervise and analyze the organization of the work of the Court, prepare the proposal for the budget and final account, make proposals and deliver opinions for resolving other issues relating to the judges, the Secretary of the Court and professional employees who are appointed and dismissed by the Court.

Article 101

The Commission for Publications and Information of the Court shall publish the Bulletin and other publications of the Court, prepare the appropriate professional literature as well as articles on the work of constitutional courts in the media, scientific and professional publications and shall decide on the purchase of professional literature.

Article 102

The Commission for Electronic Equipment and Information Systems of the Court shall be responsible for the use and improvement of the information system, for the carrying out of the development program, and for inclusion of the system into information networks in the country and abroad.

Article 103

A permanent commission shall consist of the president and, as a rule, three members.

The president and one member shall mandatorily be elected among the judges.

The commission, whenever required, shall elect a secretary.

The President and the members of permanent commissions shall be elected for two years. After this period has expired, they may be reelected.

4) The Court Service

Article 104

The Service of the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Service) shall carry out professional and other duties.

Certain accounting, financial, material and technical duties for the needs of the Court may be assigned to another appropriate service.

Article 105

The most complex professional duties relating to the realization of rights and duties of the Court shall be carried out by the Secretary of the Court and the advisors of the Court who are appointed and dismissed by the Court.

The Secretary of the Court and advisors may be appointed among distinguished lawyers with experience of the same or similar legal activities.

The mandate of the persons referred to in paragraph 1 of this Article shall have the same duration as that of the judges.

Article 106

The organization of the Service shall be regulated by a special act of the Court.

The act referred to in the previous paragraph shall provide a more detailed regulation of the organization and tasks of the Service, the conditions for the realization of the tasks, the number of executive personnel and other issues of importance for the work of the Service and the realization of the rights, duties and responsibilities of the employees.

Article 107

The President of the Court, upon agreement with the Vice-presidents, adopts individual acts in accordance with the general act according to Article 106 of these Rules.

If an agreement as referred to in the previous paragraph cannot be reached, the individual act shall be adopted by the Court.

IV - OTHER PROVISIONS

Article 108

The regulations which are in force for the organs of the authorities of Bosnia and Herzegovina shall, as appropriate, be applied to the labor law related legal status of the employees of the Service as well as the material and financial issues of the Court.

The Secretary of the Court, in accordance with the authorization of the President of the Court, shall be the superior for using the means of operation of the Court and the Service.

Article 109

The Court shall, by a separate act, regulate the salaries and other forms of compensation for the judges and the persons it appoints.

Upon the proposal of the Secretary of the Court, the Court shall adopt an act regulating the salaries and other forms of compensation for the employees of the Service.

Article 110

The regulations on office operation, working hours and house rules applicable to the organs of the authorities of Bosnia and Herzegovina shall as appropriate be applied to the Court, unless otherwise stipulated by an act of the Court.

Article 111

General acts of the Court shall be adopted by a majority of votes of all judges.

These Rules of Procedure of the Court shall be published in the *Official Gazette of Bosnia and Herzegovina* and the official

gazettes of the Entities; other general acts and the act on the election of the President of the Court and the Vice-presidents shall be published in the manner regulated by the Court.

Article 112

These Rules of Procedure shall enter into force on the day of their adoption.

No. P 7/97
Sarajevo, 5 November 1999

President
of the Constitutional Court
of Bosnia and Herzegovina

Prof. Dr. Kasim Begić

CIP - Katalogizacija u publikaciji
Nacionalna i univerzitetska
biblioteka
Bosne i Hercegovine, Sarajevo

347.991(063) (082)

MEĐUNARODNA konferencija Odnosi između ustavnih sudova i drugih sudskih instanci (2000 ; Sarajevo)

Međunarodna konferencija Odnosi između ustavnih sudova i drugih sudskih instanci, Sarajevo, 18. i 19. 3. 2000. godine = Conference internationale Relations entre les cours constitutionnelles et les autres juridictions, Sarajevo, les 18 et 19 mars 2000 = International Conference Relations between Constitutional Courts and other Juridical Instances, Sarajevo, 18-19 March, 2000. - Sarajevo : Ustavni sud Bosne i Hercegovine :
2001. - 203 str. ; 25 cm

Bibliografija uz pojedine radove

ISBN 9958-635-06-2

I. Conference internationale Relations entre les cours constitutionnelles et les autres juridictions (2000 ; Sarajevo) vidi Međunarodna konferencija Odnosi između ustavnih sudova i drugih sudskih instanci (2000 ; Sarajevo). - II. International Conference Relations between Constitutional Courts and other Juridical Instances (2000 ; Sarajevo) vidi Međunarodna konferencija Odnosi između ustavnih sudova i drugih sudskih instanci (2000 ; Sarajevo)