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Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance

Joseph Marko



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Abstract

The article reflects the experiences of the author after having served as one of the three international judges of the Constitutional Court of BiH from 1997 to 2002. Based on the relevant case-law of the Constitutional Court it gives a basic overview of the constitutional structure of BiH and analyses the position of the Court *vis-à-vis* other institutions established under the Dayton-Agreement and the powers of judicial review and human rights protection based on its appellate jurisdiction. Moreover means of interpretation and the elements of constitutional doctrine elaborated through case-law as well as organisational and procedural matters such as the role of dissenting opinions are discussed. In conclusion the article reflects the role of the Constitutional Court in transition from an ethnically divided and war-torn society to democracy and the effective protection of human and minority rights.

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Key words

Bosnia and Herzegovina - Dayton Agreement - Judicial Review - Human Rights - Minority Protection - Dissenting Opinions - Transition to Democracy.

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Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance

Joseph Marko

1. The Dayton / Paris Agreement and its International and Constitutional Legal Framework

With the signing of the General Framework Agreement for Peace in Dayton, Ohio on 14 December 1995,¹ a four year military conflict in Bosnia and Herzegovina came to an end. This Framework Agreement, with its eleven Annexes in which military and civilian implementation is regulated in further detail, can be described as the ‘institutional’ superstructure of the ceasefire, with which the military ‘status quo’ of a particular moment in time was ‘frozen’. This overwhelmingly suggested a drafting compromise of political goals between the warring parties.

As a result, the independence of the so-called ‘Republika Srpska’ (RS), as called for in early 1992 by the functionaries of the insurgent Serbian Democratic Party under the leadership of Radovan Karadzic, went unrecognised. The RS, however, retained its institutional structure, which as a result of the constitution of 1992 reflected that of an independent state, and hence was transformed into one of the two ‘entities’ of the state of Bosnia and Herzegovina whose continued international legal existence was presumed. The other entity, the so-called ‘Federation of Bosnia and Herzegovina’, had been established by means of the Washington Agreement in April 1994. This agreement - heavily influenced by the US administration - contained the international and constitutional legal foundations to bring about the end of the “war within a war”, i.e. the military conflict between the Croatian paramilitary sections of the Croatian Defence Council (HVO) and the Bosnian Government Forces which had broken out in 1993. As one of the four documents of the Agreement, the Constitution of the Federation of Bosnia and Herzegovina² established by means of an institutional framework and provisions for the territorial scope of applicability the essential groundwork for the subsequent Dayton Agreement. In doing so the group previously referred to in the constitution as “Muslims” became known as Bosniacs and the ‘new’ language of Bosnian was established alongside those of Serbian and

¹ The Dayton Agreement and all related texts maybe found in Office of the High Representative (ed.), *Bosnia and Herzegovina. Essential texts* (Sarajevo, 3rd revised and updated edition, 2000).

² Published in *Službene novine Federacije Bosne i Hercegovine*, br. 1/1994 (Official Journal of the Federation of Bosnia and Herzegovina, No. 1/94), 30 March 1994.

Croatian. Furthermore, the Bosniacs and Croats were labelled “constituent peoples” of the Federation. In addition, an ethnic quota system for the legislative and executive and the establishment of “cantons” each with a Bosniac or Croatian majority population were developed after the model of consociational democracy in order to ensure an institutional and territorial equilibrium of power between these constituent peoples.

These very same structures are to be found in Annex 4 of the Dayton Constitution: as such reference is made in the Preamble to “Bosniacs, Croats and Serbs, as constituent peoples (along with Others) ...” In accordance with Article IV. 1, the “House of Peoples”, as the upper body of parliament consists of five Croats, five Bosniacs and five Serbs. In accordance with Article V, the Presidency consists of three members: a Bosniac, a Croat and a Serb. In addition there is ensured in accordance with Article V. 4. b. a proportion of constituent peoples in the nomination procedure for ministers and their deputies for the Council of Ministers as a collegiate organ.

As a result of the classification of Republika Srpska (RS) and the Federation of Bosnia and Herzegovina as entities in accordance with Articles I. 1 and I. 3 of the Constitution, the legal continuity of the Republic of Bosnia and Herzegovina as internationally recognized state out of the 1992 dissolution of the communist state of Yugoslavia was ensured. Not only the change of name to Bosnia and Herzegovina, but also in particular the weak position of the so-called national “Institutions of Bosnia-Herzegovina” under the distribution of power should be regarded as expressions of a balance of power and a drafting compromise between the warring parties. Article III. 1 states that only matters of foreign policy, foreign trade policy, customs policy, monetary policy, international and inter-Entity criminal law enforcement and regulation of inter-Entity transportation are in the jurisdiction of the national organs, whilst the general clause of paragraph 3 of that Article provides that all “governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina” are within the jurisdiction of the entities. As a result, the entire internal and external security as provided by both the police and military apparatus has been constitutionally rendered to the jurisdiction of the entities. Consequently, and as a result of the de facto existing ethnic separation, the national organs themselves cannot properly function. Parliament and the Presidency cannot therefore fulfil their legislative role so that the “High Representative” established under Annex 10 of the Agreement started - in interpreting his powers extensively - to promulgate legislation in the place of a Parliament blocked along ethnic lines.³

³ See Joseph Marko, “Friedenssicherung im 21. Jahrhundert: Bosnien und Herzegovina als europäische Herausforderung”, in Konrad Ginther et al. (eds.), *Völker- und Europarecht: 25. Österreichischer Völkerrechtstag* (Vienna, 2001), 55-87 and the empirical analysis of the state of democracy and rule of law in Bosnia and Herzegovina five years after Dayton. See also the recent

All in all it has become evident that not only as a result of the distribution of powers, but also the drafting compromises such as that provided by Article III. 2. a. which grants the entities the right “to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina”, the Constitution does indeed contain strong disintegrating factors, which in practice through application by the same political parties which were once warring factions, become even more enhanced.

The exact role of a constitutional jurisdiction in such an international and constitutional framework is therefore a matter of ongoing debate. From the comparative position, the constitution of Bosnia raises two important peculiarities. As a result of the constitutional acceptance of the supremacy of the sovereignty of the people and the ideological assumption that communist constitutions containing fundamental social rights represent themselves the highest level of human rights protection, none of the former communist states recognised either the concept of judicial review or the protection of fundamental rights by a specialised court. The sole exception to this was the Socialist Federal Republic of Yugoslavia in which the constitutional document of 1963 provided for the establishment of a Constitutional Court. On the basis of a unique federalised structure, other constitutional courts were also established in not only the six republics and thereby also Bosnia, but also in the autonomous provinces of Vojvodina and Kosovo. As a result, Bosnia and Herzegovina did possess a functioning constitutional tradition, albeit under a different ideological model, before the establishment of the Constitutional Court by the Dayton Agreement to which - as a second peculiarity - not only national but also three international judges belong.

The following chapters not only deal with the necessary description and analysis of the role of the Constitutional Court as a national institution, the role of the judges, their constitutional powers of judicial review and of human rights protection⁴, the relevant gaps in legal protection and the methods of

analysis by Edin Sarcevic, “Verfassungsgebung und ‘konstitutives Volk’: Bosnien und Herzegovina zwischen Natur- und Rechtszustand”, 50 *Jahrbuch des öffentlichen Rechts* (2002), 494-532.

⁴ Both the so-called abstract and concrete judicial review of legislation as well as individual constitutional complaints are regulated in Article VI. 3. of the Constitution:

The Constitutional Court shall uphold this Constitution.

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

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

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

b. *The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.*

interpretation as well as dogmatic doctrines developed on the basis of the case law of the Court, but also with the reflection and evaluation of the role of the Court in relation to law and politics as the main issue of constitutional jurisdiction under the particular circumstances of the re-construction of Bosnia and Herzegovina as a state.

2. The Institutional Position of the Court

2.1. What is 'the' Constitution of Bosnia and Herzegovina?

In order to provide clarification of the institutional position of the Constitutional Court towards the international and other national organs, another preliminary question of the entire legal system as developed by the Dayton Agreement has to be addressed. What really is *the* constitution of Bosnia and Herzegovina and how wide is the role of the Court as provided in Article VI. 3 "to uphold *this Constitution*" (emphasis added)?

This question raises two main issues. Firstly, how does the Dayton Constitution relate to the earlier version of the re-promulgated constitution of the Republic of Bosnia and Herzegovina from 1993?⁵ Secondly, what is the relationship between Annex 4 and the other Annexes to the Agreement? Is solely Annex 4 to be regarded as 'the' constitution of Bosnia and Herzegovina or does the Constitution embrace *all* Annexes?

One particular matter worthy of note is that on 12 December 1995 the Parliament of the Republic of Bosnia and Herzegovina passed a constitutional law on the 'amendment' of the constitution of the Republic of Bosnia and Herzegovina, Article 1 of which "empowers" the Republic to configure the internal national infrastructure in accordance with the framework of the peace agreement. Despite this and in a form of constitutional 'mental reservation' Article 1 paragraph (2) provides then that in the event that the agreement would not be 'implemented', the Republic of Bosnia and Herzegovina may declare the Dayton Agreement invalid and hence in

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

In addition, the Court by virtue of Article IV. 3. f. is empowered to determine in cases of an ethnic block veto in Parliament by means of emergency proceedings the procedural regularity of the legislative process. The recently approved Electoral Law, Službeni glasnik Bosne i Hercegovine, br. 23/2001 (Official Journal of Bosnia and Herzegovina, No. 23/2001) granted the Court the competence to determine the temporary incapacity to hold public office of a member of the Presidency. Article 18.12(1) of this law states furthermore that the electoral rules for the Presidents and Vice Presidents of the entities and for the delegates of the House of Peoples of the national Parliament are not to be finalised until the implementation of the Court's decision in case U 5/98.

⁵ Službeni list Republike Bosne i Hercegovine, br. 5/1993 (Official Journal of the Republic of Bosnia and Herzegovina, No. 5/1993).

accordance with the constitution of the Republic continue as an internationally recognised, sovereign and independent state.⁶

In the case U 7/97 from 22 December 1997,⁷ the Constitutional Court was called upon to determine an application by the “Croatian Party of Law 1861” and the similarly-named Bosnian party upon the constitutionality of the Dayton Agreement. The two parties had both argued without detailed reasoning that the Dayton Agreement violates the terms of the constitution of the Republic of Bosnia and Herzegovina. With the somewhat brief reasoning that “on the basis of the Constitution of Bosnia and Herzegovina the Constitutional Court is endowed with the sole task of protecting the Constitution” the Court dismissed the argument that the Dayton Agreement be examined through application of the standards of the ‘old’ constitution of the Republic of Bosnia and Herzegovina. This decision is indeed correct, even if the Constitutional Court omitted to mention the wording of the clear provisions of Article XII. 1 of the Dayton Constitution, which expressly foresees that “this Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending *and superseding* the Constitution of the Republic of Bosnia and Herzegovina” (emphasis added). In light of the fact that the draft text was written by US lawyers, the somewhat unusual formulation of “amending and superseding” was included with the aim of making quite clear that the Dayton Constitution came about in a revolutionary manner, i.e. as a result of a breach of the provisions of the old constitutional law on constitutional amendments.⁸ As such, the new constitution does not merely replace the individual sections of the ‘old’ constitution in which it may be in conflict; rather it replaces the old version in its entirety. As the Dayton Agreement came into force on 14 December, the provisions of Article XII of Annex 4 derogated from the above-mentioned constitutional law which had itself come into force on 12 December.

The recurrent mention within the Dayton Agreement, such as in Articles VI. 3, X and XII, to “this Constitution” clearly refers to Annex 4 assisting in answering the second question on the relationship between Annex 4 and the other Annexes. The main issue is the ranking within a hierarchy of norms of these Annexes and whether the provisions of the other Annexes might serve as a standard of review for the constitutional court. As for the first aspect, there is already contained within case U 7/97 a somewhat confusing *obiter dictum* on the matter. The Court stated that the Constitution was accepted as Annex 4 of the Dayton Agreement, from which follows that there can be no conflict between this and the other Annexes. The *obiter dictum* is to be understood in such a way that the Court relied upon the theory of ‘legal unity’ of the Dayton

⁶ Službeni list Republike Bosne i Hercegovine, br. 49/95, para. 540.

⁷ Službeni glasnik Bosne i Hercegovine, br. 7/98.

⁸ The constitutional amendment was thereby not taken into consideration. It was not until official assent was given to the international agreement that the Parliament passed the constitutional law referred to in the text.

Agreement,⁹ i.e. that the Framework and all its Annexes were assigned constitutional status and as such - as has been clarified by later decisions to be analysed - the Court assumed that in the event of a nevertheless possible conflict of norms, such a conflict cannot be resolved with recourse to the argument that Annex 4 is the 'supreme law', but only through a harmonising interpretation. It follows however that the constitutional status of the other Annexes not only serves a systematic interpretation of Annex 4, but may also serve independently as a standard of control for the Court. Despite this, the Court and the majority of its justices remain somewhat cautious insofar as not only provisions of the General Framework Agreement¹⁰ but also those of the other Annexes were applied in a systematic interpretation of Annex 4. In the third and fourth partial decisions in the case U 5/98 on the "constituent peoples" the Court did explicitly rely upon the provisions of Articles I and II of Annex 7 for Refugees and Displaced Persons, from which resulted an obligation incumbent upon the entities to protect others as a standard of review.¹¹ However, the wording of Article III.5. expressly referred to Annex 7 in guaranteeing refugees and displaced persons the right "in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated of any such property that cannot be restored to them."

As a result of such a constitutional understanding came also the need for the Court to dismiss applications *rationae temporis* if they would be based upon events taking place before the coming into force of the Dayton Agreement.¹² In this respect the Court saw its own competences as essentially time-barred. Despite this, some cases do indeed refer to the continuance of matters from before 14 December 1995 into the time period of the Dayton Agreement,¹³ as clearly illustrated by the above-mentioned case brought under Article III. 5 of the Constitution. In particular reference to the equal protection clause, the Court by implicitly incorporating the jurisprudence of the US Supreme Court ruled out in the third partial decision of the case U 5/98 that "past *de jure* discrimination" through the means of an act or an omission¹⁴ can represent a violation of Article II. 4 of the Constitution.

In conclusion it may therefore be stated in respect of the jurisprudence of the Court that Annex 4 of the Dayton Agreement represents the

⁹ In contrast the related literature is of the opinion that on the basis of the somewhat differing make up of the treaty parties, that *the* Dayton Agreement should rather be a bundle of free-standing international treaties which would however be brought together by the Framework Agreement. Cf. Oliver Dörr, „Die Vereinbarungen von Dayton/Ohio“, 35 *Archiv des Völkerrechts* (1997), 129-180, esp. 130.

¹⁰ Cf. the first partial decision in the case U 5/98, in *Službeni glasnik BiH*, br. 11/00, esp. para. 15.

¹¹ Cf. the third partial decision, in *Službeni glasnik BiH*, br. 23/00, esp. paras. 73, 79 et seq. and the fourth partial decision, in *Službeni glasnik BiH*, br. 36/00, esp. paras. 18, 20, 29, 31.

¹² Cf. esp. U 2/98, in *Službeni glasnik BiH*, br. 22/98.

¹³ Cf. the unpublished cases of U 18/00 and U 19/01.

¹⁴ *Službeni glasnik BiH*, br. 23/00, para. 79 et seq.

‘constitutional document’ of Bosnia and Herzegovina and that the fifteen international treaties for the protection of human rights listed in Annex 1 to Annex 4 which form directly applicable law and which require no special transformation procedure, represent the formal constitutional law of the state - just as the remaining Annexes and the General Framework Agreement. Despite this, the European Convention on Human Rights (ECHR) and its related Protocols enjoy a special position over and above that of the Constitution. The ECHR is, as the agreements in Annex I, in accordance with Article II. 2 of the Constitution directly applicable law and should moreover enjoy “priority over all other law”. There remains however the issue of the ranking of such in the hierarchy of the legal system of Bosnia and Herzegovina and whether in the event of a conflict with the Dayton Constitution the ECHR would - in the words of the US Supreme Court in *Marbury v. Madison* - retain priority as “paramount law of the land”. However, the Court was not yet forced to answer such a question, as the requests in cases of unconstitutionality of laws have not raised such an issue and the Court itself - in contrast to individual complaints under the appellate jurisdiction - did in such cases strictly limit itself to examination of the requests alone.¹⁵

From the standpoint of the rule of law it should however be critically noted that not only the Constitution, but also the constitutional law suffer from a significant lack of publicity. Even today, the Dayton Agreement including the Constitution has not yet been published in the Official Journal of Bosnia and Herzegovina. Moreover and in accordance with the closing provisions of the Framework Agreement, the text of the agreements is deemed to be equally authentic in the Bosnian, Croatian, Serbian and English languages, even though at the time of signature only “working texts”¹⁶ did exist in the relevant languages of Bosnia and Herzegovina.

There is indeed provided by the Office of the High Representative (OHR) a collection of the most important documents in English, which includes the Dayton Agreement and all Annexes,¹⁷ as is a brochure containing the Bosnian, Serb, Croatian and English texts of the Constitution, both of which publications are in wide use. In addition the European Convention on Human Rights and some of the international treaties as listed in Annex 1 of the Dayton Constitution have already been translated by the Council of Europe into the relevant local languages. Despite this, the ECHR was not published

¹⁵ Cf. the as yet unpublished case U 27/00.

¹⁶ The first High Representative for Bosnia and Herzegovina, Carl Bildt, in an introduction to a collection of constitutional texts: OHR (ed.), *Ustav Bosne i Hercegovine, Constitution of Bosnia and Herzegovina* (Sarajevo, 1996) states in this respect: “The English language version contained in this booklet is the agreed text contained in the Peace Agreement. The Bosniac, Serb and Croat texts do not have the same official status, but they do in our view represent good working documents, based as they are on the texts which the parties have been using themselves. A legal expert from Sarajevo has looked at these texts, and believes that each of them represents an accurate translation of the English [sic]”.

¹⁷ OHR (ed.), *Bosnia and Herzegovina. Essential texts ...* .

until 1999 in the Official Journal,¹⁸ whilst the majority of the remaining international treaties remain unpublished by the same source. Even the quasi official publication of the English texts is no substitute for the formal official publication by the organs of the state. Moreover, however, the translations of the constitutional texts by the OHR tend to be misleading even in crucial sections!¹⁹ Consequentially the Court treats solely the English version as the authentic text and thereby to some extent corrects misleading translations, not merely in cases of direct,²⁰ but also indirect reliance upon a certain provision, for example where a provision is cited.²¹ Moreover, the Court itself has never received from the organs of Republika Srpska the edition of the Official Journal from 1992 in which the constitution with preamble was published.²² Even today, the Official Journals from between 1992 and 1998 are not available for the usage of either the Court, or indeed also the OHR. The same applies to some items of legislation relating to the dissolved entity of Herzeg-Bosna which are through the terms of the Washington Agreement still in force. In case of the District of Brcko which was declared 'federal' as a result of arbitration, despite having had its own Official Journal since 2000, the district administration has been somewhat reluctant to make available to the Court or the OHR its own journal editions. How is a citizen to determine his rights, when not even the Constitutional Court may see copies of such laws?

2.2. The Position of the Constitutional Court in Relation to other Institutions

An expression of the General Framework Agreement as a formula compromise is evident in the lack of legislative agreement upon the individual Annexes and thereby also the competences of the various institutions as established through those sources in relation to each other. The Court is therefore presented with the issue of its own position in relation to the other institutions of and established by the various Annexes to the Dayton Agreement.

¹⁸ A rather poor translation appears at Službeni glasnik BiH, br. 6/99.

¹⁹ An example is that the Preamble to the Constitution of Republika Srpska is not actually included in the version published by the OHR, whilst some pages further in the same publication, the Preamble is however declared unconstitutional through the third partial decision in the case U 5/98.

²⁰ See for example, the first partial decision in case U 5/98, Službeni glasnik BiH, br. 11/00, esp. paras. 14-17, in which the term 'granica' (border) of the Constitution of the Republika Srpska for the demarcation of the inter-Entity boundary line was declared unconstitutional, because the Dayton Agreement had subsequently differentiated between the term boundary as being an inter-Entity line and the term border which was held to be the demarcation line between states.

²¹ See e.g. case U 25/00, para. 23, in which reference is made to the translation error contained within Article I. 2 of the Bosnian and Croat versions of the Constitution, whilst the Serbian version of the text had been correctly translated.

²² Luckily this very edition of the Official Journal was found quite by chance as a result of an earlier mania for collecting and hoarding of the author of this article - also judge rapporteur in the case at hand - in his personal archives!

2.2.1. *The Position of the Court in Relation to the Human Rights Chamber of Annex 6*

After all the horrific experiences of ethnic cleansing, the effective protection of human rights has become in accordance with Article VII of the Framework Agreement “of vital importance in achieving a lasting peace”. Through Annex 6 the Human Rights Commission consisting of the Ombudsperson and the Human Rights Chamber was established with its own mechanisms of legal protection based upon the Strasbourg model. Since the Human Rights Chamber of which the bench is predominantly occupied by international judges, is competent according to Article I of Annex 6 to decide on the violation of rights as guaranteed under the ECHR and those human rights agreements listed in the Annex to Annex 6, the question is raised how this competence competes with the competences of the Constitutional Court. Indeed the latter in accordance with Article VI. 3. b. of the Constitution possesses within its appellate jurisdiction responsibility for individual complaints, hence may decide upon a violation of a human right as guaranteed within the Constitution itself so that there is an overlapping of competences between the two organs.

In doing so however, both organs have disadvantages to show for a rapid and effective legal protection. The Human Rights Chamber may deal with any act of a state body which violates a human right, whilst the Court is in accordance with Article VI. 3. b. restricted to “judgments of other courts of Bosnia and Herzegovina”. It is of course in relation to the procedural confusion on the parallel legal protection more practical for the individual to turn to the Human Rights Chamber, as the matter of exhaustion of all other legal recourse is approached by this institution in a far more relaxed manner than that of the Court which takes more of a formal route.²³ In contrast, if an individual were to feel violated in the application of a norm of the ECHR or a constitutional rule, the Human Rights Chamber is not in the position to abrogate such an item of legislation. It can only determine a violation and provide for compensatory damages, whilst the Court in accordance with Article VI. 3. c. could nullify an unconstitutional provision and through the provisions of Article VI. 3. b. can also decide on the merits of the case.

The matter of how legal protection against violations of human rights has to be regulated is not an easy one, but following the principle of effectivity it can be resolved with good will of the relevant institutions. As such, in accordance with Article VI. 3. c. of the Constitution, the Human Rights Chamber, just as any other court, if it is faced with unconstitutional or ECHR-violating rules for assessment, could refer the case to the Constitutional Court for control in accordance with an objective legal function of judicial review. Nevertheless, both organs could at least informally agree that those

²³ Cf. esp. Nedim Ademović, “Iscrpljivanje pravnih lijekova - princip međunarodnog prava inkorporiran u pravni sistem BiH” (“Exhaustion of Legal Remedies - a Principle of International Law Incorporated into the Legal System of BiH”), in 7 *Pravni savjetnik* (2001), 50-60.

complaints which have already been brought before the one organ should be declared inadmissible by the other.

It can be traced back to human nature that a far-reaching ‘co-operative’ harmonisation of the two Annexes could not be achieved; instead there came into existence a form of ‘institutional jealousy’, in other words, which organ should have priority over the other? Even before a concrete case was brought before the Court, informal negotiations between the two organs revealed that both sides claimed to be the higher organ and could therefore in effect accept appeals from the other. The Human Rights Chamber was for example of the opinion that they were established as a substitute for the lack of membership of the Council of Europe and the consequent membership of the ECHR of Bosnia and Herzegovina which would mean that they would be required to check the decisions of the national constitutional court. On the other hand, the Constitutional Court presented itself as ‘Guardian of the Constitution’ and thereby as highest organ, decisions of which could not be put into question, provided that Bosnia and Herzegovina does not ratify the ECHR and in doing so subject the entire national system to the supranational jurisdiction of the European Court of Human Rights. The Human Rights Chamber cannot therefore be a supranational court; rather would on the equality of ranking of the Annexes be an organ *sui generis* beside the Constitutional Court, or would in the sense of the wording of Article VI. 3. b. of the Constitution, just as “any other court in Bosnia and Herzegovina”, rank even under that of the Constitutional Court.

During 1998, the Constitutional Court received several constitutional complaints against decisions of the Human Rights Chamber, so that the matter of their concurrent relationship became an issue the Court could no longer circumvent, as it had done in the cases U 3/98 and U 4/98.²⁴ In the several cases decided on the same day of U 7/98 to U 11/98²⁵, the wording in the reasoning rendered by the Court for the dismissal of the applications is in each case almost identical. On the basis of the above-mentioned obiter dictum on the ‘legal unity’ of the Annexes of the Dayton Agreement and the provisions in Annexes 4 and 6 which declare the decisions of the relevant organs to be “final and binding”, the majority of the Court relied on the equal ranking theory and concluded that upon agreement of the treaties, the treaty parties could not have had the intention that each body be granted with the competence to review the decision of the other. Furthermore, the Human Rights Chamber had indeed been endowed with judicial functions in relation to the protection of human rights, but that from an organisational standpoint the organ had not been established as a court; rather on the basis of its transitional character in the field of human rights should be regarded as an institution *sui generis* with a five year mandate. Moreover, the Chamber was not a Bosnian institution in the sense of Article VI. 3. b. and c. of the

²⁴ Službeni glasnik BiH, br. 22/98.

²⁵ Službeni glasnik BiH, br. 9/99.

Constitution and was therefore explicitly prevented from referring a case to the Constitutional Court for concrete judicial review. The 'transition phase' was also used by the Court as an explanation for the existing procedural legal uncertainty for the individual. It was also stated that after the transitional period, the competences of the Human Rights Chamber would be transferred to the Bosnian institutions, with the result that the parallel system come to an end.

Indeed it was on the original initiative of the Human Rights Chamber, the OHR and the Venice Commission of the Council of Europe that in 2000 there began intensive negotiations towards a so-called merger of the two organs which resulted in the production of a draft law on the issue.²⁶ Just before the mandate of the Human Rights Chamber was due to expire at the end of 2000, the mandate was extended in a surprise move in the form of a parallel action by the treaty parties to Annex 6 for a further three years, at which point the negotiations for the merger suddenly came to a halt. It is however to be noted that the five year mandate of the Constitutional Court ended in May 2002 and that the judges appointed under Article VI. 1. c. of the Constitution may not be re-appointed. As in the meantime only two of the original elected local judges gave up their post and were replaced by newly elected judges, a total of seven of the nine judges which included the three international judges must therefore be replaced.²⁷ It is therefore clear, from the view of the judges of the Human Rights Chamber why they had little interest in a rapid fusion of the two institutions.

2.2.2. The Position of the Court in Relation to the Real Property Claims Commission of Annex 7

After the decisions relating to the possibility of appeal against decisions of the Human Rights Chamber to a great extent clarified the relationship of the Court to the other institutions established through the Annexes, the Court in cases U 21/01²⁸ and U 32/01²⁹ rejected appeals against decisions of the Real Property Claims Commission (CRPC) under Annex 7. This organ determines applications for restitution of property and residence rights in cases where since 1 April 1992 - the beginning of the conflict - such property has not voluntarily been sold or such rights otherwise voluntarily been transferred to others.

²⁶ Cf. Draft from 23 October 2001 [CDL-INF (2001) 20]: "Proposal for a Law on the Merger of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina", approved at the 48th Plenary Meeting of the Venice Commission, Venice, 19/20 October 2001, at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)020-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)020-e.asp).

²⁷ The institutional logic of this provision is however unclear. In practice, this would mean a completely new beginning, more than likely after a long pause after the expiry of the mandate of the first bench of judges, as the relevant organs responsible for such matters appear largely not to have made timely preparations for the nomination of new judges.

²⁸ Službeni glasnik BiH, br. 25/01.

²⁹ Službeni glasnik BiH, br. 27/01.

In contrast to the reasoning in the decisions relating to the Human Rights Chamber, the Constitutional Court on the basis of the specific legal and factual situation opened for itself a back door and declared - again in contrast to the usually concise and authoritative reasoning - far and wide³⁰ that for the clarification of specific matters excluded by the CRPC it would be possible or even necessary to ensure access to lower courts and thereby winning also access to the Constitutional Court under its appellate jurisdiction.

2.2.3. *The Position of the Court in Relation to the High Representative of Annex 10*

Annex 10 of the Dayton Agreement provides for the establishment of a High Representative, the task of whom is to ensure the observation and encouragement of civilian implementation for the peace agreement.³¹ Of particular significance for the relationship of this organ to the Constitutional Court is that the provisions of Article V from Annex 10, describe the position of the High Representative as a “final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement”. On the basis of this provision, further significant far-reaching competences were granted at the Bonn Conference of the so-called Peace Implementation Council (PIC),³² in particular the power to approve legislation and to dismiss civil servants who do not heed the terms of the peace agreement.³³ Both the High Representatives, Carlos Westendorp and Wolfgang Petritsch, have put such powers to ever-increasing significant use; so much so that the relevant literature has begun to speak of a quasi protectorate.³⁴

The question may therefore at this point be raised whether the High Representative - politically responsible *vis-à-vis* the ‘International Community’ represented by the PIC - is also legally responsible or not,

³⁰ In this respect there appear to be two main positions that have been adopted by the judiciary of the Court, including the international judges. Some judges assume that the Court is to determine matters authoritatively and therefore with a somewhat brusque reasoning thereby avoiding any *obiter dicta*, whereas other judges are of the opinion that the Constitutional Court should also provide an educational function in particular in relation to those lawyers arguing before it. As such and with the financial support of the Vienna Chamber of Advocates, the Constitutional Court with the co-operation of the European Training Centre for Democracy and Human Rights in Graz held in 2001 a unique seminar for Bosnian-Herzegovinan advocates on the competences of the Constitutional Court.

³¹ Cf. Gianni La Ferrara, “Experimenting Internationally Managed Conflict Resolution in a Divided Society”, in European Commission for Democracy through Law (ed.), *Societies in Conflict: the Contribution of Law and Democracy in Conflict Resolution* (Council of Europe, Strasbourg, 2000), 184-196.

³² The Bonn Conference of the Peace Implementation Council brought together the contact group from the Yugoslavia Conference (USA, France, Great Britain, Germany, Russia and Italy) and those states who had participated in the peace conference in Lancaster House on 9 December 1995.

³³ The so-called ‘Bonn powers’ can be found in OHR (ed.), *Bosnia and Herzegovina. Essential texts ...*, (Bonn Peace Implementation Conference 1997), Point XI. 2, 199,

³⁴ Cf. Manfred Nowak, “Menschenrechtsschutz als Voraussetzung für den dauerhaften Frieden in BiH”, in Ginther et al., *Völker- und Europarecht ...*, 95; Wolfgang Graf Vitzthum and Marcus Mack, „Multiethnischer Föderalismus in Bosnien-Herzegowina“, in Wolfgang Graf Vitzthum (ed.), *Europäischer Föderalismus. Supranationaler, subnationaler und multiethnischer Föderalismus in Europa* (Berlin, 2000), 116, which makes reference to a “subsidiäres de-facto Protektorat”.

thereby possibly infringing the rule of law principle enshrined in Article I. 2. of the Constitution of BiH. Hence there is the pertinent issue of whether not only the legislation as approved and published in the Official Journal by the High Representative, but also any dismissal of functionaries may be challenged before the Court. Through its decision in case U 9/00,³⁵ in which the constitutionality of the law on the state border service was at issue, the Court attempted to solve the political and constitutional dilemma that the inroads taken by the High Representative into the legal system of Bosnia and Herzegovina were in fact necessary in the interests of political efficiency to counterbalance an obstructionist policy lead by the nationalist elites, but to the extent that these could then be subject to review or even be repealed by a state organ such review or repeal could then limit the political authority of the High Representative.

The attempt to square the circle was evident in the reasoning of the judgement as far as the power of the Constitutional Court is concerned to review the law on the state border service as adopted by the High Representative. On the one hand the Court declared that the international law foundations of the competences of the High Representative and their exercise are not subject to review, but, at the same time, the Court developed a theory of 'functional duality' and 'substitution' in order to be able to review the law in question. In doing so it was asserted that the High Representative actually intervenes into another legal system, namely the constitutional system of BiH, by acting on behalf of the state institution which was responsible for the adoption of laws, namely the Parliament of BiH. In effect, the High Representative's 'decision' as published in the Official Gazette is to be formally regarded as an item of legislation of Bosnia and Herzegovina. However, as all legislation is subject to review by the Court in accordance with Article VI. 3. a. of the Constitution, the Court declared in conclusion: "The competence of the Constitutional Court to examine the conformity with the Constitution of the Law on State Border Service enacted by the High Representative *acting as an institution of Bosnia and Herzegovina* is thus based on Article VI. 3. a. of the Constitution. Consequently the request is admissible" (emphasis added).

Quite apart from the contradictory logic in the reasoning in which firstly the exercise of competences was declared non-reviewable, yet secondly that the legislative acts as part of the very exercise of the Bonn powers would be subject to constitutional review, this decision introduced a limitation of the jurisdiction of the High Representative which has since been upheld by cases U 16/00,³⁶ U 25/00³⁷ and U 26/01³⁸ and also developed into a system of checks

³⁵ Službeni glasnik BiH, br. 1/01.

³⁶ Službeni glasnik BiH, br. 13/01.

³⁷ Službeni glasnik BiH, br. 17/01.

³⁸ This case concerned an item of 'legislation' by the High Representative which created a new State Court. Službeni glasnik BiH, br. 29/00. Again this law on the State Court was brought before the

and balances between the High Representative and the Constitutional Court. However, the entire system was based upon the tacit consensus between the Court and the High Representative that the Court in exercising its power to review all legislative acts whomever they will emanate from will always confirm the merits of his legislation as can be seen from those judgments.

Significantly more problematic was the application of the theory of functional dualism and substitution in cases relating to dismissals of individuals in public office by the High Representative. The first case was brought before the Court only in 2001. It was decided by the High Representative on 23 February 2001 “to remove Mr. Edhem Bicakcic from his position of General Manager of the company Elektroprivreda and bar him from holding any official, elective or appointive public office unless or until such time as I may, by further Decision, expressly authorise him to hold the same.”³⁹ This decision was based upon the reasoning that during his period of office as Prime Minister of the Federation of Bosnia and Herzegovina - before he had become General Manager of that company - Bicakcic had abused his position and in doing so had endangered the effective enforcement of the peace agreement. The complaint submitted by not only Bicakcic, but also some 37 members of parliament of the Federation represented the first attempt to submit the power of dismissal to judicial examination.

The Constitutional Court could have simply accepted on the basis of the theory of functional dualism that the High Representative ‘substituted’ either the management board of the public enterprise or even the High Court of the Federation of Bosnia and Herzegovina. In doing so the Court could have dismissed the case then on the merely procedural basis that not all legal remedies had been exhausted as required under the Court’s Rules of Procedure thereby ‘avoiding’ the conflict with the High Representative. Instead, a rather more formalistic decision in case 37/01⁴⁰ was achieved. The Court stated that not only the application of the parliamentarians but also the individual complaint had to be dismissed on the basis of a lack of jurisdiction of the Court with the weak justification that the decision complained against did not represent a judgment in the sense of Article VI. 3. b. of the Constitution. Moreover, the parliamentarians would not be empowered to bring such a complaint under that paragraph and furthermore that their application did not fall within the scope of applicability of judicial review of legislation in the sense of Article VI. 3. a. of the Constitution.

Hence, after the two steps forwards, the Court took one large step back in the development of a democratic system with a proper separation of powers in relation to international institutions.

Court, but the Court declared it to be in conformity with the Constitution. Cf. Službeni glasnik BiH, br. 4/02. Despite this, the new State Court has not yet come into being.

³⁹ Službeni glasnik BiH, br. 9/01.

⁴⁰ This decision of 2 November 2001 has not been published.

2.2.4. *The Position of the Court in Relation to the Electoral Commission of Annex 3*

The decision in case U 40/00⁴¹ came to a similarly formalistic conclusion, in which an application by a then member of the Presidency, Ante Jelavic, disputing the constitutionality of the electoral rules as adopted on the basis of Annex 3 of the Dayton Agreement by the OSCE Provisional Election Commission was rejected with the rather lukewarm reasoning that the Election Commission of Annex 3 was not an “Institution of Bosnia and Herzegovina”. As the Court to some extent relied upon its past case law - and in particular on case U 9/00 - it was necessary to distinguish this case from others. The difference was stated to be that in adopting electoral rules, the Election Commission did not replace the national legislative body; rather such powers of the Election Commission emanated from Article III of Annex 3 directly. However, the Court attempted through the means of obiter dictum to prevent the floodgates from opening in that on the one hand the transitional character of such provisions were emphasised, yet at the same time the necessity of constitutional protection in matters of democratic elections were enhanced by the drafting and approval of an Electoral Law which would then be entirely subject to the full judicial control of the Constitutional Court.

In the further case U 41/00, the Serbian Radical Party of Republika Srpska had challenged the decision to exclude them from local elections of April 2000 and the general elections of November 2000. The application could nevertheless be removed from the list of cases of the Court, as it became evident in the proceedings that the party had already submitted an application to the Human Rights Chamber which rendered the case inadmissible according to the practice of the Court. It remained problematic that the Human Rights Chamber had however declared the same cases CH/98/230 and CH/98/231 inadmissible for lack of jurisdiction.

2.2.5. *The Position of the Court in Relation to the Entity Constitutional Courts*

Despite the existence of a clear hierarchy within the legal system which renders by virtue of Article VI. 3. a. the constitutions of the entities inferior to that of the Dayton Constitution, it has been voiced in particular by members of the Constitutional Court of Republika Srpska that judgments of the entity constitutional courts should not be subject to review or challenge before the Constitutional Court of Bosnia and Herzegovina as judgements in the sense of Article VI. 3. b, the reason being that the constitution of Republika Srpska declares judgments of its constitutional court as final and binding.⁴² In cases U 5/99⁴³ and U 39/00⁴⁴ the Constitutional Court put an end

⁴¹ Službeni glasnik BiH, br. 13/01.

⁴² Cf. Rajko Kuzmanovic and Miodrag Simovic, *Ustavni sud Republike Srpske i zaštita ustavnosti i zakonitosti (The Constitutional Court of Republika Srpska and the Protection of Constitutionality and Legality)* (Banja Luka, 1999), 58. See also the contributions of the judges of the Constitutional

to such claims with the argument that not only are the constitutional courts of the entities parts of the legal systems of the entities and therefore fall clearly under the term “judgment of any other court in BiH” in the sense of Article VI. 3. b., but that also the effectiveness of the Constitutional Court of BiH would be severely limited if it were possible not to challenge the decisions of the constitutional courts of the entities before the Court for the purposes of ensuring adherence to the constitution of Bosnia and Herzegovina. Despite this, the Court emphasised in case U 5/99 that its only standards of control were the ECHR and the Dayton Constitution, rather than the constitutions of the entities.⁴⁵

Judicial review in line with the standards of the entity constitutions is therefore the sole competence of the constitutional courts of the entities. The rejection of the submission of the representatives of Republika Srpska that the non-reviewability of the decisions of the constitutional court of Republika Srpska should be regarded as an expression of sovereignty and independence of the RS legal system bases itself on the one hand on the clear wording of the ‘supremacy clause’ of Article III. 3. b., whilst on the other hand an attempt was also made to ensure the ‘relative constitutional autonomy’ of the entities. Already in the first partial decision to the case U 5/98, the Court had relied upon such doctrine and in doing so upheld the far-reaching human rights catalogue - which included social rights - of the RS constitution, with the justification that not every difference necessarily means a conflict with the Dayton Constitution.⁴⁶ It is therefore neither sovereignty nor separation, but rather autonomy and integration which are the key elements unspoken yet followed by the Court.⁴⁷

3. Court Powers and the Extent of Legal Protection

Already the first clause of Article VI. 3. of the Constitution: “The Constitutional Court shall uphold this Constitution” raises the concrete issue of whether this is of a free standing normative nature or whether it should be understood as a ‘Preamble’ to the following competences of abstract review of constitutionality of legislation as referred in Article VI. 3. a., of the

Court of Republika Srpska, Rajko Kuzmanovic, Miodrag Simovic und Marko Rajcevic as part of the Round Table in Sarajevo on 29 November 1999 and in Teslic on 8-9 December 2000 on the jurisdiction of the Constitutional Court and the provisions of Article VI. 3. b. of the Constitution, in *Okrugli stolovi Ustavnog suda BiH* (Sarajevo, 2001), 64-68, 164-176 and 182-190.

⁴³ Službeni glasnik BiH, br. 3/00

⁴⁴ Službeni glasnik BiH, br. 24/01

⁴⁵ See also fourth partial decision of case U 5/98, Službeni glasnik BiH, br. 36/00, para. 39: “Nor is the RS Constitution a standard of control. The Constitutional Court of BiH thereby carefully observes the competence of the Constitutional Court of RS.”

⁴⁶ Cf. First partial decision in case U 5/98, Službeni glasnik BiH, br. 11/00, paras. 31 et seq.

⁴⁷ An international conference bringing together representatives from other European constitutional courts was organised by the Court on this matter. See Joseph Marko, “Relations between Constitutional Courts and Other Jurisdictions in Federal States”, in *Ustavni sud BiH (Constitutional Court of BiH, ed.), Odnosi izmedju ustavnih sudova i drugih sudskih instanci (Relations between constitutional courts and other judicial instances)* (Sarajevo, 2001), 83-93 with particular reference to the US Supreme Court landmark case *Martin v. Hunter’s Lessee* (1816).

“appellate jurisdiction” under Article VI. 3. b. and of the concrete judicial review of Article VI. 3. c.⁴⁸

The Court - reminiscent of the famous controversy between Hans Kelsen and Carl Schmitt⁴⁹ - took from these provision not only its role of ‘Guardian of the Constitution’ but also an understanding of the task of interpreting its powers as part of a comprehensive system of legal protection since the text of the Dayton Constitution contained some inconsistencies on this matter; in addition that provision should be regarded in conjunction with Article I. 2. of the Constitution as an expression of the rule of law principle.

As the Court began its task, the extent to which the appellate jurisdiction would include not only judicial decisions, but also those of the administration was however still a matter of debate. It was argued by a minority of the judges who preferred a limitation of the powers of the national constitutional court that in order not to hinder the constitutional, legislative and executive scope of discretion of the entities, a strictly formalistic interpretation of Article VI. 3. b. should reign with the result that only “judgments” of “courts” in Bosnia and Herzegovina should be subject to examination by the Constitutional Court.⁵⁰ This problem is however minimized by the fact that in both entities at the conclusion of some, but not all administrative acts, the opportunity exists to commence judicial proceedings against those acts. In cases where the respective statute did not provide an opportunity to commence judicial proceedings, the Constitutional Court was therefore required according to Article 6 ECHR to determine whether there was a violation of the right of access to a court after such judicial rulings of inadmissibility.⁵¹ On the basis of the votes of the international judges, the Court - to the chagrin of the minority of the Court from the entity concerned - in several cases and with reference to Strasbourg case-law which had Austria required to change its legal system held that there had indeed been a violation of Article 6 ECHR.

Despite this it has been long clear that a “judgment of a court” in relation to the provisions of the Constitutional Court’s rules of procedure requires an exhaustion of legal remedies so that those are closing judgments of

⁴⁸ See above, Fn 4.

⁴⁹ Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931); Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Berlin-Grünwald, 1931). Cf. esp. Wolfgang Mantl, Hans Kelsen and Carl Schmitt, “Ideologiekritik und Demokratiktheorie bei Hans Kelsen” in Beiheft 4, *Rechtstheorie* (1982), 185-199. It is interesting to note in this respect that the successor to Arsovic, the judge who retired during the case U 5/98 (see section 5. below), Judge Snjezana Savic as elected by the Parliament of Republika Srpska, was appointed Professor at the Law Faculty of Banja Luka in the field of Theory of Law and State on the basis of her thesis on the legal theory of Hans Kelsen entitled: “Pojam prava kao normativnog poretka - prilog kritici Kelsenove normativne doctrine”, (Banja Luka, 1993).

⁵⁰ It was in this manner that case U 3/96, Službeni glasnik BiH, br. 5/98, one of the first applications to the Court was dismissed, not for *rationae temporis*, nor for sufficient standing, but rather through the reasoning that the Court was principally not empowered to hear applications against administrative acts from the entities.

⁵¹ Cf. U 7/99, Službeni glasnik BiH, br. 3/00.

proceedings of a civil, criminal or administrative judicial nature. In a highly political delicate decision concerning the introduction of criminal investigations against the former Prime Minister of the Federation of Bosnia and Herzegovina, Edhem Bicakcic, the Court, however, interfered with a small majority of votes against the two international judges⁵² through the means of an interlocutory decision in the pre-case hearings and declared the Supreme Court of the Federation incapable of hearing the case and hence transferred the proceedings to the Cantonal Court of Sarajevo.⁵³

In contrast to its position as contained within the old state constitution, in which the Court was empowered in the communist tradition to *ex officio* admit cases of judicial review and determine the constitutionality of certain provisions, yet did not possess the power to abrogate those provisions found to be unconstitutional,⁵⁴ it is not expressly foreseen in provisions of the Dayton Constitution that it may *ex-officio* commence judicial proceedings. As such, the Court may only hear an abstract judicial review case under Article VI. 3. a. upon request of the relevant local officials enumerated in this provision, whilst Article VI. 3. c. provides that any court may petition the Constitutional Court as to whether in the case at hand the legislative provisions are in line with either the constitution or the ECHR. Despite this a subjective right to proceedings is not, according to the majority opinion of the Court, available to the parties in actual concrete cases. This would be no longer relevant in the systematic context of Article VI. 3. b., as the parties to the proceedings have the right to appeal and could therefore as a last resort challenge the constitutionality of the legislation in the judgments of the lower courts. It is this very opportunity to not only declare the judgment unconstitutional, but also repeal or nullify the law upon which it was based which was nevertheless rejected by the majority of the judges. The Austrian model which prefers the introduction of an interlocutory decision and the transferral of the case to a matter for judicial review was rejected on the basis that the Court is not entitled *ex-officio* to commence judicial review procedures. Does this mean in conclusion that in proceedings the Court itself may be obliged to apply unconstitutional legislation?

The Court has not yet dealt with this problem directly, but has in a handful of cases in which the issue was evident at least declared the relevant judgments of the highest entity courts inconsistent with provisions of the ECHR and have recommitted such matter for fresh proceedings.⁵⁵ This has been on the basis of the argument of one of the three international judges

⁵² Only two of the three international judges were present in this case.

⁵³ See U 34/01, Službeni glasnik BiH, br. 20/01 and the dissenting opinions of Judges Danelius, Marko and Omeragic.

⁵⁴ See Amra Huseinbasic, "Ustavni sudovi u Bosni i Hercegovini i zastita ljudskih prava" ("The Constitutional Court of Bosnia and Herzegovina and the Protection of Human Rights"), Dissertation, (Law Faculty Graz, 2002), 5 et seq.

⁵⁵ See U 19/00, Službeni glasnik BiH, br. 27/01.

who did not accept the objective legal cleansing function of the individual application in the context of the appellate jurisdiction.

This conflict between constitutionality and legality has not yet however resulted in an entity court insisting upon judgment based strictly on available legislation, so that renewed proceedings before the Constitutional Court would be necessary. As the ECHR is directly applicable by all organs and thereby also all courts and also enjoys legal priority, it could result that the lower courts in heeding the judgments of the Constitutional Court do not in practice apply the legislation inconsistent with the ECHR, even if such legislation had not been formally repealed! There have not however been investigations into this matter. Despite this, the judgments of the Human Rights Chamber experience a similar problem as the Chamber does not itself possess the competence to repeal legislation.

The consequence of this situation from the view point of legal certainty is however two-fold. On the one hand, the process of concrete judicial review of Article VI. 3. c. is undermined through the continuation of such practice, as the lower courts instead of referring the case to the Constitutional Court for review proceedings simply do not apply legislation which is - in their opinion - not in conformity with the ECHR or the Constitution. As a result and in a comparative sense, it is possible to discern a hybrid mix between that of the US system of diffuse judicial review and that of the Austrian model of monopolised judicial review with a specialised court. The existence of some laws which would be formally have been nullified by the Constitutional Court alongside those which would not be applied by lower courts, even if they had not been subject to the final control of the Constitutional Court would lead to significantly enhanced legal uncertainty! On the other hand, no court has so far taken action under the concrete judicial review procedure of Article VI. 3. c. It was not until after a seminar organised by the Constitutional Court and the European Training Centre for Democracy and Human Rights at the University of Graz for judges and advocates in September 2000 that this very issue of the competences of the Court was expressly brought in the form of a referral before the Court by a Cantonal Court of the Federation of Bosnia and Herzegovina. Despite this it was necessary to return the matter unanswered, as the crux of the question from referring court was simply how to decide the case on the merits! In accordance with the provisions of the Constitution, the Court itself is not empowered to grant advisory opinions, with the sole example of cases under Article VI. 3. c., in other words, in those matters relating to “the existence of or the scope of a general rule of public international law pertinent to the Court’s decision”, which may only really be imparted in the form of an opinion.

4. Means of Interpretation and Elements of Constitutional Doctrine

At this stage it is suitable to discuss the application of different means of interpretation and the development of elements of constitutional doctrine as

the background to the issue of the relationship between the Constitutional Court and the legislative, in particular, the constitutional law-making qualities of the Dayton Agreement which have been evident in the activities of the Court since its establishment.

Shortly after the Court commenced its judicial functions in September 1997, with the problem of admissibility of an application in case U1/98 of then “Co-chair” of the Council of Ministers, Haris Silajdzic, the issue of necessary interpretation in conformity with the Constitution was raised in light with the hierarchy of norms as established by the Dayton Constitution.⁵⁶ Indeed, a Chair is foreseen by Article V. 4. of the Constitution, although on the basis of the ethnic distribution of the ministerial posts, it was intended in the Law on the Council of Ministers that not one Chair, but rather two Co-Chairs exist who would chair meetings on a weekly rotating basis. This therefore begs the question in the concrete case whether one of the two Co-Chairs on the basis of Article VI. 3. a. would be solely entitled to bring judicial review proceedings before the Constitutional Court or whether this should only be permissible upon joint application of both.

Due to the fact that this case was eventually ‘decided’ with a close 5:4 vote and that the reasoning contained a differentiation between on the one hand a ‘simple’ solution, i.e. an interpretation of the constitution on the basis of the statutory provisions applicable, and on the other, the fundamental principle of constitutional interpretation requiring functional conformity with the constitution, a significant proportion of the Court’s reasoning is cited here in full:

.... Interpreting the Constitution on the basis of subconstitutional provisions can be seen as a variant of the principle of interpretation which requires conformity of all subconstitutional norms with the Constitution insofar as there is a legal hierarchy based on the supremacy clause of Article III. 3. (b) of the Constitution of Bosnia and Herzegovina. From that follows the general principle of interpretation that all statutes under review are supposed to be in conformity with the Constitution as long as possible. However, this general principle of interpretation in reviewing the constitutional conformity of statutes has to be distinguished from the case before us insofar as there is no request to review the conformity of the Law of the Council of Ministers with the Constitution! On the contrary, the problem raised concerns the interpretation of the Constitution in light of the sub-constitutional statute which, however, in itself would reverse the legal hierarchy that has to be derived from Article III. 3. (b) of the Constitution.

Moreover, from an interpretation that the two Co-Chairs must act jointly, it could follow that any access to the Constitutional Court by

⁵⁶ Službeni glasnik BiH, br. 22/98.

the Chair of the Council of Ministers may effectively be excluded if they block each other. Such an interpretation could thus have the effect that none of the two Co-Chairs can exercise this responsibility. This would violate the principle of effectiveness which is to be derived from the first sentence of Article VI. 3 of the Constitution of BiH that “the Constitutional Court shall uphold this Constitution.”

Hence, if the principle of interpretation supposing conformity of sub-constitutional norms with the constitution leads to unreasonable results or, in the case of this admissibility question, raises serious doubts about the conformity of the Law on the Council of Ministers with the Constitution of BiH - the review of which was, however, not requested by the applicant -, another principle, namely that of constitutional interpretation requiring functional conformity has to gain priority. The function of constitutional law is to provide a basic legal framework for living together in state and society. According to this function, constitutional law is formally characterized by its supremacy vis-à-vis statutes and other general legal norms and, usually, has to be amended in parliament by a qualified majority. It can be derived thus as a principle of interpretation that the function of the constitution must not be undermined by way of interpretation. In case of doubts, therefore, constitutional law must not be interpreted in such a way as to allow the “ordinary” legislature in actual effect to reach its goals without amendment of the constitution.⁵⁷

Although the application of Haris Silajdzic was eventually withdrawn with the result that the Court could no longer decide on the merits in the case, one consequence of the doubt voiced in case U 1/98 as to the constitutionality of the Law on the Council of Ministers was that that very item of legislation was promptly challenged by other sources. The Court declared in case U 1/99⁵⁸ that not only the post of Co-Chair as introduced on the basis of ethnic considerations, but also the post of Vice Prime Minister who would have the power to nominate ministers from ‘his’ own ethnic group - a situation clearly contrary to the wording and principles of the Constitution - were indeed unconstitutional.

The Court’s decision in U 5/98⁵⁹ is one of the most significant cases for not only political reasons, but also for an understanding of the development of constitutional doctrine. The starting point for the case was the application by the then chairman of the Presidency, Alija Izetbegovic, which called for examination of the constitutions of the entities in more than twenty issues, as

⁵⁷ See Ludwig K. Adamovich and Bernd-Christian Funk, *Österreichisches Verfassungsrecht* (Vienna, New York, 3rd ed. 1985), 38. Despite this the relevant source as cited by the author of this article in the draft decision of the Court was not included in the published version of the decision.

⁵⁸ Službeni glasnik BiH, br. 16/99.

⁵⁹ The Court’s decision was published in four parts, and appear in a series as Službeni glasnik BiH, br. 11/00, br. 17/00, br. 23/00 and br. 36/00.

in his opinion, the entities had not sufficiently fulfilled their obligations under Article XII. 2. of the Constitution to bring their constitutions into line with the Dayton text within a time limit of six months. Perhaps the most politically sensitive issue was the allegation of the applicant that both Articles 1 of the entity constitutions - just as in the preamble to the RS Constitution which itself through reliance on a right to self-determination, contained a presumption of state sovereignty - was in no means in conformity to the preamble to the Dayton Constitution which provided a guarantee for all Bosniacs, Croats and Serbs as “constituent peoples” to equality within the entire territory of Bosnia and Herzegovina. In this context, the provisions of the entity constitutions which not only declared Serbian as the sole official language in Republika Srpska, and which declared Bosnian and Croat as official languages of the Federation of Bosnia and Herzegovina, but which also ensured a privileged role to the orthodox church were all subject to legal challenge. In addition, legal provisions which permitted the appointment of army officers by the relevant entity presidents, the appointment of diplomatic and consular staff, several paragraphs of the constitution of Republika Srpska regulating state and so-called socially owned property, the prohibition of extradition of citizens, the meaning of “granica” in the delineation of state borders, the human rights catalogue of the RS and, last but not least, an emergency clause which would permit the organs of RS to invoke unilateral measures “for the defence of the rights RS” were all challenged before the Court.

It is unfortunately not appropriate at this point to enter into discussion on each of these individual points;⁶⁰ rather the most significant results in the development of constitutional doctrine shall be presented in overview.

Even in relation to the extent to which the preamble of the Dayton Constitution could be applied as a standard of control, the representatives of the Parliament of Republika Srpska - in applying the theories of Hans Kelsen - argued that the preamble had no normative value; rather it was of a simple grammatical declaratory nature. In contrast, the plurality of the Court held that the preamble of the Dayton Constitution was indeed of a significantly normative character, in so far as it contained the normative principles and fundamental aims and values of the state as reflected in the rest of the constitutional provisions.⁶¹ As such, the wording of the preamble

⁶⁰ Just as in the legal political discussion on the enforcement of the Court’s decision as in the relevant legal literature, on the basis of the strong ethnic and political context of the decisions, only the third partial decision on “constituent peoples” has really been taken notice of! See Carsten Stahn, “Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken - Neue Hoffnung für das Friedensmodell von Dayton? Zugleich eine Anmerkung zur dritten Teilentscheidung des bosnischen Verfassungsgerichts vom 1. Juli 2000 im Izetbegovic-Fall”, in 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000), 663-696 and Sarcevic, “Verfassungsgebung und ‘konstitutives Volk’ ...”, esp. 501 et seq.

⁶¹ This is not however evident in the concurring opinion of Judge Danelius: *Službeni glasnik BiH*, br. 23/00, point II. As for the matter of the acceptance of the decisions if, as in this case, a very close vote amongst the judges results 5:4 yet one of the judges then by means of a concurring opinion does not share the same reasoning, see section 5. of this article.

“... to promote the general welfare and economic growth through the production of private property and the promotion of a market economy” and in particular the provisions of Article I. 4. of the Constitution which lays down the “full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina” was applied and as a result the remaining legislative provisions relating to socially owned property which originated in the self-governing communist systems were declared to be unconstitutional. This was justified on the basis that in the process of privatisation, such provisions hindered the development of a market economy as expressly contained within the preamble to the Constitution.

Furthermore, the issue was raised in relation to the interpretation of human rights, and the extent to which they were to be regarded as classic negative rights or indeed as those of a more normative and positive nature. This matter has been raised in the context of Article 1 of the First Optional Protocol to the ECHR and the jurisprudence of the European Court of Human Rights, which protects only existing private property rather than the possibility of its acquisition, in so far as a right to property in accordance of Article II. 3. k. of the Constitution has not solely been interpreted by the majority of the bench as a subjective negative right, but also - in particular in the context of judicial review proceedings - as an institutional guarantee.⁶²

Moreover and in accordance with the opinion of the majority of the Court, the human rights provisions are interpreted as a source of positive legal obligations.

Perhaps the most significant element in the re-construction of Bosnia is the issue of returning refugees. Article II. 5. of the Constitution provides not only a special right to return for refugees and internally displaced persons, but also a right to restitution of property. Of particular significance in this context is the *expressis verbis* reference to Annex 7 which contains a series of positive obligations to protect and act in the form of affirmative action measures. In accordance with Article I. 3. and the general duty to protect, “the Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons”, through the following means:

(a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect

(b) the prevention and prompt suppression of any written or verbal incitement, through the media or otherwise, of ethnic or religious hostility or hatred;

⁶² Cf. the dissenting opinion of Judge Danelius in Službeni glasnik, br. 17/00, esp. 375.

(c) ...the prompt suppression of acts of retribution by military, paramilitary, and police services, and by other public officials or private individuals;...

In addition, Article II. 1. lays down that “the Parties undertake to create in their territories the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group.” This represents not only one of the fundamental aims and values for the return to a multi-ethnic society as had existed before conflict began in 1992: it must also be understood as a fundamental positive duty to be fulfilled by the legislative.

It is particularly significant in this context to discuss the term ‘framework legislation’. The Dayton Constitution itself contains no reference to this term. The expression was used for the first time in a decision by the High Representative, Carlos Westendorp. in the context of privatisation,⁶³ but is only now becoming applied by the Constitutional Court in order to establish a clear constitutional basis for economical integration and thereby the integrity of the state. This appears in both the second and fourth partial decisions in case U 5/98: contrary to the opinion of the RS representatives, that all matters not expressly enumerated in Article III. 1. of the Constitution automatically fall to the sole competence of the entities, the Court initially determined through systematic interpretation in the second partial decision that the organs of the state as a whole are indeed endowed with other powers and in doing so relied upon the catalogue of human rights: “Article II. 3. therefore gives a general competence to the common institutions of Bosnia and Herzegovina to regulate all matters enumerated in the catalogue of human rights which cannot exclusively be left to the Entities since the protection has to be guaranteed to ‘all persons within the territory of BiH’”.⁶⁴

The elements of Article I. 4. of the Constitution which provide for the freedom of the person, of goods, of services and of capital for the whole of Bosnia and Herzegovina and which prohibit the entities from limitation of such were also interpreted in this manner. It is hence on the basis of these competences that the basis for affirmative duties is founded. The Court went on to comment on the basis of such provisions that it is necessary for a functioning market economy based on these four fundamental freedoms and the institutional guarantee of private property,⁶⁵ that not only the state as a whole, but also the entities are responsible for the maintenance of the relevant legal framework which will reflect such constitutional duties. The Court also specified that as a result, the national parliament of the state as a whole is obliged to establish through the means of framework legislation the

⁶³ See Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina, Službeni glasnik BiH, br. 14/98.

⁶⁴ Službeni glasnik BiH, br. 17/00, para. 13.

⁶⁵ It is in this context that the first reference to the “Wesensgehaltstheorie” was made.

minimum standards for a unified civil private law for Bosnia and Herzegovina⁶⁶ which will provide the basis upon which the entity legislatures are obliged to develop their own concurrent provisions - after having had disintegrating effects so far.⁶⁷

A further example is the legislative duty contained within the fourth partial decision in the case U 5/98 in relation to the introduction of Serbian, Bosnian and Croatian as the sole official languages of the relevant entities as compared to the clear guarantee of the minimum standard of protection for the languages of the other constituent peoples and minorities through the means of framework legislation of the state. In this sense, the Court even describes in great detail how the different levels of protection provided by the European Charter for Regional and Minority Languages are to be incorporated into suitable framework legislation.⁶⁸

5. Position of the Judges, Organisational Issues and Proceedings

As part of the background to a deep ethnic segregation of society and the institutional concretisation of the notion of ethnic proportionality within the Dayton Constitution for the legislative and executive as a means of compromise through power-sharing in the model of consociational democracy, the question arises just how justice and in particular the Constitutional Court can be ethnically neutral so as to effectively uphold the rule of impartiality. This can be illustrated through the example of Switzerland and the Article 188 (4) of the 1999 Constitution of Switzerland which states clearly that the interests of impartiality of justice and consideration of the balance of the linguistic groups in the composition of the state Supreme Court must not come into conflict.

It is evident from the composition of the highest state organs that the creators of the Dayton Constitution explicitly intended an ethnic quota system for the Presidency, the higher chamber of parliament, the House of Peoples and the government, whilst the six national judges of the Court are to be elected by the entity parliaments on a basis of 2:1 without any reference to ethnic considerations. Due also to that fact however that the entities regard themselves as 'national states' of their constituent peoples, it must also have been clear to the drafters of the Dayton Constitution that the parliaments would only elect judges from their own constituent people, with the *de facto* result that there would each be elected two judges who considered themselves representatives of either the Bosniacs, Croats or Serbs. It must also have been the intention of the drafters of the Dayton Constitution to balance such ethnic parity with a further three international judges.

⁶⁶ Službeni glasnik BiH, br. 17/00, paras. 14 and 29.

⁶⁷ The constitution of Republika Srpska did however retain the notion stemming from the former communist system of socially owned property, which was nevertheless declared by the Court to be unconstitutional.

⁶⁸ Službeni glasnik BiH, br. 36/00, para. 34.

It can be seen from the Rules of Procedure⁶⁹ as provided for by Article VI. 2. b of the Constitution that the Court is itself not entirely free from ethnic considerations. As a result of the need to establish the decision-making capabilities of the Court in the shortest time possible, the drafting and acceptance process of the Rules of Procedure⁷⁰ ended in a compromise.

As such, the Serbian and Croat judges finally accepted not only Sarajevo as the seat for the Court, but also the rapid election of the first President of the Court, after the concept of ethnic parity and rotation between the three constituent peoples for this position and the election of three vice presidents had been accepted in the provisions of Articles 83 and 86 of the Rules of Procedure.⁷¹ In addition a form of ‘delaying veto’ had to be accepted. Article 37 (2) of the Rules of Procedure provides that at least one judge from each constituent people must participate in the voting process, otherwise the meeting is to be re-scheduled. Despite this, a vote may be taken in the following meeting if the same judge once again is absent without justification. Paragraph 3 of that provision states an exception to this rule in those cases in which an application is dismissed or which concern matters which are not directly related to the constituent people which that judge may represent. This has however only de facto occurred twice in the case of U 5/98 which lasted for two years and which directly concerned the legal position of the constituent peoples and their members.

In contrast to the Presidency and the Parliament which for years were paralysed for reasons of ethnic conflict,⁷² so that the High Representative was required to assume the role of legislator, the continuous functioning of the Constitutional Court since commencing its mandate with the constitutive session in May 1997 must be regarded as a great success. At no time in its period of operation has the Court found itself blocked along ethnic conflict lines, even though in the afore-mentioned case U 5/98 there was tension evident between the judges and that the ethno-political pressure on the national judges did appear to be immense.⁷³

If one is to examine the voting behaviour of the judges from this point of view, certain conclusions are inevitable: there has never in any session of voting occurred a long-term formation of ethnic coalitions. Even in the unique case of U 5/98 which produced four partial decisions, the voting behaviour of

⁶⁹ The most recent version of the text of the rules of procedure may be found at Službeni glasnik BiH, br. 24/99.

⁷⁰ The activities of the Court are based upon the few provisions of the constitution and procedural rules which required at the time of drafting a minimal consensus and in which there are however a few gaps in legal protection. There is no constitutional law on the overall national level which regulates the organisation and procedure of the Court in further detail.

⁷¹ The compromise was such that the three international judges would avoid election as President of the Court, yet on the basis of internal financial controls may participate in the rotation system for the post of Vice President.

⁷² The Parliament for example only approved some 30 items of legislation between 1996 and 2000.

⁷³ One of the Croatian judges complained with great pathos the extent to which he had been “od generala do kardinala”, placed under pressure.

not only the local but also the international judges tended to be subject to frequent change.⁷⁴ Despite this there does appear to have developed a certain trend in the variously motivated judicial voting patterns between on the one hand, the appellate functions carried out by the Court and on the other, the determination of the constitutionality of legislation. In those cases relating to individual applications and complaints there was almost always a unanimous decision amongst the judges, as all judges generally took the effort to ensure from a procedural viewpoint that the individual will come as far as possible in their application. In this context, the considerations of ethnic representation are as good as meaningless; rather there has developed out of the awareness of competition with the Human Rights Chamber a certain sense of *corps d'esprit* to ensure far-reaching human rights protection and to not only enforce but also develop the application of the ECHR and the decisions of the Strasbourg organs.⁷⁵ In cases of judicial review of legislation on the other hand, the national judges appear to act as representatives of their constituent group of the population. In particular the Serbian judges attempted in this sense to 'defend' the constitution and legislation of Republika Srpska in a manner which to a lesser extent had also been deployed by the Bosniac and Croat judges in relation to the Federation.

Article 93 of the Rules of Procedure regulates the issue of judicial independence: in accordance with that section, a judge may not be a member of a political party of Bosnia and Herzegovina, nor member of a legislative, executive nor law enforcement body. In addition, any other function which could affect the impartiality of the judge is decreed not in agreement with a judicial post. Doubts on judicial independence on the basis of an obvious conflict of interests arose in the case of contemporaneous membership of one of the national judges of the Court with the Human Rights Chamber and the Commission of Arbitration on the territorial status of Brcko, yet neither the Human Rights Chamber nor the Court officially confirmed such doubts. Furthermore, the un-regulated independence of the legal advisors to the Court has been proven to be particularly problematic. In one case, a legal advisor to the Court also held the post of deputy prosecutor of Republika Srpska which - in the sense of ECHR case law⁷⁶ - would in the least cast doubt on the impartiality of the Constitutional Court. A further deficit is the lack of an explicit provision on economic independence. As such all judges - not only those of the Constitutional Court - are forced, a result of the economic

⁷⁴ In this sense the politically motivated stories in the media that two peoples were outvoted are quite wrong and can be traced to the fact that case U 5/98 has been understood not in its entirety, rather only in the context of the third partial decision.

⁷⁵ See also Kasim I. Begić, "Ustavopravni okvir zaštite ljudskih prava u Bosni i Hercegovini" ("The Constitutional Framework for the Protection of Human Rights in Bosnia and Herzegovina"), in *Država BiH i ljudska prava* (Sarajevo, 1999), 23-29; Snježana Savić, "Demokratija i ljudska prava u Bosni i Hercegovini" ("Democracy and Human Rights in Bosnia and Herzegovina"), 9 *Pravni savjetnik* (2001), 85-89.

⁷⁶ See the equitable maxim: "justice must not only be done; it must also be seen to be done". See Jochen Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention, EMRK Kommentar* (Kehl, 2nd ed. 1996), 251.

situation in Bosnia and Herzegovina, to seek out other sources of income: a situation which opens its doors wide to ethnically dominated corruption. For judges of the Constitutional Court this situation is somewhat enhanced, insofar as four of the six national members of the bench are also simultaneously members of the national law faculties. Thus for those newly appointed judges at the end of the five-year mandate of the current bench and the consequently necessary switch to life as a career judge the problem of economic independence will be particularly critical.

Article 89 of the Rules of Procedure regulates any potential conflicts of interest and disqualification from office: if one of the judges has a personal interest in the case, if they have participated in the same case at an earlier stage as judge, advocate or party or if other relevant circumstances exist which lead to doubt on the impartiality of the individual, they may be disqualified from hearing the case at hand. In this context it has occurred that national judges have declared their interests in cases on the basis of participation in a lower court or personal links to the parties. On the other hand the tool of disqualification from the case has also been employed twice as a political instrument so as to influence the overall majority of the Court. On application of the representative of the Parliament of Republika Srpska the judge rapporteur in case U 5/98 was accused⁷⁷ of partiality, since he had served as legal expert of the Venice Commission of the Council of Europe by contributing to a report on the inter-relationship of the entity constitutions with the Dayton Constitution in Summer 1996 - almost one year before the commencement of the mandate of the Court and even though in the proceedings of the same case the exclusion of the judge was unanimously dismissed.⁷⁸ Even one of the Bosniac judges was at a further stage of the proceedings accused of having been one of the legal advisors at the Dayton negotiations and hence as being unimpartial. In this case too the exclusion of the judge was rejected with an overwhelming majority.

The more or less 'voluntary' resignation from the same case of one of the two Serbian judges had the end effect of a particularly problematic political manoeuvre. In order to avoid the aforementioned suspensory veto or indeed also any conflict on the exact interpretation of this provision of the Rules of Procedure, a preemptory decision was rendered at an early stage to the effect that judgement will only be passed in case U 5/98 in the presence of all nine judges. As such, when it became clear that the proceedings would result in a 5:4 majority decision that the preamble and Article 1 of the Constitution of Republika Srpska and the Constitution of the Federation were unconstitutional, the Serbian judge who had no other source of income than the Court stood down 'voluntarily'. It took six months for the Parliament of Republika Srpska to appoint a successor judge, with the consequence that

⁷⁷ The author of this article.

⁷⁸ See also the additional personal accusations in the dissenting opinions of judges Vitomir Popovic and Mirko Zovko in *Službeni glasnik BiH*, br. 23/00, esp. 504 et seq. and 513 et seq.

during that time the case was discussed in Court, but no further voting took place.

Alongside such and six months after the constitutive session of the Court, one of the Bosniac judges was forced after exclusionary proceedings to stand down after having in journalistic interviews referred to pending legal proceedings in which he publicly rendered his own personal opinion. Towards the end of 2001 a case arose under similar facts in that an application was made to exclude one of the two Serbian judges yet was however for reasons of opportunism eventually retracted.

In the context of the pro and contra of the publication of dissenting opinions the issue once again arises of the relationship of the judges to general public opinion.

It should firstly be generally stated that *summa summarum* the possibility foreseen by Article 36 of the Rules of Procedure, in that dissenting and concurring opinions are to be published, has indeed had an overall positive effect on the Court.

It should be emphasised that the particularly positive aspect of the situation is that the anticipation of dissent leads to the majority taking special care in argumentation and thereby also to an improvement in the quality of the reasoning of the decision. This also works in reverse in that there is no great effort involved in the preparation of a dissenting opinion, as in the proceedings the opposing positions to the majority are clearly tackled by the complexity of the argumentation and hence - generally - the dissenting opinions may be put together relatively quickly so that the duration of the proceedings are in no way significantly affected.⁷⁹

On the one hand, the legal-political conflicts amongst the members of the bench are played out with the possibility of a dissenting opinion resulting, although this does not tend to enhance the conflict; rather it acts as an instrument to let feelings vent and to release burdens along the lines of the ethnic composition of the Court as the judges who consider themselves representatives of their constituent peoples can prove to their 'clients' that they indeed have been 'defending the national interest', have given their 'best', yet that they have been subject to the 'fate' of the voting procedures.

Furthermore the values and various styles of judicial reasoning of the individual judges have become clearer with the result that transparency of judicial proceedings has become greater. This transparency prevents speculation on the formation of factions or possible political tendencies amongst the judges. The notion of judicial independence together with the

⁷⁹ Despite this, the problem has arisen in some cases that dissenting opinions have been produced under the pretext of delaying publication by several months of the decision in the Official Journal, such as those in cases U 9/00 and U 25/00.

authority of the Court is however not endangered through transparency of the voting procedures. In so far as opposing positions are visible for the parties to the case and the general public, so split decisions of the Court are met with a greater acceptance.

Of course, in the context of dissenting opinions, judges may experience personally unpleasant consequences particularly when matters depart from the level of factual criticism as in the aforementioned proceedings on the exclusion of judges. In general, however, this tends to be more a conflict of individuals. For the Court itself as an institution, a non-factual criticism within a dissenting opinion could detract from the legitimacy of the Court, but even in such a case for the actual judges this serves as a form of boomerang. It does however become problematic when individual judges give media interviews and utilise television appearances as a means not of explaining the reasoning of the majority of the bench but rather of presenting their own dissenting opinion as ‘the’ final decision of the Court.⁸⁰

Even if in some decisions with a close 5:4 majority vote such as U 5/98 some four dissenting but also one concurring opinion is rendered, this form of ‘plurality vote’ remains difficult for the general public to comprehend and leaves it open for the ‘over-ruled’ minority to claim that they were in reality in the majority. Should this not only be widely discussed *in camera* but also in public, it is likely to lead to a lack of legitimacy for a decision. This did not however occur in the case at hand, as not only the entire international community, but also the majority of the population of the Federation in fact welcomed the Court’s decision.

6. Concluding Remarks

The issue of the relationship between the legislative and the Constitutional Court and thereby also the demarcation between politics and law is - just as the drama of the recent decision of the Austrian Constitutional Court in relation to the erection of bi-lingual street signs - even in a mature parliamentary democracy with a decades long tradition of constitutionality not entirely free of conflict. Even greater are nevertheless the problems of comprehension over the necessity and means of operation of constitutional justice in a young state, which has not only experienced over several years the effects of conflict with elements of civil war, but where the transformation of its entire political, economic and cultural system from that of communist monism to that of a pluralistic, non-ethnocratic multiparty democracy on the basis of a civil society has just begun.

⁸⁰ See for example the interview in the weekly publication Reporter from 1 May 2001 under the title “Nevjesto napisan pamflet” or the interview in *Glas Srpski* published on the occasion of the tenth anniversary of the passing of the constitution of Republika Srpska, 19-20 January 2002 entitled “Za unitarizaciju BiH”.

As for the role of constitutional justice in this context it is clear that the Constitution as Annex 4 to the Dayton Agreement has indeed fulfilled its aims of stabilising the cease-fire and thereby also the precarious 'negative' peace. It is and remains questionable whether the Constitution would also stand up to a consolidation of the state itself. The Constitution is as a result of its fundamental antinomy⁸¹ wedged between on the one side the democratic state and rule of law, and on the other the entrenchment of ethnocratic structures which, despite massive in-roads made by the international community and in particular the OSCE and their efforts in relation to elections, has so far prevented the development of a multi-ethnic party system. On the contrary: as a result of the almost annual elections held since 1996,⁸² the mechanisms of ethnic representation as foreseen by the Constitution have rather become a firm part of society.

It was with this background that the Court in the case U 5/98 was faced with the fundamental issue of deciding to either on the one hand maintain the political compromise - which emerged as the price for the ceasefire - through the means of historical interpretation and reliance on the will of the contracting parties and effects of the compromise on the ethnic homogenisation by means of institutional and territorial separation, or on the other, to break up the allegedly intact connexion of territory and ethnicity of the entities and thereby go against the ethnocratic developments yet in doing so to strengthen the infrastructure of the state. This was indeed attempted - as described above - through the means of an interpretation of the institutional structure of the Constitution, the re-orientation from an exclusive to a competing distribution of powers and the inclusive framework legislation of the entire state, legislative affirmative duties and lastly the strong emphasis on individual rights and a ban on discrimination for the return of refugees. As the boundary of constitutional justice is the clear wording of the Constitution itself, it was and remains impossible on the basis of the Dayton Constitution to find an alternative between ethnically structured consociational democracy and an ethnically indifferent democratic state based on the rule of law in the form of a strict separation of state, law and ethnicity.⁸³ With such a judgment the weighting was firstly merely transferred from the heavily dominated ethnic principle to that of an ethnically indifferent equality of citizens, and secondly it was attempted to strengthen the overall ability of the state to integrate. Even if the tight majority of the bench are accused by their

⁸¹ See for example to pregnant analysis by Sarcevic, "Verfassungsgebung und 'konstitutives Volk' ...", esp. 524 et seq.; and even Joseph Marko, "Bosnia and Herzegovina - Multi-ethnic or multi-national?", in European Commission for Democracy through Law (ed.), *Societies in Conflict: the Contribution of Law and Democracy in Conflict Resolution* (Council of Europe, Strasbourg, 2000), 92-118.

⁸² See Marko, "Friedenssicherung im 21. Jahrhundert ...", 70 et seq.

⁸³ In relation to this, Sarcevic, "Verfassungsgebung und 'konstitutives Volk' ...", 531 sees the Dayton Constitution only as a provisory document and concludes that only as a result of a newly formed, democratic constitution based on the rule of law will Bosnia and Herzegovina see a real chance for change. Apart from the fact that it would re-open a Pandora's box, the main issue would however be the specific institutional combination of rule of law with a multi-ethnic democracy: matters which are unavoidable in Bosnia and Herzegovina.

colleagues within their dissenting opinions to have over-stepped the boundaries between law and politics and in doing so making themselves into members of the legislative, the identity of the state and law and therefore also the Constitution as a legal basis of the state make clear that it cannot be the purpose of a constitution and thereby also the task of a constitutional court to participate in a disintegration through the means of segregation and as a result in the dissolution of a state.

In conclusion the Constitutional Court as perhaps the most effective institution on the entire national level has in its five-year history attempted to fulfil three essential functions: to establish a constitutional balance between democracy and ethnocracy; to develop alongside the international control wielded by the High Representative a democratic system of checks and balances and finally to ensure by means of its appellate jurisdiction the effective protection of human rights.

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