

## **The Constitutional Court of Bosnia and Herzegovina Individual Complaints**

In 1995, the jurisdiction of the Constitutional Court of Bosnia and Herzegovina (CC BiH or the Court) was expanded to appellate review over questions under the Constitution of BiH arising out of a judgment of any other court in Bosnia and Herzegovina (BiH) (Art. VI.3.b of the Constitution of BiH). In upholding the Constitution of BiH, the Court does not only provide for abstract review (viz. review of compatibility of laws with the Constitution of BiH), but also acts as the final national authority to remedy violations of human rights and fundamental freedoms guaranteed by the Constitution of BiH and international law. Thus, the appeal (in local languages: *apelacija*) represents a legal remedy allowing for individual access to the CC BiH.

**Concept and scope of individual complaints to constitutional courts.** Individual access to constitutional justice is regarded as an important milestone for the protection of human rights and fundamental freedoms at the national level. Historically, individual complaints against the violation of constitutionally guaranteed individual human rights in the United States of America (USA) and in the Austrian part of the Habsburg Empire with Article 3 (b) of the Fundamental Law on the Establishment of a Supreme Court (Reichsgericht) as part of the so-called “December Constitution” of 1867. The first organisationally separate Constitutional Court, called the Kelsenian “model” of constitutional judicial review, was established after World War I in Austria (see: Constitutional Court(s) and Constitutional Review). A recent report by the Venice Commission (2020) shows that the majority of European systems do foresee some type of individual constitutional complaint to the extent that nowadays they are considered common features of European constitutional justice for both centralized and de-centralized systems of judicial review (see: Constitutional Court(s) and Constitutional Review). Their purpose is twofold. In the first place, individual complaints provide a legal remedy at the national level against violation and unconstitutional interference with one’s rights and freedoms by state authorities. In the second place, through individual complaints, constitutional courts can be understood as “filters” for cases appearing before the European Court of Human Rights (ECtHR) by relieving the burden on the docket of the latter.

An individual complaint is not regarded as an appeal understood as an ordinary legal remedy in the ordinary court system. In the first place, like the ECtHR, constitutional courts are not courts of the last instance. However, they are considered supplementary institutions that provide judicial protection in issues falling under the scope of constitutional review. For example, in the context of its appellate jurisdiction, the CC BiH only examines whether rights and

freedoms within the meaning of Arts. II.2 and II.3 of the Constitution of BiH were violated by actions and decisions of ordinary courts. It thus follows that the object of the appeal as the form of individual complaint to the CC BiH is to provide constitutional protection of human rights and fundamental freedoms from the unconstitutional interference of ordinary courts. In the second place, the legal possibility of individual access to constitutional justice can be understood as a form of respect for State sovereignty. This means that the responsibility of the State before international forums, most notably before the ECtHR, may be considered only after an opportunity to put matters right through their own legal system. In other words, if an individual from BiH would like to file an appeal before the ECtHR, all of the domestic legal remedies have to be exhausted first, including an individual complaint before the CC BiH.

**Admissibility criteria.** Art. 18 of the Rules of CC BiH provides for admissibility criteria of appeals within its meaning under Art. VI.3.b of the Constitution of BiH. In particular, an appeal can be submitted against a judgment or other court decisions only if all effective legal remedies have been exhausted and within the time limit of 60 days from the date on which the appellant received the decision in question. What constitutes an effective legal remedy is a factual question determined on a case-by-case basis. Whilst an appeal to the Court will generally be declared inadmissible if all ordinary legal remedies were not exhausted as the contested decision has not acquired the effect of *res judicata*, the assessment of the effectiveness of legal remedies is made taking into consideration whether the protection sought by such remedies is practical and effective, rather than illusory and theoretical. However, Art 18.2 of the Rules of CC of BiH provides for an exception by allowing the Court to examine an appeal in cases where there is no decision of an ordinary court, provided that the appeal alleges grave violations of human rights and freedoms guaranteed by the Constitution or international documents applicable in BiH. Such a situation relates to, for example, allegations of the excessive length of court proceedings as an element of the right to a fair trial under Art. II.3.e of the Constitution of BiH or Art. 6 ECHR, or the right to an effective remedy under Art. II.2 of the Constitution and Art. 13 ECHR. That exception relates to the examination of the constitutionality of imposed measures ensuring the presence of the suspect or accused in criminal proceedings pending before a competent court, provided that the procedural decision in question became final. Art. 18.3 of the Rules of CC BiH explicitly lists thirteen formal and substantive grounds for declaring an appeal inadmissible. In addition, the Rules of CC BiH provide for two separate grounds for dismissal of an appeal: (1) if there is no a justified claim or that the submitted facts cannot justify the allegation of the existence of violation nor the appellant has suffered a violation of any of the rights or freedoms protected by the Constitution of BiH (Art. 18.4. Rules of CC BiH); and (2) if it is determined that the appellant has not suffered a significant damage unless the respect for human rights requires the examination of the appeal on the merits (Art. 18.5 Rules of the CC BiH).

**Effect of decisions on appeals.** Pursuant to Art. VI.6 of the Constitution of BiH, the Court's decisions are final and binding. However, the question is what effect the decisions of the Court have on proceedings completed before the respective ordinary courts when finding a violation of human rights and freedoms protected by Arts. II.2 and II.3 of the Constitution of BiH

and the ECHR? As a rule, such decisions on an appeal in cassation have the effect that they will quash the judgment of the ordinary court, and, according to Art. 62.1 of the Rules of the CC refer the case back to that court for new proceedings. Nevertheless, in comparison to the Rules of the CC BiH (2005) previously in force, the present Rules of the CC BiH allow for an exception to this rule in situations when the consequence of a violation of constitutional rights and freedoms may be remedied in another manner. For example, codes of criminal procedure provide for an extraordinary legal remedy defined as the possibility of reopening of criminal proceedings for the benefit of the defendant. This is possible, if proceedings or the judgment of the court were based on a violation of human rights and fundamental freedoms established by the CC BiH, the Human Rights Chamber, or the ECtHR (see Arts 327.1.f CPC BiH, 343.1.f CPC FBiH, 343.1.d CPC RS, and 327.1.f CPC BD BiH). In its case law, the CC BiH did not consistently resort to the exception of appeal in cassation. In a number of cases the Court, in granting appeals, quashed the final judgment of the ordinary courts in criminal cases although legislation governing rules of criminal procedure explicitly provide for the possibility of remedying the violation by resorting to the rules for reopening criminal proceedings. In conclusion, whilst the cassation of the successfully impugned decision of the ordinary court remains as a rule, resorting to it may be avoided, provided that the applicable laws allow for the violation of constitutional rights and freedoms to be remedied in another way.

**Appeal as an effective legal remedy?** When upholding the appeal and quashing the impugned decision, the Court is obliged to specify which constitutional right or freedom was violated and provide reasons for such findings (Art. 62.3 of the Rules of the CC BiH). Further, the ordinary court or other authority is obliged to reach another decision and, in doing so, is bound by the opinion of the CC BiH concerning the violation in question (Art. 62.4 of the Rules of CC BiH). If the court fails to adhere to the legal stance of the CC BiH, the Court may itself decide on the merits of the case (Art. 62.5 of the Rules of the CC BiH). Whilst it is a question decided on a case-by-case basis, it is generally accepted that appeal to the Court is an effective legal remedy. For example, in the case of *Mirazović v. Bosnia and Herzegovina*, the ECtHR held that an appeal to the CC BiH is in principle an effective legal remedy for questions related to statutory prevention of the enforcement of judgments (App. no. 13628/03, Decision of 16 May 2006). On the opposite, in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, the ECtHR held that, with respect to one of the applicants, the appeal to the Court was not considered as the effective remedy as, given the previous case law of CC BiH on nearly identical circumstances, provided no reasonable prospect of success (App. nos 2312/08 and 34179/08, Judgment of 18 July 2013, paras 59-60).

**Limits of the appeal.** As explained above, the Court's appellate jurisdiction extends to constitutional issues "...arising out of a judgment of any other court in [BiH]" (Art. VI.3.b of the Constitution of BiH). It follows that, unlike in comparative legal systems, constitutional protection against violations of rights by administrative authorities, either in form of general or individual administrative acts, falls outside the scope of the Court's appellate jurisdiction. Given that the existence of a judgment of an ordinary court is a formal requirement, prior

judicial review of such acts in the administrative dispute procedure constitutes a prerequisite to trigger the appellate jurisdiction of CC BiH. Such an approach was considered as a gap in the scope of the Court's judicial review and thus the subject of criticism in legal scholarship.

The final point relates to the question of the legal possibility of constitutional review of decisions of the High Representative (HR), the authority established under Annex 10 of the General Framework Agreement for Peace in BiH (GFAP) to oversee its civilian implementation (see: The High Representative and Annex 10 of the Dayton Peace Agreement). It is a matter of settled case law that the Court has no subject matter jurisdiction over decisions of the HR in relation to removal of individuals from public offices as this was even confirmed by the ECtHR in the case of *Berić et.al. v. Bosnia and Herzegovina* (App. Nos 36357/04 et.al., Judgment of 16 October 2007). Quite contrary, the CC BiH has established its jurisdiction to review legislative impositions by decisions of the HR already in cases U-9/00, U-16/00 and U-25/00 based on the constitutional doctrine of "functional duality" stemming from French legal thinking. According to this doctrine the HR is "substituting himself for the national authorities [...] and therefore acted as an authority of Bosnia and Herzegovina" so that "the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina. [...] The Parliamentary Assembly is free to modify in the future the whole text of part of the text of the Law[...]." Consequently, even the imposition of amendments to the constitution of the Entities are subject to review by the CC BiH. This doctrine was again upheld by the CC BiH in 2022 in case U-27/22 against the imposition of amendments to the Constitution of the Federation BiH and the BiH election law.

## References:

- Chakim, M. Lufti. „A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions.” *Constitutional Review* 5:1 (May 2019). <https://doi.org/10.31078/consrev514> (accessed February 26, 2023).
- Dannemann, Gerhard. „Constitutional Complaints: The European Perspective.” *The International and Comparative Law Quarterly* 43:1 (January 1994). <http://www.jstor.org/stable/760826> (accessed February 26, 2023).
- De Vergottini, Giuseppe. *Uporedno ustavno pravo*. Beograd: Službeni glasnik, 2015.
- Dürr, Schuntz Rudolf. „Individual Access to Constitutional Courts as an Effective Remedy against Human Rights Violations in Europe – The Contribution of the Venice Commission.” *Journal of Law and Politics* 258 (2014). [https://www.venice.coe.int/files/articles/Durr\\_individual\\_access\\_JU\\_effective\\_remedy.pdf](https://www.venice.coe.int/files/articles/Durr_individual_access_JU_effective_remedy.pdf) (accessed February 26, 2023).
- European Commission for Democracy through Law. Revised Report on Individual Access to Constitutional Justice. Opinion no. 1004/2020, CDL-AD(2021)001. [https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD\(2021\)001-c](https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-AD(2021)001-c) (accessed February 26, 2023).
- Guastini, Riccardo. *Sintaksa prava*. Zagreb: Naklada Breza, 2019.
- Krapac, Davor. *Postupak pred Ustavnim sudom Republike Hrvatske. Ustvojtvo i proceduralni aspekti ustavnog nadzora*. Zagreb: Narodne novine, 2014.
- Marko, Joseph. „Foreign judges: a European perspective.” In *Hong Kong's Court of Final Appeal. The Development of Law in China's Hong Kong*. Edited by Young, Simon N.M., and Ghai, Yas. Cambridge: Cambridge University Press, 2013.
- Mourgeon, Jacques. *Ljudska prava*. Beograd: Plato, 1998.
- Rakić-Vodinelić, Vesna. *Pravosudno organizaciono pravo*. Beograd: Pravni fakultet Univerziteta Union u Beogradu – Službeni glasnik, 2012.
- Shapiro, Martin. *Courts: A Comparative and Political Analysis*. Chicago: The University of Chicago Press, 1986.

Smailagić, Nedžad. „Constitutional Court of Bosnia and Herzegovina (Ustavni sud Bosne i Hercegovine).” In *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*. Oxford: Oxford University Press, 2020. <https://oxcon.oup.com/display/10.1093/law-mpeccol/law-mpeccol-e804> (accessed February 26, 2023).

Trnka, Kasim. *Ustavno pravo*. Sarajevo: Fakultet za javnu upravu, 2006.