

4th Congress of the World Conference on Constitutional Justice
THE RULE OF LAW AND CONSTITUTIONAL JUSTICE
IN THE MODERN WORLD

11-14 September 2017, Vilnius, Lithuania

QUESTIONNAIRE

The 4th Congress of the World Conference on Constitutional Justice will be subdivided into five sessions. Four of them will deal with the main topic of the Congress, "The Rule of Law and Constitutional Justice in the Modern World" (Part A). A special session will be devoted to a stocktaking exercise on the independence of the members of the World Conference (Part B): Constitutional Courts, Councils, Chambers and Supreme Courts exercising constitutional justice (hereinafter all "Courts").

The Member Courts are kindly requested to reply to the questionnaire below by 30 November 2016 at the latest. The replies relating to the rule of law will be public, whereas the replies relating to the independence of the Courts will be available only to the Member Courts in the restricted Venice Forum.

A. The rule of law and constitutional justice in the modern world

Without attempting to give a definition, for the purpose of this questionnaire, rule of law shall refer to a state in which all persons, institutions and entities, public and private, including the state itself, are bound by and accountable to the law.

As a concept of universal validity, the rule of law is a characteristic of modern democratic legal systems. Even if some Member Courts of the World Conference on Constitutional Justice have very specific powers, they all ensure the supremacy of the Constitution, and thus they promote the rule of law.

The need for universal adherence to and implementation of the rule of law at both the national and international levels was endorsed by all Member States of the United Nations in the Outcome Document of the 2005 World Summit. In 2011, the United Nations published the Rule of Law Indicators and, in 2012, a high-level meeting of the General Assembly recognized that the rule of law applies to all states equally, and to international organizations.

At the regional level, the Inter-American Democratic Charter of the Organization of American States, the Constitutive Act of African Union and the Arab League refer to the rule of law. For the Council of Europe, the rule of law is one of the three principles which form the basis of all genuine democracy, together with individual freedom and political liberty.

While the scope of the rule of law is not always defined in the same manner in these instruments, the work of the Venice Commission may be able to provide some guidance for the 4th Congress and for the replies to this questionnaire.

Following its 2011 Report on the Rule of Law (CDL-AD(2011)003rev), the Venice Commission, in March 2016, adopted its detailed Rule of Law Checklist (CDL-AD(2016)007), which provides

an overview of the wide scope of the rule of law, *inter alia*, covering legality (supremacy of the law, relationship between international law and domestic law, law-making procedures, law-making powers of the executive, emergency situations, private actors in charge of public tasks), legal certainty (accessibility of legislation and court decisions, foreseeability, stability and consistency, legitimate expectations, non-retroactivity, *nulla poena sine lege, res judicata*), prevention of abuse of powers, equality in and before the law and non-discrimination, access to justice (independence and impartiality of the judiciary and judges, fair trial, including effectiveness of judicial decisions, autonomy of the prosecution service). These topics can help in order to identify elements which are part of the rule of law, even when they are used without an explicit reference to this principle.

In your replies to the questions below, please briefly present the case-law of your Court whenever applicable.

I. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

Under the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina¹ shall be a democratic state, which shall operate under the rule of law and based on free and democratic elections. The principle of the rule of law is determined in Article I(2) of the Constitution of Bosnia and Herzegovina as one of the fundamental values and it constitutes grounds for its interpretation.

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

The Constitution of Bosnia and Herzegovina in its original text in English language utilizes the Anglo-Saxon term “rule of law” which entails an introduction of the principle of the rule of law. However, in practice, this term is understood much broader in its Bosnian, and thus also continental European context. The Constitutional Court of Bosnia and Herzegovina interprets and refers to the principle of the rule of law in different ways both in its formal and substantive sense.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

The Constitutional Court of Bosnia and Herzegovina is entrusted with the classic constitutional jurisdictions such as: abstract (normative) and specific constitutionality control, deciding on disputes that arise between relevant levels of government or between institutions of Bosnia and Herzegovina, as well as the appellate jurisdiction. Moreover, the Constitutional Court resolves blockages in the decision-making process of the Parliamentary Assembly of Bosnia and Herzegovina arising when the majority of delegates belonging to one constituent peoples declares a specific decision destructive for the vital national interest of the constituent peoples in the House of Peoples, and the

¹ The Constitution of Bosnia and Herzegovina (i.e. Annex IV to the General Framework Agreement on Peace in Bosnia and Herzegovina (so called Dayton Peace Agreement) as agreed upon in Dayton, Ohio, USA on 21 November 1995 and signed in Paris, France on 14 December 1995) establishes that Bosnia and Herzegovina consists of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and additionally, by the International Arbitration Decision of 2000, the District Brčko is established as a unique administrative unit of local self-government under the sovereignty of Bosnia and Herzegovina.

majority of delegates from another constituent peoples disagree with such an assessment. The complete operation of the Constitutional Court of Bosnia and Herzegovina is aimed at protecting and promoting the rule of law. It may be said that the Constitutional Court, within the scope of its abstract jurisdiction (review of constitutionality) has given a very significant contribution to further constitutional and legal development in Bosnia and Herzegovina, especially when it comes to the strengthening of the functionality of the state and its constitutional system, legal certainty, rule of law and systematic protection of everyone without discrimination. When the rule of law is concerned, the different fields of law are represented in the case-law of the Constitutional Court, but a special emphasis cannot be placed on one in particular.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

Referring to the rule of law we actually refer to the specific legal principles which are determining the functioning of public authorities. Thus, **the principle of legal certainty** is laid down as one of the significant principles of the system of Bosnia and Herzegovina, which is set forth as an inseparable element of the rule of law by the Constitutional Court of Bosnia and Herzegovina as well. In connection with this principle, in the cases in which it considered the issue of different case-law of a court when it decides on the same factual and legal issue, the Constitutional Court took position that in principle, the case-law of courts and inconsistent application of substantive law in the same or similar cases might arise to a violation of the rule of law principle under Article I(2) of the Constitution of Bosnia and Herzegovina and the principle of legal certainty as an inseparable element of the rule of law (Decision No. *AP 1076/09*). In accordance with the case-law of the Constitutional Court, imprecision of the legal norm leads to the deprivation of the right to legal certainty. Thus, the Constitutional Court concluded that by the issuance of the High Judicial and Prosecutorial Council's decision ("the HJPC") in the disciplinary proceedings before the HJPC in which, due to inconsistent application of substantive law and imprecision of the legal norm, the appellants were denied the right to legal certainty as an element of the rule of law principle under Article I(2) of the Constitution of Bosnia and Herzegovina and the right to a fair trial has been violated (Decision on Admissibility and Merits No. *AP 4101/09*).

From the aspect of promoting the rule of law principle, it is necessary to point out to the cases relating to war damages. In the large number of these cases the appellants indicated the violation of the right to a fair trial because of the failure to enforce legally binding court decisions by which the compensation of damages occurred during the war activities in Bosnia and Herzegovina had been awarded. In these cases, the relevant laws practically impeded the enforcement of legally binding judicial decisions. The Constitutional Court, *inter alia*, emphasized that the court will not be considered "independent" under Article 6(1) of the European Convention if it requires and accepts a binding opinion of executive public authority since in that way "the court function would be subjected to the executive authority". The conclusion of the Constitutional Court in these cases was that there is a violation **of the right to an "independent court"**, which is inseparable part of the right to a fair trial if the acts of legislative or executive authorities change the binding court decisions, thus also violating the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina (Decision No. *AP 703/04*). The issue of the rule of law in the context of **the independence of judiciary**, the Constitutional Court firstly considered on its own example, and then on the ordinary courts' example. Thus, in the Decision in the case No. *U 6/06*, the Constitutional Court reviewed the constitutionality of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina by which the salaries of the Judges of the Constitutional Court had been established and reduced at the same time. The Constitutional

Court, *inter alia*, underlined that the principle of the rule of law and the independence of judiciary, as its inseparable part, and, in particular, the principle of the separation of powers, by no means imply that the legislator cannot regulate the issues important for functioning of the state institutions, even when relating to the Constitutional Court. The Constitutional Court also emphasized that the independence of the Constitutional Court implies that it is governed by specific rules which are also imposed on the legislator; and these rules should therefore have a constitutional value. In the absence of constitutional laws, the Constitutional Court must be able to decide independently on its internal organization and functioning. In the Decision No. U 7/12 in which the Constitutional Court decided on the constitutionality of the provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina, the Constitutional Court has found that the relevant Law is incompatible with the provisions of Articles I(2) of the Constitution of Bosnia and Herzegovina as it violates the principle of independence of the judiciary as the fundamental guarantee of the rule of law. In this Decision, the Constitutional Court, *inter alia*, pointed out that taking into account the standards established by the international instruments, referred to by the applicant, relating to the status of judges and aimed at ensuring that the judicial system is at the highest level, and given the fact that the Constitutional Court has not found in the challenged Law any reasonable or objective justification for the differential treatment relating to the issue of the structure of earnings in question, nor has the legislator offered such justification in its reply to the request, the Constitutional Court is of the opinion that the challenged Law is disproportionate to the aim sought to be realized. In addition, the Constitutional Court concluded that the challenged Law is disproportionate to the European standards established with regard to the status of judges. The division of powers in the state as one of the fundamental principles of the rule of law is derived from the mentioned case-law. This is explicitly confirmed in the Decision of the Constitutional Court No. AP 3208/06 which, in addition to the aforementioned also refers to **the legality** as one of the rule of law principles. In this Decision, the Constitutional Court emphasizes that judicial bodies, in terms of Article I(2) of the Constitution of Bosnia and Herzegovina, must act in accordance with law since that is one of basic principles of the rule of law as well as the principle of the separation of powers in the state.

The Constitutional Court dealt with the principle of **equality before the law** as an inseparable element of the rule of law in the case in which it reviewed the constitutionality of a provision of the Law on the Court of Bosnia and Herzegovina prescribing in general the situations in which the Court of Bosnia and Herzegovina, under certain conditions, shall have jurisdiction (Decision No. U 16/08). However, in addition to the above, it is important to note that the Constitutional Court concluded in this case, *inter alia*, that this provision allows meeting of the constitutionally stipulated obligation of the state to protect the sovereignty, territorial integrity, political independence, national security and international personality of Bosnia and Herzegovina, and the **meeting of these constitutional responsibilities** is one of the requirements of the rule of law principle in the democratic states.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

No.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

Article II(2) of the Constitution of Bosnia and Herzegovina provides for the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. Furthermore, the Constitution of Bosnia and Herzegovina prescribes that the enjoyment of

the rights and freedoms provided for in the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground set forth in Article II(4) of the Constitution of Bosnia and Herzegovina. Annex I to the Constitution of Bosnia and Herzegovina, under a title "Additional Human Rights Agreements to be Applied in Bosnia and Herzegovina" lists the following international agreements: 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities. Moreover, under Article II(6) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in Article II of the Constitution. In essence, this means that all of these are obliged to directly apply the European Convention and secure the minimum of rights and freedoms guaranteed by it. From all stated above, it may be concluded that the legal system of Bosnia and Herzegovina is under a considerable influence of the international law. However, by the limitation to the legal principle of the rule of law in the strict sense, i.e. to Article I(2) of the Constitution of Bosnia and Herzegovina pursuant to which Bosnia and Herzegovina operates under the rule of law, it may be said that, first of all, the Constitutional Court interpreted the principle of the rule of law **by its own** interpretation of the Constitution of Bosnia and Herzegovina, and that the influence of the international law is not particularly noticeable in this respect.

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

Even though a positive development of Bosnia and Herzegovina is evident since the signing of the Dayton Peace Agreement, it still remains the country with serious social and economic problems. Political parties can hardly find common ground when the joint development of the county is concerned. Because of numerous problems the citizens of this state are encountering on a daily basis (unemployment, corruption, length of judicial proceedings, etc.), they are losing trust in the rule of law. In such circumstances, the strengthening of the rule of law is of utmost importance. It is on the political institutions and courts to restore that trust. The role of the Constitutional Court, especially in view of its jurisdiction, is exceptionally important and noticeable. In this sense, it is necessary to mention one of the important decisions of the Constitutional Court which has given its contribution to strengthening of the rule of law in Bosnia and Herzegovina. It related to the review of constitutionality of the Law on the Court of Bosnia and Herzegovina, which was imposed in 2000 by the High Representative for Bosnia and Herzegovina. The Constitutional Court assessed in this case that the applicant's statement that the constitutional grounds for the passing of this Law did not exist

was unfounded, because, except for the Constitutional Court, the Constitution of Bosnia and Herzegovina has not provided for any other judicial instance on the state level. The Constitutional Court pointed out that although it is not the task of the Constitutional Court to express an opinion on whether it is appropriate to enact a certain law, the Constitutional Court observed that in the context of Bosnia and Herzegovina, the establishment of the Court of Bosnia and Herzegovina can be expected to strengthen the rule of law which is one of the fundamental principles of any well-functioning democracy. Furthermore, the Constitutional Court underlined, *inter alia*, that functioning as a democratic state, Bosnia and Herzegovina was authorised “to establish, in the areas under its responsibility, other mechanisms, besides those provided for in the Constitution of Bosnia and Herzegovina, and additional institutions that were necessary for the exercise of its responsibilities, including the setting up of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the European Convention”.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

Not in the hitherto case-law.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

It has already been mentioned above that the provisions of the European Convention on Human Rights and Fundamental Freedoms have the force of constitutional provisions in Bosnia and Herzegovina, and that the Constitution of Bosnia and Herzegovina prescribes the enjoyment of rights and freedoms enshrined in the international agreements enumerated in Annex I of the Constitution of Bosnia and Herzegovina, without discrimination on any grounds. In view of the aforementioned the Constitutional Court established in a number of decisions adopted as part of its abstract jurisdiction that the given challenged law was not in conformity with the European Convention, the UN Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In one of the cases the Constitutional Court concluded that there was a violation of Article III(3)(b) of the Constitution of Bosnia and Herzegovina in a situation where a domestic law is not in conformity with the provisions of the general rule of international law *pacta sunt servanda* under which “Each treaty that is in force shall be binding on the parties and they should observe it in good faith”, as well as when not in conformity with the provisions of the international agreements that Bosnia and Herzegovina has acceded to. It is important to mention also the case of the Constitutional Court where the examination of the harmonization of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention and its Protocols (Decision No. *U 5/04*) was sought. In the mentioned decision the Constitutional Court stated the following: “In order to establish jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of BiH, it is necessary to establish that there is “a dispute” within the meaning of this constitutional provision. The present case does not involve “any dispute that arises under this Constitution between the Entities or between BiH and an Entity or Entities, or between institutions of BiH” but a possible conflict between international and domestic law. In addition, where as in the present case an examination of conformity of certain provisions of the Constitution of BiH with the European Convention is requested, the Constitutional Court notes that the rights under the

European Convention cannot have a superior status to the Constitution of BiH. The European Convention, as an international document, entered into force by virtue of the Constitution of BiH, and therefore the constitutional authority derives from the Constitution of BiH and not from the European Convention itself. Although the Constitution of BiH does not expressly provide for the Constitutional Court's jurisdiction as to the interpretation of the Constitution, it is clear that the Constitutional Court cannot exercise its jurisdiction unless it has first interpreted the relevant constitutional provisions and the provisions of the law subject to abstract review by the Constitutional Court on a request lodged with the Constitutional Court, as well as the provisions relating to its own jurisdiction. The Constitutional Court must always adhere to the text of the Constitution of BiH, which in the present case does not allow for wider interpretation of its jurisdiction, in view of the obligation of the Constitutional Court to "uphold this Constitution". In light of the aforesaid, the Constitutional Court concludes that it falls out of the scope of its competence to decide in the present case on the conformity of certain provisions of the Constitution of BiH with the European Convention and its Protocols."

When it comes to the enforcement of the decision of international courts there is an outstanding problem in Bosnia and Herzegovina persisting for years regarding the enforcement of the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. The case of *Sejdić and Finci* is related to the resolutions, which entirely rule out a possibility for persons not belonging to any of the three constituent peoples to stand as candidates for elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and to the Presidency of Bosnia and Herzegovina. The judgment in the case of *Sejdić and Finci* has been awaiting enforcement since 22 December 2009. Although the very enacting clause of the judgment does not order specific measures that the state is obliged to undertake in order to redress the established violation of rights, in practice, in compliance with the reasons for the judgment, its enforcement requires, among other things, amendments to the relevant provisions of the Constitution of Bosnia and Herzegovina in order to make it possible to the members of others to stand as candidates to the Presidency and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. Regarding this complex issue, amendments to the Constitution of Bosnia and Herzegovina, no agreement has been reached in Bosnia and Herzegovina yet. The European Court dealt with similar issues relating to persons' standing as candidates in the elections in Bosnia and Herzegovina also in the cases of *Zornić v. Bosnia and Herzegovina* and *Pilav v. Bosnia and Herzegovina*, which enforcements share the same fate as the enforcement in the judgment of *Sejdić and Finci*.

III. The law and the state

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina prescribes the jurisdiction of the Constitutional Court regarding disputes of the conflict of jurisdiction and the assessment of constitutionality (abstract control). In accordance with this Article, the Constitutional Court shall:

(...)

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 neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.*

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

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

Referring to the relations between the Entities and the State, it is important to point out that the issue of the distribution of responsibilities between the Entities and the State appears as a complex issue in BiH, particularly when bearing in mind that under Article III(1) of the Constitution of Bosnia and Herzegovina the responsibilities of the institutions of BiH were exclusively enumerated, and the residual responsibilities were prescribed in favour of the Entities (Article III(3)(a) of the Constitution). One of the most significant decisions wherein the Constitutional Court dealt with this issue is the decision of the Constitutional Court No. *U 1/11* of 14 July 2012. In the mentioned decision the Constitutional Court deliberated on the constitutionality of the Law on the Status of State Property Located in the Territory of the Republika Srpska and under the Disposal Ban. The applicant held that there was no constitutional basis for the National Assembly to enact the challenged Law. According to the analysis of the challenged Law, the Constitutional Court established that the Republika Srpska took over the responsibility to regulate, on the one hand, the issue of denying "Bosnia and Herzegovina" the right of ownership over "the state property", and the legal transformation thereof into the Entity property, and, on the other hand, the right of protection of property, the ceding of the right to property and the use of that property. In the end, the Constitutional Court concluded that the Republika Srpska enacted the challenged Law contrary to Articles I(1), III(3)(b) and IV(4)(e) of the Constitution of BiH. The Constitutional Court is of the opinion that this is the exclusive responsibility of BiH to regulate the issue of property referred to in the disputed Article 2 of the challenged Law. On the other hand, in the Decision No. *U 15/09*, the Constitutional Court concluded that the preparation and submission of the Second Report of the Republika Srpska to the United Nations Security Council on the Situation in Bosnia and Herzegovina does not constitute an interference with or assumption of foreign policy, and it is not inconsistent with Articles I(1), III(1)(a), III(3)(b), V(3)(a) and (c) and V(4)(a) of the Constitution of Bosnia and Herzegovina. Among decisions relating to the issue of responsibility, it is important to mention two decisions closely related to negotiations about the Stabilisation and Association Agreement and the process of fulfilment of commitments referred to in the "Road Map", in the cases where the Constitutional Court examined the conformity of the Law on Statistics of BiH (Decision No. *U 9/07*) and the Law on Insurance Agency in BiH (Decision No. *U 17/09*) with the Constitution of Bosnia and Herzegovina. Following an extensive analysis of the challenged laws in relation to the relevant constitutional provisions the Constitutional Court concluded in these cases that the Parliamentary Assembly of Bosnia and Herzegovina had the power to adopt the challenged laws, and stated, among other things, that they were aimed at harmonizing the Entities' legislation in the specific areas as well as their harmonization with the relevant legislation regulating this matter within the European Union, which constitutes the meeting of obligations undertaken upon signing the Stabilisation and Association Agreement with the European Union". All of the mentioned examples from the case-law concerned rather significant issues, which, almost certainly, had a very huge influence on defining constitutional responsibilities.

In one of its decisions (*U 14/04*) the Constitutional Court adopted a principled position that "the adoption of Entities' laws contrary to the procedure prescribed by state laws raises the issue of constitutionality of such laws, and that obligations imposed by state laws must be complied with". The Constitutional Court confirmed such a position after some time and reemphasized that "the laws of Bosnia and Herzegovina adopted by the Parliamentary Assembly of Bosnia and Herzegovina are

considered decisions of the institutions of Bosnia and Herzegovina, and the enactment of laws by the Entities and other administrative units in Bosnia and Herzegovina contrary to the procedure prescribed by state laws may bring into question the compliance with the provisions of the Constitution of Bosnia and Herzegovina. The Constitutional Court indicated that if held otherwise it would, not only bring into question the authority of the institutions of Bosnia and Herzegovina in entirety, but also the principle of the rule of law.

11. Do the decisions of your Court have binding force on other courts? Do other/ordinary courts follow/respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The decisions of the Constitutional Court shall be final and binding, which is prescribed by the very Constitution of Bosnia and Herzegovina and the Rules of the Constitutional Court. The appellate jurisdiction of the Constitutional Court is related to the issues "arising out of a judgment of any court in Bosnia and Herzegovina". The appellate jurisdiction so laid down and interpreted in practice, one can freely say, has caused a certain tension between ordinary courts, including supreme courts, on the one hand, and the Constitutional Court of Bosnia and Herzegovina, on the other hand, for a number of reasons: not understanding and not accepting the new procedural mechanism of appeal before the Constitutional Court (especially initially), because it did not exist before, and the general level of education in this field does not exist at a necessary level; not understanding and even not accepting to a certain extent constitutional rights and freedoms (particularly the political and civil ones), as new obligations of contemporary democracy; objectively thin line between constitutional and ordinary judiciary in certain cases. However, the strengthening of the authority of the Constitutional Court and the quality of its case-law led to positive changes in the case-law of ordinary courts and supreme courts of both Entities of Bosnia and Herzegovina. In this way, courts uphold the principle of legal certainty, which, among other things, suggests that in the event where the Constitutional Court has adopted a final decision on a certain issue, the lower courts must no longer question it. One should emphasize the fact that the decisions of the Constitutional Court have lately in a way encouraged the ordinary courts to directly apply the European Convention in the process of solving their respective cases. Positive examples prevail in the practice. In only a couple of cases before the Constitutional Court an ordinary court did not observe in a new procedure the legal position of the Constitutional Court enunciated in the previous decision on the same factual and legal situation (Decision No. AP 699/15).

It should be mentioned that according to the latest statistics, the Constitutional Court adopted a total of 27,400 decisions resolving 56,333 cases. Out of the mentioned number of 27,400 decisions, the Constitutional Court established that 94 decisions have not been enforced within the given deadline, and adopted ruling on non-enforcement. However, it should be mentioned that in the meantime, following the adoption of the rulings of non-enforcement and after the expiry of the deadline for enforcement, 81 decisions of the Constitutional Court were enforced. Thus, according to the latest statistics a total of 13 decisions have not been enforced, of which number eight decisions are related to the appellate jurisdiction, namely the jurisdiction of the ordinary courts to comply with the orders of the Constitutional Court.

12. Has your Court developed/contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

The Constitutional Court dealt with the issue of the application of a more lenient law and retroactive application of law in a great number of its decisions, relating to the war crimes cases. Complaints of

applicants were related to criminal procedures before the Court of Bosnia and Herzegovina during which they were found liable and were punished under the provisions of the 2003 Criminal Code of Bosnia and Herzegovina (Criminal Code of BiH) for crimes against civilian population that they had committed during the war in Bosnia and Herzegovina in the period from 1992 to 1995. They complained that, due to the refusal of the Court of BiH to apply the Criminal Code of the Socialist Federative Republic of Yugoslavia (former joint state, which had ceased to exist upon dissolution) from 1976 (Criminal Code of SFRY), which had been in force at the time of the perpetration of war crimes, the rule prohibiting retroactive punishment enunciated in Article 7 of the Convention was violated. By relying on the principle of the European Court, under which its task was not to consider *in abstracto* whether the retroactive application of the 2003 Criminal Code of BiH in the cases of war crimes was in itself incompatible with Article 7 of the European Convention, the Constitutional Court established that the answer to that question depended on the circumstances of each case individually. Those circumstances depend on the pronounced penalty and the prescribed penalty, that is to say it depends on the range of the prescribed penalties under the law that was in force at the time of the perpetration of the criminal offence and under the law on the basis of which the penalty was pronounced (Criminal Code of SFRY or Criminal Code of BiH). In that context, the Constitutional Court noted that the criminal offence of a war crime against the civilian population was defined in both laws (Criminal Code of SFRY and Criminal Code of BiH) in an identical fashion, but that the range of the prescribed penalty was different. In that respect, the Constitutional Court found that, given the length of the pronounced penalty, it was of special significance to establish which law (Criminal Code of SFRY or Criminal Code of BiH) was “more lenient” or more favourable in respect of the prescribed maximum penalty. The Constitutional Court concluded in cases like these that there was a violation of the appellant’s constitutional right under Article II(2) of the Constitutional Court of Bosnia and Herzegovina and Article 7(1) of the European Convention, because in the present cases, regarding the sentencing, the retroactive application of the Criminal Code of BiH was to the appellant’s detriment irrespective of the fact that, according to the prescribed range of the prison sentences, it did not mean that the appellant would have received a lower prison sentence if in his case the Criminal Code of SFRY had been applied. (Decision No. AP 325/07).

The role of the Constitutional Court was extremely important and effective in the cases related to the issue of protection of the right to liberty and security of person, notably in the cases raising the issue of lawfulness of deprivation of liberty of the persons who committed a criminal offence in the state of mental incompetence. In the leading decision related to such cases (Decision No. AP-2271/05), the Constitutional Court found that there was a violation of the right to liberty and security of person as the review of the decision imposing the security measure of treatment and placement in a healthcare institution, which was requested by the appellant, was not granted. The Constitutional Court concluded that “there is a violation of the right under Article 5(1)(e) and (4) of the European Convention where the valid laws lack the precise definition of the following terms: possibility, conditions, manner and procedure of pronouncing, extending and/or terminating the measure of compulsory medical treatment and placement in an appropriate healthcare institution, including the access to a 'court' for the purpose of reviewing the lawfulness of detention, which leaves ample room for the arbitrary application of law”. The crucial problem in those cases was the lack of regulations in the legal system of Bosnia and Herzegovina that would provide for the persons who committed an offence in the state of mental incompetence the procedure and requirements for imposition, review and termination of the security measure of treatment and placement in a healthcare institution. The Constitutional Court therefore ordered the Government of the Federation of Bosnia and Herzegovina to take actions, within a time limit of three months as from the date of delivery of that decision, to create a legal framework necessary for the protection of the constitutional rights of the appellants in accordance with the decision of the Constitutional Court. It is important to note that in the mentioned case the Constitutional Court performed two functions – dealing with the specific cases under its appellate jurisdiction referred to in Article VI(3)(b) and incidental control of constitutionality of laws. In

such cases the Constitutional Court exercises full jurisdiction and, consequently, it can fully protect the principle of the rule of law. The Criminal Procedure Code was amended in the procedure for enforcement of the mentioned decision. Moreover, the constituent unites of BiH reached an agreement with the aim of developing a special institution where such persons would be placed, and not together with the persons who committed criminal offence in the state of mental competence.

The Constitutional Court's case-law which relates to the application of laws and principle of lawfulness is important in the cases related to the forcible placement in an institution. The Constitutional Court decided that legal issue in a number of decisions by concluding that there is a violation of the right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5(1)(e) of the European Convention, since the appellants were forcibly accommodated and deprived of liberty within the meaning of the Law on the Fundamentals of Social Protection, Protection of Civilian Victims of War and Protection of Families with Children and Law on Social Protection, Protection of Civilian Victims of War and Protection of Families with Children, which were adopted at the level of the Federation of Bosnia and Herzegovina, and placed in the Institute for Care for Mentally Retarded Persons. Namely, that did not amount to meeting the requirement of "lawfulness" within the meaning of the European Convention, considering the fact that the Law on the Protection of Persons with Mental Health Problems defines a possibility, conditions, manner and procedure for keeping or detaining persons with mental disorders, which was not applied to the mentioned case. Also, there is a violation of Article 5(4) of the European Convention as no decision has ever been issued by a court or some other independent body on the appellant's forcible accommodation or the extension of the forcible accommodation (Decision No. *AP-2472/11*).

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

So far the Constitutional Court has not had the case-law on this issue.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

When it comes to the issue of immunity, the legal framework of Bosnia and Herzegovina is very complex and extensive as there are several constitutions, laws and rulebooks related to immunity. As to the regulations at the state level, Article IV(3)(j) of the Constitution of Bosnia and Herzegovina affords immunity to the delegates and members of the Parliamentary Assembly with regards to any act they commit while performing official duties within the Parliamentary Assembly. It should be noted that after the adoption of the Dayton Constitution, the 1997 Law on Immunity of Bosnia and Herzegovina afforded absolute immunity, according to which any proceedings (either civil or criminal) initiated against a delegate or member of the Parliamentary Assembly of Bosnia and Herzegovina were suspended during their term of office. However, that law was rendered ineffective by the new Law on Immunity of Bosnia and Herzegovina, which was imposed by the High Representative (OHR)² in 2002, and the interpretation of the scope of immunity afforded to the

²The Office of the High Representative (OHR) is an *ad hoc* international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. The position of High Representative was created under the General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement.

delegates and members of the Parliamentary Assembly of Bosnia and Herzegovina was considerably changed. In 2003 the Parliamentary Assembly adopted a new law by applying the ordinary procedure. The new law does not impose general prohibition of conduct of criminal and civil proceedings but it rather serves as a protection against the proceedings which are initiated for the actions which the delegates (the members of the upper house) or the members (deputies of the House of Representatives) take while holding office. According to that law, the immunity from civil and criminal responsibility was afforded to the delegates and members of that legislative body, i.e. the Parliamentary Assembly, where the immunity from civil responsibility is afforded to the holders of executive powers. According to that law, a decision on the issue whether immunity is to be applied or not in a case is left to the competent court, where the relevant ministries are obliged to issue standard procedural rules regulating the resolution of such issues and determining the court competent to deal with such issues. Shortly after the Laws on Immunity were adopted at the level of the State and Entity, the Constitutional Court took a decision within the scope of its abstract jurisdiction, wherein it determined that the Law on Immunity of Bosnia and Herzegovina and Law on Immunity of the Federation of Bosnia and Herzegovina were compatible with the Constitution of Bosnia and Herzegovina. In the mentioned case, the Constitutional Court found that the *ratio* of the contested laws was to strike a balance between the need to protect the integrity of legislative and executive institutions and need to prevent the abuse of authority by individuals in such institutions and to ensure public accountability of the persons holding such office, and, at the same time, to ensure that such persons enjoy the forms of immunity that are appropriate to the office they hold. The Constitutional Court's case-law on the issue of immunity followed the constitutional amendments at the Entity level. In particular, in the period preceding the mentioned amendments, the Constitutional Court found in a certain number of cases that there was a violation of the right to a fair trial under Article 6(1) of the European Convention as the criminal proceedings against the appellants had been initiated before the issue of immunity was resolved. In the mentioned cases, the Constitutional Court did not deal with the merits of the issue of immunity but it rather established that it should be resolved in the procedure prescribed by the law. The Constitutional Court noted in such cases that the ordinary courts should have considered the issue of immunity as an important preliminary issue in the criminal proceedings, and the Constitutional Court held that their failure to do so amounted to a violation of the right to a fair trial under Article 6(1) of the European Convention (Decision Nos. *U 59/01*, *U 60/01* and *U 61/01*). The Constitutional Court took the mentioned decisions on 10 May 2002 when the legal circumstances were considerably different. In particular, the Article of the Constitution of the Federation of Bosnia and Herzegovina, which strictly prohibited the conduct of the criminal proceedings against certain holders of executive office for criminal offences they committed while performing official duties, was in force at that time. The mentioned provision of the Constitution of the Federation of Bosnia and Herzegovina was incorporated in the cantonal constitutions so that certain holders of the cantonal executive power enjoyed immunity from criminal prosecutions for the criminal offences committed in performing official duties. Moreover, at that time there was no clear procedure under which the courts could act in case of objection raised in respect of immunity. Following the legal changes related to the issue of immunity which started by the imposition of the Law on Immunity by the High Representative (OHR) and the Constitutional Court's decision on the compatibility of new laws on immunity with the Constitution of Bosnia and Herzegovina, the Constitutional Court adapted its case-law to the new legal situation. In new cases, the appellants contested the decisions of the ordinary courts and Constitutional Court of the Federation of Bosnia and Herzegovina, which related to the issue of immunity. The Constitutional Court of the Federation of Bosnia and Herzegovina³, having dealt with the appeals of the holders of executive office against the ordinary courts' rulings on the issue of their immunity from criminal accountability, issued rulings wherein it dismissed the appeals and upheld the ordinary courts' rulings wherein it was found that the appellants were not entitled to immunity from criminal accountability. The essential reasons which the ordinary courts and Constitutional Court of the

³ In Bosnia and Herzegovina, in addition to a Constitutional Court at the level of the State, there are constitutional courts of the Entities, namely that of the Federation of BiH and that of the Republika Srpska.

Federation of BiH gave for their decisions were that the immunity was a privilege of public - legal character, that it was in effect as long as the holder of immunity held office and that the Law on Immunity of the Federation of BiH, which entered into force on 6 October 2002, only recognized the immunity of the holders of executive power in the Federation of BiH and cantons from civil accountability. Moreover, the Constitutional Court of the Federation of BiH based its rulings on the fact that according to Amendment LXV to the Constitution of the Federation of Bosnia and Herzegovina (which came into force on 6 October 2002), Article IV.B.4.10 of the Constitution of the Federation of BiH, which afforded immunity to the President of the Federation, Vice-President of the Federation, Prime Minister, Deputy Prime Minister and other members of the Government of the Federation, was deleted. The Constitutional Court primarily noted in the mentioned decisions that its task was not to examine whether the appellant had or did not have the right to immunity, since that issue was finally resolved by the decisions of the Constitutional Court of the Federation, but that the task of the Constitutional Court was to examine whether the contested rulings of the Constitutional Court of the Federation of BiH amounted to the violation of the appellants' right to a fair trial in the proceedings dealing with the objections raised in respect of their immunity. The decisions of the Constitutional Court of Bosnia and Herzegovina, in which the Court decided on their appeals, upheld the legal view of the Constitutional Court of the Federation of BiH. The Constitutional Court of BiH concluded that the rulings of the Constitutional Court of the Federation of BiH contained enough reasons showing why that court considered that the appellants' objections in relation to immunity were ill-founded, and that there was no violation of the appellants' right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention (Decisions Nos. *AP 72/04*, *AP 58/03*, *AP 412/04*, *AP 527/04*). In the recent years, decisions on appeals raising the issue of immunity have been very rare.

IV. The law and the individual

15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

One of the most important and most frequently exercised competences of the Constitutional Court is the protection of constitutional rights and freedoms, including the rights and freedoms under the European Convention in the proceedings under the appellate jurisdiction of the Constitutional Court. The mechanism of appeal before the Constitutional Court (known as the "constitutional claim" in other countries) represents the last mechanism for the protection of human rights and fundamental freedoms in Bosnia and Herzegovina. An appeal can be filed with the Constitutional Court of BiH against a judgment of any court in Bosnia and Herzegovina.⁴ However, in its jurisprudence, the Constitutional Court has interpreted the term "judgment" broadly so that an appeal can be filed not only against the judgments but also against other decisions and rulings of the ordinary courts, wherein certain rights and freedoms are finally decided. The appeal is the last chance to remedy a violation of human rights and freedoms within the judicial system of Bosnia and Herzegovina. While exercising that jurisdiction, the Constitutional Court, as an independent institution which applies the norms and standards of the European Convention and other norms and standards of international law on the protection of human rights and fundamental freedoms, becomes the strongest mechanism for the protection of human rights and fundamental freedoms. The Rules of the Constitutional Court stipulate that the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international

⁴ The Constitutional Courts of the Entities do not have that jurisdiction, and the appellate jurisdiction of the Court of BiH is the second-instance ordinary jurisdiction, and not the jurisdiction over the so-called appeals, i.e. constitutional claims or constitutional appeals (the name of that mechanism for the protection of human rights in some countries) as it was only afforded to the Constitutional Court of Bosnia and Herzegovina.

documents applied in Bosnia and Herzegovina. In that manner, the issue of the length of proceedings before a court and other authority may be raised under Article 6(1) of the European Convention before the Constitutional Court, but also some other issues, such as, for example, the issue of violation of some human rights and freedoms due to the failure to enforce positive obligations of the State. The Constitutional Court's case-law related to the decisions on appeals is based on the case-law of the former European Commission of Human Rights and European Court of Human Rights. In principle, the Constitutional Court does not deal with the issue of regularity and lawfulness of the contested individual acts but it rather decides on the violation of the constitutional rights and issues that are frequently understood restrictively. Such a practice of the Constitutional Court is primarily motivated by the need to reduce its activity to the limits of its constitutional jurisdiction, i.e. the protection of constitutional rights, and not all subjective rights of citizens.

The Constitutional Court has jurisdiction to decide whether any provision of an Entity's constitution or law is consistent with this Constitution of Bosnia and Herzegovina. Such disputes may be referred to the Constitutional Court by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

Article 6 of the European Convention guarantees to everyone the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal. Thus, Article 6 of the European Convention embodies the "right to a court", of which the "right of access to a court" constitutes one aspect. Therefore, although this right is not expressly specified as such by Article 6 of the European Convention, it is a result of the case-law of the European Court of Human Rights. The Constitutional Court also follows such case-law. The Constitutional Court has an extensive case-law related to "access to a court". It has established violations of the right of access to a court in many cases and for different reasons. In its Decision No. *U 106/03*, the subject-matter of examination by the Constitutional Court was the following question: whether the proceedings conducted before administrative authorities in accordance with the relevant laws on minor offences satisfied the requirements under Article 6(1) of the European Convention, i.e. whether it was required that the persons, whose rights and obligations were determined in those proceedings, had a judicial protection in respect of the decisions of the administrative authorities. The Constitutional Court concluded that both first instance authority and second instance authority failed to meet the requirements under Article 6(1) of the European Convention in respect of "an independent and impartial tribunal established by law" for the "determination of any criminal charge". In addition, the Constitutional Court concluded that the relevant regulations did not foresee an independent and impartial tribunal in the case concerned. Furthermore, the Constitutional Court concluded that the relevant cases related to an issue of the quality of laws for the legislator failed to foresee judicial review by a court having full jurisdiction at least at one instance, as required by the constitutional standards. In its case No. *AP 98/03*, the Constitutional Court established a violation of the right of access to a court in the situation where the appellant's claim was rejected on the ground of lack of jurisdiction and where the appellant was instructed to claim damages with the State Commission for War Damages. The Constitutional Court established that the ordinary courts should have accepted their jurisdiction based on Article 6(1) of the European Convention and should have examined whether the appellant's claim had been well-founded in terms of the applicable provisions of the Law on Proprietary Relations and the Law on Obligations and should have decided the case on the merits as to whether the defendants had been liable or not. As to the issue of war damages, in many

cases the Constitutional Court established a violation of the right of access to a court, as one of the elements of the right to a fair trial, on the ground that the enforcement of final court decisions had been prevented by a law or some other act of the authorities and where such a law or other act imposed “an excessive burden on the individuals concerned”, thereby violating the requirement of proportionality between the public interest and the fundamental rights of individuals. An interesting case example of the case-law of the Constitutional Court includes the Decision in case No. AP 369/10, dealing with the issue of discrimination in conjunction with the right of access to a court. Namely, it concerned the case in which the appellant could not initiate proceedings by filing a petition for divorce with the relevant court. The challenged decision concluded that the appellant’s petition was inadmissible in terms of the provision of Article 43 of the Family Law of the Federation of BiH, stipulating that the husband was not entitled to file a divorce petition at the time when his spouse was pregnant or until the time their child reached the age of three years. In the relevant case the appellant filed a petition for divorce at the time when the minor child did not reach the age of three years. According to the appellant, compared to women, men were discriminated against by the aforementioned provision, as women were entitled to file a petition for divorce at any time, whereas this right was limited for men. Therefore, the appellant indicated that there was discrimination on the ground of gender. In addition, the appellant pointed out that women were entitled to divorce at any time and to enter into a new marriage, whereas this right was limited as regards men/husbands, as they could not remarry during the three-year period for which they were not entitled to divorce. The Constitutional Court concluded that the provision of Article 43 of the Family Law did not have the quality of a law to the extent necessary to satisfy the standards of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention in respect of the right of access to a court, as an aspect of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. In view of the above, the Constitutional Court established that the appellant had been discriminated against on the ground of gender in respect of the right of access to a court. Therefore, the Constitutional Court ordered the Parliament of the Federation of Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina to take measures from within their respective jurisdiction to ensure compliance with the constitutional right of access to a court without discrimination on the ground of gender, within the meaning of the said Decision, including all other relevant cases. Having acted in accordance with the order in the said Decision of the Constitutional Court, the Government of the Federation of Bosnia and Herzegovina informed the Constitutional Court that the Parliament of the Federation of BiH had passed the Law Amending the Family Law of the Federation of BiH, deleting the challenged legal provision.

Another interesting case is case No. AP 2691/10, where the appellant complained that his right of access to a court was violated because his request to postpone the main hearing scheduled for and held on the second day of a religious holiday was not met. In the relevant case, the appellant filed a written request in a timely fashion (eight days before the date of the main hearing) with the Municipal Court and sought that the main hearing scheduled for the second day of the religious holiday be postponed. As the first instance court held that the reason stated in the appellant’s request for postponing the main hearing was unjustified, the main hearing was held in the appellant’s absence. Deciding on the appellant’s motion to reinstate the case, the Municipal Court dismissed the appellant’s motion and offered the reasoning that the reasons in the appellant’s motion to reinstate the case *did not fall within the group of justified reasons*. In the mentioned case, the Constitutional Court established a violation of the appellant’s right of access to a court, as one of the elements of the right to a fair trial, in the situation where the appellant’s request to postpone the main hearing scheduled for the second day of the religious holiday had not been recognised, within the discretion of the Municipal Court, as a justified reason to postpone the main hearing and, in addition, the ordinary courts, in decision-making, lacked a special sensibility in respect of the

appellant's right to satisfy his religious needs. In the relevant decision, the Constitutional Court also recalled that Bosnia and Herzegovina, as a multicultural and multi-ethnic society, has to cherish a spirit of tolerance and respect for cultural and traditional characteristics of its peoples. The aforementioned, as a basic value of a multicultural society as in Bosnia and Herzegovina, in the view of the Constitutional Court, should also serve as grounds for the ordinary courts to accept the appellant's request in the situation where the procedural law does not specify the reasons justifying the postponement of the main hearing. According to the Constitutional Court, the relevant case was indeed related to the justified request that should have been met.

In connection with court fees, as a type of procedural obstacles in the context of the right of access to a court, an issue was raised before the Constitutional Court in case No. *U 8/12* as to the existence of legal restrictions on the right of access to a court. Namely, in the aforementioned case, which was initiated based on a request filed by the Municipal Court in Sarajevo, the applicant challenged the compatibility of certain provisions of the Law on the Court Fees of the Sarajevo Canton⁵ and the Civil Procedure Code of the Federation of Bosnia and Herzegovina with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, safeguarding the right to a fair trial in connection with the payment of court fees. As to the challenged Article of the Law on the Court Fees of the Sarajevo Canton, which, *inter alia*, stipulates that a court will not undertake any actions whatsoever if a taxpayer failed to pay the fee prescribed by that law, the Constitutional Court has concluded that that provision is in contravention of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, because rendering it impossible for a court to conduct a proceeding, if no court fee has been paid beforehand on a submission, including a lawsuit, does not constitute an instrument which is reasonably proportional to the achievement of a legitimate aim, as that completely restricts the right of access to a court and a possibility to conduct such a court proceeding, which can lead to irreparable detrimental consequences for a party to the proceeding, which is contrary to the very essence of the right to a fair trial under Article 6(1) of the European Convention. On the other hand, the Constitutional Court has concluded that the challenged provision of the Civil Procedure Code, which stipulates that each party will cover the costs they incurred through their respective actions, is in conformity with the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, as that provision does not thwart the conduct of a proceeding, rather it prescribes a general principle in relation to the costs of a civil procedure. Consequently, the Sarajevo Canton Assembly was ordered to bring in line, not later than six months from the date of the publication of the decision in the *Official Gazette of Bosnia and Herzegovina*, the provision of challenged Article of the Law on the Court Fees of the Sarajevo Canton with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. With a view to implementing the mentioned Decision of the Constitutional Court, the Sarajevo Canton Assembly adopted under an expedited procedure the Law Amending the Law on the Court Fees of the Sarajevo Canton, so that it, *inter alia*, reads: *An unpaid court fee shall not stay the course of judicial proceedings.*

17. Has your Court developed case-law on other individual rights related to the rule of law?

⁵ In the Entity of the Federation of BiH there are 10 cantons as administrative-territorial units, as well as municipalities and towns as units of local self-government and administration. The Republika Srpska is a centralized Entity without cantons, but it has municipalities and towns.

The Constitutional Court has referred to the principle of legal certainty as an element of the rule of law and an element of the right to a fair trial. Few examples of case-law are mentioned above, where the Constitutional Court established a violation of the right to legal certainty in the situation where a single court, which is also the court of last resort to decide certain matters, in the cases that have identical or similar factual and legal basis, made conflicting decisions that lacked the reasons why the court had departed from its own previous case-law, while there was no mechanism for ensuring consistency of decision-making. In the case related to disciplinary proceedings conducted before the High Judicial and Prosecutorial Council (see paragraph 59 of Decision No. *AP 4101/09*), the Constitutional Court explicitly referred to the principle of legal certainty, as a part of the right to a fair trial. The rule of law principle requires from states to ensure that there are effective mechanisms for protecting and controlling that laws are enforced properly. To that end, it should be noted that the Constitutional Court, *inter alia*, controls whether the state has proper mechanisms in place to protect and to review the enforcement of laws. The Constitutional Court does not have jurisdiction *ex officio* to initiate proceedings related to a review of constitutionality. However, the Constitutional Court has taken the position that “the Constitutional Court, if need be, entertains jurisdiction to review constitutionality in a procedure under appellate jurisdiction by virtue of Article VI.3 (c) of the Constitution of Bosnia and Herzegovina”, (Decision No. *U 106/03*). Thus, the Constitutional Court, in its hitherto case-law, has protected the appellants’ right to a fair trial (*AP 3947/12*), right to liberty and security (*AP 498/15*), right to property (*AP 1524/06*) and right not to be discriminated against (*AP 369/14*).

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

In the case-law of the Constitutional Court relating to abstract jurisdiction (review of constitutionality), the principle of rule of law was applied as a basis and general principle and, within the appellate jurisdiction, it was applied as part of the rights guaranteed under the Constitution of Bosnia and Herzegovina and European Convention.