



CONCRETE CONSTITUTIONAL REVIEW IN BOSNIA AND HERZEGOVINA – ‘RULE BY LAW’ OR ‘THE RULE OF LAW’ COURTS?

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Benjamin Nurkić, Master of Laws
Researcher at the “Dialogos” Tuzla
e-mail: bnurkic@bih.net.ba

The problem of the concrete constitutional review in Bosnia and Herzegovina

Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (B&H) states: “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.”¹ Unfortunately, from the adoption of the Constitution until the writing of this paper, ordinary courts asked for the review of the constitutionality of a law in only 52 instances.² Also, the constitutional review can be initiated “(...) 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 Enti-

1 Article VI(3)(c) of the Constitution B&H.

2 This data is available on the official website of the Constitutional Court of Bosnia and Herzegovina. Available at: <https://www.ustavnisud.ba/en/decisions?sp=DatumDesc&>.

ty.”³ Paradoxically, these institutions do not have special knowledge of constitutional law or they do not have to have special knowledge of constitutional law, and yet they have initiated the constitutional review in 140 instances, in significantly larger numbers than the ordinary courts.⁴ So, the question is, why the legislative and executive branches in B&H are more active than the judiciary in protecting the constitutional rights of B&H citizens. Or, why ordinary courts do not initiate constitutional review in B&H? The problem with concrete constitutional review is that ordinary courts in B&H have the lowest rate of requests for concrete constitutional review. This issue is characteristic of states that are in the process of transition from an authoritarian government to democracy. Thus, the judiciary in B&H, especially the ordinary courts, similar to other post-socialist countries, fears to become a true judicial power.⁵ In simple terms, the ordinary courts consider their role only as enforcers of laws. That is a legacy of socialism, where courts were only a tool in the hands of the government. In a democracy, however, the courts should constraint the government’s laws if those laws violate human rights. Concrete constitutional review gives the power to ordinary courts not to enforce “unconstitutional regulations” that are not in accordance with the constitutional rights of citizens. Therefore, ordinary courts should refer “unconstitutional regulations” to the Constitutional Court of B&H under the concrete constitutional review. The table below shows the number of times the ordinary courts initiated a concrete constitutional review for each year.

3 Article VI(3)(a) of the Constitution B&H.

4 This data is available on the official website of the Constitutional Court of Bosnia and Herzegovina. Available at: <https://www.ustavnisud.ba/bs/odluke?sp=DatumDesc&kr%5B%5D=239>.

5 Sadurski Wojciech (2014), *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer, New York, 35-28, 68.



Year	Number of initiated constitutional reviews	Number of accepted requests	Case number
2000	1	0	U-26/00
2001	2	1	U-10/01; U-50/01
2002	1	0	U-55/02
2005	2	0	U-11/05; U-16/05
2006	2	1	U-17/06; U-03/06
2010	1	1	U-5/10
2011	4	2	U-16/11; U-15/11; U-17/11; U-8/11
2012	3	3	U-7/12; U-8/12; U-6/12
2013	3	1	U-29/13; U-5/13; U-12/13
2014	3	1	U-20/14; U-22/14; U-16/14
2015	5	0	U-9/15; U-8/15; U-4/15; U-6/15; U-3/15
2016	2	1	U-20/16; U-3/16
2017	4	2	U-11/17; U-7/17; U-9/17; U-2/17
2018	5	1	U-22/18; U-23/18; U-18/18; U-12/18; U-1/18
2019	4	2	U-10/19; U-6/19; U-4/19; U-1/19
2020	4	1	U-6/20; U-8/20; U-3/20; U-9/20
2021	6	3	U-12/21; U-17/21; U-13/21; U-18/21; U-10/31; U-7/21

Thus, in 2021 the ordinary courts “broke the record” with six initiated requests for concrete constitutional reviews. It is also possible to see the insufficient development from 2000 to 2021. However, in 2021 the ordinary courts showed a bit more positive attitude towards concrete constitutional review. Of course, this is not enough, but can be encouraging for the future. This statistic suggests that in the future, ordinary courts will use this possibility to be a real constraint for “unconstitutional regulations”.

Concrete constitutional review - courts between rule by law and the rule of law principles

The question of how ordinary courts will use this possibility of concrete constitutional review is not only related to concrete constitutional review but also to whether the ordinary courts in B&H are “authoritarian” or “democratic” courts? What is the difference?

Democratic courts support the rule of law principle, so they are not only enforcers of laws but also protectors of citizens' constitutional rights. On the other hand, authoritarian courts support the rule by law principle, and therefore are only the enforcers of laws, without regard as to whether those laws are in accordance with the constitutional rights of citizens.⁶ Hence, if the ordinary courts do not use the possibility of the concrete constitutional review, they will be authoritarian courts. If ordinary courts merely comply with the wishes of executive and legislative branches and if their only task is to fulfill the desires of regimes, they will be certainly characterized as authoritarian courts. Currently, the ordinary courts in B&H are authoritarian courts, where they only enforce the laws and adhere to the wishes of executive and legislative branches.

How do the ordinary courts serve to the executive and legislative branches in B&H? The following case is an example of how the ordinary courts enforced *prima facie* the unconstitutional Act instead of initiating a concrete constitutional review. The amendments to the Bankruptcy Procedure Act were adopted by the Parliament of the Federation of B&H in 2006 and they stipulate that a worker in case of bankruptcy can claim only the last eight earned salaries regardless of how much they earned while they were working for the company.⁷ Practically, companies did not pay salaries for five to ten years, and once bankruptcy proceedings were initiated, they were mandated to pay only the last eight salaries. The intention of the legislature was basically to exonerate "companies" from paying all salaries that they were obligated to pay. More precisely, the legislature's intention was to exempt state-owned companies from paying all salaries, which was the political decision for no legitimate reason. Unfortunately, the ordinary courts enforced this Act for over ten years, and in that way, they infringed workers' right to a salary, which is a constitutional right. Thus, the ordinary courts were following the wishes of

6 On authoritarian courts see: Moustafa Tamir (2017), *Law and Courts in Authoritarian Regimes* in: Howard M. Robert, Randazzo K. A. (eds.), *Routledge Handbook of Judicial Behavior*, Routledge, 427-444.

7 Begić Zlatan, Selma Razic, "Constitutionality of the Bankruptcy Proceedings in the Federation of Bosnia and Herzegovina: How Did We Kill Working Class", *Soc. Persp.-J. Legal Theory & Prac.*, 2 (2015): 49.



the legislative to save companies rather than protect the interests of workers. Instead of initiating the concrete constitutional review, the ordinary courts, in this case, were mere enforcers of this unconstitutional regulation. After ten years, this Act was proclaimed “unconstitutional” by the Constitutional Court of the Federation of B&H, on the initiative of the President of Federation of B&H,⁸ but that did not erase the consequences that this Act has caused in the past. So, while the ordinary courts are protecting the interests of political regimes, instead of the constitutional rights of citizens, they will be “rule by law” courts.

How to increase the number of initiated the concrete constitutional review or how to “rule by law courts” can become “the rule of law courts”?

The ordinary courts should proactively protect citizens from “unconstitutional regulations”, and the best tool is the concrete constitutional review. To increase the number of initiated concrete constitutional reviews by ordinary courts my recommendation is to change the model of education for future and current judges. Apart from preparation of future judicial officials for the implementation of legal norms, they should also be prepared to be critical of these norms. Fikret Karcic stated that a separate course should be introduced which will tackle the relationship between law and society, which should develop a critical attitude of judges toward the norms implemented in practice.⁹ Moreover, a more detailed study of international human rights is necessary. Additionally, law students in B&H should learn more about justice than they learn about mere legality. Of course, legality is as important as justice, but without justice, the system cannot achieve the rule of law. In this sense, I would say that law students should study more about Radbruch’s and

8 See: The Judgment of the Constitutional Court of Federation of B&H (U-27/15). Available at: https://www.ustavnisudfbih.ba/bs/open_page_nw.php?l=bs&pid=443.

9 Karčić Fikret, “A Study on Legal Formalism in the Former Yugoslavia and its Successor States“, Centre for Integrity in the Defence Sector, 2020.

Hayek's philosophies and less about Kelsen's philosophy. Of course, Kelsen's philosophy is equally important as Hayek's and Radbruch's philosophies, but currently, Kelsen's philosophy has predominance over these two philosophies in B&H. This is one of the reasons why ordinary courts only enforce the rules and not protect the constitutional rights of B&H citizens.

In this sense, the ordinary courts should be the first obstacle to laws that are not in accordance with the Constitution. Until then, B&H will be a state of the "rule of unconstitutional regulations" or a "rule by law" rather than "the rule of law" state. Therefore, the proactive role of the ordinary courts is a prerequisite for the rule of law in B&H. The way ordinary courts utilize the possibility of subsequent concrete constitutional reviews is closely related to the rule of law in B&H in the future.

References

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