

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 54 and 56 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina”, Nos. 2/97, 16/99 and 20/99), at its session held on 3 November 2000, the Constitutional Court of Bosnia and Herzegovina adopted the following

DECISION

The Law on State Border Service is hereby declared to be in conformity with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina and the Official Gazette of the Republika Srpska.

REASONS

I The Proceedings

1. On 13 January 2000, the High Representative for Bosnia and Herzegovina (hereinafter: the High Representative) enacted the Law on State Border Service of Bosnia and Herzegovina, published in the Official Gazette on 26 January 2000 (Official Gazette of Bosnia and Herzegovina, No. 2/2000). On 7 February 2000, eleven members of the House of Representatives of the Parliamentary Assembly initiated proceedings before the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) according to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina for the evaluation of the constitutionality of the Law on State Border Service.
2. The applicants contend, on the one hand, that the High Representative does not have the normative powers to impose a law in the absence of a vote by the Parliamentary Assembly, since neither Annex 10 of the General Framework Agreement nor Chapter XI.b.2 of the Bonn Declaration confers such powers upon him; on the other hand, the applicants also contest the constitutionality of the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service, particularly with regard to Articles III.4, III.5 (a) and V.3 as well as the conformity of the Law on State Border Service with Articles III.2 (c) and III.3 (a) of the Constitution of Bosnia and Herzegovina.
3. In a letter of 21 February 2000, the Constitutional Court communicated the request to the High Representative and gave him the opportunity to respond to it. By a memorandum dated 2 May 2000, the Office of the High Representative submitted comments on the request.

II Admissibility

4. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has the “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”. Article VI.3 (a) adds that “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”.

5. The Law on State Border Service was enacted by the High Representative on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.

Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.

6. Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 (O.G. No. 2/2000) - or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed.

7. The competence given to the Constitutional Court to “uphold the Constitution” according to the first paragraph of Article VI.3 of the Constitution of Bosnia and Herzegovina, as further specified by subparagraphs (a), (b) and (c) and as read in conjunction with Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections”, confers on the Constitutional Court the control of the conformity with the Constitution of Bosnia and Herzegovina of all acts, regardless of the

author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina.

8. The constitutionality of the Law on State Border Service of 13 January 2000 has been challenged by eleven members of the House of Representatives of the Parliamentary Assembly or one quarter of the latter, on the basis of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina.

9. The competence of the Constitutional Court to examine conformity with the Constitution of Bosnia and Herzegovina of the Law on State Border Service enacted by the High Representative, acting as an institution of Bosnia and Herzegovina, is thus based on Article VI.3 (a) of the Constitution of Bosnia and Herzegovina. Consequently, the request is admissible.

III Merits

10. The applicants contest the conformity with the Constitution of Bosnia and Herzegovina of the Law on State Border Service in regard to Article III.5 (a) of the Constitution of Bosnia and Herzegovina, which provides:

Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

The applicants are not justified in claiming that, according to Article III.5 (a), the Presidency of Bosnia and Herzegovina required the prior consent of the National Assembly of Republika Srpska to submit a proposal for the Law on State Border Service to the Parliamentary Assembly of Bosnia and Herzegovina. Indeed, the aforementioned Article distinguishes between three mutually independent hypotheses: Bosnia and Herzegovina shall assume responsibility for such other matters as (1) are agreed by the Entities; (2) are provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to the provision of Articles III.3 and III.5 of the Constitution of Bosnia and Herzegovina. It is in application of the last of these three cases that the Law on State Border Service was proposed by the Presidency of Bosnia and Herzegovina to the Parliamentary Assembly. In this context, only Article IV.4 (a) which provides that the Parliamentary Assembly shall enact legislation as necessary to implement decisions of the Presidency must be considered. As this Article does not require the consent of the Entities, the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service is not in conflict with the Constitution of Bosnia and Herzegovina.

11. The applicants also contest the conformity of the Law on State Border Service with the provisions of Article III.2 (c) of the Constitution of Bosnia and Herzegovina, which sets out responsibilities of the Entities. Article III.2 (c) provides that “the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining

civilian law enforcement agencies operating in accordance with in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate". Article III.2 (c) cannot be interpreted as establishing an exclusive responsibility of the Entities for control of the international State borders, but it authorizes the Entities to assume tasks of law enforcement "in their respective jurisdictions". Moreover, the Law on State Border Service, in its Articles 2, 4 and 5, upholds this responsibility of the Entities and provides for a policy of cooperation and assistance between the State Border Service and the Entities' police forces, which should improve the guarantee of public order in jurisdiction of the Entities.

12. The Constitution of Bosnia and Herzegovina enumerates, *inter alia* in Article III.1, the exclusive responsibilities of the institutions of Bosnia and Herzegovina. This Article entrusts the latter with all external activities of Bosnia and Herzegovina, e.g. foreign policy, foreign trade policy, customs policy, monetary policy, establishment and operation of common and international communications facilities and air traffic control. More specifically, Article III.1 (f) and (g) provide that immigration, refugee and asylum policy and regulation, as well as international and inter-Entity criminal law enforcement, including relations with Interpol, fall within the responsibilities of the institutions of Bosnia and Herzegovina.

13. Furthermore, the fundamental right of a State to self-protection, inherent in the notion of State sovereignty, includes the right of a State to take all necessary actions for the protection of its territorial integrity, its political independence and its international personality, while respecting other general principles of international law. In the context of Bosnia and Herzegovina, the establishment of a State border service contributes to the guarantee of this fundamental principle. The Law on State Border Service, which ensures the right of the institutions of Bosnia and Herzegovina to carry out their responsibilities, is thus not in contradiction to Article III.2 of the Constitution of Bosnia and Herzegovina and is in conformity with the responsibilities laid down in Article III.1 of the Constitution of Bosnia and Herzegovina and supplemented in Article III.5 of the Constitution of Bosnia and Herzegovina.

14. The Constitutional Court concludes that the Law on State Border Service is consistent with the Constitution of Bosnia and Herzegovina.

The Constitutional Court ruled in the following composition:

President of the Constitutional Court: Prof. Dr. Kasim Begić,

Judges: Hans Danelius, Prof. Dr. Louis Favoreu, Prof. Dr. Joseph Marko, Dr. Zvonko Miljko, Azra Omeragić, Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić, Mirko Zovko.

The present decision was adopted by seven votes to two.

The two dissenting judges, Prof. Dr. Vitomir Popović and Prof. Dr. Snežana Savić, will set out their reasoning in a separate opinion.

U 9/00
3 November 2000
Banja Luka

Prof. Dr. Kasim Begić
President of the Constitutional Court
Of Bosnia and Herzegovina

ANNEX

Separate dissenting Opinion of Judge Snežana Savić against the majority Decision of the Constitutional Court of Bosnia and Herzegovina in Case No. U 9/00

Having regard to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - Amended text (Official Gazette of Bosnia and Herzegovina, No. 24/99), I hereby dissent in my opinion against the majority decision of the Constitutional Court in Case U 9/00.

The majority decision of the Constitutional Court in Case U 9/00 found that the Law on the State Border Service, enacted by the High Representative was in conformity with the Constitution of Bosnia and Herzegovina.

1. In view of the admissibility of the request

Pursuant to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, elected in Republika Srpska, submitted to the Constitutional Court on 7 February 2000, a request for the review of constitutionality of the Law on State Border Service enacted by the High Representative on 13 January 2000.

The applicants contend that the High Representative does not have normative powers to impose a law in the absence of a vote by the Parliamentary Assembly, since neither Annex 10 of the General Framework Agreement nor Chapter XI.b.2 of the Bonn Declaration confers such powers upon him. Therefore, the applicants contest the formal and legal aspect of this law and its constitutionality from the substantive aspect.

The applicants, furthermore, contest the constitutionality of the procedure before the Presidency of Bosnia and Herzegovina preceding the enactment of this Law, particularly with regard to Articles III.4, III.5 (a) and V.3 as well as with Articles III.2 (c) and III.1 (a) of the Constitution of Bosnia and Herzegovina.

I find that the first part of the request is in conformity with the Constitution of Bosnia and Herzegovina. However, I am of the opinion that the examination of the constitutionality of the procedure before the Presidency of Bosnia and Herzegovina cannot be viewed separately since this case does not involve a law, but an act which is the basis for the adoption of the law, an act being merely an action in the adoption of the law before the Parliamentary Assembly of Bosnia and Herzegovina, or a proposal of the law. A proposal of the law is not yet a legal act with legal force, and therefore cannot be examined by the Constitutional Court. It can be examined only as one of the phases in the procedure of the review of constitutionality of a law from a formal aspect.

2. In view of the substance of the request

The decision of the Constitutional Court holds that the law enacted by the High Representative should not be examined from a formal aspect since his mandate is of an international character, but it also finds that it is a law of Bosnia and Herzegovina, or, in other words, that a law of the High Representative who acted as an authority of Bosnia and Herzegovina, and, therefore, that it can be examined from the substantive aspect since it deals with a substance set forth in the Constitution of Bosnia and Herzegovina.

The Constitutional Court did not decide on the formal aspect of the constitutionality of the contested act, i.e. the principle of constitutionality, which it was obliged to do when it proclaimed itself competent. The Constitutional Court rendered its decision but took into consideration only one of the elements of the form of the act - its acquisition of substantive features, publication in the Official Gazette of Bosnia and Herzegovina, acknowledging legal force to this act by invoking "pertinent examples... the mandates under the regime of the League Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision".

The Constitutional Court continued to conclude: "Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative - whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court - intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina".... "irrespective of the nature of the powers vested in the High Representative.... the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina"...."

To my mind, the standpoint taken by the Constitutional Court is not in conformity with the notion of law in general, nor does it offer sufficient arguments for the determination of the character of the act and consequently its constitutionality.

For these reasons I find that several basic preliminary questions should have been presented before this Court or what is the nature of the act of the High Representative for Bosnia and Herzegovina, in other words, is the Constitutional Court competent to examine its constitutionality or not. Is the Constitutional Court competent to examine all or merely some of the acts enacted by the High Representative, and does this mean that the Constitutional Court shall be competent to examine an act, when in the future the High Representative renders one not bearing the title of a law, but which, according to the Constitution of Bosnia and Herzegovina, regulates the law or does this mean that the legal contents of an act, regardless of its form, bestow the character of the law on that act.

The applicants requested a review of the constitutionality of the legal act both from the formal and substantive aspects. The formal and legal aspect deals with the review of competence of the High Representative to enact laws in general, this one included, together with the issue of the procedure of adoption of a law and its acquirement of substantive features. In regard to the substantive and legal aspect, only the contents of the law are contested in view of the provisions of the Constitution of Bosnia and Herzegovina, which render them to be in contravention with Article III of the Constitution of Bosnia and Herzegovina. This is not unusual, since the principle of constitutionality that is legality understands conformity, or in other words, the evaluation of both of these principles. However, the Law on State Border Service was enacted by the High Representative, an institution established by Annex 10 of the Dayton Peace Agreement. His competencies are also determined by Annex 10. The Constitution of Bosnia and Herzegovina does not discuss the High Representative and his competencies.

This act was enacted by the High Representative and it does not present an act in the true sense of the word in the formal aspect, since it was not enacted by a legislative body of Bosnia and Herzegovina, nor was it enacted in legislative proceedings as provided for by the Constitution of Bosnia and Herzegovina, in its universally accepted meaning in the theory of law. It was, however, published under the regulations on the publication of laws (acquirement of substantive features as the third element of the form of a legal act in general). Consequently, a question arises as to whether the Constitutional Court is, from the formal and legal aspect, competent to examine the constitutionality of the act in that sense, as requested by the applicants to these proceedings. Is this examination the most important issue in the present case? Could the constitutionality in the substantive aspect be examined without it being examined from the formal and legal aspect, although that was explicitly requested by the applicants?

Although this act has legal, even constitutional contents as taken from the substantive aspect, it is not a law in the formal aspect, but a specific act enacted by the institution of the High Representative which is outside the legal system set forth in the Constitution of Bosnia and Herzegovina, and over which the Constitutional Court does not have any competencies at all. The institution of the High Representative is an institution *sui generis*, it is an institution which deals with the character of Bosnia and Herzegovina, and which was forecast by Annex 10 of the Dayton Peace Agreement. The institution of the High Representative was not however forecast by the Constitution of Bosnia and Herzegovina as well, which is Annex 4 of the same Agreement, and which must, as every other Constitution, contain basic provisions on the legal order of the State concerned. The Constitution of Bosnia and Herzegovina does not provide for acts enacted by the High Representative. In view of the fact that the competencies of the Constitutional Court are to protect the Constitution of Bosnia and Herzegovina, the potential competencies of the Constitutional Court for the review of constitutionality of acts enacted by the High Representative are not even foreseen in the Constitution of Bosnia and Herzegovina.

In regard to the substantive aspect of this act, it can be noted that it does not only encompass the legal, but moreover, to a certain degree, it also encompasses the constitutional contents. The act establishes organs in Bosnia and Herzegovina which are not foreseen as such in its Constitution. The Constitution of Bosnia and Herzegovina does not contain provisions on the State Border Service, neither within the competencies of Bosnia and Herzegovina, nor in the respect of existence of such institutions on the level of Bosnia and Herzegovina. If statements pertaining to Article III.5 (a) of the Constitution of Bosnia and Herzegovina were to be

considered - additional responsibilities and institutions could result from the provisions pertaining to perseverance of territorial integrity, sovereignty, political independence and international personality of Bosnia and Herzegovina. These institutions and responsibilities, however, could be regulated (established) by law only in the case the Parliamentary Assembly of Bosnia and Herzegovina enacts such a law, whereupon it would serve as a constitutional basis for its enactment. However, this is not the case in the present case.

The decisions enacted by the High Representative resulting from the authorizations set forth in Annex 10 of the Dayton Peace Agreement pertain to the civil implementation of the Agreement and have the character of temporary decisions enacted in specific situations. They are not laws in the formal sense, and therefore cannot be examined by the Constitutional Court. The fact that they are entitled as laws is not exemplary to their nature, according to Annex 10 of the Dayton Peace Agreement, although they have, in fact, the contents of a law. It is a general standpoint in the law theory that acts which are laws in the substantive aspect and not in their formal aspect, are not denominated as such since the denomination results from their formal aspect. Therefore, although they contain general legal norms and encompass legal contents, established by the Constitution of the State concerned, they are not denominated as such.

This case cannot be referred to as being a classic concept of substitution, the notion on which the Constitutional Court's decision rests, given that the office of the High Representative is not an institutions of the internal constitutional system, but a specific international institution which does not derive its authorizations from the Constitution of Bosnia and Herzegovina but from the Dayton Peace Agreement - a wider concept (act) than the concept of the Constitution of Bosnia and Herzegovina - merely one of the Dayton Peace Agreement Annexes. The provision stated in the preamble of the Law on State Border Service of Bosnia and Herzegovina provides that the Parliamentary Assembly of Bosnia and Herzegovina is obliged to adopt this Law in due form, without amendments and no conditions attached, speaks in favor of the above. Consequently, the part of the decision which invokes the possibility that the Parliamentary Assembly "is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed" is totally incorrect. The Law on State Border Service explicitly provides the very contrary; that the Parliamentary Assembly of Bosnia and Herzegovina is obliged to adopt the Law in due form, without amendments and no conditions attached.

These acts are in fact legal acts when observed from the substantive aspect and in view of their contents. However, if the Constitutional Court does not discuss whether there are grounds in terms of authorization for the enactment of this act reasoning that "it need not be done", and simultaneously endorses the examination of the substantive aspect of the act, the question arises as to how it can be determined that this case is about a Law, which generally understands both of these aspects. The assessment based on the title of the act and its publication in the Official Gazette of Bosnia and Herzegovina is by all means not sufficient. From the formal aspect, the characteristic of a law, as a legal act, is determined, by the authorization of its adoption, the procedure of its adoption and its materialization, and not only by the last element which served as the basis for the Constitutional Court's decision.

It can be concluded by analogy that the crucial issue in this case is the issue of the character of the institution of the High Representative and the nature of his acts, and the competence of the Constitutional Court to examine their constitutionality - what the Constitutional Court did not

do even though it was necessary if a valid decision was sought. This is the reason why my opinion was opposed to the majority vote.