

Comments made by the OHR Legal Department concerning Case number U-6/06, constitutionality of certain provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of BiH

Constitutional Court of Bosnia and Herzegovina

Case number U -6/06

Request to review the constitutionality of the certain provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina

Comments made by the Legal Department of the Office of the High Representative

1. Introduction

1.1 On 8 May 2006, the Constitutional Court of Bosnia and Herzegovina invited the *Office of the High Representative* (hereinafter "OHR") to participate as a party to the proceedings in its *Case U-6/06*. The case before the Court is based on requests to review the constitutionality of certain provisions of the *Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina*, Decision No. 389/05 of 9 December 2005 (BiH O.G. 90/05, 26 December 2005) (hereinafter "Law on Judicial Salaries") and the *Law on Civil Service in the Institutions of Bosnia and Herzegovina* (BiH O.G. 19/02, 35/03, 4/04, 17/04, 26/04 and 37/04). The said requests were submitted by members of the Presidency of Bosnia and Herzegovina, namely Mr. Ivo Miro Jovic and Mr. Sulejman Tihic (hereinafter "requesting authorities").

1.2 On 23 May 2006, the OHR informed the Court that due to the status and powers of the High Representative pursuant to Annex 10 of the General Framework Agreement for Peace (hereinafter "GFAP"), the High Representative could not be a party to proceedings before judicial institutions of Bosnia and Herzegovina. However, the OHR indicated that it was willing to assist the Court as *amicus curiae* in this case and requested the Constitutional Court to postpone the examination of the case at hand in order to grant it adequate time to prepare and forward its observations.

1.3 On 29 May 2006, the Court invited the OHR to provide written observations in its capacity as *amicus curiae*. On 22 June 2006, the Office of the High Representative informed the Court of its intention to submit written observations by Friday 23 June 2006.

1.4 The OHR respectfully submits the following observations with the intention to assist the Court in the examination of the case at hand.

2. Admissibility of Case U-6/06

2.1 In its *Decision U 9/00* of 3 November 2000, the Constitutional Court expressly indicated that the situation in Bosnia and Herzegovina:

"[...] 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." [§5]

The Court further indicated:

“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. [§6]

2.2 In that case, which concerned the exercise by the High Representative of his legislative powers, in place of the legislative institutions of Bosnia and Herzegovina, the Court considered that the exercise of the High Representative’s legislative power was open to review, because he was acting in the place of authorities which would otherwise have been subject to such review and whose legislation was subject to the power of amendment and repeal by the legislative organs of Bosnia and Herzegovina or its component entities.

2.3 The High Representative, in the exercise of his powers under Article V of Annex 10 of the GFAP, subsequently expressly approved the approach of the Court in relation to the exercise of his legislative powers. Pursuant to the same powers, the High Representative approves, in the case at hand, the review by the Constitutional Court of the *Law on Judicial Salaries*.

3. The Parliamentary Assembly of Bosnia and Herzegovina is constitutionally entitled to regulate the salaries of judges and other employees of the Constitutional Court

3.1 The responsibility to decide upon sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and the responsibility to approve a budget for the institutions is vested with the Parliamentary Assembly of Bosnia and Herzegovina under Article IV (4) b) and Article IV (4) c) of the Constitution of Bosnian & Herzegovina.

“The Parliamentary Assembly shall have responsibility for: [...]

(b) Deciding upon the sources and amounts of revenues for the operations of institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

(c) Approving a budget for the institutions of Bosnia and Herzegovina.”

3.2 Pursuant to Article IV (4) a), the Parliamentary Assembly enjoys the responsibility to enact legislation in order to carry out its responsibilities.

3.3 The OHR therefore respectfully submits that the Parliamentary Assembly is entitled, under the Constitution of Bosnia and Herzegovina, to adopt the *Law on Judicial Salaries*. The said law was enacted by the High Representative in accordance with his powers under Annex 10 of the GFAP pursuant to which he substituted for the Parliamentary Assembly.

3.4 It is non disputable that the Constitutional Court is an institution of Bosnia and Herzegovina and that the Parliamentary Assembly’s power to approve a budget includes the power to approve a budget for any such institution, including those enjoying a certain degree of independence like the Constitutional Court.

4. The principle of independence of the judiciary cannot be interpreted as preventing the Parliamentary Assembly of Bosnia and Herzegovina from adopting legislation regulating the salaries of judges and other employees of the Constitutional Court.

4.1 Article I (2) of the Constitution provides that Bosnia and Herzegovina shall be a democratic state operating under the rule of law. The OHR is fully cognizant of the fact that the separation of the executive, legislative and judicial powers constitute a fundamental attribute of any democratic regime. The OHR believes that the principle of independence of the judiciary is a fundamental pillar of the democratic system established by the Constitution of Bosnia and Herzegovina. The OHR committed itself, in the implementation of its mandate, to a series of ambitious reforms aiming at strengthening the rule of law and the independence of the judiciary in Bosnia and Herzegovina. It is in that context that the Steering Board of the Peace Implementation Council underlined that “*the efficient*

administration of justice, a core plank of Bosnia and Herzegovina's postwar rehabilitation, depends on a properly functioning and appropriately remunerated judiciary" and supported "the urgent need to review judicial salaries in order to ensure the proper allocation of funds to enable the judicial system to work effectively".

4.2 The OHR respectfully submits however that the question raised in the case at hand does not pertain to whether the Constitution requires the principle of independence to be respected in Bosnia and Herzegovina but to *whether this principle shall be interpreted as prohibiting the Parliamentary Assembly from adopting legislation regulating the salaries of the judiciary, including those of the members of the Constitutional Court.*

4.3 We note that in a substantial number of member states of the Council of Europe, salaries and other compensations of judges of Constitutional Courts are all regulated in separate laws adopted by Parliament.[1] We note also that in its *Recommendation on the Independence, Efficiency and Role of Judges*, the Committee of Ministers of the Council of Europe recommended to each Member State that the terms of office of judges and their remuneration should be guaranteed by law in order to promote and protect their independence.[2] It is respectfully submitted therefore that the mere adoption of a legislative act of Parliament regulating the salaries of judges of a Constitutional Court cannot amount, as a matter of principle, to an infringement of the principle of independence of the judiciary. We note that the requesting authorities implicitly concede in their observations that an act of the Parliamentary Assembly can regulate salaries of the judges of the Constitutional Court by indicating that the Constitutional Court could be the subject of a "Constitutional law".[3]

4.4 The requesting authorities have indicated that the Constitutional Court cannot be the subject of an "ordinary law". The OHR respectfully submits that this interpretation of the Constitution would entail that the Constitutional Court functions outside the general legal regime of Bosnia and Herzegovina. Such a position would be unprecedented in a democratic regime and finds no basis in the Constitution. As a matter of principle, legislation enacted by the Parliamentary Assembly under Article IV (4) (a) is of general application throughout the whole territory of Bosnia and Herzegovina. The non-applicability of legislation to persons or institutions cannot be presumed.

4.5 We note that Article VI of the Constitution does not contain any provision stipulating that (1) ordinary laws do not apply to the Constitutional Court or that (2) only laws adopted pursuant to a qualified majority may regulate the salaries of judges and employees of the Court.

4.6 Moreover, interpreting the Constitution as implying that the Constitutional Court cannot be the subject of any "ordinary law" would lead to results that are manifestly unreasonable. As the Court must surely understand, if such an interpretation were to be favored by the Court, none of the laws applicable to the institutions of Bosnia and Herzegovina would be applicable to the Court. This would mean, for example, that ordinary laws regulating the auditing of the institutions of Bosnia and Herzegovina, labor relations or taxation or even laws regulating ordinary matters such as construction work within the premises of the Constitutional Court would not be applicable to the Court. Not only would such an interpretation lead to disturbing results but would also place the Constitutional Court in a very questionable position, namely in the position of an institution functioning completely outside the general legal regime of Bosnia and Herzegovina. Such an interpretation can obviously not be followed.

5. The Constitution does not entitle the Constitutional Court to regulate or otherwise determine the salaries of its judges and/or employees.

a) The Constitution does not recognize any general normative power of self-organization to the Constitutional Court

5.1 We note that the requesting authorities have indicated in their observations that the Constitutional Court has a "constitutionally guaranteed normative power of self-organization". The OHR respectfully submits that, as the Court surely agrees, this contention finds no equivalent in any other democratic regime, contravenes the most fundamental principles of democracy and finds no basis in the Constitution.

5.2 The general responsibility to adopt legislation and normative act is exclusively vested, under Article IV (4) (a), with the Parliamentary Assembly of Bosnia and Herzegovina. As indicated above under Paragraphs 3.1 to 3.3, the responsibility to adopt legislation regulating the salaries of the judiciary and its employees including those of the judges and employees of the Constitutional Court unequivocally belongs to the Parliamentary Assembly of Bosnia and Herzegovina.

5.3 It is respectfully submitted that any interpretation of the Constitution that would entitle the Constitutional Court

to adopt normative rules regulating the salaries of its judges and employees would be directly incompatible with Article I (2) of the Constitution. Such an interpretation would grant the capacity to non-elected public officials to adopt normative rules having a direct impact on public resources. This interpretation would mark a clear point of rupture between the citizenry and the public resources that it contributes to the state and is thus inherently irreconcilable with a democratic system like that of Bosnia and Herzegovina. It is an essential feature of a democracy to require that public resources be decided upon by elected representatives. The proposed interpretation would most disturbingly concentrate segments of the legislative powers in the hands of an unelected body, namely the Constitutional Court and would therefore, as the Court is most surely aware, be directly incompatible with Article I (2) and Article IV (4) of the Constitution.

5.4 Moreover, the interpretation suggested by the requesting authorities would again lead to results that are manifestly unreasonable. Assuming that the Constitutional Court would enjoy the power to adopt normative acts determining the salaries of its judges and employees, members of the Court would be legally entitled to grant themselves any type of salary and increment without any possibility for tax payers to question, discuss or otherwise participate in this decision-making process. This would entail for example that the members of the Court would be, from a strict legal point of view, entitled to grant themselves annual salaries in any amount without any effective legal means being available to citizens to modify or otherwise participate in such a determination. Such an interpretation leads to results that could not have possibly been foreseen by the drafters of the Constitution wishing to establish a democratic state.

5.5 The OHR is under no doubt that the distinguished members of this Court would not act in such a way if they were entitled (which they are not) to decide upon their own salaries. However, the more fundamental point to be made is that the Constitution cannot be interpreted as leaving it solely to the good faith of non-elected members of a given court to decide upon their own salaries. This would simply be, as the Court is most surely aware, unprecedented in any democratic regime. Such a result would significantly affect public perception of the Court and would lead to reactions and pressures likely to affect its capacity and duty to carry out its functions independently.

5.6 One could counter argue that members of the Parliamentary Assembly are entitled under the Constitution to determine their own salaries. This situation is significantly different from that discussed in the case at hand. Unlike the members of the Constitutional Court, members of the Parliamentary Assembly are elected and therefore accountable to their electorate. They could, unlike members of the Court who are independent, be ultimately “politically sanctioned” by voters for any determination of salaries with which the citizens would disagree. There is, under this scenario, no point of rupture between citizens and the manner in which public resources are spent.

5.7 We note finally that the principle of separation of powers stemming from Article I (2) of the Constitution applies to all branches of government. While this principle protects the independence of the judiciary, it equally protects the sovereignty of Parliament and its exclusive general responsibility to enact normative acts. The OHR respectfully submits that Article I(2) cannot be interpreted as, on the one hand, guaranteeing the independence of the judiciary and as allowing, on the other hand, members of the judiciary to adopt normative acts regulating their own salaries. This would amount, as the Court is most surely aware, to a serious distortion of the principle concerned.

b) The entitlement to adopt “Rules of Court” under Article VI (2) b) cannot be interpreted as allowing the Constitutional Court to regulate the salaries of its own judges and employees.

5.8 We note that the requesting authorities have referred to Article VI (2) b) of the Constitution as providing a basis upon which the Court would enjoy guaranteed normative powers of self organization. The OHR respectfully submits that this contention is based on a misinterpretation of the said Article.

Article VI (2) b) provides that:

“The Court shall adopt its own rules of court by majority of all members. It shall hold public proceedings and shall issue reasons for its decisions which shall be published.”

It is submitted that sub-item b) of Paragraph 2 cannot be interpreted in isolation from the remainder of the said Paragraph. We note that Paragraph 2 is entitled “procedures” and that item (a) relates to purely procedural matters. While the first sentence of sub-item b) provides that the Court can adopt its own “rules of court”, the words “rules of court” must be interpreted in conjunction with the remaining part of sub-item b) that provides that

the Court shall “hold public proceedings and shall issue reasons for its decisions which shall be published”. This overwhelmingly indicates that the capacity of the Court to adopt rules of court relates strictly to matters of procedures before the Court and do not encompass in any way the capacity to regulate salaries of judges and employees of the Court.

5.9 Moreover, the terms “rules of court” should be interpreted in accordance with their ordinary meaning. We note that the term “rule of court” is defined, by ***Black’s Law Dictionary*** as:

“A rule governing the practice or procedure in a given court”

The term “procedure” is defined by ***Black’s Law Dictionary*** as:

“1. A specific method or course of action. 2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution”

The word “procedure” is also defined by the *Gilbert Law Dictionary* as:

“The process by which lawsuits are resolved, the rules regulating the pleadings, service of process, trial practice, evidence and appeal. In contrast “substantive” rules create and define legal rights and duties.”

Whereas the term “procedural law” is defined by *Black’s Law Dictionary* as:

“ [...] rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves”

Based on the aforesaid, the OHR believes that the ordinary meaning of the words “rules of court” and “procedure” unequivocally excludes the determination of salaries of judges and employees of a Court.

5.10 Moreover, the adoption of rules of court by the Court constitute a derogation or exception from the overall legislative responsibility of Parliament under Article IV (4) a) and must therefore be interpreted restrictively. The terms “rules of court” cannot be interpreted broadly and can surely not be interpreted as encompassing the capacity for the Court to regulate the salaries of its judges and employees as such an interpretation directly collides with the powers of the Parliamentary Assembly.

5.11 Finally, we note that other authorities are granted the capacity to adopt similar rules of procedures under the Constitution. The Parliamentary Assembly is, for example, entitled under Article IV (3) b) to adopt rules of procedure:

“Each chamber shall by majority vote adopt its internal rules [...]”

The Presidency enjoys a similar right under Article V (2) a):

“The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.”

We note that that Articles VI (2) b), IV (3) b) and V (2) a) all fall under sections titled “Procedures” and that they are all aiming at allowing each institution to determine the manner in which it carries out its constitutionally prescribed mandate.

The OHR also submits that the Constitution must be interpreted as a coherent and functional whole and that Article VI (2) b) cannot consequently be interpreted in isolation from Articles IV (3) b) and V (2) a). If the Court were to interpret Article VI (2) b) as granting it the capacity to regulate the salaries of its own judges and employees, it would consequently have to interpret similar Articles in the Constitution in a similar fashion. This would mean that members of the Presidency and the chambers of the Parliamentary Assembly would have the right to regulate their own salaries and those of their employees through rules of procedure. Such an interpretation would introduce a substantial level of chaos in Bosnia and Herzegovina. It would also be directly incompatible with Article I (2) and Article IV (4) a) of the Constitution and would be, as the Court surely understands, incompatible with the fundamental object and purpose of the Constitution.

5.12 The OHR finally submits that there is nothing in the Constitution that justifies any significant difference in

interpretation between rules of procedures adopted by the Court and those adopted by the Presidency and the Parliamentary Assembly.

6. The Constitution does not allow for the adoption of a “constitutional law”

6.1 The requesting authorities have indicated that the Court could only be the subject of a “constitutional law”. The OHR wishes to indicate that there is no possibility, under the current text of the Constitution, for the Parliamentary Assembly to adopt a law by a qualified majority, namely a “constitutional law”.

Article IV (3) c) of the Constitution provides *inter alia*:

“All decisions in both chambers shall be by majority of those present and voting.”

The only derogation to this general principle is prescribed in Article X (1) of the Constitution, which stipulates:

“The Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.”

It is respectfully submitted therefore that the Constitution does not foresee the possibility for the Parliamentary Assembly to adopt a constitutional law. We note that the constitution of countries where constitutional laws can be adopted contain an explicit provisions to that effect. By way of illustration, the constitutions of Austria, Croatia and Italy all contain explicit provisions allowing the adoption of constitutional laws.^[4]

6.2 Without prejudice to the observations made above and in the event that the Court were to consider that a constitutional law can be adopted under the Constitution and that the salaries of judges and employees of the Constitutional Court may only be regulated by such a law, the OHR respectfully submits, as the final interpreter in theatre regarding the interpretation of the agreement on the civilian implementation of the peace settlement pursuant to Article V of Annex 10 GFAP, that the High Representative is entitled to adopt such a law.

6.3 Based on the aforesaid, the OHR submits that none of the provisions challenged in this case are incompatible with the Constitution of Bosnia and Herzegovina.

Notes:

[1] This is the case, for example, for Armenia, Austria, Azerbaijan, Belarus, Czech Republic, France, Georgia, Germany, Italy, Latvia, Lithuania, Moldova, The Netherlands, Portugal, Russia, Slovakia, Slovenia, Ukraine.

[2] See COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Recommendation No. R (94) 12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges*, 13 October 1994 under principle 1.

[3] The question of whether the Constitution of Bosnia and Herzegovina provides for the possibility of adopting a “constitutional law” is addressed under Point no. 6 below.

[4] See for example Article 44 of the Constitution of Austria, Article 131 of the Constitution of Croatia and Article 137 of the Constitution of Italy.