



In line with Resolution II adopted by the Circle of the Presidents at its meeting held on 13 June 2018 in Prague, the theme of the XVIII Congress of the Conference of European Constitutional Courts to be held in Prague from 26 to 29 May 2020 will be:

**HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE
21ST CENTURY**

**QUESTIONNAIRE FOR THE XVIII CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**

I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.1 International catalogues of human rights (ECHR, UDHR and ICCPR)

- In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?
- What mechanism is used to invoke the international treaties in national court decision-making?
- Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

Article II (2) of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), and its Protocols shall apply directly in Bosnia and Herzegovina and these acts shall have priority over all other law.

Accordingly, the provisions of the European Convention have the force of constitutional provisions in Bosnia and Herzegovina. By incorporating the European Convention into its constitutional legal order, Bosnia and Herzegovina, prior to becoming a member of the Council of Europe, also assumed a positive obligation to harmonise its legislation and legal practice with minimum guarantees provided under the European Convention. In addition, the Constitution of Bosnia and Herzegovina prescribes the enjoyment of the rights and freedoms contained in the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina, without discrimination on any of the grounds referred to in Article II (4) of the Constitution of Bosnia and Herzegovina. Annex I to the

Constitution of Bosnia and Herzegovina, titled “Additional Human Rights Agreements to be Applied in Bosnia And Herzegovina”, lists the following international treaties: 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 and 1994 Framework Convention for the Protection of National Minorities. The above listed international documents are therefore *de facto* and *de jure* an integral part of the Constitution.

In addition, pursuant to 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. This essentially means that everyone is obligated to apply directly the European Convention and to secure the minimum rights and freedoms guaranteed under the European Convention.

According to the well-established and consistent case-law of the Constitutional Court of Bosnia and Herzegovina, the supremacy of the European Convention and the Protocols thereto is acknowledged, *i.e.* they have priority over all other law, meaning that in the event of contradiction between national laws and the European Convention, the latter shall apply.

I.II Supranational catalogues of human rights (the Charter)

- Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?
- Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?
- Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is it conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

Bosnia and Herzegovina is not a member of the European Union and the EU Charter of Fundamental Rights is not part of its legal system.

I.III National human rights catalogues

- Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?
- What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?
- What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The catalogue of human rights is part of the Constitution of Bosnia and Herzegovina. Article II of the Constitution of Bosnia and Herzegovina includes a catalogue, *i.e.* an enumeration of the human rights and freedoms enjoyed by all persons within the territory of Bosnia and Herzegovina, as follows: a) The right to life; b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment; c) The right not to be held in slavery or servitude or to perform forced or compulsory labor; d) The rights to liberty and security of person; e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings; f) The right to private and family life, home, and correspondence; g) Freedom of thought, conscience, and religion; h) Freedom of expression; i) Freedom of peaceful assembly and freedom of association with others; j) The right to marry and to found a family; k) The right to property; l) The right to education; m) The right to liberty of movement and residence.

Unlike many countries, the Constitution of Bosnia and Herzegovina was created under specific circumstances. Actually, the major part of the Constitution was made in the course of various peace negotiations on Bosnia and Herzegovina, which were completed by the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton, Ohio (the USA), on 21 November 1995 and signed in Paris (the Republic of France), on 14 December 1995, when it came into force. The Constitution of Bosnia and Herzegovina is actually Annex IV to the mentioned Agreement (also known as the Dayton Peace Agreement).

The Constitution provides that it may be amended by a decision of the Parliamentary Assembly, which is taken by a majority of those present and voting in the House of Representatives. The Parliamentary Assembly has two chambers: the House of Peoples and the House of Representatives. All decisions in both chambers are taken by majority of those present and voting but with certain exceptions, as specified below. Therefore, an amendment to the Constitution by the House of Representatives, unlike the procedure applicable to other decisions, requires a two-thirds majority. Thus, Article X (1) of the Constitution of Bosnia and Herzegovina is a provision *specialis*, as it requires a qualified majority, in respect of Article IV (3) (d), first sentence, of the Constitution of Bosnia and Herzegovina, which requires a simple majority for the adoption of laws and other legislative decisions. Therefore, stricter criteria must be met where amending the Constitution, in contrast to the adoption of or amendments to laws and other legislative decisions.

Pursuant to Article X (2), no amendment to the Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of the Constitution. Accordingly, the rights and freedoms referred to in Article II of the Constitution are protected by an unamendable provision (also known as an 'eternity clause'). It does not apply to other human rights and freedoms that are outside the scope of Article II of the Constitution of Bosnia and Herzegovina. However, it could be said that it is not absolutely prohibited to amend Article II of the Constitution, with regard to the rights and freedoms referred to

therein. The provision specifies that the rights and freedoms may not be eliminated or diminished, which leads to the conclusion that amendments are allowed if the scope of protection of human rights and freedoms is extended or affirmed. This is the only method allowed for making amendments.

Article II of the Constitution of Bosnia and Herzegovina, which, as stated above, includes the catalogue of human rights, has never been amended upon its coming into force.

I.IV The mutual relationship between different catalogues of human rights

- Can you give examples from the case law of your court related to the use of any of the international catalogues?
- Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?
- Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

The Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) is both independent guardian of the Constitution of Bosnia and Herzegovina and mechanism of the protection of human rights provided under the European Convention, the application of which is mandatory. An efficient and consistent implementation of the rights may and has to be based on the supremacy of the Constitution and international human rights documents incorporated therein, *because the failure to respect human rights and fundamental freedoms and the failure to fulfil international obligations inevitably leads to international isolation and, through the lack of recognition of the institutions of such a state, to the disappearance of that personality*¹. Therefore, as to the catalogues of human rights under the European Convention and the Constitution of Bosnia and Herzegovina, the Constitutional Court simultaneously refers to them in almost all its decisions. This means that in a case where, *e.g.*, a violation of the right to a fair trial is established, the Constitutional Court states that there is a violation of the rights under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention. For example, in its Decision No. AP-3629/17, the Constitutional Court concluded that there was a violation of the rights under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention, where the amount of compensation for non-pecuniary damages for ungrounded deprivation of liberty was decided in an arbitrary manner. In case No. AP-5509/18, the Constitutional Court concluded that there was a violation of the rights under Article II (3) (d) of the Constitution of Bosnia and Herzegovina and Article 5 (1) (c) of the European Convention, where the appellant's custody was ordered by the ordinary court although the challenged rulings showed that basic legal requirement was not met, namely, that there was a grounded suspicion that the appellant had committed the criminal offense charged with, since it cannot be concluded based on the reasoning of the challenged verdicts that the legal standard of “grounded suspicion”, as defined by the provisions of the Criminal Procedure Code, was met nor can it be concluded that there existed “the facts or information” that would satisfy an objective observer that the person concerned may have committed the offence charged with”, as required by the legal standards under Article 5 (1) (c) of the European Convention.

¹ Decision No. U-14/05 of 2 December 2005

Exceptions are the cases in which the state bodies and public authorities appear as appellants. In such cases, the Constitutional Court examines allegations stated in appeals only within the context of the Constitution of Bosnia and Herzegovina. Namely, in one of its cases, the Constitutional Court, having referred to the case-law of the European Court of Human Rights according to which appeals filed by the state authorities are declared inadmissible *ratione personae*, including the reasoning that Article 34 of the European Convention, in principle, protects individuals, non-governmental organisations or groups of individuals, concluded that *the state bodies and public authorities are parties to court proceedings and Article VI (3) (b) of the Constitution of Bosnia and Herzegovina entitles them to file an appeal with the Constitutional Court, as the mentioned Article does not distinguish constitutional rights under the nature of parties to proceedings. If the Constitutional Court excluded the possibility for the state bodies and public authorities to file appeals, it would actually amount to reduction of its appellate jurisdiction under Article VI (3) (b) of the Constitution of Bosnia and Herzegovina.*²

As regards the international human rights agreements referred in Annex I to the Constitution of Bosnia and Herzegovina, in case No. U-9/09 the Constitutional Court essentially modified its previous position. Prior to its Decision No. U-9/09 of 26 November 2010, the Constitutional Court considered the international human rights agreements referred in Annex I to the Constitution of Bosnia and Herzegovina only in combination with Article II (4) (a) of the Constitution of Bosnia and Herzegovina (non-discrimination). In the mentioned case, the Constitutional Court has taken a position that the International Covenant on Civil and Political Rights makes an integral part of the Constitution of Bosnia and Herzegovina and that, consequently, the Constitutional Court has jurisdiction to decide whether the impugned provisions are consistent with Article 25 (b) of the International Covenant on Civil and Political Rights. Therefore, in the mentioned case, the Constitutional Court, in assessing the constitutionality of the impugned provisions, concluded that Article 25 (b) of the International Covenant may apply independently. In this case, the Constitutional Court concluded that, *inter alia*, certain parts of Article 19.4, paragraph 2 of the Election Law of Bosnia and Herzegovina and Article 17, paragraph 1 of the Statute of the City of Mostar were not consistent with Article 25.b) of the International Covenant on Civil and Political Rights, which is an integral part of the Constitution of Bosnia and Herzegovina. In case No. AP-5156/15, the Constitutional Court concluded that there existed a violation of the best interests of the child under the Convention on the Rights of the Child in a situation where the court failed to provide the reasons for its decision, which would meet the standards of the right to protection of the best interests of the appellant's children guaranteed by the Convention on the Rights of the Child.

Undisputedly, the European Convention, according to the Constitution of Bosnia and Herzegovina, has priority over all other law. However, the relationship between the Constitution of Bosnia and Herzegovina and the European Convention has long been subject to different interpretations by the domestic political and legal public in the context of whether the European Convention has supremacy over the provisions of the Constitution of Bosnia and Herzegovina, too. This issue was also the subject of consideration before the Constitutional Court. In a case related to abstract judicial review, the Constitutional Court, deciding on **a request for review of conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention**, rejected the request as inadmissible because the Constitutional Court of

² Decision of the Constitutional Court of BiH No. AP-39/03 of 27 February 2004, pp. 12-15

Bosnia and Herzegovina had no jurisdiction to take a decision.³ In the aforementioned case, the Constitutional Court pointed out that *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, and 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.* The Constitutional Court followed the same view in another case, where it was deciding on the request for review of conformity of certain provisions of the Election Law of Bosnia and Herzegovina with the European Convention.⁴ Although in the mentioned case the subject matter of review of conformity were not the provisions of the Constitution of Bosnia and Herzegovina but the provisions of the Election Law, the Constitutional Court concluded that *it cannot be ignored that that the challenged provision of the Election Law, de facto, derive fully from the provisions of Article V of the Constitution of BiH, which remove any doubts as to its unconstitutionality. For these reasons, the Constitutional Court has no competence to decide because this would otherwise imply a review of conformity of the constitutional provision with the provisions of the international documents relating to the human rights, and it has already taken the position that these, i.e. the European Convention, could not have a superior status in relation to the Constitution of BiH.* These are the only situations in which the Constitutional Court, in some way, dealt with the issue of hierarchy between the Constitution of Bosnia and Herzegovina and the European Convention, or international human rights documents, in the case of abstract jurisdiction. When it comes to the catalogues of human rights within the scope of the appellate jurisdiction, the issue of hierarchy was not raised, nor was a procedure for selecting a concrete human rights catalogue established. As stated above, the European Convention is an integral part of the Constitution of Bosnia and Herzegovina and the rights referred to in both European Convention and Constitution of Bosnia and Herzegovina are being considered in parallel as constitutional provisions.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

- What is the original wording of the provision protecting this right in your national catalogue?
- Is it possible to restrict the right? If so, how and under what conditions?
- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.
- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As already stated, Article II (2) of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols apply directly in Bosnia and Herzegovina. Therefore, the relevant provision of the European Convention will also be cited with regard to this right, as well as with the others rights listed below. In addition,

³ Decision of the Constitutional Court No. U-5/04 of 27 January 2006.

⁴ Decision of the Constitutional Court No. U-13/05 of 26 May 2006.

it should be noted that the Constitution of Bosnia and Herzegovina only prescribes a certain right while a more detailed "elaboration" of these rights is contained in the European Convention, which applies directly in BiH. Also, certain rights guaranteed by the European Convention are limited by the mere formulation of that right in the European Convention.

The right to life in the legal system of Bosnia and Herzegovina, in addition to the European Convention for the Protection of human Rights and Fundamental Freedoms, is protected also by the Constitution of Bosnia and Herzegovina, Article II (3) (2), which reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a) The right to life.

....

Article 2 of the European Convention reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

An important case of limitation of this right is the execution of a capital punishment, referred to in paragraph 1 of Article 2 of the European Convention. However, it should be added that Protocols No. 6 of 1985 and No. 13 of 2002 completely abolished the death penalty, so that the provision, or the exception, of paragraph 1, has no longer any practical importance for all countries that have ratified these Protocols. Bosnia and Herzegovina has ratified both of these Protocols.

Pursuant to paragraph 2 of Article 2 of the European Convention, the deprivation of life is not regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In its case-law, the Constitutional Court has considered the right to life as a right protected by the Constitution of Bosnia and Herzegovina and the European Convention. As already stated, the Constitutional Court has been determining whether or not the right to life guaranteed by the Constitution of Bosnia and Herzegovina and the European Convention (in parallel) has been breached. When making decisions in its cases, the Constitutional Court takes into account the standards established by the European Court

of Human Rights and seeks to harmonise its case-law with the case-law of the European Court of Human Rights, which remains the final authority on the interpretation of the European Convention.

As to the case-law of the Constitutional Court of Bosnia and Herzegovina related to a violation of the right to life, it mostly concern the cases of missing persons, which is actually a result of the war that occurred in this territory. On several occasions, the Constitutional Court has emphasized that the obligation to protect the right to life under Article 2 of the European Convention actually arises where the death of an individual has been caused by the use of force. The issue raised before the Constitutional Court was whether the competent authorities in specific cases had undertaken an effective investigation prescribed by law to determine whether a particular person had been killed by the use of force and, if so, whether the necessary procedures had been initiated against the perpetrator of the criminal offense, in order to meet the positive obligation to protect the right to life. The mentioned obligation implies certain actions in accordance with the law, but not the outcome, *i.e.* the outcome of the proceedings. Thus, in case No. AP 1045/04, the Constitutional Court found a violation of the right to life in the case where the state authorities failed to take the necessary measures to satisfy the positive obligation to protect the life of the appellant's daughter. In its decision No. AP-1107/06, the Constitutional Court concluded that, despite the relevant documentation recording the violent death of a close relative of the appellants, and alleged appearance and position of his mortal remains, the competent legal entity failed to undertake necessary measures in the present case and failed to inform the prosecution authorities on the aforesaid circumstances, which indicate that this is the case of violent homicidal death, as it is provided for in all of three criminal procedure codes that were in force at the relevant time, all in accordance with the positive obligation within the meaning of Article 2 of the European Convention.

The Constitutional Court, in its case-law, has not had such cases in which the limitations under paragraph 2 of the European Convention have been applied, or such cases in which the Constitutional Court could possibly give a more extensive or different interpretation.

II.II Freedom of expression

- What is the original wording of the provision protecting this right in your national catalogue?
- Is it possible to restrict the right? If so, how and under what conditions?
- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.
- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article II (3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

h) Freedom of expression

....

Article 10 of the European Convention

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The first paragraph of Article 10 of the European Convention defines the right itself, and the second paragraph allows for the interference with and restriction of those rights, under the conditions laid down in that paragraph. The restrictions on the freedom of expression referred to in Article 10 of the European Convention must be prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public security, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The freedom of expression is not absolute and the state authorities may interfere with that freedom in certain circumstances and under certain conditions referred to in paragraph 2 of Article 10 of the European Convention. Therefore, the key role and task of an independent judiciary is to clearly define in each individual case the boundary between justified and necessary, and unjustified and unnecessary restrictions, which confirm a principle as a rule or denounce it as a mere declaration.

A State may restrict human rights if there are conditions provided for by the European Convention: a) a restriction must be provided for by law, prescribed by law and in accordance with law; b) it must be necessary in a democratic society; and c) it must pursue clearly stated legitimate aims. As to the restrictions under paragraph 2 of Article 10 of the European Convention, the European Court of Human Rights pointed out that the "democratic necessity test" requires that, in deciding whether a violation has occurred, it should be assessed whether the "interference" with this freedom by the domestic authorities is justified by a "pressing social need" and proportionate to the legitimate aim pursued and whether the reasons and justifications given by the competent authorities for such interference are relevant and sufficient. The same principle, or "test", is followed by the Constitutional Court, as well as the practice that any restriction must have a clear basis in law.

For example, in one of its cases concerning the freedom of expression, the Constitutional Court found that there was no violation of the right to freedom of expression under Article II (3) (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention where the ordinary courts' impugned rulings ordered the appellant (media house) to pay the plaintiff compensation for the non-pecuniary damage inflicted on her reputation and honour by presenting untrue facts, since "interference" was in

accordance with the law, the aim was "to protect the rights of others" and was "necessary" measure in a democratic society ", thus striking a fair balance between the plaintiff's right to the protection of reputation and the appellant's right to freedom of expression.⁵ On the other hand, in one of its cases, the Constitutional Court concluded that the ordinary courts failed to strike a fair balance between the freedom of the media and the rights of the second plaintiff to the protection of reputation, in accordance with the principle of proportionality, and that they exceeded their margin of appreciation in violation of Article II (3) (h) of the Constitution of Bosnia and Herzegovina and Article 10 of the European Convention.⁶ In another case the Constitutional Court concluded that there was no violation of Article 10 of the European Convention where the appellant was fined for inappropriate behaviour at the hearing, as it was required for the maintenance of the dignity and authority of the court, as a restriction inherent in the aforementioned Article.⁷

II.III Right to privacy/right to respect for private life/right to private life

- *What is the original wording of the provision protecting this right in your national catalogue?*
- *Is it possible to restrict the right? If so, how and under what conditions?*
- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*
- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

Article II (3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

f) The right to private and family life, home, and correspondence.

....

Article 8 of the European Convention

Right to respect for private and family life

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 8 of the European Convention guarantees to everyone the right to respect for private and family life, home and correspondence. Article 8 of the European Convention

⁵ Decision of the Constitutional Court No. AP-2291/14 of 7 March 2017

⁶ Decision of the Constitutional Court No. AP-1203/05 of 27 June 2006

⁷ Decision of the Constitutional Court No. AP-2486/11 of 17 July 2014

protects the private sphere of individuals. However, the private sphere is not protected without any restriction. In order for the interference with this constitutional right to be justified, it must be in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. According to the case-law of the European Court of Human Rights, which is followed by the Constitutional Court, an interference is lawful if the following conditions are met: (a) the interference has to be based on national or international law; (b) the law concerned must be widely available thus enabling an individual to be familiarized with the circumstances of the law that could be applied in the case concerned; (c) the law also has to be formulated with the adequate accuracy and clarity to allow an individual to adjust his/her actions in accordance therewith.⁸ The interference which is in accordance with the law must also be a measure necessary in a democratic society for the purpose of achieving one of the "legitimate aims" under Article 8(2) of the European Convention. "Necessary" in this context means that the "interference" corresponds to "pressing social needs" and that there is a reasonable relationship of proportionality between the interference and the legitimate aim pursued.⁹

The Constitutional Court applies the same "test" with regard to the right to respect for home (interference with the protected scope of the right to home, the justification of interference with the right to home, the lawfulness of interference, a legitimate goal and necessity in a democratic society).

In that context, we refer to a decision in the case in which the appellant, as a father of the child X, challenged the decisions of the ordinary courts based on which the appellant was obligated to support his child. In that case, the Constitutional Court concluded that the fact that it was established that the appellant was a father of the child amounted to an interference with the appellant's right to respect for private and family life, but that interference was lawful and a necessary measure in a democratic society, and proportionate to the aim pursued.¹⁰ In another case, deciding on the appeal of an appellant who was threatened with deportation to Syria, the Constitutional Court concluded that the ordinary court failed to utilise the test of proportionality required by Article 8, paragraph 2 of the European Convention and, consequently, the Constitutional Court found a violation of the appellant's right to respect for his private and family life.¹¹

As is the case with all other constitutional/convention rights, the Constitutional Court follows the standards and case-law established by the European Court of Human Rights, and there is no difference between the case-law of the Constitutional Court and the case-law of international courts with respect to the protection of this right.

II.IV Freedom of religion

- What is the original wording of the provision protecting this right in your national catalogue?
- Is it possible to restrict the right? If so, how and under what conditions?

⁸ Decision of the Constitutional Court No. AP-1031/04 of 26 April 2015, para. 18, including reference to the case-law of the European Court of Human Rights in the case of *Sunday Times vs. the United Kingdom* of 26 April 1979.

⁹ *Ibid*, para. 19.

¹⁰ Decision of the Constitutional Court No. AP-1040/05 of 9 February 2006.

¹¹ Decision of the Constitutional Court No. AP-1222/07 of 4 October 2008.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.
- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article II (3) of the Constitution of Bosnia and Herzegovina, as relevant, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

g) Freedom of thought, conscience, and religion.....

Article 9 of the European Convention

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The first paragraph of Article 9 of the European Convention defines protected freedoms, and the second paragraph contains the so-called "restrictive clause", *i.e.* prescribes the circumstances under which the public authorities may restrict the enjoyment of the protected freedoms.

The restriction prescribed in Article 9, paragraph 2 of the European Convention allows States to decide on the extent of the enjoyment of these rights and freedoms only when that State's intervention is prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims such as public safety, the protection of public order, health and morals, or the protection of the rights and freedoms of others. This means that the State is allowed in the general social interest to limit the exercise of these rights, but not to suspend them. The Constitutional Court's case-law on this issue is very scarce. However, in a small number of cases in which the Constitutional Court dealt with this issue, the Constitutional Court, by applying these principles, was examining the grounds of the allegations related to Article II (3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention. So, for the "restriction" to be justified, it has to be "prescribed by law". In one of its cases the Constitutional Court pointed out that, considering the principle of legality of the restriction of freedoms safeguarded by Article 9 of the European Convention, the European Court of Human Rights referred to its case-law in connection with Articles 8 and 11 of the European Convention (see *Hasan and Chaush vs. Bulgaria*, judgment of 26 October 2000, application no. 30985/96, paragraph 84).¹² In that sense, the condition of

¹² Decision of the Constitutional Court No. AP-286/06 of 29 September 2007, para. 43

legitimacy, in accordance with the meaning of a notion of the European Convention, consists of several elements: (a) any restriction must be based on domestic or international law; (b) the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and (c) the law must be formulated with sufficient precision to enable the individual to regulate his/her conduct.¹³ The aforementioned principles were referred to in a very interesting case of the Constitutional Court, in which a canon law issue was raised. In that case, the appellant was the Parish of St. Ante Padovanski of Bugojno, the Franciscan Province of Bosna Srebrna, Sarajevo and the subject-matter of the appeal was a judgment by which the civil proceedings related to the determination of the existence of the right to property were concluded. In proceedings before the ordinary courts, it was established that the deceased person (who was a member of the Order of Manje Braće of St. Franjo and, as a member of the Franciscan Province of Bosna Srebrna), had had his own property at the moment of death, and that he failed to make a will to leave the property to his brother. According to the norms of canon law, a member of a religious order is obliged to make a will, as a legal act disposing of his own property, which would be valid within the civil legal framework, and the property of a physical person who is simultaneously a member of a religious order is not automatically the property of Church by operation of law, including the norms of canon law. The Supreme Court, taking into account the circumstances and the appellant's constitutional and legal status, concluded that the appellant did not submit evidence to prove that it had lawfully acquired the property within the meaning of Article 23 of the Law on Ownership and Proprietary Relations. The Constitutional Court held that the impugned judgment, whereby the Supreme Court dismissed the appellant's claim, did not place restrictions on freedom of the appellant as a religious community within the meaning of Article 9 of the European Convention and, therefore, the Constitutional Court considered that there was no need to consider other aspects of Article 9 of the European Convention. Finally, the Constitutional Court concluded that the impugned judgment was not in violation of Article II (3) (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention, because it did not impose restrictions on the appellant's freedom of religion.

II.V Prohibition of discrimination

- What is the original wording of the provision protecting this right in your national catalogue?
- Is it possible to restrict the right? If so, how and under what conditions?
- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.
- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article II (4) of the Constitution of Bosnia and Herzegovina reads:

¹³ *Ibid*, including reference to the case-law of the European Court of Human Rights in the case of *Sunday Times vs. the United Kingdom* of 26 April 1979.

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 of the European Convention

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1 of Protocol No. 12 to the European Convention

General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

In its previous case-law the Constitutional Court has been using the criteria of non-discrimination established by the European Court for Human Rights, which includes the constitutional rights and rights set forth in the European Convention coupled with the rights under international human rights agreements listed in Annex I to the Constitution of Bosnia and Herzegovina. It follows from the aforementioned case-law of the Constitutional Court that Article II (4) of the Constitution of Bosnia and Herzegovina provides a more extensive protection from discrimination than Article 14 of the European Convention.¹⁴ Therefore, Article II (4) of the Constitution of Bosnia and Herzegovina provides for the prohibition of discrimination in relation to the rights set forth in the European Convention as well as the rights and freedoms under the international instruments contained in Annex I to the Constitution of Bosnia and Herzegovina. In this way, the scope of protection of the rights and freedoms of citizens of Bosnia and Herzegovina has been extended, while the State of Bosnia and Herzegovina and both of its Entities have been further obligated to ensure the highest level of internationally recognized human rights, without discrimination on any ground, as provided for in Article II (1) of the Constitution of Bosnia and Herzegovina. For example, in one of its cases the Constitutional Court found a violation of the appellant's right to non-discrimination under Article II (1) of the Constitution of Bosnia and Herzegovina in conjunction with the right to work under Articles 6 and 7 (a) (i) and (ii) of the International Covenant on Economic, Social and Cultural Rights and the right safeguarded by Article 5 (e) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination, as the appellant was treated differently compared to other defendant's employees in the same

¹⁴ Decision of the Constitutional Court No. U-44/01 of 27 February 2004, para. 45

factual and legal situation.¹⁵ In another case in which a similar issue was raised, the Constitutional Court concluded that the appellant was discriminated against in the enjoyment of her right to be admitted, on general terms of equality, to public services and, as a result, she was discriminated against in the enjoyment of her individual right to work. In the mentioned case, the Constitutional Court found a violation of the appellant's rights, as determined by Article II (4) of the Constitution of Bosnia and Herzegovina, Article 6 (1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights and Article 25 of the International Covenant on Civil and Political Rights.¹⁶

In view of the above, it is evident that the limitations on these rights are determined by the text of the international document that prescribes them. The same applies to the prohibition of discrimination, where limitations may concern certain group of rights or persons belonging to a particular category (e.g. only nationals). Bearing in mind that, in addition to the European Convention, a number of international documents containing provisions prohibiting discrimination are applied in Bosnia and Herzegovina (e.g. the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights), it can be said that there exist those limitations that are prescribed by the documents themselves. In the case-law of the Constitutional Court of Bosnia and Herzegovina, there are no cases in which the Constitutional Court of Bosnia and Herzegovina dealt with this issue (limitations on the prohibition of discrimination).

II.VI Right to liberty

- What is the original wording of the provision protecting this right in your national catalogue?
- Is it possible to restrict the right? If so, how and under what conditions?
- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.
- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article II (3) (d) of the Constitution of Bosnia and Herzegovina reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

d) The rights to liberty and security of person.

...

Article 5 of the European Convention

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;

¹⁵ Decision of the Constitutional Court No. AP-1093/07 of 25 September 2009

¹⁶ Decision of the Constitutional Court No. U-64/01 of 26 September 2003

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Some rights and freedoms are limited by the mere formulation of the right guaranteed. The freedom of a person is an inviolable value, but certain persons may be deprived of their liberty in accordance with a procedure prescribed by law. Sub-paragraphs (a) through (f) of Article 5 (1) contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 (1) unless it falls within one of those grounds.¹⁷ The grounds on which persons may be deprived of their liberty are thoroughly listed in Article 5 (1) of the European Convention. It is about exceptions to the prohibition of deprivation of liberty on the grounds stemming from criminal law, where there is a number of grounds on which certain persons may be deprived of their liberty although they have not committed a criminal offence, *i.e.* persons such as minors, vagrants or persons suffering from infectious diseases, or persons of unsound mind, alcoholics or drug addicts, or a person against whom action is being taken with a view to deportation or extradition. However, the control of the protection of human rights is not excluded in such cases. There are numerous examples in the case-law of the Constitutional Court in relation to the general

¹⁷ See, European Court of Human Rights, *Al-Jedda vs. The United Kingdom* (GC), number 27021/08 of 7 July 2011, para. 99

rule for the protection of everyone against deprivation of liberty, where the Constitutional Court found a violation of the right to personal liberty and security as the ordinary courts exceeded the framework of the European Convention. Thus, in one of its cases the Constitutional Court found a violation of Article II (3) (d) of the Constitution of Bosnia and Herzegovina and Article 5 (1) (f) of the European Convention, where a person, who, at the time of determining and extending the supervision measure, did not have the status of a BiH citizen nor had he had the right to reside in BiH, was deprived of liberty in accordance with the law for he posed a threat to public order and peace or security of BiH, whereas such deprivation of liberty was not undertaken with a view to initiating expulsion proceedings nor could it be subsumed under any of the exceptions provided for in Article 5 (1) of the European Convention.¹⁸ On the other hand, the Constitutional Court established no violation of Article 5 (1) (f) of the European Convention in the case in which it found that the appellant had the status of an alien, who was illegally staying in the territory of BiH and who requested international protection, where the ordinary court assessed that in that case the conditions were met for the appellant to be put in the Immigration Centre, so that it was about the lawful deprivation of liberty of the alien pending a decision on his admission, as permitted by Article 5 (1) (f) of the European Convention.¹⁹

As in the cases mentioned above, and in accordance with the established case-law of the Constitutional Court, the catalogues of human rights under the Constitution of Bosnia and Herzegovina and the European Convention are applied in parallel with each other.

In a number of cases the Constitutional Court dealt with an issue of whether the guarantees referred to in Article II (3) (d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention may be applied in the event of imposing the measures of prohibition. In those cases, the Constitutional Court pointed out that, having regard to the case-law of the European Court of Human Rights with regard to the distinction between deprivation of liberty under Article 5 of the European Convention and restrictions on the right to liberty under Article 2 of Protocol No. 4 to the European Convention (which is reflected in the examination of the degree, intensity and consequences of measures taken by the public authority), the Constitutional Court considers that the standards established by the European Court of Human Rights constitute a minimum standard for the protection of a particular right guaranteed by the European Convention. Also, the Constitutional Court pointed out that the aforementioned does in no way prevent the Constitutional Court from providing a wider scope of protection than the one provided by the standards established in the case-law of the European Court of Human Rights and, consequently, it examined the impugned rulings, which imposed the measures of prohibition on the appellants, within the scope of guarantees for the protection of the rights under Article 5 of the European Convention.²⁰

Explanatory notes:

¹⁸ Decision of the Constitutional Court No. AP-3153/09 of 15 May 2012

¹⁹ Decision of the Constitutional Court No. AP-3307/08 of 28 March 2009

²⁰ Decisions of the Constitutional Court Nos. AP-4850/14 and AP-5432/14 of 15 April 2015, para. 38 and 35 respectively.

ECHR	– European Convention on Human Rights
Charter	– Charter of Fundamental Rights of the EU
UDHR	– Universal Declaration of Human Rights
ICCPR	– International Covenant on Civil and Political Rights

Notes on the design of the questionnaire:

Most European countries have laid down a number of rights and freedoms in their various stages of development, which they consider to be of such importance that they put them above other rights, duties and values. The primacy of these rights over other values and interests of the state has also been reflected in their formal expression, that is, in a summary list of such rights and freedoms in a document with the highest legal power. Such a document is most commonly the constitution of the state; for countries with a poly-legal constitution – such as the Czech Republic – it is a special catalogue with an autonomous normative character, but it is comparable with the Constitution in terms of its legal force and system hierarchy.

Similarly to how the positions of fundamental rights and freedoms have been highlighted in national constitutional documents, international human rights documents contain provisions on human rights, their protection, application and application primacy. Therefore, national catalogues of human rights are similar to international ones in that they contain a similar list of rights, at least a similar scope of basic rights and also the fact that higher emphasis is placed on the rights and freedoms protected by the national catalogues.

International human rights documents, mostly having the form of treaties, have been influencing, conditioning and determining the decision-making process of constitutional courts in the area of human rights for decades. However, their approach to the use of international human rights documents is not uniform as it is subject to the national setting of the reception of international law sources. The questionnaire aims to inquire what steps are taken by the constitutional, or equivalent courts, when a value (a right or a freedom) is protected by more sources of law (which usually include a national constitution, the European Convention on Human Rights adopted within the Council of Europe, Charter of Fundamental Rights of the EU or another international multilateral treaty protecting human rights). Therefore, the use of various catalogues of human rights by constitutional courts should be analysed further by the XVIIIth Congress of the Conference of European Constitutional Courts.

Notes on the structure of the questionnaire:

The questionnaire has two parts: a general and a special part.

The first part focuses on general aspects of reasoning regarding the application of individual catalogues of human rights. It will examine, in particular, the essence of their normative enshrining in the national legal order, their plurality, their possible hierarchical position, their mutual relationships, their application in the case law, and the importance attached to the particular catalogue of human rights by a particular constitutional court. The structure of the questionnaire distinguishes national, transnational and international catalogues of human rights; the last area deals with the mutual relationship between such catalogues.

(Note on Part I.II of the questionnaire: if your country is not a member of the EU and your court does not apply the Charter or the case law of the Court of Justice of the European Union, it is not necessary to fill in this part).

The second part examines human rights common to most human rights catalogues. An example of six human rights makes it possible to make an in-depth comparative analysis of the approach taken by the European constitutional courts and the degree of use of the individual catalogues when protecting specific rights.

Practical issues for submitting the questionnaire:

Many of the CECC Congresses in the past have focused extensively on the Charter of Fundamental Rights of the EU and EU law, even in relation to the case law of the European Court for Human Rights and the Court of Justice of the European Union. Despite the fundamental importance of both of these courts and the role of the Charter for the decision-making of the European constitutional courts, we believe that it is not necessary to repeat the conclusions from the questionnaires for previous Congresses. We would be happy if the focus is placed on national constitutional courts and how they use the human rights catalogues, rather than on the hierarchy of the courts or application priority issues in the individual jurisdictions.

In accordance with the provision of Article 9 (2) of CECC Statute and Resolution II adopted by the Circle of Presidents at its meeting on June 13, 2018 in Prague, we hereby attach the final version of the Questionnaire and kindly request you to complete it **electronically, in your national language and in English or French** (Article 3 of the Conference regulations) and it would be appreciated, if your answers to the Questionnaire **did not exceed 25 standard pages**. Please return the completed Questionnaire by electronic mail to CECC secretariat at cecc2017-2020@concourt.cz **by October 31, 2019 at the latest**.

Thank you!

Your CECC-team

