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APELACIJSKA NADLEŽNOST USTAVNOG SUDA BOSNE I HERCEGOVINE

SAŽETAK

Ljudska prava i temeljne slobode su neizostavni dio suvremenih ustava, a suštinsko pitanje suvremene ustavnosti jest njihova učinkovita pravna zaštita. Najvišu pravnu zaštitu ljudskim pravima i temeljnim slobodama pružaju ustavni sudovi.

Mogućnost zaštite ustavom zajamčenih sloboda i prava čovjeka i građanina u postupku pred ustavnim sudovima otvara pitanje njihovog odnosa prema redovitim sudovima. Ustavni sudovi čine specifičnu, četvrtu vlast, i ne smiju se pretvoriti u četvrtu instancu redovitog sudstva. Oni štite samo specifična, ustavna prava. Može se reći da je granica između Ustavnog i redovnog sudstva ta što ustavni sudovi štite ustavna prava, a redoviti sudovi ordinarno pravo.

Apelacijska nadležnost Ustavnog suda Bosne i Hercegovine ustanovljena je odredbom sadržanom u čl. VI./3. b) Ustava po kojoj Sud ima apelacijsku nadležnost za pitanja iz Ustava koja se pojave na osnovi presude bilo kojeg suda u Bosni i Hercegovini. Uobičajeni nazivi za ovaj institut u europskoj pravnoj tradiciji su ustavna žalba/tužba. Izvorni engleski tekst Ustava Bosne i Hercegovine, koji nije preveden na domaće, službene jezike, govori o apelacijskoj nadležnosti Ustavnog suda (appellate).

Ustavni je tekst kratak, a Bosna i Hercegovina nema Ustavni zakon o Ustavnom sudu, pa su, relevantan izvor prava Pravila Ustavnog suda Bosne i Hercegovine (Službeni glasnik Bosne i Hercegovine br. 94/14).

Pravilima i svojom praksom je Ustavni sud prevladavao nedoumice koje je izazivala apelacijska nadležnost. Kao važnije kojima se i u radu posvećuje pozornost jest pitanje predmeta apelacije, odnosno što se smatra presudom u smislu značenja čl. VI./3. b) Ustava.

Predmet spora mogu biti presude sudova u Bosni i Hercegovini. Pod pojmom presuda podrazumijevaju se i druge sudske odluke, a ne samo presuda u užem smislu riječi.

Prijepornim su se pokazalo pitanje nadležnosti Ustavnog suda Bosne i Hercegovine u odnosu na Ustavne sudove entiteta i odluke Visokog predstavnika.

Iako teorijski postoji mogućnost da se pojavi i neko drugo pitanje, apelacijska nadležnost se u pravilu svodi na zaštitu temeljnih prava i sloboda.

Subjekti prava na apelaciju mogu biti građani i pravne osobe kada im je sudskom presudom povrijeđeno neko ustavno pravo, a kako Ustav i odgovarajuće odredbe Pravila ne predviđaju

bilo kakva ograničenja u vezi s pravom podnošenja apelacija, prema jezičnom tumačenju ni organi javne vlasti nisu isključeni kao potencijalni podnosioci apelacije. Praksa Ustavnog suda je po ovom pitanju evoluirala, jer im u početku pravo na podnošenje apelacije nije bilo priznato.

Postupak pred ustavnim sudom u apelacijskim predmetima dijeli se na fazu ispitivanja dopustivosti, te ukoliko su uvjeti dopustivosti ispunjeni, ispitivanje merituma apelacije. Pravilima je propisano da Ustavni sud može razmatrati apelaciju samo ako su protiv presude, odnosno odluke koja se njome pobija, iscrpljeni svi djelotvorni pravni lijekovi mogući prema zakonu i ako se podnese u roku od 60 dana od dana kada je podnositelj apelacije primio odluku o posljednjem djelotvornom pravnom lijeku koji je koristio. Iznimno može razmatrati apelaciju i kada nema odluke nadležnog suda, ukoliko apelacija ukazuje na ozbiljna kršenja prava i temeljnih sloboda koja štite Ustav Bosne i Hercegovine ili međunarodni dokumenti koji se primjenjuju u Bosni i Hercegovini. Sud će odbaciti apelaciju kao očigledno (*prima facie*) neutemeljenu kada utvrdi da ne postoji opravdan razlog stranke u postupku, odnosno da predložene činjenice ni na koji način ne mogu opravdati tvrdnju da postoji kršenje Ustavom zaštićenih prava i/ili kada se za stranku u postupku utvrdi da ne snosi posljedice kršenja Ustavom zaštićenih prava, tako da je ispitivanje merituma apelacije nepotrebno.

Ukoliko Sud apelaciju usvaja, on ukida osporenu odluku i predmet vraća sudu, odnosno organu koji je donio tu odluku na ponovni postupak. Sud, odnosno organ čija je odluka ukinuta, dužan je donijeti novu odluku pri čemu je obavezan poštovati pravno shvaćanje Ustavnog suda o povredi Ustavom utvrđenih prava i temeljnih sloboda podnosioca apelacije. Podatci pokazuju rast broja podnesenih apelacija. To ukazuje na svijest građana o ljudskim pravima i mehanizmima zaštite, ali i razini poštivanja ljudskih prava i temeljnih sloboda u Bosni i Hercegovini, koja nije na zadovoljavajućoj razini. Ustavni sud u okviru ove nadležnosti donosi veliki broj odluka kojima izgrađuje praksu promoviranja i zaštite ljudskih prava i temeljnih sloboda, no za potpuni uspjeh potreban je pojačan angažman i drugih segmenata društva. Ljudska prava su najviša vrijednost ustava i kao takva zaslužuju i traže navedeni angažman u cilju učinkovite zaštite.

APPELLATE JURISDICTION OF THE CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA

SUMMARY

Human rights and fundamental freedoms are an indispensable part of modern constitutions, and the essential question of the contemporary constitutionality is their effective legal protection. The highest legal protection of human rights and fundamental freedoms is provided by the constitutional courts.

The ability to protect rights and freedoms guaranteed by constitutions in the proceedings before the constitutional courts raises the question of their relationship to the regular courts. Constitutional courts are specific, the fourth power, and cannot be converted into a fourth instance of the regular judiciary. They protect only specific, constitutional rights. It can be said that the border between Constitutional and ordinary judiciary is that the constitutional courts protect the constitutional rights, and the ordinary courts ordinary law.

Appellate jurisdiction of the Constitutional Court of Bosnia and Herzegovina was established under provisions contained in Article VI./3. b) of the Constitution, according to which the Court shall have appellate jurisdiction over issues under this Constitution that arise out of a judgment of any other court in Bosnia and Herzegovina. Common names for this institute in European legal tradition are the constitutional appeal/complaint. The original English text of the Constitution of Bosnia and Herzegovina, which was not translated into local, official languages, is talking about appellate jurisdiction of the Constitutional Court. Constitutional text is brief, and Bosnia and Herzegovina does not have the Constitutional Law on the Constitutional Court, so the relevant source of law are Rules of the Constitutional Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina. 94/14). By Rules and its practice the Constitutional Court has prevailed concerns caused by the appellate jurisdiction. As important one, that the work pays attention to, is the question of the object of the appeal, or what is considered to be a judgment within the meaning of Art. VI./3. b) of the Constitution.

It can be the judgment of the courts in Bosnia and Herzegovina. The term implies judgment and other court decisions, not just the judgement in the narrower sense of the word. Questionable was jurisdiction of the Constitutional Court of Bosnia and Herzegovina in

regard to the Constitutional Courts of entities, and to decisions of the High Representative (OHR).

Although theoretically some other issue may occur, appellate jurisdiction reduces to the protection of fundamental rights and freedoms. The subjects of the right to appeal may be citizens and legal persons when some of their constitutional rights are violated by a judgement, and since there are not provided any restrictions on the right to submit an appeal by the Constitution and the relevant provisions of the Rules, according to language interpretation nor public authorities are excluded as a potential Appellant. The practice of the Constitutional Court on this issue has evolved, because at the beginning the right of appeal has not been recognized for those subjects. Proceeding before the Constitutional Court in Appellate cases is divided into the stage of the examination of admissibility, and if the conditions of admissibility are fulfilled, examination of the merits of the appeal. Under the provisions of the Rules of court, the Constitutional Court shall examine an appeal only if all effective remedies, that are available under the law against a judgment or decision challenged by the appeal, are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her. Exceptionally, they may consider an appeal if there is no decision of the Court, if the appeal indicates the serious violations of the rights and fundamental freedoms that are protected by the Constitution of Bosnia and Herzegovina or international instruments applicable in Bosnia and Herzegovina. The Constitutional Court shall reject an appeal as being manifestly (*prima facie*) unfounded when it establishes that the request of the party to the proceedings is not justified or when the presented facts do not in any way justify the allegation of a violation of the constitutional rights and/or when the Constitutional Court establishes that the party to the proceedings is not a “victim” of a violation of the constitutional rights, so that the examination of the merits of the appeal is superfluous.

If the Court adopts the appeal, it shall quash the challenged decision and refer the case back to the court or to the body which took that decision, for renewed proceedings. The court or the body whose decision has been quashed is obligated to take another decision and, in doing so, it shall be bound by the legal opinion of the Constitutional Court concerning the violation of the rights and the fundamental freedoms of the appellant guaranteed under the Constitution.

The data show growth of the number of submitted appeals. This indicates people's awareness of human rights and protection mechanisms, but also the level of respect of the human rights and fundamental freedoms in Bosnia and Herzegovina, which is not at a satisfactory level. The Constitutional Court brings a large number of decisions under this jurisdiction, by which

builds the practice of promoting and protecting human rights and fundamental freedoms, but for the complete success enhanced engagement of all other segments of society is required.