

Remarks by the High Representative, Paddy Ashdown, at the Press Conference on Constitutional Court

This press conference is about the Constitutional Court – and I bet you think that's boring. I want to try to explain to you why it is not. Imagine that the International Community is the scaffolding within which we have built the state. Within that scaffolding we have built a house, the house is called Bosnia and Herzegovina. And in that house live the three peoples of BiH. The walls of that house are the Constitution of the State and as we begin to dismantle the scaffolding which the International Community has provided, we need to strengthen those walls, so that the State of BiH can remain what it is and what it needs to be, as this country transitions to full statehood, full sovereign statehood and full membership of the European Union.

The Constitution of this country is a difficult and complex document holding together a very fragile set of checks and balances. And that Constitution is absolutely essential to the future of the State.

So, I want to talk to you today about some thoughts we've been having, which have now been turned into a proposition as to how we can strengthen the Constitution of the State. This has been brought to a head because next week on Tuesday Mr Novakovic has a resolution before the Parliament calling for the withdrawal of all international judges from the Constitutional Court. And that has meant that some of the ideas we have been generating here in the OHR, to strengthen

the Constitution and to look at the withdrawal of internationals from this process, have to be brought to a head little earlier. So the draft law which comes up on Tuesday begins a process which I would like to explain to you. This morning after consultation with all of the people involved

I have written to the President of the Court, Mato Tadic, Justice Minister Slobodan Kovac, and Momcilo Novakovic, the proponent of this law, saying that it might be appropriate to find a framework in which this draft law could be withdrawn from parliamentary procedure so that we can consider something much bigger than the draft law is proposing.

I did this because the Constitutional Court is indispensable in making BiH's complex and fragile constitutional structure work; however, key issues related to making the Court function in an optimal way have not been addressed in the draft law. It looks like an important topic, which is the issue of international judges in the Constitutional Court, but it does not look at some other aspects that I think it should be looking at.

I have therefore proposed to Mr Kovac that the Justice Ministry establish a Working Group to examine, among other things these important questions

- What is the optimal jurisdiction of the Constitutional Court – is it an asset that is used to the full by ministries, political parties, and individual citizens? Could it be made more accessible? Can it do a bigger job? It does a good job already, but can it do a bigger job?
- Secondly, what is the framework for the international engagement in the Court? How long should the international judges stay? What is the continuing role of international judges and how much longer should they serve on the Court? I told Mr Novakovic this morning that, although it may surprise him, I was rather in

favour of his resolution. It just needed to be considered in a more thoughtful context.

So this Working Group that is about to be established will need to deal with these and other issues and I hope they will deal with them quickly. Some of them may indeed require a change to the Constitution itself so as to strengthen the role of the Constitutional Court . I think that should be addressed as fast as possible. Indeed, in my letter this morning I stressed that recommendations, which can be incorporated in a revised draft law, should be formulated and presented as soon as possible. Now, let me give you some details.

The Constitutional Court has played a very positive role in strengthening and protecting the BiH institutions over the last decade. The role of the Court in such a complex and fragile institutional landscape is crucial. It is well established and it does its job well, but I believe its role can be further developed.

For example, should the Court be entitled (as I think it should) to provide an advisory opinion to government? This exists in some countries, notably France , it does not exist under our Constitution.

Under the present system a law is passed, and then if its constitutionality is challenged, a case may be taken to the Constitutional Court .

I believe we should explore the possibility of having the Court review draft legislation BEFORE it is enacted.

In other words, that any one of the governments touching on a piece of legislation that may be constitutionally contentious has a right to ask the Court whether the law they propose is constitutional before enacting it.

My Office has already spoken to the Secretary General of the Court, and I spoke to Mr Tadic yesterday, about enabling a

limited number of people to request an opinion from the Court before a law comes into force. A government, for example, would be in a position to request an advisory opinion from the Court as to whether a particular draft law conforms with the provisions of the BiH constitution.

Currently, that job is done but it is done here in the OHR. We provide ad hoc legal scrutiny to governments before they enact a law. That must not and cannot continue any longer, we have to find that role that OHR performs and invest it in BiH institutions. And the right place to invest that is in the Constitutional Court.

I also believe and it is a matter which is been really very little remarked on, but I also believe that the Constitutional Court is an asset that should be used by the High Representative. Since the beginning of my mandate I have recognized the Constitutional Court's right to review my Decisions. That's not always been welcome to some of my international partners who believe this is infringement of the absolute power of the Bonn powers. But, I have said that I would have submit my Decisions where they were constitutionally contentious to the Court, and if the Court decided that the action I had taken was unconstitutional I would withdraw that procedure. It's never happened yet, but I am prepared that it should and I've already informed the Court that I would respect their decision. I am the first High Representative to have done this. If the right administrative mechanisms are set in place by this working committee, I stand ready to refer contentious Decisions which I may take in the future and which touch upon the Constitution itself to the scrutiny of the Constitutional Court before I substitute for the domestic authorities and enact laws.

I've also asked the Working Group to review the question of the judges from the International Community who sit on the Court. Currently they have no time limit. Currently they are on the Court forever. I don't think that's right.

You are all familiar with this process in regard to other institutions.

The HJPC, is now staffed entirely by BiH personnel, a status achieved through the systematic reduction of international engagement, from its peak at the launch of the Independent Judicial Commission.

We have seen similar exercises at the CRA and the Central Bank. And the State Court is on a clear trajectory from its current phase, where international judges are playing a key role, to a planned drawdown that will culminate in full BiH staffing within five years. That is the target date.

The rationale for this process is clear. International staff can provide BiH institutions with impartial international expertise in the early phases of their establishment. But as BiH institutions establish their authority, that service can be reduced, until the point where it is no longer required.

I have asked the Working Group to explore an appropriate timeline for the withdrawal of international judges from the Court. I am not saying that that moment is tomorrow, but the moment is now rapidly approaching when internationals should withdraw. I think they have played an important role and I think it is likely that they will play an important role in the immediate future, let's say for the next year or two years, particularly as BiH's institutions need to be adapted in order to join the European institutions within the framework of the European Community. But beyond that I think there is a really strong case for the progressive transition of international judges out of the Constitutional Court, so that in an appropriate timeframe (I have mentioned a year or two years, but it would be up to the WG to decide that), the Constitutional Court itself should become a wholly BiH institution.

The bottom line is this: the action that I propose would

further strengthen the protections of the Constitution of BiH, the walls which hold the state together. It would further empower the BiH Constitutional Court including, in relation, to the High Representative himself. The Working Group will ensure that the draft law that goes to Parliament gives the Court the full range of resources it needs in order to act effectively as the final arbiter of constitutional questions in the future.

This is on its way to becoming an institution which is not living within the international scaffolding but is itself a free standing part of the sovereign and independent state governing itself according to democratic principles.

Thank you