

**Constitutional Court and the Bonn power**

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**The State in the Rift Between Human Rights and International Obligations (II)**

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The decisions of the High Representative as the “final authority in theatre regarding interpretation” of the Dayton Agreement (Annex 10) are binding for all in Bosnia and Herzegovina. Based on the powers from Annex 10 of the Dayton Agreement and the [Conclusions](#) from the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, (the so-called “Bonn powers”), the High Representative is authorised to “undertake measures against persons holding public office” in order to ensure the implementation of the Dayton Agreement. On the other hand, according to article II/1. of the Constitution of Bosnia and Herzegovina (Annex 4), “Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.” This obligation of Bosnia and Herzegovina is not only derived from the Constitution of BiH, but also from the provisions of the European Convention on Human Rights and Fundamental Freedoms as well as a series of other international human rights and fundamental freedoms documents that BiH is a party to. The fact is that when it comes to human rights, cases of deposition of government officials in BiH by decisions of the High Representative reflect a collision of his powers as per Annex 10 and the obligations of BiH as per Annex 4, that is, the Constitution. That is why once again, just as with the case of “decertified police officers,” BiH finds itself “caught between human rights and international obligations” (text by [B. Topić](#) in this issue), as can best be seen from the Decision of the Constitutional Court of Bosnia and Herzegovina, which recently “caused a stir” on the international and domestic political scene and a harsh reaction of the High Representative.

**Violated Right to Legal Remedy**

On 8 July 2006, the Constitutional court of Bosnia and Herzegovina passed [decision](#) Ref. No. AP-953/05 admitting the appeals of Milorad Bilbija and Dragan Kalinić filed against decisions of the High Representative in Bosnia and Herzegovina. With the disputed decisions, the High Representative deposed Bilbija from office in the executive branch of government in Bosnia and Herzegovina, and deposed Kalinić, a top level SDS official, from a leading position in the legislative branch of government in Republika Srpska. Although the appellants cited violations of the right to a fair trial, the right to free elections, the freedom of expression and the freedom of association, the Constitutional Court limited its decision to examining the alleged violation of the right to effective legal remedy as per Article 13. of the [European Convention for the Protection of Human rights nad Fundamental Freedoms](#). Regular courts in Bosnia and Herzegovina discarded the cases of the appellants disputing the decisions to depose them on the grounds of no jurisdiction, which imposed the question of whether there is any effective legal remedy in Bosnia and Herzegovina against decision passed by the High Representative.

In the opinion of the Attorney General of Bosnia and Herzegovina, as the representative of the state in this dispute, decisions of the High Representative in Bosnia and Herzegovina cannot be compared to the decisions of any domestic body due to the fact that in Bosnia and Herzegovina, even though it is an internationally recognised state, there is a so-called dual system of domestic and international bodies as set up by the Dayton Agreement. The Attorney General of BiH therefore concluded that the position of regular courts to discard the cases filed by the appellants on the ground of no jurisdiction to adjudicate in matters of High Representative decisions was correct.

However, in its Decision, the Constitutional Court concluded that such court decisions violated the right of the appellants to effective legal remedy as per Article 13. of the European Convention, because the existing legal system of Bosnia and Herzegovina lacks an effective legal remedy against decisions of the High Representative pertaining to the rights of individuals, and also because Bosnia and Herzegovina did not, within its positive obligations, undertake activities to provide an effective legal remedy against decisions of the High Representative.

Based on the fundamental constitutional principles for the protection of human rights derived from Article II/2. of the [BiH Constitution](#), the principles prohibiting discrimination from Article II/4. of the BiH Constitution and Article 1. of the European Convention, the Constitutional Court emphasised in its Decision that all persons in Bosnia and Herzegovina must be provided their basic rights and freedoms as guaranteed by the BiH Constitution and the European Convention without any exceptions to these standards and without limitations. Obligations to protect human rights and freedoms from Article 1. of the European Convention cannot be eschewed by the state by transferring authority to international organisations as concluded also by the European Court of Human Rights in [Matthews vs the United Kingdom](#). Consequently, the Constitutional Court could not accept the statement of the Attorney General of BiH about a “strong influence of the international community” in Bosnia and Herzegovina as an argument in favour of amnesty for Bosnia and Herzegovina in view of its failure to execute positive obligations to protect human rights and fundamental freedoms.

Following a detailed analysis of the authority of the High Representative as per Annex 10 of the Dayton Peace Agreement, or the conclusions of the Peace Implementation Conference from 10 December 1997, the Constitutional Court concluded that Bosnia and Herzegovina has the positive obligation to provide effective legal remedy in all cases of violated guaranteed rights. This does not contend the legal power of the High Representative’s decisions to depose the appellants from office. Namely, it is indisputable that the Constitutional Court did not decide on the merit of the High Representative’s decisions, as was sometimes misinterpreted by the public, nor did it make the High Representative’s decisions null and void. The Constitutional Court limited its Decision to the issue of whether Bosnia and Herzegovina fulfilled its positive obligation to provide effective legal remedy for the protection of basic human rights and freedoms to all persons in its territory, and in that sense instructed Bosnia and Herzegovina to ensure the protection of the rights of the appellants in accordance with Article II/2. of the Constitution of Bosnia and Herzegovina and Article 13. of the European Convention.

### Collision of Rights and Politics

With its Decision, the Constitutional Court reaffirmed its opinion on the mandatory nature of the positive obligation derived from Article 1. of the European Convention, which is of particular importance, especially due to the fact that the state often “justifies” its passivity in providing for the protection of basic human rights and freedoms by citing the complex constitutional and legal order of Bosnia and Herzegovina, the division of jurisdiction between the state and its entities, the competencies of the international community, etc. The Constitutional Court had a similar stance in Case Ref. No. [AP-130/04](#) related to the failure of Bosnia and Herzegovina to provide a constitutional and legal framework for a unified resolution of the problem of “old foreign exchange savings” in Bosnia and Herzegovina.

In this Decision, the Constitutional Court also invoked the [Opinion](#) of the European Commission for Democracy through Law (the Venice Commission) on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representatives from March 2005 where it is stated, *inter alia*, that “*this practice [of using Bonn powers] does not correspond to democratic principles when exercised without due process and the possibility of judicial control [...] The [Venice] Commission therefore calls for a progressive phasing out of these powers and for the establishment of an advisory panel of independent lawyers for the decisions directly affecting the rights of individuals.*”

Such a clear opinion of a respectable and competent European body engaged in promoting democracy through advising on constitutional matters should be a “signal” for Bosnia and Herzegovina to fulfil its positive obligation, within its jurisdiction as per the Dayton Agreement and in accordance with its

international commitments, of providing protection for basic human rights and freedoms to individuals deposed by the High Representative. Just like the case of “decertified police officers”, where the Venice Commission considered the process of decertification review and explicitly stated in its [Opinion](#) that it cannot be conducted by bodies of Bosnia and Herzegovina, thus in the case of “deposed officials” the fulfilment of the positive obligation does not imply that the state must establish “domestic” bodies to re-examine these decision. In that respect, the Decision of the Constitutional Court clearly state that “*Bosnia and Herzegovina, through the Steering Board of the Peace Implementation Council and Security Council of the United Nations, a body in charge of nominating and confirming the appointment of the High Representative, was obliged to make an effort in pointing to the alleged violations of constitutional rights of individuals on the grounds of non-existence of an effective legal remedy and thus ensure the protection of constitutional rights of its citizens.*”

Given such a clearly stated opinion of the Constitutional Court on measures that Bosnia and Herzegovina was supposed to undertake in order to ensure effective legal remedy, the harshness and patronising tone of the [Order](#) on the Implementation of the Decision of the Constitutional Court passed by the High Representative on 23 March 2007 is rather surprising. The High Representative’s Order clearly states the following: “Notwithstanding any contrary provision in any legislation in Bosnia and Herzegovina, any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or takes issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent,” and that any such proceeding “shall be effectively and formally notified to the High Representative by the concerned court without delay.”

This Order of the High Representative is least concerned with the implementation of the Constitutional Court Decision and much more concerned with reactions to the possible political and legal implications of this Decision in Bosnia and Herzegovina and beyond. Namely, ESI ([European Stability Initiative](#)) analysts, Gerald Knaus and Marcus Cox recently published an [article](#) in which they call this decision ‘legal dynamite’ and the ‘most authoritative challenge yet to the international protectorate in Bosnia’. They point out that one of the possible responses to this Decision considered by the Office of the High Representative was the possibility of annulling the Decision by employing Bonn powers. As the authors of the article warn, such a move would be very destructive to the process of state building, and since acting in breach of European human rights standards had already undermined the credibility of the international community, the annulling the Constitutional Court Decision would only make the international community look ‘ridiculous’. This would certainly strike at the very foundations of the already feeble rule of law in BiH, and one of its fundamental principles that no one apart from judicial authorities can influence the decisions of courts or change court decisions, although even the latent threats to the judiciary in BiH stated in the above Order can produce the same effect.

Can Bosnia and Herzegovina, and should it, take responsibility for its functioning as a legal state or will the pervasive, but formally unacknowledged protectorate of the international community led by the High Representative continue indefinitely – is a political question recently brought to the forefront through the decision to extend the High Representative’s mandate and appoint a new High Representative. Even if it is a political fact that the Office of the High Representative is still a necessity for BiH, it is nevertheless inevitable to consider how the use of Bonn powers will proceed, and how the necessary balance between these powers and respect for basic human rights and fundamental freedoms will be struck, for without it, there can be no democracy or rule of law.

**[Translation by: U. Tanovic]**