Perils from Within and Without

The Constitutional Court of BiH Under Pressure

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27.07.2023 doi: 10.17176/20230727-132151-0

The Constitutional Court of Bosnia and Herzegovina (BiH) is described as one of the few success stories of the 1995 Dayton Peace Agreement (DPA) as well as one of the most effective institutions established by Annex 4 of the DPA. In contrast to the state-level legislature and executive which have various veto mechanisms (such as entity veto, vital national interest procedure) linked to a consociational institutional setting, the Court's decision-making process in principle cannot be vetoed. Voting rules do not condition the presence of all three ethnic groups. This has made it difficult for Republika Srpska's (RS) political leadership to block, boycott or undermine the work of the Court compared to other state-level institutions. However, recent months saw the RS identifying and seizing a rare moment of vulnerability with potentially severe consequences. If RS does not elect new judges in the meantime, not even a Court's small chamber will be able to operate.

Empty seats in the Court and (no) time to spare

The composition of the Court is somewhat exceptional although comparatively not entirely unknown. The Court is composed of nine members, six of which are so-called domestic judges and three international judges. Six domestic judges are elected *entity-based*: four by the House of Representatives of the Parliament of the Federation of BiH (PFBiH), and two by the National Assembly of Republika Srpska (NARS). Although not a constitutional rule, it is an established practice to elect six domestic judges *ethnicity-based*: two Bosniaks and two Croats from PFBiH and two Serbs from NARS. The previous international judge, Joseph Marko, noted that in cases of judicial review, domestic judges often behave as representatives of their constituent peoples and use dissenting opinions to prove that they did their best in defending the constitution and legislation of RS. Three international judges are appointed by the President of the European Court for Human Rights (ECtHR). Although the Court itself might have been one of the greatest success stories, the combination of ethnicity-based elements and the presence of international judges affected the perception of power play between the constituent peoples and drew criticism, especially from the RS.

Since August 2022, there has been an open vacancy in the Court since PFBiH failed to elect a new judge before the 2022 general elections. In November 2022, another domestic judge, this time elected by NARS, retired as he met the retirement age of 70 years. Although NARS started the procedure of electing the new judge, it has not yet been completed. In both cases, the ongoing political debates certainly did not help. The president of the Court has attributed this failure to pressure on the Court. The absence of the two domestic judges not only resulted in total paralysis of the Grand Chamber that decides on human rights cases, but it also made it harder to reach a majority of five when deciding in plenary sessions. Clearly, the Court cannot be blocked by veto mechanisms, but it can be paralyzed and eventually blocked if entity parliaments fail to elect domestic judges, as happened previously in 2002 and 2003 after the five-year mandate of first judges ended.

The National Assembly of RS triggers the biggest crisis in the Court's existence

RS, led by Milorad Dodik, identified this as a rare opportunity to exert influence on the work of the Court. The reasons for this can be found in RS's continuous calls for the re-appropriation of state-level powers, registration of state property in RS, and

upholding the Day of Republika Srpska (among others). The Court continuously declared such behavior unconstitutional. So far, the influence has been confined to offensive public statements or the adoption of legislation in NARS. For example, NARS adopted a conclusion questioning the Court's legitimacy due to the presence of international judges requesting their elimination from the composition of the Court.

However, prompted by the latest decision of the Court that temporarily invalidated the law on immovable property, the situation escalated in April 2023 with NARS calling on the Serb judges of the Court to resign. To further support its position, in June 2023 NARS adopted the Law on Non-application of Decisions of the Court and conclusions on unconstitutional activities of the Court. In the words of the Court, such behavior of NARS has triggered the biggest crisis in the last 28 years of the Court's existence.

Impotent international community

The lack of proper institutional reaction at the state level in BiH to the actions of NARS and the Serb political leadership led by Milorad Dodik, could have been anticipated. That is why the Office of High Representative (OHR) used the so-called Bonn powers to annul the Law on Non-application of Decisions of the Constitutional Court of BiH in RS. Venice Commission urged NARS to withdraw its call for the resignation of Knežević, describing it as contrary to the guarantee of the independence of the Court. NARS actions were also condemned by the Secretary General of the Council of Europe and EU Delegation as well as the European Parliament. Diplomatic missions in Sarajevo, including the United States and the United Kingdom, also strongly reacted in the same direction.

However, apart from acknowledging the collision course set by Milorad Dodik and related widespread condemnation, very little has been practically done. Internally, the OHR has been avoiding, for years now, enforcing the Bonn powers to remove public officials from office, which was a widespread practice before (see, for example, here). As the most prominent external actor at the moment, the EU remains reluctant to impose sanctions on RS political leadership for undermining peace and stability in BiH.

No Serb judges in the Court any more

Soon after NARS issued the call and adopted conclusions, in April 2023, the only remaining Serb judge elected by NARS and the current vice-president of the Court, Zlatko Knežević, took a sick leave from April until June 2023, making it impossible for the Court to schedule and hold a Plenary Session planned for the end of May 2023. Also, without informing the president of the Court, he informed the president of NARS that he plans to retire on 2 January 2024 effectively. On 13 July 2023, the Court in the Plenary Session decided to dismiss him from office before the end of the term on his request due to (early) retirement. The motives for a decision to retire before the end of his term were explained by Knežević himself. He made it clear that the key reason for his decision was the conclusion adopted by NARS and his willingness to respect it.

The actions of Knežević – who is also a member of the Venice Commission in respect of BiH! – resemble the actions of his other colleague, judge Krstan Simić, who was dismissed from the Court. Simić (elected by NARS as a Serb judge) faced dismissal because of his correspondence with the Prime Minister of RS (at that time Milorad Dodik) in which he not only discussed one of the Court's cases but also addressed the Prime Minister as boss implying the loyalty to the RS leadership. In this case, the Court decided anonymously to dismiss him for knowingly violating the reputation and dignity of the Court and the position of a judge. These actions are in stark contrast to the retired judge Miodrag Simović who was the president of the Court when Simić was dismissed. Simović (also elected by NARS as a Serb judge) as the president of the Court initiated and led a procedure that resulted in the dismissal of Simić. He did that facing political indignation from RS as his actions were perceived as a lack of loyalty to RS.

The actions of NARS call into question the independence of the judge. One of the fundamental guarantees of such independence is tenure until the

mandatory retirement age. In the case of BiH, the mandate of the judge of the Court can end either by reaching the retirement age of 70 years, by resignation or by dismissal by other judges. Knežević will be 64 in 2024 and was supposed to serve until 2030. However, from the statement he made it is obvious that a political request expressed by NARS is forcing him to retire prematurely. Judicial independence also requires that a judge can only be accountable to the Constitution and submit to the rule of law but not to the rule of any political body, including the one who appointed them. The reasons provided by Knežević for his decision most certainly mean that he decided to submit himself to the request of a political body – a legislator of RS and as such, it is incompatible with the independence of the constitutional court judge.

Perspectives on the work and functioning of the Court

If RS does not elect new judges in the meantime, not even a Court's small chamber will be able to operate. Strikingly, in the meantime, RS leadership has stated that two new judges from RS will be elected once the legislation on the Court is amended so that (1) the election of international judges is abolished, and (2) decisions can be adopted only if at least one judge from each constituent people supported the decision. Since domestic judges in cases of judicial reviews often behave as representatives of their constituent peoples, international judges make an important contribution in delivering decisions in accordance with constitutional law. That is why the Court, together with the OHR, is considered as the only dam to further escalation and potential secession of RS. Regarding new voting rules, years ago, there was a proposal to change voting rules in a way that the decision would be valid only when at least one judge from each constituent people supported the decision. However, the Venice Commission considered it to run counter to European standards, and thus it was rejected.

Being faced with the fact that there might be two judges from RS missing for a longer time but also with the possibility of the current judge from RS affecting the pace of the plenary sessions by using a so-called "delaying veto", the Court resorted to changing the rules of the Court. The quorum is five judges, which is also a minimum for decision-making. The Rules define that at a minimum one judge elected by NARS (along with three judges from FBiH) has to attend the plenary session, otherwise it will be adjourned, whereby the next session will be held if the same situation repeats itself without justified reasons. In an attempt to preserve its functionality, the Court decided to eliminate such a rule and now delays will not be possible. Although the rule was there since 1998, faced with unprecedented challenges, the Court used this nuclear option, also bearing in mind that the mandate of three judges elected by PFBiH will end in three years. On the other hand, the question is whether this will provoke further pushbacks against the Court in RS.

Why bother, Dodik?

On the evening of 24 July 2023, a meeting between representatives of the political establishment in BiH (including Milorad Dodik) was organized to discuss, among other things, the political crisis initiated by Milorad Dodik himself. The outcomes of the meetings remain rather obscure. Apparently, in the upcoming months, work groups will be formed related to the judiciary and the rule of law. However, without walking back the previous conclusions and the law regarding the non-application of the decisions of the Court, one question remains: Why does the political leadership of Republika Srpska even bother entering the negotiation concerning the election of judges and decision-making in the Court if the decisions of the Court will not be applied?

Editor's note: A minor mistake regarding the composition of the court was corrected retrospectively.

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SUGGESTED CITATION

Išerić, Harun; Sahadžić, Maja: Perils from Within and Without: The Constitutional Court of BiH Under Pressure, Verfassungsblog, 27.07.2023, doi: 10.17176/20230727-132151-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20230727-132151-0.