Opening Pandora's Box?

On the Kovačević Case and the European Court of Human Rights' fundamental criticism of the electoral system in Bosnia and Herzegovina

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Bosnia and Herzegovina (also: BiH) is widely known as a "complex State" that has struggled to progress towards EU accession due to internal divisions. More than 25 years after the war ended, the country seems to remain stuck in transition. Recently, secession claims from Republika Srpska (RS) have become more concrete, a crisis has been triggered around the Constitutional Court (see Harun Išerić and Maja Sahadžić), and the High Representative of the International Community has become active again by imposing legislation through international decree (see Jens Woelk and Maja Sahadžić, Tahir Herenda, and Benjamin Nurkić and Faris Hasanović).

Despite the worsening political situation, BiH received candidate status for EU membership in December 2022 due to the new geopolitical importance of the enlargement process in the wake of the Russian war against Ukraine. On 22 August, 2023, party leaders concluded a political agreement promising the adoption of major legislative reforms necessary for preparing EU accession. At the end of August, a proposal for amendments to the Law on the High Judicial and Prosecutorial Council was adopted after being on the table for more than 10 years.

Amid these dynamic developments, a judgment by the European Court of Human Rights (ECtHR) could cause tensions, if not even the opening of Pandora's box: After a series of previous judgments of a similar kind, on 29 August, 2023, the ECtHR published its judgment in the case of Kovačević v. Bosnia and Herzegovina (Application no. 43651/22). The Court found that "the current political system rendered ethnic considerations and/or representation more relevant than political, economic, social, philosophical and other considerations and thus amplified ethnic divisions in the country and undermined the democratic character of elections." (para. 56) The Court also criticized that "'constituent peoples' (Bosniacs, Croats and Serbs) clearly enjoyed a privileged position in the current political system." (para. 61) Yet again the judgment confirms that the current constitutional arrangements are flawed and instrumental and highlights the need for constitutional reform.

A "complex State": the combination of territorial and ethnic elements

The democratic weaknesses of the Current BiH Constitution have already been discussed by the Venice Commission in its Opinion on the constitutional situation in BiH (2005). Pointing to the origins of the constitutional framework with its instrumental character and its democratic deficit the Commission noted: "The Constitution of the State of Bosnia and Herzegovina was agreed at Dayton as Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Due to its being part of a peace treaty, the Constitution was drafted and adopted without involving the citizens of BiH and without applying procedures which could have provided democratic legitimacy."[1]

To freeze the situation at the end of the war, the two existing units, the Republika Srpska (RS) and the Federation of BiH (FBiH), were confirmed as Entities of

[1] European Commission for Democracy through Law, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, COUNCIL OF EUR. (MAR. 11, 2005), (par. 86); https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e. Extensive parts of the Opinion are reported in the judgment (para. 25).

BiH, with 49% and 51% of the territory, respectively (no winner, no loser of the war), and 1/3 and 2/3 of the population. As a result, the Constitution left most powers with the two Entities. The extremely weak powers of the State of BiH were strengthened only later, under considerable pressure from the International Community. In addition to this complex (con)federal set-up, Bosniacs, Serbs and Croats – the three dominant groups – were referred to as "constituent peoples" and received ample institutional guarantees, in contrast to "Others and citizens", i.e. persons belonging to minorities or those who do not declare any affiliation. However, people can decide their own (non-)affiliation to one or another ethnic category without any objective criteria such as language or religion.

At the state level, power-sharing arrangements were introduced that made it difficult to reach decisions against the will of representatives of any constituent people. A collective Presidency of three members was established, with a Serb from RS and a Bosniac and Croat from the Federation (art. V Constitution BiH). A House of Peoples was established as a second chamber with 15 members (5 members for each constituent people; art. IV § 1 Constitution BiH), and a vital interest veto for all three constituent peoples was introduced alongside an Entity veto (art. IV § 3 Constitution BiH). The House of Peoples at State level fully participates in the legislative procedure at State level, but its members are elected by the Entity Parliaments (the Serbs from RS and Bosniac and Croat members from the Federation). By contrast, no comparable ethnic requirements apply to the first chamber of the Parliamentary Assembly, the House of Representatives.

The aim of this complex compromise was to end a war through the guarantee of the status quo. However, the privileged position of constituent peoples in the consociational system and the need for consensus-based politics often block the functioning of the institutions. The continuous support for ethno-nationalist parties entrenches divisions in the institutional sphere, allowing large parties from each group to control the situation: a de facto "ethnic cartel" (see Joseph Marko).

The case: ethnic representation vs. effective political participation of all citizens

In a series of previous cases (starting with *Sejdić and Finci v. BiH* in 2009),[2] the ECtHR had to decide on the right to vote of individuals who do not identify as Bosniacs, Croats or Serbs or who reside in the wrong place for legislative and presidential elections at the State level. In those cases, however, the applicants were potential candidates and successfully complained about restrictions on their right to stand for election.

The current case concerns legislative elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and presidential elections at the State level held in October 2022. The central issue is the complaint that the combination of territorial and ethnic requirements made it impossible for the applicant to vote for the candidates of his choice in those elections, allegedly restricting his active right to vote by constitutional provisions.

The applicant, Slaven Kovačević, is a citizen of BiH born in 1972. He is a political scientist and adviser to a member of the Presidency of Bosnia and Herzegovina and does not declare affiliation to any particular ethnic group. Living in Sarajevo, i.e. in the FBiH, he could only vote for Bosniac and Croat candidates standing for election in the Federation, preventing him from voting for candidates who best represented his political views but stood for election in the other Entity and/or were from a different ethnic origin.

Because of its power-sharing arrangements with the privileged position of the three "constituent peoples", the applicant considers Bosnia and Herzegovina an "ethnocracy" rather than a genuine democracy. The Court reminds of the origins of these arrangements (para. 6 and 7):

[2] ECtHR judgments in *Sejdić and Finci v. BiH* ([GC], App nos. 27996/06 and 34836/06, ECHR 2009), *Zornić v. BiH*, App no 3681/06 (ECtHR, 15 July 2014), *Pilav v. BiH*, App no 41939/07 (ECtHR, 9 June 2016), *Šlaku v. BiH*, App no 56666/12 (ECtHR, 26 May 2016) and *Pudarić v. BiH*, App no 55799/18 (ECtHR, 8 December 2020).

"Fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out".

As a counterweight, art. II § 2 of the Constitution provides that individual rights and freedoms of the Convention and its Protocols shall have "priority over all other law". This provision is central for direct application as well as supremacy of an international human rights catalogue vis-à-vis domestic constitutional law. It also compensates for the democratic deficit of the Constitution by linking it to international standards and values.

The case raises issues under Article 14 of the Convention (prohibition of discrimination), Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination). The applicant also relied on Articles 13 (right to an effective remedy) and 17 (prohibition of abuse of rights) of the Convention.

The Court held that there had been a breach of Article 1 of Protocol No. 12 of the Convention in relation to the applicant's complaint concerning the composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

In the special historical context of Bosnia and Herzegovina, the Court considered the existence of a second chamber composed exclusively of representatives from the three main ethnic groups as acceptable, provided that the powers of the House of Peoples were limited to precisely, narrowly and strictly defined vital national interests of the 'constituent peoples'. However, since the House of Peoples must approve all legislation, it should also represent all segments of society.

Under the relevant legal framework it is stated that a reform of the electoral system in line with Council of Europe standards was an outstanding obligation following from Bosnia and Herzegovina's accession to the Council of Europe in 2002 and that the Parliamentary Assembly of the Council of Europe had periodically reminded Bosnia and Herzegovina of this post-accession obligation urging it to adopt a new Constitution to replace "the mechanisms of ethnic representation by representation based on the civic principle". (para. 21)

The Court confirmed its previous case-law, particularly in Sejdić and Finci, Zornić, and Pilav, where it found discrimination against individuals not affiliated with the three main ethnic groups or those who failed to meet a combination of ethnic origin and place of residence requirements regarding their right to stand for election to the House of Peoples and the Presidency.

As the same combination of territorial and ethnic requirements also applies to the right to vote in elections to the Presidency of Bosnia and Herzegovina, these restrictions amount to discriminatory treatment in breach of Article 1 of Protocol No. 12, too.

For the applicant, there was neither the option of voting for candidates who did not declare affiliation with any of the 'constituent peoples' (as only Bosniacs, Croats and Serbs are entitled to stand for election), nor could he, as a resident of the Federation, vote for candidates who declared affiliation with Serbs. Therefore, the Court found that the applicant was treated differently on the grounds of his place of residence and ethnicity and was not genuinely represented in the collective Presidency. The Court underlined that the policy and decisions of the Presidency, as a political body of the State and not of the Entities, affected all citizens of Bosnia and Herzegovina, independently from their residence in one or the other Entity.

Regarding the power-sharing arrangements, the Court held that "Although the Convention does not prohibit Contracting Parties from treating groups differently in order to correct 'factual inequalities' between them, none of the 'constituent peoples' is in the factual position of an endangered minority which must preserve its existence. On the contrary, the 'constituent peoples' clearly enjoy a privileged position in the current political system." (para 61)

Responding to the government's justification for the current system, the Court held that "peace and dialogue are best maintained by an effective political democracy, of which the ability to freely exercise one's right to vote is a pillar. Therefore, no one should be

forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint. Even if a system of ethnic representation were maintained in some form, it should be secondary to political representation, should not discriminate against 'Others and citizens of Bosnia and Herzegovina' and should include ethnic representation from the entire territory of the State." (para. 74)

The decision was supported by a clear majority of six judges (including judge Faris Vehabović from BiH). In her dissenting opinion, the Austrian judge Gabriele Kucsko-Stadlmayer, President of the panel, criticized the majority's equation, in the context of Protocol No. 12, of passive and active voting rights. The consequence is the presumption that the Court's findings in its past judgments about the right to stand for election can automatically be applied to the present case. This raises problems, according to her, in examining two essential admissibility requirements: exhaustion of domestic remedies and victim status (Articles 34 and 35 § 1 of the Convention). Doubts regard the role of the Constitutional Court of BiH which should not be declared "ineffective" and thus destabilized, and the requirement of being "directly affected" by the disputed measure, in particular as the House of Peoples is only indirectly elected.

"It's the implementation, stupid!" Where does Bosnia and Herzegovina go from here?

So far, no judgment of the Sejdić and Finci case law has been implemented. To comply with these judgments, including the most recent one, a constitutional change is necessary. This has been an unambiguous consequence since the Sejdić and Finci judgment of the ECtHR. In May 2019, the European Commission recognised this when the necessity of constitutional change re-emerged in the Key Priorities of its Opinion on the application for membership. However, the new Kovačević decision takes the ECtHR case law (from Sejdić and Finci through Pilav, Šlaku, Zornić and Pudarić) much further. As in those cases, a violation of Article 1 of Protocol 12 has been found, but the Court adds that the "current arrangements rendered ethnic considerations and/or representation more relevant than political, economic, social, philosophical and other considerations and/or representation and thus amplified ethnic divisions".

While the amendment procedure is simple, as it only requires a decision by the Parliamentary Assembly, including a two-thirds-majority in the House of Representatives (art. X Constitution BiH), any change would question the status of the 'constituent peoples' on which the Dayton system is based. This might well mean opening Pandora's box.

Indeed, the Kovačević decision goes well beyond the single case, by repeating the Commissioner for Human Rights' finding that the current system is "based on ethnic discrimination [and] impedes social cohesion, reconciliation and progress" (see paragraph 59 of the judgment). This is a fundamental and systemic critique of the power-sharing arrangements and clearly determines the direction any constitutional amendment or reform needs to take: The only possible way is to reduce the institutional relevance of ethnicity and of the privileged status of 'constituent peoples'. As already stated by the Venice Commission in 2005, "It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable." (Opinion, para. 76)

Both, the Venice Commission's Opinion and the ECtHR case law are based on the proportionality principle. The Dayton Compromise can no longer justify such a marked distinction of two classes of citizens or the privileged positions of the 'constituent peoples' in the institutional sphere. The Court recognizes that a system of "ethnocracy" has emerged and been consolidated, thanks to the ethno-nationalist parties representing the 'constituent peoples' which exploit their overall dominant positions further through mutual agreements. While guarantees in favour of groups are possible (and necessary in complex systems), they need to be justified by an effective need, such as a non-dominant minority position or specific interests, which must be restrictively interpreted. But individual rights must be guaranteed, as stated in art. II § 2 Constitution BiH.

These are important indications for any project of incremental, gradual constitutional change or attempts to "improve" the Dayton Constitution and the resulting framework, including those by the High Representative in the election night of October 2022. The pending Begić case will add to this issue.

From a legal perspective, time seems ripe for change. Politically, the judgment requires a U-turn from the current ethno-nationalist dominance and control to inclusion of all citizens and respect for their individual rights, with some specific collective guarantees for the three major groups. The essence of the judgment is that the Dayton Peace Accord needs to be substituted or profoundly amended to allow for such change.

The only way to get there is by agreement. The first reactions to the judgment follow the usual pattern with divisive rhetoric and threats by ethno-national elites interested in closing Pandora's box. A concerted action of the EU, its Member States and the International Community is necessary to prevent this by creating a public space for debate. Advice can and should come from all sides, but any solution for the situation in Bosnia and Herzegovina must come from within the country. This would mark a fundamental departure from the current Dayton system.

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