Not a Curtain Drop, but an Abuse of Rights

A Reply to Joseph Marko on Kovačević v. Bosnia and Herzegovina

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The recent Grand Chamber decision in *Kovačević v. Bosnia and Herzegovina* [GC] might send shockwaves through the legal and political landscape in Bosnia and Herzegovina (BH) or even across Council of Europe states, as Professor Joseph Marko suggests in his article. However, his analysis presents an incomplete picture of the Court's decision and overlooks critical context necessary for a full understanding of why the Grand Chamber declared the application inadmissible. This reply seeks to correct, or better to say, to expand the narrative by explaining some aspects of Professor Marko's claims and the fundamental questions surrounding the applicant's standing, which ultimately led to the case's dismissal. Of course, both Marko's and my arguments are to some extent speculative since the judgment has not been published.

The Need for Full Context

To briefly recapitulate: in 2023, the ECtHR ruled in *Kovačević v. Bosnia and Herzegovina* that BiH's electoral framework, which restricts political participation to representatives of the three "constituent peoples" (Bosniaks, Croats, and Serbs), discriminates against the applicant who declares himself only as a BH citizen and not a member of constituent peoples or ethnic minorities in terms of his active voting right. The case was then referred to the Grand Chamber (for earlier posts about the Chamber's judgment and the case in general, see here, here, here, here, and here). Before delving into the substantive legal arguments made by Marko, two preliminary points are essential for the sake of objectivity and transparency.

First, Professor Marko's analysis focuses almost exclusively on two aspects of the operative part of the decision – the scope of the case concerning the BH House of Peoples (HoP) and the applicant's victim status – thus omitting to clearly indicate the third conclusion. Namely, besides the non-applicability of Article 3 of Protocol 1 to the HoP and victim status, the Court, by an overwhelming majority, held that the applicant had *abused the right of application* (16 votes to 1). Marko does not elaborate on the abuse of the right, which is of the same importance to the case as the other conclusions. Strasbourg case law requires parties to cooperate with the ECtHR in good faith, demonstrating "meaningful cooperation with the Court" (*Prodanović and Todorović v. Bosnia and Herzegovina* (decision) § 5). An "irresponsible and frivolous attitude towards the Court" (*Georgian Labour Party v. Georgia (decision) 2008*) renders an application inadmissible. Based on publicly available information, particularly the public hearing before the Grand Chamber, two factors seem decisive. The first is the leaking of the initial Chamber judgment and the applicant's subsequent misleading statements before the Court. On the day of the leak, he stated on live television that he had been informed of his victory (see the show from 1:50; the applicant admitted that he was informed about the outcome before the official publication at 2:25). Yet, when questioned by a Grand Chamber judge during the hearing, he denied prior knowledge, even when confronted with his own words (see 2:52:00 of the hearing). Such conduct constitutes a breach of the duty of good faith. The second, perhaps more serious, factor concerns the applicant's manipulation of his ethnic identity. He declared himself a Croat for the 2012 elections and in his application for Croatian nationality (see 51:50 of the hearing). Yet, the applicant claims that his Croatian family origin was a legal basis for acquiring the nationality, not his Croatian ethnicity, two distinctive concepts (see Articles 3, 8, and 16 Law on Croatian Nationality). This opportunis-

tic shifting of identity undermines the very purpose of non-discrimination law – protecting individuals with protected characteristics, such as ethnicity (see *Timishev v. Russia*, § 55-56). His failure to disclose to the European judges that he was previously declared as Croat twice casts his standing before the Court in an even more troubling light.

Second, Marko suggests the GC ruling "has something of a retroactive effect, because the case had been decided on the merits in the Chamber's judgment already". This is incorrect. The ECtHR may declare an application inadmissible at any stage (ECHR Art 35 § 4), including before the Grand Chamber. The case is thus not unusual in this regard, as shown, for instance, by *Vučković and Others v. Serbia*.

House of Peoples

Professor Marko argues that the decision threatens to overrule the entire line of ECtHR jurisprudence on BH electoral rights, beginning with *Sejdić and Finci*, but also beyond BH. It is possible that the judgment will depart from the Court's established case-law, which holds that Article 3 of Protocol No. 1 applies to indirect elections for a body vested with genuine legislative powers, such as the BH HoP. A second possibility is that, given BH's peculiarities, the Court will find the Article inapplicable to the BH HoP, without thereby affecting other European legislative bodies. Either of these outcomes would align with the arguments of Judge Mijović in her dissenting opinion in *Sejdić and Finci* (see part V). A third option is that the Court will distinguish between active and passive electoral rights in the specific context of the BH HoP. This could be a pragmatic approach for the majority in *Kovačević* not to amend any previous rulings.

In *Sejdić and Finci*, the majority found a violation of Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No. 1, of non-constituent peoples regarding their *passive voting rights*. Members of the three constituent peoples (Bosniacs, Croats and Serbs) at least have a theoretical chance of becoming HoP members. By contrast, no voter in BH – not even from the constituent peoples – has a direct or indirect right to elect HoP members. They are delegated by other legislative bodies: five Serbs by the National Assembly of Republika Srpska, and five Bosniaks and five Croats by Bosniak and Croat delegates in the Federation's House of Peoples. Thus, even voters affiliated with the constituent peoples have no possibility to influence the BH HoP composition. The Grand Chamber may well have reasoned along these lines, concluding that since no citizen has a direct active right to vote for this body, the applicant cannot claim to be a victim of discrimination in the exercise of a right that no one possesses. Finally, for the same reason, Article 3 of Protocol 1 does not apply. This rationale would also explain the difference between this case and the cases on which Professor Marko relies – *Aziz v. Cyprus* and *Bakirdzi v. Hungary*.

Victim Status

Regarding the applicant's victim status, Professor Marko states that "as a resident of the Federation of BiH, he was forced either to abstain from voting… or to cast a vote for… candidates who were not candidates of his choice". This claim does not withstand scrutiny for several reasons.

First, Mr. Kovačević is a political advisor to Željko Komšić, the Croat member of the Presidency elected from the Federation of BiH, where the applicant resides (see § 21 of the judge Kucsko-Stadlmayer dissenting opinion in Chamber judgment and § 8 of the majority opinion). It is difficult to believe that he had no candidate of choice for the Presidency when his own principal was on the ballot.

Second, the applicant's complaint is abstract and resembles an *actio popularis* rather than a claim of personal harm. For example, at the Grand Chamber hearing, he urged the judges to consider the feelings of returnees in Republika Srpska who had survived horrific crimes and genocide, but he never explained in detail how *he personally*, as a voter, was affected. His wish – that everyone can vote for everyone –reflects general dissatisfaction with the political system, a kind of *Weltschmerz*, but such claims are inadmissible before the ECtHR.

Third, any discrimination requires a comparator and a basis of discrimination. During the hearing, the

GC President, Judge Bošnjak, asked the applicant to specify both: was it ethnicity, residency, or something else, and who was the relevant comparator (see from 2:13:00 of the hearing)? The applicant failed to provide a clear answer or to identify a group in a similar situation that was treated more favourably than him. He merely replied that voters from the Federation of BH (where he resides) were treated differently from voters in Republika Srpska regarding the election of HoP members (see 2:57:30 of the hearing). Yet, as explained above, no voter in either entity can influence HoP membership.

Fourth, the applicant's shifting ethnic identity undermines his claim to be a victim *as a* "*citizen*". When questioned by judges about the ethnicity change, his defense was that his ethnicity is irrelevant (see from 2:37:15 of the hearing). This is a logical fallacy: one cannot claim discrimination on the basis of ethnicity while simultaneously arguing that one's ethnicity is irrelevant to the case. He did not deny declaring himself a Croat when applying for Croatian nationality or running in the 2012 Sarajevo elections; instead, he merely invoked his legal entitlement to Croatian citizenship through family origin (see his response to Judge Jelić at 2:33:00). Such opportunistic behavior casts doubt on his current claim to victim status as a "citizen." Protected characteristics must be stable categories; shifting from Croat to "citizen" undermines the authenticity of his claim.

Finally, Professor Marko's reliance on the Framework Convention for the Protection of National Minorities is misplaced. Identifying as a "citizen of BiH" does not make one a member of a "national minority". All BH nationals are citizens, and a citizen may simultaneously be Bosniak, Croat, Serb (constituent peoples), Roma, or Jew (national minorities). Citizenship is not an ethnic category but, at most, a political identity—perhaps cosmopolitan—falling outside the ECtHR's definition of ethnicity based on shared nationality, faith, language, or culture (§ 43). BiH citizens lack a common language, faith, or culture; there is, for example, no "language of BiH citizens." Self-identifying as a "citizen" is therefore more an act of rejectng an ethnic identity than expressing one. It does not entail the objective, shared traits of a common heritage, language, or culture that define an ethnic group. In short, being "just a citizen" is not comparable to membership in an ethnic group. For this reason, it was a legal error in *Zornić* to equate those declaring themselves simply as citizens with genuine members of ethnic minorities. The Court at the time did not even assess comparability but accepted the application outright (§ 31). That error should not be repeated.

Conclusion

In conclusion, the Grand Chamber's decision to declare the Kovačević application inadmissible was not a sudden reversal of its principles but a necessary procedural safeguard against the misuse of the application mechanism. A full and honest account must acknowledge the applicant's lack of standing and the abuse of the right of application, issues which are central to the case and essential for any credible analysis of its outcome.

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