

Op-Ed



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“The ECtHR delivers the next blow to the Dayton Agreement and the Constitution of Bosnia and Herzegovina: implications of the judgment *Slaven Kovačević v. Bosnia and Herzegovina*”

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Introduction

On 29 August 2023, following a complaint by Mr. Slaven Kovačević, currently advisor to the member of the Bosnian Presidency Zeljko Komšić, the European Court of Human Rights (ECtHR) ruled that the Constitution of Bosnia and Herzegovina and the current Electoral Law have violated his individual rights as guaranteed by the European Convention for Human Rights (ECHR) and the Protocols. Mr. Kovačević, who does not declare himself as a member of one of the three ‘constituent peoples’ in Bosnia and Herzegovina, (Bosniaks, Croats and Serbs) and therefore as a citizen falls in the category ‘Others’, filed a complaint with the ECtHR. He was of the opinion that the current electoral rules based on ethnic and territorial criteria deprive him of the right to vote for any candidate he believes deserves his vote during the elections for the Presidency and for the House of Peoples of Bosnia and Herzegovina.

Background; Achieving complex peace in Bosnia and Herzegovina

In the period 1992-1995, Bosnia and Herzegovina was confronted with a bloody aggression in which the state was attacked from both outside and within. The results of this aggression were an ideology of ethnic cleansing put in practice by the establishment of concentration camps, racial e.g. ethnic discrimination, war crimes, crimes against humanity and ultimately the horrifying genocide that took place in Srebrenica in July 1995. After several peace attempts to end the armed conflict failed, the United States of America took over the initiative to stop the conflict. As a result of the peace talks on November 21, 1995, the General Framework Agreement for Peace in Bosnia and Herzegovina was agreed in Dayton, Ohio, and signed in Paris on December 14, 1995.

‘It may not be a just peace, but it is more just than a continuation of war (...) in the situation as it is, and in the world as it is, a better peace could not

have been achieved', said the first President of the Republic of Bosnia and Herzegovina, Alija Izetbegović.

The Dayton Peace Agreement brought peace to the state, but also one of the most complicated political systems, which were a direct result of the armed conflict and the aforementioned crimes. Two entities, a District, three constituent peoples, a three-member Presidency, ten Cantons, countless (municipal/regional) governments and a discriminatory Constitution were the direct result of the Dayton Peace Agreement.

At that time, this was seen as the highest achievable goal in a time of a bloody conflict in which achieving peace justified all means. However, and as was also evident from the numerous judgments of the ECtHR, the Dayton Peace Agreement was seen as a temporary solution. Dayton Agreement was meant to evolve in the future into a democratic system of government in which the concept of constituent people's should be gradually abandoned and ultimately move towards a democracy in which all citizens are equal and enjoy the same citizen rights on the whole territory of Bosnia and Herzegovina.

Nevertheless, this effort has largely failed to materialise over the past two decades, mainly because of the fact that the three constituent peoples enjoy absolute rights and the most possible (territorial) conformity that they have been able to imagine. As a result, Constitutional reforms have not materialised and individual citizens and other minorities are discriminated against in various ways within the current state system. For example, standing for certain positions or voting for candidates is directly

related to someone's affiliation with an ethnic group (i.e. constituent people) or the part of Bosnia and Herzegovina the person lives in. This issue was discussed in detail in the Sejdić-Finci, Zornić, Pilav, Pudarić and Slaku judgments, in which citizens complained about the fact that they could not stand as candidate for political office because they did not feel affiliation with the three constituent peoples and/or were not living in the 'right' entity to do so.

Although the current Dayton Constitution of Bosnia and Herzegovina contains many shortcomings and discriminatory elements, the drafters of the Treaty must also be given some credit for the fact that in the Constitution (in the form of Annex IV of the Treaty), article II paragraph 2 states that the ECHR and its Protocols have direct effect and priority over national legislation and regulations in Bosnia and Herzegovina. Hence, the citizens who, for various (aforementioned and future) reasons, believe they are being discriminated against under the current Constitution can rely on this article for legal validity of their claim.

Moreover, by ratifying the Convention, Bosnia and Herzegovina accepted the jurisdiction of the ECtHR to decide on the claims of individuals who claim or believe that they are victims of violations of the rights established by the Convention, and committed by Bosnia and Herzegovina.

The facts of the case Slaven Kovačević v. Bosnia and Herzegovina

As mentioned earlier, in several prior cases that were brought before the Court by discriminated citizens of Bosnia and Herzegovina, the ECtHR

has considered that the current Constitution of the state contains discriminatory elements that prevent citizens who do not identify with one of the three constituent peoples, or belong to a minority (like Roma and Jews), are unable to stand for election directly because of this, or in combination with the entity in which they live. As a result, for example, a Jewish person or Roma cannot stand for election for the Presidency at all (*Sejdić-Finci vs. Bosnia and Herzegovina*), neither a Serb who lives in the entity of the Federation of Bosnia and Herzegovina (this also applies to a Bosniak and Croat who live in the Bosnian entity Republika Srpska).

However, what makes the present case different from the other five cases is the fact that the ECtHR has, for the first time, concluded that the current Constitution and the Electoral Act also restrict the active voting rights of some citizens.

Mr. Kovačević has refused to define himself ethnically; he declares himself as a Bosnian. This is a generic term used by many people in Bosnia and Herzegovina who see themselves primarily as citizens and usually also as non-nationalist. Therefore, Mr. Kovačević is neither Croat, Bosniak, nor Serb. He is a citizen of the state, he rejects the division of the population into so-called constituent peoples, which mostly correspond with religious affiliation. He sees the Constitution of Bosnia and Herzegovina and the ethnic principle as a corset that prevents the State of Bosnia and Herzegovina of becoming a democratic State. What Mr. Kovačević asked for was the protection of his active voting rights during the elections for the members of the Presidency, which is ethnically and territorially limited, as well as elections for the House of Peoples of the Parliamentary Assembly of Bosnia

and Herzegovina (the upper house with legislative powers). In addition he stated that in the election of delegates to the House of the Peoples, citizens cannot participate in any way because persons who are eventually appointed are not directly chosen by the electorate voters. Summarised they do not have any electoral legitimacy, with repeated ethnic and territorial restrictions.

Summarized Mr. Kovačević was of the opinion that Articles IV and V of the Constitution were found to discriminate against him as 'Other' and are in conflict with the Convention and its Protocols.

In its judgment the ECtHR considered that the Presidency is a political body of the state, not of the entity. Its policies and decisions affect all citizens of Bosnia and Herzegovina, whether they live in the Federation, Republika Srpska or Brčko District. Therefore, the political activity of the collective head of state is a matter that clearly concerns all citizens of the state.

The Court continued by stating that it believes “that no one should be forced to vote only along prescribed ethnic lines, regardless of their political viewpoint” (para. 74).

Furthermore, the Court concluded that none of the constituent peoples is in the factual position of an endangered minority that must preserve its existence. On the contrary, the constituent peoples clearly enjoy a privileged position in the current political system (para. 61).

In addition, the court considered that even if the system of ethnic representation is 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. Important conclusion of the Court is, that the discrimination due to ethnic origin is a form of racial discrimination and requires from the authorities special vigilance and a vigorous reaction (para. 51).

The Court therefore finally considered that it ‘sees no reason to depart from that case-law’, i.e. aforementioned cases, and states that ‘Indeed, a reform of the electoral system is an outstanding post-accession obligation of Bosnia and Herzegovina’, and finally, ‘The Court has found that this combination of territorial and ethnic requirements amounts to discriminatory treatment in breach of Article 1 of Protocol No. 12 in the context of the right to participate in elections to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. It considers that the same is true in respect of the right to vote in elections to the Presidency of Bosnia and Herzegovina’ (paras. 51-75).

Conclusion & the way forward

Although it was the only possible and unavoidable solution at the time of its creation, three decades later, it is certain that the Dayton Peace Agreement has expired and needs to be adjusted. In addition, one must be aware that the current state system, as legalised in the Dayton Peace Agreement, was a direct result of aggression and violence against Bosnia and Herzegovina.

This judgment is the sixth judgment of the ECtHR in which the court takes a hard line

against the Dayton Constitution of Bosnia-Herzegovina, and considers that it is incompatible with the Convention and its Protocols and infringes Article 1 of Protocol No.12 of the Convention. While in the cases of Sejdić-Finci, Zornić, Pilav, Pudarić and Slaku, the ECtHR previously considered the rules regarding passive voting rights in Bosnia and Herzegovina to be in conflict with the Convention and the Protocols, the Court found for the first time in the case Kovačević vs. Bosnia and Herzegovina, that a citizen in Bosnia and Herzegovina is limited in his active voting rights as well. None of these five judgments have been executed up to this date by Bosnia and Herzegovina. The Council of Europe Commissioner for Human Rights considers it a matter of great concern that, fourteen years after the Grand Chamber delivered its first judgment in this group of cases, the discriminatory provisions remain in the Constitution and the electoral legislation, as published in her submission to the Committee of Ministers in the context of the supervision of the execution of the Sejdić and Finci group of judgments of the European Court of Human Rights.

This is a ground-breaking judgement with major consequences regarding the Constitutional reforms that await Bosnia and Herzegovina, which must ensure that Bosnia and Herzegovina, like other European states, evolves into a modern democratic system in which every citizen has equal rights, and which will allow the state to join the European Union in the (near) future.

The judgment of the ECtHR sent an unequivocal message to Bosnia and Herzegovina. The state must take all necessary measures to protect its citizens and eliminate any form of discrimination from the process of socio-political decision-

making. In accordance with the international democratic standards, the citizen is the primary political subject and as such should be enabled, regardless of the fact in which part of Bosnia and Herzegovina the citizen lives, and regardless of which ethnic group the citizen belongs to, that a citizen must have the right to elect (and to be elected) to state authorities. The court in addition mentions that: ‘, it considers 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 is 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).

In our opinion Bosnian society has always been a pluralistic society and should be nurtured as such. In such a society, democratic values enshrined in the constitution are the only way forward. The guarantees of individual human rights and freedoms simultaneously protect numerous social groups to which citizens, based on their identities, belong and with which they identify. Maintaining peace should be the main objective for the obviously necessary and frequently called for democratic evolution of the State, and is in our opinion the only way forward.

With the current decision, the ECtHR made it clear that all citizens throughout the territory of the state of Bosnia and Herzegovina have the right to vote and be elected, regardless of their religion or ethno-national affiliation. The Court

has thus created clarity for the next elections. The electoral laws and possibly Constitution must now be harmonized accordingly.

In addition, one may wonder how the Bosnian authorities, with these six judgments of the ECtHR in mind, and with the current system, which contains elements of racial discrimination, can sincerely conduct negotiations on accession to the European Union? Therefore the European Union should impose a strict condition on the state to implement these judgments first, as part of the negotiations for accession to the European Union.

The time has come that the people of one of the oldest states on the European continent get a state of equal citizens, living in a democratic system in which their individual (and collective) rights are protected by the rule of law.

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