

THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA DECLARES THE SYSTEM OF ETHNIC FEDERALISM OF THE ENTITIES INCONSISTENT WITH THE PRINCIPLE OF NON-DISCRIMINATION: MUCH ADO ABOUT NOTHING?

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On March 16, 2015, the Constitutional Court of Bosnia and Herzegovina (BiH) declared, for the first time, that the electoral system of both Entities, which is based on the mechanism of ethnic federalism, is inconsistent with the principle of non-discrimination, according to Article II(4) of the BiH Constitution and Art. 1 of Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While, at first glance, the decision might seem an exceptional and unexpected reversal of the Constitutional Court's position, since until now the Court has always declared any appeal on the Election Law to be inadmissible, the potential impact of the case should not be overestimated.

The case arose from the request by Željko Komšić, then a member of the Presidency of Bosnia and Herzegovina, on the basis of the

procedure provided by article VI(3)(a) of the Constitution of Bosnia and Herzegovina, according to which the Constitutional Court has exclusive jurisdiction to decide on any dispute arising under the Constitution between Bosnia and Herzegovina and an Entity or between the Entities. According to the claimant, Art. 80(2)(4) and 83(4) of the Constitution of the Republika Srpska, Art. IV.B.1, 2(1) and (2) of the Constitution of the Federation of Bosnia and Herzegovina, as well as Art. 9.13, 9.14, 9.16 ad 12.3 of the Election Law of Bosnia and Herzegovina, were not in conformity with the principle of non-discrimination – provided by Art. 1 of Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as Art. 2, 25 and 26 of the International Covenant on Civil and Political Rights – and the right to free elections, according to Art. 14 in conjunction with Art. 3 of Protocol no. 1 to the ECHR.

According to the abovementioned articles, both the Republika Srpska and the Federation of Bosnia and Herzegovina shall elect a President and two Vice Presidents, each of them representative of three different constituent peoples (Art. 80(2)(4) Const. RS; Art. IV.B(1) Const. Federation of BiH). In particular, in Republika Srpska, «The President of the Republic and Vice Presidents of the Republic shall be directly elected from the list of the candidates for the President of the Republika Srpska so that the candidate who wins the highest number of votes shall be elected President while the Vice Presidents shall be the elected candidates from the other two constituent peoples who win the highest number of votes after the elected President of the Republic» (Art. 83(4) Const. RS). In the Federation, «In electing the President and two Vice Presidents of the Federation, at least one third of the delegates of the respective Bosniac, Croat or Serb caucuses in the House of Peoples may nominate the President and two Vice Presidents of the Federation. The election for the President and two Vice Presidents of the

Federation shall require the joint approval of the list of three nominees, by a majority vote in the House of Representatives, and then by a majority vote in the House of Peoples, including the majority of each constituent people's caucus» (Art. IV.B(1) Federation BiH). More detailed provisions are included in the respective sections of the Election Law of Bosnia and Herzegovina.

According to the claimant, in recognizing only the right of members of the constituent peoples to stand for presidential elections, these provisions – largely drawn on the model of the federal electoral system – discriminate against the Others, the minority groups who are not represented in any constituent people, thus violating both the Constitution of Bosnia and Herzegovina and the European Convention in so far as the right to vote and the right to non-discrimination are concerned.

The Constitutional Court, while dismissing the request as ill-founded with reference to the right to vote – arguing that the Presidency cannot be assimilated to a legislature in accordance with Art. 3 of Prot. No. 1 to the European Convention, concluded that the challenged Articles are in contrast with the principle of non-discrimination. Indeed, according to the Court, in the context of the adoption of the Dayton Agreement, the exclusion of representatives of the Others from the right to stand for presidential election was justified by the urgent need to establish a framework able to maintain peace and stability after one of the bloodiest ethnic conflicts in recent European history. However, this need no longer reflects the compelling needs of that emergency. Indeed, in the view of the Court, considering, on one side, the commitment of Bosnia and Herzegovina to the respect of international standards on human rights, and, on the other, the progress made on the path of democratic transition, «the exclusion of "Others" from exercising one of the human rights which constitutes the foundation of a democratic society can no longer represent the only way in which to achieve the legitimate goals reflected in the preservation of peace» (§ 72) and introduces a differential treatment on the basis of ethnic

origin without an objective and reasonable justification.

The relevance of the decision is outstanding, since for the first time in a case concerning the Election Law the Constitutional Court of Bosnia and Herzegovina did not dismiss the case as inadmissible. Indeed, in its previous case-law, the Court had declared inadmissible the question of compatibility of Art. 5 of the Constitution of Bosnia and Herzegovina (Constitutional Court, decision U-5/04, 31/3/2006) and the Election Law (Constitutional Court, decision U-13/05, 26/5/2006) with the European Convention of Human Rights, arguing that while the Convention has priority over any piece of legislation in Bosnia, according to art. II-2 Annex 4 to the Dayton Agreement, it is not superior to the Constitution or the legislation such as the Election Law fully deriving from it.

However, although with this sentence for the first time the Constitutional Court did not declare the question inadmissible, its importance should not be overestimated. Indeed, the objects and the standards of review of the previous and the current cases are different. Moreover, while declaring the Entities' provisions to be in conflict with the principle of non-discrimination, the Court showed a high level of deference with regard to the Parliament.

With reference to the first point, the object of the case are the Constitutions of the Entities and the sections of the Election Law of BiH concerning the Entities, with regard to the Constitution of BiH as well as the European Convention of Human Rights which, according to the BiH Constitution, «shall apply directly» and «shall have priority over all other law» of Bosnia and Herzegovina. Therefore, as the Court argues, its task in this case was not to verify if the provisions of the BiH Constitution and the BiH electoral law are consistent with those of the European Convention, but if the provisions of the Constitutions of the Entities – that «are not identical to any provision of the Constitution of BiH» (§ 49) – are consistent with the Constitution of BiH. Moreover, according to the Court, it is admissible to review the conformity of this legislation also with the European Convention, since «in interpreting the term Constitution

and the obligation of the Constitutional Court to uphold this Constitution, one must take into account 15 international human rights agreements referred to in Annex I to the Constitution of BiH, which are directly applied in BiH, and the position that the rights referred to in the European Convention and the Protocols thereto occupy in the constitutional order of the state» (§ 49). This means that while the Court accepted that it would judge on the compatibility of the electoral systems of the Entities with both the constitutional and supranational principle of non-discrimination, it does not recognize any supra-constitutional value to the European Convention. Indeed, while the European Convention has a special position in the Bosnian system of the sources of law, it «cannot have a superior status in relation to the Constitution of BiH, given the fact that the European Convention entered into force on the basis of the Constitution of BiH» (§ 48). Reading between the lines, it is therefore more than evident that in this opinion the Court has not modified its previous approach.

As to the second point, the Court upheld the referral, but at the same time showed a significant deference to the Parliament, probably considering that the issue at stake touches highly sensitive political interests. This emerges clearly from the analysis of the decision-making technique adopted by the constitutional judges.

Indeed, the Court upheld only the question of the compatibility between the Entities' legislation and the principle of non-discrimination, dismissing the complaint concerning the right to vote. It follows that the Court did not annul the provisions by a pure declaration of unconstitutionality, but applied the more nuanced proportionality test.

Moreover, and more importantly, the decision of the Court does not produce any direct effect in the BiH legal system. The Court in fact states that, pending the implementation of the decisions of the European Court of Human Rights on the electoral system of Bosnia and Herzegovina, according to which the BiH Constitution shall be amended, the declaration of unconstitutionality shall not take effect

until the constitutional reform at the federal level has been completed.

In the words of the Court, «the Constitutional Court notes that it unambiguously follows from the Sejdić and Finci judgment of the European Court that the Constitution of BiH should be amended» (§ 74). However, being aware that the process of constitutional reform is not an easy task, the Court finally states that the «Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases».

In conclusion, the position of the BiH Constitutional Court in the case at stake is much more conservative than it might appear at a first reading. Indeed, the Court confirms without any exceptions its previous case-law on the issue, and – in its respect for the role of the Parliament in such a delicate matter – decided to suspend the effects of its decision. Moreover, some points remain unclear in the Court's reasoning. In particular, in setting the differences between the previous decisions of inadmissibility and the current case, the Court omitted to explain the grounds on which the provisions of the Election Law of BiH concerning the Entities' Presidency can be included in the object of the review with reference to the ECHR while, on the contrary, the Election Law has so far always been excluded, since it has been considered, as already mentioned, a law "fully deriving from the Constitution".

However, while the "internal" approach of the Court is without any doubt conservative, its "external" approach is much more progressive. Indeed, drawing on the special position of the ECHR in the BiH legal system, the Court has taken an important step in the

process of cooperation with the European Court of Human Rights. In the opinion of the Court, indeed, the implementation of the *Sejdić and Finci* case, which is also a legal duty following *Zornić*, is the necessary premise for the implementation of the constitutional decision at stake. Nevertheless, there is no doubt a risk that this “multilevel system of constitutional review” will remain meaningless without the active involvement of the Parliament, a risk that, realistically, has to be considered quite high due to the current stasis of the BiH political system.

Following the end of the War of the Balkans, the constitutional system of Bosnia and Herzegovina is regulated by Annex 4 to the Dayton Agreement, providing for the formula of “ethnic federalism”. Indeed, according to this peculiar “International Constitution”, BiH is a federal State, divided along territorial and ethnic lines. The territory is divided in two Entities (the Republika Srpska and the Federation of BiH) and the population is divided in three constituent peoples (the Serbs, the Croats and the Bosniacs). All the federal and Entity institutions are composed in order to guarantee equal representation to each constituent people. Therefore, while the principle of equality among constituent peoples is widely respected, the Others, the minorities that are not represented in any constituent people, are discriminated, as the European Court of Human Rights stated in the *Sejdić and Finci* case.