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THE EUROPEAN COURT OF HUMAN RIGHTS ON *KOVAČEVIĆ*: TIME FOR CONSTITUTIONAL CHANGE IN BOSNIA AND HERZEGOVINA?

Posted on 4 Ottobre 2023 by ***Lidia Bonifati***

On August 29, 2023, the European Court of Human Rights delivered a judgment against Bosnia and Herzegovina (*Kovačević v. Bosnia and Herzegovina*, application no. 43651/22), that at a first look might sound familiar to its previous decisions on *Sejdić and Finci* and following cases. However, if it is indeed true that the Court sees no reason to depart to its previous case law, it is also true that in *Kovačević* the ECtHR goes even further.

Background

Following the war in Bosnia and Herzegovina (BiH), the 1995 Dayton Peace Agreement sponsored by the international community introduced a complex constitutional architecture, based on both power-sharing and federal principles. As a result, in the Preamble, the BiH Constitution recognizes the three major ethnocultural groups, i.e., Bosniacs/Muslims, Croats, and Serbs, as "constituent peoples", distinguishing them from the so-called "Others", i.e., national minorities and those citizens who do not affiliate with any constituent people. This is a crucial distinction, since only the three constituent peoples are entitled to collective rights and to share power in the central political institutions (Parliamentary Assembly and

collective Presidency), whereas the "Others" are represented only in the lower chamber of the central parliament (i.e., the House of Representatives). Indeed, only the citizens who declare their affiliation to one of the constituent peoples are eligible to stand for election to the collective Presidency, as well as only the three constituent peoples can be elected in the second chamber of the central parliament (i.e., the House of Peoples). Moreover, this ethnic criterion is entangled with a residence requirement. In fact, the BiH Constitution provides for two sub-state entities, i.e., the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). The FBiH has a Bosniac-Croat majority, whereas the Republika Srpska has a clear Serb majority. On these premises, the Dayton Constitution provides that the 15 delegates of the House of Peoples are indirectly elected from the Federation (five Bosniacs and five Croats) and from the Republika Srpska (five Serbs) (Art. IV.1). Similarly, the members of the House of Representatives are directly elected from the territory of the Federation and from the territory of the Republika Srpska (Art. IV.2). The same applies to the election of the collective Presidency, consisting of one Bosniac and one Croat directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska (Art. V).

Previous case law

Since 2009, the European Court of Human Rights has tackled different critical aspects of the BiH constitutional and electoral system. Starting with the landmark decision on *Sejdić and Finci*, the Court of Strasbourg found the BiH Constitution and electoral legislation in breach of Art. 14 ECHR read in conjunction with Art. 3 Protocol No. 1, and of Art. 1 Protocol No. 12, thus departing from its previous case law anchored on *Belgian Linguistics v. Belgium* and *Mathieu-Mohin and Clerfayt v. Belgium*. In *Sejdić and Finci* (2009), the two applicants belonged to the so-called "Others" and were ineligible to stand for election to the Presidency and the House of Peoples, precisely because they did not affiliate to any constituent peoples. Similarly, in *Zornić* (2014), the applicant was ineligible because she declared no affiliation to any constituent people by simply defining herself as "Bosnian", a category that has no legal relevance in the BiH

political system. If in these first two cases the issue revolved around ethnicity and the affiliation requirement, in *Pilav* (2016) and in *Pudarić* (2020) the cases concerned the limitation of passive electoral rights based on the place of residence. In *Pilav*, the applicant declared his affiliation to the Bosniac constituent people and resided in the Republika Srpska, and therefore was declared ineligible to stand for election to the Presidency since the Constitution provides that the Republika Srpska elects the Serb member of the Presidency. Conversely, in *Pudarić*, the applicant belonged to the Serb constituent people but resided in the Federation, and based on the same grounds as in Pilav, he was ineligible to stand for election to the Presidency while still residing in the Federation.

The case

Almost 15 years after *Sejdić and Finci*, the ECtHR broke new ground with its decision on *Kovačević*. The case presents some interesting innovations relative to the previous ones since the applicant claimed the violation of his active (and not passive) right to vote on the ground of both his non-affiliation (as in *Sejdić and Finci* and *Zornić*) to any constituent people and his place of residence (as in *Pilav* and *Pudarić*). Indeed, Slaven Kovačević is a citizen of Bosnia and Herzegovina who does not declare affiliation to any constituent people and resides in Sarajevo, i.e., in the Federation of Bosnia and Herzegovina. Due to the combination of the territorial and ethnic requirements, the applicant was unable to express his vote for the candidates best representing his political views, as they were not "from the 'right' entity and/or of the 'right' ethnic origin" (para. 8 of the judgment). Therefore, he was unable to vote for the candidates of his choice in the last legislative and presidential elections held in 2022. On these grounds, he relied on Art. 14 ECHR (prohibition of discrimination) read in conjunction with Art. 3 Protocol No. 1 (right to free elections) and on Art. 1 of Protocol No. 12 (general prohibition of discrimination).

In a 6-1 majority, the Court declared that there has been a violation of Art. 1 Protocol No. 12 ECHR in respect to the complaints about the composition of the House of Peoples and the election of the Presidency. Despite being aware that the power-sharing and federal arrangements introduced within the system were necessary to end a violent conflict and

ensure peace, the Court observed that the composition the House of Peoples, as designed by Dayton, "would have been acceptable in the special case of Bosnia and Herzegovina, had the powers of the House of Peoples been limited to the precisely, narrowly and strictly defined vital national interests veto of the 'constituent peoples'" (para. 55). However, according to the BiH Constitution, the House of Peoples is a chamber with full legislative powers, providing that all legislation requires approval of both chambers (Art. IV.3(c)). Therefore, the Court argued that "it is of the utmost importance that all segments of society should be represented in the House of Peoples" (para. 55). Similarly, the ECtHR held that "the Presidency is a political body of the State and not of the Entities. Its policy and decisions affect all citizens of Bosnia and Herzegovina, whether they live in the Federation, the Republika Srpska or the Brčko District" (para. 73). Most importantly, the ECtHR clearly stated that "the current arrangements render ethnic considerations and/or representation more relevant than political, economic, social, philosophical and other considerations and/or representation and *thus amplify ethnic divisions* in the country and *undermine the democratic character of elections*" (para. 56). Moreover, the Court found 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). Thus, the Court openly criticized the power-sharing arrangements by looking at their outcome and impact on the system, insofar as they ended up amplifying ethnic divisions and undermining the democratic character of elections. Moreover, the need to counter "factual inequalities" among groups is also reframed, since the Court recognized not only that none of the three constituent peoples are an "endangered minority", but also that these "enjoy a privileged position". The Court also recalled the findings of the Commissioner for Human Rights, according to which the current system is "based on ethnic discrimination *impedes social cohesion, reconciliation and progress*" (para. 59).

The way forward

In conclusion, in *Kovačević*, the European Court of Human Rights went straight to the heart of the Dayton constitutional system and reiterated that the ability to freely exercise the right to vote is a pillar of "an effective political democracy", which best maintain peace and dialogue. Moreover, the Court adds that "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). Therefore, the Court clearly sets the limits to the maintain of consociational elements within the system and shows the way in shaping the new constitutional system. The judgment arrived in a difficult time in Bosnia and Herzegovina since, as already noted by Woelk, more than 25 years after Dayton "the country seems to remain stuck in transition". Moreover, the dysfunctionalities of the system appear more and more evident, under the weight of secession threats, a Constitutional Court in crisis, and a High Representative rather active in resuming to the use of the so-called "Bonn powers". In December 2022, Bosnia and Herzegovina received the candidate status for EU membership, and in August 2023, political leaders concluded an agreement on future reforms necessary for implementing the key priorities identified by the EU Commission for accession. Therefore, constitutional change is desperately needed to implement the ECtHR judgment(s) through a profound amendment the Dayton Constitution, namely providing for the inclusion of "Others" and all citizens of Bosnia and Herzegovina, as well as the respect of their individual rights. However, since the failure of the 2006 package of constitutional reforms, attempts at constitutional change have been held hostage by ethnonational élites that have no interest in abandoning a system that grants them wide powers and autonomy. Certainly, to break with the past, constitutional change must come from a collective effort. As Marko has argued elsewhere, reforms must come "from below" (civil society), "from the side" (multicultural and civic parties from all angles of society), and "from above" (EU, Council of Europe, international community). What is certain is that constitutional change in Bosnia and

Herzegovina can only happen through an open and public space for political debate, something that was missing while drafting the Dayton Constitution.