The ECtHR Grand Chamber May De-Block the Constitutional Impasse in Bosnia and Herzegovina

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Joseph Marko
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The Kovačević Case Revisited

On 20 March 2023 the Council of the European Union gave Bosnia and Hercegovina (BiH) green light to start accession negotiations. However, despite this political endorsement, BiH must fulfill the conditionality criteria, including a series of six judgments by the ECtHR relating to the predetermined ethnic keys for the Presidency and the House of Peoples, the second chamber of the Parliamentary Assembly, following from the Dayton constitution in combination with the respective rules of the Election Law of BiH. The last case, *Kovačević v. BiH*, 29 August 2023, was referred to the Grand Chamber on request of the Government of BiH only in December 2023. If the Court follows its well established case law against the dissenting opinion of one of the judges of the Chamber judgment, this should force the mono-ethnic political parties and their leaders as well as the EU institutions to insist on de-blocking the constitutional impasse as soon as possible for any realistic steps towards European integration.

Kovačević v. BiH and differentiation between the active and passive electoral rights

Two former recent blogs by Jens Woelk and Benjamin Nurkić together with Admir Isanović already reviewed the case of *Kovačević v. BiH* in which a chamber of the ECtHR reiterated that Articles IV and V of the Constitution of BiH violate the anti-discrimination provisions of Article 1 of Protocol No. 12. In contrast to the previous case law,[2] Mr. Kovačević had not argued a violation to stand as a candidate in the legislative and presidential elections at state level in 2022. He rather claimed that due to his legal status as “citizen” living in Sarajevo and following from the combination of territorial and ethnic requirements of the BiH constitution, “he had been unable to vote for the candidates of his choice in those elections“ and “that the candidates best representing his political views were not from the ‘right’ Entity and/or of the ‘right’ ethnic origin” (para. 8). Following its previous case-law, the majority of judges of the ECtHR Chamber found BiH in violation of Article 1 of Protocol No. 12 again due to discriminatory treatment on grounds of ethnicity and place of residence.[3]

However, the majority opinion encountered strong objections in the dissenting opinion of one of the judges of the Chamber. Embedded in the overall question of the nature of representative democracy, the dissenting judge criticizes the majority by arguing that they did not adequately take into account the "deep structural differences" between the right to vote and the right to stand for elections which would follow from the jurisprudence of the ECtHR. Thus, the case raises the "constitutionally and politically sensitive question as to whether and, if so, to what extent discriminatory provisions about the right to stand for election also discriminate against individual voters" (para 10). In conclusion, the dissenting judge rejects the normative concepts of a "right to vote for a candidate of one's choice" (para 17) and the concept of "vote dilution" on which the claim of the applicant was based (para 20). According to the dissenting judge, the contested constitutionally embedded ethnic keys regulating the right to stand for election *do not* automatically restrict the (active) right to vote. Nor is there a *positive obligation* of the Contracting States of the ECHR to take positive measures to ensure the representation of all social, religious, economic, or other groups. This would change the concept of parliamentary, representative democracy as such (paras 19-20).

The trajectory of protection of the active right to vote

A detailed analysis of the development of the case-law of the ECtHR since the first landmark judgment *Mathieu-Mohin and Clerfayt v. Belgium*, 1987, demonstrates that one cannot differentiate between the active and passive electoral rights. In the said case the ECtHR established the elementary doctrinal rules for the interpretation of Article 3 Protocol No. 1 in conjunction with Article 14 ECHR. In the wording of the Court, the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature … implies essentially … the principle of equality of treatment of all citizens in the exercise of their right to vote and the right to stand for election" (para 54). Hence, *without any differentiation* between these two electoral rights, the Court argues from the very beginning that the wording of Article 3 expresses a *conceptually coherent concept* to be guaranteed equally.

Nonetheless, these rights are not absolute. The Contracting States have "a wide margin of appreciation" so that any electoral system must be assessed in light of the political evolution of the country concerned. But in order to guarantee the "very essence" and "effectiveness" of these rights, the Court reviews the electoral system with the proportionality test, namely that the interferences "are imposed in pursuit of a legitimate aim, and that the means employed are not disproportianate" (para 52). Finally, by taking into account the conceptually essential *mutual interrelationship* of the *active right to vote* and the *linguistic composition* of the *parliamentary bodies* in the Belgian constitution, the Court came to the conclusion that the requirement to use an official language other than the mother tongue in public office was not a "disproportionate limitation" (para. 57) for minority language speakers of what could be called a "right to vote for a candidate of one's choice" from a comparative constitutional perspective.

However, public international law in the European context has dramatically changed at the beginning of the 1990s, not the least with the adoption of legal instruments for the protection of national minorities within the framework of the Council of Europe and institutions on minorities within the OSCE.[5] Accordingly, the case-law of the ECtHR has taken ethnic discrimination more seriously and has developed normative standards concerning more detailed *positive obligations* of Contracting States to ensure the *effectiveness* of protection.[6]

In this different political and international legal context, in the case of *Aziz v. Cyprus* as of 22 June 2004, the ECtHR for the first time ruled on the *complete exclusion* from the (active) right to vote. The Cypriot Supreme Court had upheld the political situation after the military invasion and occupation of the northern part of the country by Turkey in and after 1974 by allowing that the parliamentary elections were carried out on the basis of electoral lists only for citizens declaring to be members of the Greek-Cypriot community. The applicant, a Turkish-Cypriot, was therefore "completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived" so that "the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was impaired" (para 30). Moreover, the Court ruled that there was a double violation in relation to Article 14 ECHR since the difference in treatment had resulted "from the very fact that the applicant was a Turkish Cypriot" preventing him from "voting at any parliamentary election" (paras 36-7).

These two criteria, the exclusion from the substantive right and ethnic discrimination and their intimate link, were *expressis verbis* confirmed and specified in two more recent cases. In the case *Riza v. Bulgaria*, in 2016, the Court explicitly ruled that "the active electoral right … is not confined exclusively to the acts of choosing one's favourite candidates … It also involves each voter being able to see his or her vote influencing the make-up of the legislature, subject to compliance with the rules laid down in electoral legislation. To allow the contrary would be tantamount to rendering the right to vote, the election and ultimately the democratic system itself meaningless" (para 148).

With reference to minority rights, this was most recently confirmed in the case of *Bakirdzi and E.C. v. Hungary*, in 2023. Concerning the prohibition of ethnic discrimination, the Court held that "no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for differing cultures" (para 50). Moreover, the Court also affirmed its case-law concerning positive obligations on behalf of minorities and its members by declaring the following: "[T]o express and promote its identity it may be instrumental in helping a minority to preserve and uphold its rights" (para 54). Thus, the Court finally ruled: "[T]he national legislator needs to assess whether the statutory scheme creates a disparity in the voting power of members of national minorities, as the applicants, in order to avoid that the *potential value* of votes that might be cast for national minority lists *becomes diluted*" (para 59, emph. JM) and concluded: "[R]ather than perpetuating the exclusion of minority representatives from political decision-making at a

national level … the system that was put in place limited the opportunity of national minority voters to enhance their political effectiveness as a group and threatened to reduce, rather than enhance, diversity and participation of minorities in political decision-making" (para 73).

From mono- to multi-ethnic parties

It follows from this analysis that the majority opinion in the case *Kovačević v. BiH* regarding the (active) right to vote is firmly based on the case-law of the ECtHR continuously developed since the case *Mathieu-Mohin and Clerfayt v. Belgium* even before and outside the context of the power-sharing system of Bosnia and Herzegovina. The specification of the *identical criteria* for *judicial review* of *both participatory rights* is based on the recognition of the right of "every citizen" to influence the composition of the legislature without discrimination. Additionally, as it follows from the minority context of the country concerned, members of de jure or de facto minorities and the citizens who reject any ethnic self-identification (in the meaning of Article 3 in conjunction with Article 15 FCNM) have the specific "right to vote for a candidate of their choice". Furthemore, the Contracting State has the positive obligation to prevent political marginalisation of minortities and to guarantee that their right to vote is not completely denied and the vote is not "diluted". As scientific empirical studies on the BiH electoral system prove,[7] only if the pre-determined ethnic keys for constituent peoples in the electoral system are changed by constitutional reform will "Others" as "citizens" have an "effective" right to vote for their candidates on party lists of multi-ethnic parties which have remained splinter-parties so far due to the cartel of power of the mono-ethnic parties.[8] Accordingly, I hope that the Grand Chamber will in the end render a landmark judgment which would facilitate the necessary constitutional reforms required for European integration.

References

↑**1** 1 Bosniac, 1 Croat, 1 Serb for the three-member Presidency and 5 Bosniacs, 5 Croats, 5 Serbs for the fifteen-member House of Peoples, the second chamber of the Parliamentary Assembly.

↑**2** See the cases Sejdić and Finci v. BiH, 22 December 2009; Zornić v. BiH, 15 July 2014; Šlaku v. BiH, 26 May 2016; Pilav v. BiH, 9 June 2016; Pudarić v. BiH, 8 December 2020 and Kovačević v. B-H, appl.no. 43651/22, 29 August 2023.

↑**3** The majority opinion did not decide on his claim of violation of Article 3 Protocol No. 1 in conjunction with Article 14 ECHR because "in view of this conclusion, it is not necessary to examine separately either the admissibility or the merits of this same complaint…" (para 61).

↑**4** According to Sect 2, US Voting Rights Act 1965, "vote dilution" amounts to a violation of the equal effect of votes cast, if members of racial or ethnic minorities have less chances than other members of the electorate to participate in the electoral process and to elect "candidates of their choice."

↑**5** These are the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and the European Charter of Regional and Minority Languages with their supervisory mechanisms as well as the OSCE High Commissioner on National Minorities as conflict prevention mechanism.

↑**6** First, a "duty to protect minorities' identities" was established in Chapman v. the United Kingdom, 18 January 2001; "institutional segregation" in educational systems was prohibited by the Grand Chamber in D.H. and Others v. Czech Republic,13 November 2007; a "duty to take measures of affirmative action" in Oršuš and Others v. Croatia, 16 March 2010. For a systematic analysis see Joseph Marko, Against discrimination: the right to equality and the dilemma of difference, in: Joseph Marko and Sergiu Constantin (eds.), Human and Minority Rights Protection by Multiple Diversity Governance, London-New York (Routledge), 2019, 307-339.

↑**7** For detailed empirical evidence see Arianna Piacentini, "Trying to Fit In": Multiethnic Parties, Ethno-Clientelism, and Power-Sharing in Bosnia and Herzegovina and Macedonia, *Nationalism and Ethnic Politics*, 2019, Vol. 25, 273-291 and John Hulsey/Soeren Keil, Change amidst continuity? Assessing the 2018 regional elections in Bosnia and Herzegovina, *Regional and Federal Studies*, 2020, Vol. 30, 343-36.

↑**8** The most recent amendments of the BiH Election Law by the High Representative on 26 March 2024 do not effect this assessment. They are supposed to better secure the electoral process against election fraud.

References

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