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THE CASE OF BARALIJA *V* BOSNIA AND HERZEGOVINA: A NEW CHALLENGE FOR THE STATE AUTHORITIES OF BOSNIA AND HERZEGOVINA?

Judgment by the European Court of Human Rights (ECtHR) in the case of Baralija v. Bosnia and Herzegovina holds several important points. Under the surface, different layers are visible, pointing to the deficiencies in the general state of rule of law in Bosnia and Herzegovina. The core issue, as identified by the ECtHR is one of non-compliance with the final and binding decision adopted by the Constitutional Court of Bosnia and Herzegovina, resulting in a legal void, which has left residents of Mostar without the possibility to fulfill their rights to free, democratic, and periodical elections. However, the most interesting part of the ECtHR's reasoning might be the view which the ECtHR holds in regards to the position and the power of the Constitutional Court of Bosnia and Herzegovina to step in and play an the active role, giving solutions, albeit temporary, in form of "interim arrangements.". This article offers an overview of the background of "Mostar case," as well as the ECtHR's reasoning and purported position of Constitutional Court of Bosnia and Herzegovina as well as the challenge this case, as well as previous similar ones may represent to the State authorities.

Keywords: Discrimination; Right to free elections; Rule of law; Constitutional Court; Legal void

INTRODUCTION

Article 2 of the Constitution of Bosnia and Herzegovina, in its English version, which is considered as the authoritative one, states that "*Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and dem-*

ocratic elections"[1]. The local translation of the text, however, uses the term "*is*" (*"je"*) instead of "*shall be*", which may be read as a statement of an existing fact rather than a statement of the aspiration or a promise, found in the original text. The apparent anecdotal linguistic contradiction is, however, a telling one, leading to the question of factual or aspirational truthfulness of that statement.

The state of rule of law and free and democratic elections in Bosnia and Herzegovina (BiH and Bosnia and Herzegovina will be used alternatively) has been scrutinised on multiple occasions by the European Court of Human Rights (ECtHR). Most relevant cases to date: Sejdic and Finci[2]; Pilav[3]; Zornic[4].

All of them ended in decisions concluding that certain provisions of the Constitution are discriminatory in the treatment and the position of "Others"[5] through their inability to be elected as members of Bosnia and Herzegovina's collective presidency and members of House of peoples[6], a part of BiH's bicameral Parliamentary assembly. Nevertheless, discrimination includes also the territorial arrangements prohibiting even the members of the "constituent" peoples to run for the presidency[7]. The treatment of "Others" to the detriment of the constituents is a situation which need to be removed if the country wishes to further its goal of European integrations (Trnka 2004:19)

Latest one of those assessments came on the 29 October 2019 in the form of Judgement of the ECtHR to the case of Baralija v. Bosnia and Herzegovina, Application no. 30100 18 (Judgement). The case concerns situation in Mostar, a regional centre of Herzegovina as well as one of the largest cities in Bosnia and Herzegovina, and the lack of "free and democratic (local) elections" in it. Relating to it, the lack of "rule of law" in Bosnia and Herzegovina altogether and the practice of non-implementation of the final and binding decisions of the Constitutional Court of Bosnia and Herzegovina.

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1 Constitution of Bosnia and Herzegovina, English version published by OHR, Available via: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constituti-ons/BH/BH%20CONSTITUTION%20.pdf, Accessed April 2020

2 Sejdic and Finci v Bosnia and Herzegovina (GC), no. 2799/06 and 34836/06, 22 December 2009, ECLI:CE:ECHR:2009:1222JUD002799606

3 Pilav v Bosnia and Herzegovina, no. 41939/07, 9 June 2016, ECLI:CE:ECHR:2016:0609JUD004193907

4 Zornić v Bosnia and Herzegovina, no. 3681/06, 15 July 2014, ECLI:CE:ECHR:2014:0715JUD000368106

5 Preamble of the Constitution of Bosnia and Herzegovina defines Bosniaks, Serbs and Croats as "constituent peoples", using the term "Others" to describe minorities or people who do not wish to declare themselves as members of one of the constituent peoples.

6 As in the cases of Sejdic and Finci and Zornić

7 As in the case of Pilav

We can describe Mostar's administrative and political order as complex, even in the context of Bosnia and Herzegovina's own complex constitutional and administrative order. Political stalemate in finding a solution that would satisfy two once warring communities (Croats and Bosniaks[8]) in regards to the administrative division and the election rules applicable in the City of Mostar, resulted in a situation in which the last local elections were held in 2008, and a situation in which a final and binding decision adopted by the Constitutional Court of BiH ordering the amendments to these rules is left unimplemented since 2010[9]. Thus the violation of applicant's human rights was found in the ECtHR's Judgement. The difficult challenge of multicultural society undergoing transition and reeling from a conflict persisted for a long time. (Puzić 2004: 71)

The wording of the Judgement, however, is going beyond the situation in Mostar, which is examined in the article and has the potential of holding wider implications for the functioning and the position of Constitutional Court of Bosnia and Herzegovina and its apparent competences. The Judgement also has several specific points that are noteworthy in defining the practice of the ECtHR on issues of discrimination. Some of those aspects are going to be examined in this text.

The key question examined is the position held by the ECtHR, which is perhaps guided by the need to strengthen the position of the Constitutional Court and to halt the practice of non-implementation of the final and binding decisions adopted by the Constitutional Court that, under the domestic law and practice has the power to enact temporary measures that solve the situation until the permanent measures are adopted by the legislative bodies. The grounding of such position, however, is lacking of broader and more substantive case law by the Constitutional Court of BiH, thus can be accepted only by the extensive interpretation of the domestic law and practice in question.

Further question is the challenge the case of Baralija represents to the State authorities of Bosnia and Herzegovina. The judgements of the Constitutional Court are final and binding. Constitutional Court B&H, in the case it finds that certain norm is not consistent with the Constitution or other applicable international convention, such as European Convention on Human Rights, which is directly applicable in B&H, (Vehabović 2006: 98), as it was primarily the situation described in the case of Bar-

[8] According to the 2003census data, out of 105,789 citizens of City of Mostar, 48,4% are Croat and 44,2 % are Bosniak. Data published by Agency for Statistics of Bosnia and Herzegovina, Available via https://www.popis.gov.ba/ , accessed April 2020;

[9] Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JUD 003010018;

alija, orders in its judgement that the State authorities are obliged to adopt necessary changes trough the parliamentary legislative procedure, either immediately or within a certain timeframe. The State authorities, primarily the legislative bodies, are thus under dual obligation, to fulfil the obligation undertaken by joining a convention, and to fulfil the judgement by the national constitutional court. Under international and domestic pressure, State authorities are obliged to find the solutions to the case of Baralija, which they apparently did, as well as to other cases related to discriminatory nature of election system, such as Sejdic Finci, Pilav and Zornic. The position of ECtHR regarding the powers of Constitutional court of Bosnia and Herzegovina may prove to be another incentive to State authorities and political representatives, however, whether such incentive will prove itself in other cases or turn out to be a single-use tool?

2. BACKGROUND OF THE "BARALIJA" CASE

Before going any further, a brief background overview of the specifics of Bosnia and Herzegovina's legal and constitutional system, as well as some background on the inception of the issue of (the lack of) local elections in Mostar need to be considered.

2.1. Relevant background and the constitutional order of Bosnia and Herzegovina

The society of Bosnia and Herzegovina with its inter ethnic components and recent post conflict era is a society undergoing deep changes which are reflected in the legislative order of the country (Caspersen 2014:12).

The Constitution of Bosnia and Herzegovina (Constitution) is, in fact, an Annex to the General Framework Agreement for Peace in Bosnia and Herzegovina (the "Dayton Agreement"); an international agreement initialled in Dayton, Ohio, USA on the 21 November 1995 and signed in Paris on the 14 December 1995[10]. As such, the Constitution has not been adopted in a manner usual in modern democracies involving the democratic choice of the people, or at least, their representatives, thus theoretically is lacking in democratic legitimacy (Šarčević 2009).

[10] General Framework Agreement for Peace in Bosnia and Herzegovina

The Constitution did, however, left the possibility of its amendment through the procedure in the Parliamentary Assembly of Bosnia and Herzegovina, foreseeing the majority vote of two-thirds of those present and voting in the House of Representatives, except for the human rights guarantees in Article 2 which cannot be diminished or eliminated. Therefore, at least theoretically, the lack of democratic scrutiny and the legitimacy of its inception may be rectified in future.

The Dayton Agreement set out the continuation of Republic of Bosnia and Herzegovina, now Bosnia and Herzegovina as a state under international law and provided for its internal structural modification, thus recognising entities of Federation of Bosnia and Herzegovina, which is further divided into ten Cantons[11] and the entity of the Republic of Srpska.

The Dayton agreement, however, did not resolve the issue of the inter-entity territorial boundary line in the area of Brcko, leaving that question to be resolved by the binding decision of international arbitration. The arbitral award[12] from 14 February, 1999 defined Brcko District as a separate administrative unit under the sovereignty of Bosnia and Herzegovina.

This occurrence is of certain significance since it is in the case of Brcko when the constitutional amendment procedure set out in Article 10 of the Constitution has been put to practice. It is an interesting theoretical question whether, on that occasion, the Constitution has obtained its democratic legitimacy, or whether in fact, only the "Brcko amendment" has democratic legitimacy, having been adopted in a manner prescribed by the Constitution, by democratically elected representatives. Nevertheless, that might be an interesting point for separate consideration.

One further specific and noteworthy aspect of Bosnia and Herzegovina's Constitutional system is the doctrine of direct application of the European Conventionon Human Rights (Convention) outlined in the Constitution[13]. These instruments do have supremacy over local laws. However, the Constitutional Court of BiH has shown restraint in giving that same supremacy over the Constitution itself. Hence although they all form the set of constitutional legislation, in the instance of a contradiction of these documents with the actual text of the Constitution, the Constitutional Court of

[11] Article 2 of the Constitution of Federation of Bosnia and Herzegovina defines cantons as federal units within the entity of Federation of Bosnia and Herzegovina.

[12] Arbitral award for Brcko, text published by OHR, available via http://www.ohr.int/ohr_archive/arbitrazna-odluka-za-spor-oko-meuentitetske-granice-na-podruju-brkog-2/ , accessed April 2020;

[13] Article 2, Section 2 of the Constitution of Bosnia and Herzegovina states *"The rights and freedoms set forth by the European convention for the Protection of human rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law"*.

BiH has taken a position that it is its mandate to uphold the Constitution[14]. For further consideration of the case at hand, it is important to bear in mind that the 1966 International Covenant for Civil and Political Rights is one of enumerated human rights documents applicable in Bosnia and Herzegovina.[15]

Therefore, European Convention on Human Rights, as an integral part of the Constitution of Bosnia and Herzegovina, together with its protocols prohibits discrimination, which creates a positive obligation on behalf of the State authorities, to enact appropriate legislation (Krešić, Begić, Alihodžić, Omerdić 2017:47) .

The significance of the "legitimacy gap" has already been scrutinised by the ECtHR as well, in its assessment of the objection set out by the state, putting forward the notion that certain discriminatory aspects of the Constitution cannot be put on the burden of Bosnia and Herzegovina due to unique origin and position of the Constitution. The ECtHR concluded that, even though it might be said that the responsibility of Bosnia and Herzegovina for the creation of original discriminatory provisions of the Constitution is diminished, the fact that there is a possibility of amendment of such provisions by democratic means, leaves the burden of responsibility on the state for the maintenance of such situation which is found to be discriminatory[16].

All of which leads us to another aspect of Bosnia and Herzegovina's unique legal structure and another point adding to the "legitimacy gap", one that is also directly linked with the Mostar case, namely the existence and position of the institution of position named High Representative for Bosnia and Herzegovina, and connected to it, the Office of High Representative (OHR).

Annex 10 of the Dayton agreement, the Agreement on Civilian Implementation foresees the position of the High Representative, an international civilian administrator, operating under the authorisation of the United Nations Security Council, as an enforcement measure under the Chapter VII of the United Nations Charter, as set out by the Resolution no. 1031 of the 15 December 1995[17].

The High representative, however, has wide-reaching powers, colloquially dubbed the "Bonn powers", which include, among others, the powers of imposition or annulment of any laws, including the provisions of an entity or canton constitutions.

[14] Constitutional Court of Bosnia and Herzegovina, Decision in the case U-5/04, 27 June 2006, Official Gazette of BiH no 49/06;

[15] Annex I to the Constitution of Bosnia and Herzegovina, Additional Human Rights agreements to be applied in Bosnia and Herzegovina, in point 7 enumerates the 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional protocols thereto.

[16] Sejdic and Finci v Bosnia and Herzegovina (GC), no. 2799/06 and 34836/06, 22 December 2009, ECLI:CE:ECHR:2009:1222JUD002799606, paragraph. 30

[17] Resolution of the UN Security Council no. 1031, 15 December 1995, available via: https://undocs.org/S/RES/1031(1995) , accessed April 2020

Since the mandate of High Representative is to interpret and implement the Dayton agreement, the practice established a sort of "self-restraint" when it comes to the amendment of the Constitution itself due to it being an Annex to the Dayton Agreement.[18]

However, in other cases, the use of the powers by the High Representative and the intervention into the legal and constitutional system of Bosnia and Herzegovina was extensive, at least in the years following the end of the 1992-1995 war, with its intensity being more restrained in later years.

Some of those interventions of the High Representative into the legal and constitutional system of Bosnia and Herzegovina are of great significance in this case, namely in the instance of the imposition of the Statute for Mostar in 2004[19] and the corresponding provisions of the Election Law B&H.

The specifics of constitutional order of Bosnia and Herzegovina are perhaps mostly visible in the rules of its election system. The Constitution of Bosnia and Herzegovina recognises Bosniaks, Croats and Serbs as "constituent peoples", prescribing specific seats and quotas for persons declaring as belonging to one of the constituent peoples, thus leaving the "Others" discriminated, a situation which is well documented in the cases of Sejdic and Finci and Zornic. However, it is an obligation of the state authorities to ensure the enjoyment of the rights (in this case the right to vote and stand for elections) to individuals regardless of their group status and regardless of the specific composition of Bosnia and Herzegovina. (Kazazić, Omerdić 2019: 325).

Finally, it is important to note that the Constitution of Bosnia and Herzegovina expressly states in Article 6 (4) that the decisions adopted by the Constitutional Court of Bosnia and Herzegovina are final and binding. In relation to the powers and obligations of the parliamentary assembly of Bosnia and Herzegovina, article 4 (4) of the constitution expressly tasks it with adopting legislation, necessary to "…*carry out the responsibilities of the Assembly under this Constitution"*. Therefore, there is an obvious legal link and the obligation on the part of the Parliamentary assembly, in the situations when Judgement of the Constitutional Court of Bosnia and Herzegovina orders the adoption of certain legislative amendments, to adopt the necessary legislative changes.

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[18] Sejdic and Finci v Bosnia and Herzegovina (GC), no. 2799/06 and 34836/06, 22 December 2009, ECLI:CE:ECHR:2009:1222JUD002799606, paragraph. 17

[19] Decision by High Representative on declaring the Statute of the City of Mostar, 28 January 2004, available via http://www.ohr.int/odluka-kojom-se-proglasava-statut-grada-mostara-2/ , accessed April 2020

2.2. Background of Mostar case

Adding to the complex background of Bosnia and Herzegovina's constitutional and legal system, Mostar also has a complex background itself. On the 10 November 1995, an Annex to the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina[20], a separate document signed during the Dayton peace process, agreeing on the principles for the interim statute of the City of Mostar was signed.

It provided for the legal and functional unity of the City of Mostar, with its pre-war territory and division of competences between the city administration and newly formed municipalities, which are now divided along ethnic lines. In general Dayton peace process in Bosnia and Herzegovina is still on-going (Steiner 2003)

On the 7 February 1996, the Interim statute of City of Mostar was issued by Mr. Hans Koschnik, the International Administrator for Mostar, dividing the cityinto six municipalities[21], three of them with Bosniak and three with Croat majority, further setting up the division of competences, which would favour the municipalities and providing the rules of the City Council elections.

The experiences of the interim statute were deemed as unsatisfactory by the Office of High Representative[22], thus on the 28 January 2004, High Representative, late Mr. Paddy Ashdown passed a decision ordering the Statute of Mostar, as well as adopting corresponding changes to the Election Law BiH, relating to the local election rules in the City of Mostar.[23]

The new statute defined a City of Mostar as one unit of local self-government and the previous six municipalities as city areas. Election of the members of the city council was prescribed by Article 17 of the City Statute, as well as by the corresponding provisions of the Election Law BiH. The provisions ordered that the six city areas were to give four councillors each, and the remaining seventeen city councillors were to be elected of offthe city-wide list, comprising of all of the six city zones, and including the "central area", which was defined as a separate area by the 1996 Interim statute, comprising of the historic and prominent old town area surrounding the sym-

[20] A separate document named Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, dated on 10 November 1995, related to the functioning of entity of Federation of Bosnia and Herzegovina, and an Annex thereto related to Mostar.

[21] Annex to the Interim Statute of Mostar, published 20 February 1996, in the Official Gazette of the City of Mostar no. 1

[22] Commission for Reforming the City of Mostar: Recommendations of the Commission Report of the Chairman, 15 December 2003, p. 49

[23] Decision by the High Representative on adopting the changes to the Election Law, 28 January 2004, available viahttp://www.ohr.int/odluka-kojom-se-proglasava-zakon-o-izmjenama-i-dopunama-izbornog-zakona-bosne-i-hercegovine-3/?print=pdf , accessed April 2020

bol of the city, the Old bridge. The last local elections in Mostar were held in 2008, under these rules.

On the 16 September 2009, the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina filed the request with the Constitutional Court of Bosnia and Herzegovina for the review of relevant provisions of the Election Law BiH, as well as corresponding provisions of the Constitution of Federation of Bosnia and Herzegovina and the Statute of Mostar.

On the 26 November 2010, the Constitutional Court of Bosnia and Herzegovina declared articles 19.2(1) to (3), and articles 19.4(2) to (8) of the Election Law BiH, as well as article 17(1) of the Statute of the City of Mostar, as contrary to the Article 25 of the 1966 International Covenant on Civil and Political Rights[24], and thus as unconstitutional. The reasoning of the Judgement explains that the rules imposing the election of the three city councillors from the six city areas are of a discriminatory effect since it creates a mismatch in the "weight" of a vote between the more populous and less populous election areas[25]. Further discrimination is found in the instance of the "central zone" whose inhabitants may only elect councillors from the citywidelist, while the inhabitants of other city zones are entitled to elect both the seventeen councillors of the citywide list and the four councillors allocated for their respective city zone.

The Constitutional Court of BiH ordered the relevant provisions to be amended by the parliament within six months. However, that did not happen, leading the Constitutional Court to adopt the Decision on the non-enforcement on the 18 January 2012[26] establishing that the provisions of the Election Law BiH and Statute of the City of Mostar, which has been found unconstitutional would cease to be in effect and lose their legal validity. By doing so the Constitutional Court of BiH created a legal void, which made the local elections in Mostar impossible unless new provisions are enacted.

No local elections were held in the election cycles in the years of 2012 and 2016 when citizens in other cities of Bosnia and Herzegovina were able to elect their local

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24 Article 25 of the 1966 International Covenant on Civil and Political rights states *"Every citizen shall have the right and the opportunity ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors..."*

25 Decision of the Constitutional Court of BiH in case U9/09, 26 November 2010, Official Gazette of BiH no. 48/11

26 Decision on non-implementation, Constitutional Court of BiH, 18 January 2012, Official Gazzete of BiH no. 15/12

representatives. During all that time, Mostar's current mayor, who was elected by the City Council in 2009, has been in "technical mandate" since 2012.

3. THE REASONING OF THE ECTHR JUDGEMENT

The application against Bosnia and Herzegovina was lodged with the ECtHR by Ms Bralija, an active participant in the local political life of Mostar. The complaint was that her inability to stand as a candidate or to vote in local elections amounted to the violation of her human rights protected by the Convention. On the 29 October 2019 the ECtHR adopted the Judgement in this case.

The reasoning of the Judgement offers many important points. The Court concludes in paragraph 62 that the core issue which has created this situation, namely the non-implementation of final and binding decision previously adopted by the Constitutional Court of Bosnia and Herzegovina "*...would be likely to lead to situations that were incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention...*" [27] Thus reaffirming the principle of rule of law as one of the basic principles to which all of the member states to the Convention should adhere to (Loucades 2007:35).

As in previous cases, most notably in the case of Sejdic-Finci, the Court examined the justifications set forth by the State regarding the prolonged non-implementation of the decisions adopted by the Constitutional Court. The difficulties in finding a political solution that would enable a power sharing arrangement having in mind a particularly complex recent past and inter ethnic divide in Mostar, was taken as a viable justification for some delay in implementation, however, having in mind the duration of the non-implementation, such justification is completely rejected by the Court in the Paragraph 58[28]. Power sharing arrangements are often found in post conflict societies trying to overcome the adversity (Schnecker 2002) Even the fact that the High Representative enacted the disputed Statute and provisions of the BiH Election Law, cannot absolve the State from the responsibility, since the State has at its disposal democratic means of adopting non-discriminatory measures, as it was previously stated in the Sejdic-Finci Case[29].

[27] Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JUD00301 0018, paragraph. 62

[28] Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JUD0030 10018, paragraph. 58

[29] Sejdic and Finci v Bosnia and Herzegovina (GC), no. 2799/06 and 34836/06, 22 December 2009, ECLI:CE: ECHR:2009:1222JUD002799606, paragraph. 30

One of the specific points to this case as compared to previous cases relating to the election system of Bosnia and Herzegovina, such as Sejdic-Finci and Pilav, is the fact that in the case of Mostar, it is not a legal norm currently in force which is producing a discriminatory effect, but a legal void which was created by the Decision of the Constitutional Court, adopted on the 22 September 2004, declaring the provisions of Mostar Statute and Election law without legal effect. The provision were found to be contrary to the Article 25 of the International Covenant on Social and Political Rights, which prescribes the obligation to hold periodic and democratic elections, ordering a six months period in which the national legislative body was supposed to adopt new non-discriminatory measures.

Further, the ECtHR found a violation of the Article 1 of the Protocol no. 12, which imposes the prohibition on discrimination in the enjoyment of any rights set forth by the law, not only limited to the catalogue of rights listed in the Convention, thus establishing a general prohibition of discrimination[30].

In this case, the discriminatory basis i.e. the place of residence, is not the one which represents the innate characteristic of the person, but to characteristics which would fall in the category of "other status", as previously decided in the case of Carson, where the ECtHR decided that the "…*place of residence constitutes an aspect of personal status*"[31]. The applicant is, due to her place of residence, discriminated against other citizens of Bosnia and Herzegovina, which could partake in the local elections.

The argument set forth by the state that the application actually represents "actiopopularis" and therefore is inadmissible under the requirements of Article 43 of the Convention, requiring for the applicant to be able to prove its victim status (White, Ovey, Jacobs 2010: 31) is rejected. The ECtHR held as in the Case of Burden[32] the applicant belonged to the group of people i.e. citizens of Mostar, especially those actively participating in local politics, which are under the risk of having their rights violated by the measure. Relating to the issue of legal void having discriminatory effect, the court reiterated that the same applies in the situation of absence of legal measure which is able to produce the discriminatory effect[33].

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30 Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JUD0030 10018, paragraph. 59

31 Carson and Others v United Kingdom (GC), no. 42184/05, 16 March 2010, ECLI:CE:ECHR:2010:0316JU D004218405

32 Burden and Burden v United Kingdom, 13378/05, 12 December 2006, ECLI:CE:ECHR:2006:1212JUD00 1337805;

33 Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JU D003010018, paragraph. 33;

The ECtHR also rejected the argument that the appellant has not exhausted all of the legal remedies available in the State. Exhaustion of legal remedies is one of the prerequisites of the address to ECtHR (Schabas 2015:551). In this case the remedy in question would be an appeal to the Constitutional Court of Bosnia and Herzegovina. The ECtHR decided in the Paragraph 39 of the Judgement that, since the core issue is non implementation of the previous decision of the Constitutional Court related to that matter, which ordered the adoption of the changes in the legislation, the application to the Constitutional Court would not have been effective remedy, therefore, the applicant was under no obligation to pursue it[34].

Finally in Paragraph 62 of the Judgement, the ECtHR, after finding the violation of the applicants rights ordered to the State to adopt changes to relevant provisions within six months from the moment when the Judgement became final, which was on the 29 January 2020.

In the case the State fails to do so, the ECtHR, perhaps with the wish to strengthen the position of the Constitutional Court of Bosnia and Herzegovina and to rectify the practice of non implementation of final and binding decisions adopted by the Constitutional Court, is of the view that "… *the Constitutional Court, under domestic law and practice … has the power to set up interim arrangements as necessary transitional measures*[35]" leading us to the question of the repercussions of the Judgement and the view of the ECtHR on the position of the Constitutional Court of Bosnia and Herzegovina.

4. ASPECTS RELATED TO THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

It is a quite usual practice of the ECtHR, following the finding of a violation of applicant's human rights, to order the respondent State to make the necessary amendments in the legislation and to remove the measures that are found to be contravening the Convention. In its Judgement, the ECtHR primarily ordered Bosnia and Herzegovina to adopt the required provisions through the regular legislative procedure. However, perhaps the most interesting point in the interpretation of the legal and constitutional system of Bosnia and Herzegovina that can be found in this Judgement is

[34] Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019: 1029JUD 003010018, paragraph. 39;

[35] Baralija v Bosnia and Herzegovina, no. 30100/18, 29 October 2019, ECLI:CE:ECHR:2019:1029JUD00 3010018, paragraph. 62

the part where the ECtHR holds that the Constitutional Court BIH "…*has the power ... under domestic law and practice*..." to adopt interim "*arrangements*".

4.1. Law and practice of the Constitutional Court of Bosnia and Herzegovina

The ECtHR holds in paragraph 20 of the Judgement, that there is an established practice by the Constitutional Court of Bosnia and Herzegovina that holds as the basis for the power of the Constitutional Court BiH to adopt its interim measures, in case the required measures are not adopted by competent legislative bodies.

The Court, therefore, holds that the Constitutional court, under the relevant "domestic law and practice" has a position which is not one of a mere "negative legislator" (Trnka 2010:363), who, in its review of the disputed provisions strikes down and leaves without legal power any provision of the law that is not consistent with the Constitution of Bosnia and Herzegovina. Instead, the Court sees, in this case, a basis on which the Constitutional Court may take the position of an "*active legislator*" that has jurisdiction of adopting the "interim arrangements" as temporary measures solving the issue until a permanent solution is adopted by the legislator.

The practice in question cited by the ECtHR is the Decision adopted by the Constitutional Court of B&H on the 22 September 2004[36], related to the case U-44/01. The case in question refers to the names of the cities in the entity of Republic of Srpska that were found to be contrary to the Constitution of Bosnia and Herzegovina. In a decision adopted on the 27 February 2004[37], Constitutional Court of BiH ordered to the entity authorities to adopt changes to the parts of legislation regulating the names of the cities in question, all within six months. Following the failure of the entity authorities in adopting the changes sought for by the decision, Constitutional Court of BiH adopted a decision on the 22 September 2004 stating that the impugned provisions ceased to be in force, adopting on the same day, a separate decision, essentially a temporary measure, which replaces, until the relevant changes are adopted, the names of the cities in question[38].

[36] Decision by the Constitutional Court of Bosnia and Herzegovina, 22 September 2004, Published in the Official Gazette of BiH no. 46/04

[37] Decision by the Constitutional Court of Bosnia and Herzegovina, 27 February 2004, Published in the Official Gazette of BiH no. 18/04

[38] Decision by the Constitutional Court of Bosnia and Herzegovina, 22 September 2004, Published in the Official Gazette of BiH no. 46/04

The decision in question, as its legal basis, cites the Article VI (3.a) of the Constitution of Bosnia and Herzegovina, and the articles 59 (2) and 80 of the Rules of the Constitutional Court of Bosnia and Herzegovina[39]. Article VI of the Constitution establishes the jurisdiction of the Constitutional Court of BiH do decide on the disputes that arise under the Constitution, between the state and the entities, the entities themselves, or between the institutions of Bosnia and Herzegovina, including the disputes in the matter of whether any provision of the entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. Article 59 (2) of the Rules of the Constitutional Court of BiH generally enumerates the types of decisions the Constitutional Court adopts in its procedure, following the deliberation and the vote of the panel judges. Article 80 (now Article 76, the Revised text of the Rules of the Court 2014) states that the Constitutional Court of BiH "*... shall decide in each individual case on any issue regarding the proceedings before the Constitutional Court not regulated by these Rules."*

4.2. Division of powers

Due to the lack of further case law that would give more light into the relevant practice of the Constitutional Court of BiH and its purported powers to actively prescribe measures, instead of merely impugning the provisions found inconsistent with the Constitution, it may be said that a conclusion on the existence of such powers may be reached only by the means of extensive interpretation of the enumerated articles, especially of the Article 80 of the Rules of the Constitutional Court of BiH.

It is unclear whether the said provision refers solely to the procedural issues that may arise or any other issues that may include the very *meritum* of the case. The cited article refers to the "*issues regarding the proceedings*[40]" ("*pitanja postupka"*). Extensive interpretation is also necessary in considering the measures adopting temporary solutions that are falling within the *meritum* of the case, as those measures which the Article 59 (now Article 57) of the Rules of the Court cites as "interim measures".

Taking into account the fact that the Rules of the Constitutional Court of Bosnia and Herzegovina is an internal act, adopted by the Constitutional Court of Bosnia

[39] Revised text of the Rules of the Constitutional Court of Bosnia and Herzegovina, Official Gazette BiH nos. 22/14, 57/14

[40] Revised text of the Rules of the Constitutional Court of Bosnia and Herzegovina, Official Gazette BiH nos. 22/14, 57/14

and Herzegovina itself, as per the Article 6 (2.b) of the Constitution of Bosnia and Herzegovina, it is unclear whether the "constitution maker", however that term might be loose in the case of Bosnia and Herzegovina and its Constitution, had intended that the Constitutional Court, as a part of the judicial branch of power, has certain competencies which would fall in the realm of the legislative branch of power, even in their form as "*temporary arrangements*". The Constitution itself is rather silent on the issue; however, the composition of the text of the Constitution clearly separates the sections related to three branches of power.

Theoretically, the situation might be regarded as a deviation in the division of powers, benefiting, in this case, the judicial branch to the detriment of the legislative branch, in a manner not so different from the situation where an executive branch may assume certain legislative powers in the case of extraordinary circumstances (e.g. outbreak of war). However, the Constitution of Bosnia and Herzegovina interestingly does not foresee that kind of situation and does not, under any circumstance, allow that kind of deviation from the separation of powers, which may be found in some constitutions (Trnka 2010: 228). In Bosnia and Herzegovina, such a situation is only granted in the constitution of the entity of the Republic of Srpska and is not found in the constitution of the entity of Federation of Bosnia and Herzegovina.

Whatever the reasons for such omission might be, the lack of those provisions is a telling sign of Constitution of Bosnia and Herzegovina's firm position on the separation of powers between the legislative, executive and judicial branch. Since the decisions of the Constitutional Court of BiH are final and binding, no other instance in the domestic legal system is in the position to legally interpret its decisions, except for the intervention in the form of an amendment of the constitution itself ordering the changes to the balance of powers, which would usually take effect after their adoption. The ECtHR, on the other hand, cannot be regarded as such overseeing and superimposed institution, since its jurisdiction is limited to the review of the compliance by the Member States with the requirements of the European Convention on Human Rights (Ichim 2015: 8).

The dynamics of the legislative activity in Bosnia and Herzegovina should also be taken into account. From the experience of the aforementioned decision adopted by the Constitutional Court which replaced the names of cities, following the failure of the entity authorities to comply with the obligation, as ordered, we may see how a measure that was intended to become a temporary solution, becomes, in fact, a permanent one, since the cities in question still carry the names ordered by the decision of the Constitutional Court of BiH. It is not hard to imagine, especially in the case of

Mostar, where the search for a compromise is proven to be a difficult task, that a temporary measure adopted by the Constitutional Court, would, actually, become a lasting one, if not even a permanent one. Such development, of course, would not be the intention or the responsibility of the Constitutional Court of BiH, should it decide to act in that manner.

Speaking of the political and legislative dynamics in Bosnia and Herzegovina, another case relating to the election rules should not be overlooked. The case in question concerns another similar decision of the Constitutional Court of Bosnia and Herzegovina and relates to the rules applicable to the election of the members to the House of Peoples of the Parliament of the entity of Federation of Bosnia and Herzegovina. The Ljubic case[41] also declared certain provisions related to the election process inconsistent with the Constitution and ordered their amendments. Those amendments, however, have not been adopted, so to ensure the process of constituting the House of Peoples of the Parliament of Federation of Bosnia and Herzegovina, the Central Election Commission (CIK) adopted necessary decisions (in a form of instruction)[42] and gave mandate to the elected representatives. Such practice, however, may be regarded as problematic. The issue in question is that, the questions that are regulated by the law or constitution itself, are been regulated by the acts of much lesser legislative power, such as decisions, instructions etc. and are adopted by the body tasked with conducting and overseeing the election process, not the one tasked with the setting of the election rules (i. e. a legislative body). Even if taken as temporary solutions, such situations may be regarded as substandard.

4.3. The aftermath of the Baralija Case

After the Judgement in the case of Baralija became final in the January 2020, the authorities were given a six months timeframe to adopt the legislation prior to the possible intervention by the Constitutional Court of Bosnia and Herzegovina. It is difficult to speculate whether the Constitutional Court itself would indeed use the powers purported by he ECtHR.

In any case, under the pressure of foreign diplomats, and the possible adoption of the solution by the Constitutional Court, the political leaders first agreed the changes

41 Decision of the Constitutional Court of BiH, no U-23/14, 1 December 2016, Official Gazette of BiH no. 54/17

42 Decision by Central Election Commission, adopted on 18 December 2018, Published in Official Gazette BiH no. 21/18

to the Election Law BiH[43], which were adopted by the Parliamentary Assembly of Bosnia and Herzegovina[44], thus enabling the local elections to be held in Mostar in 2020. The newly elected city councillors are expected to adopt the agreed changes to the City Statute, once the city council is formed.

Such development could be regarded as positive, since only those solutions that are adopted trough national legislative bodies have the full democratic weight. Also this could be viewed as a positive influence of the ECtHR's jurisprudence in finding the solutions to the political deadlocks that can arise in complex societies. However, solutions to other cases relating to the election system of Bosnia and Herzegovina, such as Sejdic-Finci, Pilav, Zornic are still not in sight.

5. CONCLUSION

It can be said that Bosnia and Herzegovina is a complex society with a complex constitutional and legislative order. The Dayton construction resulted in a complex power-sharing compromise, which is perhaps mostly visible in the election system. The constitutional order introducing and differentiating the position of "Constituent peoples" and "Others", was examined in the practice of the ECtHR, in the cases of cases of Sejdic-Finci, Pilav and Zornic and was found to have discriminatory elements. In addition to the discrimination based on grounds of declared ethnicity, or lack thereof, as in previous cases, the case of Baralija found the countries election system discriminatory on the grounds of place of residence as well. The ECtHR is not blind to the complex constitutional and legal order of Bosnia and Herzegovina and a difficult path towards the viable and long-term solution. However, the prolonged inability to find a political compromise is rejected as a justification.

The decision has certain points, which are interesting for the practice of ECtHR, having implications outside Bosnia and Herzegovina. The place of residence is reaffirmed as a discriminatory grounds on the basis of "other status", while legal void is found to be able to produce discriminatory effect in a same manner as the legal norm currently in force.

The core issue, as pointed by the Judgement in case of Baralija is in non-implementation of the final and binding decisions adopted by the Constitutional Court of

43 EU Delegation to BiH, 17 June 2020, Press release, via http://europa.ba/?p=69147, Accessed June 2020

44 COE (2020) Press release, 9 July 2020, via https://www.coe.int/en/web/portal/-/mostar-congress-spokespersons-welcome-adoption-of-amendments-to-the-election-law-of-bosnia-and-herzegovina , Accessed August 2020

Bosnia and Herzegovina. Such situation is viewed by the ECtHR as being contrary to the principle of rule of law as one of the basic principles to which the Member States to the Convention should adhere. It may be the reasoning behind the ECtHR's move intended to empower the position of the Constitutional Court and bring to an end the practice of non-implementation of its decisions.

Namely, the ECtHR holds that, in the case of failure of the legislative body to enact the legal changes needed to end the discriminatory situation, the Constitutional Court of Bosnia and Herzegovina has the power "under local law and practice" to adopt "interim arrangements" which are supposed to be temporary until the permanent solution is adopted by the legislative body, thus holding that the Constitutional Court has powers that go beyond the mere "negative legislator" striking down the norms which are inconsistent with the constitution, but one that can offer solutions.

However, due to a lack of more convincing legal practice by the Constitutional Court, the legal basis cited by the ECtHR in its view of the purported powers of the Constitutional Court can be accepted only with the extensive interpretation of the Rules of the Constitutional Court and the previous decisions related to the names of the cities which are cited as relevant legal practice.

The legislative changes have been adopted by the Parliamentary Assembly of Bosnia and Herzegovina, hence, at least in the case of Mostar the alleged powers of the Constitutional Court of BiH were not used. However, the case of Baralija will leave a mark in the understanding of the legal ambit of the discrimination, the understanding of the principle of rule of law as one of the basic principles of the democratic society and most importantly, the understanding and interpretation of the legal position of the Constitutional Court of Bosnia and Herzegovina in the constitutional system of Bosnia and Herzegovina.

Furthermore, the Constitution of Bosnia and Herzegovina expressly states that the judgements adopted by the Constitutional Court are final and binding, while, on the other hand, expressly in describing powers of the Parliamentary assembly, to enact legislation, as necessary to carry out the responsibilities of the Assembly under the Constitution. The legal link and obligation on the part of Parliamentary assembly, to enact legislation once such action is ordered by the judgement of the Constitutional court is clear. So is the responsibility. Further, by joining an international legal instrument such as European Convention on Human Rights and accepting the position of the ECtHR as prescribed by the Convention and its protocols, the obligation of state authorities may become twofold: it is an obligation under international law to which the State adheres to, and the obligation under the national constitution.

However, regardless of the obligation and the responsibility, the enactment of necessary legislative changes has often proven to be a surprisingly difficult task. The reasons for it, often cited as difficulties in finding a political compromise, are legally examined and rejected by the ECtHR as well as other international authorities. The opinion of ECtHR on the powers of the Constitutional Court, together with international pressure on political leaders and leading political parties participating in the Parliamentary Assembly may have given result in the case of Baralija. However, the solution for other cases related to the discriminatory nature of election rules in Bosnia and Herzegovina, such as Sejdic and Finci, Pilav and Zornic, is not in sight.

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PREDMET BARALIJA PROTIV BOSNE I HERCEGOVINE: NOVI IZAZOV ZA DRŽAVNE VLASTI BOSNE I HERCEGOVINE?

Sažetak:

Presuda Evropskog Suda za Ljudska Prava (ESLJP) u predmetu Baralija protiv BiH sadrži nekoliko bitnih tačaka. Ispod površine, različiti slojevi su uočljivi, upućujući na nedostake i sveopšte stanje vladavine prava u BiH. Ključni problem, kako ga je identificirao ESLJP, je problem nepoštivanja konačnih i obavezujućih odluka Ustavnog Suda BiH, koje je prouzrokovalo situaciju pravne praznine, koja je dalje ostavila stanovnike Mostara bez mogućnosti da uživaju svoje pravo na slobodne, demokratske i periodične izbore. Kako god, možda najzanimljiviji dio obrazloženja datog od strane ESLJP je onaj o viđenju pozicije i ovlaštenja Ustavnog Suda BiH, koji može da se uključi u aktivnoj ulozi, dajući rješenja, iako privremena, u obliku "prijelaznih rješenja". Ovaj članak daje pregled i pozadinu "slučaja Mostar", kao i pregled obrazloženja datog od strane ESLJP i navodne pozicije Ustavnog Suda BiH, kao i izazov koji predmet, kao i neki prethodni, može predstavljati državnim vlastima.

Ključne riječi: diskriminacija; pravo na slobodne izbore; vladavina prava; Ustavni sud; pravna praznina

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