

Kovačević v. Bosnia and Herzegovina: Dofederalism and consociation matter?



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Abstract:

The subject of the paper is the judgment of the European Court of Human Rights in the case *Kovačević v. Bosnia and Herzegovina*. The judgment reflects the Court's opinion on discrimination against particular groups of citizens who may or may not, depending on the approach and attitude, use their active voting right in the elections for the Presidency of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly. The novelty of this judgement is in the fact that the Court analysed the possibility of exercising active voting right while in previous cases it decided on discrimination against groups of citizens regarding the exercise of passive voting right. The judgement has to be criticised for several reasons and from several angles. The Court did not consider the legal nature of the Presidency and the House of Peoples which led it to wrong conclusions regarding discrimination against. It only took into consideration that the Others as well as some segments of constituent peoples could not be represented in these institutions. However, this fact has already been contained in several other judgements. The novelty is that the Court has judged that a voter cannot exercise the active voting right since he/she cannot vote for his/her preferred candidate for his/her ethnic affiliation and/or Entity place of residence. The purpose of this paper is to challenge this view and particularly to oppose the attitude that the implementation of this judgement has to introduce the solution that Bosnia and Herzegovina has to become one electoral district.

Keywords: European Court of Human Rights; Bosnia and Herzegovina; discrimination; right to vote; Presidency of Bosnia and Herzegovina; House of Peoples of the Parliamentary Assembly

INTRODUCTION

The European Court of Human Rights (ECtHR) has judged in the case of *Kovačević v. Bosnia and Herzegovina* (2023). This judgment treats some constitutional issues in Bosnia and Herzegovina fundamentally. Therefore, it could seriously influence the present-day constitutional order of Bosnia and Herzegovina. Although the judgment caused profound political disagreements in Bosnia and Herzegovina, one could expect serious theoretical and political debates in the future when the question of its fulfilment becomes acute. At the moment it is not the case since the political crisis turns around other constitutional and political issues. However, when the problem of non-fulfilment of the judgment becomes an important issue, the debates over it will arise (Borić, 2023).

The ECtHR has already made several judgments which could have implications for the constitutional system of Bosnia and Herzegovina. All of them have been centred around the issues of discrimination of particular social groups (constituent peoples or the Others), the composition of particular political institutions (The Presidency of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina), and the existence and fulfilment of the passive voting right. These cases are *Sejdić and Finci v. Bosnia and Herzegovina* (2009), *Pilav v. Bosnia and Herzegovina* (2016), *Zornić v. Bosnia and Herzegovina* (2014), *Šlaku v. Bosnia and Herzegovina* (2016), and *Pudarić v. Bosnia and Herzegovina* (2020).

The present case is similar to previous ones to some extent. It is also about discrimination dealing with the constitutional and political position of the Others, i.e., those citizens who do not belong to any constituent people. However, this case introduces one more issue which has not been the object of previous cases, namely the active voting right or the right to vote.

The case has to be analysed in different ways. Firstly, it has to be analysed starting with the principles of consociation democracy which is the type of democracy and political regime that has been constitutionalized in Bosnia and Herzegovina (Kasapović, 2005; McCrudden & O’Leary, 2013: 481). Secondly, it has to be analysed considering the principles of federalism since Bosnia and Herzegovina is a federal state. The primary method of analysis has to be the positive legal method since I shall analyse the Constitution of Bosnia and Herzegovina and the Electoral Law. However, the analysis has to be comparative as well since it could be useful to understand how other federal states have solved the problem of constituencies for the election of the federal institutions.

Besides the legal methods, it is necessary to use the methods of other sciences, particularly sociology and political sciences. This is important because a political system depends on social relations and political subjects who influence it. It is impossible to think about a political system and to make decisions on it without taking into consideration the reasons for the creation and functioning of a system. The legal analysis which would take into consideration only abstract notions of discrimination and human rights generally would miss its aim.

The purpose of this work is to critically examine the judgment, to show its strengths and weaknesses, and to presuppose what the possible outcomes could be when it comes to the fulfilment of the judgment.

THE CASE

The applicant in the case is Mr Slaven Kovačević, a citizen of Sarajevo, in the Federation of Bosnia and Herzegovina, who is also an adviser to a Croat member of the Presidency of Bosnia and Herzegovina. He does not declare affiliation with any constituent people or any other ethnic group. He complained that he could not vote for the candidates of his choice in the 2022 general elections because of the legal provisions which introduce territorial and ethnic requirements for candidates who stood in the elections for the Presidency of Bosnia and Herzegovina and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina. He claimed that the candidates who he would vote for were not from the “right” Entity or ethnic origin. In his opinion, Articles 13, 14 and 17 of the European Convention for Human Rights (“Convention”) as well as Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 were violated.

Bosnia and Herzegovina is composed of two Entities – the Federation of Bosnia and Herzegovina (“Federation”) and the Republika Srpska. Although their legal nature has not been clearly and explicitly defined in the very Constitution since they have been defined only and exclusively as “Entities”, it is pretty clear that they are federal units in a federal state (Marković, 2012: 185–196; Marković, 2021: 474–478). This is an important issue for the analysis. As shall explain later on, it seems that the ECtHR has not taken it into consideration seriously enough.

The Parliamentary Assembly of Bosnia and Herzegovina is a bicameral representative and legislative body at the state level. It is composed of the House of Representatives and the House of Peoples. The House of Representatives is composed of 42 directly elected deputies, 28 of them from the Federation and 14 from the Republika Srpska. Since they are elected directly, it seems that they represent the citizens or at least the citizens of their respective entities. However, the fact that so-called entity voting has been constitutionalized as a means for the protection of the entities’ interests is not a classical representation of citizens (Marković, 2021: 184–187).

The House of Peoples also has a hybrid character. It is primarily a representation of the constituent peoples as the societal segments in a fragmented and segmented society. This fact is of fundamental importance for understanding the nature of the constitutional system of Bosnia and Herzegovina. Therefore, it had great importance for the understanding of the case *Kovačević v. Bosnia and Herzegovina* (2023). The Court could not ignore the considerations of the legal nature either of particular political institutions or of the constitutional system as a whole.

The Presidency of Bosnia and Herzegovina is a collegial head of state composed of three members. One of them is a Serb elected directly by the citizens in the Republika Srpska, while one Bosniac and one Croat are elected also directly by the citizens in the Federation. One thing is not disputable: the Presidency is the head of state. However, it is only one aspect of its legal nature. Another equally important question is who the members of the Presidency represent. The answer to this question is important since the Court had to consider it when deciding on the application. The Constitutional Court of Bosnia and Herzegovina has expressed an opinion in the U 5/98 case that the Presidency has been the representation of citizens since the citizens elect its members. In my opinion, however, the members of the Presidency represent their respective constituent peoples (Marković, 2012: 111–117; Marković, 2021: 206–207). Some authors point out that the Presidency is shaped in such a way that the power is divided between three constituent peoples and that each member is a representative of one constituent people and of one of the Entities (Steiner & Ademović, 2010: 590).

The applicant complained that he has been discriminated against in the enjoyment of the right to vote (para. 39 of the Judgment). Since the House of Peoples exercises important functions according to the Constitution of Bosnia and Herzegovina and the applicant cannot participate in the exercise of the House's powers, he cannot influence the decisions made by the House although they affect him as well as those who declare themselves in the same way as he does. For these reasons, the Court has found that Article 1 of Protocol No. 12 is applicable.

The applicant claimed that Bosnia and Herzegovina was not a genuine democracy but an ethnocracy (para. 44 of the Judgment). He thought that the three constituent peoples controlled the state institutions while all the others were second-class citizens with no real political influence.

He also claimed that he was discriminated against on the grounds of his ethnicity and place of residence since he was not represented in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

The Government claimed that the applicant was not discriminated against on any of the prohibited grounds for several reasons (para. 47 of the Judgment). Firstly, the existing constitutional system was a result of the war in Bosnia and Herzegovina and the time was not yet ripe for changes in the constitutional system which would be a simple reflection of the majority rule (para. 46 of the Judgment). Secondly, the Government expressed its view that the applicant had the right to vote (active voting right). Since he also had the right to choose his residence, he could change it and therefore vote for Serb candidates if his place of residence would be in the Republika Srpska.

The Court thought that the system of ethnic representation could be maintained in some form. Still, even in that case, 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 of the Judgment).

The applicant also claimed that he was discriminated against since his choice in elections to the Presidency was limited to candidates who declared themselves as Bosniacs or Croats. He was also discriminated against since he could not stand for election to the Presidency since he did not declare affiliation either with Bosniacs or Croats. The applicant claimed that his right to vote was limited because of the combination of ethnic and territorial requirements.

The problem for the Court had also to be found in the fact that the applicant, as a resident of the Federation, was not entitled to vote for the Serb candidates (para. 73 of the Judgment). In the same paragraph the Court concludes: “Therefore, unlike persons from the Federation who declare affiliation with Bosniacs and Croats and persons from the Republika Srpska who declare affiliation with Serbs, the applicant is not genuinely represented in the collective Presidency”. The Court observed that the Presidency is a state and not an entity-body whose decisions and policies influence all citizens regardless of their ethnicity and place of residence. Since this was the case, the applicant had the right to decide on the composition of the Presidency in the elections as well as to stand as a candidate.

The Court decided that there has been a violation of Article 1 of Protocol No. 12 in respect of the complaint about the composition of the House of Peoples and about the elections to the Presidency. Some authors argued that the Court ruled once again that the constitutional system based on power-sharing has been incompatible with the European Convention for Human Rights ([Kushtrim, 2023](#)), which is a hypothesis which has to be challenged.

DISCUSSION

First of all, the Court has already decided on the issue of the right to vote in Bosnia and Herzegovina in several cases which I have mentioned in this text. However, it is important to note that in these cases the Court has decided on the discrimination against on the grounds of ethnic affiliation and/or place of residency regarding the passive voting right. The issue in these cases has been whether the applicants had the right to stand in the elections for the House of Peoples of the Parliamentary Assembly and/or the Presidency of Bosnia and Herzegovina. In all these cases, the Court decided that discrimination against the appellants existed on the grounds of their ethnic affiliation and/or place of residence since they could not stand in the elections.

Therefore, the discussion about discrimination against Others or even of particular constituent peoples depending on the place of residence of their members in the light of the passive voting right is obsolete. Nonetheless, the Court has decided that the composition of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina is discriminatory since not all citizens can be elected in it.

Paragraph 74 of the Judgment is interesting and important for the discussion here. The Court thought that the system of ethnic representation could be maintained in some form. Of course, it did not and could not explain what it meant by the words “in some form” since it was not its task to propose to the Parliamentary Assembly the content of possible constitutional reforms. It is doubtless that the Court has formulated its political attitude claiming that the system of ethnic representation could be maintained in some form. The opposite conclusion could be made if one knew that the Court intended to conclude that the system of ethnic representation in some form would not be opposite to the notion of human rights as it was defined in the Convention, including discrimination against citizens on ethnic grounds or the place of residence.

The Court also formulated its political attitude claiming that ethnic representation should be secondary to political representation. First of all, the Court understood political representation as the liberal democratic model of political regime, as the opposite of ethnic representation which is essentially the political regime of consociation democracy. It gave the primacy to political over ethnic representation. One could argue that the Court did it since ethnic representation has been founded on discrimination against some citizens on the grounds of their ethnicity or place of residence. However, this was not the case since discrimination could be eliminated even if ethnic representation would be preserved not only “in some form” but even as the main principle of the organization of state power. For example, it could be possible to prescribe the right to vote (both active and passive) to all citizens regardless of their ethnic affiliation and place of residence and at the same time to preserve the political regime of consociation democracy, i.e., to preserve ethnic representation as dominant. That is the

reason why it has not been necessary for the Court to contemplate whether ethnic representation should be secondary to political representation or if some sort of equilibrium between them would be acceptable.

It is quite clear that the principle of ethnic representation prevails in the constitutional system of Bosnia and Herzegovina. It is not the only principle of organization of state power since it is combined with the principle of citizens' representation. The principle of ethnic representation certainly is not secondary to political representation. It is not clear at all how the constitutional system would look like if ethnic representation were secondary to political representation. The Court did not explain it although it was not its duty to do it. Such an explanation would be a political trap for the Court. However, one can conclude with a great degree of certainty that the Court had in mind that the constitutional system should be a liberal democracy with some (limited, of course) features of consociation democracy. Another conclusion is not possible since the phrase "secondary to political representation" could be understood only in the sense that consociation democracy is a supplementary element of the democratic political regime.

There was no need for the Court to formulate such an assessment. It is not its competence to give advice to states or to formulate opinions on desirable political and constitutional arrangements. The same conclusion is valid even if one takes into consideration the fact that in the same paragraph the Court concluded that ethnic representation should not discriminate against Others and citizens of Bosnia and Herzegovina. It is possible to construct such a constitutional system which would not discriminate against anyone while at the same time having ethnic representation as its basic feature. During the past fifteen years, there were few draft constitutional amendments which were based on the notion that consociation democracy would remain the basis of the constitutional system while Others would be included in all institutions on an anti-discriminatory basis ([Udruženje mladih pravnika, 2010](#); [Ustav Bosne i Hercegovine, 2010](#)).

One can agree with the conclusion that the constitutional system of Bosnia and Herzegovina is an ethnocracy. The question is not whether it is time to overcome it ([Kushtrim, 2023](#)), but whether it can be overcome at all for two reasons. Firstly, how such a constitutional system could be overcome if there was no consensus for its overcoming? Such an outcome could be possible only on the basis of the adoption of a completely new Constitution of Bosnia and Herzegovina which is obviously impossible. Secondly, even if this could be possible, the question is whether it would be desirable. The main issue here is not whether one is ideologically closer to ethnocracy than to genuine political democracy but rather what kind of constitutional system is possible in a state and segmented society ([Woelk, 2023](#)).

On the other hand, it seems that the Court concluded that it was only possible to overcome discrimination with the abolition of the political regime of consociation democracy or at least with its fundamental weakening. The Court did not seriously consider constitutional arrangements which would be based on the convergence of consociation democracy and elimination of discrimination.

In the very Judgment, the Court made the decision solely based on the notion of elimination of discrimination against Others and the citizens belonging to the constituent peoples with the place of residence in a "wrong" Entity. The notion of discrimination (or rather of anti-discrimination) is of fundamental legal system which is based on human rights, democracy, and the rule of law. However, elimination of discrimination is not the only value in a state and a society. Its meaning depends not only on legal culture, prevailing ideology and legal provisions but also on understanding of social, historical and political conditions which influenced the enactment of a constitution and its functioning. In the concrete case, the Government argued that the time was not ripe for a political regime which would be a simple reflection of majority rule (para. 46 of the Judgment). The Court did not agree with this argument although it did not reject it with no prior consideration. In this way, the

Court confirmed its prior attitude that meta-legal arguments should have a certain, even important, role in the decision-making process.

If meta-legal arguments were given certain importance, which has to be supported as an indispensable approach, a meta-legal analysis should be broadened and deepened. In the concrete case, the Court had to take into consideration the nature of the society which influenced the political regime and the whole constitutional system. In other words, the Court had to take into consideration the fact that the society in Bosnia and Herzegovina has been a fragmented or a segmented one, composed of three sub-societies, in the sense that each constituent people has created a network of its institutions and organizations (political, economic, educational, professional, etc.). The institutions of Bosnia and Herzegovina have been constitutionally arranged as consociational institutions based on typical consociational principles – grand coalitions, parity or proportional representation of constituent peoples, mutual veto, qualified majorities or even consensus in the decision-making process, institutes of protection of vital interests of the constituent peoples or vital interests of the Entities, etc. These constitutional provisions stemmed from the historical and political circumstances (civil war in Bosnia and Herzegovina 1992–1995), the nature of the society (fragmented society), the relationship of political forces (balance of power of ethnic political elites which tended to and were able to check each other).

These meta-legal arguments have not been taken into consideration by the Court. They lead to the conclusion that ethnic representation has to have primacy not because it is a political will of ethnic political elites but because its primacy is a result of objective social and political circumstances. Ethnic representation does not necessarily exclude the representation of all citizens. On the other hand, in a fragmented society, political representation cannot be a primary form of representation. It can only be a secondary one. The very constitutionalizing of political representation cannot be neglected since a person does not belong only to a constituent people (some of them do not belong to any constituent people) but is also a citizen. Therefore, political representation is necessary in each constitutional system even the one which is based on consociation democracy.

The Court also concluded in para. 74 of the Judgment that ethnic representation from the entire territory of the State should be included. The question is what this means. Ethnic representation from the entire territory of the State could be understood in a way that the members of the Presidency, for example, have to be elected by the electors from the entire territory regardless of the inter-entity boundary line. In the same fashion, the delegates to the House of Peoples from each constituent people should be selected from the entire territory of the state regardless of their place of residence.

This kind of thinking neglects one important feature of the constitutional system of Bosnia and Herzegovina – federalism. The members of the Presidency indeed are members of the collective and collegial head of state. The Presidency's competencies originate from the fact that it is a political institution of the state. Therefore, the Presidency represents the state and has to consider that its policies are state policies reflecting the interests of the state. Regardless of the political and ideological opinions of the members of the Presidency on the state, its nature and character, they have to act as state officials.

This is one side of the coin. The other side of the coin has essentially been neglected by the Court. Namely, if Bosnia and Herzegovina were a unitary state and a non-segmented society, it would be not only appropriate but only possible to have a head of state elected on the whole state territory which would be one electoral district. In that case, there would not be any need for a collegial head of state.

However, the members of the Presidency cannot be only representatives of the state. The legal nature of the Presidency as well as of its members' position is hybrid. In a segmented society, all political institutions (often other institutions as well) have to be composed entirely or dominantly of representatives of societal segments. It would be meaningless if the members of the Presidency have to belong to constituent peoples without being their respective representatives at the same time. This

conclusion comes not only from a political and meta-legal analysis of the legal nature of the Presidency. It also originates from an explicit constitutional provision which prescribes the procedure for the protection of vital entity interests through the right to veto which belongs to each member of the Presidency. If a member of the Presidency thinks that a decision of this institution is harmful to the vital interests of his/her Entity, a decision would be forwarded to the National Assembly of the Republika Srpska (if it is vetoed by a member of the Presidency elected in this entity) or to the Bosniac or the Croat delegates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (if it is vetoed by a Bosniac or a Croat member of the Presidency). As one can see, only in the Republika Srpska a veto has to be confirmed by the entity representative and legislative body. In the Federation of Bosnia and Herzegovina, a veto has to be confirmed only by the delegates of one of two constituent peoples and not of the representative body as a whole or at least by one of its chambers. This constitutional provision confirms that members of the Presidency have not been assigned only the role of collective head of state but also that of the representatives (and merely members) of their respective constituent peoples.

On the other hand, the members of the Presidency could be seen also as the representatives of their respective entities. They defend the vital interests of their entities which means that they have in mind not only the state interests but also the entity interests. Otherwise, it would be unclear why the Constitution prescribed the protection of the vital entity interests at all.

The Constitutional Court of Bosnia and Herzegovina concluded in the U 5/98 case that the members of the Presidency were representatives of the citizens since they were elected directly. No other aspect of the Presidency's constitutional role was taken into consideration, neither the methods of decision-making nor the members' right to veto. This approach is one-sided since it takes into consideration only one aspect of the constitutional role of the Presidency.

In the *Kovačević v. Bosnia and Herzegovina* case (2023), the Court essentially adopted the same approach. It has just taken the issue of discrimination as an absolute principle with no references to other aspects of the Presidency's legal and political role. The consequence of such an approach is visible in the Judgment. The Court could conclude only as it did since it thought that every limitation in the realization of the right to vote would be unacceptable and discriminatory. It is one thing to decide on the limitation of the passive voting right as discriminatory as the Court did in the *Sejdić and Finci* (McCrudden & O'Leary, 2013: 477–501), *Pilav*, *Zornić*, and *Pudarić* cases. It is another issue to find the existing constitutional provisions as discriminatory because of the limitation of the active voting right, as the Court does in the *Kovačević* case.

The applicant has the active voting right since he can vote in the presidential elections. He thinks that the problem is because he can vote only for the candidates in the Entity where his place of residence is. First of all, it is important to note that in this case the Court, contrary to previous cases which were emphasized here, decided on discrimination against particular sections of citizens who could not vote for preferential candidates not in the citizens' Entity of residence but could not vote for candidates who stand for elections in the other Entity.

The Court found out that the applicant was discriminated against in his place of residence. This argument cannot be accepted as valid. Firstly, the applicant has the active voting right in the presidential elections. He can vote for any candidate equally as other voters can. If he was discriminated against, then all other voters were discriminated too since his legal and political position was not different in any sense. He could claim that he had the right to vote only for a Croat or a Bosniac candidate for the Presidency. But all other citizens had the same possibility, i.e., the same limitation. The applicant could not vote for a candidate who was not a Bosniac or a Croat. However, the fact that a Bosniac or a Croat voter can vote for a candidate belonging to his/her constituent people does not in itself mean that discrimination exists. Namely, a Bosniac or a Croat voter may want to vote for a candidate who is neither a Bosniac nor a Croat but he/she cannot do it since all the candidates have to be affiliated either

with Bosniac or Croat constituent people. This problem could be solved if all citizens were allowed to stand for elections, i.e., if all citizens would have passive voting right. However, the issue of passive voting right has already been solved in a few judgments of the Court in the *Sejdić and Finci*, *Pilav*, *Zornić*, and *Pudarić* cases. The judgment in the *Kovačević* case could not add anything new to this issue.

The fact that the state is divided into two constituencies in the presidential elections has its justification both in the federal nature of the state as well as the nature of the segmented society. The Court has not taken these arguments at all as it was not important to it why two constituencies were established in the Constitution. Since Bosnia and Herzegovina is a federal state, it is acceptable, even unavoidable, that the members of the Presidency are elected in the Entities. In most federal states even in parliamentary elections for the lower chamber, the deputies are elected in constituencies whose boundaries are drawn inside each federal unit. Although lower chambers represent citizens of the federal state, their members are usually elected in constituencies inside federal units. No one thinks that the voters in these federal states are discriminated against in their place of residence since a voter with a place of residence in one federal unit cannot vote for a candidate who stands for elections in another federal unit. It is the same case in Bosnia and Herzegovina since the electoral districts for the parliamentary elections are formed inside the Entities.

It should not be different from the presidential elections. It is not contrary to the legal nature of the Presidency to be understood as a representation both of the State and the Entities' interests. In this case, the members of the Presidency have to formulate such policies which would be complementary to the interests both of the State and the Entities. This attitude can be confirmed by some constitutional provisions. Namely, there is no confirmation in the constitutional provisions that the members of the Presidency entirely and exclusively represent only the State interests. On the contrary, some constitutional provisions are proof for the argument that the members of the Presidency represent not only the State but also their respective constituent peoples or even the Entities. The constitutional provisions which prescribe the method of decision-making of the Presidency as well as the members' right to veto support this argument. Therefore, *the Presidency is not exclusively the representative of the State interests and all citizens. It is simultaneously the representative of constituent peoples and the Entities' interests as well.* If the Court analysed the problem from this angle, and if it adopted this attitude, its judgment may have been different. Not just that it would not be necessary, but it would not be justified, to adopt the attitude that the Presidency should be elected in a single electoral constituency if it would be understood not only as a representative of the State and its citizens but also of the Entities and constituent peoples.

If the deputies to the Parliamentary Assembly can be elected in separate constituencies, this can be the case with the Presidency. Deputies of the Parliamentary Assembly, at least formally, do not represent the voters of their respective constituencies but all citizens regardless of their different belongings. Why, then, a voter could not vote for any candidate, in any part of the country? The Court found out, in my opinion correctly, that this should not necessarily be the case. In many states, the territory is divided into electoral constituencies for parliamentary elections and no one finds it discriminatory.

One can argue that it is different from the Presidency since it is a head of state. However, the fact that the Presidency is a collective head of state seriously influences its very nature, including the method of election of its members. While an individual head of state has to be directly elected in a single electoral district, a collective head of state does not need to be elected in such a way. It can easily be contrary to the nature and purpose of this institution to be elected in this way. The fact that voters have to vote for candidates in their respective constituencies is not in itself contrary to the idea that members of the collective head of state represent or should represent the whole state. It is more important to understand that members of the Presidency even have to be elected in the electoral constituencies (the Entities) since they do not represent only the State but also their respective constituent peoples and to some extent even the Entities. Whether this is the case in reality is another issue. The constitutional provisions on the role and nature of the Presidency can be interpreted in different

ways. However, the very composition of the Presidency, its' members' veto right, and the method of decision-making after using the veto right, are the main arguments for the attitude that members of the Presidency cannot simply be seen as representatives of citizens and the State.

Constitutional history as well as comparative constitutionalism register similar solutions. Take for example the Presidency of the Socialist Federal Republic of Yugoslavia (SFRY) which was also a collective and collegial head of state elected (although indirectly) in the federal units and autonomous provinces. Another example is the collegial head of state in Switzerland – the Federal Council. It is composed of seven indirectly elected members and the Constitution explicitly provides for some limitations regarding their cantonal belonging, i.e., belonging to particular linguistic groups. According to Article 175, para. 4: "Care shall be taken that the various geographical and language regions be adequately represented." This provision is not discriminatory in any way. However, one can pose the following dilemma. The Federal Assembly cannot elect to the Federal Council more members from one linguistic group than would be appropriate since that would not be an adequate representation. For example, it could not elect more German-speaking members than it would be appropriate even if it wanted to.

The composition of the Presidency in the sense that it includes only Bosniacs, Serbs, and Croats is another problem. It was decided by the Court in the abovementioned judgments, and the judgment in the Kovačević case could not contribute to this problem.

The same can be concluded regarding the composition of the House of Peoples of the Parliamentary Assembly. However, the novelty of the Kovačević case has to be found in the arguments of the Court on the applicant's right, or it is better to say the lack of right, to vote for the delegates in the House of Peoples. Again, the novelty of this case has to be found in the claims that the applicant's active voting right was jeopardized. Firstly, the indirect election of the House of Peoples cannot be a problem in any sense since the second chambers in many parliaments are elected indirectly. From a comparative perspective, such a solution is known, often, and legitimate. Its legitimacy in the case of Bosnia and Herzegovina originates from the legal and political nature of the House of Peoples. Since it is not a representation of citizens, there is no necessity for direct election of the delegates. Moreover, they cannot be elected directly if at least a minimum of legitimacy has to be secured since there would not be a guarantee that delegates would be legitimate representatives of their respective constituent peoples.

The Court did not at all analyse the following dilemma: is it more appropriate to have indirectly elected delegates with legitimacy for representation of constituent peoples, or delegates who could be voted by anyone but whose legitimacy could be very easily put under suspicion?

One can wonder why this dilemma or alternative is unavoidable. And whether it is unavoidable. The answer is that it is not unavoidable necessarily but that there is a high degree of possibility that exactly something like that can happen. Namely, it can happen that directly elected delegates, at least from the less numerous constituent peoples (or one of them) can be elected by voters who dominantly come from another constituent people.

Secondly, such a character of the House of Peoples requires the election of its members in the Entities for two reasons. The first reason is that the House of Peoples at least implicitly and at least to some extent has to represent the Entities as well keeping in mind that the delegates can use the entity voting to protect the Entities' interests. The second reason is that constituent peoples have been concentrated in one of the Entities. They realized their segmental autonomy in one of the Entities. This changed after the *Sejdić and Finci* case at least intentionally since the State had the duty to amend its Constitution and to remove discrimination against the Others as well as Serbs in the Federation and Bosniacs and Croats in the Republika Srpska. However, constituent peoples are still concentrated in one or another Entity and they still find one of them as a basis for the realization of their segmental autonomy. This does not necessarily exclude the Others as well as the other constituent peoples from

participation in the election of the House of Peoples. If all citizens in each Entity are interested in the protection of the interests of their respective Entities, it is justified that the Entities serve as constituencies for the election to this parliamentary chamber. All citizens could be elected to the House of Peoples and all of them could participate in the election of the delegates, although indirectly. One cannot find discrimination against any population group in this case. The fact that the applicant cannot vote, at least indirectly, for his favourite candidates from another Entity does not mean that he is discriminated against. He can vote, although indirectly, under the same conditions as the other citizens can do it. He cannot vote for the candidates from the other Entity but the other voters cannot do it too. He has to choose candidates from the Entity where he has the place of residence but all other voters have to do it too. The applicant's right to vote for candidates (to say again, only indirectly) is limited (as it is limited for all other citizens in the country) for the reason of the legal nature of the House of Peoples and the fact that it is neither reasonable nor necessary for the citizens to have the right to vote for candidates from one or another Entity. This is even more important because the voters cannot vote for the candidates from the whole State territory (or even from the whole Entity territory!) in the elections of the House of Representatives, although one could claim that the deputies represent all the citizens of the State. If the Parliamentary Assembly reflects the democratic order (Ademović et al., 2012: 174), one would expect that each voter has the right to vote for each candidate, at least in the House of Representatives election. This is not the case, rightly in my opinion, and the Court did not find discrimination for that reason.

The Court concluded that the House of Peoples as a legislative body could be acceptable only if its powers would be limited to narrowly and strictly defined vital national interests (para. 55) (Bonifati, 2023). Again, the Court did not take into consideration that such a reform would considerably weaken the federal principle since the House of Peoples is composed of the delegates elected in the Entities as federal units. It would also considerably limit the features of consociation since it would limit the powers of the House as a representation of the societal segments. If the House of Peoples were composed both of delegates of the constituent peoples and the Others, discrimination would be eliminated and the House could retain its powers. However, it would not be enough for the Court since voters still could not vote for their preferred candidates if they came from the "wrong" Entity. The Court did not try to answer the question of why voters would have the right to vote (even indirectly) for candidates from another Entity when they do not have the same right in the elections of the House of Representatives which is elected directly as supposedly representation of citizens.

Once again, the applicant did not say or do anything new claiming that his right to stand for elections has been limited or neglected since it has already been decided and confirmed by the Court in the previously mentioned judgment. Bosnia and Herzegovina already must amend its Constitution as well as the Electoral Act. The fact that it has not done this yet is another problem. So, deciding that there has been discrimination against the appellant regarding the right to stand for elections the Court has not contributed anything. It has just confirmed its already existing case law.

The Court's arguments in favour of the attitude that the appellant has been discriminated against since he cannot vote for any candidate on the territory of the State are not convincingly elaborated. However, the Court had to find some arguments since its approach included the idea that discrimination against particular groups of the population exists even regarding the right to vote. The problem arises around the dilemma of whether the right to vote (i.e. the active voting right) is exercised even when a voter cannot vote for a candidate of his/her preference. This dilemma can be developed in the following way. Does a voter have the right to be represented in a parliament always or only under some circumstances? What are these circumstances?

In my opinion, the Court adopted a very unusual understanding of representative democracy and the right to vote itself. Representative democracy does not mean that every citizen or even every social group or political organization has the right to be represented in a parliament. A voter does not have the right to be represented in all cases and under all circumstances. Take for example different censuses which exist even in the constitutional systems which are usually understood as democratic

ones. Do the censuses represent discrimination against voters since they do not have the right to vote for the candidates of their own choice? Another example is the electoral threshold. If it is relatively high, a voter would have the chance to vote for a candidate or a political party but he or she would not necessarily be represented in a parliament if his or her favourite political party did not cross the threshold since it is high. Or, if a candidate or a political party does not fulfil legal conditions for participation in the elections (paying the electoral deposit, for example) a voter again would not be able to vote for his/her favourite candidate(s).

Another inconsistency has to be found in the previously mentioned fact that the applicant has been a political adviser to a member of the Presidency of Bosnia and Herzegovina. It is hard to imagine that a member of the Presidency is not a choice of his political adviser. This is an additional, although not the only reason for the opinion that the applicant does not have the victim status. The absence of the victim status has been underlined in the dissenting opinion of Judge Gabriele Kucsko-Stadlmayer.

It is not understandable how the applicant is not represented in the Presidency and how he could not choose a candidate whom he prefers if the members of the Presidency represent all citizens as the Constitutional Court of Bosnia and Herzegovina claims. If this is the case, the applicant is represented in the Presidency not only if he has voted for one of the candidates who has been elected but also if he had the right to do it which has been the case for his right to vote is not limited in any way. If the members of the Presidency represent the citizens, the fact that the applicant had to vote for one of the registered (or offered) candidates had no discriminatory consequences. The same can be said for the House of Peoples *mutatis mutandis* since the delegates to this chamber have been elected by deputies of the cantonal parliaments (i.e. assemblies) while the applicant has an unlimited right to vote for one or more candidates at the cantonal parliamentary elections.

The fact that the applicant maybe (but only maybe, since he could not prove it and the Court also failed to prove it) could not vote for a person because that person could not become a candidate does not mean that the applicant has been discriminated against but can mean that such a person (a potential candidate) has been discriminated against.

The upper chamber of the federal parliament is not a representative body of citizens. It is a representation of federal units and/or other collective subjects. In Bosnia and Herzegovina, these subjects are constituent peoples and the Others. This is quite important since it shows that it is wrong to consider direct election as something natural for the upper chamber. If an upper chamber does not represent citizens, its members do not need to be elected directly. In the concrete case, the applicant could not claim that his right to vote has been neglected because he did not have and should not have the right to vote in the elections for the upper chamber. If the House of Peoples is a representation of constituent peoples and/or Entities, there is no good reason for the applicant to have the right to vote for a candidate from the other Entity. The members of the House of Peoples are not expected to represent all citizens. Therefore, there is no need for them to be elected by all citizens. As a consequence, the applicant should not necessarily have the right to vote for candidates from the whole State territory.

The same argument *mutatis mutandis* has to be adopted for the Presidency. Neither the composition nor the method of decision-making of this institution should lead to the conclusion that it is a representation of all citizens regardless of their ethnic or territorial belonging. One cannot make as convincing the attitude that the Constitution-maker intended to introduce a three-member institution whose constitutional and political task should be to represent only the citizens. If this was the Constitution-maker's intention, the President of Bosnia and Herzegovina would be introduced. The Court did not take into consideration these arguments. Moreover, the Court did not consider the explicit constitutional provision according to which the members of the Presidency protect vital entity interests. The Constitution-maker neither intended to point out the task of members of the Presidency to protect the State's or the citizens' interests nor did he do that.

The very Presidency defines its constitutional task as coordinating the work of the institutions of Bosnia and Herzegovina, protecting the interests of Entities, which includes constituent peoples and all citizens (Rules of Procedure of the Presidency, Art. 1, para. 2). As one can conclude, the Presidency itself finds that it is not solely the representation of citizens but rather a hybrid institution which protects different interests in Bosnia and Herzegovina. It also comes from the constitutional provision according to which it decides by consensus on some issues. Consensus would certainly be useless if the Presidency would be only the representation of citizens. The same is true for the institute of protection of vital interests of Entities.

The Entities are electoral districts in the presidential and parliamentary elections which is justified for some other reasons. Namely, the citizens realize their citizenship at two basic levels. They are the citizens both of the State and the Entities. They fulfil their political subjectivity at different levels of state organization. Therefore, the fact that the citizens, including the applicant, do not vote for candidates for the entire state territory is not unusual let alone discriminatory. It is particularly important for the House of Peoples since the citizens do not exercise their political subjectivity as individuals but as members of collectives, i.e., of constituent peoples.

If the voters cannot vote for candidates from the entire State territory in the elections for the lower house, and it is not discriminatory, why does discrimination exist in the elections for the House of Peoples and the Presidency? I do not think that discrimination exists because the electoral districts for the House of Representatives have been formed on the territory of the Entities. One has to keep in mind that the so-called entity voting in this chamber serves to protect the interests of the Entities (Steiner & Ademović, 2010: 577), which is proof that this chamber is not purely a representation of citizens. The Court did not find that discrimination against any particular category of citizens has existed for this reason. Therefore, it is still less understandable why discrimination against anyone exists in the case of elections of political institutions which are not representative bodies of citizens or at least are not entirely representative bodies of citizens.

CONCLUSION: POSSIBLE SOLUTIONS

Since the Court found out that discrimination against citizens has been based on the combination of ethnic and territorial requirements, it seems that it could be eliminated only if all citizens had the passive voting right and Bosnia and Herzegovina would be one electoral constituency (Nurkić, 2023). These two solutions have to be and can be separated. First of all, the Kovačević case is about active voting right. The problem of passive voting right in Bosnia and Herzegovina has been principally solved in previous cases and judgments. Therefore, it is not necessary to discuss it regarding the Kovačević case. It is obvious that Bosnia and Herzegovina will have to solve the problem of discrimination against some categories of citizens although it is still not clear at all how and when this will happen.

Secondly, there is no need and even justification to introduce the system according to which Bosnia and Herzegovina would be one electoral district for the purpose of election of the Presidency and the House of Peoples. If it would become one electoral district each voter could vote for each candidate on the whole State territory. In that case, the active voting right would not be limited in any way since the voters could make political choices according to their preferences.

However, such a solution would be suitable for a unitary state whose society is not segmented. Since Bosnia and Herzegovina is a federal state and a segmented society, it is unacceptable to base its constitutional system on the principles of a unitary state and a non-segmented society. In other words, it is not only an individual citizen who is important as a political subject. Societal segments, i.e., constituent peoples, as well as political-territorial units, i.e. Entities, also have political subjectivity. They also have to be represented in political institutions whose primary task is to formulate and protect their interests. These are the main reasons why Entities have to be separate electoral districts. There is no

discrimination in this solution because citizens vote not only as abstract individuals (although this is one of their social and political functions as well) but also as members of constituent peoples and citizens of Entities as federal units.

If Bosnia and Herzegovina were one electoral district in the presidential elections, for example, the problem of overvote would inevitably arise. Two scenarios would be possible. According to the first scenario, voters who belong to one constituent people would elect a member of the Presidency who belongs to another constituent people as has already happened three times when Željko Komšić was elected predominantly by the Bosniac voters. The second scenario would be that a member of the Presidency was elected by combined votes of voters who belong to two other constituent peoples. Therefore, all kinds of strategic voting or coalitions of political elites who belong to two constituent peoples would be possible in order to decisively influence the electoral outcome.

One may wonder why it is not acceptable that voters who belong to one constituent people elect a member of the Presidency who belongs to another constituent people. Principally, it is not unacceptable. If one understands that voters are abstract individuals, political subjects and citizens, it is quite natural that they have the right to vote for any candidate for the Presidency regardless of his/her ethnic affiliation or Entity citizenship. However, if one understands that the society is segmented and that citizens are not only citizens of Bosnia and Herzegovina but also citizens of the Entities, the problem has to be analysed from different angles and with opposite conclusions. Even if the candidates can stand for the elections only in the Entity of their place of residence, all kinds of political programmes and ideologies can compete. Voters would still be able to vote for any political party or a coalition under the conditions that it runs the elections in both Entities. Therefore, it may be true that a voter from one Entity could not vote for a candidate whose place of residence is in another Entity. However, he still could vote for another candidate who belongs to the same ideological trend and political party. His or her active voting right would not be limited particularly not in a society where political parties are the most important and visible political subjects whose monopoly over the electoral process is indisputable. This is an “accident” of the federal system and consociation democracy, which is the result of the necessary compromise in such a state and a political regime.

Judicial sources

Kovačević v. Bosnia and Herzegovina, App no. 43651/22, ECtHR (Fourth Section), 29 August 2023.

Pilav v. Bosnia and Herzegovina, App no. 41939/07, ECtHR (Fifth Section), 9 June 2016.

Pudarić v. Bosnia and Herzegovina, App no. 55799/18, ECtHR (Fourth Section), 8 December 2020.

Sejdić and Finci v. Bosnia and Herzegovina, App nos. 27996/06 and 34836/06, ECtHR (Grand Chamber), 22 December 2009.

Šlaku v. Bosnia and Herzegovina, App no. 56666/12, ECtHR (Fifth Section), 26 May 2016.

Zornić v. Bosnia and Herzegovina, App no. 3681/06, ECtHR (Fourth Section), 15 July 2014.

REFERENCES

- Ademović, N., Marko, J., & Marković, G. (2012). *Ustavno pravo Bosne i Hercegovine*. Konrad Adenauer Stiftung. [Google Scholar]
- Bonifati, L. (2023). *European Court of Human Rights on Kovačević: Time for constitutional change in Bosnia and Herzegovina?*. *Diritti Comparati*. Retrieved from <https://www.diritticomparati.it/the-european-court-of-human-rights-on-kovacevic-time-for-constitutional-change-in-bosnia-and-herzegovina/> on 2023, October 4.

- Borić, F. (2023). Bosnia-Herzegovina political briefing: New judgment of Strasbourg against BiH: What next? *China-CEE Institute Weekly Briefing*, 65(1)(BH). Retrieved from <https://china-cee.eu/2023/09/18/bosnia-herzegovina-political-briefing-new-judgment-of-strasbourg-against-bih-what-next/>. [Crossref] [Google Scholar]
- Kasapović, M. (2005). Bosnia and Herzegovina: Consociational or liberal democracy? *Politička misao*, 42(5), 3-30. [Google Scholar]
- Kushtrim, I. (2023). Kovačević v Bosnia and Herzegovina, and the saga of the Dayton Peace Agreement's incompatibility with the European Convention on Human Rights. *EJIL: Talk! Blog of the European Journal of International Law*. Retrieved from <https://www.ejiltalk.org/kovacevic-v-bosnia-and-herzegovina-and-the-saga-of-the-dayton-peace-agreements-incompatibility-with-the-european-convention-on-human-rights/>. [Google Scholar]
- Marković, G. (2012). *Bosanskohercegovački federalizam*. Array. [Google Scholar]
- Marković, G. (2021). *Ustavni lavirint - aporije ustavnog sistema Bosne i Hercegovine*. Službeni glasnik. [Google Scholar]
- McCrudden, C., & O'Leary, B. (2013). Courts and consociations, or how human rights courts may de-stabilize power-sharing settlements. *The European Journal of International Law*, 24(2), 477-501. [Crossref] [Google Scholar]
- Nurkić, B. (2023). Kovačević v Bosnia and Herzegovina: The complete guidelines for the constitutional reform in B&H. Strasbourg Observers. Retrieved from <https://strasbourgobservers.com/2023/09/12/kovacevic-v-bosnia-and-herzegovina-the-complete-guidelines-for-the-constitutional-reform-in-bh/> on 2023, September 12.
- Steiner, C., & Ademović, N. (2010). *Ustav Bosne i Hercegovine - komentar*. Konrad Adenauer Stiftung. [Google Scholar]
- Udruženje mladih pravnika u BiH. (2010). *Nove ideje, bolji Ustav*. Pravni institut u BiH. Retrieved from <https://lawinstitute.ba/docs/Amandmani%20na%20Ustav%20BiH%20od%20mladih%20pravnika.pdf>.
- Ustav Bosne i Hercegovine - izmjene i dopune. (2010). Forum građana Tuzle. Retrieved from <https://forumtz.org/dokumenti>.
- Woelk, J. (2023). *Opening Pandora's Box?*. Verfassungsblog on matters constitutional. Retrieved from <https://verfassungsblog.de/opening-pandoras-box/> on 2023, September 1.