



Bosnia and Herzegovina

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I. INTRODUCTION

Compared to 2017, the events in 2018 witnessed several quite diverse constitutional matters in Bosnia and Herzegovina. After the elections in October 2018, the political life in Bosnia and Herzegovina was (and still is) revolving around the distribution of mandates in legislative bodies in the country. In particular, the contentious question was which census to apply when distributing mandates, the 1991 one or the 2013 one. This continues to emphasize the importance of the participation of all citizens of Bosnia and Herzegovina in its system of government under non-discriminatory conditions, yet doesn't support the status of the constituent peoples that remain an integral element of the heterogeneous legal and political order of Bosnia and Herzegovina.

With some exceptions, and for a change, the focus of the Constitutional Court of Bosnia and Herzegovina was shifted to the excises, criminal procedure, and land registries. One possible explanation for this might be that after it became clear that several decisions of the European Court for Human Rights, namely *Sejdić and Finci v. Bosnia and Herzegovina*, *Zornić v. Bosnia and Herzegovina*, and *Pilav v. Bosnia and Herzegovina*, would not be implemented again, attention was shifted to another direction. During 2017, the Parliamentary Assembly of the Council of Europe, the Head of the Delegation of the European Union to Bosnia and Herzegovina, and the European Union Special Representative in Bosnia and Herzegovina urged representatives in the Parliamentary Assembly to amend the country's Constitution and Election Law. Since 2018 was an election year, it was expected that the representatives

would adopt modifications to the Constitution and Election Law in order to harmonize them with the aforementioned decisions of the European Court for Human Rights. But in the end, the representatives put pressure on the Constitutional Court to decide in several cases involving the amendments to the Election Law and did not comply with its decisions. As the elections approached, it became obvious that there was not enough time to amend the Constitution and Election Law. The subject was set aside, and so too the pressure from the Constitutional Court, although not entirely. As a result of that, unlike in the previous year, the Constitutional Court of Bosnia and Herzegovina heard quite diverse cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The political representatives still show no progress in introducing constitutional amendments that would make the constitutional system of Bosnia and Herzegovina responsive. At the same time, internal intermediaries, such as the Office of the High Representative in Bosnia and Herzegovina, still remain mere bystanders. During 2018, ethnicity continued to play an important role in constitutional reality since there is still a lot of support for ethnic strongholds, which became and have remained a fundamental factor in the system of government.

In terms of the above-mentioned decisions of the European Court for Human Rights, the Parliamentary Assembly of Bosnia and Herzegovina remains inert in taking steps to harmonize constitutional and legal norms with the decisions. In 2009, the European Court, deciding in the case of *Sejdić and*

Finci v. BaH,¹ established that the constitutional provisions that rendered the applicants ineligible for election to the Presidency of BaH were discriminatory. (In this case, the persons who did not identify themselves as one of the constituent peoples.) Later on, in 2014, in the case of *Zornić v. BaH*,² the European Court reinforced the previous decision. Finally, in 2016, in the case of *Pilav v. BaH*,³ the European Court again looked into the provisions of the Constitution, this time from a different angle. In particular, the Presidency of BaH consists of one Bosniac and one Croat, each directly elected from the Federation of BaH, and one Serb directly elected from the Republic of Srpska. The European Court held that the applicant (in this case a Bosniac living in the Republic of Srpska) were prevented from being entitled to stand for the election to the Presidency and therefore the Court found it to be a discriminatory feature of the constitutional system. All of this means that the persons who do not identify themselves as one of the constituent peoples are still ineligible for election to the Presidency of Bosnia and Herzegovina, and that the Serbs from the Federation of Bosnia and Herzegovina are prevented from being entitled to stand for the election to the Presidency in the same way the Bosniaks and Croats from the Republic of Srpska are.

The report of 2017 noted that the Constitutional Court of Bosnia and Herzegovina, by its decision U-23/14, established that certain provisions of the country's Election Law are not in conformity with its Constitution. These include the provision that "each of the constituent peoples shall be allocated one seat in every canton" as well as the provisions that stipulate the number and ethnic belonging of the delegates in the House of Peoples in the Parliament of the Federation of Bosnia and Herzegovina based on the 1991 census. The Constitutional Court ordered the Parliamentary Assembly of Bosnia and Herzegovina to harmonize the provisions with the Constitution no later than six months from the day of delivery of the decision. However, in July 2017, the Constitutional Court established

that the Parliamentary Assembly had failed to enforce its decision within the given time limit, and, by its decision 54/17, rendered the provisions ineffective from the day following the ruling being published in the Official Gazette of Bosnia and Herzegovina.

Followed by this and amidst heated discussions and pressure from different stakeholders, the Central Election Commission of Bosnia and Herzegovina issued the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law. The instruction provides for the division of mandates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina according to the 2013 census. What makes this instruction controversial is that according to the Constitution of the Federation of Bosnia and Herzegovina, the constituent peoples and members of the group of Others shall be proportionately represented; however, such proportionate representation shall follow the 1991 census until Annex 7 of the Dayton Peace Agreement is fully implemented. To that end, the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented. There are two problems related to this.

First, a comparison between the census in 1991 and 2013 points out significant differences in ethnic composition before and after the 1992-1995 conflict. Some cities and municipalities that were once predominantly populated by one constituent people are now almost entirely populated by another. Some cities and municipalities became unpopulated. The population that was once mixed became territorially distributed in such way that ethnic belonging became territorially embedded. That would surely affect the distribution of mandates according to the decision U-23/14 of the Constitutional Court of Bosnia and Herzegovina and the instruction of the Central Election Commission.

Second, Annex 7 of the Dayton Peace Agree-

ment regulates the return of refugees and displaced persons in Bosnia and Herzegovina after the conflict. In order to be considered as implemented, it is necessary that, in line with Annex 10 of the Dayton Peace Agreement, the Office of the High Representative for Bosnia and Herzegovina deliver a decision to confirm this. Since the Office has not made any decision so far, Annex 7 is not considered to have been implemented, which means that, in accordance with the Constitution of the Federation of Bosnia and Herzegovina, only the 1991 census can be used as a basis for the calculation. Nevertheless, one cannot disregard that the ruling of the Constitutional Court of Bosnia and Herzegovina ordered the Parliamentary Assembly to harmonize the provisions with the Constitution, and when the Court established that the Parliamentary Assembly had failed to do so, it rendered the provisions ineffective.

The saga further developed in January 2019, when the applicants (27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina) required a review of the constitutionality of the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law. The Constitutional Court rejected the request as inadmissible since it was not competent to take a decision (*case U-24 18*). The Court concluded that the challenged Instruction on Amendments is an implementing regulation, passed by the Central Election Commission in order to implement the Election Law in the process of administering indirect elections for the bodies of authority in Bosnia and Herzegovina, which determined the preliminary number of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina to be elected from cantonal assemblies. Accordingly, and taking into account the fact that it concerned a temporary provision, the Court concluded that the subject in the case did not consist of a general act, the constitutionality of which could be reviewed by the Constitutional

¹ Sejdīć and Finci v. Bosnia and Herzegovina, App no 27996/06 and 34836/06 (ECtHR, 22 December 2009).

² Zornić v. Bosnia and Herzegovina, App no 681/06 (ECtHR, 15 July 2014).

³ Pilav v. Bosnia and Herzegovina, App no 41939/07 (ECtHR, 9 June 2016).

Court. Moreover, taking into account the content of the request in the case at hand, the Constitutional Court did not find any reason why the contested implementing act of the Central Election Commission would raise an issue of violation of human rights and fundamental freedoms. Therefore, the Constitutional Court, taking into account the mentioned circumstances and in particular the jurisprudence related to the interpretation of its jurisdiction, concluded that it was not competent to decide on the review of the constitutionality of the impugned act of the Central Election Commission.

III. CONSTITUTIONAL CASES

The core activity of the Constitutional Court of Bosnia and Herzegovina in 2018 was the same as in 2017. The Court was lodged by a large number of appeals with regard to the right to a fair trial, notably with regard to the failure to take a decision within a reasonable time. To that end, the Constitutional Court ordered the competent judicial bodies to complete their proceedings urgently. In its sessions, the Court highlighted the failure to meet the requirement of deciding within a reasonable time as a problem that is very much present in the judicial practice in the country. Apart from this, the focus of this report is on several decisions that raised constitutional issues in several different fields.

1. U-5/18: The Law on Excise Duties in Bosnia and Herzegovina

This case challenged the constitutionality of laws on excise duties, revenues, and taxes that have been adopted by the Parliamentary Assembly of Bosnia and Herzegovina. The applicants (19 representatives of the House of Representatives of the Parliamentary Assembly) filed a request for a review of the constitutionality of the Law on Amendments to the Law on Excise Duties, the Law on Amendments to the Law on Payments into the Single Account and Distribution of Revenues, and the Law on Amendments to the Law on Indirect Taxation System. The applicant claimed that the challenged laws are in contravention of the Constitution of

Bosnia and Herzegovina. The applicant also stated that the challenged laws were adopted in a summary procedure in the course of the first reading and then in the course of the second reading. The applicant claimed that this procedure may be applied only in the case of a law of lesser scope or degree of complexity and that the aforementioned simplified procedure does not apply to the challenged laws. The applicant also argued on the authorized proponents of laws, claiming that the second chamber undertook the prerogatives of the executive power by putting forward the challenged laws. In line with this, the applicant claimed that under the course of the chosen procedure, the only proponent of the law could be the Council of Ministers of Bosnia and Herzegovina and not the House of Peoples of the Parliamentary Assembly.

Deciding in this case, the Constitutional Court dismissed the request as it established that the challenged laws are in conformity with the Constitution. The Court established that the challenged laws were approved by both chambers of the Parliamentary Assembly by the majority of those present and voting, respecting the necessary majority for adoption. It also established that the laws did not take effect before publication in the Official Gazette and that the transcripts of deliberations were published and that the public aspect of their sessions was secured. The Court could not accept the claims with regard to deliberation in the course of an urgent legislative procedure and the claim that the principle of separation of powers was violated as well founded. The Court was aware of the fact that it is undisputed that the second chamber may be a proponent and that is sufficient for it to conclude that there was no violation of the principle of separation of powers as well as no violation of the appropriate provisions of the Constitution in regard to compliance with the principle of the separation of powers.

2. U-8/18: The principle of the constituent peoples and the principle of non-discrimination

This case challenged the application of several provisions of several cantonal

constitutions in the Federation of Bosnia and Herzegovina with regard to the principle of the constituent peoples and the principle of non-discrimination. The applicant (the Deputy Chair of the House of Representatives of the Parliamentary Assembly) filed a request for review of the constitutionality of several articles of the Constitution of the Posavina Canton, the Constitution of the Herzegovina-Neretva Canton, the Constitution of the Zenica-Doboj Canton, the Constitution of the Bosnian-Podrinje Canton, and the Constitution of the Western Herzegovina, claiming that they are not in compliance with the principle of the constituent status of peoples and principle of non-discrimination. The applicant claimed that all three constituent peoples—the Bosniaks, Croats, and Serbs—should be constituent on the whole territory of Bosnia and Herzegovina without discrimination. The applicant then cited the articles from the aforementioned constitutions that refer only to the Bosniaks and Croats as constituent peoples as well as the articles that define only the Bosnian and Croatian language as the official languages and the Latin alphabet as the official alphabet in these cantons. According to the applicant, this was contrary to the preamble of the Constitution of Bosnia and Herzegovina since the Serbs were discriminated against. Apart from this, the applicant questioned the competence of the Constitutional Court of the Federation of Bosnia and Herzegovina to decide in this case, arguing that the Constitutional Court of Bosnia and Herzegovina, as a central-level constitutional court, should decide as a constitutional court of a sub-national entity.

The Constitutional Court of Bosnia and Herzegovina declared the request inadmissible as it was not competent to take a decision. It also referred to the Constitutional Court of the Federation of Bosnia and Herzegovina as a competent authority to decide in this case. The Constitutional Court also noted in the reasons for its decision that there were no circumstances indicating that the Constitutional Court of the Federation of Bosnia and Herzegovina interpreted and applied the Constitution of the Federation of Bosnia and Herzegovina contrary to the Constitution of Bosnia and

Herzegovina. This is especially taking into account the previous relevant case-law of the Constitutional Court of the Federation of Bosnia and Herzegovina. Moreover, the Constitutional Court referred to its decision U-5/98, known as the “constituent peoples” decision, which established all three constituent peoples as constituent on the whole territory of Bosnia and Herzegovina, regardless of the entities and cantons. By this decision, the Court also struck down as unconstitutional all provisions of the Constitution of the Federation of Bosnia and Herzegovina that did not reflect the principle of the constituent peoples. The Court then considered that since the provisions of the cantonal constitutions have to be harmonized with the Constitution of the Federation of Bosnia and Herzegovina, the principle of the constituent peoples also applies in this case.

3. U-15/18: Authorized officials in the criminal procedure

This case concerned the scope of authorized officials in the criminal procedure determined by the Criminal Procedure Code of Bosnia and Herzegovina. The applicant (the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly) filed a request for review of the constitutionality of the provision of the Criminal Procedure Code referring to the authorized officials under the authorization of the Prosecutor’s Office. The applicant challenged the provision that considers expert associates, as well as investigators working for the Prosecutor’s Office under the authorization of the Prosecutor, as authorized officials. The applicant claimed that under this provision the authorized officials are all persons authorized under the scope of police forces, including the State Investigation and Protection Agency; the Border Police of Bosnia and Herzegovina; the court, financial, and military police; customs and taxation authorities, etc. However, the applicant also claimed that this provision was imprecise, unclear, and against the rule of law since the number of authorized officials was widened to include expert associates and investigators of the Prosecutor’s Office working under the authorization of the Prosecutor. The

applicant believed that this was against the provisions of the Law on the Prosecutor’s Office of Bosnia and Herzegovina since the scope of the work of this office is performed by the chief prosecutor, four deputy chief prosecutors, and prosecutors. The Law did not mention the possibility of employing authorized officials. This is important since potential authorized officials did not possess adequate training and knowledge, and direct supervision by the prosecutor could not compensate for this.

The Constitutional Court of Bosnia and Herzegovina established that the challenged provision of the Criminal Procedure Code was compatible with the Constitution. The Constitutional Court, among others, established that the above provision in the challenged part meets the “quality of law” requirement in terms of its precision and clarity and foreseeability, thereby not leaving room for arbitrary decision-making and possible abuses. In other words, it was compatible with the rule of law principle under Article (1)(2) of the Constitution. Authorized officials, regardless of their authorization, perform their duties under the supervision of and by informing a prosecutor. It follows that the relationship between the prosecutor and the authorized officials is hierarchical, in which the prosecutor is the supreme authority running the investigation while the authorized officials act on his order. The Court was not convinced that this rendered the challenged provision imprecise and unclear.

4. U-7/18: The constitutionality of the Law on Land Registry

This case challenged the constitutionality of the Law on Land Registry in the Federation of Bosnia and Herzegovina. The applicants (29 representatives of the National Assembly of the Republic of Srpska) filed a request for review of the constitutionality of the Law on Land Registry of the Federation of Bosnia and Herzegovina. The applicant claimed that the provisions are against the right to property. The reasons were that the characteristics of the registration of real estate in Bosnia and Herzegovina were based on two registers, the land registry and

cadaster, while many European countries joined these two registries under a single institution. The applicant claimed that the challenged provisions introduced the protection of the property that was not acquired on a valid legal basis because it enabled the current beneficiaries to register as owners even when they did not have any legal basis to possess the particular property. The challenged provisions also allowed for the procedure to be conducted on bulletin boards, meaning that the person did not necessarily have knowledge of the actions that were carried out in the process of establishing or replacing land registers and ownership rights. The applicants were convinced that this was against the principle of legal certainty, which is a prerequisite for the development of democratic societies. It has been pointed out that it was exactly the opposite of legal security.

Deciding on the request, the Constitutional Court of Bosnia and Herzegovina established that the challenged provisions of the Law on Land Registry of the Federation of Bosnia and Herzegovina were in accordance with the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights. The Court pointed out that there was no established standardized organizational structure of real estate registration in Europe. Also, the registration in land registers was not carried out solely on the basis of a factual situation, but all other relevant documents and evidence, which were also taken into account, could serve when determining ownership and other rights and limitations on real estate. Therefore, the Court found that challenged provisions did not violate the right to property. Finally, the legislator prescribed public announcements through daily newsletters that are distributed throughout Bosnia and Herzegovina as well as through the Official Gazette of Bosnia and Herzegovina, all with the aim of including persons who hold certain property rights that are subject to registration in land registries. Accordingly, it followed that the legislator had taken reasonable measures to ensure that persons involved were included in this proceeding.

IV. LOOKING AHEAD

As predicted in the previous report, the 2018 elections intensified relations in political life in Bosnia and Herzegovina. On one side, the pressure that was put on the Parliamentary Assembly to amend the Election Law has now transferred to the Election Commission, who took the initiative to implement the decision of the Constitutional Court of Bosnia and Herzegovina. On the other side, the European Commission and the American Embassy in Sarajevo expressed their support for the Central Election Commission. The point at issue, then, is what role the Constitutional Court will play further.

Setting aside the cases based on a tendency to preserve individual interests of each constituent people along territorial lines in Bosnia and Herzegovina, in 2019 the Constitutional Court will most likely continue to be overburdened with applications requesting it to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, etc.) have been violated or disregarded, and whether the application of the law was, possibly, arbitrary or discriminatory.

V. FURTHER READING

Patricia Popelier and Maja Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism, Managing Multinationalism in Multi-tiered Systems* (Springer International Publishing, 2019).

Patricia Popelier and Samantha Bielen, 'How courts decide federalism disputes: legal merit, attitudinal effects, and strategic considerations in the jurisprudence of the Belgian Constitutional Court' [2018] *Publius* 1.