DISCRIMINATION BASED ON PLACE OF RESIDENCE IN RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH EMPHASIS ON BOSNIA AND HERZEGOVINA

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Dženeta Omerdić, PhD, Associate Professor
Faculty of Law, University of Tuzla
e-mail: dzeneta.omerdic@untz.ba

Harun Halilović, MA
Attorney at law, Sarajevo
e-mail: halilovicharun@gmail.com

Abstract

Widening case law of the European Court of Human Rights (ECtHR) interpreting the notion of discrimination, especially the ambit of discrimination based on "other status" offers important elements in the understanding of the legal definition of discrimination. More specifically, it offers elements in understanding of the scope of discrimination grounds listed under "other status", such as the place of residence. Discrimination cases before the ECtHR against Bosnia and Herzegovina relate primarily to the discriminatory nature of Bosnia and Herzegovina's election system, focusing on ethnicity as the main basis for discrimination. However, often overlooked is the place of residence as the discriminatory ground, identified in numerous cases alongside ethnicity (such as the cases of Pilav, Zornic and recently Pudaric), or as a stand-alone basis as in the case of Baralija. The ECtHR's positions expressed in judgments to these cases offer certain interpretations important for Bosnia and Herzegovina's election system, legal and constitutional order and showcase the potential power and influence which the ECtHR's judgments may have in the strengthening of rule of law and overcoming political stalemates. Outside Bosnia and Herzegovina, the cases may offer some new insights in defining and reinterpreting the legal

notion of discrimination and the legal ambit of the prohibition of discrimination on the grounds of place of residence, such as discriminatory effects of legal void and the discriminatory treatment between persons having a place of residence within the same respondent country.

Keywords: *Discrimination, Place of Residence, Right to Free Elections • Rule of Law*

1. Introduction[1]

As a general principle, to which all the Member States of the Council of Europe subscribe, the prohibition of discrimination should be one of the basic pillars of rule of law in any democratic society. As such, it is enshrined in the basic texts of human rights law such as the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), as well as multiple other general human rights documents and specific anti-discrimination documents. Prohibition of discrimination is a principle recognized by the international documents and case law of international bodies. The unlawful distinction in the treatment of citizens based on an open-ended list of grounds, including place of residence is prohibited and States cannot bring into question should it be allowed that some rights and freedoms are available to certain groups based on where they live.

The case law of the European Court of Human Rights (ECtHR) concerning discrimination on the grounds of place of residence is relatively new, compared to similar grounds that are to be counted under the umbrella of "other status". One of the first cases defining the place of residence as the grounds of discrimination, falling within the open-ended list of "other status," is the case of Carson and Others v. United Kingdom[2] from 2010, followed by other cases, such as the one of Aleksandr Aleksandrov v. Russian

1 This paper was previously published in *IUS Law Journal, vol. 1, no. 1, 2022*

2 *See* Carson and Others v. United Kingdom (GC), Case no. 42184/05, Judgment 16 March 2010.

Federation[3] from 2018 and, more recently, the case of Baralija[4] from 2019. The case of Pilav[5] and a recent case of Pudaric[6] from 2020 are also noteworthy. Although the primary basis of discrimination in the cases of Pilav and Pudaric was ethnicity, due to specific constitutional arrangements in Bosnia and Herzegovina, the discrimination of applicants based on place of residence is also evident.

Cases finding discrimination based on place of residence have certain distinctions between them, which makes the formulation of a pattern or a unified legal stance an uneasy task. For example, the case of Carson refers to persons having a permanent place of residence outside of the State in question (i.e. the UK). Such situation, for example, may bring into question the issues of personal and territorial application of the Convention and thus open further debate whether the place of residence is an actual basis of discrimination in the concrete case. Furthermore, in the case of Aleksandr Aleksandrov, although the place of residence within the State was evident, the core issue of the case was one of the criminal law proceedings and sentencing, where the particular place of residence (or lack thereof) is taken as an aggravating circumstance in sentencing. These circumstances may call into question discussion on the margin of appreciation in criminal law sentencing practices of the States. The cases related to Bosnia and Herzegovina, on the other hand, could be identified as cases where the place of residence as a discriminatory basis is prominently evident. The applicants in cases of Baralija and Pilav as well as Pudaric all have places of permanent residence within Bosnia and Herzegovina and the justifications set forth by the State were thoroughly examined and rejected by the ECtHR.

3 *See* Aleksandr Aleksandrov v. Russia, Case no. 14431/06, Judgment 27 March 2018.

4 *See* Baralija v. Bosnia and Herzegovina, Case no. 30100/18, Judgment 29 October 2019.

5 *See* Pilav v. Bosnia and Herzegovina, Case no. 41939/07, Judgment 9 June 2016.

6 *See* Pudaric v. Bosnia and Herzegovina, Case no. 55799/18, Judgment 08 December 2020.

In the following text, the most notable cases establishing discrimination on the grounds of place of residence shall be examined and compared, with a particular look into the circumstances and background of cases emanating from Bosnia and Herzegovina. Further point of interest in the article is the influence of ECtHR jurisprudence and the impact of recent case law and its novelties in clarification and reinterpretation of the notion of discrimination and the ambit of discrimination based on "other status" such as place of residence. Another important point, specifically linked to Bosnia and Herzegovina as a primary focus of the article, is the question of whether the ECtHR and its judgments hold the potential to contribute to the efforts of strengthening the rule of law and the search for solutions in order to overcome the constitutional and political stalemates and discriminating situations.

2. The Notion of Discrimination under the Convention and Discrimination Based on Place of Residence

Article 14 of the Convention constitutes a right of an individual not to be discriminated against in the enjoyments of rights and freedoms enshrined within the Convention. Hence, Article 14 complements other substantive provisions, having an "ancillary nature".[7] However, the subsequent practice of the ECtHR gave a wide interpretation to the notion and the scope of the substantive rights in concern. On the other hand, Article 1 of Protocol No. 12 sets the scope of protection against discrimination to "any right set forth by law", introducing a general prohibition of discrimination and a "free-standing right" not to be discriminated against.

The discrimination may present itself in a form of direct or indirect discrimination. Direct discrimination describes a "difference in treatment of persons in analogous, or relevantly similar situations" which is "based on an identifiable characteristic or 'status'", as stated in the case of Biao v . Denmark.[8] Indirect discrimination, however, may appear in disproportionately detrimental effects of a general policy or a measure which, although it may be constructed

7 White, R. C. A., Ovey, C., & Jacobs, F. G. (2010), pp. 641.

8 *See* Biao v. Denmark (GC), Case no. 38590/10, 24 May 2016.

in neutral terms, results in a discriminatory effect on a particular group, as found in the case of D.H. and Others v. the Czech Republic.[9] Further, discrimination by association may be found in situations where the protected ground in a particular case relates to another person who is connected to the applicant.[10]

In determining the existence of the discrimination, the ECtHR must apply the test to determine whether such difference in treatment can be explained by "an objective and reasonable justification,"[11] as reiterated in the case of Molla Sali v. Greece.[12] The test entails the following questions: 1) has there been a difference in treatment in the situations which are analogous or relevantly similar to the situation at hand; and 2) can such difference be objectively justified, by the means of a legitimate aim, or through the application of proportionate means?

The other person or group of persons compared to whom the applicant is claiming the difference in treatment is called a "comparator". The other group or person do not necessarily need to be identical, but instead, similar in a manner relevant to the situation, taking into account the nature of the particular complaint.[13]

When it comes to the grounds which may be invoked by seeking protection against discrimination, the Convention and Protocol no. 12 are complementary. Both Article 14 of the Convention and Article 1 of Protocol no. 12 have an open-ended list, as indicated by the inclusion of the phrase "any other status".[14]

The ECtHR developed an extensive case law defining the scope of the "other status", giving an interpretation not limited only to a personal characteristic, which is innate or inherent and unchangeable, as found in the case of Clift v. the United Kingdom,[15] but also covering the circumstances which a person may change, such as the

9 *See* D.H. and Others v. the Czech Republic (GC), Case no. 57325/00, Judgment 13 November 2007.
10 W. A. Schabas, (2015), pp. 18.
11 White, R. C. A., Ovey, C., & Jacobs, F. G. (2010), pp. 642.
12 *See* Molla Sali v. Greece [GC], Case No. 20452/14, Judgment 19 December 2018.
13 Arnardóttir, O.M. (2012), pp. 35.
14 White, R. C. A., Ovey, C., & Jacobs, F. G. (2010), pp. 107.
15 *See* Clift v. the United Kingdom, Case No. 7205/07, Judgment 13 July 2010.

place of residence.[16]

The case law related to discrimination based on place of residence has thus far been mainly, but not exclusively, concerned with the situations which involve the difference in treatment directed at persons who are having permanent residence outside of the State in question. Such was a situation in the much-cited Carson Case.[17] The difference in treatment was directed against a British citizen living abroad and thus not having its pension indexed and adjusted on a periodical basis, but "frozen" at the level existing in the moment when the person left the UK.

Whether the nationals of one Member State who are living abroad are discriminated against by the legal measures of that State may trigger the discussion on the issue of the jurisdiction over these persons exercisable by that State. Such a debate would include the question on the application of jurisdiction *ratione personae*, or jurisdiction based on territoriality, or other links between them and the State in question.[18]

However, the situations in the cases emanating from Bosnia and Herzegovina are substantially different. The applicants in the case of Baralija, as in the case of Pilav and Pudaric, all have their place of residence within the State and are discriminated against other persons who also have their place of residence within the State but reside in a different administrative unit. Hence there is no doubt on the question of whether the territorial, as well as personal jurisdiction, is being triggered.

3. Overview of the Case Law of ECtHR Regarding the Place of Residence as a Discriminatory Basis

The case law of ECtHR is regarded as paramount in the development and application of the notion of discrimination as defined by the Convention. Following is an overview of some of the notable cases concerning discrimination based on place of residence.

16 Gerards, J. (2013), pp. 107.

17 *See* Carson and Others v. United Kingdom (GC), Case no. 42184/05, Judgment 16 March 2010.

18 Supra, note 14.

As previously stated, the case of Carson relates to the situation where applicants, all having permanent residence outside the respondent state (United Kingdom), are denied the incremental annual increase of their pensions which was given to other persons having UK residence. The applicants claimed the violation of Article 1 of Protocol 1 (right to property). However, the main issue turned out to be the place of residence and the issue of whether the place of residence can be considered as a ground for discrimination based on "other status". In paragraph 71 of the Judgment, the ECtHR concluded that the place of residence constitutes an aspect of personal status for the purpose of Article 14 of the Convention. However, the ECtHR treated this issue as the question of whether "country of residence" falls within the meaning of the phrase "other status" found in Article 14", thus distinguishing the application of the laws onto the citizens of different regions within one country[19] to the different application of laws between the applicants having the residency status in another country.

The case of Pilav, on the other hand, was primarily the case of discrimination based on the grounds of ethnicity. However, the facts of the case make the place of residence an important factor. The applicant was precluded from running for the position of one of three members of the Presidency of Bosnia and Herzegovina due to the fact that the member of the Presidency that is voted from the entity of Republic of Srpska is to be an ethnic Serb. The applicant, due to his Bosniak ethnicity, could not run for the position, unless he changed his place of residence to another entity (i.e. the Federation of B&H), from which a Bosniak and a Croat member of the Presidency are voted in. The ECtHR rejected the argument set forth by the respondent State that the applicant could evade discriminatory treatment by changing his place of residence.[20] A more recent case following the logic of the Pilav case is the case of Pudaric. The facts of the case remain similar, but in this case they refer to an applicant who is an ethnic Serb, living in the entity of Federation of B&H, but who is being precluded to run as a Serb member of the Presidency who is

19 *See* Carson and Others v. United Kingdom (GC), Case no. 42184/05, Judgment 16 March 2010.

20 *See* Pilav v. Bosnia and Herzegovina, Case no. 41939/07, Judgment 9 June 2016.

elected exclusively from the entity of Republic of Srpska.[21]

The case of Aleksandr Aleksandrov v. Russian Federation, however, has its own specific characteristics. The applicant was found guilty of assaulting a police officer and was sentenced to one year of imprisonment. In determining the sentence, the criminal court took as an aggravating circumstance the fact that the applicant had a place of residence outside of the area where the incident happened (suggesting he wandered to another place to commit offences). Such circumstance was not prescribed by the law as an aggravating circumstance in terms of sentencing. The respondent State, however, claimed that it was not the only factor that the court considered in sentencing, but that it was taken in corroboration with other circumstances under which the incident occurred (like, for example, the applicant being intoxicated). To sum up, the case basically concerned the sentencing policy of the criminal courts of the country.[22]

It may be said that all the presented cases have their specific characteristics pointing out to the place of residence being the grounds for discrimination; however, all of them having additional factors and circumstances. The case of Baralija, on the other hand, could be regarded as a clear case of discrimination based on the place of residence as a primary basis of discrimination, by (non)application of the same law (the Election Law of Bosnia and Herzegovina) within one State.

Further interesting point set out in the reasoning of the Judgment of the ECtHR is that in the case of Baralija, as opposed to the cases of, for example, Sejdic and Finci, Pilav and other cases, it is not a legal provision currently in force which has the effect of violation of human rights, but rather a legal void or the absence of an applicable legal provision that has produced a violating effect. The Constitutional Court of B&H, in its Decision adopted on 22 September

2004,[23] declared that certain provisions of Election Law of B&H

21 *See* Pudaric v. Bosnia and Herzegovina, Case no. 55799/18, Judgment 08 December 2020.

22 *See* Aleksandr Aleksandrov v. Russia, Case no. 14431/06, Judgment 27 March 2018.

23 Decision by the Constitutional Court of Bosnia and Herzegovina, 22 September 2004, published in the Official

and the Statute of Mostar which were deemed unconstitutional are without further legal effect, thus eliminating them from the legal system. The Decision further set out an obligation to replace the erased provisions with new provisions which are supposed to comply with the human rights standards.

Article 25 of the International Covenant on Social and Political Rights[24] applicable in Bosnia and Herzegovina, on the other hand, creates a positive obligation of the state to ensure free, democratic, and periodical elections[25] and to adopt laws and measures ensuring the enjoyment of the right. Thus, it may be concluded due to the nature of the obligation outlined in Article 25, that is, the presence of the positive obligation of the state to ensure the enjoyment of certain rights, the breach of human rights may exist in the situation of a legal void.

Upon the examination of the established backlog of cases, the ECtHR found a violation based on Article 1 of Protocol no. 12, a provision which extends the scope of the prohibition on discrimination in the fulfillment of the rights set forth by the Convention to include any right "set forth by the law". The prohibition of discrimination in this regard is therefore not limited only to the rights contained in the Convention but represents a general obligation to ensure that rights set out by the state's laws are enjoyed on a non-discriminatory basis.[26]

However, a substantive problem occurs if the wording "set forth by the law" is read narrowly, because not every discriminatory measure or action is "set forth by the law". It can be either the case of a discriminatory practice which is not overtly stated (as in the case of indirect discrimination) or when a discriminatory provision may not exist at all as a positive norm. Such absence of provision (legal void) may produce discriminatory effects, as was a situation in the Case of Baralija.

Gazette of B&H no. 46/04.

24 *See*: International Covenant on Civil and Political Rights 1966.

25 Xenos, D. (2012), pp. 16.

26 *See* Baralija v. Bosnia and Herzegovina, Case no. 30100/18, Judgment 29 October 2019.

To overcome the narrow interpretation of the wording "set forth by the law", one must read it in conjunction with the Explanatory Report to Protocol No. 12, which states in Paragraph 22 that the scope of protection of Article 1 of the Protocol No. 12 concerns four categories of cases, in particular...

... where a person is discriminated against:

1) In the enjoyment of any right specifically granted to an individual under national law;

2) In the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

3) By a public authority in the exercise of discretionary power (for example, granting certain subsidies);

4) By any other act or omission by a public authority...[27]

Therefore, when interpreting the facts of the case, in order to determine whether the alleged discrimination falls within one of these four categories, the apparent narrow constraints of the wording "set forth by the law" must be interpreted by the means of wording found in the Explanatory Report. Following the Explanatory Report, it becomes possible to interpret that the wording "...act or omission by a public authority ..."provides for the protection of discriminatory effect produced by omissions of the public authority (i.e. legislative body) in the case of existence of a legal void.

Further, differing from the Sejdic and Finci, Pilav, Zornic and Pudaric cases, in the Baralija case, the primary discriminatory basis is not some characteristic which is innate or inherent to the person claiming to be discriminated against, such as racial or ethnic background, or other feature that makes one group inherently distinguishable from other groups. This case follows the line of decisions giving the wide interpretation and the scope of the basis on which discriminatory treatment may arise. The discriminatory treatment, in this case, is based primarily on residence, which is not an inhe-

27 COE (2000), Explanatory Report to Protocol no. 12, retrieved from: https://rm.coe.int/09000016800cce48.

rent characteristic *per se*; however, as previously established by the ECtHR in the cases such as Carson, the ECtHR holds that the "...place of residence constitutes an aspect of personal status" and is considered to be within the ambition the prohibition of discrimination based on "other status."[28] The applicant, in this case, is discriminated against, compared to other citizens of Bosnia and Herzegovina who are enjoying the protected rights and have had the opportunity to partake in local elections in the previous two cycles.

Not a dissimilar situation was considered in the case of Pilav, where the appellant, a Bosniak with a place of residence in the entity of the Republic of Srpska, was barred from running for the position of Bosniak member of the state presidency. Although the main basis of discrimination, in that case, was on the grounds of the ethnic background of the applicant, the response from the State was that there was no discrimination, since the appellant could have changed his place of residence and run for that position as a candidate from the entity of Federation of Bosnia and Herzegovina.

Surely, one could argue that the appellant could move and partake in local elections in another city since the place of residence is not an inherent and unchangeable personal characteristic. However, such reasoning was dismissed in the case of Pilav, where the ECtHR concluded that the appellant has an established life in his place of residence and is under no obligation to forgo it to enjoy certain rights, such as the right to run for office.[29]

4. Specific Traits of the Cases Related to Bosnia and Herzegovina: The Issues of Rule of law, Non-Implementation of Judgements and Political Stalemate

The cases emanating from Bosnia and Herzegovina have certain specific characteristics holding significant legal, as well as political implications for the country. Looking into the cases against Bosnia and Herzegovina in front of the ECtHR related to the issues of

28 *See* Carson and Others v. United Kingdom (GC), Case no. 42184/05, Judgment 16 March 2010.

29 *See* Pilav v. Bosnia and Herzegovina, Case no. 41939/07, Judgment 9 June 2016.

discrimination, one cannot overlook some specific issues concerning the rule of law, non-implementation of judgments and consequences of political stalemates. These issues are very much noted and intertwined in the wording of the judgments, which makes them impossible to ignore.

The task of the full respect of human rights of every citizen should be a paramount objective of any democratic society based on the rule of law. However, it has proven itself to be difficult even in societies with long-standing democratic traditions, robust institutions, laws and procedures guaranteeing the rule of law. Further difficulties are faced in the societies undergoing transition, or healing from devastating conflicts which tore the very fabric of society. In the era of peace, at least on the European soil, which followed the conclusion of the Second World War, few conflicts were so devastating to cause such a rupture in the society and escalate mistrust between its ethnic groups as the 1992-1995 war in Bosnia and Herzegovina.

The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), which ended the armed conflict, defined Bosnia and Herzegovina as a state consisting of two entities: Republic of Srpska and Federation of Bosnia and Herzegovina, the latter one being further divided into ten cantons. Besides the two entities, there is a separate administrative unit under State sovereignty, the Brčko District. The Dayton system tries to find a way out of inter-ethnic mistrust and creates a delicate power-sharing mechanism.[30]

The constitutional order of Bosnia and Herzegovina, as well as the very nature of its society and its political structure, is a unique paradigm. Theoretically, it has been described as an asymmetrical consociation society.[31] However, it may be argued that the society of Bosnia and Herzegovina, as well as its constitutional order, may not be defined in terms related to the pure forms of consociational or other models, but instead needs its own model, one which is retaining the protection of the "constituent" peoples as well as protection of rights of all of its citizens (including the "Others"). The implementation of such a model may represent a precondition for the stabili-

30 C. Hartzell and M. Hoddie (2003), pp. 319.
31 M. Kasapović (2005), pp. 77.

zation of Bosnia and Herzegovina's society.[32]

The delicate compromise of the Dayton Peace Agreement is most visible in the country's election system. The election system of Bosnia and Herzegovina is rather complex and as such, was subject to a lot of scrutiny by the European Court of Human Rights. The constitutional stalemate resulted in discriminatory situations, and the ECtHR was called upon in numerous cases to determine the possible solutions.[33]

The discriminatory nature of Bosnia and Herzegovina's election system is well documented by the case law of ECtHR[34] in the cases like Sejdic and Finci[35]; Pilav; Zornic[36], Baralija and, more recently, Pudaric. It may be said that the issue of the discriminatory nature of Bosnia and Herzegovina's election rules is systemic in its nature. An interesting fact is that the judgements have found discrimination to exist on multiple grounds, most importantly, on the grounds of ethnicity and, more recently, on the grounds of place of residence.

One of the aspects of the constitutional setup of Bosnia and Herzegovina is the provision on direct application of certain human rights instruments, including the European Convention on Human Rights. Such provision has been seen as one of the instruments in rebuilding the country's legal system and the rule of law. Consequently, the jurisprudence of the ECtHR is bound to follow the special status of the Convention in interpretation and application of the Convention provisions and principles in Bosnia and Herzegovina.[37] Such position holds a potential that may be used in the strengthening of the rule of law.[38]

In the reasoning of the judgment in the Baralija case, the ECtHR concludes, in paragraph 62, that the core issue, in this case, is the failure of the State to implement a final and binding decision adopted by the Constitutional Court of B&H. Deliberating on that matter, the

32 Dž. Omerdić (2016), pp. 69.
33 Dž. Omerdić and H. Halilović (2020), pp. 223.
34 M. Mijić, (2011), pp. 13.
35 *See* Sejdic and Finci v. Bosnia and Herzegovina (GC), Case no. 2799/06 and 34836/06, Judgment 22 December 2009.
36 *See* Zornić v. Bosnia and Herzegovina, Case no. 3681/06, Judgment 15 July 2014.
37 A. Caligiuri and N. Napoletano (2010), pp. 127.
38 M. A. Shah (2006), pp. 438.

ECtHR notes that such practice *"...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..."*.[39] The principle of rule of law is one of the core principles invoked in the Preamble of the Convention.

Generally, the notion of the rule of law, in general, may be described as a principle whereby all the members of the society are subject to publicly disclosed laws and procedures which are equally enforced.[40] Thus, as a matter of principle, a final and binding decision of the Constitutional Court is to be implemented, primarily by those specifically tasked to do so by the decision itself, namely the legislative bodies. Anything falling short of that leads to the erosion of the principle within a legal system. Further, it leads to the failure of fulfillment of the obligation set out by the international law which the State undertook to obey by a manner of joining the Convention, as the ECtHR has concluded.[41]

The complexity of the issue and the difficulty in reaching a solution that would satisfy the once warring communities led to the non-implementation of the Decision adopted by the Constitutional Court of Bosnia and Herzegovina. Referring to it, the ECtHR recalled some of the positions that have been outlined in the response by Bosnia and Herzegovina, further reiterating the stance previously taken in the Sejdic and Finci case. ECtHR held that certain discriminatory aspects of the Constitution need to be amended, further accepting the fact that there is no obligation on the part of Bosnia and Herzegovina to remove all the power-sharing mechanisms and install a simple majority rule. The ECtHR even examined the justifications set out by the Constitutional Court of B&H in the original appeal to the Sejdic and Finci case stating that the overarching principle and the need to maintain peace and dialogue between the communities allows for certain inconsistencies with the Convention standards, pointing that a flawed solution is better than none. One would be compelled to agree with the strong wording of the dissenting opinion to the judgment in the Sejdic and Finci case held by Judge Bonello

39 See Baralija v. Bosnia and Herzegovina, Case no. 30100/18, Judgment 29 October 2019.

40 L.G. Loucades, (2007) pp. 35.

41 Dž. Omerdić and H. Halilović, (2020), pp. 234.

in which he states that the ECtHR is in danger of removing the "Dayton formula", which seems to give some results, and replacing it with Strasbourg "non-formula,"[42] thus compromising what has been achieved so far in the peace-building process.

The ECtHR, however, even when not fully acceptant, has approached these arguments with a certain degree of understanding and has provided in the very reasoning of the Judgment to the Sejdic and Finci Case certain formulas put forward by the Venice Commission[43] which would remove, or at least reduce, the discriminatory effects of the relevant provisions, while retaining the power-sharing checks and balances.

Again, in the Baralija case, the ECtHR examined justification set out by the State purporting to explain the lack of implementation of the Constitutional Court's decision, as the search for and a need for establishment of a "viable and sustainable power-sharing mechanism", ensuring that none of the ethnicities would receive dominant position within the City of Mostar, especially if that aim is set against the history of the past conflict in that area. The ECtHR nevertheless concluded in paragraph 58 of the Judgment that, even if the complexities of the issues and the difficulties in reaching the political agreement are amounting to the delay in the implementation, such circumstances cannot be taken as sufficient, objective and reasonable justification for the violation of human rights, especially taking into account the fact that such situation has already lasted for a long time.[44]

Although the argument is not expressly stated by the Bosnia and Herzegovina in response to the application in the application in Baralija case, the logic of ECtHR's reasoning is visible and resonating to the Sejdic and Finci reasoning. Even when the discriminatory provisions in question were adopted by the High Representative, the fact that the authorities of Bosnia and Herzegovina have at their disposal a legislative mechanism to amend these provisions does not

42 *See* Sejdic and Finci v. Bosnia and Herzegovina (GC), Case no. 2799/06 and 34836/06, Judgment 22 December 2009, Separate opinion by Judge Bonello.

43 Supra, note 42.

44 *See* Baralija v. Bosnia and Herzegovina, Case no. 30100/18, Judgment 29 October 2019.

absolve the State from the responsibility for the maintenance of such discriminatory provisions.[45]

As stated, at the heart of the issue lays a problem of non-compliance with the final and binding decision adopted by the Constitutional Court of Bosnia and Herzegovina, which is described by the ECtHR as a situation detrimental to the principle of rule of law. Such non-compliance created a legal void, that has amounted to a situation where applicant's rights to free, democratic and periodical elections are violated resulting in discrimination against a category of people based on their place of residence (that is, residents of Mostar). Bosnia and Herzegovina's complex legal system and particular difficulty in reaching a compromise that would allow for the local elections in Mostar to be held is not accepted by ECtHR as a valid justification. The circumstance that the constitutional setup of Bosnia and Herzegovina has a complex origin and the fact that the Mostar City Statute and applicable election rules are imposed by the High Representative do not change the fact that there are mechanisms for the legal and democratic change of those rules. Hence the responsibility for the maintenance of that critical situation remains on the authorities of Bosnia and Herzegovina.

Due to non-compliance with the decision adopted by the Constitutional Court of Bosnia and Herzegovina, the applicant was absolved from the obligation of exhaustion of remedies in the national law, due to their ineffectiveness in this particular case.[46] The ECtHR found a breach of the applicant's rights under article 1 of Protocol 12, finding general discrimination in the enjoyment of provisions of national law. The ECtHR ordered a six-month period in which the Parliamentary Assembly of Bosnia and Herzegovina is to adopt measures that would allow the local elections in Mostar to be held.

Finally, the ECtHR interpreted that under the established laws and practices, the Constitutional Court of Bosnia and Herzegovina has the power to adopt temporary arrangements, thus elevating the position of the Constitutional Court of B&H and hinting at the possibility for it to act as an active legislator, capable of adopting solutions, albeit temporary, which would replace the invalidated

45 *See* Sejdic and Finci v. Bosnia and Herzegovina (GC), Case no. 2799/06 and 34836/06, Judgment 22 December 2009.

46 D. Shelton, (2006), pp. 89.

provisions, instead of being only seen as a "negative legislator" that is depriving provisions which are inconsistent with the Constitution of their legal validity.[47]

Implementation of the judgment has proven itself to be a significant challenge to the authorities in Bosnia and Herzegovina.[48]

Faced with such a situation, political leaders, under scrutiny and guidance of the representatives of the international community found a solution,[49] which was later adopted through the Parliamentary Assembly of Bosnia and Herzegovina,[50] filling the legal void by enacting, apparently, non-discriminatory amendments to the Election Law B&H, thus enabling the elections in Mostar to be held in the 2020 local elections cycle.[51] This could be viewed as a positive sign and one of the potential influences of the ECtHR judgments in the rebuilding of rule of law; however, it has to be noted that the solution to Sejdic and Finci, and connected to it, the Pilav, Pudaric and Zornic cases, is proven to be more difficult.

It is not uncommon in comparative legal and political practice that the highest courts within the country, as well as courts and other judicial or non-judicial bodies when deliberating on certain important issues, can leave a profound mark on the political system and the society as well. Moreover, supreme courts and constitutional courts in numerous countries do have a history of intervening in their respective legal systems. Supreme courts and international courts, especially those adjudicating on human rights, including the

47 K. Trnka, (2010), pp. 117.

48 Dž. merdić and H. lilović, (2020), pp. 219.

49 EU Delegation to Bosnia and Herzegovina (2020), Press release, 17 June 2020, Retrieved from: http://europa.ba/?p=69147, Accessed February 2021.

50 COE (2020), Press release, 9 July 2020, Retrieved from: https://www.coe.int/en/web/portal/-/mostar-congress-spokespersons-welcome-adoption-of-amendments-to-the-election-law-of-bosnia-and-herzegovina, Accessed Febru- ary 2021.C

51 COE (2020), Press release, 22 December 2020, Retrieved from: https://www.coe.int/en/web/congress/news-2020/-/asset_publisher/XLGtwSgAs7nz/content/-mostar-made-the-first-step-towards-a-return-to-democratic-normality-sa ys-congress-president, Accessed February 2021.

ECtHR, have previously found themselves under criticism for "judicial activism". In Bosnia and Herzegovina, however, the activity of the Constitutional Court of B&H as an active legislator is rather limited. The ECtHR hinted in the Baralija judgment that the Constitutional Court of B&H should step in and offer solutions. However, the country is facing a problem of a different nature. Instead of having a problem of "active judicial legislation", there is a problem of non-implementation of final and binding judgments.

The ECtHR is not keen on instructing countries how to solve political issues. However, in the judgment to the Sejdic-Finci case, the ECtHR, rather uncharacteristically, referred to the solutions offered by the Venice Commission as possible solutions for the political stalemate in finding the way out of the political deadlock related to election rules, discrimination and functioning of the three-person presidency of Bosnia and Herzegovina. The political conflicts and stalemates in finding the solutions which would implement the decisions of both the Constitutional Court of Bosnia and Herzegovina and the ECtHR are likely to continue and rise. Many of the proposed solutions, including the aforementioned one offered by the Venice Commission, have been rejected. The global political situation, as well as the relations within the region of Western Balkans and within Europe itself, is getting more complex. Already strained relations between the political representatives are worsened by the lack of any newly proposed solutions and by the regression into more incendiary rhetoric.

However, it is an opportunity for the Council of Europe and the ECtHR to have a significant influence. The Council of Europe mechanism of oversight of the compliance and implementation of the ECtHR judgments produces international political pressure and a constant reminder on the unfulfilled tasks. Backed with legal argumentation of the ECtHR judgment, the reminder alerts the public on the outstanding obligations and human rights issues.

Furthermore, the inclusion of the requirements on the respect of the rule of law and implementation of judgments and the conditionality embedded by the European Union within the legal instruments related to the accession process puts the topic of human rights in a more prominent spot. Although a separate legal and political structure from the Council of Europe, the European Union relies on

the fundamental principles found in the ECtHR. Further, it embeds the principles of the rule of law in the instruments such as Stabilization and Association Agreements concluded with the countries of Western Balkans.

To conclude, it is likely that the stalemate in finding solutions in the outstanding cases related to the rules of the election system of Bosnia and Herzegovina will not be ended soon. The political positions are drifting furthermore. However, the case of Baralija may show a positive example of how a judgment by the ECtHR, with its legal strength and clarity, coupled with the international pressure by the Council of Europe mechanisms and the conditionality applied by the European Union, may lead to positive developments.

5. Conclusion

The jurisprudence of ECtHR leaves a mark and points a way for national legislative and judicial bodies to develop their own human rights jurisprudence.[52] The Convention and the European Court of Human Rights in application and interpretation of the Convention have proven themselves to be of great importance, contributing to the search for a solution of legal and political stalemates.[53]

Legal implications of the judgments of the ECtHR, dealing with discriminatory aspects of the election system of Bosnia and Herzegovina on the legal order of the Bosnia and Herzegovina, have proven to be significant. The constitutional order in post-conflict societies such as Bosnia and Herzegovina has certain specific elements that reflect on the nature of such society and obstacles it strives to overcome.

The election system of Bosnia and Herzegovina, in its preoccupation with the position of the "constituent peoples" and check and balances which sought to ameliorate the ethnic mistrust, is repeatedly found to produce discriminatory effects to the "others", namely persons not declaring to belong to one of the "constituent peoples".[54] However, as stated, the election system produced a discrimina-

52 H. Keller and A. Stone-Sweet (2008), pp. 14.
53 S. Graziadei (2017), pp. 208.
54 L. Sadiković (2015), pp. 6.

tory stalemate resulting in the situation where even the members of the "constituent peoples" are discriminated against based on "other status", namely, their place of residence. Following the Judgment in the Case of Baralija and the interpretation of the ECtHR which has given the Constitutional Court of Bosnia and Herzegovina the possibility to enact interim arrangements, local leaders, under pressure and guidance from the representatives of the international community, found the solution to the Mostar elections which were held in 2020.

Unfortunately, the solution to other cases related to the election system of Bosnia and Herzegovina is still in waiting. Bosnia and Herzegovina has a characteristically complex constitutional order and discriminatory situations which resulted from its complex election system might have no comparable cases with elements of equal legal nature and societal structure.

However, the experience of the process which started by defining the discriminatory practice in the judgment of the ECtHR and went on to overcoming of such a situation through the democratic legislative process is a sign of the ECtHR's influence in strengthening the rule of law and overcoming political stalemates. It is a possible example in similar cases and a sign that international scrutiny applied by Council of Europe and the conditionality embedded in the accession agreements with the European Union can, in the end, give a way out of political deadlocks.

Stepping outside Bosnia and Herzegovina, the widening case law of the ECtHR concerning the notion of discrimination has brought some new important elements for its understanding and interpretation. The place of residence as grounds for discrimination based on "other status" has been reaffirmed in a way that reiterates the discrimination of residents within the State, not just of the nationals of the State having residence abroad, or to aspects related to criminal proceedings. The understanding of ECtHR gives way to broaden the notion of discrimination on the grounds of place of residence, making it firmly a part of the "other personal status", giving protection to the persons having different treatment by the same law within the borders of one respondent state.

The position held by the ECtHR that a legal void can produce discriminatory effects is helpful in the understanding of the notion of discrimination, especially in the cases which result from the non-im-

plementation of final and binding decisions of the country's highest court, which may be defined as a situation contrary to the principle of the rule of law.

The EctHR's condemnation of the State's inactivity in adopting necessary measures needed to fill a discriminatory situation produced by legal void and the Court's reaffirmation of the paramount importance of the rule of law is particularly needed in the societies undergoing transition. In Bosnia and Herzegovina, the political stalemate in finding solutions to the outstanding cases of discrimination is likely to continue; however, a seemingly positive precedent is set in the case of Mostar which can be used as an example going forward.

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DISKRIMINACIJA NA OSNOVU MJESTA PREBIVALIŠTA U RECENTNOJ SUDSKOJ PRAKSI EVROPSKOG SUDA ZA LJUDSKA PRAVA SA NAGLASKOM NA BOSNU I HERCEGOVINU

Dženeta Omerdić, vanr. profesor
Pravni fakultet Univerziteta u Tuzli
e-mail: dzeneta.omerdic@untz.ba

Harun Halilović, MA
Advokat iz Sarajeva
e-mail: halilovicharun@gmail.com

Sažetak:

Svojom recentnom praksom, Evropski sud za ljudska prava (ESLJP) prilikom tumačenja pojma diskriminacije, posebice opsega diskriminacije na temelju „drugog statusa", nudi važna „rješenja" neophodna za razumijevanje pravne prirode diskriminacije. Konkretnije, ESLJP nudi rješenja za razumijevanje opsega osnova diskriminacije navedenih pod "drugi status", polazeći prevashodno od mjesta stanovanja kao kriterija na temelju kojeg se diskriminiraju građani kao subjekti prava. Slučajevi diskriminacije koji je ESLJP utvrdio u postupcima protiv Bosne i Hercegovine prvenstveno se odnose na diskriminatornu prirodu izbornog sistema Bosne i Hercegovine, te se primarno fokusiraju na etničku (ne)pripadnost pojedinaca što je poslužilo kao glavna osnova za diskriminaciju. No, analizirajući pitanje diskriminacije, u BiH se zanemaruje mjesto prebivališta koje nerijetko predstavlja osnovu za diskriminatorno postupanje. Naime, u određenim slučajevima mjesto prebivališta predstavlja tzv. dopunsku osnovu za diskriminatorno postupanje i tada se konstatuje/identificira uz etničku pripadnost (na primjer: slučajevi Pilav, Zornić i Pudarić). Međutim, mjesto prebivališta predstavlja i samostalnu osnovu za diskriminatorno postupanje (na primjer: slučaj Baralija). Stavovi ESLJP-a izneseni u presudama u ovim predmetima nude određena tumačenja važna za izborni sistem, pravni i ustavni poredak Bosne i Hercegovine i prikazuju potencijalnu snagu i utjecaj koje presude ESLJP mogu imati u jačanju vladavine prava i prevladavanju političkih zastoja. Ukoliko se navedena pitanja analiziraju izvan bosanskohercegovačkog pravnog sistema, sudska praksa bi ujedno mogla ponuditi i neke nove uvide u (re)definiranju i (re)interpretaciji

pravnog pojma diskriminacije i zakonskog opsega zabrane diskriminacije na temelju mjesta prebivališta. Posebno mjesto u ovom radu odnosi se na analizu pravnih praznina i diskriminatornih učinaka koje one stvaraju na pravni sistem tužene države. Nadalje, analiziraju se i diskriminatorna postupanja prema licima ovisno o njihovim mjestima prebivališta u tuženoj državi, kao i posljedicama nastalih uslijed onemogućavanja uživanja garantovanih ljudskih prava i osnovnih sloboda.

Ključne riječi: *diskriminacija, mjesto prebivališta, vladavina prava, izborno pravo*