

The Sejdic and Finci Case: More Than Just a Human Rights Issue?

Written by Elyse Wakelin

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ELYSE WAKELIN, OCT 31 2012

The 31st August 2012 saw the deadline pass for the government of Bosnia and Herzegovina to comply with the ruling in the case of Sejdic and Finci v Bosnia and Herzegovina, regarding eligibility for official posts. The deadline was set in the Road Map to Europe on the 27th June 2012 (European Commission 2012a), which saw the Council of Europe encouraging Bosnia to make the changes for EU accession. The Council of Europe expressed its disappointment in a statement made by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland;

The Council of Europe and the European Commission note with great disappointment that the institutional and political leaders of Bosnia and Herzegovina missed the first timeline for implementing the Road Map and did not submit their joint proposal (European Commission, 2012b).

This is not the first time the Bosnian government have failed to meet deadlines set for constitutional amendments; November 30 2011 saw the deadline set by the European Court of Human Rights pass, whereas 12 March 2012 saw the end of the mandate of a parliamentary commission. It has been suggested changes have not been possible due to the need for unity among political leaders; President of SNSD, the Bosnian Serb party Milorad Dodik, stated "There are possible ways to solve the problem but we did not want a partial solution so we've decided to do it comprehensively," (Jukic 2012a). Despite claims that solutions are possible, the political parties, especially the central players in Bosnian politics including the Alliance of Independent Social Democrats (SNSD), the Party of Democratic Action (SDA) and the Croatian Democratic Union of Bosnia and Herzegovina (HDZ) have been unable to come to an agreement on how to make the necessary changes instead focusing on how best to keep hold of power.

The Sejdic and Finci ruling highlighted the human rights difficulties which are still present in Bosnia seventeen years after fighting ended. This paper seeks to fill a gap in current academic literature, analyzing whether the ruling is more than a human rights issue, looking at the wider economic and political implications of the failure to implement the court ruling. A consideration of the details of the case will provide a general understanding of the case and its immediate implications allowing for further consideration of the wider and long term consequences which Bosnia may face as a result of the failure to comply with the ruling. Furthermore, this paper seeks to consider the steps Bosnia is and could be taking towards implementation of the ruling.

The Case

The Sejdic and Finci case centres on anti-discrimination rights provided for in various international instruments. Central to this case is Protocol 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in Bosnia in April 2005. It states that 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground' (Article one, Protocol 12 European Convention for the Protection of Human Rights and Fundamental Freedoms). Further relevant provisions include that everyone has the right to equal access to public service in his country (Article 21, Universal Declaration of Human Rights) and the prohibition of discrimination based on characteristics such as race, national or social origin or association with a national minority (Article 14, European Convention on Human Rights).

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The case of *Sejdic and Finci v Bosnia and Herzegovina* arose from separate claims being brought to the European Court of Human Rights, where both parties claimed that the Bosnian constitution to be discriminatory on the base of race, religion and association with a national minority, with reference to a failure to comply with Protocol 12 of the ECHR. Whilst Sejdic, a Roma Bosnian was unable to stand as a candidate for the presidency, Finci a Jewish Bosnian was prevented from being a candidate for the House of Peoples of the parliamentary assembly. Both argued that their inability to stand for high office positions were a direct result of Articles IV and V of the Bosnian constitution (Bosnian Constitution 1995) which reserves these positions for the constituent peoples. The constituent peoples comprise of Bosnian Serbs, Bosnian Muslims and Bosnian Croats, the majority peoples when the Dayton Agreement was drafted in 1995. Those residing in Bosnia and Herzegovina who identified with different ethnic groups than the constituent peoples were classified as 'others', segregated from the majority population. Thus, as 'others', both were ineligible to stand for the positions they wished to run for. The Grand Chamber ruling in December 2009, found that Bosnia had violated Protocol No.12 and Article 14 of the convention due to the ethnic discrimination enshrined in its constitution (European Court of Human Rights, 2009). The court ruled that these discriminatory provisions lacked the necessary proportionality to make them justifiable, although did not rule on whether the exclusion of ethnic minorities to sit in High Office positions served a legitimate aim.

Following this ruling, the Council of Europe called for immediate implementation of the court's decision before the October 2010 elections to ensure that national minorities are able to stand for High Office positions (Council of Europe 2010). In an attempt to implement the ruling, the Bosnian government did adopt an action plan and form a working group consisting of the National Council of Ministers. Ultimately, the working group was unable to reach a consensus due to inadequacies in knowledge, time, resources and diverging political opinion on how best to implement the ruling. Furthermore, within the working group, no national minority representation raises questions of the ability of the working group to provide for the rights of 'others'. Whilst the Council of National minorities proposed amendments in May 2010 to eliminate ethnic discrimination, these have not been included in any current proposals to the Council of Europe. The government's failure to make any constitutional amendments resulted in the October 2010 elections being held with the provisions, restricting positions to constituent peoples.

Despite this, Bosnia was still required to report its progress in implementing the court's decision, to the Council of Europe, in May 2011; a document was sent to the Council of Europe, containing several proposed amendments, but these are yet to be pursued. The lack of any constitutional amendments can be linked to the political stalemate which has been exacerbated due to the election results. The election left Bosnia without a national government; even after the coalition government formed in January 2012 it was faced with numerous difficulties, culminating in its collapse on May 31, 2012. Without a national government, no constitutional amendments could pass, due to the requirement of amendments to be passed through both Bosnian parliamentary assemblies, prolonging the deadlock position.

It is possible to link any proposed constitutional amendments with the political parties' own interests. The Council of Europe hinted that 'faced with a number of disparate proposals, we regret that it appears that these issues are given a lower priority by Bosnia and Herzegovina's leaders than political rivalries' (European Commission, 2012). There appears to be mixed attitudes amongst political leaders in Bosnia at present towards constitutional change. Whilst the Croat parties including the HDZ 1990 have called for changes to the constitution which benefit the Bosnian Croats, leader of the SDA, Sulejman Tihic has suggested that "We should all focus on the Sejdic-Finci case and leave any issues concerning the equality of the three ethnic groups in various areas to some other time" (Jukic 2012b). At the same time some Bosnian Serb politicians have been calling for referendums on the position of the Republika Srpska within Bosnia. Thus, with the actions of politicians speaking louder than words in towards putting ethnic issues aside, along with little evidence to suggest a real desire to reach a solution, Bosnian politicians have yet to deal effectively with the issue of constitutional ethnic discrimination.

Implications of Failing to Meet the EU deadline for the Sejdic and Finci case

The principle consequence of the Bosnian Government failing to comply with the Sejdic and Finci deadline, is the Human Rights implications to Bosnian nationals, who are prevented by the Bosnian constitution from standing for High Office positions due to their 'others' status. Whilst the Human Rights violations which are occurring are of undoubted importance, it is the wider implications of failing to comply with the Court ruling and continuing to miss

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deadlines, which could have the greatest effect on Bosnia in the long term.

Bosnia and the International Community

The involvement of international actors in bringing an end to the war, which tore through Bosnia between 1992 and 1995, through the Dayton Agreement (DPA) has led to international influence remains prevalent in Bosnian politics. In particular, the DPA provided for the creation of the Office of High Representative (OHR) with the mandate of implementing the civil aspects of the agreement, a role which has been fulfilled exclusively by non-Bosnian nationals including Lord Ashdown. With the EU and USA playing key roles in both the negotiation and execution of the DPA, with annex four comprising of the Bosnian Constitution, these parties should be keen to see the removal of the ethnically discriminatory provisions which they are partly responsible for, given the importance they place on upholding human rights. However, since the European Court of Human Rights ruling, there has been a fall in international calls for political reform (Human Rights Watch 2012, p.21).

With Bosnia continuing to miss deadlines and not progressing with their journey to possible EU membership, there is a risk that international actors will lose interest in Bosnia, focusing their attention elsewhere. To this end, Chivvis highlights the fact that global attention has shifted to states including Afghanistan and Iraq despite the fact Bosnia is not stable (Chivvis 2010). Moreover, without international involvement, there is the risk that the constitution will continue to contain discriminatory provisions as the political parties continue to focus on party interests, rather than focus on implementing the ruling. This was evident in the recent attempts to reform the police system in Bosnia where the European Union Special representative (currently also acting as OHR) became involved to ensure the reforms occurred (Brljavac 2012); without international involvement, party politics would have prevented these reforms. International involvement remains imperative to Bosnian progress; the role of the EU to ensure reform cannot be underestimated. As a result, the possibility of distance forming due to Bosnia's inability to implement the ruling has the possibility consequences in the wider political sphere.

Economic Stability and Security

As highlighted above, Bosnia is putting itself in danger of alienation from the international community by failing to make the necessary changes to the constitution and missing deadlines. Since the DPA, the Bosnian economy has been dependent upon foreign aid. This is exemplified by the \$15 billion of foreign aid Bosnia has received from the USA alone since 1995 (US Department of State 2012). In recent years, the turbulent global economy has seen the annual aid flowing into Bosnia fall, contributing to Bosnia's shrinking economy (US Department of State 2012). At present, Bosnia faces further cuts to foreign aid as a result of alienation from the international community due to allegations of corruption and little political motivation for reform. Further cuts in foreign aid would lead to an economic downturn for the country, from which Bosnia may not be able to recover. Moreover, with the European Union already divided in the recent bailout packages for member states including Greece and Portugal, is the EU in a position to consider taking on another state, one with economical weakness, exemplified in unemployment rates estimated at 43.1%, a GDP of only \$8200 (CIA 2012) and poor property rights, especially, when said state, is not meeting the road map conditions it has been set?

At present, with Bosnia unable to meet the conditions of the court ruling, other more complex conditions, for the Road Map, seem impossible, which has broader implications for the Bosnian economy. The ability to export goods to neighboring states could be a saving grace for the economy, generating a much need income in lieu of dwindling aid. However, Bosnia is at 'risk being left behind by the rest of the Balkan region that is making progress toward European integration' (Brunwasser, 2011), with the region turning to Europe for their stability and prosperity. For example, with Croatia set to become an EU member in July 2013, the implications for Bosnia's economy could be profound, given the high volume of Bosnian exports to Croatia. At present exports between the two Balkan countries are regulated by the Central European Free Trade Agreement, an easier regime to comply with than the more stringent European Union standards. However, upon membership, Croatia will be expected to leave this behind, adopting the higher European standards on its imports.

This is set to weaken Bosnia's position as an exporting country losing its primary export destination unless quick and

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drastic changes are made to Bosnian exports and manufacturing process in order to comply with EU legislation. Duljko Hasic, an economic expert at the Foreign Trade Chamber has already advised that the volume of exports to Croatia fell in the first six months of 2012 (Jukic 2012c). As Croatia gets closer to EU membership, the exports which it is able to accept from Bosnia will begin to all but cease. Currently, minimal efforts are being made to bring production and manufacturing in line with EU legislation which would allow for continued trade relations. It has been highlighted, that 'Bosnia's development is still hostage to ethnic feuding over power and the past, leaving it languishing behind...in the queue to join the EU' (Robinson 2012). If Bosnia were to look beyond the ethnic divisions and comply with EU legislation, its ability to form trade relations would increase ten-fold, a failure to make these changes, in the long term, could be devastating to the Bosnian economy.

Progress Towards Change?

There are steps being made to reduce discrimination in aspects of everyday life in Bosnia. For example, there are changes currently being made in schools to remove the separate curriculums for the Bosnian Serb, Croat and Bosniak children to create a central curriculum to be followed by all students (Jukic, 2012d). Whilst this development does not directly correspond to the amendments needed to be made to the constitution as per the court ruling, it could be seen as baby steps towards removing the discriminatory provisions found in Bosnia, taking measures to reduce discrimination and segregation in the public sphere of education, allowing for further amendments to be made in time avoiding to the risk of too much too soon. However, it is questionable whether these steps show the level of commitment necessary, when such drastic change is needed?

Furthermore, at present, government and office positions are allocated on a quota basis between the constituent peoples as per the last population census which occurred before the war began in Bosnia in 1991. As a result, the allocations of positions are not representative of the current population of Bosnia. In February 2012, the coalition government announced that a census will be conducted in 2013. At present there are estimated to be seventeen different recognized minorities in Bosnia, all of whom are denied the right to stand for High Office positions due to constitutional discrimination. By having a better grasp of the population of Modern Bosnia, one can hope that the current quota allocation of positions will be shifted to be more representative of the current situation, to include an allocation for 'others' aiding in the necessary constitutional amendments which could open the door to Europe.

Conclusion

The Sejdic and Finci ruling confirmed that the Bosnian constitution contains discriminatory provisions, in breach of Human Rights. Whilst the implications of the discriminatory provisions on the national minorities are numerous and cause severe restrictions on the rights afforded to them in the ECHR, existing academic literature has not considered the wider implications of a continued failure to make the required constitutional changes required by the court ruling. This paper has sought fill this gap by outlining the wider impact that failure to comply with the ruling has upon Bosnia. The consequences of failing to make the constitutional changes are greater than the Human Rights violations which the European Court pinpointed. At present, Bosnia is putting itself at risk of alienation from Europe and the international community and with that, risking both international interest in the country and the support network which the country has come to rely heavily on in order to function. Furthermore, Bosnia faces a failing economy with high levels of unemployment and low GDP only set to weaken further with possible loses to foreign aid and exports.

Despite the missed deadline, Europe still urges Bosnia to "uphold their responsibilities and work together to implement the judgment of the Strasbourg Court (ECHR), fulfil the country's commitments to the Council of Europe and move the EU integration agenda forward" (European Commission, 2012a). Among the general population, there is support of Bosnia member ship of the EU. A recent poll of the Bosnian agency for European integration shows that eighty-eight percent of the population in favor of Bosnia as an EU member (e-business 2011). However, up to this point, "the promise of EU membership has not been 'sufficient instrument' for the Bosnian politicians to make them respect the European values, norms and rules and work on their implementation into domestic policies" (Brljavac 2012, p.5). Despite public support, the future of Bosnia as an EU member is only possible if political parties put ethnic feuds aside and find a solution to the court's ruling and jumpstart their journey to membership and future stability and prosperity.

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