

Diversity: Beyond Recognition in Bosnia and Refusal in France

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Abstract: *Diversity is a condition necessary for the building of a pluralist democratic society if it is perceived as a source of enrichment. But when its recognition proves to be partial and therefore excluding some categories of individuals from the participation in public life, diversity appears to be rather a threat than enrichment. The very opposite examples of Bosnia and Herzegovina on the one side and of France on the other side are chosen as illustration. In Bosnia and Herzegovina the constitutional recognition of the constituent peoples is limited to the three ethnic groups of Serbs, Croats and Bosniacs excluding the so-called 'Others' namely from the House of Peoples and the Presidency. In France, the traditional ignorance of diversity and the concept of universal citizenship have prevented the acknowledgment of minorities and regional or minority languages. The admitted diversity being limited, it is difficult for both countries to conceive diversity as enrichment and to accede to a true pluralist society. Bosnia's non-implementation of the ECtHR's judgment *Sejdić and Finci* as well as the continuous controversies about religious signs in France and the difficulty to enforce a real equality between men and women exemplify this statement.*

Keywords: *Ethnicity; pluralism; minority rights; equality; constituent peoples.*

I. Introduction

'A society in which diversity is not perceived as a threat but as a source of enrichment' – this is how the European Court of Human Rights (ECtHR) in the *Sejdić and Finci case*¹ formulates the aim in matters of democracy. It seems that still this goal is rather far from being reached.

Yet nowadays diversity is everywhere. Not only is it the characteristic of the European Integration but it is also prevailing within the states. Whatever might be the criterion – linguistic, religious, social, economic, cultural or ethnic –, no population proves to be homogeneous. Nevertheless or, conversely, for that reason, the constitutional regulations or their interpretation seem to conceive diversity more as a threat than as enrichment. The classic models are quite opposite in this respect as illustrated namely by *Joseph Marko*.² The German model of the 'nation state' recognizes

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¹ ECtHR 22. 12. 2009 (GC), 27996/06 and 34836/06 point 43.

² *Marko*, Ethnopolitics. The Challenge for Human and Minority Rights Protection, in *Corradetti* (ed), Philosophical Dimensions of Human Rights. Some Contemporary Views (2012) 265 (266 et seqq).

diversity, ethnic difference and cultural or national minorities whereas the French model of the 'state nation' relying on cultural indifference acknowledges only abstract citizens and no minorities. While the German model leads to 'institutional segregation and/or territorial separation'³ the French model aims at assimilation.

As history shows, both of these models have failed insomuch as they do not have succeeded to transform diversity from a threat to a source of enrichment. To the contrary, ethnic conflicts and divided societies have resulted from the ethnic differences in ex-Yugoslavia, namely in Bosnia and Herzegovina (BiH). The recognition of ethnic differences and the adoption of a power-sharing mechanism in the Dayton-Constitution not only prove to be insufficient but also discriminatory. And instead of assimilation the French denial of ethnic and cultural diversity has been pushed to introduce increasing derogations without being able to manage some hot social and/or ethnic crises. To put it in a nutshell, recognize or not diversity, that is not the question (II.). The question is rather what kind of diversity should be recognized and with which legal and/or political consequences (III.). This is what I would like to underline here by the opposite examples of BiH and France.

II. Recognition of diversity: that is not the question

As can be seen in BiH, the recognition of ethnic diversity does not overcome the divide between majority and minority since it does not include all citizens (A.). Paradoxically, the French example converges with this statement insofar as it admits some exceptions from the principle of the universality of citizens (B.).

A. The scope of ethnic diversity enshrined in the Bosnian Constitution

The Dayton Constitution, still in force, implicitly but clearly rejects the concepts of a single nation state or of minority rights in concluding the preamble by the following formula: 'Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows.'

The – completely fictive⁴ – constituent power mentioned in this provision are the three ethnic groups, the 'Others' being put into brackets in their quality as both constituent peoples and citizens. According to this provision, the Bosnian State is first of all composed by the constituent peoples and only secondarily by the citizens. Therefore the power sharing is limited to the three constituent peoples. The Constitution institutes the monopoly of the three ethnic groups for the Presidency and the House of Peoples. Furthermore, each one disposes of a veto power when it considers that its vital interest has been violated. The Bosnian Constitutional Court has been confronted with the consequences of ethnicity in numerous proceedings. The landmark ruling is in this regard the '*Constituent peoples*' case of 2000⁵ where *Joseph Marko* has been the judge rapporteur.

3 *Marko* in *Corradetti* 268.

4 *Maziou*, L'internationalisation du pouvoir constituant, RGDIP 2002, 549 (568).

5 CC, U 5/98, *Constituent peoples* – four partial decisions: 28/30 January, 18/19 February, 30 June/1 July and 18/19 August 2000. The decisions of the Constitutional Court of BiH are available at <http://www.ccbh.ba/eng/> (10. 6. 2015). See *Marko*, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance, European Diversity and Autonomy Papers 7/2004, available at <http://www.eurac.edu/edap> (10. 6. 2015).

Here, the Court had to decide what status the constituent peoples had within the two entities. The Court concluded that the entities were not to be equated with the territory of a particular constituent people, and that the three constituent peoples enjoyed equal collective rights in both entities.⁶ While the Constitutional Court certainly wished to balance ethnic and civic elements in this case, subsequent developments cast doubts on the success and the solidity of this jurisprudence. The principle of equality of the constituent peoples could not prevent the increasing ethnic homogenization of the entities.⁷ So the Court invalidated later on the municipal status of the city of Sarajevo for the reason that it conferred privileges, such as a guaranteed minimum representation, only to some and not to all constituent peoples.⁸ In other instances, the Court had to annul entity coats of arms, hymns and flags, which constitute important symbolizations of collective identity, because they did not represent all ethnic groups⁹ or to quash the ethnically colored names of towns and municipalities.¹⁰ Hence it can be observed that the ethnic element takes an increasing place in the constitutional order that is favored by the territorial organization, the electoral system, the ethnic quotas in central institutions and the veto-mechanism.

The specific interconnection of territoriality and ethnicity in BiH raises serious problems with regard to the right to stand for elections and democratic equality. The election rules concerning the House of Peoples and the Presidency imply that those who do not identify themselves as a member of one constituent people cannot be elected at all to either organ. These arrangements have been contested several times before the Constitutional Court¹¹ and eventually before the ECtHR. The Constitutional Court rejected the complaints essentially for reasons of normative hierarchy. In the landmark *Sejdić and Finci* case handed down in 2009,¹² the Grand Chamber of the ECtHR ruled on an application by Bosnian citizens who identified themselves as members of the Jewish and Roma communities and were therefore totally excluded from the House of Peoples and the Presidency. The Court held that the exclusion of non-constituent peoples amounted to a violation of the non-discrimination principle. It did not accept the argument that the restoration of peace still justified such specific power sharing more than a decade after the civil war ended. This underlines that the margin of appreciation, which the Court generally leaves to states in electoral matters, is limited when it comes to discrimination on ethnic grounds.

Although the ECtHR stated that the exclusion of the 'Others' and not the power sharing as such was called into question, BiH has not yet implemented this judgment until today. In France, the scope of recognized diversity is still more restricted since the principle is here the denial of diversity or the indifference of the latter.

6 *Maziau*, Le contrôle de constitutionnalité des Constitutions de Bosnie-Herzégovine, RFDC 2001, 195 (195).

7 For more details, see *Grewel/Riegner*, Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared, in *Bogdandy/Wolfrum* (eds), Max Planck Yearbook of United Nations Law (2011) 1 (17 et seqq).

8 CC 22. 4. 2005, U 4/05, *Statute of the city of Sarajevo*.

9 CC 31. 3. 2006 and 18. 11. 2006, U 4/04, *Flags, Coats of arms and anthems of the Entities as well on official holidays*.

10 CC 27. 2. 2004, U 44/01, *Names of towns*.

11 CC 28. 2. 2005, AP 35/03, *Elections to the House of people*, dissenting opinion judge *Grewel*; CC 31. 3. 2006, U 5/04, *Elections to the Presidency and the House of Peoples*; CC 26. 5. 2006, U 13/05, *Electoral Law*, dissenting opinions of judges *Feldmann*, *Palavric* and *Grewel*.

12 See above footnote 1.

B. The slow emergence of diversity in the French Constitution

Initially, that is from the revolution on, the French Constitution relied on the direct and vertical relation between the 'Republic' and the citizens. Orders, privileges and corporations had been suppressed; the decentralized entities and the citizens were ordered to be equal and were governed by a uniform legal regime. Still nowadays the Republic is qualified as 'indivisible' that is considered to be opposite to any normative power at the local level.

The Constitutional Council has been inspired several times by the republican indivisibility. The most famous example is the *Corsican people's case*¹³ where the Council derived from the indivisibility of the Republic the indivisibility of the French people. As no other people can exist within the French one, it becomes also impossible to recognize national or cultural minorities. Therefore there is no question to ratify the European framework agreement on minorities.

Likewise the French language as official language hinders the use of regional or minority languages in the citizens' relations with administrative or judicial offices. This has been stated in the *Polynesia case*,¹⁴ and has prevented the French ratification of the European Charter for Regional and Minority Languages. In this latter application¹⁵ the Constitutional Council having declared the unconstitutionality of the Charter, the government refused to modify the Constitution even though, in 2008, a new Art 75 (1) had been added declaring the regional languages part of the French cultural heritage. This provision might have served to overcome the objections of the Constitutional Court but as the political power still was opposed to the ratification, this did not happen.

In his campaign for the presidential elections in 2012, *François Hollande* promised eventually the ratification. Rather than relying on Art 75 (1) of the Constitution,¹⁶ he aimed at the adoption of a constitutional amendment.¹⁷ The corresponding draft was voted in the National Assembly in January 2014 and since this moment it is waiting for its reading in the Senate. In any case, the present political majority would be unable to gather the 2/3s majority required for constitutional amendments. This way, it is unfortunately likely that the Charter will fall again into its long sleep of 'Sleeping Beauty.'

Although the Constitutional judge is strongly supervising the respect of these traditional principles, there have been increasing statutes derogating more or less from this doctrine, especially concerning the decentralized entities. Thus the three biggest cities, Paris, Lyon and Marseille, are no more governed by the same regime as the other municipalities but have a special status. The Constitution has partly acknowledged this evolution by evoking the overseas populations within the French people (Art 72 (3)), the possibility for territories to experiment specific laws (Art 72 (4) and Art 74 (1)) or by defining a special electoral body for the vote on the independence of New Caledonia (Art 77).

13 CC 9. 5. 1991, 91-290 DC, *Peuple corse*. The decisions of the Conseil constitutionnel in French and in English are available at <http://www.conseil-constitutionnel.fr> (10. 6. 2015).

14 CC 9. 4. 1996, 96-973 DC, *Autonomie de la Polynésie française*.

15 CC 15. 6. 1999, 99-412 DC, *Charte des langues régionales et minoritaires*.

16 Against this legal basis: CC 20. 5. 2011, 2011-130 QPC: Art 75 (1) does not institute a right or a liberty the violation thereof could be declared in a preliminary referral of constitutionality before the CC.

17 Report before the National Assembly by *Urvoas*, No 1703, 14. 1. 2014.

But what is legally and politically more significant is the will to improve a real equality between men and women since in this regard the constitutional legislator has chosen the mean of positive discrimination, which is diametrically opposed to the abstract concept of citizens. So the new para 2 of Art 1 reads: 'Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.'

Concerning professional and social positions this provision, for the time being, proves to be issued from wishful-thinking but in electoral matters, the so-called 'parity' has been confirmed and consolidated in Art 4: 'Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy. They shall contribute to the implementation of the principle set out in the second paragraph of Art 1 as provided for by statute.'

While the mentioned statutes have instituted the principle of parity lists for the elections, the sanction of the non-observance is only financial so that most parties continue to present more male than female candidates. But for the recent 'département' elections, the scrutiny has been changed. Henceforth it is foreseen that the electors vote in favor of a couple of candidates, one women and one man. Thus many women are part now of these assemblies (about 1.000). However, it remains significant that among all these women, only eight have been elected president of their assembly.¹⁸

In conclusion it can be observed that in both countries the diversity is admitted and organized almost in the public and political sphere. In Bosnia the diversity is extended to a true power sharing and forms a fundamental principle of government whereas in France it is limited to elections, professional and social life forming an important exception to the principle of cultural/ethnic indifference. Consequently the political diversity is not complete; in Bosnia, it does not cover the 'Others', in France it concerns only a little segment of political life. And what is lacking in both countries is the organization and the implementation of a real pluralism.

III. The kind of diversity and its effectivity: that is the question

As formulated by the ECtHR, diversity should become a source of enrichment. This is possible only when diversity is not limited to the political sphere and when it is not locked up in rigid structures. Yet, this is precisely the difficulty in Bosnia first of all, in France to a lower degree. I will illustrate this idea by the persistent Bosnian difficulties to implement the *Sejdić and Finci* judgment (A.) and the problems raised in France by what the ECtHR calls the 'living together' (B.).

A. The Bosnian difficulties with the *Sejdić and Finci* judgment's implementation

The ECtHR's judgment has been delivered in 2009. Before the Bosnian parliamentary elections in 2010, the European institutions – Council of Europe as well as EU – threatened Bosnia not to recognize these elections if there was no implementation of the judgment. Despite all resolutions and recommendations, even the general elections of 2014 have taken place without any modification.

¹⁸ See Liste-des-présidents-des-conseils-departementaux-elus (10. 6. 2015).

Namely, there has been no constitutional amendment modifying the composition of the Presidency or of the House of Peoples. Likewise in spite of the manifold opinions given by the Venice commission in this sense, the electoral law has not been changed. In other words, the political and democratically legitimated authorities have refused to draw the practical consequences from the ECtHR case law.¹⁹

As to the Constitutional Court, it considered that it was up to the political power to make the necessary decisions. Yet several applications more or less linked to the discrimination problematic were pending before the Court. There was in particular a request alleging the unconstitutionality of the entities' constitutions relating to the elections of the Presidents and vice-presidents in the entities.²⁰ The allegations based on Art 1 Protocol 12 and Art 3 Protocol 1 in combination with Art 14 ECHR, were quasi identical to the *Sejdić and Finci* case with the only difference that they concerned the entities' constitutions and not the central one.

While the request had been filed in November 2012 – which is already far from the ECtHR decision – the Constitutional Court resigned itself only very recently at the end of March 2015, i.e. more than two years later, to decide on this case. In this judgment it admitted that the exclusion of the 'Others' amounted to an unjustified discrimination. Nevertheless, the Court's reluctance to intervene can be seen in the fact that it does not impose any delay to the Parliaments for the implementation of its judgment: The hope is still that there would be a constitutional amendment obliging the entities in their turn.

If it seems hence to be clear that the constituent peoples' monopoly in the public decision making is at least contrary to the Convention, probably even to the Constitution (Art II (4) and Art X (2)), it is not sure that this idea would be followed in similar cases. In this regard, it will be very interesting to see how the Constitutional Court will decide in the pending case concerning the law implementing the stabilization agreement with the EU. The said law creates an independent State-aid Council where each constituent people but not the 'Others' must have at least one representative. A valid decision cannot be reached without the consent of at least one constituent people and with a majority of 5 out of 6 members.

Likewise it is not evident that the Court would change its Rules of Court where the ethnic quotas are present either in the appointment procedure either in the regulations concerning the election of the Court's President and Vice-Presidents. But even in societies that are not divided, such as France, diversity is source of conflict.

B. French problems with the 'living together'

It is true that the principle of assimilation finds a concrete legal transposition in the legislation concerning the French nationality. Most children issued from the second generation of immigration obtain the French nationality. But the discriminations are not so much based on nationality than rather on color or home address – the famous suburbs of big cities: they are racial, social and economic. The periodical revolts in these suburbs are the sad testimony thereof. The other

19 For a more general overview, see Marko, Defective democracy in a failed state? Bridging constitutional design, politics and ethnic division in Bosnia-Herzegovina, in Ghai/Woodman (eds), Practising Self-Government. A Comparative Study of Autonomous Regions (2013) 281 (281 et seqq).

20 CC, U 14/12, *Discrimination in the Entities' Constitutions*.

face of this problem is the temptation to reduce immigration. Yet in this respect most of the EU member states show similar reactions today. What is more specific in France and closely linked to the idea of the Republic, this time in the sense of the secular Republic, is the number and the importance of controversies on religious signs in the public space.

The law on separation between the churches and the State of 1905 brought to a temporary end an old conflict that existed already during the French revolution. While this law marked the victory of the proponents of secularity, almost immediately after its adoption, the secularity supporters confronted each other on the interpretation of this principle: was tolerance the message of the law or the fight against clericalism? The latter answer was probably the most common reaction at the beginning whereas, after World War II, the former began to prevail.

These ancient controversies awoke up again when, following the decolonization and then under economic or political pressure, the immigration increased so much that Islam were becoming the second religion in France. This is not very surprising when considering that in the French republican model diversity is denied and assimilation required. In other words, the problem with foreign religions that nearly all European states have to face presently receives in France a specific dimension because of its convergence with truly strong traditions. It explains the reluctance to tolerate these differences and the tendency to make a radical separation between public and private life, even if this could seem impossible to do.

Thus the Islamic headscarf occupied the political and legal fore scene for many years, approximately from the 1970s to 2004 when the law prohibiting visible religious signs in primary and secondary schools had been adopted. But this was just an armistice since now there are more and more people wishing the prohibition of the headscarf at the University. After the headscarf, the French discussion turned around the full-face veil. One of the questions raised was to know whether this kind of veil should be forbidden as religious sign or for reasons of public order, more precisely for identification matters. The government opted in favor of the latter solution that is enshrined in the law of 11 October 2010. In July 2014, the ECtHR²¹ decided that this prohibition was compatible with the Convention. The government had invoked the public order, the principle of human dignity and the necessities of the 'living together.' Curiously, since it is not included in the Convention, the ECtHR based its judgment on this latter ground. This way, the margin of appreciation of the state parties, when it comes to such society questions, seems to be largely increased. Even though the legal basis of this decision appears fragile, the preservation of a vague 'living together' was perhaps more important for the Grand chamber than to put forward in this case a strict obligation of tolerance.

IV. Concluding remarks

How to conclude if not to underline that both constitutions contain elements pleading in favor of a more pluralist interpretation of diversity? Indeed, the Preamble of the Bosnian Constitution declares to be 'Dedicated to peace, justice, tolerance, and reconciliation,' in its § 2 and 'Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,' in its § 3.

21 ECtHR 1. 7. 2014 (GC), 43835/11, S.A.S/France.

These provisions introduce some flexible elements counterbalancing the rigidity of the ethnic structures. The Constitutional Court in the *Constituent peoples*' case considered them and tried to take them into account. Therefore the principle of equality of the constituent peoples is presented as a compromise formula that has to be balanced with the democratic multi-ethnic state, individual equality and political majority. The constitutional rules and principles based on ethnic affiliation must be viewed as an exception explicitly authorized by the Constitution. This nuanced analysis has then regressed in favor of a stronger preference given to the ethnic structures.

In France as well the new Art 4 proclaims in its § 3 that 'Statutes guarantee the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the Nation.' While the Constitutional Council had already qualified the pluralism of opinions as one of the constitutional objectives,²² this is the first time that the concept of pluralism is explicitly mentioned in the Constitution.

Even though it is certainly important to proclaim solemnly this principle because constitutional texts have to be taken seriously, the effectiveness of the latter does not seem to be completely realized when compared to its definition by the ECtHR in the *Gorzelik v. Poland* case:²³

'While in the context of Art 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.'

The most characteristic element of a pluralist society is indeed the possibility given to everybody to play manifold different roles in his/her public, professional or private life: To accede freely to and to withdraw from various groups, associations, trade unions, parties, churches, etc. These roles or identities are neither necessarily same nor even similar or coherent and they are likely to evolve in time. This is the precious ingredient of flexibility allowing for the establishment of a pluralist society. And this is the missing dimension of a society governed by fixed ethnic groups or rigid social structures.

22 CC 29. 7. 1986, 86-210 DC, *Régime de la presse*.

23 ECtHR 17. 2. 2004 (GC), 44158/98 point 92.