Commentary

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Continuing Discrimination with Judicial Means: Logical Acrobatics and Absurdities of the Second Instance Decision in the Case of "Two Schools under One Roof"

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The Continuity of a Temporary Solution

The concept and practice known under the name of "two schools under one roof," according to which in certain schools, pupils of different ethnicities attend classes formally within the same school, yet following different, national programs, using different classrooms, sometimes entering the school using different entrances or even different buildings in the process, is one of the paradoxes of the Bosnian-Herzegovinian (BiH) post-war society. Introduced as a temporary solution aimed at facilitating equal treatment for children of different ethnicities, in the regions in which it still survives, the concept has long grown out of the model for easier integration into open segregation, while at the same time, naturally, the greatest damage is suffered by the very children who go to such schools. Limited to perceiving only one, their own identity, discouraged or even prevented from knowing the other and different, that from the opposite end of the schoolyard, street or town, pupils from these schools grow up afraid of assimilation, which in the end leads to the development of individuals who are afraid of the world around them, instead of individuals who live in freedom and who prosper. Sixty years ago, in the famous judgment of *Brown v. Board of Education*, which abolished racially segregated education in the United States, US Chief Justice Earl Warren said: "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Already in 2003, the Framework Law on Primary and Secondary Education had foreseen the administrative merger of such schools. However, ten years into the law, the reform foreseen by this legislation has yet to happen. Meanwhile, this phenomenon has been criticized by various international instances, including the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, as well as the United Nations Committee on the Elimination of All Forms of Racial Discrimination. In 2009, the Committee, which is the body competent for the supervision of implementation of the UN Convention on the Elimination of All Forms of Racial Discrimination, praised the manner in which the segregated schools were abolished in the Brčko District, which was followed by the introduction of a uniform system of education for all children in the District. In September 2010, the Committee found that where it was still

continuing, the practice of "two schools under one roof" represents segregation in education which perpetuates non-integration, mistrust and fear of the "other," thus recommending that in order to comply with its international obligations, Bosnia and Herzegovina should abandon the segregated system of mono-ethnic schools and ensure that the same basic curriculum be taught to all children promoting tolerance among the different ethnic groups in the country and appreciating their specificities. Segregation of children in "two schools under one roof" is practiced to this day in 34 schools in the cantons of Central Bosnia, Herzegovina-Neretva and Zenica-Doboj.

The Changing Destiny of a Collective Claim

Since neither the international criticism, nor the obligations stemming from domestic legislation, failed to motivate competent authorities to finally proceed to abolish the practice of segregation, in February 2011, the Association of Citizens "Vaša prava," acting within the anti-discrimination program of the Open Society Fund Bosnia and Herzegovina, filed a collective claim against the Ministry of Education, Science and Sports of the Herzegovina-Neretva Canton, the Elementary School "Stolac" and the Elementary School "Čapljina," requesting from the court to determine that the practice of educating children of Bosniak and Croat ethnicity in the two defendant schools was discriminatory. In May 2012, the Municipal Court in Mostar, per judge Rabija Tanović, published the first instance judgment which found that by establishing classes based on the ethnic principle, the defendants discriminated against the pupils of the said schools. The Ministry was ordered to undertake necessary steps to organize uniform classes for all children and stop the discriminatory practice of segregating children at schools by 1 September 2012.

The reasoning of the judgment is clear, well-directed and unambiguous, so that in the end the arguments used don't leave any dilemma. The court asked all the necessary questions, and answered them to a satisfactory result, finally bringing the judgment to the conclusion that the defendant Ministry, as well as the defendant schools, were participants, or to be more precise, perpetrators of years' long discrimination against children, based on their ethnic origin. The Court found that discrimination in this case had lasted without interruptions since the introduction of the practice of "two schools under one roof" until the present day. The court also found that it had been undisputable that the defendants separated children exclusively based on their ethnic belonging. Since in such circumstances it was up to the defendants to provide justification for such differential treatment, and since the defendants had failed to provide a single valid evidence to justify such practice, the court found that they had acted discriminatorily.

Nevertheless, by its decision of 11 June 2013, the Cantonal Court in Mostar quashed the judgment and rejected the claim as being submitted after the time limit prescribed by law. This decision is, however, rather confusing, poorly reasoned, partly illegible, while based on a completely arbitrary application of legal standards in discrimination. Actually, the approach of "complicated is better" cannot be valid in law. One of the useful pieces of advice I have been given as a young lawyer (for which I think it must surely be applicable in the present case) was – if a twofold explanation can be given for an occurrence, always choose the simpler

one, as that one must be more correct. Any unnecessary complication is, in the majority of cases, a tactic to make up for one's own lack of competence or, even worse, a consequence of an attempt to cover up the real motivation behind one such complicated legal explanation. The first instance judgment of the Municipal Court in Mostar was a pleasure to read, as it is quite informative and, even though quite lengthy, much easier to understand than the much shorter decision of the Cantonal Court in which legal arguments are so complicated that in the end, it is only clear that the action was declared inadmissible by a final decision.

Before going into the reasons for which the claim should have been rejected as inadmissible, the Cantonal Court has in a short "manifesto" revealed the real background for their decision. As a matter of fact, the Cantonal Court believes that parents of children who attend segregated schools actually have the right to enroll their children into such schools, in a way making it known that, as far as they are concerned, "two schools under one roof" will be an accepted practice as long as there are parents who want so. Furthermore, the Court emphasizes that the association "Vaša prava" filed the action only on their own behalf, since their claim had no support among parents and pupils, and that the association cannot be a better protector of the rights of the children than their own parents. Not refraining from going even further in exposing the real reasons for the disputed decision, the Cantonal Court found that the problem of "two schools under one roof" is actually of a political nature, thus, all in the same spirit, finding that the claim was unclear and unenforceable, hence "falling outside of the scope of the action claim under the judicial competence, and has to be resolved on another (failing to specify on what, author's remark) level."

In this part, where it promotes what is known in theory as voluntary apartheid, and which is not operational and as such could be ignored in the context of the substance of the second instance decision, it is important to note hints which the Cantonal Court revealed for the future, should any future discrimination claim be able to overcome the insurmountable obstacle known as the "time limit" for judicial protection from discrimination.

First, the Cantonal Court in some ways implies that politics and rule of law don't go together, and that whatever may be subject to a political debate should not be deliberated by courts until the politics has its final say on the subject. Accordingly, following this logic, as long as the political structures finally implement the judgment of the European Court of Human Rights in the case of Sejdić and Finci vs. BiH, the Cantonal Court has no intention to find discrimination should an action come to them where it is claimed that "Others" are discriminated against in political participation. The judges of the Cantonal Court thus make themselves redundant, since – what use do we have from the judiciary when we have "other levels" of problem resolution.

Nevertheless, as if such an auto-goal of the judiciary was not a defeat in itself, what indeed is upsetting is the fundamental failure of understanding the concept of "interest of the child" and the obligation which the state – in this particular case represented through the Ministry of Education, Science and Sports of the Herzegovina-Neretva Canton, 34 schools which segregate children and, finally, through the Cantonal Court itself – has towards each child

under their jurisdiction. According to Article 3 of the Convention on the Rights of the Child, Bosnia and Herzegovina has an obligation to ensure the appropriate care for children even when their parents or legal guardians fail to do so. Unfortunately, the Cantonal Court considers the decision of parents to enroll their children into mono-ethnic schools a reasonable act of responsible parenthood. The Cantonal Court finds a practice that is classified as abuse by certain authors to be a legitimate parental concern. The Cantonal Court decides to protect, no matter at what the cost, an approach to education that the Council of Europe Commissioner for Human Rights and the UN Committee on the Elimination of Racial Discrimination find to be unacceptable. This is of particular concern when we know that students and teachers of segregated schools have often expressed the stance that students of different ethnicities should attend the same school in order use the educational process to get to know better the culture, language and tradition of all peoples who live in Bosnia and Herzegovina, also stating that the process itself should be developing the feeling of belonging to Bosnia and Herzegovina.

The Cantonal Court, thus, fails to comprehend that exposing children to segregated education is not an act of responsible parenting, or a sign of the state taking good care of its youngest. Quite the contrary.

Nonetheless, despite the above stated and very indicative excurse on voluntary apartheid, it is important to say that the court did not interfere with the merits of the case, meaning that the court did not establish whether or not there has been discrimination in the present case, since the claim was dismissed on procedural grounds. Thus, in the continuation of the text we shall focus on arguments offered by the court in that sense.

Key Problem: Time Limits for Protection from Discrimination

Unlike antidiscrimination legislation in the region, which does not foresee time limits for submitting claims for protection from discrimination, Bosnian-Herzegovinian Law on Prohibition from Discrimination sets a time limit, and admittedly, quite a short one: subjectively three months and objectively one year. Subjective time limit is the one calculated from the day of finding out about (in this case) discrimination. For example, a job vacancy has been published, one of the requirements being that, besides a degree in law, the candidate has to have green eyes. From the day I read the advertisement I have three months to file a claim against the employer, since my eyes are brown. The objective time limit is, on the other hand, related to the fact of the occurrence of discrimination – in this case, the day the vacancy was advertised. So, if I read the advertisement today in a two-year-old newspaper, the objective time limit expired a year ago.

This is how the time limits are observed when we are dealing with a one-time violation. However, the question is how to calculate time limits if the violation goes on for years, or even decades, as is the case with our “two schools under one roof”?

In the first instance proceedings, the Municipal Court had carefully observed the question of timeliness as it understood correctly that this issue could be of major importance in the

case. The practice of "two schools under one roof" was introduced yeas before, ten or (in the case of the Stolac school) twenty years before the judgment itself. Thus, should we accept the interpretation according to which discrimination was committed by the very act of establishment of a school, the time limit for antidiscrimination protection has long expired. Carefully examining all the facts, the first instance court initially reflected on the day when the schools in question were registered as such, i.e. the day they commenced with work, as well as the day of establishment of the claimant, as a possible moment in which the Association "Vaša prava" could have found out about discrimination. However, what is extremely important is that the court made a particular reference to the fact that, regardless of when the discrimination started or when the claimant found out about it, it is still ongoing, and children are continuously exposed to segregation in schools each time they enter the school using the entrance or time reserved for their ethnic group.

And this is what is crucial in this entire story, and what is crucial in the first instance judgment. The Municipal Court is taking a correct approach to discrimination, observing it as what is in the doctrine and case-law of the European Court of Human Rights known as a continuing situation. In brief, this doctrine means that when one's right is violated by a legislative act or an administrative practice, such a violation is continuous, and the time limits don't start running until the situation ends. For those reasons, as long as such a situation lasts, a request for protection is within the time limit, regardless of when it was filed. What is even more interesting is that the Municipal Court did not even have to resort to the case-law of the European Court for the simple reason that one sort of continuing situation is known in the domestic practice, or rather in the legal tradition of the former Yugoslavia. As a matter of fact, in observing the moment when the time limits start to run, the first instance court in the case of Two Schools under One Roof relied upon the case-law of the District Court in Novi Sad, which examined a similar situation in relation to calculating time limits in cases of permanent disturbance of possession. The situation is the following: Someone is occupying your land and is disturbing your possession for twenty years, and you are aware of it from day one. Does that mean that after twenty years you cannot file a claim? Of course not. The District Court in Novi Sad ruled on an important legal question in a case from 1969, while the first instance court in Mostar correctly translated this approach to discrimination in the case of Two Schools under One Roof. Coming to the conclusion that the defendants start discriminating against children when they are first enrolled in the first grade of elementary school, and discriminate against them again each September when they are enrolled in the next school year, and not only then, but every day during the school year, judge Tanović nicely stressed: "It would be completely incomprehensible and inacceptable to refuse the claimant's request due to the failure to meet time limits in a situation where the behavior of the defendants, for which the claimant submits to be discriminatory, is still ongoing and there is no indication that the defendants are considering to change such behavior." The same court and the same judge conclude in continuation that "the claim was filed in time and cannot become out of time as long as the discriminatory behavior repeats."

Accordingly, the claim was found to have been within the time limit, while judge Tanović made a decent analysis of international standards and an overview of instances where the

international human rights mechanisms, all in accordance with international conventions that were ratified by Bosnia and Herzegovina, and together with an appropriate reference to comparative case-law, found that the practice of "two schools under one roof" was discriminatory. In the process, the judge managed to expose the lack of elementary knowledge of the situation in the field by the very minister and directors of the defendant schools. So, it came to the fore that the Director of the Elementary School "Stolac" had not known if the students of the two schools used their lunch breaks at the same time, while the Minister of Education, Science, Culture and Sports of the Herzegovina-Neretva Canton had not been able to say how many elementary schools operated in the territory of the Čapljina Municipality, nor how many students were enrolled in the elementary schools in Stolac, as well as whether or not the classes in these schools were combined. The Director of the "Čapljina" Elementary School, nevertheless, tried to avoid replying to questions, even though "given the situation he should have known the answers to such questions." The Municipal Court finally, even if they wanted to, could not come to a different conclusion than the one expressed in the judgment.

Legal Acrobatics of the Second Instance Decision

Nonetheless, in the second instance proceedings, the Cantonal Court quite illustratively demonstrated that anything can be done if there's will to do so. In an excuse for a court decision, the Cantonal Court dissected the analysis of timeliness offered by the first instance court, and then mixed and obscured all the arguments which judge Tanović has so nicely and logically set, and added, here or there, an occasional attempt of a legal argument.

Namely, the Cantonal Court starts from the same premises as the Municipal Court before them – that time limits are preclusive (meaning that they are strictly set and cannot be extended), that there had been a number of moments from which the time limit might have been calculated and that there was the case-law of the District Court in Novi Sad. And this is where any similarity of legal arguments ends.

First and foremost, the Cantonal Court finds that the decision of the Municipal Court was contradictory since it first established that the claim could have been out of time, in order to finally conclude that this indeed was not the case. The Cantonal Court does not seem to understand that the first instance decision, for the purposes of the analysis, offered a couple of possible answers and then used arguments to come to a result where only one possible answer was correct and based in the case-law, while the other was not. Since the defendants put forward the argument of timeliness, the court simply offered as a possibility that a narrow interpretation of time limits might lead to a conclusion that the claim had been out of time. And then the first instance court reasoned why the law could not and must not be narrowly interpreted in this regard, concluding as described above. In order to prove a conclusion as wrong, the process of coming to such a conclusion should be exposed, while any inconsistencies should be pointed out. There is nothing contradictory in this approach unless, apparently, when it is observed by the Cantonal Court in Mostar.

Furthermore, the appellate court says that the case-law of the District Court in Novi Sad was not correctly interpreted in the first instance decision. The court in Novi Sad found

that "if the disturbance continues, time limits for filing claim start running from the first action that was found out by the claimant, and if the disturbance repeats, the time limits are calculated from the moment the claimant finds out about each new disturbance. Whether there has been continuation or repetition is a question of fact." According to the opinion of the Cantonal Court, if we talk about continuing discrimination – the time limits start running from the day of learning about discrimination, meaning from the day the schools in question became operational, or the latest in February 2009, when the Association "Vaša prava" was established, concluding that the time limit for the claim expired in May of the same year. If, however, there is repeated discrimination, the time limit starts running in September each year "if not even before, at the time of enrolment."

The first instance court tried to come to a conclusion that is undoubtedly logically and legally founded, thus observing what the European doctrine calls a continuing situation as a series of "repeated violations" in order to finally be able to consider that as long as such a situation continues, the time limits don't start running. On the other hand, it would appear that the second instance court decided that the first instance decision must be quashed even before they read the judgment and the appeals. However, once they were read, it became obvious that the judgment could be quashed only on formal grounds – since it was simply impossible to conclude in the merits that there had been no discrimination – the Cantonal Court resorted to complicating to cover for the irrationality of their decision. This is how, to begin with, they came to a conclusion that the findings of the Municipal Court were not correct, but from the inarticulate and confusing reasoning of the second instance decision nobody can be clear about when the time limit for filing claim in this particular case actually starts running.

To be honest, it is not at all clear whether the Cantonal Court finally decided on this key question of fact – whether the violation was repeated or continued, thus failing to decide whether in the given case there was a continuing situation. After finding that the reasoning of the first instance decision was contradictory and unintelligible, the second instance court finds, now contradictory and unintelligible itself, that even though the time limit for filing the claim expired three months after the claimant was established, meaning in May 2009, the discrimination nevertheless does not happen every day, but only on the 1st of September, when the new school year starts. Hence, as far as I understand the writings of the Cantonal Court, once the children start school in September, discrimination happens instantly and is immediately finished for that year although it lasts continuously until the year's end. However, the time limit for filing claim runs from the 1st of September, regardless of the fact that the discriminatory practice actually ends in June, with the end of the school year. It is possible however, says the Cantonal Court, that this situation actually does not start even on the 1st of September, but "earlier, at the time or enrolment," whenever this enrolment is taking place.

This is the part of the second instance decision in the case in which issues become extremely confusing, and it is very difficult to decipher what the Cantonal Court intended to say. It would appear that we might come to a conclusion that, should we ask the judges of the Cantonal Court in Mostar – in the context of comparative law – in the case of, for example, interdiction for people belonging to a different race to use certain spaces in public transport – if we take

that the time limits run from the day of learning about the violation, the time limits would start running on the day a claimant was born, and would run out when the individual turns three months. Or it might start running when a small African American asks his mother why he can't sit in the empty front part of the bus, but has to squeeze in the crowded back, since this would be the moment of learning about discrimination? Or, in the case of depriving women of their right to vote, again the time limits would start running at birth or perhaps when a young man born on the same day goes to register for elections, depending on what moment would be considered the one when a victim of discrimination really could or should have become aware of the differential treatment?

In both these examples, the victim of discrimination is exposed to a certain treatment for a lifetime, but the subjective time limits for protection, according to the interpretation of the Cantonal Court, start running exclusively from the day of learning about discrimination. Should we also take into consideration the objective time limit, in the above examples, any claim would be out of time after a person's first birthday, since the actual moment when the discrimination started, given the personal attribute which is grounds for discrimination – color of skin or gender – were known at birth, and should we go further in the application of the absurdity of the Cantonal Court to these examples, perhaps even earlier.

Besides, the question in this particular case is – is the enrolment done at a one-time basis, once for all nine years of elementary education or, technically speaking, pupils re-enroll each year for the next school year? Can it be, then, that discrimination is found in relation to only those pupils who were enrolled in first grade this very September? Does it mean, for example, that the European Court for Human Rights could not have issued the judgment in the case of Sejdić and Finci, except if the application to the Court had been lodged six months after the announcement of elections (as this is the time limit for submitting the application to the European Court) since these gentlemen were discriminated against only at the time when they could (or couldn't) have run for elections? Or perhaps six months after the Constitution of Bosnia and Herzegovina entered into force, since as literate people, they could have known about the differential treatment already at that time? Needless to say, in the cases of Sejdić and Finci, the European Court did not discuss this issue at all, probably finding it superfluous to discuss the obvious.

However, the Cantonal Court further argues that exactly their approach to observing the time limits is "logical, since, should we allow for enforcement of one such judgment at any time, it would have a negative effect on the school-year schedule and on the implementation of the adopted educational plans." However, the Cantonal Court conveniently ignores the fact that the first instance judgment ordered exactly that the necessary measures be undertaken until 1 September, meaning until the beginning of the school year. Thus, the first instance court took into consideration that such a judgment could not be implemented instantly and at any moment, but from May to September, that could be possible.

From the Court's Absurd Conclusion to Hope

Finally, in accordance with the reasoning of the Cantonal Court, it would appear that for those who would like to file a claim against the practice of "two schools under one roof" the Law on Prohibition from Discrimination leaves three equally absurd options.

First inquire when schools enroll children, and then file a claim within three months from enrolment. The second option is to file the claim between 1 September and 1 December, while the third is, for just in case, to set up an NGO which would file a discrimination claim within three months from its establishment, as the time in which it is supposed that newly established NGO would learn about the discriminatory practice of "two schools under one roof". It would certainly be good to establish the NGO within three months from enrolment of children to elementary school, and it would be ideal if the period between enrolment and the beginning of school in September would be shorter than three months, so that we might be sure that the claim is filed in time. The alternative is to, simply, file three claims. Of course, if those claims do not cover all 34 schools that under the same roof have different criteria for different pupils, then one should register a new NGO next year. Taking this approach, it would take at most the next 34 years to have 34 NGOs more and perhaps also 34 discriminatory schools less.

In any case, leaving the irony aside, the hope remains that when observing the appeal which "Vaša prava" filed against the second instance decision, the Supreme Court of the Federation will be able to resist the pressures of the social context and politics and just like judge Tanovic before them, but perhaps with more ease, come to a judgment which would confirm what the Municipal Court supported by undeniable legal arguments – that the "children are enrolled in school depending on their ethnicity" and that the defending Canton "failed to demonstrate the legitimate aim of separating children based on their ethnicity," which is in violation of the provisions of the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina, the European Convention on Human Rights and the Convention on the Rights of the Child, which all guarantee right to education without discrimination.

It is unnecessary to stress the importance of the Supreme Court's taking the right approach in relation to the segregated schools, and giving a valid judicial epilogue to this problem, regardless of whether it is a political one or not. Should the courts not respect the law and should we fail to take into consideration the interests of the children in the process of decision-making, it is in vain to leave the resolution of the problem of "two schools under one roof" for some other level of decision-making. This "other level" certainly does not have an obligation, and probably also lacks the necessary knowledge, to take into consideration two key parameters – the law and the interest of children.

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