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Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements

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Abstract

We consider the use of consociational arrangements to manage ethno-nationalist, ethno-linguistic, and ethno-religious conflicts, and their compatibility with non-discrimination and equality norms. Key questions include to what extent, if any, consociations conflict with the dictates of global justice and the liberal individualist preferences of international human rights institutions, and to what extent consociational power-sharing may be justified to preserve peace and the integrity of political settlements. In three critical cases, the European Court of Human Rights has considered equality challenges to important consociational practices, twice in Belgium and, most recently, in Sejdić and Finci, *concerning the constitutional arrangements established for Bosnia Herzegovina under the Dayton Agreement. The Court's recent decision in* Sejdić and Finci *has significantly altered the approach it previously took to judicial review of consociational arrangements in the Belgian cases. We seek to account for this change and assess its implications. We identify problematic aspects of the judgment and conclude that, although the Court's decision indicates one possible trajectory of human rights courts' reactions to consociations, this would be an unfortunate development because it leaves future negotiators in places riven by potential or manifest bloody ethnic conflicts with considerably less flexibility in reaching a settlement. That in turn may unintentionally contribute to sustaining such conflicts and make it more likely that advisors to negotiators will advise*

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them to exclude regional and international courts from having standing in the management of political settlements.

Dervo Sejdić and Jakob Finci are both citizens of Bosnia Herzegovina. They describe themselves as of Roma and Jewish origin respectively. Mr Sejdić was the Roma Monitor of the Bosnian OSCE Mission, having previously served as a member of the highest representative body of the local Roma community and as a member of the joint body comprising representatives of the local Roma community and of the relevant government ministries. Mr Finci served as the Ambassador of Bosnia to Switzerland, having previously held positions that included being the President of the Inter-Religious Council of Bosnia and the Head of the State Civil Service Agency. They are both influential people.

Together, they challenged the Bosnian constitutional provisions that provide that only persons declaring affiliation with one of three 'constituent peoples' are entitled to stand for certain elected posts. The three constituent peoples are Bosniaks (who are predominantly Bosnian Muslims), Bosnian Serbs, and Bosnian Croats. Since the two did not declare affiliation with any of the three constituent peoples, they were ineligible to stand for election to the House of Peoples (the second chamber of the state parliament) and the Presidency (the three-person, collective Head of State). They complained that their ineligibility to stand for election was because of their Roma and Jewish origin.

The European Court of Human Rights concluded by 14 votes to three that the applicants' ineligibility to stand for election to the House of Peoples of Bosnia *was* because of their ethnic identity and that it lacked an objective and reasonable justification. Bosnia had therefore breached the prohibition of discrimination in the conduct of elections under the European Convention on Human Rights Article 14 (the prohibition on discrimination), read in conjunction with Article 3 of Protocol No. 1 (on the right to elections). Furthermore, the constitutional provision under which the applicants were ineligible for election to the State Presidency was also held to constitute ethnic discrimination more broadly under the relatively recent prohibition against discrimination in Protocol No. 12, since it too lacked an objective and reasonable justification. The Court concluded by 16 votes to one that there had been a violation of Protocol 12.[1]

[1] App. Nos. 27996/06 & 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina,* Judgment of the Grand Chamber, 22 Dec. 2009, reported at: 28 BHRC (2009) 201. For previous scholarly discussion, see Bardutzky, 'The Strasbourg Court on the Dayton Constitution', 6 *European Constitutional L Rev* (2010) 309; Claridge, 'Protocol 12 and *Sejdić and Finci v. Bosnia and Herzegovina:* A Missed Opportunity?' [2011] *European Human Rts L Rev* 82; Wakely, 'From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdić v Bosnia', 36 *N Carolina J Int'l L and Commercial Reg* (2010) 233; Milanovic, 'Case Note', 104 *AJIL* (2010) 636; and E. Hodžić and N. Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights Decision in the Case of Sejdić and Finci v BiH* (2011).

1 Consociations and Consociationalism

Though the term is never used in the judgments of the Court, which preferred the expression 'power-sharing',[2] the arrangements that were challenged and found to be in breach of the Convention are classic aspects of what are now called 'consociations' in the political science literature. Understanding the *Sejdić and Finci* case, and its consequences, is of critical importance for an appreciation of the future relationship between consociations and courts in European, and international, human rights law. The case has elicited highly mixed reactions. For one of the dissenting judges, Judge Bonnello, the two applications to the Court 'may *appear* to be the simplest the Court has had to deal with to date, but they may well be, concurrently, among the more *insidious*'.[3] The case thus raises, directly and dramatically, the role of courts in balancing the desire to end or prevent bloody 'ethnic'[4] conflicts with the need to establish an acceptable degree of human rights protections in the longer term.

John Stuart Mill famously asserted in 1861 that '[f]ree institutions are next to impossible in a country made up of different nationalities'.[5] Political practice has long sought to prove him wrong through a multitude of strategies developed to provide for democratic government within multi-ethnic or multi-national states. There are, broadly, two grand strategies to address such differences: elimination or management.[6] One of the 'management of differences' strategies has been termed *consociation* by Arend Lijphart. It describes a distinct set of power-sharing institutions used to manage places divided by ethnicity, nationality, religion, and ideology or other powerful non-class cleavages.[7]

European jurisdictions that have adopted democratic consociational arrangements at some juncture after 1945 include Belgium, the Netherlands, Switzerland (which has combined consociation and federation), Alto Adige (South Tyrol), Cyprus, Bosnia Herzegovina, Macedonia, and Northern Ireland. Beyond Europe, consociational arrangements have been adopted in Lebanon, Netherlands Antilles, briefly in South Africa (1993–1996), and in conjunction with federal arrangements in both Iraq and India.[8] The European Union itself has also been read as having consociational features.[9] The examples are not accidental. Consociational institutions have been adopted after or to prevent national, ethnic, or linguistic conflicts. In the repertoire of policy

2 *Supra* note 1, at 207, para. [7].

3 *Ibid.*, at 246.

4 We consider the meaning of 'ethnicity' below, text at nn. 47–51.

5 Mill, 'Of Nationality, as connected with Representative Government', in J.S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government* (1988), at 391, 392.

6 O'Leary and McGarry, 'The Politics of Accommodation and Integration in Democratic States', in A. Guelke and J. Tournon (eds), T*he Study of Politics and Ethnicity: Recent Analytical Developments* (2012), at 79.

7 A. Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (1968) and *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice* (2008); Lijphart, 'Consociational Democracy', 21 *World Politics* (1969) 207.

8 R. Taylor (ed.), *Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict* (2009), at 6.

9 P.G. Taylor, *The European Union in the 1990s* (1996), at 80; D.N. Chryssochoou, *Democracy in the European Union* (1998).

options available to local and international negotiators responding to deeply divided groups, consociation has often been the option of choice over the past 20 years.[10]

'Power sharing' as a synonym for consociation – 'inclusivity' is a vaguer variation – has frequently been recommended as best practice by international organizations, both IGOs and NGOs. The United Nations now annually appoints an expert on power-sharing to the Standby Team of the Mediation Support Unit of its Department of Political Affairs, one illustration that consociational thought has been partly mainstreamed into *international* responses to civil wars or protracted violent conflicts. At the *European* level, although overall EU policy on minorities has been ambiguous, consociation has often been encouraged in *practice* by the European Union in accession negotiations, and the OSCE's High Commissioner on National Minorities has often commended consociation rather than territorial autonomy. Consociationalism is therefore not a particularist, or local peculiarity, but increasingly advocated by external and international agents.

2 Defining Characteristics of Consociations

Four key elements of democratic consociation are commonly identified. These are, first, the *sharing of executive and, often, legislative and security powers* among representatives of all the major communities of a polity, especially those with histories of prior antagonism. Examples of specific arrangements include collective presidencies and co-premierships; examples also include bi-cameral or tri-cameral chambers, which deliberately enhance the powers of minorities through co-decision-making, or concurrent or qualified majority rules. Plainly such power-sharing aims to achieve greater inclusivity and jointness in decision-making than 'winner-takes-all democracy'. The second key feature is *community autonomy*. Each constituent group has significant internal self-government in at least one public function (for example, in establishing and controlling its own schools). Equality across the multiple communities applies in these respects. *Self*-government accompanies *shared* government. The third feature is the widespread use of the *proportionality* principle, understood to encompass proportional representation in shared institutions, and the allocation of important resources and public offices, e.g., in the civil service, security forces, and judiciary, by reference to the proportions the group partners have in the population as a whole, or in the labour market. Proportionality may also apply to the allocation of public expenditures, e.g., each group may receive the same *per capita* funding for its primary schools. Lastly, because power-sharing, proportionality, and autonomy may not provide sufficient assurance to particular groups that their interests will not be over-ridden, explicit *veto rights* may be granted to each of the communities on vital issues, with variations in how these veto rights are allocated and legally entrenched.

[10] C. Bell, *Peace Agreements and Human Rights*, (2000); Bell, 'Peace Agreements: Their Nature and Legal Status', 100 *AJIL* (2006) 373. See also P. Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (2008); Mattes and Savun, 'Fostering Peace after Civil War: Commitment Problems and Agreement Design', 53 *Int'l Studies Q* (2009) 737; and Krook and O'Brien, 'The Politics of Group Representation: Quotas for Women and Minorities Worldwide', *Comp Politics* (2010) 253, at 264.

Each of these four elements is necessary for there to be a full or classic consociation, which is expected to be durable. In a semi-consociation, by contrast, some elements of consociations will be present, but not others. There may be proportionality and autonomy, for example, but no guaranteed power-sharing or veto rights. This distinction matters because some semi-consociational practices, often known as 'multiculturalism', are not meant to encompass the entire relevant polity; they are related to improving the inclusiveness of otherwise majoritarian liberal democracies; and they are generally thought to be temporary measures.

3 Bosnia as a Consociation

Bosnia is a classic consociation, albeit tempered by its effective status as an international protectorate. Its consociation is a response to war. After its declaration of independence from Yugoslavia on 6 March 1992, a brutal war started that continued until 1995. The Research and Documentation Centre of Sarajevo produced *The Bosnian Book of the Dead* in 2007, estimating that nearly 100,000 people were killed in the war. More than 2.2 million people left their homes because of organized programmes of ethnic expulsions and generalized violence, mostly fleeing to areas controlled by their own ethnic groups. Almost 30,000 people went missing; and one third of them remain missing. One consequence was a significantly altered ethnic map. Before the war, the pattern of ethnic presence was often described as a patchwork quilt; by the time the war ended, the groups had predominantly chosen or had been forced to live apart.[11]

A hard-won peace agreement was initialled at Dayton, Ohio, in November 1995,[12] the culmination of some 44 months of intermittent negotiations. The conflict formally ended on 14 December 1995 when the General Framework Agreement for Peace ('the Dayton Peace Agreement') entered into force. The Constitution of Bosnia and Herzegovina is an annexe to the Dayton Peace Agreement. Under its provisions, the state of Bosnia now consists of two 'entities': the *Federation* of Bosnia and Herzegovina (predominantly Bosniak and Croat) and the *Republika Srpska* (predominantly Serb). In 2000, according to not very reliable census data, Bosniaks comprised about 48 per cent of Bosnia's population, Bosnian Serbs about 37 per cent, Bosnian Croats about 14 per cent, with 'others' amounting to just over a half of 1 per cent. There is a

[11] See S.L. Burg and P.S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (1999); N. Cigar, *Genocide in Bosnia: The Policy of 'Ethnic Cleansing'* (1995); K. Coles, *Democratic Designs: International Intervention and Electoral Practices in Postwar Bosnia-Herzegovina* (2007); R.J. Donia and J.V.A. Fine, *Bosnia and Herzegovina: A Tradition Betrayed* (1994); R.M. Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflict* (1999); Hayden, '"Democracy" Without a Demos? The Bosnian Constitutional Experiment and the Intentional Construction of Nonfunctioning States', 19 *E European Politics and Societies* (2005) 226; N. Malcolm, *Bosnia: A Short History* (1994); Marko, '"Unity in Diversity"? Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina', 30 *Vermont L Rev* (2006) 503; Weller and Wolff, 'Bosnia and Herzegovina Ten Years After Dayton: Lessons for Internationalized State-Building', 5 *Ethnopolitics* (2006) 1, at 1–14.

[12] The making of the agreement is described in the memoir of the chief negotiator, R. Holbrooke, *To End a War* (1998).

significant, but not complete, overlap between claimed religion and claimed national identity. According to the earlier 1991 census, Roma comprised less than one fifth of 1 per of the population, but unofficial estimates have put the Roma at between 2 and 10 per cent of the total population. There are currently about 500 Jews in Bosnia (mostly in Sarajevo).

At the state level, new institutional arrangements were introduced at Dayton, including a 42-member House of Representatives, and a 15-member House of Peoples (whose members are referred to as 'delegates'). The House of Peoples is composed of five Bosniaks and five Croats from the Federation, and five Serbs from Republika Srpska. Croat and Bosniak delegates from the Federation are separately elected by the Croat and Bosniak caucus in the Federation House of Peoples. Serb delegates and delegates of the 'others' to the Federation House of Peoples are not permitted to participate in the process of electing Bosniak and Croat delegates for the state House of Peoples. One of the most important functions of the delegates to the state House of Peoples is that each national group of delegates may exercise a veto over any issue that it considers threatening to its 'vital interests'.

The Dayton Agreement also provided for a collective presidency. Eligibility for election to the state Presidency combines both a territorial and an ethnic requirement, which, as we have seen, exists also for elections to the state House of Peoples. The Presidency consists of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska. The members of the Presidency who are elected from the entities are elected by voters registered to vote in each of the entities. A voter registered to vote in the Federation may vote for either a Bosniak or Croat member for the Presidency, but not for both. A similar 'vital interests' safeguard applies to decisions of the Presidency.

The Constitution contains no provisions regarding how a person's ethnicity is to be determined for these purposes. Indeed, it appears that self-classification by the individual is sufficient. No 'objective' criterion, such as belonging to a specific religion or fluency in a given language, is required. Nor is there any requirement of acceptance by other members of the ethnic group with which the person has self-identified. Nothing therefore stops a Roma or a Jew from identifying with one of the constituent peoples. In practice, the 'others', i.e., those not self-identified with one of the constituent peoples, consist of persons who issue from mixed parenthood or who are exogamously married, as well as members of small national minorities, such as Jews and Roma. A candidate is entitled not to declare his or her affiliation to a constituent people, but a failure to declare such affiliation is considered a waiver of the right to hold an elected or appointed position for which such declaration is required.

4 Liberal Scepticism about Consociations

Heated debate between proponents and opponents of consociation has been long lasting. Consociational arrangements are alleged to 'jeopardize important values, principles, and institutions'; one prominent critic claims that 'consociational democracy

inevitably violates the rights of some *groups* and the rights of some *individuals*'.[13] For convenience we shall refer to these critiques of consociation as liberal, though we emphasize that there are liberal consociationalists.

Liberal critics maintain that consociations provoke an unacceptable conflict with the value of *non-discrimination* on ethnic grounds. This appears to be a simple criticism, but the simplicity dissolves on scrutiny. Consociation is better understood to involve a clash between two different understandings of equality, rather than a clash between equality and consociation. An *individualized and majoritarian* conception of equality is undoubtedly put under pressure by consociation, but consociationalists seek to further equality between the consociated *peoples* or *groups*. They do not presume that there is one demos, certainly not the type of demos in which majority rule would be legitimate. Parity (in power-sharing) and proportionality (in representation, institutions, and allocations) of peoples may conflict with individualized and majoritarian conceptions of equality, especially when the latter presumes the existence of just one people.

The second criticism arises from the clash between two different conceptions of *political representation*. One conception considers representation 'to be adequate when a representative acts on behalf of and according to the ideas of those who are represented'.[14] Let us call this the 'delegation' model. Alternative conceptions of political representation 'deem the presence of representatives with relevant social or other characteristics to be sufficient'. Let us call this 'the politics of presence'.[15] In consociations, political representation weights the politics of presence more than the politics of delegation – though it has room for both. What liberal proponents of delegated representation object to is consociation's emphasis on actual rather than virtual representation.

The third objection made by liberal critics is that consociation 'freezes and institutionally privileges (undesirable) collective identities at the expense of more "emancipated" or more "progressive" identities, such as those focused on class or gender'; that 'opportunities for transforming identities are more extensive' than supposed by the allegedly unduly pessimistic proponents of consociation, who are said to have an 'essentialist' view of the nature of the groups involved, in which fixed 'traits are homogeneously distributed' within each group.[16] Such essentialism is rejected empirically and normatively – as insufficiently sensitive to individual uniqueness and the personal choice of identity.

5 Liberal and Corporate Consociations

Such criticisms of consociations have been met by equally robust defences.[17] Prominent defenders of consociations distinguish between liberal and corporatist

[13] Summaries and citations from the critics, such as Paul Brass and Brian Barry, are in O'Leary, 'Debating Consociational Politics: Normative and Explanatory Arguments', in S.J.R. Noel (ed.), *From Power-Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (2005), at 3.

[14] Krook, Lovenduski, and Squires, 'Gender Quotas and Models of Political Citizenship', 39 *British J Political Science* (2009) 781, at 789.

[15] A. Phillips, *The Politics of Presence* (1995).

[16] See O'Leary, *supra* note 13.

[17] *Ibid.*, and see the contributions in R. Taylor (ed.), *supra* note 8.

versions, and prefer the former to the latter, when this is feasible. The distinction addresses the third criticism considered above. Whereas *corporate* consociation accommodates groups according to ascriptive criteria, and rests on the assumption that group identities are fixed, and that groups are both internally homogeneous and externally bounded, *liberal* consociation rewards *whatever* salient political identities emerge in democratic elections, whether these are based on ethnic groups or on other subgroups or transgroup identities.[18] An important aspect of *liberal* consociations, then, is said to be the degree to which they are conceivably transitional. For liberal consociationalists, accommodation of ethnic identity *now* may be a more successful way of achieving a less ethnic or *non*-ethnic political *future*. John McGarry and Brendan O'Leary, for example, have argued that an extensive period of cooperation between deeply divided rival ethnic groups is more likely to transform identities in the long run than liberal integrationist approaches.

6 Consociations and Human Rights Standards

Although there has, until recently, been relatively little cross-fertilization between political science and academic legal considerations of consociation, translating the political science and political theory debates into legal language evidently may result in consociations being seen as possible violations of human rights law, whether domestic, regional, or international. Two particular rights are seen to be most often challenged: the right not to be treated on the basis of particular prohibited characteristics, such as race and ethnicity, and the dilution of a person's right to participate in the political process on equal terms with others. The human rights critique is primarily co-extensive, then, with the first two liberal political criticisms.

Henry Steiner's influential 1991 article pointed to the legal problems that consociational arrangements face from equality and non-discrimination rights. Steiner wrote, '[a] state must give all its citizens equal protection. Power-sharing schemes proceed on a contradictory premise. They are cast in ethnic terms … and thus explicitly discriminate among groups on grounds like religion, language, race, or national origin.'[19] The second human right most often alleged to be infringed by consociation is the right to political participation, including 'the right to take part in the conduct of public affairs, the right to vote and to be elected at genuine periodic elections …'. Mohammad Shahabuddinhas claims that '[c]onsociational arrangements essentially violate these rights of the members of the majority community by providing minority

[18] McGarry and O'Leary, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription', 5 *Int'l J Constitutional L* (2007) 670, esp. at 675–676, 687, 689, 692, and 696. They here extend Lijphart, 'Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems', in W. Kymlicka (ed.), *The Rights of Minority Cultures* (1995).

[19] Steiner, 'Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities', 66 *Notre Dame L Rev* (1990–1991) 1551.

ethnic groups political power disproportionate to their number through reserved seats and offices, minority veto rights, or similar devices'.[20]

Human rights law scholars identify not only specific rights that may be endangered by consociations, but more general philosophical conflict between consociationalism and the *foundations* of human rights thinking. For Wippmann, 'consociational structures … may conflict with the liberal individualist paradigm that underpins contemporary international human rights norms'.[21] For Steiner consociational arrangements threaten to submerge the individual within the community, whereas 'all persons should be seen as empowered by human rights norms to decide whether to remain on one side of a cultural boundary, to shift to another side, or to seek a life not committed to one or the other community'. These, in some ways deeper, concerns are one way in which the anti-essentialism in liberal political *theory* echoes human rights *law* discourse. More recently, the liberal anti-essentialist stance has been translated into a claimed legal *right* not to be classified as a member of a racial or ethnic group, except voluntarily, although this issue does not feature in the Bosnian case.

Particularly for liberal human rights lawyers, the preferred approach to ethnic disputes is to emphasize the potential for more traditional constitutional protections, such as the judicial protection of rights. Yet the trend on the ground appears to be going in the opposite direction. Sujit Choudry argues that 'debates over the character and content of bills of rights are no longer at the center of more recent rounds of post-conflict constitutional politics'. His conclusion is that constitutional agents understand that rights-based constitutionalism cannot do all the work it has been *expected* to do.[22] That said, however, consociational peace settlements are seldom *solely* consociational in the package of measures adopted.[23] In particular, Bills of Rights and equivalent mechanisms tend to be omnipresent in peace agreements that include consociational elements. Indeed, defenders of liberal consociationalism see strong human rights protections as an important safeguard for liberal values in such arrangements.

7 Courts in Consociations

In functioning consociations, *courts* are themselves the object of consociational impulses. Those courts that are thought likely to play a significant constitutional role

[20] Shahabuddinhas, 'A Normative Analysis of International Law Compatibility with Ethnic Conflicts', available at: www.interdicplinary.net/ati/els/els2/Shahbuddin%20paper.pdf. In fact, consociation does not require disproportionality in representation: standard proportional representation electoral formulae may be applied which do not require quotas or reserved seats: see e.g. O'Leary, Grofman, and Elklit, 'Divisor Methods for Sequential Portfolio Allocation in Multi-Party Executive Bodies: Evidence from Northern Ireland and Denmark', 49, *Am J Political Science* (2005) 198.

[21] Wippmann, 'Practical and Legal Constraints on Internal Power Sharing', in D. Wippmann (ed.), *International Law and Ethnic Conflict* (1998), at 232.

[22] Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State,' 6 *Annual Rev L and Social Science,* (2010) 301.

[23] E.g., the 1998 Agreement regarding Northern Ireland comprised multiple elements: O'Leary, 'Complex Power-Sharing in and over Northern Ireland: A Self-Determination Agreement, a Treaty, a Consociation, a Federacy, Matching Confederal Institutions, Inter-Governmentalism and a Peace Process', in M. Weller, B. Metzger, and N. Johnson (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (2008), at 61.

are likely to be proportionally composed in ways that reflect the ethno-national make-up of the polity, and to operate according to tacit or explicit qualified majority decision-making, as was the case in Cyprus during the period of consociation, and is currently the case in Belgium. The Constitutional Court of Bosnia, for example, consists of nine judges: four are selected by the House of Representatives of the Federation, two are selected by the National Assembly of Republika Srpska, usually resulting in three Bosniak, one Croat, and two Serb judges.[24]

The composition of the courts is important precisely because courts may play decisive roles in consociational polities. Political science discussions suggest that consociational arrangements may require a satisfactory method of dispute resolution when the political elites of the major communities clash on vital interests. Along with other political methods of dispute settlement, courts may help to resolve such tensions. Indeed, where the courts do not play that role, this may itself *contribute* to instability. The inability of the Cyprus Constitutional Court to operate effectively is often thought to have contributed to the breakdown of the consociational arrangements in the period before 1963.[25]

The role of the judiciary in consociations is not restricted to domestic courts and, increasingly, is likely to involve international and regional courts. In particular, as the jurisdiction of the European Court of Human Rights has been extended to include an ever widening set of rights, particularly the right to non-discrimination, and applied to an ever widening group of states, particularly those countries with a history of bloody ethnic, religious, or national disputes, *European* judges are likely to be faced with disputes in consociations that require resolution.

The European Court of Human Rights is no stranger to such disputes. The consociational arrangements in Belgium have been before the Court in several high-profile cases from the earliest days of the Court's existence. Indeed, the Court first cut its teeth on the meaning and extent of the non-discrimination principle, and the principle of fair elections, in cases arising from challenges to the Belgian arrangements.[26] So too, the European Court of Justice is likely to play an increasingly important role, given that its jurisdiction has also been extended geographically and substantively in ways that are likely to engage consociational arrangements.

One political issue that therefore arises is whether international and regional courts are as legitimate as sovereign state courts in considering these arrangements. On the one hand, state courts are closer to the ground, more familiar with the background, and more able to judge whether a particular legal interpretation will succeed in practice. On the other hand, a regional or international court may have greater legitimacy because it is seen as above the fray, reflecting opinion beyond the state, and able to draw on deeper reservoirs of international support in having its decision implemented.

[24] We shall see below that there are, additionally, two internationally appointed judges.

[25] Adams, 'The First Republic of Cyprus: A Review of an Unworkable Constitution', 19 *Western Political Q* (1966) 475.

[26] *Cases relating to certain aspects of the laws on the use of languages in education in Belgium* [1968] ECHR 1474/62, 1 EHRR 252 (1968) ('Belgian Linguistics'); *Mathieu-Mohin v. Belgium* [1987] ECHR 9267/81, 10 EHRR (1988) 1.

In some contexts, institutional designers have sought to combine the benefits of *both* state *and* supra-state judges in the construction of *domestic* constitutional courts by requiring a degree of extra-state representation on the court. Bosnia is one example of such an arrangement: three members of the Bosnian Constitutional Court are selected by the President of the European Court of Human Rights after consultation with the state Presidency. They cannot come from Bosnia or from immediately adjacent neighbouring states.

8 Courts as Possible 'Unwinders of Ethnic Political Bargains'

Given the potential conflict between the consociational aspects of settlements and the human rights aspects of the same settlements, courts are also likely to be called on to perform an even more delicate role than simply adjudicating on disputes arising *within* consociational arrangements. One central question here is whether (and, if so, how) to move *from* consociation to a *non*-consociational (or a less consociational) future. One of the obstacles to the dissolution of consociations is said to be that political elites that benefit from them will be loath to give them up, so *courts* are sometimes considered to have a pivotal role in ensuring that the transition takes place. Richard Pildes, in particular, has identified courts as potential 'unwinders of ethnic political bargains'.[27]

The reaction of the courts to consociations, then, may be a significant determinant of the success or failure of consociations as political systems. There has been excellent work on this issue carried out in particular jurisdictions, including the work by our colleagues John Morison and Gordon Anthony on litigation under the Belfast Agreement.[28] However, very little recent *comparative* research appears to have been done on how courts react in practice to challenges to consociational agreements on human rights grounds. So far as we are aware, there has been no sustained legal theory focused on how judges do, or should, treat consociations. Recent work by Samuel Issacharoff[29] and Richard Pildes, however, has at least provided useful opening hypotheses for such research.

Issacharoff makes the important point that in this area of controversy courts are often considering 'first-order challenge[s]', meaning that they are called on to determine the nature and the composition of the polity itself. Such 'first-order challenges' pose problems for courts 'that may not be unique in nature, but the consequences of which are uniquely serious' because they 'can be highly destabilizing', involving the breakdown of civil peace and the recurrence of widespread political violence. Issacharoff stresses how frequently the challenges to political bargains in such cases

[27] Pildes, 'Ethnic identity and Democratic Institutions: A Dynamic Perspective', in S. Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (2008), at 173, 195.

[28] Anthony and Morison, 'The Judicial Role in the New Northern Ireland: Constitutional Litigation and Devolution Disputes', 21 *European Rev Public L* (2009) 1219; Anthony, 'Public Law Litigation and the Belfast Agreement', 8 *European Public L* (2002) 401.

[29] Issacharoff, 'Democracy and Collective Decision Making', 6 *ICON* (2008) 231.

are based on 'fundamental rights' arguments that 'are almost invariably addressed by reference to higher authority at either the national level or even at the international level'. This not only pits the legal against the political sphere, but, more importantly, the universalist orientation of human rights against what he considers to be the intense particularity of consociational politics. '[P]recisely because context-sensitive local accommodations tend to be idiosyncratic', he writes, 'the homogenizing effect of a rights template threatens the political accommodations …'. The consequent difficulties posed for the courts should lead us to expect them to adopt 'exit strategies', 'by means of which the courts could restore a measure of deference to the institutional realities of politics'.[30] For Issacharoff, courts are hypothesized to prioritize public order and stability rather than engage in what some would see as usurpationist judicial activism without a democratic mandate.

For Pildes, too, 'there are serious normative and pragmatic concerns with courts playing the role of institutional agents for transitioning away, even modestly, from ethnic accommodation in the design of democratic institutions'. His normative concern arises from 'the *legitimacy* of courts in partially undoing political agreements reflected in legislation'. We would add 'or in a *constitution*'. Pildes' pragmatic concern is that, 'to the extent judicial interventions of these sorts rest, in part, on the view that circumstances have changed enough to justify moves toward a more integrationist political sphere, they require exquisitely charged judgments'. If the court gets its judgment wrong, 'its decision could fuel ethnic conflicts'. Like Issacharoff's, however, Pildes' concern about the courts' legitimacy is lessened, 'the longer the interval between the original agreement and the court's action'.[31]

9 The Judicial Modesty of Domestic Courts

Turning now from the theory to the practice, it would appear that domestic courts have been highly restrained in intervening to unwind ethnic political bargains, in most cases upholding consociational arrangements, and in some cases even cautiously extending the logic of consociation beyond its original scope. This appears to be the case, for example, in judgments considering issues under Northern Ireland's Belfast Agreement, as well as in the decisions of the Belgian courts when consociational arrangements are in issue.

Of most significance for this article are the decisions of the Constitutional Court of Bosnia, itself an example of consociation, as we have seen. The European Convention on Human Rights features prominently in the Bosnian Constitution, not only in the context of the appointment of judges, but because it provides that the rights and freedoms contained in the European Convention 'shall apply directly in Bosnia and Herzegovina'.[32] In a series of cases, the Court has trodden a delicate line between intervention and non-intervention. In particular, the Court decided that the arrangements

[30] *Ibid.*, at 232, 262, 242, 262.
[31] Pildes, *supra* note 27, all citations at 197.
[32] Art. II(2).

regarding the state Presidency that were subsequently in issue before the Court of Human Rights were *not* in conflict with the equality requirements of the Bosnian constitution.[33]

10 The European Court of Human Rights and the Belgian Cases

Although the practice of these domestic courts is consistent with the Issacharoff/Pildes hypotheses of what courts are likely to do, these hypotheses have also been useful guides to how international and regional courts react to similar challenges. Indeed, the Issacharoff/Pildes hypotheses were partly based on earlier decisions of the European Court of Human Rights itself, particularly those in the Belgian consociational cases, *Belgian Linguistics*[34] and *Mathieu-Mohin*.[35]

These two judgments stood for many years as the only major cases of the European Court of Human Rights, or indeed of any other international human rights court, considering the application of human rights norms to consociations. Four features of these earlier cases are important. First, the Court took a highly deferential approach to state decision-making, not only in the area of electoral systems, but more generally, through the 'margin of appreciation' doctrine. In particular, the Court was, in most respects, unwilling to second-guess the Belgian state in deciding whether *alternative* policies were available that would satisfy the same objectives as the impugned measures with less adverse effect on the rights claimed. Secondly, there was a low intensity standard of review adopted in the interpretation of the *non-discrimination* norm, which essentially amounted to little more than a test of non-arbitrariness. Passing this relatively low threshold justification test nullified a determination of discrimination. Thirdly, the Court accorded considerable weight to the legitimacy of the *purposes* sought to be achieved by the impugned measures, as defined by the state itself. Fourthly, considerable support for the legitimacy of the measures was gleaned from the democratic and inclusive nature of the support received across the different communities that were affected by the arrangements.

Although these cases under the European Convention on Human Rights were not explicit interpretations of *international* human rights norms, they were seen subsequently as indicating the approach that would, and should, be adopted by *international* human rights courts to consociations. Academic legal commentators who evaluated the compatibility of consociational arrangements with human rights norms therefore generally accepted that they would survive a human rights challenge in domestic, regional, and international courts.[36] Though they often suggested that power-sharing

[33] Case AP 2678/06, 29 Sept. 2006. For detailed consideration of the Constitutional Court's equality jurisprudence see Rosenberg, 'Promoting Equality After Genocide', 16 *Tulane J Int'l and Comp L* (2008) 329.

[34] Belgian Linguistics Case, *supra* note 26.

[35] *Mathieu-Mohin v. Belgium, supra* note 26.

[36] See, e.g., Wippmann, *supra* note 21, at 240.

or consociations should be permitted primarily because they were frequently the least worst option.[37]

11 Explaining *Sejdić and Finci*

What, then, explains the apparently contradictory decision of the European Court of Human Rights in the *Sejdić and Finci* case, and what are its implications? Our explanation of the apparently significant differences between this case and what went before is based on three significant developments that occurred between the Belgian cases and the Bosnian case: the growth of a considerably more robust approach to discrimination and the status of minorities by the Council of Europe and the ECtHR; the increasing adoption of the liberal critique of consociations by other human rights organizations, in particular by the Venice Commission; and the particular features of the Bosnian situation itself, in particular Bosnia's commitments to the Council of Europe and the EU. We do not seek to explore these considerations here but, instead, to consider the broader implications of the case.

Several of the Issacharoff/Pildes hypotheses we examined earlier concerning the role of courts are supported by an examination of the *Sejdić and Finci* case. First, the Court of Human Rights was offered the opportunity of ensuring that a transition from consociational to non-consociational arrangements would take place, supporting Pildes' identification of the courts as potential 'unwinders of ethnic political bargains'. Secondly, the case supports the hypothesis that challenges to such political bargains are likely to be based on 'fundamental rights' arguments, and are likely to be made on the basis of 'higher authority at the international level'. In the *Sejdić and Finci* case an international dimension was present on both sides of the argument. The Court majority was anxious, however, to downplay the international origins of the consociational arrangements, seeing these as having been largely superseded. The Court put to one side whether Bosnia Herzegovina could be held responsible for *adopting* the contested constitutional provisions, since 'it could nevertheless be held responsible for *maintaining* them',[38] thus allowing the Court to argue that it was imposing *European* human rights standards on *local* political arrangements. The Court considered that it was supporting the emerging consensus that things had to change, articulated at the European level by the Venice Commission among others. This story fits with the Court's view of its function as policing the boundaries of European consensus and bringing to heel those states that act outside that consensus.

In some other respects, however, the Issacharoff/Pildes hypotheses have proven less accurate guides to what a court is likely to do when asked to 'unwind' an ethnic political bargain. In the Belgian cases the opportunity to 'unwind' the political bargain was mostly avoided, whereas in *Sejdić and Finci* the Court appears much more prominently in the role of an unwinder. We can identify several respects in which hypotheses developed by Issacharoff/Pildes may have to be modified after the *Sejdić and Finci* case.

[37] Steiner, *supra* note 19, at 1540; Wippmann, *supra* note 21, at 241.

[38] *Supra* note 1, at 228, para. [30].

12 Different Readings of the Court's Judgment

It is, however, not possible to be definitive in assessing the effect of the case, not least because the reasoning presented by the Court to justify its decision is surprisingly sketchy and somewhat ambiguous. On one reading, what the Court was doing was to cast a sceptical gaze on consociations generally (the broad interpretation), but on another view all that the Court was aiming to achieve was to require the parties to liberalize the existing consociational arrangements by specifying that 'the others' should have the opportunity to be elected to the Presidency and the House of Peoples (the more restrictive interpretation). On the latter reading, the Court aimed to *reform* the consociational arrangements rather than abolish them. That is, we suggest, the most constructive reading. However, if the Court's decision indicates the likely trajectory of human rights courts' reactions to consociations in general, we consider this to be deeply unfortunate.

The more restrictive interpretation of the judgment clearly gives rise to fewer problems than the broader interpretation, but even the more restrictive interpretation is, we consider, problematic. It would be hard to argue that liberalizing the Bosnian consociation would not, overall, be a better system, but the key issues are *when* to make the changes, and *how,* and *who* has the legitimate authority to do so. In the Belgian cases the opportunity for the *Court* to 'unwind' the political bargain was mostly avoided, wisely in our view, whereas in *Sejdić and Finci* the Court appears much more prominently in the role of an 'unwinder'. So what are the problems with the Court's decision in this case?

13 Margin of Appreciation and Proportionality

The first problem arises from the Court's approach to the margin of appreciation and proportionality as legal doctrine. Though we might have expected that the Court would adopt an 'exit strategy', none of the doctrinal moves available to the Court to enable it to defer to those who constructed the consociational arrangements was adopted. In contrast with the Belgian cases, the Court took a highly interventionist approach, not only regarding what constituted the electoral systems covered by Article 3 of Protocol 1 but, more generally, through the weakening of the 'margin of appreciation' doctrine. The Court was willing, drawing on the Venice Commission's findings, and again in contrast with the Belgian cases, to decide that other alternatives were available that would, in the Court's view, achieve the same objectives as the impugned measures with less adverse effect on the rights claimed.

Also in contrast with the Belgian cases, there was a high intensity standard of review adopted in the application of the non-discrimination norm. This essentially amounted to a test of strict scrutiny, given the Court's approach of regarding ethnic discrimination as being practically impossible to justify. In contrast with the Belgian cases, little weight was accorded by the Court to the legitimacy of the purposes sought to be achieved by the impugned measures, as defined by the Bosnian government. The Court essentially avoided considering whether achieving peace between the groups in

conflict after a vicious civil war continued to be a legitimate purpose by holding that, in any event, the measures adopted were disproportionate.[39]

The challenged requirements were held not to satisfy the proportionality test for several reasons. While the Court agreed with the Bosnian government 'that there is *no* requirement under the Convention to abandon *totally* the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule',[40] it relied on the opinions of the Venice Commission to support its conclusion that 'there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities',[41] and therefore that the state had failed to demonstrate that there were no alternative means of achieving the same end. Not only were there serious alternatives available, but (as importantly) the time was ripe for these to be implemented now. While 'progress might not always have been consistent and challenges remain',[42] the Court identified 'significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement'.[43] The Court judged that there was progress toward normalization of security, and appears to have relied on the Venice Commission to support this opinion.[44]

Several aspects of this analysis are troubling, in particular the Court's assessment of the effects of requiring a change in the basic structure of the Constitution at this time. The Court heard an argument from the Bosnian government that prospective changes threatened the whole foundation of the international and inter-ethnic bargain made at Dayton, and risked unravelling it, plunging Bosnia back into civil war. Changes, the Bosnian government argued, should come, but it held that the time was not yet ripe, *and* they should be made under the previously agreed procedures for constitutional change. The Bosnian constitutional court had agreed with this assessment. One might have predicted that this would push the Court to adopt a cautious, non-interventionist approach, but one would have been wrong.

No doubt some agents currently in the Bosnian political system have strong disincentives to change the system, either because they benefit from it, as their critics suggest, or because they fear the repercussions that change would set in motion for their constituent people. A court may sometimes be faced with the need to break a log-jam created by self-interested politicians, which Pildes suggests makes a case for judicial intervention. But did the Court of Human Rights have the standing, or the knowledge, to make a judgment about the consequences of its actions in this case? How does the Court have the capacity to decide that the likelihood of a return to civil war has sufficiently subsided to allow it to require a corporate consociational bargain to be unpicked, at least to some degree? Was the Venice Commission's fact-finding process

[39] *Supra* note 1, at 232, para. [46].
[40] *Ibid.*, at 221, para. [75].
[41] *Ibid.*, at 233, para. [48].
[42] *Ibid.*, at 232, para. [47].
[43] *Ibid.*
[44] *Ibid.*

sufficiently rigorous to bear the weight that the Court placed on it? And why exactly is the Venice Commission an authority on ethnic conflict and peace?

Other courts have sometimes developed doctrines to cope with these types of situations, where it may not be appropriate for the Court to intervene, but it does not want to wash its hands of the issue for the future. Alexander Bickel termed these 'the passive virtues'.[45] The absence of an equivalent to the political question doctrine in the European Court of Human Rights, leading courts to be more prudent and modest, might be worth considering, unfashionable though it is in the country of its birth. It is certainly activism of the highest order for a court to require the restructuring of the presidency and powerful second chamber of a federal system, to render confident security assessments based largely on the view of a legal advisory body, to presume to make somewhat paternalistic and instrumentalist assessments of the motivations governing the conduct of a member state's politicians, and to assume that there are feasible alternatives that will nevertheless keep the same founding constitutional bargains in place.

Two implicit conclusions flow from this assessment, which we shall flesh out a little further. The first is practical. Courts without their own professional fact-finding bodies would be well advised to weigh more than the judgments of legal or human rights NGOs and advisory bodies when they evaluate whether critical human rights are adversely affected by consociational bargains. They also, minimally, need scientific surveys of public opinion, credible evaluations of what group members themselves regard as vital national, ethnic, religious, or linguistic concerns, and security assessments by experts on civil wars.

The second conclusion is more political. Though a move from corporate to more liberal principles of consociation may, other things being equal, indeed be better for all citizens, especially 'others', there should be no presumption that there are always feasible institutional alternatives to corporate principles. Difference-blind rules for making and running institutions can always be imagined which will protect more than the largest group. Yet the fact that they can be formulated proves nothing about their feasibility. All such rules will have advantages and disadvantages for key ethnic groups, and their leaders and followers will not be slow to understand their implications, material and symbolic. If the parties to negotiations cannot agree on difference-blind rules, it may not be because they are illiberal, or contemptuous of human rights provisions, or lacking in knowledge of alternatives, but rather because they are existentially anxious about the future of their groups, and see no reason to trust cosmopolitan rules to protect them from their equally anxious co-negotiators. Premature lack of restraint by cosmopolitan courts may generate blowback, not least in the rejection of their verdicts, a point we will return to in a moment. It may even reduce the number of power-sharing settlements that are made, and thus the number of wars terminated.

14 Suspect Classifications and Heightened Scrutiny

We turn now to the second major problem: what makes suspect the use of a 'suspect classification'? In this case the Court, in one of its most important moves, identified

[45] A. Bickel, *The Least Dangerous Branch* (1962), at 111.

ethnic discrimination as being akin to racial discrimination, thus defining the use of such a classification as of such danger as to be almost impossible to justify. It would thus appear that the Court in future may be less willing to accept some types of consociations than others, i.e., those involving racial or ethnic criteria.

At least two significant problems arise from this. First, the Court seemed most concerned with the fact that the discrimination was apparent on the face of the Constitution and the Election Law. Does that mean, however, that other approaches could have been taken which would have the same effect, even perhaps based on the same motivation, but which would not be facially discriminatory? Is it permissible, under the Court's approach, to adopt methods that do not mention race or ethnicity but end up achieving racial or ethnic shares? In this context, it would have been useful to learn from the Court which of the Venice Commission's options the Court considered acceptable, since several of them appear to continue to rely on discrimination on their face.[46]

The argument of Mr Finci followed the approach adopted by some cases in the US Supreme Court, namely that the common element that linked those grounds that were most highly protected was that they involved 'immutable traits', meaning that these characteristics were not chosen and could not be altered by an individual. The judges in *Finci* were not overly concerned to explain why the use of 'ethnicity' should produce heightened scrutiny. There was, in fact, remarkably little discussion of the issue. Heightened scrutiny, however, cannot have been warranted because the ethnicity of the applicants was deemed 'immutable'. In Bosnia's constitutional arrangements a person's declared ethnicity is chosen by the individual. That fact might be taken in two (rather different) directions.

One consequence might be to say that, since the applicants were able to self-designate as one of the Constituent People, they should bear the consequences of their choice not to do so. There is no incompatibility between being Roma or Jewish and self-identifying as Bosniak, Serb, or Croat. Self-identifying with one of the three designations did not require any repudiation or degradation of any other identity. The European Roma Rights Centre, however, responded to this argument by claiming that to accept this reasoning would be contrary to Article 3 of the Framework Convention on National Minorities.[47]

But it is not necessary to take the consequences of the Constitution's approach to ethnicity so far. A more minimalist approach would say that, whatever other consequences may flow, the argument at least undermines the 'immutability' theory as a

[46] Northern Ireland's executive since 1998 has consisted of two components: joint premiers (termed the 'First and Deputy First Ministers'), and an Executive. The election of the first requires parties and members of the NI Assembly to designate themselves as [British] 'unionists', [Irish] 'nationalists', or 'others', whereas the second is chosen through a difference-blind algorithm, the d'Hondt rule, in which parties choose ministries in sequence and in total numbers according to their vote-share. Does the Court's judgment render the rule regarding the election of the premiers suspect because it requires elected officials to designate themselves?

[47] European Roma Rights Centre, *The Non-Constituents: Rights Deprivation of Roma in Post-Genocide Bosnia and Herzegovina* (Country Report Series, No. 13, Feb. 2004), at para. 5.4. See further Bardutzky, 'The Strasbourg Court on the Dayton Constitution', 6 *European Constitutional L Rev* (2010) 309, at 324.

convincing explanation of why the Court decided as it did in *Sejdić and Finci*. Indeed, the immutability approach has long been regarded sceptically by many academics in the home of its birth as being both under- and over-inclusive.[48]

While the 'immutability' theory is unconvincing, no *alternative* theory was identified by the Court as a replacement. Attempting to isolate a principled reason why certain groups and not others are particularly protected by the Court brings us face to face with the major unresolved issue in the approach the Court takes in its recent anti-discrimination jurisprudence. What is it that ECHR anti-discrimination law is attempting to do? Of the alternatives available probably the most popular theory is to seek to explain the categories of protected characteristics as involving those that are closest to an individual's *identity*. Not all identity groups are protected, however, and therefore 'identity' in itself is significantly over-inclusive as an explanation. Most often, there is a sense that to become a specially protected identity the identity group has to be seen as in some way 'vulnerable', but in what does the vulnerability of the groups protected in *Sejdić and Finci* lie? Perhaps the fact that Jews and Roma were the chief victims of the Holocaust might be thought sufficiently obvious to make the point, but the Court does not identify this as the reason. Nor does it identify the threat of anti-semitism or anti-Roma prejudice in other areas of Bosnian life as a reason. The Court's opinion provides no answer; readers should not be expected to have to intuit what its reasons were.

The possible difficulties in reviewing other consociational arrangements should now be obvious. The Court has placed much importance on whether the groups are classified in ethnic terms; the Court has appeared to conflate race and ethnicity – or at least ranked them equal among suspicious categories. Compounding all these difficulties, we do not know on what *basis* the Court classifies ethnic treatments as ethnic. Would the *Belgian* consociation now be classified as based on 'ethnic' rather than 'linguistic' distinctions, and would this mean that they are less acceptable? Would Northern Ireland's political arrangements be classified as 'ethnic' rather than 'national', and would its employment legislation establishing a quota for the filling of posts in the police force have been classified as 'ethnic' rather than 'religious', and would racial or ethnic be less acceptable than the use of national and religious criteria?[49]

These questions are also highly pertinent in Bosnia itself. Another way of viewing the groups involved in Bosnia is precisely in 'national' terms. Indeed, one of the arguments for the Dayton settlement was that it helped to deliver self-determination for different 'peoples', as provided for in international human rights law. Thus, each of the 'constituent peoples' of Bosnia is, under this approach, a nation which merits self-determination. Seen from this perspective, differentiating on the basis of whether one person is a member of one of these 'peoples' but another person is not means

[48] Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories', 89 *Yale LJ* (1980) 1063; Balkin, 'The Constitution of Status', 106 *Yale LJ* (1997) 2313, at 2365–2366.

[49] For a discussion of these arrangements see McCrudden, 'Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities', in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition and Human Rights Cultures* (2007), at 315.

preferring 'nationals' rather than discriminating on grounds of ethnic origin. Since the Court has not explained why in this case it is 'ethnicity' rather than 'nation' that is in issue, it has made future cases even more difficult to predict. One person's 'national' conflict may be another's 'ethnic' conflict. In conflicts of these kinds there may indeed always be a 'meta-conflict', i.e., a conflict about what the conflict is about, and it is not clear that courts can judge expertly and objectively on these matters. Will the Court be more willing to uphold the constitutional arrangements in Bosnia when faced with a challenge from a Bosnian *Serb* resident in the *Federation* who wants to participate in elections for the Federation candidates for the Presidency and the House of Peoples, and is prohibited from doing so? Is this different from Jews and Roma being excluded, and if so how? The Court may have intended to produce a narrowly tailored result, but it may prove difficult to confine it to this, in a principled way.

There is another difficulty that seems to arise from the different levels of scrutiny applied to discrimination on different grounds. Several consociations have been established to manage religious as well as other disputes (e.g., in the Netherlands and Cyprus). How are these to be treated? There are sometimes close connections, of course, between religion and ethnicity. Indeed, it can be difficult to draw a distinction between the two, as is famously true of Jews.[50] Ethnic discrimination may be interwoven with discrimination because of a person's adherence to a particular religion. The Court itself, in defining what constitutes 'racial' discrimination, has explicitly included 'ethnic' discrimination within the concept of 'racial', and defined 'ethnic' as including 'religious faith'.[51] Does this mean that all these grounds should be subjected to the strictest scrutiny?

15 Taking Sides

The third problem we identify is that the Court effectively took sides in favour of the Bosniak position and against the Bosnian Croats and (particularly) the Bosnian Serbs. Whatever one's views on the cause of the Bosnian conflict or the appropriate allocation of historical responsibilities for antagonisms in Bosnia before and after Dayton, it is legitimate to question whether that was a wise move. Courts judging consociations should take into account the possibility that the parties are engaging in something akin to 'lawfare', which Charles Dunlap defined as 'the use of law as a weapon of war'.[52] The Court, on one reading, appears to have viewed any ethnic model of the

[50] See, e.g., the discussion in McCrudden, 'Post-Multiculturalism, Freedom of Religion, and Antidiscrimination Law: the *JFS* case considered', 9 *Int'l J Constitutional L* (2011) 200.

[51] *Supra* note 1, at para. [43]. See also *Timishev v. Russia,* 44 EHRR (2007) 37, at para. [55]: '[e]thnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, *religious faith*, shared language, or cultural and traditional origins and backgrounds' (emphasis added).

[52] Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', Harvard University, Carr Center, 29 Nov. 2001, available at: http://people.duke.edu/~pfeaver/dunlap.pdf (last accessed 30 Jan. 2013).

polity as unacceptable in the longer term, and to have viewed a civic model as the European norm, as the Venice Commission appears to do. The civic or the integrationist model is thus perceived by the Court, on this reading, as a 'neutral' alternative to the use of ethnicity in the longer term. But to make this judgment is to ignore two facts of life. What is 'civic' is rarely, if ever, devoid of ethnic content, and the dominant group, or the most likely dominant group, tends to define itself as civic and its challengers as ethnic. As Joanne McEvoy observes concerning the situation in Bosnia Herzegovina, 'Bosniaks, by virtue of being the plurality, would like to see the abolition of the entities and a move towards a citizen- rather than group-based democracy'.[53] Eldar Sarajlic goes further, describing the dichotomy between civic and ethnic as 'analytically false' in the Bosnian context: '[t]he problem with the "civic" versus "ethnic" understanding of nationalism in Bosnia and Herzegovina is … [that] it is essentially embedded in a particular Bosniak political discourse and has few supporters outside political and intellectual circles of this ethnic group. … The notion of civic belonging in Bosnia and Herzegovina is often identified with Bosniak political discourse and does not resonate in areas dominated by Serbs and Croats'.[54]

Plainly put, the decision of the Court is one that in the longer term attempts to move Bosnia decisively in the direction of the preferred Bosniak position, because a central element of most Bosniaks' politics is to move towards majoritarian democracy.[55] This is not to maintain that Mr Finci's strategy was intentionally to engineer a judgment that would favour the Bosniak position. But that appears to have been the effect of his litigation, intended or not.

16 Creating Uncertainty for Future Negotiations

Perhaps the most troubling dimension of the Court's judgment is the fourth problem we identify: the uncertainty that the Court's approach has generated for past, present, and future sites of conflict in Europe (and elsewhere), and for efforts to resolve conflicts there and in Europe's 'near abroad'. Our concern is that the Court leaves future peace negotiators in places riven by bloody ethnic conflicts with considerably less flexibility in reaching a settlement, and may thus unintentionally contribute to the maintenance of such conflicts.

One of the defining features of most consociational arrangements is the expectation of the parties that the arrangements are to be *durable*, i.e., unchanged unless and until the contracting parties renegotiate the arrangements in ways provided for under the original bargain. One of the strongest senses conveyed by the Court's new approach, by contrast, is the belief that consociations are appropriate *only* in the

[53] McEvoy, '"We Forbid!" The Mutual Veto and Power-Sharing Democracy', in J. McEvoy and B. O'Leary (eds), *Power-Sharing in Deeply Divided Places* (2013).

[54] Sarajlic, 'Bosnian Elections and Recurring Ethnonationalism: The Ghost of the Nation State', 9(2) *J Ethnopolitics and Minority Issues in Europe* (2010), 66, at 67 and 72.

[55] Hitchner, 'From Dayton to Brussels: The Story Behind the Constitutional and Governmental Reform Process in Bosnia and Herzegovina', 30(1) *Fletcher Forum World Aff* (2006), 125, at 132.

immediate *aftermath* of a war or dispute, and then only for a *temporary* period. The model for what is seen as acceptable seems to us to be an over-generalization from the South African transition from apartheid.

In the Bosnian case, the Court sought liberalization of the state's corporate consociational provisions in ways that required change beyond that envisaged by the founding bargain itself, and through means not foreseen in that agreement. In so doing, the Court sent a clear signal that any foundational aspect of a consociation can be reversed by judges, even, or rather especially, when the parties themselves have not agreed or cannot agree to change. The message that the case sends, intentionally or not, is that courts can and may unpick highly sensitive national, ethnic, religious, or linguistic bargains in some future, unpredictable, circumstances. That is not perhaps the most helpful message to filter into the latest or any future UN-led negotiations to reunify Cyprus. The Court's message may lead, in the future, to negotiators being much less open to persuasion that the arrangements they are being offered as protection for their interests will be stable in the future, i.e., not subject to change without their consent. The blunt choice between a continuation of war and agreeing to a heavily compromised power-sharing agreement to end hostilities, always highly uncertain, may now hang even more in the balance than in the past because commitments involving courts may lack credibility. The ECtHR's older approach in the Belgian cases was seen to reflect, and to some extent to create, international human rights standards. The Court's new approach brings with it significant uncertainties, therefore, not only in Europe but internationally over how courts will react to consociations.

Lawyers will immediately reflect on a related repercussion. Should wise legal advisors to one of the parties to a future consociational bargain advise them to exclude domestic, regional, and international courts from having the right to review their bargain? Should they suggest that Bills of Rights be written which expressly exclude the application of the rights in question to the composition and decision-rules of executive, legislative, and judicial bodies? Should they say that accession to the Council of Europe, let alone the European Union, will jeopardize any consociational bargain? For there are, of course, mechanisms that may be drawn on to prevent judicial reversal of a consociational agreement from occurring, such as creating exceptions, making derogations, and specifying the duration of agreements, or portions thereof, and the rules under which they may be reviewed or modified.

One indication that negotiators of consociational arrangements are already aware of the potential for judicial unwinding is to be found in Northern Ireland. In 2000, under pressure from local parties and supported by the Government of Ireland, the EU amended one of its principal anti-discrimination directives specifically to protect aspects of the consociational arrangements in Northern Ireland from challenge on equality grounds.[56] There is, of course, a significant danger that in following this route,

[56] Council Dir. 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ (2000) L303/16, Art. 15. However, in other respects, legal challenges to aspects of consociationalism may still be possible under EC law: see, e.g., Case C–274/96, *Bickel and Franz* [1998] ECR I–7637.

i.e., in trying to close off the availability of judicial review completely, new arrangements may result which are even more complex, filled with veto points, and leave the polity without recourse to what courts are often good at. They may even encourage lawyers and courts to find ways round these exclusions and limits. There is often nothing more determined than a court faced with an exclusion clause restricting its jurisdiction. In short, future legal and political advisors are likely to counsel the makers of power-sharing agreements with consociational components to exclude bills of rights with wide application, and seek to exclude regional courts, and the jurisprudence of international human rights law. Is that an outcome that furthers human rights?

17 Democratic Mandates

Fifthly, it is surprising and troubling that there was an obvious distinction between the Bosnian case and the Belgian cases that the Court did *not* stress. A much narrower – and democratic – approach was available to the Court. One of the most significant differences between the Belgian and the Bosnian cases is that the measures in Bosnia were not supported by any democratic process, within or across the constituent peoples. This was in marked contrast with Belgium, where the democratic and inclusive nature of the support received for the arrangements across the different communities was clear.

Not only did the United States, and the international community, foist the Dayton Accords on Bosnia, the minority groups that make up 'the others' were not even invited near to the negotiating table, and had no opportunity to accept or reject the package that was agreed by the negotiators on behalf of the three constituent peoples. The Dayton Agreement was not only created through the full vigour of coercive US diplomacy, it was not ratified by any referendum which enabled the relevant peoples to endorse it – unlike Northern Ireland's 1998 Agreement or Iraq's Constitution of 2005.

Issacharoff has argued that courts should be more willing to intervene where corporate consociational arrangements are *maintained* because of the possibility of 'a lock up of power by self-interested incumbents' rather than because of 'a genuine compromise'.[57] We would go further, but in a different direction. Although, in general, we favour consociational bargains being unwound only by the parties themselves, according to their previously agreed rules – and there is certainly a role for courts in ensuring that they comply with such rules – we are minded to favour making the democratic inclusiveness of the process under which the bargain was arrived at a key test of its acceptability, and a key element in deciding whether a particular consociational arrangement passes muster under human rights scrutiny. The absence of any significant reliance by the Court on *this* feature of the Bosnian case is troubling, because it thus leaves uncertain those consociational arrangements (not only in Belgium) that *have* been given significant democratic mandates (i.e., concurrent endorsements by the affected and participating peoples).

[57] Issacharoff, 'Democracy and Collective Decision Making', 6 *Int'l J Constitutional L* (2008) 231, at 265.

We recognize that our suggestion is not without difficulties. The Dayton Agreement was intended to make peace among warring parties and set in place arrangements that were deemed necessary to do that. The 'others' were not among the warring parties. What if they had been present during the negotiations, and raised their objections, and the overwhelming majority, including the representatives (such as they were) of the three main groups, had then rejected their arguments? Would their unsuccessful participation have been sufficient to justify affirming the arrangements that resulted? We can also imagine the 'others' participating and agreeing to provisions which they disliked, under the threat that the war would continue if they did not. What effect should this difference have? Should we be suspicious of any such result, on the analogy of viewing agreements made under duress as unacceptable?

Nevertheless, we maintain there are two key principles that courts would be well placed to consider, as and when they consider future cases. The first of these is that consociations in states or regions of states that have been ratified through referendums, especially with the concurrent assent of the affected groups or peoples, deserve a higher margin of appreciation from courts compared with those that have not. This is not an idle recommendation, given that any Cyprus settlement will be conditional on concurrent assent from Greek and Turkish Cypriots. The second is that consociations are best unwound, as and when that is required, by the parties who made the relevant bargain, with or without mediators (not arbitrators). If that bargain was broadly inclusive in its negotiation, and produced with relatively little overt great power, regional, or local coercion, then its provisions for its own review and amendment deserve the most profound respect of courts, whether they be specialized human rights courts or otherwise.

18 Judicial Legitimacy

We come now to our final point: the effect of the Court's decision on judicial legitimacy. Neither Pildes nor Issacharoff appears to have envisaged the possibility that where courts did strike down aspects of an ethnic bargain the result would be that the judgment would simply be ignored. Yet that is what appears to be happening following the *Sejdić and Finci* decision, with potential damage to the Court's own long-term credibility and the legitimacy of the Bosnian Constitutional Court.

Wojciech Sadurski usefully distinguishes between different types of legitimacy for courts. 'Sociological' legitimacy relates to the legitimacy of the courts judged against the 'standards adopted in a given community', while 'normative' legitimacy relates to legitimacy judged against 'factors such as rationality, reasonableness, consistency etc.'. He also distinguishes 'input- and output-legitimacy'. The former focuses on pedigree: are constitutional courts set up in a way that properly confers legitimacy on them? The latter relates to the 'product that the courts deliver: the consequences of their actions judged by the criteria of overall political values espoused by the society'.[58]

[58] Sadurski, 'Constitutional Courts in Transition Processes: Legitimacy and Democratization', Sydney Law School Legal Studies Research Paper, No. 11/53 (Aug. 2011) (available on SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919363, last accessed 30 Jan. 2013).

We can say, at the moment at least, that the sociological and the output-legitimacy of the Court's judgment is low among Croat and Serb politicians in Bosnia, whereas it is high among many academic Court-watchers, and human rights activists. Marco Milanovic captures this gap in perceptions well: '[f]rom the Strasbourg perspective, the result in *Sejdić* … could hardly have been different. Ethnic discrimination is repugnant to any form of liberalism, and the Court would simply not set a precedent that would potentially open the door to future cases seeking further exceptions to the Convention's prohibition on such discrimination. Viewed from Sarajevo, however, the clarity of the law does not sit very comfortably with the messy facts on the ground.'[59] For the moment, the judgment of the Court remains un-implemented, and it would be a brave person who would predict implementation soon. The danger is, of course, that non-implementation not only weakens the sociological output legitimacy of the Court in Bosnia, but may further weaken the Court's legitimacy elsewhere.

Turning now to the impact of the Court's decision on input legitimacy, the concern here is not with the legitimacy of the European Court of Human Rights so much as the effect of that Court's decision on the legitimacy of the Constitutional Court of Bosnia itself. Bardutzky has questioned whether, under the approach adopted in *Finci and Sejdić*, 'the composition of the Constitutional Court [itself] … could be seen as questionable'.[60] The potential problem for these other arrangements is that the Court may have adopted such a heightened scrutiny of ethnic classifications that the Bosnian court's composition may be difficult to justify. It would be profoundly ironic if the carefully negotiated rules to ensure presence in the Constitutional Court for the constituent peoples were deemed illegitimate whereas the position of foreigners on the Court was not suspect.

19 Conclusion

As we have made clear, we believe that it would be hard to argue that liberalizing some features of the Bosnian consociation would not, overall, lead to a better political system, but the issue, we said, is *when* to make the change, *who* is to make it, and *how*. We have provided arguments for finding the Court's answers to these questions troubling, and its reasoning unpersuasive.

[59] Milanovic, *supra* note 1, at 638.

[60] Bardutzky *supra* note 47, at 328. But see *Jacobs v. Belgium*, Communication No. 943/2000, CCPR/C/81/D/943/2000), 17 Aug. 2004.