

Consociation as an Impediment to EU Accession

The Case of Bosnia and Herzegovina

By

Kenan Idrizovic

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Department of Legal Studies

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Supervisor: Professor Daniel Smilov

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ABSTRACT

The principal premises of consociational constitutional framework are exhaustive. They are contingent and predicated upon a number of factors which are at the center of interest of political science. Bosnia and Herzegovina and its constitutional framework fall within this ambit and stand out as a par excellence political issue. The constitutional framework of the country was further strained when the European Court of Human Rights delivered ‘Sejdic and Finci’ decision; the decision created a new challenge to the consociational arrangement of the country – one, incapable of providing a bare minimum for accession to the European Union. The following discussion analyses the impact of the Sejdic Court’s decision on the fragile constitutional state building capacity and its capacity to accede to the EU. It does not purport the judgment to be the answer to overly complex issue of Bosnia and Herzegovina; however, where political science falls short to advance a fresh, omnipotent solution – international court’s intervention may be the way forward.

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INTRODUCTION

Discussion about Bosnia and Herzegovina in any context invariably invokes its recent past marked by the armed conflict, reminisces of which dominate the country's agenda of today. 1992-1995 war in Bosnia and Herzegovina has created new realities and presented legal theorist, practitioners and political scientists with a new set of challenges. The *Strasbourg Court*¹ by its *Sejdic and Finci*² decision has not eased, but rather added to the complexity of the situation in light of the country's constitutional framework and its effort to constitute as a modern liberal democracy. The European Court of Human Rights (hereinafter 'ECtHR' or 'Court') took upon itself an unprecedented task of reviewing the compatibility of constitution of the Council of Europe member state with the European Convention on Human Rights.³ The decision sparked stark discussion and criticism among political scientists but equally constitutional lawyers for its implications on the constitutional system of the country. The prolific critical work of the decision covers a wide spectrum of concerns, the country's consociational legal framework and ethnocratic structure coming back into the center of the discussion.

The forward work addresses McCrudden and O'Leary⁴ criticism of *Sejdic Court*, namely its proposition of potential negative implications of the Court's decision to peace-negotiating processes in situations similar to that of war-time Bosnia and Herzegovina. The authors in an elaborate discussion express their skepticism towards the ECtHR change in judicial review of the consociational arrangements. As a counterargument I suggest that voluntary nature of accession of Bosnia and Herzegovina to the Council of Europe casts doubt

¹ European Court of Human Rights, the judicial organ of the Council of Europe

² *Sejdic and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, ECtHR, Grand Chamber, 2009

³ Judge Mijovic makes reference in her partly concurring and partly dissenting opinion in *Sejdic and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, ECtHR, Grand Chamber, 2009; Hodzic and Stojanovic, pg. 24, *New/Old Constitutional Engineering? Analitika*, Sarajevo 2011

⁴ *Courts and Consociations*, Christopher McCrudden and Brendan O'Leary, March 24, 2012.

on the skepticism advanced by McCrudden and O’Leary. One of the basic premises of any consociational arrangements is a voluntary nature of change in the system. In situations such as currently in Bosnia and Herzegovina, no coercion or influence by international community has accounted for the country’s decision to accede to the Council of Europe. Consequently, while suggestions of possible negative implications of the ECtHR decision on peace negotiations in societies suffering from ethnic conflicts are plausible, the decision of the ECtHR is without effect unless the societies in question join the organization. Moreover, the Court’s decision is important not only from the aspect of protection of human rights as provided for by the Convention;⁵ it serves as an impetus for constitutional change in situation when domestic political elites, disinterested in change and self-entrenched decide to maintain a *status quo*.

The ensuing discussion is contemporary as nearly 18 years after the reconstitution Bosnia and Herzegovina has hardly managed to resolve any of the issues that led to the war – let alone established itself as a service of its people – a modern, well-functioning democracy. The country is marked by sharp ethnic cleavages, the constitutional framework providing a bare minimum of its intended purpose. There is a common consensus among the commentators that the Dayton Agreement⁶ has managed to stop the bloodshed in the country; however, this was done through constituting the country on consociational principles. The agreement, envisaged as a transitional constitutional framework has created a category of *others*⁷, and thus created a conflict with “global justice and the liberal individual preferences of international human rights institutions.”⁸

⁵ European Convention on Human Rights

⁶ Dayton Agreement – The General Framework Agreement for Peace in Bosnia and Herzegovina, signed in Paris in December 2005; an international agreement by which the war in Bosnia and Herzegovina has ended.

⁷ Others – Under the Annex 4 of the Dayton Agreement, others are all citizens of Bosnia and Herzegovina who do not declare as Bosniak, Serb or Croat.

⁸ Supra note 4

Various modalities for implementation of *Sejdic and Finci* have been suggested. The political rights in ‘*Sejdic and Finci*’ are a powerful tool for dismantling consociational system, a one that is clearly not suitable for entering Bosnia and Herzegovina in the European Union. The question of how to reconcile the ECtHR affirmed individual rights against the constitutional system favoring collective, ethno-dominated elites is a paramount challenge to constitutional legal thought. Hodzic and Stojanovic⁹ suggest territorial instead of ethno-cultural federalization. Their work is a practical set of proposals for implementation of the decision, based on a comparative study of countries with similar conflict between consociational mechanisms and individual human rights.

The forward work is limited in its scope in that it does not attempt to offer a conclusive solution to the debated issue of implications of the ECtHR decision for the political processes and stability in the country. The comparative approach in the paper is limited to situations where necessary and possible for Bosnia and Herzegovina being a *sui generis* in constitutional sense. Furthermore, it does not take to analyze the European Union or Bosnia and Herzegovina and their relation in light of accession requirements. As a *caveat*, thesis title uses the EU as a catch-all synonym for it symbolizing the best of the tradition of the European people in spheres of human rights, economic progress and political stability and unity. The focus of the thesis is on the judicial means for breaking of the political impasse.

The contribution of this work is in that it further discusses implications of the decision in *Sejdic and Finci*, and offers fresh arguments in favor of the ECtHR jurisprudence on the issue of consociationalism and role of the courts in transformation of consociations.

The paper is structured in that it offers a general historical background information about Bosnia and Herzegovina and its constitutional framework. The second chapter discusses the main principles and ideas behind consociational arrangement, its strengths in harnessing

⁹ Hodzic and Stojanovic, pg. 24, *New/Old Constitutional Engineering? Analitika*, Sarajevo 2011

violence among divided groups, but also the limitations in sense of human rights. The next chapter discusses the decision of the ECtHR in *Sejdic and Finci*, and obligations that follow from it for Bosnia and Herzegovina. In Conclusion, the research suggests a way forward for Bosnia and Herzegovina. Its membership in the Council of Europe and obligations that follow from it are safe guarantees for progressive, if not effective protection of human rights in consociational democracies.

1. CHAPTER 1 – BOSNIA AND HERZEGOVINA

The full account of complexity of Bosnia and Herzegovina, both from constitutional, but also socio-political and human rights perspective is not possible without reference to the pre and post war times. The case of Bosnia is an open chapter which challenges many existing theories in relevant field of law and legal science.

1.1 Chronology of the Conflict

Bosnia and Herzegovina is a sovereign state which gained its independence from the Socialist Federal Republic of Yugoslavia in March 1992. The act of independence has come as a result of disintegration of Yugoslav federation which started when Slovenia, an equally standing republic within the federation has proclaimed its independence from the state. A brief armed conflict had ensued when the federal authorities attempted to stop secession by forceful means. The Slovenia's example was followed by Croatia in summer 1991. Unlike Slovenia which was ethnically highly homogenous territory, mostly comprised of Slovenians, the majority of the Croatia's population was composed of ethnic Croat majority and Serb minority. This resulted in a war which in its length and intensity at times resembled that in Bosnia and Herzegovina.

Bosnia and Herzegovina faced with new realities was left with a choice of remaining within what left of former Yugoslavia, or pursuing its own future as a new state. Far from this being a simple choice, in situation when one third 31.2%¹⁰ of population is ethnic Serb, 17.4%¹¹ ethnic Croat, and 43.5%¹² ethnic Muslim¹³, the country faced a situation in which it

¹⁰ Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Federal Office of Statistics; Census Results 1991, source: <http://www.fzs.ba/Dem/Popis/NacPopE.htm>

¹¹ *Id.*

¹² *Id.*

¹³ Ethnic name for Bosniaks under the Constitution of Socialist Federal Republic of Yugoslavia of 1974.

failed to find a compromise. Demise of the Socialist Federal Republic of Yugoslavia along with the general elections in Slovenia and Croatia have lead Bosnians to elect its representatives along nearly identical ethnical lines.¹⁴ The disintegration of the federal state has led the new democratically elected government to seek international recognition as an independent state. The recognition was contingent upon the fulfillment of conditions set by the European Community.¹⁵ The European Community Arbitration Commission set a two-prong request before the Socialist Republic of Bosnia and Herzegovina. It has been requested of the state to: “provide guarantees and organize referendum in which all citizens of the Socialist Republic of Bosnia-Herzegovina would participate and which would be conducted under international supervision.”¹⁶ Having met the conditions, the referendum was organized on February 29 and March 1, 1992. 63.4%¹⁷ of the eligible voters have participated in the referendum; 99.7 %¹⁸ of those voted for the state independence. It is important to note that majority of Serbs in Bosnia and Herzegovina has boycotted the referendum, casting a shadow to the referendum’s legitimacy. It is beyond the scope of this paper to discuss in detail the circumstances surrounding the event, consequences of which continue to dominate the state’s constitutional agenda up to date.

Following results of the referendum the war had broke out in the country. Nevertheless, the country was admitted to the United Nations as a member state by the General Assembly resolution¹⁹ on May 22, 1992. The United States and the majority of European countries including Russian Federation have recognized Bosnia and Herzegovina in April 1992. The severity and the character of the war have come to the attention of the international community as early as in 1992. Number of international judicial instances and

¹⁴ International Crisis Group, ICG Bosnia Report No. 16, 1996;

¹⁵ Commission on Security and Cooperation in Europe, 102nd Congress, 1st Session, The Referendum on Independence in Bosnia – Herzegovina February 29 – March 1, 1992.

¹⁶ *Id.* at 10

¹⁷ *Id.* at 21

¹⁸ *Id.*

¹⁹ The text of the UN Resolution A/RES/46/237, <http://www.un.org/documents/ga/res/46/a46r237.htm>

organizations are actively working on defining and documenting the character of war and prosecuting those responsible for the gravest of the violations of the laws of war, international humanitarian law, including the genocide, perpetrated by the Bosnian Serb armed forces against the Bosniak population in the eastern Bosnia.

The position of Bosnia and Herzegovina as a republic within federal Yugoslavia and its ethnic composition are crucial for proper understanding of the subsequent events. At no times the political elites of the country were left free to define its own interests. A heavy influence from the neighboring countries, particularly from Serbia and Croatia on political leadership of the two respective ethnoses in Bosnia and Herzegovina had further exacerbated inter-ethnos relations. The dependency of the political leadership of Bosnian Serbs and Croats and the crucial role of Serbia and Croatia in the war in Bosnia has been confirmed by these countries taking part in the peace negotiations in 1995.

1.2 Bosnian Constitutional Framework

The constitution of Bosnia and Herzegovina has come about as an effort of the international community to put an end to the bloody ethnic war in the country. In autumn of 1995, presidents of Bosnia, Serbia and Croatia were gathered in Dayton, Ohio, away from its constituencies to negotiate the peace. “It was to be a constitution by international decree.”²⁰ The people of Bosnia and Herzegovina did not draft it nor did they ever ratify it; yet, it was meant to serve the needs of the people on the ground. As one of the authors²¹ of *Dayton*²² suggested, the agreement was both “a forward-looking effort to resolve the war’s underlying

²⁰ Carl Bildt in his observations on the Constitution of Bosnia and Herzegovina, 1998, pg. 139

²¹ James O’Brien, ‘The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation, quoted by Sofia Sebastián, 2012, Constitutional Engineering in Post-Dayton Bosnia and Herzegovina, *International Peacekeeping*, 19:5, 597-611

²² „The General Framework Agreement for Peace”, an international agreement by which the war in Bosnia and Herzegovina has ended, agreed by the presidents of Bosnia and Herzegovina, Serbia and Croatia in Dayton, Ohio in November 2005, and signed in Paris, France in December 2005.

tensions and a backward looking arrangement that retained and empowered persons who depended on exploiting these tensions.” However, the question of legitimacy of the agreement remains, as the highest law of the land has never been legitimized by the people on the ground either by referendum, ratification in the parliament or other democratic means. Instead, the constitution recognized the realities on the ground. “Demands of democratic legitimacy had to give way to obvious priority of ending blood-shed and securing peace in the country”²³

As a result, the new Constitution (Article 1²⁴) has affirmed the continuity of the Republic of Bosnia and Herzegovina as internationally recognized state, albeit under the new name of Bosnia and Herzegovina. The state took different territorial arrangement, getting organized into two Entities, Federation²⁵ of Bosnia and Herzegovina and Republic of Srpska. The underlying principle behind the new constitutional arrangement was that of power-sharing, or as is known among political scientists – consociation. The Constitution did not take into count full ethnic picture of the country. It created a two-tier structure of people in Bosnia and Herzegovina institutionalizing the discrimination at the highest level. The preamble introduced a category of “constituent peoples” and “others”.²⁶ The constitution was never envisaged as a permanent solution for the country. Instead, the focus was on “state-building rather than human rights.”²⁷ The issue of human and political right hierarchy has eventually become the key political issue that culminated in the decision of the European Court of Human Rights in *Sejdic and Finci v. Bosnia and Herzegovina* in 2009. The creators of the Dayton agreement were far from unaware of the inequalities created in this way. The text did not stipulate criteria for belonging to either of the ethnic groups. As McCrudden and O’Leary correctly observe, the constitution left out any objective criteria for determination of

²³ Samo Bardutzky, The Strasbourg Court on the Dayton Constitution, Judgment in the case of *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009

²⁴ The General Framework Agreement for Peace, Annex 4, http://www.ohr.int/dpa/default.asp?content_id=372

²⁵ Federation of Bosnia and Herzegovina was created in 1994 during the war with an aim of stopping the war between Bosniaks and Croats.

²⁶ The Preamble of the General Framework Agreement for Peace, Annex 4, http://www.ohr.int/dpa/default.asp?content_id=372

²⁷ Bosnia’s Gordian Knot: Constitutional Reform Crisis Group Europe Briefing N°68, 12 July 2012

one's ethnicity. Self-classification is the only criteria and no acceptance by the members of any of the three groups is necessary. It is of no relevance whether the person speaks certain language or belongs to a certain religion. Such the constitution speaks explicitly of Bosniaks, Croats and Serbs as "constituent peoples"²⁸. So who are the *others*? According to the Constitution all those not declaring themselves as Bosniaks, Serbs or Croats are *others*. In context of Bosnia and Herzegovina and its understanding of ethnicity these are not only those belonging to other ethnicities (such as Montenegrins, Macedonians or Ruthenians²⁹), but also those who for the reasons of being born in inter-ethnic marriages do not wish to declare as either of the three major ethnicities.

Hodzic and Stojanovic give a good account of concept of minority in Bosnia and Herzegovina. Constitutionally, constituent people make neither majority nor minority at either the level of Bosnia and Herzegovina or the Entities. Although they are not the minorities, in socio-political and statistical terms Bosniaks and Croats make minority in Republic of Srpska, and Srbs in Federation of Bosnia and Herzegovina. As the tandem points, "Bosnia and Herzegovina is sometimes described as a country of minorities since it does not have one dominant nation, as is the case in Croatia, Slovenia or Bulgaria..."³⁰

The Dayton agreement institutionalized ethnicity, giving the major three ethnic groups number of privileges. This is a result of a consociational principles built into the Constitution. In this way the drafters sought to enhance equality among the three dominant ethnos, at cost of the individualized equality. The constituent people were given veto powers in both three-partite presidency of Bosnia and Herzegovina and the Parliamentary Assembly. Article V of the Constitution is explicit in that it will be composed of three members, representatives of the

²⁸ Supra note 25

²⁹ According to the Act on the Protection of Rights of Persons belonging to the National Minorities, Official Gazette of BiH 12/03, there are 17 minorities living in Bosnia and Herzegovina: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks and Ukrainians

³⁰ Hodzic and Stojanovic, pg. 24, *New/Old Constitutional Engineering? Analitika*, Sarajevo 2011; pg. 49

constituent peoples. A Serb member will be directly elected from territory of Republic of Srpska, and Bosniak and Croat member by direct election from the territory of Federation of Bosnia and Herzegovina.³¹ In situation when a decision cannot be achieved by consensus, a vital national interest veto can be declared by the over-voted member. Article IV of the Constitution is as equally discriminating as it gives no *others* veto power. The article gives only Bosniaks, Serbs and Croats option of declaring a decision of the Parliamentary Assembly as destructive of the vital national interest.³² The principle of ethnic representation discriminates again the *others* as the Constitution provides no such option to them.

As far as respect of human rights, the Constitution of Bosnia and Herzegovina can be considered as one offering one of the highest levels of protection. Article II of the Constitution stipulates a direct applicability of the rights and freedoms as contained in the European Convention for the protection of Human Rights and Fundamental Freedoms and its Protocols. "These shall have priority over all other law."³³ It is not by accident that the framers provided for a peculiar composition of the Constitutional Court of Bosnia and Herzegovina. According to the Article VI, the Court will be composed of nine members, four of which will be selected by the House of Representatives from the Federation of Bosnia and Herzegovina, while two by the Assembly of Republic of Srpska. The remaining three judges shall be appointed by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina.³⁴ The ethnicity of the judges is nowhere mentioned in the Constitution. However, it is implied and in practice the case that two judges of the courts are Serbs (the once selected by the Assembly of Republic of Srpska), two Croats, and two Bosniaks, selected by the House of Representative of the Federation. The remaining three judges, however, must not be citizens of Bosnia and Herzegovina or one of the

³¹ The Framework Agreement for Peace: Annex 4, Article V: Presidency, source: http://www.ohr.int/dpa/default.asp?content_id=372

³² *Id.*, Article IV: Parliamentary Assembly, Art IV, §3(e)

³³ *Supra* note 30, Article II: Human Rights and Fundamental Freedoms Art II, §2

³⁴ *Supra* note 30, Article VI: Constitutional Court, Art VI, §1(a)

neighboring countries.³⁵ The Court's jurisdiction is a typical of the constitutional court. It is required to uphold the Constitution. It is to adjudicate in disputes between the state and Entities, and Entities among themselves. Moreover, the Constitutional Court has a power of review of compatibility of any of the Entities' law, including the Constitutions with the Constitution of Bosnia and Herzegovina. It is also an appellate court, or the court of last instance for matters arising from any other court in the country. Most importantly, judges belonging to one of the constituent peoples can block any piece of legislation, suffice foreign judges share the opinion. The built-in mechanism is a safeguard provided for by the framers so that international community retains control over decision-making in Bosnia.³⁶ Indeed, the consociational constitutional framework has not been fully entrusted to the local power-players. This is not a consequence of the concern for the rights of *others*. Quite contrary, this system was put in place to ensure that no legislation threatening a vital interest of either of the constituent peoples is upheld, unless the three foreign judges are convinced.

It is clear from the letter of the Constitution that it made no effort to accommodate the *others*. Even if it provided the *others* with a veto power, it is clear that the *others* cannot exist as collectivity in a culture-religious-ethno sense. *Others* as a constitutional category have been clearly subjugated to the domination of the three major groups. It is of a little condolence that the Constitution was envisaged as a transitional solution. Its power-sharing mechanisms have left significant group of people without political powers. Restrictive provisions of the Constitution along with the Electoral Law stipulating the requirement of eligibility to stand for election for the state Presidency and House of Peoples is an ample example of this inequality. The system put in place is the one concerned with three major ethnic groups. The post-Dayton Bosnia and Herzegovina is envisaged as a consociational state. The futility of this constitutional arrangement is clearly demonstrated in the post war

³⁵ *Id.* § 1(b)

³⁶ Samo Bardutzky, The Strasbourg Court on the Dayton Constitution, Judgment in the case of *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009, pg. 7

period. Any and all efforts to restructure the state into the modern liberal democracy had failed. The features of this system and its strengths and weaknesses will be discussed in the next chapter.

2. CHAPTER 2 – CONSOCIATIONAL DEMOCRACY

The war in Bosnia and Herzegovina has ended only after the international community intervened by use of force. This action was followed by a meticulously designed peace package, part of which was a new constitutional framework for the country. The new constitution was designed to bring the war to an end, secure a minimum for functioning of the state, and provide some mechanisms for the future. It is true that this was possible only by constitution drafted on premises of a consociational democracy. The current research acknowledges the potentials of consociations as effective tool in stopping of armed conflicts; however, consociational democracies are inherently at odds with liberal democracies and their understanding of human rights. This is by and large due to system's inability to reconcile the concept of individual with that of collective political and human rights, thus alienating the country from the family of modern liberal democracies. The forward chapter offers an insight into the concept of consociationalism, but also discusses why it is not a solution for Bosnia and Herzegovina.

2.1 Main Principles and Ideas

Consociationalism is a political science theory most frequently attributed to Arend Lijphart for his immense contribution to the theory. Lijphart developed a theory on basis of political qualities of the Dutch system, claiming the model to be suitable to number of other instances. The cross-national theory has been readily embraced and put at work in various parts of the world with more or less success.³⁷ “Power-sharing solutions can be regarded as, at minimum, a realistic ... settlement achieving the widest consensus among all factions

³⁷ Pipa Norris, *Stable Democracy and Good Governance in Divided Society: Do Power-sharing Institutions Work?* Harvard, John F. Kennedy School of Government, 18 Jan 2005: Examples of success include Austria, the Netherlands, South Africa, and failure: Colombia, Lebanon, Cyprus, Malaysia, Czechoslovakia and Bosnia and Herzegovina;

engaged in post-conflict negotiations.”³⁸ This is not to say that Lijphart invented the concept. Scholarly works have been around since 1960’s and Lijphart has expounded on the theory anew. As Lijphart elaborates in his work³⁹, constitutional lawyers and politicians devised power-sharing concepts suitable for divided societies ahead of the theoreticians. In any case, the science struggles to establish a uniform set of principles that are applicable across the board. Countries differ in number of ways and divisions may exist along any given line. While critiques are addressed across the spectrum of solutions, it is undisputed that “deep societal divisions pose a grave problem for democracy...”⁴⁰ It is why an effort to devise an omnipotent solution for the problem is so delicate. It is clearly possible to provide a minimum necessary for the development of the democracy in a society. It is all together different question of the quality of such a system. Issues such as political stability, human rights and other remain open and differ from one country to another. According to Lijphart⁴¹, four features are necessary in classic consociations:

Power-sharing is the first requirement of the constitutional framework; in this way the groups, otherwise distinct and separate undertake to create and operate joint institutions of the state. Power-sharing secures the stake to each of the groups in each segment of government, whether legislative, executive or judicial.

The second requirement Lijphart claims is necessary is autonomy; without autonomy it is not possible to talk about consociationalism. There must exist an element of self-government in a public function. Belgium is a good example of lingual autonomy, but with each society, degree and extent of autonomy are subject to agreement between the groups. This is always a contentious issue, but nevertheless, the autonomy is a prerequisite for consociations to exist.

³⁸ Norris, *supra* at 2

³⁹ Arend Lijphart, *Constitutional Design for Divided Societies*, Project Muse, source: http://muse.jhu.edu/journals/journal_of_democracy/v015/15.2lijphart.html

⁴⁰ Lijphart, *supra* at 97

⁴¹ *Id.*

Proportionality is the third requirement. For proportionality it relates not only to the representation in common institutions, but also to allocation of the state resources. Again, no firm principle as for what the resources are intended. This is the subject of agreement or consensus and may include various functions or offices for which the funds are intended. Equally, in terms of office staffing, an adequate representation is to satisfy requirement of proportionality.

The fourth requirement of classic consociations⁴² is granting of an explicit veto right to each of the groups. The requirement of veto is provided for as an essential guarantee that no vital interest of any of the groups will be violated. This mechanism is truly powerful safeguard as its use may be allocated to either or both of the strongest branches of the government – legislative and executive.

I have already stated that no two models of consociational democracy are identical. Whether ethnic, lingual or religious – any of the divisions may further be complicated by other factors, such as political system and/or constitutional experience that preceded to the division. History of political culture of the country is extremely important for successful application of the above mentioned principles. Societies without democratic history (Bosnia and Herzegovina being an ample example) are thus much more complicated case for achieving a stable democracy.

The above principles operate as minimum of possible in a given situation. When option of dissolution is not practicable or acceptable, or may pose a threat to the peace (locally or regionally), consociational constitutional arrangement serves as a buffer between divided groups. It is envisaged as a lasting mechanism, and not only an instant solution for the problem at hand. The potential for future positive developments lies in the opportunity of otherwise opposed groups to come together and through the democratic process define its

⁴² Supra note 4 at 8, McCrudden and O’Leary speak of classic and semi-consociation. The latter is characterized by absence of last two prongs, proportionality and veto mechanism. It aims at improving inclusiveness in majoritarian liberal democracies.

common interests. There are inherent dangers in this; political representatives who strive to achieve new quality in inter-group relations are often sanctioned by its own constituents. The loss of popular support serves as an incentive for the elites to entrench and maintain the status quo, making a progress in defining a common policy among divided groups thus much more difficult to achieve. This is due to the electoral system which guarantees ethnic majorities domination within their autonomies.

The brief preview of the main features of a consociational democracy is nowhere a full account of all of the concepts that are advocated by various authorities. The above subheading summarizes the main features of a consociational democracy only to set the stage for examination of its effects on the constitutional framework of Bosnia and Herzegovina. The following two subheadings provide more detail.

2.2 Strengths and Weaknesses

It is an undisputed fact that the Dayton Peace Agreement has stopped the war in Bosnia and Herzegovina. In this respect the fact that a consociational arrangement of the country was the only possible mean for achieving the peace is not to be underestimated. The fact that no serious alternative to a consociational model has found fertile ground among either political scientists or constitutional writers corroborates the statement of consociationalism as “the only democratic model that appears to have much chance of being adopted in divided societies...”⁴³ The strengths of consociationalism are rather a product of lack of a plausible alternative, than a result of the features built into the system. The fact that power-sharing model leaves out whole group of people without a chance to stand for an office or vote in the elections is at odds with the concept of modern liberal democracy. Individualist

⁴³ Lijphart, *supra* at 4

concept of human rights is sacrificed to collective rights opening a question of the meaning of equality and non-discrimination in consociational systems. Human rights aspect of power-sharing system is seriously crippled when a constitutional framework creates unequal protection for various groups of citizens. This tension between consociations and human rights principles is inherent in the system, as it creates ethno-cultural elite. When put in the historical context of the country such as Bosnia and Herzegovina, this becomes even more of an issue. The concept of liberal democracy as understood today is virtually impossible in the country ruptured along the ethnic lines. Deep ethnic cleavages and territorial and psychological divisions are incapable of giving a due deference to the concept and principles of individual rights. This is due to constant threat of ethnic warfare, but also entrenched mentality of ruling groups, unwilling to give up on constitutionally allocated privileges. The question of justice is not entertained in case of Bosnia and Herzegovina. Unlike Netherlands or Austria, where there is a historical development in favor of consociational arrangement, there is a complete disconnect between the people of Bosnia and Herzegovina and its constitution. The shortcomings of a power-sharing system in Bosnia and Herzegovina are best manifested in what Zahar describes as a normative intransigence of elites to cooperate.⁴⁴ She ascribes this to several reasons: “the nature of electoral institutions; the balance of power between the central government and the entities; the causes and consequences of intra-communal out-bidding; and the impact of ethnic polarization.”⁴⁵ All of the above can be attributed to the power-sharing nature of the constitutional framework, and it is true that 18 years after the war, the constitutional framework succumbed to the challenges of the time.

⁴⁴ Marie-Joelle Zahar, *The Dichotomy of International Mediation and Leader Intransigence: The Case of Bosnia and Herzegovina*, Pluto Press, 2005.

⁴⁵ *Id.*

2.3 Assisted Consociation

The role of international community in Bosnia and Herzegovina is highly controversial in light of consociational constitutional framework. Early works on power-sharing make no mentioning of role of international mediators in functioning of the system. Bosnian consociational arrangement is perplexed by the presence of the Office of the High Representative (hereinafter ‘OHR’ or the ‘High Representative’).⁴⁶ The framers of the Dayton Peace Agreement understood from the beginning that consociational arrangement in Bosnia and Herzegovina will not survive without international supervision. Far from being a protectorate, there are many elements built into the agreement that suggest to this end. Annex X of the Dayton Peace Agreement provides for the Office of the High Representative charged with oversight of the civilian implementation of the peace agreement. Behind the OHR is the Peace Implementation Council⁴⁷ (hereinafter ‘PIC’), charged with political guidance of the OHR. The High Representative concurrently holds a position of the Special Representative of the European Union for Bosnia and Herzegovina. The OHR has vast powers in that it can adopt law, but also appoint or remove an incumbent from a civil post.⁴⁸ The extent of international community’s power is perhaps only limited in that the OHR cannot amend or

⁴⁶Supra note 30, Annex 10, Agreement on Civilian Implementation, source:

http://www.ohr.int/dpa/default.asp?content_id=366

⁴⁷ Peace Implementation Council comprises 55 countries and organizations: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (resigned in May 2000), Croatia, Czech Republic, Denmark, Egypt, Federal Republic of Yugoslavia (now the republics of Serbia and Montenegro), Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Jordan, Luxembourg, Malaysia, Morocco, Netherlands, Norway, Oman, Pakistan, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States of America; the High Representative, Brcko Arbitration Panel (dissolved in 1999 after the Final Award was issued), Council of Europe, European Bank for Reconstruction and Development (EBRD), European Commission, International Committee of the Red Cross (ICRC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Monetary Fund (IMF), North Atlantic Treaty Organisation (NATO), Organisation for Security and Co-operation in Europe (OSCE), United Nations (UN), UN High Commissioner for Human Rights (UNHCHR), UN High Commissioner for Refugees (UNHCR), UN Transitional Administration of Eastern Slavonia (UNTAES; disbanded in January 1998) and the World Bank. Source: <http://www.ohr.int/ohr-info/gen-info/#pic>

⁴⁸ European Commission for Democracy through Law, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, March 2005, source: <http://www.coe.ba/pdf/CDL-AD2004004-en.pdf>

enact new constitution; however, the High Representative can amend entity constitutions or even remove a member of the state Presidency from the office.

The effects and extent of the international community involvement can perhaps be best summarized in number of decisions adopted by the High Representative. The powers of high representative have been extensively used more than 900 times.⁴⁹ This was in particular true in the first years after the Dayton Peace Agreement. The issue of the role of the international community in the country underlines a nature and character of divisions among the political leaders. Federation of Bosnia and Herzegovina leadership is in favor of presence of the OHR for its role in strengthening state institutions. At the same time, authorities from Republic of Srpska bitterly oppose and criticize its presence, accusing it of a political violence.⁵⁰

Indeed, in spite of the previous experience of consociationalism,⁵¹ Bosnian elite dialogue is heavily burdened by presence of the OHR. Bosniak and to a lesser extent Croat elite rely on the decisions of the OHR to achieve their political goals. This creates an effect of the OHR and the international community as corroborators of one of the political groups in the country. The idea of consociational democracy is that of the opposed parties coming together and defining decisions of a common interest for all of the groups. In this situation, the OHR is not helping the process unfold as expected. Frustrations are further exacerbated by infrequent lack of consensus on important issues among the members of the PIC. The language of the OHR is not always consistent with its actions. Moreover, the implications of the OHR decisions for the state of political affairs in the country are such that a great deal of difficulties often associated with consociational model can be attributed to the international community.

⁴⁹ Office of the High Representative, All High Representative's Decisions, source: <http://www.ohr.int/decisions/archive.asp?m=&yr=2013&so=d&sa=on>

⁵⁰ BiH Dayton Project, Dodik Blames High Representative for Bosnia's Ills, November 10, 2012, source: <http://www.bihdaytonproject.com/?p=1597>

⁵¹ Supra note 42, pg. 124

The Dayton Peace Agreement and the consociational model it instituted have failed to create a stable democratic society in Bosnia and Herzegovina. Institutional design of the country is vastly complex, involving thirteen different governments above municipal level. A federation of entities with centralized Republic of Srpska and asymmetric Federation of Bosnia and Herzegovina is simply too big of a financial, intellectual and political challenge for a 4 million people country. The peace-building efforts in the post-Dayton Bosnia and Herzegovina have been centered on couple of strategies.⁵² The first strategy powered by the European Union (hereinafter 'EU') had for its goal strengthening of the central institutions. The Bosnian Constitution, while enumerating competencies of the state, provides that further competencies could be assigned to the state.⁵³ The role of OHR was instrumental in creating a legal basis through enactment of laws necessary to strengthen position of the state in this respect. The EU was insistent in that it wanted a central authority as a partner for the talks that would concern country's future in the EU. As a result of this effort, a number of institutions were formed at the state level, including, but not limited to formation of a unified state armed forces.

Second effort of the international community sought to redesign electoral system and achieve progress in the area of inter-ethnic relations. The progress achieved in this sphere was insufficient to get the three sides to take over and engage in a meaningful cooperation. The overall success in Bosnia and Herzegovina suffers from the fact that it did not come from inside, but rather through threat and coercion by the international community. In situation like this, policies defined within each of the respective groups were rather formulated with a view of a possible reaction of the international community and its reaction, than on the effect it may actually create.

⁵² Sofía Sebastián, 2012, Constitutional Engineering in Post-Dayton Bosnia and Herzegovina, *International Peacekeeping*, 19:5, 597-611

⁵³ *Supra* note 30

Two last efforts of the international community to change constitution have been made in 2006 and 2009 respectively. The efforts meant an effort to close the OHR and accelerate the country towards its much proclaimed destination – the EU. The EU and the US sponsored talks with the country leaders was one last effort on part of the international community to improve the constitutional framework, abolish most of the shortcomings mentioned above, but to no avail.

There are many reasons to have reservations towards the concept of consociational democracy as understood and exercised in Bosnia and Herzegovina. Efforts of the international community to secure and relax the situation yielded no qualitative results. Consociationalism combined with protectorate-like powers of the High Representative showed no capacity to place the country on its EU path. The constitutional depositories of power have been exhausted to this end. Not all hope is lost for the future of the country. One of the areas of law which have capacity in this respect is the obligations of the country under the international law. The next chapter will address the country's membership in the Council of Europe along with the jurisprudence of the ECtHR.

3. CHAPTER 3 – JUDICIARY AS A WAY FORWARD

The exhaustive character of a consociational legal framework in post-conflict societies deserves to be evaluated through the prism of a country's membership in an international organization. Perhaps, in case of Bosnia and Herzegovina, the Council of Europe (hereinafter 'CoE') is one of the most important international organizations for it having an efficient mechanism of enforcement of the Convention guaranteed rights. The organization also recognizes the country as "one of [its] most important beneficiaries."⁵⁴ The notorious shortcomings of all efforts invested in the restructuring of Bosnia and Herzegovina as a modern, liberal democracy have come to the final test. The membership poses a challenge not only for the country, but for the organization as well. Enforcement of the Court's decision is not an issue within the organization. Constitutional framework, let alone its objective hindrance such as consociational constitutional framework are not an excuse for non-compliance with the Court's decisions. The forward chapter examines the role of the courts in transforming a rigid constitutional scheme. This role is important in consociational Bosnia and Herzegovina as courts may act as "unwinders of ethnic political bargains."⁵⁵

3.1 Bosnian Consociational Judiciary

The courts in consociational system may play an important role. This role is not limited to domestic, but as McCrudden and O'Leary point, "increasingly... involve international and regional human rights courts."⁵⁶ While Bosnian Constitutional Court has a duty of upholding discriminatory constitution of the country, no such obligation lies with

⁵⁴ Council of Europe, Rapporteur Group on Democracy, Council of Europe co-operation with Bosnia and Herzegovina –Strategy Paper, source: <https://wcd.coe.int/ViewDoc.jsp?id=951051&Site=COE>

⁵⁵ Richard Pildes, Ethnic identity and democratic institutions: A dynamic perspective, in Sujit Choudhry, Constitutional Design for Divided Societies: Integration or Accommodation, 173, at 195

⁵⁶ Supra note 4 at 20

international courts. Bosnian Constitution⁵⁷ is explicit about the jurisdiction of the court in that it is to uphold the Constitution. The Constitutional Court of Bosnia and Herzegovina entertained the issue of ethnic discrimination of *others* under the country's constitution on more than a single instance. The first attempt to remove ineligibility of *others* to run for the Presidency and House of Peoples of Parliamentary Assembly of Bosnia and Herzegovina had come in 2006. The case⁵⁸ grounded on the Article II⁵⁹ of the Bosnian Constitution claimed direct applicability of the Article 5 of the International Convention on the Elimination of all forms of Racial Discrimination (hereinafter 'ICERD') along with Article 3 of Protocol 1 and Article 14 ECHR was dismissed on inadmissibility ground. The court found not to have jurisdiction⁶⁰ in the case for it concerning a dispute between domestic and international law.

The next challenge⁶¹ before the Court was equally unsuccessful. It concerned the Article 8 of the Electoral Law⁶² and its incompatibility with Article 3 of Protocol 1, Protocol 12 ECHR and Article 5 of ICERD. The Court found no violation for the inability of *others* to run for the state Presidency flows from Article V of the Constitution.

In the next case⁶³ before the Court (Party for Bosnia and Herzegovina and Mr. Ilijaz Pilav), an appellant whose right to stand in the election for the Presidency of the country as Bosniak from territory of Republic of Srpska was denied has challenged the compatibility of the Electoral Law with Article 25 ICCPR and Protocol 12 ECHR. Unlike the previous two instances the Court found the appeal admissible, but rejected it on the merits. In its reasoning

⁵⁷ The Framework Agreement for Peace: Annex 4, Article VI: Constitutional Court, source: http://www.ohr.int/dpa/default.asp?content_id=372

⁵⁸ Constitutional Court of Bosnia and Herzegovina, Decision U-5/04, source: <http://www.ccbh.ba/eng/odluke/>

⁵⁹ Supra note 59, 2

⁶⁰ Supra note 59, 3(a)

⁶¹ Constitutional Court of Bosnia and Herzegovina, Decision U-13/05, source: <http://www.ccbh.ba/eng/odluke/>

⁶² The Election Act 2001 (published in Official Gazette of Bosnia and Herzegovina no. 23/01 of 19 September 2001, amendments published in Official Gazette nos. 7/02 of 10 April 2002, 9/02 of 3 May 2002, 20/02 of 3 August 2002, 25/02 of 10 September 2002, 4/04 of 3 March 2004, 20/04 of 17 May 2004, 25/05 of 26 April 2005, 52/05 of 2 August 2005, 65/05 of 20 September 2005, 77/05 of 7 November 2005, 11/06 of 20 February 2006, 24/06 of 3 April 2006, 32/07 of 30 April 2007, 33/08 of 22 April 2008 and 37/08 of 7 May 2008) entered into force on 27 September 2001.

⁶³ Constitutional Court of Bosnia and Herzegovina, Decision AP 2678/06, source: <http://www.ccbh.ba/eng/odluke/>

the Court justified the restriction on exercise of political rights by necessity of preservation of power-sharing features of the country, as an ultimate constitutional goal.

The jurisprudence of the Constitutional Court of Bosnia and Herzegovina prompts to the conflicting nature of different provisions of the Constitution. While Article II §2 is explicit in that rights as contained in the Convention will have priority over the domestic law, Article V and its discriminatory provision against *others* run counter Article II. It can be explained by a series of compromises Bosnian elite made during the peace negotiations. The issue of hierarchy of norms is a delicate one, and the Court does not have an easy task in this respect. The challenge for the Court is in its jurisprudence, whether it chooses to develop it respecting basic notions of human and political rights, or along anachronistic, retrograde, consociational lines. In this respect it is interesting to look at the concurring opinion of one of the foreign justices⁶⁴ sitting on the panel in an appeal of „Party for Bosnia and Herzegovina and Mr. Ilijaz Pilav“(AP 2678/06):

Until the time (if it ever arrives) when Article V of the Constitution of Bosnia and Herzegovina is amended to remove the differential treatment of potential candidates for the Presidency, it seems to me that Article V leaves the drafters of the Election Law, the Central Election Commission and the courts no choice. It is not constitutionally permissible for a Law or the interpretation or implementation of a Law to be directly incompatible with the express and unambiguous requirements of Article V of the Constitution. Had the appellants succeeded in their appeal, it would have left Article V of the Constitution with no effect whatever. It would have been otiose, reduced to empty words. In my view, the Constitutional Court, required by Article VI of the Constitution to ‘uphold this Constitution’, cannot properly make a decision which makes an important part of the Constitution wholly ineffective. I accept that there different parts of the Constitution appear to have conflicting values and objectives, but constitutions are never entirely coherent. They are always shaped by, and are a compromise between, conflicting values and objectives. The task of the Constitutional Court under Article VI is to give effect to the Constitution, with all its inconsistencies, and make it as effective as possible in all the circumstances.

⁶⁴ David Feldman was a Vice President of the Constitutional Court of Bosnia and Herzegovina and its judge between 2002 and 2011.

The above opinion is prone to criticism for it showing unwillingness of the Court to take the matter of human and political rights in its hands. The guarantees of the Convention rights as provided in the Article II of the Constitution are directly applicable in the state, and by making Article V restrictions, which unduly burden political rights prevail over the Convention rights is showing the Court's unwillingness to assert itself as a protector of human rights. The judge offered no explanation why upholding Article II would be contrary to the Constitution. Instead, he insisted on Article VI⁶⁵ stipulations which require of the Court to uphold the Constitution.

Important lesson can be inferred from this. The Court does have means to act and legal basis to overturn repugnant constitutional arrangement. The legislature and the executive have no recourse against the decision of the Constitutional Court, and by this, the judiciary had put itself outside the realm of judicial activism.

3.2 Bosnia and Herzegovina's path into the Council of Europe

Bosnia and Herzegovina submitted its application for membership in the CoE in 1995. Clearly, in 1995, the situation was not ripe for this; however, the intent was shown and readiness communicated to undertake to meet minimum of the requirements for membership in the CoE. A one could hardly talk in an affirmative way about democratic institutions, rule of law, or human rights in the post-war country. On its way to the CoE membership Bosnia and Herzegovina was subjected to close scrutiny by the organs of the CoE. The Parliamentary Assembly *ad hoc* committees observed four different elections, from municipal to state level, between 1996 and 2000. The progress made in this respect was recognized in the Opinion⁶⁶ of the Parliamentary Assembly of the CoE in 2002. However, incompatibility of the state

⁶⁵ Supra note 30, Article VI, 3

⁶⁶ Council of Europe, Parliamentary Assembly, Opinion No 234 (2002), source: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EOPI234.htm>

institutions and legislation with the international standards and those of the CoE was apparent from the start. The Parliamentary Assembly of the CoE in the Opinion stressed a further need for transfer of authority from entity levels to that of the state.⁶⁷ Moreover, besides a general requirement of examination of the local legislation and its alignment with the CoE standards, a special request was put before the country “to review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary;”⁶⁸ The Electoral Law of 2001 was designed and adopted as a prerequisite for the state’s accession to the CoE. It inevitably contained discriminatory provision stemming from the state constitution. The country has officially become a member state of the CoE on April 24, 2002. The stage was set; it was only a matter of time before *Sejdic and Finci* found its way before the ECtHR.

3.3 Sejdic and Finci Decision

*Sejdic and Finci v. Bosnia and Herzegovina*⁶⁹, a Grand Chamber decision of the ECtHR of December 22, 2009, through its obligatory nature has become the issue of the highest order concerning the constitutional framework of Bosnia and Herzegovina. A case which originated as two separate applications with the ECtHR has become central focal point of all political discussion in Bosnia and Herzegovina. The case is important from the side of the ECtHR in that it for the first time challenged a constitutional order of the member state. Moreover, this was the first decision the Court delivered finding the violation of the Protocol 12 to the Convention.

⁶⁷ *Id.* para 4

⁶⁸ *Id.* IV(b)

⁶⁹ *Sejdic and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, ECtHR, Grand Chamber, 2009

The factual basis of the case concerns Mr. Dervo Sejdic and Mr. Jakob Finci, respective members of Roma and Jewish minority in Bosnia and Herzegovina and their ineligibility to exercise their political rights under the current consociational Constitution of the state. Under the Constitution and the Election Law of Bosnia and Herzegovina, only constituent peoples (Bosniaks, Serbs, and Croats) are eligible to stand in election for the state Presidency (Article V) and House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (Article IV). The constitutionally created category of *others* does not qualify to exercise this right, although no constitutional burden exists preventing the applicants from declaring as either of the three major ethnicities.

The Court, by fourteen votes to three found Bosnia and Herzegovina in violation of the applicants' rights as found under the Convention's Article 14 taken in conjunction with Article 3 of Protocol 1. As for the Article 1 of Protocol 12 claim, the court by sixteen votes to one found Bosnia and Herzegovina to be in violation of the Convention.

In arriving to the decision, the Court has heavily relied on the *amicus curiae* brief⁷⁰ of the Venice Commission. In assessing Article 14 (prohibition of discrimination), the Court referred to the principle it first discovered in the Belgium Linguistic Case.⁷¹ The principle extends applicability of Article 14 beyond the Convention guaranteed rights to other articles the State voluntarily provided. Having established applicability of Article 14, the Court took on to examine the function of House of Peoples, and whether it qualifies as a legislative organ under the meaning of Article 3 of Protocol 1. The Court found that the House of Peoples qualifies as a legislative organ for it exercising important and wide legislative functions. As for the right of the applicants to stand for the election in the House of Peoples, the Court revisited its case law, reaffirming a wide margin of appreciation it awarded to the states.

⁷⁰ European Commission for Democracy Through Law (Venice Commission), *Amicus Curiae Brief in the case of Sejdic and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06)

⁷¹ Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64

However, “[d]espite the large margin of appreciation...in organizing [its] election system, a system based on ethnic discrimination can therefore be justified only under truly exceptional circumstances.”⁷² Indeed, the court developed its jurisprudence recognizing member states’ wide margin of appreciation, however, the states had to show that impugned measures were enacted in pursuit of a legitimate aim, were necessary in a democratic society, and were proportionate. The Court did recognize necessity of the impugned measures at the time of its enactment; however, it found the state to be responsible for maintaining them in spite of the alternative, less restrictive measures, not contradicting its power-sharing arrangement. The Court recognized a voluntary accession of the state to the CoE and its obligation to review its Electoral Law and align it with the Convention. It was content with a level of progress achieved since the end of the war for which it found “... the applicants' continued ineligibility to stand for election to the House of Peoples... lack[ing] an objective and reasonable justification and ... therefore [the State] breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.”⁷³

On question of ethnic discrimination in respect to the applicants' inability to stand for the Presidential election, the Court entertained it in light of Article 1 of Protocol 12. The prohibitions contained in the Article 1 create an obligation for the state to secure enjoyment of “any right set by law”.⁷⁴ The difference in the scope of application was not a reason for the Court to assign ‘discrimination’ a different meaning. Having established the meaning of ‘discrimination’ to be the same both under the Article 14 and Article 1 of Protocol 12, the Court concluded that ineligibility of the applicants to run for the state Presidency for reasons of belonging to *others* qualifies to discrimination under the meaning of Article 1 of Protocol 12.

⁷² Supra note 70, para 23

⁷³ Supra note 69, para 50

⁷⁴ Article 1 of Protocol 12, General Prohibition of Discrimination, source: <http://hub.coe.int/protocol-12-article-1>

The implications of the decision remain to be appreciated. Three years following the Court's ruling in the case, political elite in the state have undertaken a series of negotiations about the modalities of its implementation. During this time the state remains under the close scrutiny of the CoE and its Committee of Ministers. The decision achieved what all of the other initiatives coming under the auspices of the international community and self-proclaimed initiative had failed to do; it centered a focus of the key actors on the crucial issue of human rights in a consociation state.

“The case of [*o*]thers (emphasis added) shows that the current system is not sustainable, and that any change that fails to address the ethnic principle...would fail to address the root cause of the problem.”⁷⁵ Besides, a chronicle inability of political actors, and missed opportunity of the Constitutional Court to intervene, opened the door for an international court to step in and address the issue. Concerns advanced by McCrudden and O’Leary,⁷⁶ about possible negative effects of the decision onto a similar peace negotiations and agreements should be taken with reservation. Problems, if any, with implementation of the Court’s decisions are not limited to dysfunctional states⁷⁷; The *Hirst*⁷⁸ case of Great Britain exemplifies it. To what extent the consociationalism in Bosnia and Herzegovina is capable of accommodating the highest of the human standards, is yet to be seen.

⁷⁵ Hodzic and Stojanovic, *New/Old Constitutional Engineering? Analitika*, Sarajevo 2011, pg 125

⁷⁶ *Courts and Consociations*, Christopher McCrudden and Brendan O’Leary, March 24, 2012.

⁷⁷ Marko Milanovic, *Discrimination on the basis of ethnicity-- elections in postconflict situations-Dayton Peace Agreement-Protocol 12 to the European Convention on Human Right*, 104 *Am. J. Int'l L.* 636 2010

⁷⁸ *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. **187** (Grand Chamber)

CONCLUSION

The preceding work offered an insight into the complex constitutional framework of Bosnia and Herzegovina. That consociational constitutional arrangement is incapable of internal metamorphosis is established by examining a consociational constitutional framework of Bosnia and Herzegovina. Political science response fares with difficulty, both theoretically and empirically with reconciling liberal democracy standards of human rights with ethno-dominated, collective rights in consociations.

The discussion recognized potential for a meaning progress lying with more interventionist role of the courts. Bosnian Constitutional Court has a power to untangle and direct political discourse towards international recognized standards of human rights. The framers of the Bosnian Constitution do deserve some credit for design of the Constitutional Court of Bosnia and Herzegovina. It can be safely inferred that they did intend for the Court more active role than it has chosen to play so far.

Another avenue for breaking of the constitutional impasse flows from the state's obligations under the international law. The ECtHR jurisprudence clearly set the markers of permissible under the international law, and elegantly shifted responsibility for future events back to the domestic actors. In spite of some criticism, the ECtHR had not problem putting its legitimacy to test in defending human rights and freedoms. By this, it sent a message to the Bosnian Constitutional Court and suggested more activists approach. The message sent to the legislature and executive is not without merit either. This paper limited itself in evaluating the role of the courts in consociations and criticism associated with it. There is a degree of plausibility in criticism of courts' interventionism in liberal democracies. Bosnia and Herzegovina is *sui generis*, and what theoreticians suggest may not necessarily have application in the country.

The findings I arrived to tend to suggest further examination of powers of the courts in consociational systems. They are not conclusive in any way and are prone to criticism; however, they suggest a way forward for when little other is left available.

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