

# **Constitutional Designs for Divided Societies: The Form of Government in Afghanistan, Myanmar and Kosovo**

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“As long as there is racial privilege, racism will never end.”

Wayne Gerard Trotm

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## **Abstract**

Worldwide different form of governments exists today than any time in history. This thesis looks at the capacity of constitutional design particularly the form of governments to see which form of polity can be a suitable choice to facilitate sustainable democratic regimes and to create durable peace settlements in multiethnic states; in particular those emerging from deep-rooted civil conflicts.

There is no consensus among social scientists whether constitutional designs to share power can decrease political instability in states suffering from internal conflict, or whether such arrangements may result counterproductive by inadvertently escalating ethnic tensions or facilitate a strong resurrection by an ethnic group. This issue remains unresolved despite decades of intense debates.

This thesis presents a comparison of three different polities to answer the question about role of constitutional designs mainly form of governments in fostering sustainable peace and democracy. Building upon consociational theory firstly conceptualized by Arend Lijphart in 1969.

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## Introduction

The very thesis is to focus in particular on constitutional needs of countries with deep ethnic cleavages. In societies with deep ethnic divisions the interests and demands of ethnic groups can be accommodated only by establishment of power sharing polities. There is a broad consensus among most social scientists that divided societies pose a grave threat for democracy, and that it is therefore more challenging to establish and maintain a democratic government in deeply divided than homogeneous countries.

Further, the experts on constitutional engineering and divided societies also agree that the issue of ethnic and other deep cleavages is much serious in countries that are not yet democratic rather than established democracies. Such rifts potentially impede democratization processes and may lead to new conflicts.

The First Chapter of the thesis presents an overview of constitutional designs embodied in constitutions of the three deeply divided countries – Afghanistan, Myanmar, and Kosovo – these countries have suffered from civil conflicts for many years as a result of the clash between different ethnic groups. The core cause of these confrontations has been – the struggle for power and autonomy. Further the Chapter presents form of governments enshrined in the respective constitutions of these countries.

The main content of this thesis is about the Chapter Two that looks into the efficacy of these polities from a comparative perspective. This Chapter compares the form of government in the three countries and builds on the theory of consociational or power sharing polity. The Chapter concludes that the success of democratic government in divided societies require two crucial elements: power sharing and group autonomy. Power sharing means meaningful participation of representatives of all significant ethnic groups in political decision-making

processes; particularly at the level of executive. Group or cultural autonomy denotes that these groups are autonomous in their own internal affairs, more specifically in cultural and educational areas.

This Chapter clearly explains the Kosovo's consociational form of government as a model and measures its success in terms of institutionalization of democracy and reduction of possibility of returning to conflict; from a comparative lens. Therefore, all the cases are discussed with comparative and critical analyzation to ground the theoretical framework of this thesis – consociational polity – as the most suitable form of government for deeply divided societies.

## Chapter - I

### The Case Studies

This Chapter includes three case studies; Afghanistan, Myanmar and Kosovo. I selected these countries for the following reasons. First, all the three countries are deeply divided societies and the element of ethnicity is the core of their division. Second, these are post-conflict settings in the sense that struggle for power and autonomy has been the fundamental reason for their ethnic conflicts. Third, ethnic observations have always been an inevitable element when it comes to political decision-makings. Having said that, this Chapter studies each of the selected cases in detail with a particular focus on the form of governments adopted in their respective constitutions. The ultimate purpose of this Chapter is to provide a brief background for each of cases presented here in order to identify certain elements related to their form of governments.

### Afghanistan

From 1919, when Afghanistan became independent from Britain, to 1996, when the Taliban came to power, Afghan leaders and the ruling bodies promulgated a series of constitutions.<sup>1</sup> Emir Amanullah promulgated the first basic law of the country. It was called – *Nizaamnama* – passed in 1923. This constitution lasted for the period Amanullah was in power. Tribal revolt which took place as a result of the young king's modernizing policies, toppled both him and his constitution in 1929. Ever since, Afghanistan has experienced six constitutions. The country's most recent Constitution was promulgated in 2004 following United States military intervention.

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<sup>1</sup> Tom Ginsburg and Aziz Huq, 'What Can Constitutions Do?: The Afghan Case' (2014) 25 Journal of Democracy 116. p. 118



### 1.1. Ethnic Divisions

One of the overarching factors of war in post-Soviet Afghanistan was the efforts by ethnic communities to gain power.<sup>2</sup> Lack of tolerance for other ethnicities and tribes' political beliefs has been the main cause of civil conflict in this country. Further, monopolization of power institutions by one ethnic group, this group's unwillingness to change its narrow sectarian interests for common prosperity, and lack of dialogue among the conflicting factions have been the fundamental reasons of civil conflicts in Afghanistan.<sup>3</sup>

Afghanistan has been a multi-ethnic country since its establishment as a state. However, the Country's history does not remember any other ethnic group to rule the country without Pashtuns. This means that the country has been ruled only by one ethnic community who has dominated power for a long period. These polities deprived others to be part of decision-making processes.<sup>4</sup> Pashtun leaders have ignored other ethnicities, faiths, cultures and traditions. Further, they suppressed other ethnic groups because they perceived them as source of weakness. The approach by these authoritarian-top-down polities one after another intensified tensions among the dominant and dominated ethnic groups that hindered institutionalization of a modern and united civil society.

Afghanistan is a divided society based on the elements of ethnicity and language. An estimated forty-nine languages are spoken in this country.<sup>5</sup> Persian (Farsi) and Pashtu are the two official languages recognized by the Country's Constitution. According to some estimations, Pashtuns are making up to 38 per cent of population, followed by Tajiks 25 per cent, Hazaras 19

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<sup>2</sup> "Ethnic Groups and National Unity in Afghanistan" by Emadi, Hafizullah - Contemporary Review, Vol. 280, Issue 1632, January 2002 | Online Research Library: Questia' <<https://www.questia.com/magazine/1G1-82513925/ethnic-groups-and-national-unity-in-afghanistan>> accessed 4 June 2020.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

per cent, Uzbeks 6 per cent. The rest are Turkman, Baluch, Aimaq, Qirghiz, Nuristani, Arab, Hindu and others.<sup>6</sup>

In addition, Afghanistan is fragmented along sectarian lines. 75 per cent of its population subscribe to Sunni jurisprudence and 24 per cent follow Shi'a school. Followers of other religions such as, Hindus, Sikhs and Jews form less than one per cent of the country's population. Moreover, the country is divided on the basis of tribalism and regionalism.

### **1.2. The 2004 Constitutional Design**

An ideal constitution-making process can accomplish numerous things. Namely it can contribute with the transition from conflict to peace, transform a post-conflict society from one that resorts to violence to one that resorts to political means to resolve conflict, create a government framework that will regulate access to power and resources.<sup>7</sup> It also helps reduce ethnic and political rifts; and ultimately it can substantially prevent another conflict from happening.<sup>8</sup>

The trend in conflict resolution is to use the constitution-making process as a peacemaking tool. Thus, the resulting constitution becomes a sort of peace treaty.<sup>9</sup> The legal framework that regulated the political transition and established the current regime had been set forth on 5 December 2001 in the Bonn Process.<sup>10</sup> The Bonn Agreement envisaged the process to be conducted under an *Interim Administration* (IA); followed by a *Transitional Administration* (TA). It was created by an *Emergency Loya Jirga* or grand assembly through “*free and fair*” elections

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<sup>6</sup> *ibid.*

<sup>7</sup> Dr Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' 6 *Chicago Journal of International Law* 21.

<sup>8</sup> *ibid.*

<sup>9</sup> Hallie Ludsin, Hallie Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 *U Pa J Int'l L* 239

<sup>10</sup> 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (S20011154, 5 December 2001)-.Pdf'.

that was planned to take place no later than June 2004.<sup>11</sup> Further, it mentioned a new constitution and outlined the process for its adoption. The Agreement provided that a *Constituent Loya Jirga* would be convened within 18 months of the establishment of the TA; to adopt the new constitution. Therefore, Bonn Agreement envisioned a trajectory for a post-conflict state-building process in Afghanistan.

There have been serious doubts concerning the selection process of members of the Drafting Commission. First, the process was not transparent given the internal politicking that led to compromises. Secondly, public education and consultation were designed poorly. Third and lastly, the planning deficit in the process was another aspect that undermined this constitution-making process.<sup>12</sup> President Hamid Karzai had direct authority to appoint members of the Commission after broad consultations. However, due to the above-mentioned reasons no proper consultations took place and the process was heavily influenced by the dominant ethnic elites.<sup>13</sup> Furthermore, women participation was also symbolic, the entire Commission included only seven women out of thirty-five members, which formed a small fraction of the Commission.

The Constitutional Commission was less distinguished and conscientious.<sup>14</sup> It was heavily influenced by the religious members of this Commission. The international community, members of civil society, and other members of the Commission were insisting to place democratic and human rights values in the new constitution of Afghanistan. However, this approach was seriously resisted by the religious members of the Commission. Namely the chair of the Commission,

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<sup>11</sup> *ibid.*

<sup>12</sup> International Crisis Group 'Afghanistan-s-Flawed-Constitutional-Process', Asia Report No. 56 12 June 2003, Kabul Brussels.

<sup>13</sup> *ibid.*

<sup>14</sup> Saïd Amir Arjomand, 'CONSTITUTIONAL DEVELOPMENTS IN AFGHANISTAN: A COMPARATIVE AND HISTORICAL PERSPECTIVE' 53 Drake Law Review 20.

Niamatullah Shahrani; a cleric and professor at the *Shari'ah* Department of Kabul University. He pushed the designation of “*Islamic Republic of Afghanistan*” despite oppositions from several other members of the Commission.<sup>15</sup> This cast doubts over the legitimacy of the Commission because the chair had pushed for inclusion of his personal will instead of reaching a consensus via consultation with other members of the Commission.

### 1.3. Form of Government

A poor governance framework will undermine sustainability of peace.<sup>16</sup> It can intensify fault lines, divisions, and tensions in society. Entrenching conflict-generating electoral or forms of governments not suitable in a divided society pave the ground for contesting the government.<sup>17</sup> In Afghanistan, for instance, the Constitutional Commission that was tasked to draft the constitution was inclined towards a parliamentary system given the diverse and divided nature of the country. However, before ratification of the final text of the draft constitution, Karzai and his staff modified the draft to amplify presidential powers. Meanwhile, he eliminated the provision based on which a constitutional court would have been established.<sup>18</sup> Giving the public little time for deliberations; he convened the constitutional *loya Jirga* despite heavy disagreement during the *Jirga*'s sessions. No part of the draft was changed, *loya Jirga* approved the constitution.<sup>19</sup>

This move by Karzai and his staff was the starting point of the protracted political crisis that Afghanistan has been experiencing since then. The implications of his actions are the following: creating a super-presidential system in which president is *de facto* king and the entire executive power vests in him. By this change, he eliminated separation of powers, and checks and

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<sup>15</sup> *ibid.*

<sup>16</sup> Samuels (n 12).

<sup>17</sup> *ibid.*

<sup>18</sup> Ginsburg and Huq (n 6).

<sup>19</sup> *ibid.*

balances. He also removed the Kelsenian model of constitutional adjudication – the constitutional court –. Finally, he laid the foundations a flawed electoral system; and more importantly he created a system of winner-takes-all political culture that proved to be the worst form of government for Afghanistan.

The strong presidential system has not undermined the country's young constitutionalism<sup>20</sup> but it has also exacerbated ethnic tensions among ethnic communities. Historians and constitutional scholars refrain from recommending this kind of polity and warned that it may not work in states with many tribal and ethnic divisions.<sup>21</sup> This kind of presidential system as mentioned has a single victor with several losers who challenge and undermine the victor. There are sufficient empirical evidences that testifies this proposition. For instance, we witnessed three consecutive presidential elections from 2009 until 2019. Each failed as a result of this kind of model. All of these elections resulted in crisis and required foreign intervention to help with their resolution. For instance, in the recent election, Ashraf Ghani was declared as the winner after a long political impasse lasted almost six months. Concurrently, his main political rival Abdullah Abdullah also inaugurated as president refusing to accept the results of election.<sup>22</sup>

Moreover, this model has resulted in personalization of politics as it confers all executive powers - a king enjoys – on president. <sup>23</sup> It makes the president a kinglike leader who has limitless powers. President Ghani has open-handedly exercised this power without being responsible for its consequences. For example, in recent months, he decided to dismember the Ministry of Finance. He issued a presidential decree through which he decided to move the ministry's key functions to

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<sup>20</sup> Amin Saikal and William Maley, 'Opinion | The President Who Would Be King' *The New York Times* (6 February 2008) <<https://www.nytimes.com/2008/02/06/opinion/06saikal.html>> accessed 27 May 2020.

<sup>21</sup> *ibid.*

<sup>22</sup> 'Afghanistan Plunges into a New Crisis, What Next?' <<https://www.aljazeera.com/news/2020/03/afghanistan-plunges-crisis-200310071904122.html>> accessed 27 May 2020.

<sup>23</sup> Saikal and Maley (n 25).

his office;<sup>24</sup> by doing so he sidestepped the parliament.<sup>25</sup> Like other ministries, the Ministry of Finance is an answerable institution to the parliament, especially in budgetary issues. The President attempted to circumvent parliament's role to make this institution directly answerable to his office. Although due to foreign pressures especially the United States, he rescinded his decree and the Ministry remained unchanged;<sup>26</sup> but it shows personalization of polity.

Afghanistan has a bicameral Parliament. Despite its downsides, it has provided a venue for a range of voices to be heard. Unfortunately, the executive branch has seen no compelling reason to coordinate its functions with the legislative.<sup>27</sup> Given the divided nature of the country and its history of civil confrontations and conflicts, it would be far better served by a consociational or power sharing polity that does not confer absolute powers in one person but diffuses it to all the ethnic groups.

### Myanmar

Myanmar/Burma is another divided society. Since independence from Britain in 1948, it has been a battlefield of the longest-running and most diverse ethnic insurgencies in its contemporary history.<sup>28</sup> This has led the country to become deeply militarized in its political life both – the government and opposition. Thus, the military has dominated almost all political processes including constitution-making. The country's 2008 Constitution (the "2008

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<sup>24</sup> 'Dismembering Afghanistan's Ministry of Finance' (*United States Institute of Peace*) <<https://www.usip.org/publications/2020/03/dismembering-afghanistans-ministry-finance>> accessed 27 May 2020.

<sup>25</sup> *ibid.*

<sup>26</sup> 'Ghani Rescinds Order to Divide Finance Ministry' (*TOLOnews*) </business/ghani-rescinds-order-divide-finance-ministry> accessed 27 May 2020.

<sup>27</sup> Saikal and Maley (n 25).

<sup>28</sup> 'Ethnic Conflict in Burma: The Challenge of Unity in a Divided Country | Burma or Myanmar? The Struggle for National Identity' <[https://www.worldscientific.com/doi/pdf/10.1142/9789814313650\\_0003](https://www.worldscientific.com/doi/pdf/10.1142/9789814313650_0003)> accessed 3 June 2020.

Constitution”) has been adopted under the dominance of military. It is the military that plays a pivotal role in the country’s political realm.

## **2.1. Ethnic Divisions**

Denial of democracy by the authoritarian has intensified the violation of individual and communities’ rights as there have been encroachment of people’s basic rights and freedoms. For instance, there is no freedom of expression and no tolerance if someone voices their dissent, several Burmese have been into exile.<sup>29</sup> The regime has acted very arbitrarily. It exploits people’ labor, children and others were forced into work, regime has denied basic needs and services; the scare of poverty was terrible despite the country’s wealth and resource. The small class who were connected to the military have enjoyed appropriating and misusing of Myanmar’s resources.<sup>30</sup> Myanmar’s people suffer from failure of a national identity mainly due to lack of democratic discourse and practice. The country’s elites are hostile to each other as there are considerable divisions among the ethnic groups.

There are seven major non-Burmese ethnic groups, nationalities of national races:<sup>31</sup> Arakanese, Chin, Kachin, Shan, Karenni, Karen and Mon. Each of these ethnic groups are identified with states of the Union in which they form the majority. When it comes to the criteria for political recognition, there is a high level of consensus that it shall be on a territorial basis.<sup>32</sup> There is no consensus concerning the actual population figures and also relative proportions of eight major ethnic groups are contentious. Non-Burmese political communities see the population-related figures as incomplete and distorted. They claim that the published figures are not credible

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<sup>29</sup> Yash Ghai, ‘The 2008 Myanmar Constitution: Analysis and Assessment’ 41.

<sup>30</sup> *ibid.*

<sup>31</sup> Alan Smith, ‘Burma/Myanmar: The Struggle for Democracy and Ethnic Rights’ 27, July 2003. P. 2

<sup>32</sup> *ibid.*

because as they were distorted to minimize the strength of ethnopolitical claims.<sup>33</sup> There are two largest non-Burmese ethnic groups the Shan and Karen. Each count approximately 5 million. The non-Burmese ethnic groups make almost a third and half of the overall population of Burma which is 55 million.<sup>34</sup>

Since 1948 the year the country became independent, it has witnessed conflicts both between the aforementioned dominant ethnic groups and ethnic minorities (ethnic nationalities). Mainly the struggle has been between assimilating centralism and the demand for recognition of the right of ethnic self-determinations.<sup>35</sup> Soon after independence the country witnessed an armed rebellion in which all of the main ethnic minority groups were involved. In addition, the post-independence state also faced by an armed communist challenge initiated by the disaffected leaders of the movement for independence.<sup>36</sup>

After the end of World War II, when Burma's independence was being negotiated; the ethnic minorities also wanted their own independence. Since the British had governed their areas as less than full part of Burma,<sup>37</sup> they reluctantly agreed to the merger with the rest of the country; provided that they enjoy significant autonomy in form of federation.<sup>38</sup> However, 1947 Constitution enshrined a weak form of federation that has been further weakened by the constitutional amendments in the following years.<sup>39</sup> This resulted in violence and conflict, those who felt alienated started to assert their sovereignty and autonomy through resorting to violence. Since the independence, Burma has experienced conflict between dominant ethnic Burmese population and

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<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> Ghai (n 45).

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*



ethnic nationalities. On the other side, however, the Burmese-dominant military insists to impose its nationalist approach through Burmanization of ethnic nationalities to counter the separatist's effort who want to have their own sovereignty and autonomy separate from Burma.

The minority communities have suffered to a high degree from the political systems and developments in Burma.<sup>40</sup> Government neglected the areas in which they live. These places are underdeveloped, the resources they consider to be themselves have been looted and used by others. They consider themselves as not represented properly in government institutions, and their voices hardly heard. Moreover, in terms of protection and promotion of their cultures, very little has been done.<sup>41</sup>

## **2.2. The Myanmar Constitutional Design**

In July 2008, people of Myanmar suffered from a huge cyclone. Thousands died and many more missing. The cyclone disrupted communication in various areas of the country. At the same time, the military regime held a referendum to adopt the new constitution it drafted. Despite knowing that it was not the suitable time to hold a referendum because many people were not able to take part and use their votes. The military held the referendum. It also ignored local and international pleas to postpone the election to a suitable time to be able to hold a fair and proper referendum.<sup>42</sup> As predicted, the regime announced the results of referendum which indicated a vast majority of more than 90 percent. Meanwhile, there were several reports that the state officials themselves marked the ballot papers without giving priority to the preferences of voters.<sup>43</sup> Moreover, the voters knew that if they vote against the draft constitution, they would be punished.

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<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.* P. 1

<sup>43</sup> *ibid.*

Like in Afghanistan, the public did not have the opportunity to read, study and discuss the proposed provisions of the draft constitution. In reality, the process was to fulfill the formalities to appear democratic.

As Yash Ghai puts it: “a constitution has to be assessed in the context and purposes for which it was drawn up, the same can be said about the process of making a constitution.”<sup>44</sup> According to Ghai since constitution is the document that deals with structure of state, distribution of power, access to national resources, most conflicts are also as a result of disagreement on these matters. Thus, a conflict on the mentioned matters becomes a dispute about the constitution itself.<sup>45</sup> Therefore, while reforming or making a brand-new constitution in the aftermath of a civil conflict, all the sensitive and provocative issues shall be addressed properly to prevent emergence of a new conflict.

Similarly, the process in which a constitution is made is as important as its outcome. This is the process which determines the outcome. We should not overlook the fact that such processes serve other purposes as well. For instance, reconciliation and trust building. Myanmar was ruled by the military junta for several decades. It announced that it was moving to a multi-party democracy under the authority of *Tatmadaw*; the armed force. There are several factors that characterizes the context of constitutional reform in Myanmar. An authoritarian and oppressive regime was ruling the country for several decades. The regime resisted democratic forms and rejected people’s choice of its leaders as they expressed it through the 1990 elections, and the most popular leader has been under house arrest for several years.<sup>46</sup> Further, there was no rule of law,

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<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*

and they overwhelmingly expressed their preference for a democratic and accountable government, that has been a struggle for democracy

### **2.3. Form of Government**

Myanmar's 2008 Constitution – the Constitution of Republic of the Union of Myanmar- came into force in January 2011. Nearly three years after it was adopted in May 2008. Following a flawed process described in above, this Constitution officially began the long-awaited transition from military rule (1988 – 2011) to constitutional democracy (2011 – to present).<sup>47</sup>

The 2008 Constitution provides for the principle of separation of powers. According to article 11 of the Constitution, the Executive of the Union (the “Executive”) is one of the three branches which is responsible for exercising the state's power.<sup>48</sup> According to Chapter 5 of this constitution which talks about the Executive, it includes a number of executive bodies. Namely, the Union Government, the National Defense and Security Council, and the Financial Commission. Pursuant to article 16, president is the head of executive.<sup>49</sup> Per article 200, the Union Government is composed of president, two vice-presidents, cabinet members of the Union, and attorney general of the Union.<sup>50</sup> Like Afghanistan, president has tremendous amount of power under the Constitution.

Article 217 of the constitution vests the executive power of the Union in the President.<sup>51</sup> This means that all executive actions of the Union Government shall be taken by or in the name of and are attributable to the president. As such, the president is not answerable to the legislature

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<sup>47</sup> Nyi Nyi Kyaw, 'Putting Their Guns on the Scale: Constitution-Making in Burma/Myanmar under Military Command' (2019) 7 The Chinese Journal of Comparative Law 309. P. 310

<sup>48</sup> 'Constitute' <[https://www.constituteproject.org/constitution/Myanmar\\_2015?lang=en](https://www.constituteproject.org/constitution/Myanmar_2015?lang=en)> Art. 11, accessed 28 May 2020.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

for exercising of these powers as article 215 of the constitution provides.<sup>52</sup> Besides appointment of the members of the cabinet, president has the following powers provided for in the Constitution.

Power to grant pardon or amenities, with recommendation of the of the National Defense and Security Council (NDSC).<sup>53</sup> Upon approval of the Pyidaungsu Hluttaw, president can initiate or discontinue relationship with foreign states.<sup>54</sup> Deliver an address to both chamber of legislature or to country concerning the overall situation and policies of the Union.<sup>55</sup> He can summon an emergency or special session of the of the parliament.<sup>56</sup> He has the power to issue presidential decrees while the legislature is not in session. <sup>57</sup> He also have the power to take appropriate military action in coordination with the NDSC in events of aggression against the Union;<sup>58</sup> and to decide on non-constitutional disagreements at the levels of state, region and self-administered with the help of government.<sup>59</sup> Quite similar to Afghanistan, the president disproportionately enjoys tremendous amount of power.

Furthermore, under Chapter 11 of the 2008 Constitution, president has the power to declare a state of emergency.<sup>60</sup> This chapter enshrines three types of procedures for emergency, separate provisions provided for these types. First is the one where he deems it impossible or local administrative body submits that the executive functions cannot be carried out as prescribed by the Constitution in any part of the country; after coordination with NDSC he can issue a decree and

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<sup>52</sup> *ibid.*

<sup>53</sup> *ibid*, art. 204

<sup>54</sup> *ibid*, art. 205

<sup>55</sup> *ibid*, art. 210

<sup>56</sup> *ibid*, art. 211

<sup>57</sup> *ibid*, art. 212

<sup>58</sup> *ibid*, art. 213

<sup>59</sup> *ibid*, art. 226

<sup>60</sup> *ibid*, Chapter XI

declare state of emergency.<sup>61</sup> Under Article 411 (1), the executive powers of the subject area will be transferred to president.<sup>62</sup>

Moreover, president's powers go beyond this. Under Article 398, he controls the appointment of members of the Union Election Commission <sup>63</sup> that is responsible for holding parliamentary elections.<sup>64</sup> In addition, president has considerable control over administration of Regions and States. Under provisions 261 (a), (b) and 263 (a), president has the authority to appoint and dismiss the regions and States' Chief Ministers.<sup>65</sup> Lastly, judiciary is also under his control, the appointment of judges of the Supreme Court and Chief Justices of the High Courts of the Region and States fall under the powers of the president.<sup>66</sup> President can also choose a third of the judges of the Constitutional Tribunal.<sup>67</sup>

### **Kosovo**

The main cleavage which characterizes Kosovo as a divided society is ethnicity. Like Afghanistan; Kosovo is a divided society along the ethnicity line. The country is divided between Albanians, on the one hand - constituting up to 90% - of the Kosovo's population, Serbs and other minority groups on the other.<sup>68</sup> Maintaining a balance and regulating relationship between different ethnic groups has always been subject of discussions in Kosovo. The Country was part of Albanian

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<sup>61</sup> *ibid*, art. 410

<sup>62</sup> *ibid*, art. 411 (a)

<sup>63</sup> *ibid*, art. 398

<sup>64</sup> *ibid*, art. 399

<sup>65</sup> *ibid*, art. 261 (a), (B) and 263 (a)

<sup>66</sup> *ibid*, art. 299 , 302 and 308 (b)

<sup>67</sup> *ibid*, art. 321

<sup>68</sup> Fisnik Korenica and Dren Doli, 'The Politics of Constitutional Design in Divided Societies: The Case of Kosovo' (2010) 6 Croatian Yearbook of European Law and Policy  
<<http://www.cyelp.com/index.php/cyelp/article/view/108/78>> accessed 31 May 2020.

geographical space in the Western Balkans. After the Albania's independence in the aftermath of World War II, Kosovo remained a political entity under Yugoslavian military administration.<sup>69</sup>

### 3.1. Ethnic Tensions

According to the *Independent International Commission on Kosovo* ethnic conflict in Kosovo has a long history.<sup>70</sup> The roots of the crisis are related to a new wave of nationalism that triggered the rise of Milosevic; when Serbia adopted an extreme nationalist agenda. The 1989 revocation of Kosovo's autonomy took place after Belgrade's policy of changing the ethnic composition in Kosovo to create an apartheid-like society.<sup>71</sup> Kosovo's conflict was part of the tragedy of Yugoslavia. Specifically, the conflict intensified following the death of Josip Broz Tito – the longest-ruling Yugoslavian leader.<sup>72</sup>

Due to Tito's policy of reshaping Yugoslavia through a more pluralistic approach after 1974, Kosovo's position improved greatly and during this period ethnic tensions were down. Kosovo became a constituent part of the Yugoslavian federation with the 1974 Yugoslavian constitutional system, it had veto right on every federal issue.<sup>73</sup> The Serbian nationalist leadership began to expand its authority over Yugoslavian federation after the death of Tito. The Serbian nationalist leaders deliberately raised the question of ethnicity and intensified tensions between ethnicities to strengthen its position over weaker federal units like Kosovo. It resulted in destruction of the pluralistic model of Yugoslavia that had been built by Tito. Nationalist tendencies facilitated the growth of nationalism in Kosovo. It strengthened the idea that Kosovo

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<sup>69</sup> *ibid.*

<sup>70</sup> Independent International Commission on Kosovo (ed), *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000).

<sup>71</sup> *ibid.*

<sup>72</sup> Korenica and Doli (n 85).

<sup>73</sup> *ibid.*

lacked qualification to possess the right to ask for an equal position with other federal republics. Therefore, this destroyed the foundation based on which Tito had built a Yugoslavia free from ethnic tensions. In contrary, it promoted ethnic conflicts to pave the ground for achieving certain political goals.<sup>74</sup>

Governments and international institutions were aware of the imminent conflict in Kosovo from the early 1990s onward because there were many warnings prior the conflict intensification. However, the international community failed to take necessary measures to prevent the conflict.<sup>75</sup> They had not put significant diplomatic measures from senior level. Furthermore, the non-violent movement which was initiated by the Kosovar Albanians were not taken seriously. This coupled with exclusion Kosovo from the Dayton negotiations had paved the ground for the movement to become violent to attract the international attentions.<sup>76</sup>

### **3.2. The Constitutional Design**

90 per cent of the Kosovo's population are Kosovar Albanians and less than ten per cent are Kosovar Serbs.<sup>77</sup> The Country's constitution framers took the ethnicity issue seriously and sought to address the regulation of ethnic cleavages in society through the settlement plan. The state-builders wanted to design the country's constitution to serve the following targets. First, promoting the country's multiethnic feature was vital importance for gaining international recognition from international community for the country's independence. They decided to address this issue through a mechanism that was acceptable to Kosovar people and for foreign

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<sup>74</sup> Independent International Commission on Kosovo (ed), *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford Univ Press 2000).

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Charles A Kupchan, 'Independence for Kosovo' <<https://www.foreignaffairs.com/articles/europe/2005-10-01/independence-kosovo>> accessed 1 June 2020.

counties; accommodating ethnic divisions and creating a model of power-sharing to promote stability and provide protection for the concerned ethnicities. Secondly, to become a member state of European Union, it was important for Kosovo to craft a workable constitution through which it would be able to expedite the process.<sup>78</sup>

Thirdly, the new constitution had to address the history of ethnic violence and pervasive belief that minority groups were not entitled to a fair shake or even protection from the new government.<sup>79</sup> Meanwhile, the commission had to interact directly with the United Nations mediation process who endeavored to secure an agreement for Independence of Kosovo.

With these considerations, the process of crafting a new constitution has started. A number of Kosovars were identified who became the main drafters of the constitution. The President of Kosovo appointed a commission and representatives from the minorities were designated. Trainings were held to specify options and requirements to reach a consensus on the procedure. Meetings were held in which representatives of ethnic Serbs were also present in an attempt to identify contentions for which Kosovo's senior leadership were required to resolve.<sup>80</sup>

After progress in procedural issues, in July 2007, the commission reached the step to decide the form of Kosovo's new government. There were several points to be discussed, namely, how the power would be shared among the concerned political parties, particularly between the president and the prime minister. Power-sharing turned to be the bone of contention between the concerned parties.<sup>81</sup> The American Chief of Mission, Senior European representatives of the transition office constantly met with the leaders of the two major parties to resolve the disputes and reach a consensus that was acceptable to all the concerned parties. The result was an agreement

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<sup>78</sup> 'John Tunheim 'Rule of Law and the Kosovo Constitution' 18 Minn. J. Int'l L. 371 (2009) p. 375.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.* p. 376

<sup>81</sup> *ibid.* p. 377



that defined the powers of the President and also how the President would be selected. It was considerable progress that enabled the commission to start practical works on to draft the new constitution.

According to John Tunheim, the American Advisor, who advised the drafting commission; drafting of segments of the constitution was started in late summer of 2007. By then the commission was able to prepare segments of the constitution. The commission itself, concerned advisers, and the international representatives had reviewed each segment carefully. The aim was to unify these segments into a single piece. Some parts were almost complete, some needed minor modifications, and some had to be entirely redrafted.<sup>82</sup> Small negotiations groups were held to discuss each of the segments with the representatives of commission. They finally produced a unified draft of the constitution of which the members of the commission were its ultimate producers and decision-makers.

### **3.3. Form of Government**

The structure of the government was the third section of the outline for draft of the constitution. This part included details concerning the Legislative Assembly, its election, organization and the legal framework for how it operates. More components were added to it, a presidency, judiciary, the constitutional court, prosecutorial system, security department and economic regulation.<sup>83</sup> Tunheim states that the newly crafted constitution is a “thoroughly modern European constitution with the addition of more American-style check and balances.”<sup>84</sup> In February 2008 – the day of Kosovo’ declaration of independence – they officially publicized the

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<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.* p. 378

<sup>84</sup> *ibid.* p. 378 – 379

draft constitution and the public deliberations was started where people were given the opportunity to study the supreme law of their land and share their inputs with their government.

People made their suggestions and inputs many of them were considered by the commission before they submit the revised draft to the President and Prime Minister.<sup>85</sup> Following fourteen months of intensive, rigorous and acceptable work to all concerned parties, the constitution was ratified and came into force in June 2008.<sup>86</sup>

### **Conclusion of Chapter I**

Therefore, in the conclusion of Chapter I, there are mainly three points to highlight. First and foremost, the legitimacy and transparency of the constitution making process in Afghanistan and Myanmar have been questionable. Unlike Kosovo of which concerned constitution-framers ensured the process to be inclusive, transparent and legitimate; Afghanistan and Myanmar have failed to do so.

Secondly, although all the three countries suffered from the same pain – armed ethnic conflicts – each has taken a different direction in their constitution making processes. Afghanistan and Myanmar did not address ethnic issues to the extent Kosovo did. Having learned from its recent history, Kosovo embodied one the most modern designs of politics into its constitution. In Afghanistan the warlords were dominant and had majoritarian tendencies; while in Myanmar the constitution making process was heavily influenced by the military.

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<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

Thirdly and lastly, in Afghanistan and Myanmar the purpose was to consolidate power and they designed the constitutions in manner close to their personal interest. In Kosovo, however, the Kosovar's framers of constitution took the direction of consociationalism and designed their constitution in a manner where power is diffused and almost all other ethnic minorities have been included.

## **Chapter – II**

### **Comparative Analysis of the Cases**

I discussed three divided societies that share mainly three elements. First, all the three countries have gone through ethnic conflicts. Second, ethnic divisions played a pivotal role leading these countries to civil conflicts. Thirdly, they employed different approaches to address their ethnic divisions through constitutional designs. This chapter presents a comparative analysis of form of government in the above-discussed countries. This Chapter will conclude the approach that is considered to be a suitable model for deeply divided societies.

#### **Afghanistan – Form of Government in Practice**

In the Afghan case, we saw that despite a turbulent history that different ethnic groups have fought for power; the framers of its constitution opted for purely majoritarian form of government that restricts power-sharing and allows the winner of election to take all the political power. It leaves the other actors empty-handed. During the discussion on the future form of government, there were mainly two divisions; Pashtuns and Non-Pashtuns. Pashtuns were pro-presidentialism while non-Pashtuns were prone to parliamentarism.<sup>87</sup> The group that was Pro-presidentialism argued that Afghanistan was in urgent need of a functioning government. That could be best served by a centralized presidential system. In contrary to this, the pro-parliamentarism group argued that a parliamentary system would result in coalition government that would be more representative and inclusive, and safer in terms of abuses of executive power.<sup>88</sup> Finally, this debate was concluded in favor of presidentialists and the form of government of Afghanistan was set to be presidential.

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<sup>87</sup> Barnett R Rubin, 'CRAFTING A CONSTITUTION FOR AFGHANISTAN' Journal of Democracy 15.

<sup>88</sup> *ibid.*

This model, however, did not last longer and failed due to disputes apparently on the results of election but inherently on the issue of division of power. Soon after adoption of the new constitution, the 2009 election has been the first indication that testified the fact that the super-presidential system that the constitution has envisaged does not suit the Afghan context given the society's deep ethnic cleavages. Ever since the next presidential elections have consecutively failed and resulted in political impasses. It was beyond the control of domestic actors to reach a consensus without foreign intervention.

Resolving of the impasse became possible only by foreign intervention and the domestic competitors started to enter into power-sharing agreements. This sidestepped of the model prescribed by the constitution and paved the way for a *de facto* power-sharing polity. The latter replaced the constitutional model which has seriously undermined the Afghan constitutionalism; democratic processes such as, elections and also adversely affected the government apparatus to function properly.

This is an empirical testification of Arend Lijphart theory where he argues that in deeply divided societies the interests and demands of communal groups can be accommodated only by the establishment of power-sharing form of governments.<sup>89</sup> He puts this with utmost precision as an imbalanced form of government where one group dominates and gets the entire power and the rest are left empty-handed, deepens societal divisions and poses grave problems for democracy.

### **1.1. Centralized and Disproportionate Division of Power**

The current constitutional form of government allows tremendous amount of power for president. Art. 64 of the Afghan Constitution envisages a laundry list of powers for the president. It makes him both head of state and head of government and empowers him to appoint and dismiss

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<sup>89</sup> Lijphart (n 5).

judges. The laundry list of articles 64 practically makes president a *de facto* king who has control over all segments of the Afghan polity. The Constitution envisages two vice-presidents that in practice are not from the ethnicity of president. However, the law is silent about the authorities of vice-presidents. Practically the positions of the vice-presidents are symbolic, and they do not have any executive prerogative.

Democratic processes such as elections have constantly failed since adoption of the current constitution. A pivotal reason to such failure is the disproportionate division of power. According to the current model the winner of presidential election takes all the power. In a homogenous or established democracy this model may work. However, in divided societies such as Afghanistan this model does not serve the purpose which is accommodating all different groups in political process. It began by 2009 presidential election and has ever since exacerbated racial behaviors. As the 2014 presidential election drew the country into a deep election crisis that resulted in sidestepping the constitutional form of polity and replacing it with a national unity government.

## **1.2. A Dysfunctional Government**

Election crisis has led to a chaotic situation where sharing of power has become an urgent need without which the political impasse could not be resolved. In such a situation conflicting parties should negotiate behind closed doors to reach a common understanding on who gets what. In between, public is neglected. These are the powerbrokers who decide and conclude national processes. However, it does not end here; since the basis of the negotiated government or as they call it “the National Unity Government” is division of the executive prerogatives and not a compact framework for how such as hand-made polity would operate; the Agreement itself becomes a source of disputes. For instance, after the 2014 election crisis in Afghanistan, the two rivals one of whom became president and second became Chief Executive Officer – the position that lacked

constitutional basis – started to have serious quarrels over appointments.<sup>90</sup> They breached the terms they had agreed in the aftermath of 2014 and started to weaken each other's positions which has undermined the country's security, stability and development process. More importantly in contrary to what "National Unity" would imply, their actions resulted in garnering ethnic tensions. Moreover, the NUG was not even able to appoint heads of key security ministries; the defense and interior in amid war with numerous insurgent groups.<sup>91</sup>

### 1.3. Return to Conflict

The current constitution of Afghanistan which was thought to bridge the gaps between ethnic groups in Afghanistan and help promote unity and inclusiveness resulted in contrary. Particularly, the form of government that it embodied has exacerbated ethnic tensions. The tensions among the President and CEO became worse when they could not reach a common ground on the appointment of positions in the executive. The CEO insisted on the enforcement of terms of the Agreement based on which the National Unity Government was formed. However, the President argued that according to the country's constitution, all the power resides in the presidential palace. This resulted in ethnic-prone appointments. The ethnic partisanship perceptions within the NUG has fueled mistrust and alienate excluded minorities.<sup>92</sup>

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<sup>90</sup> 'What Is Going Wrong With Afghanistan's National Unity Government?'

<<https://thediplomat.com/2016/09/what-is-going-wrong-with-afghanistans-national-unity-government/>> accessed 5 June 2020.

<sup>91</sup> 'Afghanistan: The Future of the National Unity Government' (*Crisis Group*, 10 April 2017)

<<https://www.crisisgroup.org/asia/south-asia/afghanistan/285-afghanistan-future-national-unity-government>> accessed 5 June 2020.

<sup>92</sup> *ibid.*

## **Myanmar - Form of Government in Practice**

Weak governance, underdevelopment or poor economic growth do not necessarily produce internal conflicts. It is the contentions between central government and local actors that exacerbate such conflicts.<sup>93</sup> The ethnic conflicts in Myanmar like Afghanistan are often the result of fight for the right to govern. In other words, the pivotal cause of ethnic conflicts in Myanmar is linked to the legitimacy and power over population with the people who are predominantly playing an essential role over territory and resources. Therefore, interventions in area of social services triggers sensitive ethnic issues and ultimately result in conflicts.

### **2.1. Centralized and Disproportionate Division of Power**

Following the country's independence, separate nationalist movements have formed to represent major ethnic groups as there were hopes for a federal union. But when hopes for such a union diminished, the Burmese-led government set to bring all groups under the control of a centralized Burma.<sup>94</sup> In reaction to this those non-Burmese leaders that were marginalized as a result of the centralization, armed themselves to fight for a role in the leadership of their own ethnic nationalities.<sup>95</sup> This resulted in a long ethnic conflict. In 1962 when the Tatmadaw<sup>96</sup> took the power to counter the insurgency, it adopted an approach in which they focused cutting off the relation of insurgents from population through relocation decrees and "scorched earth" campaigns.<sup>97</sup>

Given the important role the military played in counterinsurgency; the 2008 Constitution has provided a significant role for it. Furthermore, this Constitution envisaged a model through which most of the executive power resides in the central government. This approach is in sheer

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<sup>93</sup> Kim Jolliffe, 'Ethnic Conflict and Social Services in Myanmar's Contested Regions' 69.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.* p. 6

<sup>96</sup> The Tatmadaw is the official name of the armed forces of Myanmar.

<sup>97</sup> "'Ethnic Groups and National Unity in Afghanistan" by Emadi, Hafizullah - Contemporary Review, Vol. 280, Issue 1632, January 2002 | Online Research Library: Questia' (n 7).



contradiction with the will of the rest of ethnic groups in the country. As we saw in Afghanistan; political power resides in the hand of politicians mainly from two ethnicities – Pashtuns and Tajiks – and the remaining ethnic groups are either underrepresented or even not represented at all. The imbalance has caused grievances among other ethnic groups who are systematically discriminated and whose voices are not heard properly and are absent in political processes. The non-Burmese ethnic groups in Myanmar insist in self-determination and self-reliance. According to the country's educated elites, centralization of power and exclusion of non-Burmese ethnic groups are the primary reasons that drive the country into ethnic conflicts.<sup>98</sup>

Besides intensification of ethnic tensions; centralization of power has decelerated delivery of public services and development processes. This has caused grievances among members of the underrepresented groups. For example, in Myanmar, at the grassroots level in the areas affected by conflict, people are more prone to establish their own community structures to provide them with basic services.<sup>99</sup> In an interview with Asia Foundation, an ethnic Karen community-based teacher said that he preferred to lead his own progress and since there was a ceasefire they wanted to do it themselves; all they want is to be allowed to do.<sup>100</sup>

## **2.2. Despotism and Suppression of other Ethnic Groups**

In addition, the centralized government resulted in tyranny and oppression of other groups. The Rohingya ethnic cleansing by the Myanmar's Government is evident of the Government discriminatory policies. The Rohingya community has been subject to discrimination since later 1970.<sup>101</sup> The Government has renewed it in 2017; when rape, murder and arson are reported by

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<sup>98</sup> Jolliffe (n 110).

<sup>99</sup> *ibid.* p. 8

<sup>100</sup> *ibid.*

<sup>101</sup> 'What Forces Are Fueling Myanmar's Rohingya Crisis?' (*Council on Foreign Relations*) <<https://www.cfr.org/backgrounder/rohingya-crisis>> accessed 6 June 2020.

the Myanmar's security forces. The deeply militarized and central Government of Myanmar not only accommodate other ethnic/religious communities but has chosen its path towards despotism and suppression of other groups residing in this country.

### 2.3. Return to Conflict

The abovementioned factors and other approaches by the Burmese-led government represent a key element of broader grievances over lack of local autonomy for the Ethnic Armed Organizations (EAO). The core reasons for armed resistance of the EAO are lack of political equality, and rights to self-determination.<sup>102</sup> Similarly, most of EAOs argue that the Government has conducted a broader agenda of Burmanization that undermines other nationalist movements and augment the position of Burmese leaders over other groups.<sup>103</sup> Overall, the design of 2008 Constitution confers all executive power ranging from governance, security, economics and social services on the Union and in some cases to the Tatmadaw. This leaves the state and regional governments with minimal authorities over the mentioned affairs. Although social and development affairs fall under state/region governments; education and healthcare are managed by local departments of the relevant Union ministries.

Moreover, appointment of local ministers falls under the Chief Minister, who himself is selected by the President.<sup>104</sup> According to Nixon *et al.* “the state and region government has ministers but does not yet have its own ministries.”<sup>105</sup> Having said that, there are serious unclarities and meanwhile dominance of one ethnicity – Burmese – is considered by the EAO a threat to their

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<sup>102</sup> Jolliffe (n 110).

<sup>103</sup> *ibid.* p. 9

<sup>104</sup> ‘Government Decentralisation and Reform in Myanmar’s Roads Sector’ (IGC, 19 July 2018) <<https://www.theigc.org/blog/government-decentralisation-reform-myanmars-roads-sector/>> accessed 6 June 2020.

<sup>105</sup> ‘State and Region Governments in Myanmar - Nixon.Pdf’.

identities and other internal affairs. If the centralization process continues this way and the constitutional design remains as it is now; returning to another ethnic conflict is very imminent.

### **Kosovo - Form of Government in Practice**

I begin to examine whether the four grounds which Lijphart has proposed for a consociational polity is available within the constitutional design of Kosovo; 1) power sharing executive, 2) proportionality, 3) veto rights, and 4) cultural autonomy.

#### **3.1. Power-Sharing Executive**

Two issues should be examined here; first, power-sharing in the formation of government. Second, the nature of power-sharing in the context of senior leadership (the head of state). In terms of formation of government, Kosovo Constitution allocates at least two ministers and four deputy ministers to represent other ethnic communities.<sup>106</sup> Therefore, the formation of the Kosovo's Government has been according to this provision regardless of seats in parliament. Taking this into account, Kosovo follows a consociational rationale which allows other groups become part of the state apparatus.

In terms of head of state, the constitution of Kosovo stipulates one individual president; who represents the country in its entirety - majority and minorities.<sup>107</sup> Therefore, the head of state is a national unity figure signified by the Constitution to represent the people of Kosovo with an anti-majoritarian signal. Hashim Thaçi is the current president of Kosovo; he is from Albanian ethnicity but represents all the groups.

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<sup>106</sup> 'Constitute' (n 2).

<sup>107</sup> *ibid.* art. 83

### 3.2. Proportionality

Another principle of consociational polity is proportionality. It refers to proportional representation of ethnic groups in the parliament, judiciary, public administration, army, police services and departments owned by state. Under Article 64 (1) the assembly includes 120 deputies elected by secret ballot. This provision further provides that the seats are distributed among all groups and independent candidates in proportion to the number of valid votes they receive in election.<sup>108</sup> Besides, the Constitution sets 20 out 120 seats for minority communities.<sup>109</sup> Thus, the Constitution guarantees proportional representation in two levels; parliamentary level for all the groups taking part in the election and it reserves seats for ethnic minorities to ensure their representation.

Second, the Constitution also allows for minority judges and prosecutors in Kosovo. For instance, it stipulates that of nine judges of the Constitutional Court of Kosovo two come from ethnic minorities one of whom must come from Serbian ethnic group. Moreover, there is a quota for ethnic minorities in the Kosovo's Supreme Court. Of the total number of judges at least 15 per cent of them that should not be less than three are from ethnic minorities.<sup>110</sup> The same allocation applies in the composition of every other court, and recruitment and appointment of prosecutors in the country.<sup>111</sup>

Third, the principle of proportionality is also applied by the Constitution in the public administration and state-owned firms. Article 61 provides that: "Communities [ethnic groups] and their members shall be entitled to equitable representation in employment in public bodies and publicly owned enterprises at all levels; including police service in areas inhabited by the

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<sup>108</sup> *ibid.* art. 64 (1)

<sup>109</sup> *ibid.* art. 64 (2)

<sup>110</sup> *ibid.* art. 144

<sup>111</sup> *ibid.* art. 103 (6), art. 110

respective Community, while respecting the rules concerning competence and integrity that govern public administration.”<sup>112</sup> Furthermore, the Constitution also guarantees seats for ethnic groups in the Judicial Council of Kosovo,<sup>113</sup> the Central Electoral Commission,<sup>114</sup> the local government,<sup>115</sup> Security Force of Kosovo,<sup>116</sup> and so on. Therefore, the second principle of consociational polity – proportionality – has been widely considered in the Kosovar Constitution.

### 3.3. Veto Rights

The third principle of consociational polity is a veto right. Based on this principle, certain ethnic groups can block directly or suspend decision-making, adoption of a law or enactment of a policy. The Kosovar Constitution adopts veto right for ethnic minorities in two cases. The veto right on constitutional amendment procedures. For example, under Article 144.1, ethnic communities can veto a constitutional amendment process to be stopped.

Secondly, under the Kosovar Constitution minorities have the power to veto adoption, amendment and repeal of important laws. These laws are mainly related to establishment or abolition of municipalities, laws on language, local election, protection of cultural heritage, religious freedom, education and etc.<sup>117</sup> Unlike Myanmar’s Burmanisation agenda, the Kosovar agenda is to recognize other communities and to ensure their voices are heard in the political processes.

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<sup>112</sup> *ibid.* art. 61

<sup>113</sup> *ibid.* art. 108 (6)

<sup>114</sup> *ibid.* art. 139 (4)

<sup>115</sup> *ibid.* art. 62 (1)

<sup>116</sup> *ibid.* art. 126 (4)

<sup>117</sup> Korenica and Doli (n 85).

This not only helps with creating a sense of common understanding and respecting each other's language, cultural and tradition but also prevents resorting to violence and arising of new conflicts. In the first two jurisdictions we saw that the dominant ethnic groups were either ignoring other ethnic groups or intentionally imposing their identities on them. However, the approach in Kosovo is the opposite. Thus, veto rights of ethnic communities as Lijphart puts is one of the four main principles of a consociational polity that is reflected in the Kosovar Constitution. It has substantially helped ethnic minorities to voice their concerns whenever there has been any majoritarian tendency by the Government.

### **3.4. Cultural Autonomy**

The fourth and last element of a consociational polity is cultural autonomy. It is to provide special cultural protection for ethnic minorities through their own identity-protection mechanism. The Kosovar Constitution stipulates a broad cultural autonomy for the ethnic minorities. Each ethnic minority group's cultural autonomy includes allowing ethnic groups, particularly Serbs, to communicate in their own language. It recognizes Serbian language as an official language; making multi-ethnic state symbols so that each ethnicity could find itself represented.<sup>118</sup> Allowing ethnic minorities to practice their cultural affairs and recognizing their right to educate in their own language and etc. Therefore, one can claim that cultural autonomy is firmly posited in the Kosovar constitution according to which ethnic minorities are autonomous when it comes to their cultural affairs.

In sum, according to the most recent report by the European Commission published on 29 May 2019, Kosovo has been performing well in certain areas. Namely, public administration

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<sup>118</sup> 'Constitute' (n 2). art. 6 (1)

reform, judicial system, fight against corruption, protection of fundamental rights and so on.<sup>119</sup> Therefore, based on the international evaluations the country is relatively performing well in comparison with Afghanistan and Myanmar. Kosovo has been able to manage its ethnic tensions in a way that has given all the concerned parties the opportunity to be heard and participate in the political process. Finally, it has substantially reduced the imminence of another ethnic conflict.

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<sup>119</sup> 'Key Findings of the 2019 Report on Kosovo.Pdf'.

## Conclusion of Chapter II

As pointed out in above, Chapter II presented a comparative analysis of the constitutional models of the three countries in practice. Afghanistan and Myanmar are the two empirical cases of which we can draw a solid conclusion that a centralized polity where power accumulates in the hand of a single ethnic group does not suit a divided society. Because it takes the opportunity from other groups to be heard and take part in the political process. It does not last longer and ultimately fail. Moreover, its consequences would not be compensable for such societies. It can lead the country to a new conflict which will be difficult for the concerned state to afford.

Majoritarian tendencies and one-take-all-power approaches are dangerous for deeply divided societies. As we saw in Afghanistan, it resulted in a *de facto* consociational polity, where the conflicting parties has no option but to establish their self-made polity that in the long-run leads to new tensions. In such contexts a constitution becomes a dead document that except in cases profitable for the ruler, no one would care about it.

As such in Myanmar, the Government's Burmanization agenda has turned the country's constitutionalism into a sheer mess. For instance, as mentioned in the case of Rohingya minorities; it has resulted in displacement of millions of people, a substantial number died, it intensified domestic violence, and has damaged the country's international recognition. More importantly, it fueled a new civil conflict which would be way difficult for Myanmar to afford given its most recent history of conflict. Therefore, failure to include all other ethnic groups poses grave problem to peace and democracy.

In Kosovo, we have seen that the Country's constitution framers have acted in a meaningful manner. All the four pillars of the consociationalism are present within the Country's polity. It has fostered Kosovo's peace and democracy. Lijphart's prescription of power sharing has been



appropriately embodied in the Country's Constitution and given the European Commission's report, applied accordingly. Recognizing minorities' rights in constitution and ensuring its proper implementation creates a sense of inclusiveness that could potentially reduce imminence of a new conflict – unlike Afghanistan and Myanmar that have chosen a different direction.

**WHEREFORE**, model of pure majoritarian democracy,<sup>120</sup> or a centralized polity with disproportionate division of power does not suit conflict-prone and highly divided societies. As the Carnegie Commission on Preventing Deadly Conflict provides: “[I]n societies with deep ethnic divisions and little experience with democratic government and the rule of law, strict majoritarian democracy can be self-defeating. Where ethnic identities are strong and national identity weak, populations may vote largely along ethnic line. Domination by one ethnic group can lead to a tyranny of the majority, which often gives rise to hatred and sometimes open conflict. A preferable solution may be the adoption of mutually agreed upon power-sharing arrangements that encourage broad-based governing coalitions.”<sup>121</sup>

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<sup>120</sup> Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd ed, Yale University Press 2012). 32 – 33

<sup>121</sup> 'Carnegie Commission on Preventing Deadly Conflict, Preventing Deadly Conflict Final Report. p. 100 '.

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