Courts and Consociations: Human Rights Versus Power-Sharing by Christopher McCrudden & Brendan O'Lear (review)

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Christopher McCrudden & Brendan O'Leary, *Courts and Consociations: Human Rights Versus Power-Sharing* (Oxford University Press 2013), 188 pages (incl. index), ISBN 978-0-19-967684-2

Would anyone imagine an international court telling the US government that the rules on eligibility for the Office of US President are incompatible with its international human rights commitments and therefore must be amended? The authors present this unlikely—though certainly thought-provoking—futuristic scenario to juxtapose it with a real case adjudicated by the European Court of Human Rights some time ago. In the 2009 case of *Sejdić and Finci v. Bosnia and Herzegovina*,[1] the Court found some of the respondent state's constitutional provisions discriminatory, as they impeded the applicants (citizens of Bosnia) from standing for parliamentary or presidential elections due to their ethnic background. The applicants, identifying themselves to be of Roma or Jewish origin, respectively, were ineligible for elections according to domestic law since they did not declare affiliation to any of the "constituent peoples" of Bosnia and Herzegovina, i.e. Bosniacs, Croats, or Serbs. This case led the authors to ask crucial questions as to international courts' faculty in pronouncing on constitutional rules being part of political power-sharing bargains known as "consociations."

Arguably, the idea of "consociationalism" sounds more familiar to political scientists than it does to human rights lawyers. The authors begin by explaining the notion as "an alternative strategy for managing differences" within democratic societies by means of "institutional arrangements that combine principles of parity, proportionality, autonomy, and veto rights."[2] Notwithstanding their doctrinal nuances and practical implications, consociations assume cross-community power-sharing, co-decision making rules, various forms of self-governmental autonomy, proportional allocation of representatives and public expenditures, and veto rights granted to each community in order to protect its vital interests. The Bosnian Constitution might serve as a standard example of such an arrangement. It is also noteworthy that consociational features are present in several other power-sharing deals throughout the world, including Belgium, Northern Ireland, Macedonia, and Burundi.

Christopher McCrudden and Brendan O'Leary recall that some scholars find consociational principles hardly reconcilable with the very foundations of human rights thinking. Essential as the power-sharing arrangements are—or may be—for maintaining political stability among diversified communities, consociations indeed cause some uneasiness from the human rights point of view. They might imply a potential risk of discrimination due to race, ethnicity, religion, or language, as well as infringements on the right to participate in the political process on equal terms with others. Admittedly, consociational agreements usually do not overprivilege the individualist paradigm or the principle of equal participation in the political process. The authors address some of these concerns, noting, however, that human rights are far from absent in

1. App. Nos. 27996/06, 34836/06 (Eur. Ct. H.R. 2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491#{%22itemid%22:[%22001-96491%22]}.
2. Christopher McCrudden & Brendan O'Leary, Courts and Consociations: Human Rights Versus Power-Sharing 2 (2013).

post-conflict peace settlements and are normally considered part and parcel of their legal framework.

The authors pay particular attention to the position of courts within power-sharing agreements. They analyze the unique example of the Bosnian Constitutional Court, whose judges are selected not only by the parliaments of both "entities" constituting Bosnia and Herzegovina, but also by the President of the European Court of Human Rights. Yet the crux of the matter is what role should be assigned to courts within consociational arrangements that they themselves are part of. McCrudden and O'Leary advocate for a relatively high level of judicial restraint and caution within courts examining cases of a potentially "unwinding" effect for ethnic political bargains. The practice of domestic courts considered a part of consociational agreements generally reflects the authors' position. However, things get more complicated with international courts and institutions intervening or assessing how the power-sharing agreements take into account the human rights standards.

Regional human rights courts are usually considered a laudable achievement in the effort to ensure better and more efficient protection of human rights. While not denying this idea anywhere in the book, the authors indicate how a "universalist and difference-blind" judicial activism may negatively affect politically fragile power-sharing agreements. They argue that the latter has happened in the *Sejdić and Finci* case in which the Strasbourg Court Grand Chamber found, by a large majority, that the Bosnian Constitution violates the prohibition of discrimination insofar as it bars the possibility of standing for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina by "others." The applicants would have been eligible only if they had declared themselves as belonging to one of the "constituting peoples."

Taking a staunchly critical approach to the European Court's judgment in *Sejdić and Finci*, the authors perceive it as potentially threatening to destabilize the Bosnian power-sharing agreement, negotiated in Dayton, which could be considered successful insofar as it brought the 1990s bloodshed to a halt. They also argue that the Strasbourg Court departed from two precedents in which it adopted a far less intrusive scrutiny when reviewing consociational solutions in the Belgian electoral and educational system, namely the 1968 *Belgian Linguistic Case* and the 1988 *Mathieu-Mohin and Clerfayt v. Belgium*. In those cases, the Court apparently showed more self-restraint and allowed the respondent a wider margin of appreciation in defining the rules of power-sharing in an ethnically divided society. While the authors make a valid point in indicating differences of the Court's approach in the two Belgian cases and the Bosnian one, it is not entirely convincing that the Court did in fact establish any persuasive precedents as early as in the 1960s or even the 1980s with respect to consociational agreements which it then overturned. Anyway, it is true that the Court proved more reserved and cautious in dealing with the delicate compromises of the Belgian political system than it did in assessing Bosnian electoral solutions.

McCrudden and O'Leary make it clear that although the rules on eligibility to run for elections in Bosnia and Herzegovina might be seen as highly controversial from a human rights perspective, taking charge of this particular controversy is a task for the Bosnian parliament itself rather than an international court. The authors wish the Court would have considered the legitimacy of the purposes behind

the impugned electoral rules. Instead, the Court opted for a strict-scrutiny test and did not utter a word on the "margin of appreciation" doctrine. Interestingly, the authors argue for developing a sort of "political question doctrine" (so far unheard of in Strasbourg) which would favor a more restrained approach to such cases and allow the Court to avoid their examination. Further, it is suggested that in the *Sejdić and Finci* case the Court should have reconsidered the applicants' victim status and found the complaint inadmissible. According to the authors, the Court would be even excused if it was delaying the examination of the case until a political solution is worked out. These ideas, though practicable, seem far-fetched and would possibly expose the Court to legitimate criticism. But so did the judgment under consideration.

Perhaps one of the most relevant points in the book is made with respect to the criterion of ethnicity, looked upon by the Court as equal to race insofar as prohibition of discrimination is concerned. According to the authors, the Court failed to adequately explain why it sees ethnicity as "suspect" and how ethnic discrimination should be distinguished from other possibly acceptable differences in treatment based on criteria such as language or religion. Let us notice that unlike "race," "national origin," or "association with national minority," ethnicity is not explicitly mentioned in Article 14 of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms and hence falls under "other status." Nonetheless, the Court found no difficulty in considering ethnicity and race as related concepts. It reaffirmed that discrimination on account of a person's ethnic origin is a form of racial discrimination in the sense of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In consequence, both racial and ethnic discrimination were considered by the European Court as "particularly egregious" and having practically no chance of finding an "objective and reasonable justification."

The authors do not seem to be convinced by the Court's deeming race and ethnicity criteria of discrimination requiring the highest scrutiny. They argue that unlike race, the concept of ethnicity—at least in the Bosnian context—should not be considered "immutable" since it is subjective and dependent on self-classification. As a matter of fact Bosnian law does not recognize ethnicity as a legal category. The applicants in *Sejdić and Finci* were free to declare affiliation to any of the three "constituent peoples" but chose not to do so, which was obviously their right. The core question here is whether the consequences of their personal choice for (in)eligibility could be labeled ethnic discrimination. And even if they could, is it proper to assess them by exactly the same standards as if they constituted inequality in treatment due to race? McCrudden and O'Leary emphasize that the Court offered no convincing theory as to why this kind of treatment was found to be tantamount to racial discrimination, especially because the relation between ethnicity and race might be less akin than suggested in the Court's reasoning. The sole reference to CERD does not, in fact, address the essence of this problem, i.e., it does not sufficiently explain the reasons for applying the same scrutiny test both to race and ethnicity.

Moreover, the authors remind us that the term "constituent peoples," which was clearly drafted with the peoples' right to self-determination in mind,[3] is, evidently, tantamount to "constituent

3. *See* International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 1, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

nations." Thus, it might be permissible to view the solutions adopted in the Bosnian electoral system as reflecting political empowerment of "co-nationals" rather than introducing discrimination based on ethnicity. The European Court employed the criterion of "ethnic" rather than "national" origin, though the latter was expressly provided for in Article 14 of the Convention. While the Court's choice was not explained anywhere in the judgment, it may be presumed that dwelling upon definitions and concepts of a "nation" (or "national origin") was the last thing the Court was willing or prepared to do. Referring to "ethnicity" saved the Court from this trouble. In any event, the authors identified serious deficiencies in the Court's approach towards the strict-scrutiny test. The *Sejdić and Finci* judgment will probably be quoted in any future case involving "suspect" discrimination based on ethnic origin, but the problems with the Court's reasoning remain unsolved.

The expected influence of the Strasbourg Court's stance on consociational futures is dealt with further in the book. The authors note that:

> The message that the case sends to the world, intentionally or not, is that courts can and may well unpick highly sensitive national, ethnic, religious, or linguistic bargains in some future, unpredictable circumstances. . . . The Court's message may lead, in the future, to negotiators being much less open to persuasion that the arrangements they are being offered as protection for [the parties'] interests will be stable for the foreseeable future—that is, that they will not be subject to change without their consent.[4]

McCrudden and O'Leary believe that the chilling effect of the *Sejdić and Finci* case may involve a temptation to exclude domestic, regional, or international courts from reviewing the power-sharing agreements whatsoever. This could be achieved, for instance, through carefully drafted reservations to human rights treaties, even if it is not the way the authors would seem to favor. They rather point to possible negative consequences but admit that the overall effects of the judgment may be less dramatic, bearing in mind the specificity of the Bosnian consociation, and the Court's intention to reform the latter rather than abolish it.

An important issue tackled by the authors concerns the danger of undermining the judicial legitimacy of the Court in the event of non-execution of the *Sejdić and Finci* judgment. It is indeed disturbing that despite many diplomatic attempts involving the Committee of Ministers of the Council of Europe, the European Union, and several nongovernmental organizations, the judgment has not been implemented so far (as of early 2014). The authors see it as a blow to the Court's "sociological output" legitimacy—not only in Bosnia, but also elsewhere in Europe. Although the difficulty in the implementation of the judgment is worrying, it should perhaps be remembered that it is far from the only one of that kind. Only time will tell whether and how the awaited execution of the judgment shall influence Bosnia's political future.

Written by distinguished specialists in human rights law and political science, the book is a must-read for anyone interested in the effects that regional human rights courts may produce on easily-breakable power-sharing bargains. It also provides an insightful analysis of contemporary consociations, which sometimes prove the most effective—or the only available—way to avert political chaos, violence, or armed confrontation

4. McCrudden & O'Leary, *supra* note 2, at 135.

in ethnically diversified countries. It goes without saying that independent courts are natural allies in the endeavors to maintain stability, rule of law, and observance of human rights. The problem arises when it is because of courts' pronouncements that the whole process is put at risk.

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Discourse Theory, Intercultural Dialogue, and Human Rights

Jeffrey Flynn, *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach* (Routledge, 2013), 234 pages, ISBN 978-0-415706025.

While questions of pluralism and toleration have impregnated almost all debates in political philosophy over the last decades—not least in relation to discussions about global justice and global democracy—the question of intercultural dialogue has received far less attention in comparison. Indeed, deliberative democracy has a stronger position than ever before. But focus among political theorists has been redirected from deliberation as dialogue and mutual understanding towards deliberation as contestation. In light of this change of focus, Jeffrey Flynn's book *Reframing the Intercultural Dialogue on Human Rights* is a refreshing exception. Even if we tend to forget, individuals across the globe agree on norms and ways of conduct and this is as much a fact about our world as is pluralism. If there is one area of global affairs in the last sixty years that bears witness to this, it is the area of human rights. Still, among conceptions of human rights that are broadly labeled "political,"[1] not much has been said about the role of intercultural dialogue for theorizing human rights. Working within this "political" human rights framework, Flynn sets out to do just that.

According to Flynn, to the extent that theorists have stressed the need for intercultural dialogue to meet the challenges posed by cultural and religious pluralism, they have tended to presume an already developed theory of human rights. In his view, the problem with such an approach is that the question about intercultural dialogue immediately turns into a question about convincing others of a set of ready-made human rights. Instead, Flynn's ambition is to make the very dialogue on human rights the object of philosophical inquiry. From this starting-point, it is not at all strange that Flynn finds a Habermasian framework attractive. He aims to demonstrate the strengths of Jürgen Habermas' discourse theory for developing a dialogical approach to human rights over other contemporary approaches.

Against the backdrop of a reframing of the so-called compatibility debates—i.e., the debates about how human rights can be made compatible with different religious doctrines—through a re-reading of the question of compatibility in contextualist and pragmatic terms, Flynn analyzes two attempts to accommodate

1. "Political" in this sense refers to theories that attempt to draw away from natural rights theory and conceptualize human rights without reliance on controversial religious, philosophical or metaphysical premises.