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## **Consociational Democracies and the Political Participation of “Others”: Does the corporate consociational arrangement in Bosnia and Herzegovina result in an exclusion of Others from political participation?**

Weidig, Morgane

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# Consociational Democracies and the Political Participation of “Others”.

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Morgane Weidig (s3061922)

Thesis Supervisor: Dr. Maria Spirova

Second Reader: Dr. Frank de Zwart

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**Abstract**

In corporate consociationalism, power-sharers are pre-determined, which in some cases ended up in differentiation of citizens into constituent groups and Others. In Bosnia and Herzegovina, individuals who don't affiliate as Bosniak, Serb or Croat, are therefore categorized as Others. Given that the right to stand for presidential elections or a seat in the House of Peoples is reserved for constituent peoples, Others are excluded from that right. The following thesis analyzes why this exclusion remains despite international efforts to reform the Bosnian Constitution until this day. Investigating the case from 2005, the beginning of the first reform negotiations, to 2018, when the last general elections took place under discriminatory conditions. Proposing a causal mechanism of four steps, I argue that the issue lies in the general approach of corporate consociationalism, in which cooperation is unlikely due to the institutionalization of often hostile ethnic groups. Finally, in this thesis, it becomes clear that the link to this issue is the abuse of the veto-right in Bosnia, making cooperation and negotiation on complex political problems nearly impossible.

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## Introduction

Several Human Rights Conventions, such as the International Covenant on Human and Political Rights (ICCPR) and the European Convention of Human Rights, set clear non-discriminatory protocols. Any rights should be secured without distinction based on "*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*" (European Convention on Human Rights, 1953; ICCPR, 1966). There are however cases, where this right is not ensured. For instance, in Bosnia and Herzegovina (BiH, Bosnia), the Presidency and Seats in the House of Peoples (HoP), are reserved for members of the three constituent groups, Serbs, Croats, and Bosniak. This means that Individuals who don't affiliate with these groups, officially categorized as Others, don't have the right to run for elections in these offices.<sup>1</sup>: In 2009, the European Court of Human Rights (ECHR) ruled this a violation of the right to equal political participation and made amendments to the Constitution necessary (Milanovic, 2010, p. 636). Efforts on constitutional reforms were already made in previous years. After 2009, the end of the exclusion of Others would be dependent on efforts to implement the Sejdić Case, which implicates a constitutional reform. However, in the following years, little progress was made in implementing the ruling of the Sejdić and Finci Case (Stojanović, 2018, p. 350). Therefore, this thesis will investigate the following research question:<sup>2</sup>

*Does the corporate consociational arrangement in Bosnia and Herzegovina result in an exclusion of Others from political participation?*

The present thesis will use a theoretical argument based on the literature on consociationalism, emphasizing corporate consociations, immobilism, and the veto right, which will be further elaborated on in the literature review. Critically engaging with consociationalism, pointing out the pitfalls of corporate designs, I argue that the general approach entailed in corporate consociationalism, which maintains ethnic division in addition to the veto-right, results in a limited chance for constitutional

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<sup>1</sup> From here on after I will refer to Individuals who don't affiliate with constituent groups as the category of Others or simply *Others*.

<sup>2</sup> More examples of corporate consociational democracies where Others have limited rights to political participation are Belgium, Lebanon, Burundi, Northern Ireland, and South Tyrol (Stojanović, 2018, p. 359)

change (Hodžić, 2020; Horowitz, 2014; Lijphart, 1977; Stojanović, 2018). After setting the theoretical background and the theoretical argument, which contains four steps to demonstrate a causal mechanism, I will present the methodology used for this analysis. The argument will be tested using a process-tracing analysis on the case of BiH from 2005 to 2018. I will analyze the veto-right in BiH and the efforts for constitutional reform from 2005 to 2010, using literature from Džihic and Wieser (2011), Sebastian (2007), and Zdeb (2016). Furthermore, I will rely on the ECHR ruling in 2009 and reports on the implementation progress of the verdict in the years until 2018. The main sources will be reports from the European Assembly and European Parliament (EP). The empirical analysis will then put the factual findings into the presented theoretical argument's context to answer the above-presented research question.

It is essential to research this topic as it critically analyses the issues of rights to political participation in corporate consociational democracies. Consociationalism is a popular tool for reconciliation in deeply divided societies, making it even more important to point out its risks (Horowitz, 2014). Moreover, the case of BiH is important when keeping in mind that it is a potential candidate for accession into the European Union (EU). Its membership highly depends on progress made in the political participation of Others (EP, 2021).

## Literature review

The principle of non-discrimination in political participation is a central thought in liberal democracies, and international law obliges states to respect the rights of minorities to participate in public affairs, especially concerning the identity and regional and national decision making (Palermo & Woelk, 2003, p. 228; Wheatley, 2002, p. 3). Article 25 of the ICCPR clarifies that all citizens have the right to participate in public affairs, vote, and be elected without any distinctions and unreasonable restrictions.<sup>3</sup> These rights are to be enjoyed without any kind of discrimination (ICCPR, 1966, Art. 25).

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<sup>3</sup> *Unreasonable restrictions are* in reference to Article 19 that the mentioned rights are subject to certain restrictions if they are necessary “*for respect of the rights or reputations of others*” and “*for the protection of national security or of public order (ordre public), or of public health or morals*” (ICCPR, 1966, Art. 19).

Apart from the right to vote, it is essential for minorities that their interests and preferences are represented at all governmental decision-making levels and can thus also stand for election (Palermo & Woelk, 2003, p. 230; Wheatley, 2002, p. 9).

Deeply divided societies with a strong imbalance between majorities and minorities and with discrimination towards minorities are often at risk of entering conflict (Piazza, 2012). Special governmental structures are needed to create stability. Different theories suggest models to achieve democratic peace, especially in deeply divided societies. The most prominent among them are Donald Horowitz's centripetalism (2008) and Arend Lijphart's Consociationalism (1969). While they are both built on the idea of power-sharing, there are notable differences. Centripetalism revolves around the concept of electoral incentives (Horowitz, 2008, p. 1217), whereas consociationalism builds on guarantees for each group against majority rule (Lijphart, 1977, p. 31).

Consociationalism is a commonly used tool for conflict resolution and the establishment or maintenance of a stable democracy in deeply divided societies along ethnic lines. Prominent examples for consociational regimes would be Northern Ireland, Cyprus, Belgium, and BiH (Horowitz, 2014, p. 12). The key characteristics of consociational democracy are the grand coalition, proportionality in public life, veto-right, and segmental autonomy and should serve as a guarantee for minorities against majority rule (Lijphart, 1977, p. 25). Consociationalism is considered both a normative and an empirical model. Empirically, Lijphart used it to demonstrate how deeply divided societies in Europe, such as the Netherlands, Switzerland, or Austria, maintained stable democratic standards. Normatively, consociationalism should be considered a tool to apply in other deeply divided societies. The model has been criticized for its normative and empirical accounts (Andeweg, 2000; Bogaards, 2000; Hodžić, 2020; Horowitz, 2014; van Schendelen, 1985). On the other hand, some scholars claim it isn't the ideal model, but in many cases, it's the best solution there is (Pentassuglia, 2002, p. 324). Normatively, it is arguable that the model is too broadly conceptualized to the extent that it can be made to fit any case (van Schendelen, 1985). Empirically, consociationalism can bring more difficulties than benefits if not thought through (Horowitz, 2007). This also entails issues of implementation, such as immobilism, due to the potential over-use of the veto-right (Horowitz, 2014, pp. 12–14). Even Lijphart himself warns that

the veto-right risks ending in a deadlock and admits it to be one of the most significant issues of consociationalism (Lijphart, 1977, pp. 50–51). However, in the analysis of consociationalism, it is essential to differentiate between corporate and liberal consociations. While the former is grounded on negotiated settlements with pre-determined power-sharing groups, the latter is grounded on consensual forms. Here, power-sharing groups and the decisions about political identities and representations are made by the voter (Baliqi, 2018, p. 54; McEvoy, 2013, p. 255). Concerning the veto power, functionality strongly depends on the way it is designed in each case. Aspects such as who are the veto-players, in which processes can it be triggered or can it be deployed passively, or if justifications are necessary, impact whether veto-power is useful or being abused (McCulloch & Vandeginste, 2019, pp. 1180–1181)

In the context of political participation, Human Rights and International Rights scholars argue that especially pre-determined consociational arrangements aren't compatible with international law as they neglect the human rights of political participation, majorly provoked by the exclusion of individuals who don't affiliate with constituent groups (Stojanović, 2018; Wheatley, 2005, p. 163). For instance, in BiH, people who are not Croats, Serbs or Bosniaks, can't run for Presidency or a seat in the HoP. In Italian South Tyrol, Individuals must affiliate with one of the three ethnolinguistic groups, German, Italians, or Ladins, to have the right to run for political office. In Northern Ireland, Assembly members who don't identify as "nationalist" or "unionist" have less voting power than their colleagues (Stojanović, 2018, p. 343).

It comes to no surprise that many scholars see this exclusion of Others as a clear violation of human rights law and criticize consociationalism for that (Stojanović, 2018, p. 341). Also, human rights institutions called out consociationalism and appealed to governments to take action (Sejdić and Finci v. BiH, 2009; Zornić v. BiH, 2014). However, especially in corporate consociations, the political stakeholders face difficulties finding the will to cooperate and reach a consensus. A stalemate in the government is a severe consequence because no agreements can be found, of which the continuing exclusion of Others is only one of many results.



## Theoretical Argument

I argue that the general approach of corporate consociationalism, with pre-determined power-sharers, leads to the lack of constitutional reforms, which in the case of Bosnia means a continued exclusion of Others. I don't necessarily mean the four characteristics of consociationalism but rather the approach in policies it establishes or maintains (Lijphart, 1977). Firstly, I would conceptualize the mechanism as the maintenance of ethnic division, which fuels rivalries between political parties that primarily affect decision-making and legislative processes. Secondly, the lack of willingness for constitutional change inhibits progress towards equal political participation. Thirdly, an external factor pressures authorities to work on reforming the Constitution. An external factor is considered an event outside the governmental decision-making process, such as international pressure or national pressure, for instance from civil society. While this argument is built on a specific case, it would be recommendable to apply the presented steps to other cases where Others face similar exclusion from political participation would be interesting.

Others will be conceptualized as a category of people who don't affiliate with the significant segmental groups and defined as such by states. This category includes sub-categories such as ethnicity, nationality, or other identifications. With which groups or categories an Individual identifies within this category of Others is not relevant for this thesis as they are limited from the same rights in the same way (Stojanović, 2018, pp. 345–346). With *political participation*, I refer to the right to participate in public affairs, to vote, and be elected without any distinctions and unreasonable restrictions (ICCPR, 1966, Art. 25). I chose to refer to the ICCPR for the conceptualization as it is broad in defining political participation yet emphasizes the right to do so without distinction. Furthermore, scholars often refer to this article when criticizing consociationalism and limitations in political participation (Hodžić, 2020, p. 528; Wheatley, 2002, p. 3). *Corporate Consociational Democracies* are settled between pre-determined groups in conflict within a country (Baliqi, 2018). They then become the constituents and form a power-sharing governmental structure under consociational arrangements with the four typical characteristics of a grand coalition, a veto-right as a guarantee against majority rule, proportionality, and segmental autonomy (Lijphart, 1977, p. 25).

The following theoretical argument is closely related to the *immobilism* argument from Horowitz (2014). The source of immobilism lies in the veto-right as a guarantee against majority rule. When there is discontent from one party in a consociational system, it usually seeks provisions to adapt or even to opt-out. Usually, this party would be in the majority if consociationalism were dissolved. On the other side, the other party or parties would become a minority, with higher interests in keeping the consociational arrangements to guarantee their power. As a result, they are most likely to block proposals that would entail constitutional change, preferring a status-quo where no progress is possible (Horowitz, 2014, pp. 12–13). Lijphart acknowledges that mutual veto risks immobilizing decision-making (Lijphart, 1977, p. 50). He considers immobilism as the most severe issue, which could, however, be minimized in the long run if leaders learned to moderate their veto-use (Lijphart, 1977, p. 51). He further argues that minorities ought not to abuse their veto power, as it could be "*turned against its own interests, too*" (Lijphart, 1977, p. 37). In the end, many cases show that indeed opting out of consociationalism or adjusting its settings is an issue many countries face. In the case of this thesis, it comes at the expense of the right to political participation of Others, which requires a constitutional reform.

In a first step, corporate consociationalism is being established to achieve peace and stability, which justifies the establishment of constituent groups and the institutionalization of rival ethnic groups. Power-sharing arrangements indeed manage to tackle interethnic tensions; however, they fail to help overcome ethnic division, resulting in a lack of trust (Baliqi, 2018, p. 66). Arguably, under such conditions, constitutional change is unlikely as parties seek to protect their interests from each other. Through the use of the veto-right, they can block any proposals which they feel risk their vital (Horowitz, 2014, pp. 12–13). Because the system splits a country's citizens into constituent groups and non-constituent groups, Others are excluded from the equal right to political participation (Stojanović, 2018, pp. 345–346). Over time, the maintenance of constituent groups and Others loses its legitimacy, as it no longer serves the stability of a country, while the equal right to all individuals to political participation gains relevance. Through external factors, a government is pressured to adjust the constitutional framework to not exclude Others from political participation rights (Stojanović, 2018, p. 351).

Nevertheless, as already stated above, the government in question is hesitating to make complete adjustments out of fear of losing stability, given that consociational arrangements maintain a deep division between those parties (Baliqi, 2018). This again results in barely implementing measures that can, however, not tackle the issue at its roots. In sum, the presented causal mechanism contains four steps. Firstly, the maintenance of a deep division hinders genuine cooperation between ethnic parties and fuels the desire to protect interests from each other. This leads to the second, no willingness to consistently agree on reforming the Constitution as it risks the different group-specific interests. This results in third, external pressure as a reaction to the exclusion of Others. Constitutional reforms are promised; however, the actual change is limited in its measures, leading to the limited implementation of agreed-upon change.

## **Methodology**

For this research, I will apply a theory-testing process-tracing analysis on the case of BiH from 2005, when first negotiations on constitutional reforms started until the last general elections in 2018, which were still held under the same discriminatory circumstances. The negotiations between 2005 and 2010 give a deep insight into the difficulties BiH faces in reaching a consensus on constitutional reforms. Using a theory-testing process-tracing analysis has the benefit of identifying the presence of a causal mechanism in a single case and whether it functioned as hypothesized. Nevertheless, it is important to acknowledge that it limits the possibilities to test the explanatory power of other mechanisms (Beach & Pedersen, 2013, p. 15)

I will briefly present the case of BiH to put it in the context of this thesis. the Dayton Peace Agreement (DPA) was established among the Croats, Serbs, and Bosniaks, splitting the country into two entities. These three groups formed the constituent peoples. Two offices in the government, seats in the Presidency, which is chaired by three members, and the House of Peoples are reserved exclusively to the constituent groups, leaving out Others from elections for those offices (Constitution of Bosnia and Herzegovina, 1995; Mansfield, 2003, p. 2057). In the context of the consociational arrangements in BiH, it is additionally important to acknowledge that it was a system imposed on the three parties by international actors, mainly the United States (Belloni & Deane, 2005, p. 230). Collecting data from

2005, when first negotiations about constitutional change started until the election from 2018, the last elections to be held where Others were excluded, this thesis will analyze the steps of the proposed causal mechanism that led to the ongoing restriction of political participation of Others.

The first step assumes that consociationalism fuels ethnic division and limits willingness to cooperate. An indicator for this step could be the relations between the three groups. Evidence will be collected from secondary sources about consociationalism and its lack of ability to create interethnic relations (Baliqi, 2018) and literature that focuses on the negotiations on constitutional reforms prior to the ECHR ruling. (Džihic & Wieser, 2011; Sebastian, 2007; Zdeb, 2016). I will use the same sources for the second step, in which I theorized that there would be no willingness to change the Constitution in a second step on the grounds of stability risks and group interests. In consociational democracies, the veto-right is the main tool to protect a party's interests and stability. Thus, veto activities could be one indicator to identify the desire to protect interests. More specifically, who uses the veto right when and on what grounds. The Constitution of BiH defines the veto-right very broadly." (Sejdić and Finci v. BiH, 2009, p. 17).

Through textual analysis of and court rulings, it is furthermore possible to find evidence for concerns about the stability of BiH if a constitutional change would be implemented (Sejdić and Finci v. BiH, 2009, p. 42). Resulting from concerns of stability and protection of interests, step three suggests that, despite external pressure, in this case mainly the ECHR, few measures are agreed upon. Evidence for this can be found through content analysis of amendments, laws, and adjustments made after the 2009 court ruling. Finally, step four is a lack of implementation of agreed-upon measures and rulings. For this thesis, it is predicted that there will be similar patterns as in the second step. For the analysis of this step, I will rely on progress reports from European Institutions, as they closely observe the process and efforts in BiH to end the exclusion of Others. Therefore, I will also be looking for evidence that indicates efforts to find consensus or the lack thereof, differing interests, and lack of trust. Due to language restrictions, using documentation from the Bosnian government is impossible, creating a bias that needs to be acknowledged. However, due to the potential accession of Bosnia into the EU, there are close observations of Bosnia's democratic progress in general, and more closely the progress made in

the implementation of the 2009 ECHR ruling, which makes those reports the most reliable sources to use in this case.<sup>4</sup>

### **Bosnia and Herzegovina as a Corporate Consociational System**

With the DPA, BiH became a corporate consociation following a severe civil war between Serbs, Croats, and Bosniaks. The war was triggered by the declaration of independence of Bosnia from Yugoslavia in 1992 (Keil, 2012, p. 209). The three ethno-national groups had different interests in what follows from that declaration. Especially the RS opted for staying in Yugoslavia by seceding from Bosnia, which started a violent conflict between the RS Army and the Bosnian Army (Ibid. 2012, pp. 209–210).

Apart from that, the Bosnian Croats opted for the accession of the Croat populated territories into Croatia, resulting in another conflict, which was, however, less violent. The agreement that Bosnia is a country for Croats, Serbs, and Bosniaks has been broken as the groups' different interests have not been considered (Ibid. 2012, p. 210). International actors, mainly the EU and United States, elaborated several plans to end the conflict between the three groups, which failed until the United States came up with the DPA. That agreement foresaw the consociational model with BiH being divided into two entities along ethnic lines. The RS is mainly populated by Serbs, and the Federation of Bosnia and Herzegovina (FBiH) is inhabited by Croats and Bosniaks. The Federation is again split into different cantons along ethnic lines. The BiH is a typical corporate consociation. It has a grand coalition between the three ethnic parties, which are represented proportionally in the government.

Additionally, parties have a mutual veto right, and within their entities, they enjoy the right to govern autonomously (Ibid. 2012, p. 213). However, the case of BiH highlights very well how power-sharing arrangements, while they are effective in ending a conflict, don't necessarily solve the problem of political differences and ethnic division, as ethnopolitical hardliners are rewarded and incentives for interethnic cooperation disabled (Baliqi, 2018, p. 50, 66).

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<sup>4</sup> See *Sejdić and Finci v. BiH* (2009) and *EP* (2014, 2015, 2016, 2019)

Under a corporate design, consociations are less likely to overcome divisions and encourage trust. (Baliqi, 2018, pp. 66–67). In BiH, three groups with significantly different interests and a lack of trust following a civil war and ethnic cleansing have been institutionalized as power-sharing groups at that stage (Simonsen, 2005, p. 303).

In general, corporate consociations, such as in BiH, "freeze" a moment where groups are the most polarized, making that moment the foundation for governance (McCulloch, 2014, p. 508). The first step of my theoretical argument has already become more explicit behind this context. Putting the case in its historical context was necessary to understand how it affects Bosnian politics.

### **The Abuse of the Veto-Power**

Theoretically, the veto-right is the most powerful tool of consociational democracies, as it ensures the protection of vital interests and the guarantee against majority rule. However, it is noteworthy that the functionality of the veto-use strongly depends on its settings (McCulloch & Vandeginste, 2019, p. 1179). These settings differ from case to case, so it is crucial to analyze the veto-right case specifically and give it further attention. While veto-right is a valuable tool, it is also one of the main reasons why consociational democracies risk ending in a stalemate situation if not defined clearly (Bahtić-Kunrath, 2011; McCulloch, 2018). One part of step two builds on the veto-use and understanding the veto-right in a specific case helps understanding decision-making processes.

In sum, the Bosnian Constitution defines veto rights very broadly. It can be either performed as a vital-interest veto or through entity voting. The parliamentary assembly is divided into the HoP and the House of Representatives (HoR) (Constitution of BiH, 1995, p. 10). The assemblies veto through entity voting. Firstly, all legislation requires the approval of both chambers. An approval is reached if the majority includes at least one-third of the votes from delegates or members of each entity. If this is not the case, the chair and deputy chairs form a commission in an attempt to obtain approval within three days. If this also fails, a decision is taken by a majority of those members present and voting, provided that the opposing votes do not include two-thirds or more from either of the entity.

Besides, a proposed decision can be declared to risk the vital interests of the three constituent groups by a majority of the group in question. Hence, proposals in the HoP need the approval of a majority of the Bosniak, Croat and Serb Delegates present and voting. In the case of disapproval from one of the entities, a Joint commission of one delegate from each group shall be convened in the HoP to resolve the issue within five days. Otherwise, the issue will be referred to the Constitutional Court for a review of procedure regularity (Constitution of Bosnia and Herzegovina, 1995, p. 10). Within the Presidency, decisions should be adopted through consensus. A dissenting member of the Presidency may invoke a veto by declaring a decision to be destructive of the entity's vital interest from which they were elected, given this decision is made within three days of its adoption. (Ibid., p. 10). Given that delegates have to be present and voting, a more informal way of using their veto-powers is absenteeism, which became problematic during negotiations on the implementation of the Sejdić and Finčić Case (McEvoy, 2013, pp. 263–264).

What is striking in the BiH constitution is that the Constitution does not elaborate further on those vital interests, or in general, doesn't assign veto-points or other forms of restrictions to prevent an abuse of the veto-right. This lets one conclude that the groups can vote against or oppose any decision or proposal on the grounds of vital interests. Furthermore, there are no mechanisms mentioned to avoid a stalemate situation. If a decision is being disapproved in the Parliamentary Assembly and the Presidency, procedures are in place. However, if those procedures fail, there is no mention of further policies or mechanisms (Constitution of Bosnia and Herzegovina, 1995). The DPA doesn't contain any provisions for the case of stalemate situations while parties in the BiH government, especially in the Presidency and the HoP, have barely any restrictions to the use of the veto. The following three negotiations on constitutional reform highlight the consequences of this issue very well.

### **Three Negotiations on Constitutional Reforms: The April Package, the Prud Process, and the Butmir Process**

Even before the 2009 ruling regarding the Sejdić and Finci case, constitutional reforms have already been discussed between BiH and EU institutions in the light of accession of BiH into the EU (Džihic & Wieser, 2011; Zdeb, 2016). The main issue of the Constitution is the institutionalization of ethnic groups as power-sharers with the result of ethnicization of politics in BiH. The first round of negotiations took place between 2005 and 2006. (Zdeb, 2016, p. 374)

What was called the April Package (AP) was the first comprehensive attempt to reform the rich in shortcomings, DPA. The three-phased negotiations involved the US, the EU, and BiH elites. The amendments negotiated during the AP included reforms on the elections of the Presidency with a reduction of its powers, new competencies granted to the state, the creation of ministries of agriculture and technology, and the strengthening of the Council of Ministers (CoM). Moreover, the numbers of members in both parliamentary assemblies were to be increased (Sebastian, 2007, p. 4). Despite seemingly successful negotiations and heavy backing from international actors, the AP got disapproved in the HoR in April 2006, failing to achieve the necessary two-thirds (Sebastian, 2007, p. 4; Zdeb, 2016, p. 374). The collapse of the AP highlighted the different party interests. For instance, the Bosniak Party SBIH refused because they would not accept a solution that wouldn't envision the elimination of the RS and entity voting (Sebastian, 2007, p. 6). There are several explanations for the collapse of the AP and the stalemate situation it caused.

Firstly, the DPA set-up and the absence of a long-term solution to the ethnic question have led to the ethnicization of Bosnian Politics. This is an issue of structural nature that has led the country to a state of paralysis on many occasions (Ibid. 2007, p. 9). Secondly, mistrust between the ethnic groups remains widespread at the political level. The Bosniaks feared a lack of further concessions on the AP from the Serbs and that they would address issues in the FBiH. On the other hand, the Bosnian Serbs feared that accession to the EU, even though it is the only solution for BiH, would put the existence of the RS at risk. The Croats feared their remaining disadvantageous position that would not be overcome with "cosmetic changes" to the Constitution. They favored a "*genuinely decentralized but at the same*



*time functional and efficient*" government, taking a middle road between the Serb and Bosniak groups (Ibid. 2007, pp. 10–11). As proposed in step two, the three parties' priorities are the protection of their group interests, which resulted in the failure of the first attempt to reform the Constitution.

Apart from these two issues that align with the hypothesis of this thesis, two more could account for the failure of the AP. One of them is a fragmented party system. Disagreements not only happened along ethnic lines but also inside ethnic groups themselves, especially within the Croat and Bosniak communities, where parties were arguing whether they were in favor or against the AP (Ibid. 2007, pp. 11–12). The last problem involves the international community. Different points of view from several international actors further complicated the negotiations and left significant actors out from the negotiations (Ibid. 2007, pp. 10–11). In the end, the AP collapsed, and constitutional change got postponed (Ibid. 2007, pp. 11–13).

During the negotiations for the AP, the question of the political participation of Others was not relevant yet. However, a constitutional reform was a non-conditional priority for Bosnia's membership in the EU. One of the issues that should have been tackled was the ethnicization of BiH politics (Sebastian, 2007, p. 10). All the parties agreed on the priority and importance of BiH's accession to the EU. The collapse of those negotiations fueled the animosities between Sarajevo and Banja Luka and marked the *"return of a nationalistic rhetoric"* (Zdeb, 2016, p. 374)

In 2008, the Prud Process was initiated as another attempt to debate the constitutional reform in BiH. Just as the AP, the Prud Process was held behind closed doors, dominated by the Bosnian political elites. However, these negotiations happened without the involvement of international actors, which created *"a positive environment for the agreement"* (Džihic & Wieser, 2011, p. 375). While the leaders agreed on issues such as state property, the status of the Brcko District, and the census, negotiations failed on implementations strategies. Instead of cooperation, they proceeded with ethno-nationalist rhetoric and mutual accusations. Arguably, this again revealed that the ethno-national parties are unable to reach a consensus which led to the Prud Process being declared *"dead"* (Džihic & Wieser, 2011, p. 1817)

A further effort to address issues in the Constitution was the Butmir Process, just before the campaigns for the 2010 elections, which also failed. The package addressed changes regarding the competencies of the entities, which should be transferred to the state level. The state-level of the HoP should only decide on matters of vital interest and should also increase in size. In addition to that, the BiH presidency should be reduced to representative functions and be elected by parliament instead of direct elections. Finally, the CoM should assume additional competencies and become the single strong executive body. The package failed with the rejection of the ethnic leaders of BiH, mostly Milorad Dodik, the Bosnian Serb member of Presidency, and Haris Silajdžić, the Bosniak member of Presidency. The failure of the negotiations is considered a result of "*insufficiently coordinated international and EU efforts to address key problems in Bosnia & Hercegovina*" (Džihic & Wieser, 2011, p. 1817). While international involvement plays a significant role, the Prud Process, which started positively without the international community, also failed due to last-minute disagreements between the three main parties. These disagreements are a reoccurring pattern in Bosnia. While it can be argued that the international community did fail to coordinate the negotiations, this alone can't be held accountable for the failure of the three negotiations.

While consociationalism is a useful tool, it also risks ending in a stalemate situation when it comes to a proposal to change current arrangements (Horowitz, 2014, pp. 11–14). This is especially critical when those changes are necessary for the democratic progress of a country. In my theoretical argument, I hypothesized that in the first step, the creation of a corporate consociation leads to deeper division and lack of cooperation which would then, in a second step, result in a lack of willingness to reform the constitutions. While in the three presented negotiations in the case of BiH, the exclusion of Others to stand for presidential elections or elections for a seat in the HoP was not relevant yet, the results from all three negotiations showed a general willingness to reform the Constitution but strong disagreements on implementation and what those implementations entail for vital group and entity interests (Džihic & Wieser, 2011, p. 1816).

Furthermore, before presenting those three processes, I elaborated on the veto-right in BiH. Relating to theories claiming that the veto-right is one of the most powerful tools in consociationalism,

but also, depending on if and how it is defined by the relative states, the tool that engraves the risk of the stalemate situation (McCulloch & Vandeginste, 2019, p. 1179). In BiH, this issue was recognizable as follows: The veto-right is very loosely defined and, at the same time, assigned to powerful governmental institutions regarding executive and legislative institutions, the HoP, and the Presidency (Bahtić-Kunrath, 2011, pp. 901–902). The AP, the Prud Process, and the Butmir Process were closed off, elite-only negotiations, and all three of them failed due to entity voting, the strongest veto tool in BiH (Zdeb, 2016, p. 374).

In addition to this, animosities and competition were a reoccurring scheme, indicating the ethnic division and lack of willingness to cooperate (Ibid. 2016, p. 374). Despite the urgency of constitutional reform, with the aim for EU accession, the willingness to consent was missing, as predicted by step two of my theoretical argument. Nevertheless, I also assumed that the main reason for that would be the risk for the state's stability. While this concern has been raised on a few occasions, it can't be considered the main reason the negotiations failed. Even more so, the main issues have been group competition, lack of trust, ethnopolitics, and significantly differing interests (Sebastian, 2007, pp. 9–10).

### **Sejdić and Finci vs. BiH**

Step three suggests external pressure towards an increased need for constitutional change. However, due to a lack of cooperation between the ethnic elites, only little measures will be agreed upon as amendments to the Constitution. The beforementioned negotiations didn't concern the exclusion of Others yet. It was the Sejdić and Finci vs. BiH case and the ECHR ruling in 2009 that raised attention to the issue (Sejdić and Finci v. BiH, 2009).

The Bosnian Constitution reserves the Presidency and the seats in the HoP exclusively to individuals assimilating with one of the three constituent groups. The HoP is reserved for five Croats, five Bosniaks, and five Serbs. The Presidency is split up in a tripartite with one Croat, one Bosniak, and one Serb representative (Basic, 2019, p. 598; Constitution of Bosnia and Herzegovina, 1995). In 2006 Sejdić and Finci, two members of the Roma and Jewish community, challenged this highly critical electoral law and filed a lawsuit at the ECHR. The applicants argued to be excluded from running for

elections for the Presidency or Parliamentary office on the ground of ethnicity (Basic, 2019, p. 599). The ECHR ruled that because of this exclusion of Others from these governmental offices, BiH violated the discriminatory and election provisions of the European Convention of Human Rights (Basic, 2019, pp. 600–601). BiH argued that the DPA ended a civil war in which the approval of the constituent peoples was vital to reach peace. This would make this sort of exclusion necessary to maintain long-lasting peace. However, the ECHR rejected this argument, claiming that BiH is now at peace and stability, making the exclusion of Others unjustifiable (Basic, 2019, pp. 601–602; *Sejdić and Finci v. BiH*, 2009, p. 20).

Several recommendations have been made for alternatives for BiH. The Venice Commission suggested that the HoP should be abandoned as it has become a negative veto chamber, with the only task to defend their peoples' interest. The veto power should be moved to the HoR, which should solve the discriminatory composition of the HoP. Another recommendation from the Commission was to adjust the tripartite Presidency. Instead, the executive power should be concentrated in the CoM, where all constituent peoples are represented (Basic, 2019, p. 603).

In the case of BiH, the EU is the most influential international actor due to the potential accession of BiH into the EU (*Sejdić and Finci v. BiH*, 2009, p. 16). As already highlighted in previous parts of this thesis, the main problem is that BiH must work on constitutional amendments (*Ibid.* p. 15). However, this institutionalization of ethnic groups limits the cooperation between the three ethnolnational groups. Several recommendations have been made for BiH to amend its Constitution with the aim to end the exclusion of Others, and shortly after the ruling, the expectations for a reform of the Constitution and an end to the ethnic discrimination in Bosnian politics were high (Minority Rights Group, 2010, p. 1). In response to the judgment, the CoM and the Central Election Commission of BiH prepared two action plans with identified authorities for taking the necessary measures and with fixed deadlines. However, the elections of 2010, 2014, and 2018 were all held under the same discriminatory election law (EP, 2015; Mignon & Woldseth, 2012; OSCE, 2019).

## **Non-Implementation of the Sejdić and Finci Ruling**

Following the ECHR Ruling in 2009, the expectations of constitutional reform were high (Minority Rights Group, 2010, p. 5). An Action Plan for the implementation of the judgment of the Sejdić and Finci case was introduced in 2010, the year of the first elections after the ECHR ruling. It provided the establishment of a thirteen-member Working Group that should assemble the members of the CoM and the representatives of the parliamentary groups and peoples' caucuses in the Parliamentary Assembly. This working group should have prepared amendments to the Constitution by 1 April 2010 and amendments to the Election Code by 15 April 2010 (Sasi & Woldseth, 2010, p. 7).

While all parties represented in the Parliamentary Assembly participated in the Working Group, the proposals differed significantly. In addition to this, only a few meetings were held by the Working Groups, which all didn't show serious attempts to negotiate on proposals that were "opposed" (Sasi & Woldseth, 2010, p. 8). While some parties suggested inspiring the reform on the Butmir proposals, which would entail a more comprehensive reform, other parties only opted for minimal amends to eliminate the discrimination against Others. Consequently, the Working Group was a "missed opportunity," and the elections in 2010 were held under the same discriminatory circumstances as previous elections (Sasi & Woldseth, 2010, p. 8).

After the elections of 2010, BiH was facing a stalemate situation due to issues in government formation at the state level, which directly impacted the implementation of the Sejdić and Finci Ruling. Again, different interests from the three ethnic groups appeared to be a dominant factor limiting them in finding a consensus. While the RS wished to maintain direct elections to the Presidency, Croat parties opted for either indirect elections by parliament or creating a third, Croat, entity. (Mignon & Woldseth, 2012, p. 12). Since 2011, when the Joint Interim Committee declared that no consensus could be reached, the Working Group has not convened anymore (Mignon & Woldseth, 2012, p. 12).

The mixed working group was influenced by absenteeism, which led to a paralysis of the process. Furthermore, the impossibility of reaching a minimum consensus on constitutional change grew.

*"On 1 December, the Joint Interim Committee officially announced the failure of its work.*

*The assembly regrets that, once again, it was not possible to reach even a minimum consensus and to submit constitutional amendment proposals to parliament".*

(Parliamentary Assembly, 2012, p. 1)

Political stakeholders were criticized for obstructionism and an inability to work constructively at state-level institutions (Ibid. 2012, p. 3). In the following three years, towards the 2014 elections, no progress was made on this issue or the lack of cooperation. On the contrary, key state institutions were being attacked in the following years, and constitutional requirements were ignored or even violated (Vareikis & Woldseth, 2013, p. 1).<sup>5</sup> Especially a consensus on the Sejdić and Finci Case was out of sight. While they disagreed on how to guarantee the right of Others to stand for the Presidency, they decided that a number of Others should be added to the HoP, although the functioning in practice was not precise (Vareikis & Woldseth, 2013, p. 15). After 2010, Bosnia was stuck in a chain of stalemate situations. First, the three elected parties were facing difficulties in government formation, which led to further delays in negotiations and cooperation on the issue of the exclusion of Others.

The ruling parties agreed to ensure a political agreement on the ruling's implementation and to amend the Constitution by the end of 2012, which, however, did not happen (Vareikis & Woldseth, 2013). The three ethnic groups consistently displayed a lack of common vision, while the pressure from European institutions to increase cooperation and dialogue to overcome disputes kept growing (EP, 2014, p. 2). In the following years, the political stakeholders were incapable of agreeing on the implementation of the Sejdić and Finci vs. Bosnia case. (EP, 2014, 2015, 2016, 2019). In the absence of a common vision, *"ethnocentric attitudes have seriously hampered progress in the country, whereas disagreements along political and ethnic lines have had a major negative effect on the work of the assemblies at the state level"* (EP, 2015, p. 2).

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<sup>5</sup> See: EP Report from 2013: *"Republika Srpska high officials have repeatedly attacked key State institutions. In the Federation, there have been numerous cases in which political leaders and parties ignored, or in some cases directly violated, requirements set out in constitutions and laws."* (Vareikis & Woldseth, 2013, p. 1)

## **Immobilism in Bosnia and Herzegovina**

In the case of BiH, it shows that, especially through entity voting, much legislation or proposals are being rejected through entity voting. Generally, immobilism can result from the discontent of one party in a consociational system that then seeks provisions to adapt or even opt-out of those arrangements (Horowitz, 2014, pp. 12–13).

Here, the need for an adaptation of the Bosnian Constitution has been raised not by one of the parties but by international actors. Nevertheless, the way this constitutional reform was imagined clearly differed between the two entities and the three groups. Especially the negotiations between 2005 and 2010 showed very well, different ideas, for instance, concerning the tripartite Presidency and its power or the set-up of the HoP (Džihic & Wieser, 2011; Sebastian, 2007; Zdeb, 2016).

In consociational systems, some parties usually have a higher interest in keeping the arrangements to guarantee their power. In the case of Bosnia, one example of this is the RS that wants to maintain its status as an autonomous entity at all costs. Therefore, proposals that seem to risk this privilege are blocked with the veto-right, preferring a status quo over democratic progress (Horowitz, 2014). In the first set of negotiations, this mostly affected reforms about the ethnicization of politics, the Presidency, and the power of the HoP. After 2009, such negotiations directly addressed the exclusion of Others from elections for the Presidency or a seat in the HoP, which remains a violation of European Human Rights Conventions. Findings show that while the political elites in BiH agree on the vital need for the inclusion of Others, they don't agree on the implementation.

Given that some parties want a more radical change of the Constitution while Others prefer to reduce amends to the inclusion, no agreements can be reached. In the end, this happens at the expense of Others, who during the three elections after the court ruling, still are excluded from the right to stand for the Presidency of the HoP (OSCE, 2019, p. 18). Immobilism doesn't only affect the political participation of Others in the HoP or Presidency but threatens decision-making on many levels. The most severe consequence is the collapse of an entire political system (McEvoy, 2013, p. 255), which Bosnia is more and more likely to face.

## Conclusion

Three key points become clear throughout this thesis. The relevance of the historical background, the imbalanced strength of high legislative and executive offices, and, pre-dominantly, the veto-power. The combination of those issues explains why no consensus is made, why Bosnia is stuck in a constant stalemate, and finally, why matters such as the Sejdić and Finčić Case, which should tackle the issue of the exclusion of Others, are not being implemented.

Keeping in mind the historical background of Bosnia helps understand the mistrust that dominates in policy and decision making. Three groups with significantly different interests that even resulted in a civil war were institutionalized to govern as power-sharers (Keil, 2012, p. 209). Granted, at that time, a consociational design made sense in order to end the conflict, however, necessary provisions for a later stage in which stability and peace have been established were left out (*Constitution of Bosnia and Herzegovina*, 1995).

Secondly, the strength of the HoP and the tripartite Presidency are further issues that also prove to be critical in this matter. Both offices are unusually strong and imbalanced. The HoP is one of the smallest and most powerful parliamentary chambers worldwide, where all legislative issues are finally decided on (Hodžić, 2020, p. 535). The tripartite Presidency is a typical but problematic example of consociational power-sharing, given that it is chaired by one representative for each constituent people of BiH. The Presidency is the principal executive force in BiH (*Constitution of Bosnia and Herzegovina*, 1995, pp. 11–12). Many reform processes and negotiations about the implementation of the Sejdić and Finčić Case tried to tackle the power of the Presidency to make the, more inclusive and representative, CoM the main executive power. Parliamentary, presidential elections instead of direct presidential elections have also been proposed, however, all proposals of such kind have been blocked by at least one member of the Presidency (Džihic & Wieser, 2011, p. 1817).

However, the most dominant factor of this thesis is the veto-power, highlighting the fact that functionality highly depends on the design of the veto-right (McCulloch & Vandeginste, 2019, p. 1179). In Bosnia, the veto is assigned mutually on all ethnic elites. Furthermore, there is no appointment of veto-points and a loose definition of where veto can be triggered in the legislation process. Again, veto



can be deployed actively through vital interest veto or entity voting. However, it can also be used passively by being absent from the vote. Lastly, the Constitution doesn't define specific matters on which the veto can or cannot be deployed. Apart from the vital group interest, no clarification of intention or justification for using veto-power is necessary (*Constitution of Bosnia and Herzegovina*, 1995, pp. 10–12).

In sum, the way veto is designed in Bosnia leaves a lot of potential for veto abuse, which probably makes it a very extreme case. Mistrust and lack of cooperation resulting from that abuse could have been avoided with more explicit definitions of the veto-power. Therefore, this thesis shows that while the proposed mechanism was in place, it cannot be considered the dominant reason why Others are being excluded from the HoP and the Presidency. The veto-abuse likely triggered the proposed causal mechanism. Nevertheless, the general hypothesis that the issue lies in the corporate design of BiH is being confirmed, bearing in mind that the veto-right is one the most powerful tools of consociationalism (Lijphart, 1977, p. 36). Even though consociationalism can be a valuable tool to establish a stable democracy in deeply divided societies, its success depends on the terms it is settled on. In the Bosnian case, the DPA arguably couldn't do justice to the complex nature of the conflict and the relationship between the ethnic groups involved. It is a fitting case to demonstrate consociationalism's most severe potential pitfalls.

The need for electoral reform before the general elections of 2021 is essential but ultimately highly unlikely (Council of Europe, 2021). Progress highly depends on the cooperation between the members of the Presidency and their willingness to negotiate, also on complex political issues (Hitchner, 2021). Looking at the most recent developments, Bosnia is drifting towards a new civil war, especially with RS pressing towards a secession, creating fear of a new civil war (Mines, 2022).

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