Managing Power-Sharing:
Dealing with Challenges in Consociational Political Settlements

13 February 2014

Meeting Note

Consociations and their discontents

Consociations are power-sharing arrangements increasingly used to manage ethno-nationalist, ethno-linguistic, and ethno-religious conflicts in peace agreements and constitutions. They frequently involve four traits: 1) *functional autonomy* for groups, for example giving them control of their own education systems or social service provision; 2) *proportionality* in political representation of those groups in national institutions; 3) *parity* in decision-making between groups; and 4) *veto rights* in specified circumstances. Longer standing consociational arrangements in countries such as Belgium and Lebanon have been followed by more recent examples such as Bosnia, Northern Ireland, and Burundi. Aspects of consociational arrangements are under consideration in ongoing constitutional discussions in the Mediterranean (Cyprus), North Africa and the Arab region.

Such power-sharing arrangements inevitably involve the management of political, legal and social tensions. Some constitutions organized on consociational lines have recently been faced with new sets of considerations, including challenges before regional human rights courts and international human rights treaty bodies claiming violation of human rights norms relating to non-discrimination. As the international community moves towards a more comprehensive, strategic approach to support for constitution building in situations of ethnic conflict, academics and practitioners have begun exploring how these considerations can be addressed.

On 13 February 2014, the United Nations University, the Center for Constitutional Transitions at NYU Law, the United Nations Department of Political Affairs and the Permanent Mission of Canada to the United Nations convened a panel to explore some of these lessons, and consider what they may mean for practice in this area. This Meeting Note summarizes those discussions.

Power-sharing in a context of transitions

The meeting was opened by the host, **H.E. Guillermo E. Rishchynski**, Ambassador and Permanent Representative of Canada to the United Nations. Ambassador Rishchynski noted that with political and economic transitions occurring around the world, we are seeing the reemergence of old ethnic, social and other between-group faultlines. There is a compelling need to consider how the international community can provide assistance to states trying to manage these differences in a peaceful manner. How do we create the arrangements needed to underpin stability through group power-sharing, in the context of democratic institutions? The list of countries where this issue is a pressing challenge – Egypt, Libya, Central African Republic, Mali, South Sudan – is

long. The challenge is great.

The discussion was then framed by Mr. **Jason Gluck**, Senior Political Affairs Officer & Constitutional Focal Point, United Nations Department of Political Affairs (UN DPA). Mr. Gluck noted that the assumption underlying the convening of the panel is that there is a tension between the apparent necessity of consociational arrangements, as a mechanism for managing exit from conflict, and the possible non-conformity of such mechanisms with human rights guarantees. This tension has been highlighted by the case, decided in 2009 by the Grand Chamber of the European Court of Human Rights (discussed further below). The Court's decision in that case has raised the prospect that consociational arrangements in other places may also be called into question through human rights courts.

This raises numerous questions, which this panel is intended to address. What does this mean for constitutional advice and design going forward? Is this about choosing the lesser of two evils: putting aside certain rights, or sticking to principle at high cost? Or is it better thought of in terms of competition between different rights: those held by individuals, those held by communities, even those held by states? In that case, can we consider consociational arrangements in terms similar to positive discrimination or affirmative action?

Practical and pragmatic considerations also arise. If there is a risk that consociational arrangements may violate some human rights norms, are we in fact sure that consociational arrangements work? Do they contribute to positive peacebuilding, or are they just achieving a kind of "negative" peace? Do they achieve legitimate state interests in the most proportionate fashion, or do other, better alternatives exist? Can we consider temporal limitations to consociational arrangements?

Introducing the panelists, the moderator, Prof. **Sujit Choudhry**, Cecelia Goetz Professor of Law, NYU School of Law and Faculty Director, Center for Constitutional Transitions at NYU Law, noted that the problem under discussion is pervasive, and serious. Different international regimes, actors and norms – some focused on managing conflict, some focused on protecting human rights – are interacting on the same cases. The failure to think through how they interact risks giving rise to downstream consequences that might have serious negative impacts for both peacebuilding and human rights. The aim of the panel is to bring practitioners and experts together, to bridge theory and practice, and think through some of the consequences and how they might be prevented, or at least mitigated.

Political feasibility and judicial review

The first speaker of the panel was Prof. **Chris McCrudden**, Professor of Human Rights and Equality Law, Queen's University Belfast, William W. Cook Global Law Professor at the University of Michigan Law School, and Visiting Fellow, Center for Constitutional Transitions at NYU Law. Prof. McCrudden began by introducing the case of Dervo Sejdic and Jakob Finci, decided by the European Court of Human Rights (ECtHR) in 2009. Sejdic – a Roma activist – and Finci – a Jewish leader – are both Bosnian citizens. They argued that the Bosnian constitution, which was negotiated as part of the Dayton peace accords that ended the Bosnian war in 1995, was discriminatory because certain electoral

posts, for example on the tripartite presidency, can only be held by Serbs, Croats or Bosniak Muslims. The Grand Chamber of the ECtHR agreed with them. Yet to date the ruling remains unimplemented, despite pressure from the European Union (EU) and Council of Europe.

The Bosnian arrangement, Prof. McCrudden explained, is an example of *corporate* consociationalism – based on ascriptive identity markets – as opposed to a *liberal* consociation – where for the purpose of the constitution, group identity is based on whatever groupings emerge through liberal-democratic politics, notably elections. In his recent book, *Courts & Consociations* (Oxford University Press), McCrudden argues (with co-author Brendan O'Leary) that this ruling represented an alteration of the ECtHR's approach to consociationalism, particularly when compared to the approach it took earlier in dealing with constitutional arrangements in Belgium.

Still, in part because the ruling is short, it is ambiguous, and its implications for ongoing power-sharing negotiations, like those in Cyprus, are uncertain – and contestable. If the ruling is understood in broad terms, certain problems may emerge. Legal and political advisers in future may seek to exclude wide-ranging bills of human rights, and/or regional court review, from constitutional arrangements. This may, in turn, reduce the legitimacy of regional human rights review. And peacemakers may have less flexibility in the arrangements they can foster, prolonging conflict.

To avoid these consequences, Prof. McCrudden emphasized, courts in future will need to take into account the historical and political contexts in which consociational provisions are developed, especially when they emerge from peace agreements. Apparently repugnant provisions may have more comprehensible origins, once this context is factored in. The United States' Constitution's age and birth-origin limitations on eligibility for the Presidency need to be understood, for example, in terms of the concerns of the Revolutionary framers of the Constitution to prevent the emergence of hereditary monarchy in their new country.

Prof. McCrudden also stressed the need for courts to consider the democratic character of such provisions. This goes to the process of negotiation of the provision: more inclusive negotiation processes seem more likely to pass court review. Interestingly, the Bosnian provisions struck down by the ECtHR were forged in a very non-democratic process (the Dayton Peace Accords); but this was not the ground on which the Court struck them down. Contrast the terms of power-sharing following from the more inclusive Good Friday Agreement process in Northern Ireland, which therefore deserve a higher degree of respect.

Most importantly, though, courts need to be judicious. Legitimate discretion needs to be afforded to sovereign democratic republics. Courts should not impose outcomes, argued Prof. McCrudden, but respect the rules for change embedded in the political bargain establishing consociational arrangements. "Difference-blind" solutions may be desirable, but courts must also consider what was feasible, in the prevailing political circumstances. Though liberal consociations may be preferable to corporate consociationalism, they may not be feasible. In situations of violence, truly existential concerns may not be assuaged by appeals to cosmopolitanism.

Managing tensions to avoid judicial review

The second speaker of the day was Prof. **Marie-Joelle Zahar**, member of the UN Mediation Standby Team and Professor of Political Science, University of Montreal. Drawing on her practical experience, Prof. Zahar focused on three questions: 1) What are the causes of the tensions between power-sharing and human rights? 2) What are the consequences of power-sharing? and 3) How can we mitigate the tensions between power-sharing and human rights before these arrangements are challenged before the courts?

Prof. Zahar stressed the need for caution in how we frame the underlying causes of conflict. While we should not deny the significance of ethnicity, we must look more carefully at its political function. The study of "ethnic entrepreneurship" looks at how politicians mobilize ethnic identities. Ascriptive identities can be relatively easy to mobilize, and powerful once mobilized. There is a danger that if we read an armed conflict only from the moment of negotiation, when people are sitting down with ethnic labels already attached, we may risk reinforcing this tendency, contributing to and entrenching social cleavages, to the benefit of armed elites.

This is particularly relevant in South Sudan today. We are told there is a conflict raging between the Dinka and Nuer tribes. The mainstream media tells us that the leaders, President Kiir and former Vice-President Machar, are fighting *for or on behalf of* their tribes. In fact, the problem is not about ethnicity but more broadly about governance. This will not necessarily be solved by corporatist power-sharing arrangements. Fundamentally, changes in elite behaviour and governance may be required.

So context is important not just for courts and tribunals, but also for mediators at the negotiating table. Yet we continue to make the same mistakes, such as treating communities as if they were homogenous, and privileging those with weapons as our default interlocutors. This is not to say that we should *exclude* warlords, but that we should also not exclude others. Moreover, once we build a settlement on power-sharing and distribute privileges and entitlements, we are always going to forget someone. As the Sejdic and Finci case shows, it was Jews and Roma in Bosnia. In Iraq, after 2003, it was arguably Christians. The danger is not just that we risk violating rights, but perhaps even more pragmatically that we risk excluding valuable human resources from leadership positions at precisely the time, in a post-conflict transition, when they may be most needed.

Prof. Zahar emphasized that it can become particularly hard to change political settlements peacefully, if the settlement is frozen or locked in through constitutional measures. The danger is that we risk freezing identity, entrenching the power of violent actors at the moment of negotiation. We may allocate voice and political and institutional resources precisely to those actors that are most likely to mobilize around ethnic and social cleavages. In Bosnia, for example, the system is stacked in favor of ascriptive identity political parties; more cosmopolitan parties have struggled to gain traction, both in the local community, and from foreign partners. In Lebanon, a similar result is in place around religious and sectarian identity.

Feasibility is central. For the practitioner, this is not a question of choosing the lesser of two evils. It is about managing tension and mitigating harm, to avoid judicial review in the first place. So how do we do this?

First, by broadening the discussion, during negotiations, away from the zero-sum context of power-sharing, to a broader discussion of the future of the state. This requires an inclusive process, not just in terms of who is at the table, but also of what is being discussed at the table. In many countries, there is more than one conflict going on at once; effective solutions may require tackling them as a whole. In Sudan, for example, the decision to deal with the conflict between the north and south without dealing with conflicts between Khartoum and other regions of Sudan may have created a dynamic that encouraged armed groups in Darfur and eastern Sudan to hold out for the same deal as Juba. *Second,* we may need to consider including sunset clauses, to offer a path out of consociational arrangements and prevent them freezing ascriptive identities in place. And *third,* we may need to consider sequencing political settlements and constitution writing. It is sensible to be writing the rules for the future at a time people are only thinking about the past? There is some evidence to suggest that places where there is a gap between the political settlement process and constitution writing may arrive at more sustainable arrangements. Places that "muddle through" in the period between exit from conflict and formal adoption of a constitution – such as Libya and Nepal – may look less "successful" to outsiders, who often seek a "quick fix". But they may in fact be on a better track.

The third panelist, Mr. **George Anderson**, former member of the UN Mediation Standby Team, and Visiting Fellow, Center for Constitutional Transitions at NYU Law, noted that many of these challenges also arise in other constitutional contexts. Functional autonomy and proportionality, for example, both sometimes feature in federations as well as consociations. They can create challenges when majorities come to consider that minorities are receiving special treatment. Likewise, the principle of inter-group parity in decision-making, and special veto rights for some groups, crop up in other constitutional regime types. Many regimes put limits on majority-based decision-making, particularly in changing constitutional provisions.

But such decision rules tend not to be a part of everyday politics in the same way that they are in consociational arrangements. What seems unusual about consociationalism is that the majority and minority, or the different groups, are interacting in the same configurations all the time, which leads to the building up of resentment because of the difficulty of resolving important issues. Consociational arrangements thus may pose particularly acute versions of power-sharing challenges.

In some cases, this has been managed by providing for "deus ex machina" solutions. In Bosnia, this took the form of the Office of the High Representative, which was introduced by the international community as a way to resolve the many blockages. But this can create a dangerous dependence on outside arbitration and foster irresponsibility amongst the domestic players. The question is how to break that dependence. In Bosnia, the High Representative has pulled back so that local decision-makers must assume more responsibility.

When looking at consociational regimes more generally, an important distinguishing factor might be whether the system emerges fully fledged, as in a peace settlement, or whether it develops – and can develop – incrementally. Where there is room for incrementalism and the system is not too rigid, there may also be scope for change over time. This could be elite driven — in recognition of the need for better rules — but more often, if it is to be truly profound, it will reflect shifting identity patterns. In the Netherlands, for example, we see a rare case of a country that emerged out of consociational politics, as the role of religious identity in modern political life waned. Whether something similar will happen in other consociational cases, where identity is more rooted in language, ethnicity or nationalism, remains to be seen.

Applying the lessons

The panel was followed by over an hour of interactive discussion with the audience, which included UN officials, diplomatic representatives and members of civil society. This discussion took place under the Chatham House Rule. Three broad themes emerged.

1. Managing uncertainty

Speakers recognized that the implications of the European Court of Human Rights' ruling in *Sejdic and Finci v. Bosnia and Herzegovina* remain uncertain. Within the European space, it is unclear how the Court (and national courts) may approach related issues in future. Outside the European space, the impact of the ruling on other judicial and policy actors also remains unclear. As one speaker noted, however, that uncertainty is itself already complicating the negotiation of power-sharing arrangements around the world.

Speakers raised current cases from Cyprus to Libya, where these matters are already in play. What emerged was a recognition that negotiators should – and could – at least consider how judicial review might perceive consociational power-sharing arrangements, and should adjust political settlement and constitution-making processes accordingly.

2. Inclusive negotiation processes

One step that negotiators can clearly take to mitigate the risks of judicial condemnation of consociational political arrangements is to provide for an inclusive negotiation process. The more inclusive the process which generated consociational norms, the more deference judicial actors seem likely to show, on the basis of the democratic legitimacy attached to those norms. Moreover, a more inclusive process may lead to fewer challenges: one speaker noted recent, tentative research results suggesting that the earlier political settlement processes are opened up to a broad array of actors, the more enduring the negotiated outcomes tend to be.

Negotiations should be *substantively* inclusive. They should be structured in a way that allows negotiators to consider a broad array of conflicts and issues, focusing not just on zero-sum power-sharing discussions, but also the possibility of win-win scenarios

through discussion of the future of the state. This may help prevent short-term power-sharing necessities being frozen in place as long-term political inevitabilities.

Additionally, negotiations should be *procedurally* inclusive. One person noted that in Yemen, the inclusion of significant numbers of women and youth in national dialogue processes is having an increasingly noticeable effect on the country's political culture, as patriarchs grow more accustomed to hearing their voices express political opinions. Another speaker noted, however, that there is a danger of tokenism. In the current Geneva talks on Syria, for example, while each delegation has been required to include a quota of women, they are rarely incorporated into crucial subgroup discussions, tending instead to be relegated to "soft" topics. Another speaker noted that while women were included in the negotiation of the Good Friday accords for Northern Ireland, they have since complained of how they were treated during the negotiations.

As one speaker put it, what matters is not just inclusion, but the quality of inclusion. A more meaningful approach to including women, youth and other marginalized groups may require capacity-building assistance, ensuring ongoing access to information, and thinking about indicators of participation that go beyond presence "at the table".

Still, as several speakers noted, there is also need for *realism*. These inclusion goals may be more easily stated than reached, not least because external actors tend to suffer from short-termism: a focus on immediate, tangible, measurable outputs and results. And we should guard against holding post-conflict and transitional societies to higher standards than donors and assistance-providers themselves respect in their own political arrangements.

3. Sequencing and the rush to elections

Several speakers noted that the panelists' remarks suggested a need to separate immediate post-conflict power-sharing negotiations from later constitutional processes. The use of staged or sequenced processes for developing constitutional structure may allow for the evolution of ascriptive and political identity, away from the ethnic and other in-group/out-group social identity that commonly emerges from armed conflict.

In some countries that emerge from periods of dictatorship or authoritarian rule, political parties need time to emerge. One speaker suggested that cases like Egypt suggest a danger in a "rush to electoralism". Those groups with institutional depth – in the case of Egypt, the Army and the Muslim Brotherhood – have competitive advantages in early elections. Those without that depth – in the case of Egypt, liberals and other civil society groupings – are at a major disadvantage. Another speaker noted, however, that – as in Northern Ireland – elections may be crucial mechanisms for transforming armed groups into socially legitimate political actors, equipped with electoral legitimacy – and not just coercive capabilities – as a basis for inter-group bargaining.

Indeed, several speakers also pointed out that it may be difficult – and inappropriate – to hold societies back from moving rapidly to put constitutional structures in place and elect governing institutions. This might play to the benefit of armed groups and elites emerging from conflict or crisis; but it might also be the result of an unstoppable social movement. Several actors noted that in Libya and Egypt, it was the people that wanted to

rush forward to elections, to take ownership of their political lives after a long period of exclusion. What this points to, suggested one speaker, is a need to consider *alternative* forms of representation as a basis for managing transition.

Some interventions considered the role of "constituent assemblies". One speaker argued that the more successful constituent assemblies are those that do not just play a "single-purpose" role of discussing future constitutional structures, but also play a second, "dual-purpose" role as an interim legislative body. Where those functions are separated – as they are now in Libya – there is a danger of rivalry, competition and even conflict emerging. One speaker called the idea that constituent assemblies can be merely aspirational bodies above politics "a dangerous silliness". Another speaker noted, however, that there are also cases – such as Nepal – which had a "dual-purpose" assembly, but where the leadership became so focused on zero-sum power-sharing bargaining that they neglected constitution-making and failed to conclude a draft constitution; recent elections may change this. A final speaker on this point suggested that the key question for constituent assemblies is in fact the same as for other types of political settlement management mechanisms during transitions: how to make them "sufficiently inclusive".

Finally, some speakers pointed to the possibility of placing sunset clauses on consociational arrangements. One person noted that this was formally the system adopted in Iraq, after 2003 – but that the promised transition from a tripartite (consociational) Presidency to a second chamber of Parliament had failed to materialize.

4. What role for multilaterals?

Many of the interventions considered *how* power-sharing transitions should be managed. But several speakers also raised questions about whether different approaches to managing these transitions might suggest a need to consider *who* manages these transitions. In particular, there may be a need to give more thought to the different capabilities, strengths and roles of different parts of the United Nations, regional organizations and bilateral partners. Who is it, for example, that is best positioned to provide the security pressure – or the economic incentives – to convince armed groups to share power, and to move over time away from zero-sum power-sharing to more collaborative, cross-group political and economic arrangements?

Some speakers noted that in Northern Ireland, there was no question of multilateral involvement, in part because of the United Kingdom's role on the United Nations Security Council; it was the direct involvement of senior American leaders that facilitated the emergence of a consociational power-sharing agreement. Speakers noted that in Bosnia and Iraq, though multilateral actors were involved, it was again the United States that led in catalysing a power-sharing arrangement; and it is the incentives offered by EU Membership that, it is hoped, will lead Bosnia and Herzegovina to emerge out of consociational politics. Other people pointed out several cases where, perhaps because of a lack of Great Power leadership, it has fallen to multilateral organizations – both the United Nations and regional organizations – to take on this role.

This led one speaker to note the difficulty that the United Nations and *regional organizations* have sometimes had in cooperating in managing such arrangements,

particularly in Africa. Other speakers, though, pointed to new examples of success in the Middle East and North Africa. These different trends suggested a need to look in more depth at how the United Nations and regional organizations, such as the African Union and the Arab League, work together in mediation and constitution-making contexts.

Several speakers, however, noted structural obstacles that impede multilateral organizations effectively managing such transitions, especially in "non-muscular environments". Poor inter-agency coordination was high on this list, as was high staff turnover. Where the United Nations has played a more constructive long-term management role, such as in Nepal, it appears in part to be due to unusually long-term presence of key staff, allowing the development of deeper relationships with local political actors. The longer term presence of United Nations Country Teams (when compared to the United Nations Department of Political Affairs and the United Nations Department of Peacekeeping Operations) suggests a need for the United Nations to focus on strengthening cooperation between the United Nations Development Programme and political actors to strategically manage these long-term transitional processes, whether in the context of consociational arrangements or other political regime types. There are some examples of success – for example, in Tunisia.

But there may be a need to develop a more robust understanding of how development programming can best support consociational arrangements, and transitions more broadly. What policy mix, and what institutional strengthening, can help to reduce inter-group tensions? Can economic development help to reorganize incentive structures and political interests in a way that moves politics beyond ethnic or other ascriptive identity groups?

More broadly, this points to a recurring call that emerged several times in the discussion: a call for a more sophisticated evidence base about *what works* in consociationalism. The evidence-base remains anecdotal – and inconclusive. One speaker noted that Iraqis hold that consociational arrangements since 2003 have not helped them manage their sectarian differences, so much as entrenched them. Another speaker provided the counter-example of Northern Ireland; there, people recognize that consociationalism was a necessary element for peace, but complain that segregation has worsened since it was imposed. Another speaker suggested this is not, in fact, straightforwardly true: while segregation is now deeper in the housing sector, it has actually reduced in the employment sector.

An optimistic speaker pointed to the Netherlands as an example of successful transition out of consociational arrangements – though it took almost 100 years. A less optimistic speaker noted that Lebanon has been struggling with consociational arrangements for almost as long, and yet remains unstable.