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## **Power Sharing Courts**

Research Article

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# Power Sharing Courts

Stefan Graziadei\*

In this paper, I introduce a novel concept, the one of power sharing courts. Scholars of judicial politics look at the reasons behind judicial selection and the patterns of decision making within courts through the lens of ideology (left-right). However, the resulting fertile scholarly analysis has not been extended to divided societies, where the main cleavages are not partisan but ethno-national. In these societies, the liberal model of selecting judges and taking decisions within an apex court is often corrected to specifically include politically salient ascriptive cleavages (such as ethnicity/nationality/language/religion). The main thrust of my argument is that there is a model of selecting judges, taking decisions and sharing posts of influence within apex courts in divided societies that has not yet been conceptually captured: power sharing courts. In analogy to consociationalism in the political system, power sharing in the judiciary aims to solve salient inter-community conflicts by including all relevant groups in these bodies on a basis of parity or proportionality. The paper is of equal interest to scholars of constitutional courts, consociationalists, comparatists, as well as country specialists.

**Keywords:** power sharing, constitutional courts, comparative politics and law, Bosnia-Herzegovina, Belgium

## Introduction

*“At this stage of the constitutional development of Bosnia and Herzegovina, the role of the Constitutional Court is very important and difficult while, objectively, its decisions have a significant impact on political processes within the state. The Constitutional Court resolves, amongst other things, complicated constitutional issues with far-reaching implications, often involving legislative or executive authorities at the state- or entity-level as direct participants.”*<sup>1</sup>

The Bosnian Constitutional Court is well aware that many of the cases coming before it are deeply political. Over the last eighteen years,<sup>2</sup> Bosnia’s Constitutional Court has been taking decisions on such sensitive topics as the rights of refugees, the political status of constitutive groups, the constitutionality of the religious holidays of the entities,<sup>3</sup> their symbols,<sup>4</sup> flags

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<sup>1</sup> Bosnian Constitutional Court (BCC), K-I-15/10 (dismissal of judge Simic), 8. May 2010, para 56. Decisions of the Constitutional Court are available in Bosnia’s local languages and English [here](#) (accessed: 16. June 2016).

<sup>2</sup> Although the Dayton Peace Agreement was signed in 1995, the Court became operative only in 1997.

<sup>3</sup> BCC, Partial decision U-4/04, 18. November 2006.

<sup>4</sup> BCC, Partial decision U-4/04, 31. March 2006.

and names of their cities,<sup>5</sup> as well as the question of what are vital national interests of Bosnia's constitutive peoples.<sup>6</sup> Decisions of the Bosnian Constitutional Court touched on some of the most divisive issues in post-war Bosnia-Herzegovina ('Bosnia').

Many of the more controversial decisions saw the cleavages of the political system reproduced within the Court along ethnic lines. The most notorious example was the decision on the co-equal status of all constituent groups throughout Bosnia.<sup>7</sup> But the voting pattern was no different in the more recent decision on the unconstitutionality of the power-sharing presidency at entity level,<sup>8</sup> which follows up on the Strasbourg Court's verdict in *Sejdic and Finci v. BiH*,<sup>9</sup> or the holding on the unconstitutionality of the Serb Republic Day, which triggered a furious reaction from that entity.<sup>10</sup> The 5-4 majority split in all these cases occurred between the Bosniak (Bosnian Muslim) and the international judges, on the one side, and the Bosnian Croat and Bosnian Serb judges, on the other side. The ethno-political fault lines dividing Bosnians are mirrored in the Constitutional Court in politically salient cases.

The literature on judicial politics has looked at the questions of why judges are selected and how judges decide through the frame of ideology, and partisan politics as a proxy thereof.<sup>11</sup> The literature is certainly richest in the United States, but the paucity of comparative work has been addressed recent work.<sup>12</sup> The identified analytical framework is certainly useful for studying these kind of questions in most cases. The United States Supreme Court regularly decides questions that deeply divided Americans, including capital punishment, abortion, homosexual marriage, affirmative action and sometimes even the outcome of presidential elections. In the US context, it might add little to analyse whether Catholic judges in the Supreme Court decided cases differently than judges from other religious denominations, or whether judges from ethnic minorities voted differently on certain issues affecting their communities. However, on broader scale it has been shown that racial diversity

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<sup>5</sup> BCC, U 44/01, 27. February 2004. For a discussion of the judgment see the contribution of David Feldman, former international judge at the Constitutional Court of Bosnia, in Feldman, David. 2005. Renaming Cities in Bosnia. *International Constitutional Law* 3(4), 649-62.

<sup>6</sup> Steiner, Christian and Nedim Ademovic. 2010. *Constitution of Bosnia-Herzegovina - Commentary*. Sarajevo: Konrad Adenauer Stiftung [on 875-77 giving reasons why the Constitutional Court not only checked the veto's procedural regularity, but also substantively defined its content]. For case law, see Marko's contribution in the same book at page 83.

<sup>7</sup> BCC, U-5/98, Partial decisions of 29/30. January 2000, 18/19. February 2000, 1. July 2000 und 18/19. August 2000.

<sup>8</sup> BCC, U-14/12 (Komsic), 27. March 2015.

<sup>9</sup> ECtHR [GC], 22. December 2009, nos. 27996/06 and 34836/06, *Sejdic and Finci v. Bosnia-Herzegovina*.

<sup>10</sup> BCC, U-3/13, 26. November 2015.

<sup>11</sup> Sunstein, Cass R. 2007. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington DC: Brookings Institution Press; Hönnige, Christoph. 2009. The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts. *West European Politics* 32(5), 963-84.

<sup>12</sup> Hönnige, Christophe. 2011. Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts. *European Political Science* 10(3), 346-58; Hanretty, Chris. 2012. Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals. *European Journal of Political Research* 51(5), 671-92.

of judicial panels crucially influenced decisions of US appeal courts on issues touching that salient trait.<sup>13</sup>

In societies deeply divided by cleavages of group membership and identification, the issue of diversity gives even more cause for concern. In the US and Europe, ideological balances on a high court can change as a result of political alternation. But in deeply divided societies, the risk is that certain groups are permanently excluded. Permanent exclusion is likely to put at risk the legitimacy of the judicial system. Exclusion can also go beyond issue of representation, and take the form of making a certain group a permanent minority in important decisions. The mentioned examples from Bosnia show that also the highest courts are not immune from dividing along ethnic lines on questions that split the country's citizenry into opposing ethnic factions. The systemic risk is that the judicial system is not seen as legitimate any more if certain groups are permanently excluded. This bears the risk that communities might resort to extra-legal outlets to vindicate their claims, if they believe that the judicial system (or specialized bodies of constitutional adjudication) are structurally biased against them.

The paper brings together insights from different disciplines. Political scientists are interested in unearthing the (political) reasons behind judicial selection and judicial decision making. They look at the representativeness and legitimacy of political institutions from a systemic perspective. Legal scholars analyse judicial selection and decision making with canons and concepts of the juridical sciences. They are interested to find ways to improve judicial selection against the benchmark of judicial independence, and to discuss the legal legitimacy of judicial decisions. This analysis blends both disciplines: it unearths a new model of how power is shared between ethno-national groups in apex courts in certain multi-national states, and discusses whether this model is legitimate and legal.

The big and to a certain extent eternal debate in the literature of different disciplines is whether diversity in the different institutions of state and society should be the natural result of diversities within society or whether the state should intervene through positive action to bring about diversity in these institutions. Discussions whether the judiciary should be made more diverse seem just an offshoot of the debate whether societal institutions should reflect diversity. However, in the judiciary explicit inclusion of diversities has faced even stronger resistance. Making the judiciary more diverse was argued to lead to appointment of judges based on their background, a violation of substantive judicial independence.

However, I am not so much interested in answering the normative question whether courts should be more diverse or not in general. This paper is concerned whether the highest courts that solve politically salient conflicts between discrete communities in deeply divided polities should reflect the socially salient traits in their composition and organization. I am interested in this because courts have an increasing role in deciding cases that have a

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<sup>13</sup> Kastellec, Jonathan P. 2013. Racial Diversity and Judicial Influence on Appellate Courts. *American Journal of Political Science* 57(1), 167-83.

bearing on the political conflict in deeply divided polities. Hirschl defined those cases raising “matters of outright and utmost political significance that define and divide whole polities”<sup>14</sup> as ‘purely political’<sup>15</sup> or ‘mega-political’<sup>16</sup> cases. Such cases bring to the fore fundamental questions about “the proper form of governance for a nation of multiple peoples living in overlapping lands.”<sup>17</sup> Courts have increasingly been petitioned to control the authorship of fundamental political agreements against an expanding fundamental rights regime, and are arbiters in competence conflicts between different communities. As I will show in the first part, deeply divided societies are more prone to the denouement of the fiction of impartial legal interpretation, and thus more affected by issues of judge selection.

The second part forms the core of the paper. The problem it tackles is that the concept of minority representation, used in comparative constitutional law, fails to capture a distinct model of organizing the judiciary in deeply divided polities. For instance, the report of the Venice Commission on the composition of constitutional courts looks at minority representation, and makes no distinction between minorities and constituent communities.<sup>18</sup> I argue that one can justifiably talk about minority representation in cases such as Finland, Spain, Lithuania or Croatia, when there are one or two minority judges on courts that have on average over ten judges.<sup>19</sup> Minorities may be represented in these courts but certainly do not have much power to shape or block decisions that would affect the minority.

The story is different in deeply divided societies in which courts have been established on the basis of parity for resolving inter-community conflicts. Power is shared because these courts have an important political function: to resolve inter-community conflict, to resolve the commitment problem for keeping past inter-community agreements, and to balance between universal norms and the particular demands of the accommodation regime. I argue that the rules on selection and organization of these courts necessarily serve a particular function, namely to give legitimacy to courts as dispute resolvers in conflicts between constituent communities or between the state and minorities that advance a political self-determination claim.

In these cases, the frame of minority representation is less adequate. Where there is a conflict between peoples in a co-dominant position, or cases where there is an important majority/minority dynamic at the federal level (such as for instance in Canada or Macedonia) or at subnational level (South Tyrol), courts tend to follow these cleavages. But the difference goes beyond judicial selection on the basis of parity or proportionality. In these courts power sharing

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<sup>14</sup> Hirschl, Ran. 2006. The New Constitutionalism and the Judicialization of Pure Politics Worldwide. *Fordham Law Review* 75(2), 721-53, 723.

<sup>15</sup> Hirschl, *The New Constitutionalism*.

<sup>16</sup> Hirschl, Ran. 2008. The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Science* 11, 93-118.

<sup>17</sup> Issacharoff, Samuel. 2015. *Fragile Democracies - Contested Power in the Era of Constitutional Courts*. New York: CUP, 289.

<sup>18</sup> Venice Commission. 1997. *The Composition of Constitutional Courts*. Science and technique of democracy, No. 20, [page 9].

<sup>19</sup> Venice Commission, *The Composition of Constitutional Courts*.

extends to the decision making rules and the allocation of the most important functions within these bodies.

The innovation of this paper is to create a new conceptual tool that opens our eyes to see a specific model of institutionalizing diversity within constitutional courts that has not been recognized with the existing frame of minority representation. The aim of this paper is to demonstrate that this specific model of organizing apex courts in some divided polities exists.

This new concept also improves the literature on power sharing in specific political institutions. In political science, power sharing has generated an enormous literature.<sup>20</sup> Not unsurprisingly, power sharing courts represent a specific model of institutionalizing diversity in an apex court to which consociational democracies are particularly prone. With the exception of Choudhry's paper on constitutional design of apex courts in divided polities, comparing Canada, Bosnia and Germany, there is no work which has comparatively looked at how apex courts are organized in divided polities.<sup>21</sup> Power sharing analysis has been extended to specific bodies, such as power sharing executives.<sup>22</sup> This paper extends the analysis to a certain model of institutionalizing diversity in high courts in divided polities, which I label as 'power sharing courts'.

The third part of the paper discusses the potential and real criticisms that can be moved against power sharing courts, while at the same time developing a counter-narrative addressing these criticisms. In a nutshell, most of the criticisms that can be moved against power sharing courts are an offshoot of critiques to consociationalism in other political institutions. The strongest critique is that power sharing courts are illegal under evolving standards of human rights law. However, in divided societies the legitimacy of judicial decisions that touch on questions of pure politics might depend on a body of judicial adjudication that includes all relevant segments of society, that is a power sharing court. A conclusion sums up the main claims of this essay.

### **1. The Politics of Constitutional Interpretation, Representativeness and Legitimacy**

The judge has for a long time been pictured as a force that per definition applies the law neutrally and mechanically, an image that less and less depicts reality particularly in the more political fields of law. The judge's interpretative power was presumed to be tightly constrained by a complete system of law known as the code. But law alone rarely predicts judicial outcomes: it has to be interpreted. Constitutional law allows for broad interpretive freedom. Many

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<sup>20</sup> Choudhry, Sujit. 2008. *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Choudhry, Sujit. New York: Oxford University Press, 3-40, 19; Bogaards, Matthijs. 2014. *Democracy and Social Peace in Divided Societies: Exploring Consociational Parties*. Basingstoke: Palgrave Macmillan.

<sup>21</sup> Choudhry, Sujit and Richard Stacey. 2012. *Independent or Dependent? Constitutional Courts in Divided Societies*, in *Rights in Divided Societies*, edited by Harvey, Colin and Alexander Schwartz. Oxford: Hart, 89-123.

<sup>22</sup> McEvoy, Joanne. 2015. *Power-Sharing Executives: Governing in Bosnia, Macedonia, and Northern Ireland*. Philadelphia: University of Pennsylvania Press.

rights, such as the right to equality, are broadly framed and are interpreted in reference to principles of political morality. Not only constitutional law but also the body that ultimately interprets that law, constitutional courts, occupy an intermediate space between politics and the law.<sup>23</sup> Judges have never been only the mouthpiece of the law,<sup>24</sup> and over time their interpretive power has increased.

A variety of interpretative techniques and a growing body of applicable law (particularly international law) has strengthened the power of the judge. Recent scholarship unearthed overwhelming evidence that extra-judicial factors play an important role when constitutional courts take decisions.<sup>25</sup> One can picture the judge like an IT technician that feeds different information into a software program.<sup>26</sup> What comes out depends on the interpretative choice button that the judge clicks. Textual, historic, systematic and purposeful interpretation may all yield very different case outcomes.<sup>27</sup> The emphasis and interrelationship between these methods will vary between different constitutional traditions. The tools of the legal craft allow judges flexibility in the interpretation of the law. However, national constitutional traditions constrain the interpretive flexibility judges have in their decision making.<sup>28</sup> Why does this all matter? How judges decide to interpret the law determines the outcome of judicial decisions.

### 1.1. *The Politics of Constitutional Interpretation*

Difficulties in interpreting the law are magnified when there are deeply diverging conceptions of the good within a society. In many societies the polarization is ideological (left-right) and involves moral issues such as abortion and gay rights, social issues such as social rights and redistributive justice, and political issues such as freedom of speech. In other societies, the fault lines are not ideological but religious, linguistic, cultural, ethnic or racial.<sup>29</sup> These deeply divided societies are fragmented into separate sub-societies ('segments') with their own political parties, interest groups, and media of communication.<sup>30</sup> In such societies, the constitution is often a grudgingly accepted compromise between competing logics. The classic example of competing logics is the strong tension between the institutionalization of ethnicity and liberal rights of non-discrimination. Particularly in these

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<sup>23</sup> Van Oyen, Robert. 2015. *Bundesverfassungsgericht und politische Theorie*. Wiesbaden: Springer, 52.

<sup>24</sup> Schönfeld, Karel Menzon. 2008. Rex, Lex et Judex - Montesquieu and la bouche de la loi revisited. *Euconst* 4(2), 274-301.

<sup>25</sup> Hirschl, Ran. 2014. *Comparative Matters - The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press, 166.

<sup>26</sup> Posner, Richard. 2011. *The Rise and Fall of Judicial Self Restraint*. Podcast, University of Chicago Law School (accessed: 16. June 2016).

<sup>27</sup> Posner, Richard. 2010. *How Judges Think*. Boston: Harvard University Press.

<sup>28</sup> Choudhry and Stacey, *Independent or Dependent?*

<sup>29</sup> A divided society can be fragmented also along ideological cleavages. My focus though rests on those societies in which the main divisions are the result of ascriptive cleavages (primarily of ethnic/sectarian/linguistic nature).

<sup>30</sup> Lijphart, Arend. 2007. *Thinking about Democracy - Power Sharing and Majority Rule in Theory and Practice*. New York: Routledge, 67.

societies rights are not only of concern to the individual, but have a ‘constitutive’ function - they create and define a political community.<sup>31</sup>

In divided polities, liberal rights are not ‘colour blind’, but interpreted under the prism of strategic group interests.<sup>32</sup> Does for instance the right to education imply that a linguistic minority has the right to be educated in a certain language or not;<sup>33</sup> or does the right to vote imply a minority’s group right to elect a candidate that reflects their opinion and identity?<sup>34</sup> As there is no clear cut answer to that, Choudhry referred to the margin of choice that judges have in these cases as the political aspect of constitutional interpretation.<sup>35</sup> In contexts of deep dividedness, the universalizing function of rights is contested by demands for the particularization of rights through the accommodation of difference. It falls to courts to mediate the tension within the limited argumentative space that is left to them after discounting structural factors of the national constitutional tradition (such as precedent, preference for certain techniques of constitutional construction, ...).

Belgium serves as an example. Belgium is a deeply divided society between Dutch-speaking Flemings and French speaking Walloons. Disagreements extends to the meaning of central articles of the constitution. Late Belgian statesman Jean Luc Dehaene said that Belgium was a schizophrenic country.<sup>36</sup> He argued that while for Dutch speakers (known as ‘Flemings’) the Belgian polity and its constitutional law are underpinned by the territoriality principle, for French speakers the personality principle was dominant. Belgian French speaking and Flemish constitutional doctrine are still divided whether the 1968/9 division of the country into language regions establishes a principle of territoriality.<sup>37</sup>

Courts situated in the different language regions of the country remain equally divided. A political ‘hot potato’, constantly reappearing under different form, is the refusal of the territorially competent authority (Flemish Community) to nominate democratically elected mayors (French speakers) in municipalities that are territorially situated by Flanders but governed by a special status (the so-called ‘language facilities’). One of the consequences of this special status is that the language legislation is decided by federal authorities, in which French and Dutch speakers are on equal footing. However, the Flemish region issued

<sup>31</sup> Harvey, Colin and Alexander Schwartz. (eds.). 2012. *Rights in Divided Societies*. Oxford: Hart Publishing.

<sup>32</sup> Schwartz, Alexander. 2011. Patriotism or Integrity? Constitutional Community in Divided Societies. *Oxford Journal of Legal Studies* 31(3), 503-26.

<sup>33</sup> ECtHR (plenary) 23. July 1968, nos. 2126/64 and others, Relating to certain aspects of the law on the use of languages in education in Belgium v. Belgium.

<sup>34</sup> ECtHR (plenary) 2. March 1987, no. 9267/81, Mathieu Mohin and Clerfayt v. Belgium. ECHR 15. September 1997, nos. 23450/94, Polacco and Garofalo v. Italy.

<sup>35</sup> Choudhry and Stacey, *Independent or Dependent?*, 89-92.

<sup>36</sup> Velaers, Jan. 2012. *Territorialiteit versus personaliteit: een never ending story? Recente ontwikkelingen in de jurisprudentie van het Grondwettelijk Hof, de legisprudentie van de Raad van State en het Vlinderakkoord over de zesde staatsvorming*, in *Belgie quo vadis, Waarheen na de zesde staatsvorming*, edited by Popelier, Patricia / Cantillon, Bea / Velaers, Jan, and Dave Sinardet. Antwerpen: Intersentia, 61-110, 61.

<sup>37</sup> Lejeune wrote that this claim from the ‘Flemish doctrine’ was not accepted by French speaking constitutional scholars, in Lejeune, Yves. 2014. *Droit Constitutionnel Belge: Fondements Et Institutions*. Brussels: Larcier, 581.

its own very narrow interpretation of the federal language law through a lower normative act, the so-called Peeters directive. That directive was backed by the territorially competent administrative court, the Flemish section of the Council of State.<sup>38</sup> As a response, courts in the French speaking region argued that the Peeters directive cannot supersede federal law, is mere 'legislative commentary', and was deprived of any legal effect (Appeal Court of Mons, judgment of 21 January 2011).<sup>39</sup>

For the moment, this case leaves us with a dilemma. If rights define and (re)construct a political community, the question arises: should judges, who are the interpreters of these rights, reflect the different shades of a society or its salient cleavages? The question becomes only more relevant where rights interpretation might impact the stability of a political system already vulnerable to deep communitarian division.

Not only the legal effect, but the very legitimacy of the mentioned Council of State decision was questioned because of alleged bias of that jurisdiction. A French speaking constitutionalist accused the Flemish Council of State section of acting like a Flemish Supreme Court rather than a Belgian institution mindful of pacifying the language conflict.<sup>40</sup> The logical demand to close the gap between law and legitimacy was to give jurisdiction over those municipalities with a hybrid status not to the territorial section, but the federal section of the Council of State (called 'General Assembly'). Such solution would be to include the cleavages into the deciding apex court, so to invest it with a broader political legitimacy for arbitrating controversies that divide the Belgian polity along language lines. I will return to the follow up of this case later.

In broader perspective, this approach would be in line with the idea of a reflective judiciary, that is a judiciary that fairly reflects of societal diversity in terms of race, gender, religion, nationality. The concept seems well captured by earlier versions of the Code on Judicial Independence, developed by the International Bar Association (IBA), in the part where it reads that representation should be as inclusive as possible: "the process and standards of judicial selection must insure fair representation of all social classes, ethnic and religious groups, ideological inclinations and where appropriate, geographical regions [while at the same time refraining from proportional representation]."<sup>41</sup> The quoted IBA draft recommendation means that group markers are taken into consideration when selecting judges. But is this compatible with judicial independence and helpful for the legitimacy of the legal system? Is it not better if diversity on the bench is a natural by-product of

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<sup>38</sup> Council of State, decisions 138.860 to 138.363 of 23. December 2004.

<sup>39</sup> For a brief overview, see the dossier on the language legislation and the nomination of mayors in the Brussels municipalities with language facilities. *Les juges, les bourgmestres et l'emploi des langues dans les communes à facilités*.

<sup>40</sup> Uyttendaele, Marc. 1987. Les obligations linguistiques des mandataires politiques. *Courrier Hebdomadaire* 1150, 1-46.

<sup>41</sup> Shetreet, Shimon. 1998. *The Doctrinal Reasoning for More Women Judges: The Principle of Reflective Judiciary*, in *Woman in Law*, edited by Shetreet, Shimon. London: Kluwer Law, 183-94, 189.

societal diversity, rather than being engineered into the system?<sup>42</sup> Can scholarship help us out of this conundrum?

1.2. *Representativeness, Legitimacy and the dilemma of group representation*

In a theoretically rich piece of scholarly work, Mattias Kumm usefully distinguishes four sub-concepts that together construct representativeness in the judiciary: volitional, identitarian, argumentative and vicarious representativeness.<sup>43</sup> Kumm's dimensions of representativeness adapt Pitkin's seminal work on the four meanings of *The Concept of Representation* to the judiciary.<sup>44</sup> In a nutshell, Kumm argues that judges should not be elected but subjected to other forms of public accountability, be selected for their merit and not for their background, be allowed to dissent and engage in a writing style that engages the public, and be allowed to be overruled by legislative bodies. While these concepts are all interrelated, what is most interesting for my discussion is the aspect of representativeness related to the composition of apex courts.

Kumm rejects identitarian representativeness as non-desirable for the judicial function. Differences within salient social traits (gender, race, ethnicity, language, nationality) are so different that it is misguided to think that they would bring a broader variety of viewpoints to courts. Judges are more independent when there is no consideration of salient social traits in judicial selection; otherwise their interpretation of the law risks be tainted in favour of litigants that happen to have the same trait. This puts at risk the impartial administration of justice. Even more fundamentally, Kumm concludes that the representation of groups bears no relation to the legitimacy courts can claim.<sup>45</sup>

Dallara and Vauchez are more nuanced in their critique to the inclusion of salient social traits in the composition of courts.<sup>46</sup> They detect a consensus that the notion of a judge's total impartiality and detachment from values is a myth. Dalla and Vauchez find that identitarian traits should be considered, but only as a positive action effort to include specific sub-groups (women, postcolonial communities) that have been historically excluded. The Vauchez and Dallara argument is that diversity should be exceptionally considered to redress past injustices.

Although Kelsen wrote nearly a century ago, his comments on the selection of constitutional court judges read as if they were written today.<sup>47</sup> He wrote that selection to constitutional courts should ideally be solely based on considerations of merit (Kumm's argument).<sup>48</sup> However, if that is not possible

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<sup>42</sup> The French, Romanian, Czech and Georgian members of the Venice Commission made this point. Venice Commission, *The Composition of Constitutional Courts*, 10.

<sup>43</sup> Kumm, Mattias. 2012. *Representativeness and Independence of Courts*. RSCAS Policy Paper 7, San Domenico di Fiesole: EUI, 53-56.

<sup>44</sup> Pitkin, Hanna F. 1967. *The Concept of Representation*. Berkeley: University of California Press.

<sup>45</sup> Kumm, *Representativeness and Independence of Courts*, 54.

<sup>46</sup> Dallara, Cristina and Antoine Vauchez. 2012. *Courts, Social Changes and Judicial Independence*. Global Governance Programme Policy Brief 2.

<sup>47</sup> Kelsen, Hans. 1929. *Mitbericht von Professor Dr. Hans Kelsen in Wien*, in *Wesen Und Entwicklung Der Staatsgerichtsbarkeit*, edited by Triepel, Heinrich and Hans Kelsen. Berlin: Walter de Gruyter, 30-88, 83-85.

<sup>48</sup> Kelsen, *Mitbericht von Professor Dr. Hans Kelsen*, 56.

and even judges risk to be deeply politicized due to the surrounding environment, then the composition of a constitutional court should fairly reflect society. Kelsen had in mind that a constitutional court should proportionally reflect the strength of political parties in parliament,<sup>49</sup> but this argument can be extended by analogy to other diversities (ethnic/social/ideological/ - the IBA argument). Kelsen recognized the importance of context when giving recommendation about judicial selection to apex courts.

Sadurski does not write about representativeness but about a related concept - the one of legitimacy. He breaks it down into four components: normative legitimacy, sociological legitimacy, input legitimacy and output legitimacy.<sup>50</sup> Normative legitimacy is aimed at the lawyers' world. It looks at whether a judgment is legitimate for the canons of legal science ('rationality', 'reasonableness', 'consistency'). While normative legitimacy is internal and intra-institutional, sociological legitimacy is external and inter-institutional.<sup>51</sup> It structures the legitimacy of courts in relation to politics and society. Output legitimacy refers to what courts deliver: "the legitimacy of decisions based on their consequences."<sup>52</sup> This includes both society's preference for certain outcomes over others, as well as the way the decision is reasoned by the majority and opposed by dissenting opinions.<sup>53</sup> What is most relevant for my discussion is input legitimacy, that is how the composition of courts reflects politics and society.

My text is both broader and narrower than the work of Kumm and Sadurski. I deal not only with judicial selection but also with decision making in apex courts. Contrary to Sadurski and Kumm however, I am not interested in the substantive aspects of judicial decision making, but in the procedural rules governing decision making and majority formation. My claim is more modest than theirs. I do not advance a general argument whether diversities should be included in courts and build a path how to get there.

As I have tried to argue so far by recruiting examples of highly sensitive case law from Bosnia and Belgium, judges belonging to different constituent communities do indeed differ in their judgment on cases that define and divide the polity. Under the robe judges remain people; who do not 'forget' their personal or linguistic/national/ethnic background when sitting on the bench. One constitutional court judge from a divided society told me that judges who do not vote with their peers on group related issues would be considered as 'traitors' (by other judges from the same group). My text specifically addresses the composition, organization and decision making rules of apex courts in multi-national polities, and more particularly those that have consociational or confederal features.

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<sup>49</sup> Kelsen, *Mitbericht von Professor Dr. Hans Kelsen*, 57.

<sup>50</sup> Sadurski, Wojciech. 2011. Constitutional Courts in Transition Processes: Legitimacy and Democratization. *Sydney Law School Legal Studies Research Paper* 11/53.

<sup>51</sup> Ruibal, Alba. 2010. The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts. *Mexican Law Review* 3(2), 343-56.

<sup>52</sup> Sadurski, Wojciech. 2008. *Equality and Legitimacy*. Oxford: Oxford University Press, 43.

<sup>53</sup> Kelemen, Katalin. 2013. Dissenting Opinions in Constitutional Courts. *German Law Journal* 14(8), 1345-71, 1358.

In power sharing systems, where the cleavages are generally not socio-economic or class oriented, but identitarian, the input legitimacy of courts is crucial to the acceptance of the decision. O’Leary and McCrudden wrote that the input legitimacy of the Bosnian Constitutional Court remains weak, because foreigners retain the decisive votes.<sup>54</sup> As we saw before, the input legitimacy of the Flemish section of the Council of State was too weak to decide cases that are of broad concern to the entire polity (such as the interpretation of the federal language law in municipalities with a hybrid status situated on the internal language border). In order to make apex courts more legitimate, Belgium, Bosnia and other countries institutionalized the main cleavages of the political system in the design of the court. As said, this is different from minority representation because it structures inter-community power relations. In the next section, I will demonstrate that ‘power sharing courts’ represent a distinct model of organizing apex courts in polities characterized by deep diversity.

## 2. Power sharing courts

In political science, consociational power sharing systems are regarded as the nuclear option for dealing with politically salient diversities in deeply divided polities. Lijphart himself recommends consociationalism only for deeply divided societies, arguing for consensus democracy in all other countries.<sup>55</sup> Power sharing courts are the judicial pendant to power sharing in the executive: they go far beyond international standards of representativeness (‘the principle of a reflective judiciary’)<sup>56</sup> and tend to massively over-represent consociated peoples. Not much has been written on courts in consociational democracies, and the foundational texts of the discipline have been unconcerned with judicial institutions.<sup>57</sup> Still there are core institutional features that are common to courts across power sharing systems. My interest lies on the highest courts within a legal system, the so-called apex courts.

Before discussing what power sharing courts are, let me again make the case why this matters. It could be argued that the Bosnian Constitutional Court should be compared with courts from the region, and not with courts such as the Belgian, Canadian or Cyprus apex courts, or sub-national courts in divided polities (South Tyrol, Northern Ireland, North Kosovo). This has already been done and is certainly useful.<sup>58</sup> Also Belgium shares many similarities with neighbouring courts. Not unlike constitutional courts in most countries, including Germany and France, the great majority of judges are expression of

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<sup>54</sup> O’Leary, Brendan and Christopher McCrudden. 2013. *Courts and Consociations - Human Rights Versus Power-Sharing*. New York: Oxford University Press, 144-5.

<sup>55</sup> Lijphart, Arend. 2012. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press.

<sup>56</sup> “The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects. (Article 2.15).” International Association of Judicial Independence. 2008. *Mt. Scopus Approved Revised International Standards of Judicial Independence*.

<sup>57</sup> The founders of the political theories of consociationalism (Lijphart), centripetalism (Horowitz) and the power dividing theory (Roeder) barely mention courts in their scholarship. Together with Chris McCrudden, Brendan O’Leary has addressed this research gap in recent years, in O’Leary and McCrudden, *Courts and Consociations*.

<sup>58</sup> Šarčević, Edin. (ed.). 2012. *Ko Bira Sudije Ustavnog Suda?*. Sarajevo: Center za javno pravo.

the big political families. As my interest is to analyse how ethnic or linguistic cleavages are reflected in apex courts and how these cleavages define rules of decision making and power within these courts, then such comparison reaches its limits. Ethno-linguistic cleavages are more likely to be found in multi-national polities such as Bosnia, Belgium, Cyprus, Kosovo, Macedonia, South Tyrol, Canada than with their respective neighbours. In all of these cases, decisions of the court will touch on the balances of power and majority/minority dynamics within a multi-national states. It is therefore reasonable that in these contexts diversity will be institutionalized in the highest courts. The specific of institutional model of a power sharing court is found only in multi-national states, which explains the case selection.

At a minimum, a power sharing court is an apex court in a power sharing system, provided that its composition reflects the politically salient cleavages (regional/national/religious/linguistic). Power sharing courts can be situated in the broader framework of the reflective judiciary, discussed before, but are markedly different from it.

In this section, I will first discuss some differences between strong and weak forms of power sharing courts (2.1). Next, I will present a framework through which I look at power sharing courts. Here, I discuss the composition (2.2), function (2.3), decision-making procedures (2.4) and the allocation of positions of power within these power sharing courts (2.5). Different empiric examples serve to illustrate the institutional features of these courts. The section concludes with examples which show that minority groups/nations openly call - *de lege ferenda* - for power sharing courts (2.6).

### 2.1. *Strong and weak sharing courts*

I will distinguish between strong and weak power sharing courts, but in most cases the distinction between these types will be one of degree. The distinction introduces a useful theoretical construct for distinguishing different power sharing regimes within the highest courts of a country. This is not unlike the differences between strong and weak forms of power sharing in other political institutions, such as the legislative or the executive. Consociations have been described as complete, concurrent or weak, in function of the support that segment parties represented in government have within their own group.<sup>59</sup> For instance, Belgium's current (Michel) government is weakly consociational, because the parliamentary majority does not command plurality support within both groups. I am applying different degrees of consociationalism, theorized for other political institutions, to judicial bodies.

Strong power sharing courts are equally and not proportionally composed of the main constitutive nations. Their function is to be an external forum for conflict resolution, allowing that political conflict on divisive issues is deflated through judicialization. In strong power sharing courts, no decision is possible against the judges who are expression of one constitutive nation acting collectively.

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<sup>59</sup> McGarry, John / O'Leary, Brendan and Richard Simeon. 2008. *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in *Constitutional Design for Divided Societies: Integration or Accommodation*, edited by Choudhry, Sujit. Oxford: Oxford University Press, 41-90.

Power is shared on by allocating the highest office within an apex court to judges from the main constitutive communities.

Weak power sharing courts reflect the salient cleavages in the population on proportional and not paritarian basis. Their function is to be an independent tribunal for resolving competence claims and (partly also) identity conflicts, but their input legitimacy is weaker because their composition is determined by the majority nation. Judges from the majority nation do not need to seek the consensus of other members of the apex court in making decisions. There is at most informal allocation of the highest position within the Court on an ascriptive basis. At its most basic level, weak power sharing courts are judicial bodies with some form of recognition of minority representation in their composition.

There are different empirical examples of strong and weak power sharing courts. Belgium and Bosnia are examples of strong power sharing courts. The Constitutional Court of Cyprus, according to the framework laid down in the constitution and the special laws, is another constitutional court fitting the model. The Constitutional Court of Yugoslavia and the Czechoslovak Republic were historic examples thereof. Kosovo, Macedonia and Canada are examples of weaker power sharing courts. However, in Canada geographical selection requirements are based both on power sharing (of the English speaking majority with the French-Canadian minority nation) and the functional need to ensure capacity to decide civil law cases coming from Quebec. The constitutional courts of Bosnia's entities, the Federation of Bosnia-Herzegovina and the Republika Srpska (RS), equally fall into that category. The Swiss case is more ambiguous. Switzerland has always been the 'odd fellow' in the room,<sup>60</sup> and academia has vigorously debated whether the country fits the criteria for belonging to the club of consociations. As Switzerland is less fragmented than other consociations and dissenting opinions still absent, it remains unclear if linguistic differences become salient in high court cases. Other empiric examples have only minimal elements of a weak power sharing court, such as the Supreme Court of the United Kingdom.

If one wanted to draw a further distinction, certain constitutional courts with international judges could be defined as internationalized power sharing courts. The constitutional courts of Bosnia, Cyprus and Kosovo are empirical examples of such power sharing courts, with one third of the judges being foreigners. The progeny of internationalized power sharing courts lies in the ad-hoc tribunal system in international law.<sup>61</sup> I will return to the distinction between weak and strong power sharing courts throughout this essay.

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<sup>60</sup> Sciarini, Pascal and Simon Hug. 1999. *The Odd Fellow. Consociationalism and Parties in Switzerland*, in *Party Elites in Divided Societies: Political Elites in Consociational Democracy*, edited by Luther, Kurt Richard and Kris Deschouwer. London: Routledge, 134-62.

<sup>61</sup> Potier, Tim. 2008. Making an Even Number Odd: Deadlock-Avoiding in a Reunified Cyprus Supreme Court. *JEMIE* 7(2), 1-31.

## 2.2. Composition

The cleavages on which power sharing courts are based can be of ascriptive (ethnicity/religion/sectarian/race/language) or ideological nature.<sup>62</sup> Ascriptive cleavages are generally less malleable and harder than ideological cleavages.<sup>63</sup> While in Bosnia and Belgium the main ('primary') cleavages have been ideological, at least up to WWII, they now are of ascriptive nature. Secondary ideological cleavages are certainly much stronger in the Belgian society with important political families rather than in the transitional and largely de-ideologized Bosnian society. While the composition of the Belgian Court reflects ideological and ethnic cleavages, the Bosnian Court essentially reflects only the latter. As accepted in the literature on pluralism and democracy, the presence of cross-cutting cleavages tempers conflict between groups.<sup>64</sup>

Power sharing courts can be found in contexts of deep dividedness. The current empirical examples coming closest to the definition of strong power sharing courts are Bosnia and Belgium. The regional court of Bozen/Bolzano (South Tyrol/Italy) has many elements of a power sharing court. Historical examples of strong power sharing courts include apex courts in Yugoslavia, the Czechoslovakia and Cyprus.

In Belgium, the composition of all apex courts (Constitutional Court, Court of Cassation, Council of State) is paritarian, although nearly sixty percent of the population are Dutch speakers. However, the Council of State and the Court of Cassation only rarely sit in General Assembly, with both French and Dutch-speaking judges. The paritarian composition is not only required for judges, but is replicated throughout the court hierarchy. In the Council of State, an equal number of first auditors, auditors, first law clerks has to belong to the Dutch and French language groups respectively.<sup>65</sup> Even the commission for nominating lawyers that can practice before the Court of Cassation has to be paritarian.<sup>66</sup>

Belgium's Constitutional Court is composed of an equal number of Dutch and French speakers, and every language group has its own president.<sup>67</sup> Moreover, half of the Belgian Court's judges are former politicians.<sup>68</sup> The quota for politicians was created out of the fear that judges would handle politically sensitive questions without due care and install a *gouvernement des juges*. The Court is composed of a total of twelve judges who serve until the age of 70. Kelsen would have approved of the Belgian Court, as in contexts of deep division he recommended a constitutional court to be composed partly by more

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<sup>62</sup> Cleavage theory goes back to the seminal work of Martin Lipset, Seymour and Stein Rokkan. 1967. *Party Systems and Voter Alignments: Cross-National Perspectives*. Toronto: Free Press.

<sup>63</sup> Fotini, Christia. 2012. *Alliance Formation and Civil Wars*. Cambridge: CUP, 222.

<sup>64</sup> Andeweg, Rudy B. 2000. Consociational Democracy. *Annual Review of Political Science* 3(1), 509-36.

<sup>65</sup> Article 17 of the law of 25. May 1999, in modification of Article 73.1 of the coordinated Laws on the Council of State from 12. January 1973.

<sup>66</sup> Senate par.doc. 5-14/2 (2010-11); Law of 3. March 2011 modifying the judicial code concerning the composition of the advisory commission for the nomination of barristers to the Court of Cassation.

<sup>67</sup> Article 33, Special Law on the Constitutional Court.

<sup>68</sup> Article 34§1.2. Special Law on the Constitutional Court.

politicized members that reflect the diversity of parliament and partly by pure experts of the constitution.<sup>69</sup> The legitimacy of Belgium's Constitutional Court relies on a double parity - the linguistic parity for its function as organ of arbitration between Dutch and French speakers,<sup>70</sup> and the professional parity (former lawmakers/lawyers) in order to reconcile judicial review with democracy.

Formally, a qualified majority of the Chamber or the Senate propose a list of two candidates to the Belgian King.<sup>71</sup> One time this list is proposed by the Chamber and next time by the Senate, then again by the Chamber and so forth. As a rule, the King selects the top listed candidate. This is the written law. But constitutional convention has it that the selection of Belgian Constitutional Court judges is based on an informal agreement between political parties to use the D'Hondt system of political representation in the state parliament.<sup>72</sup> Given that the Court has to be paritarian, this means that the D'Hondt rule is not applied to the whole state parliament but to the language groups within parliament. Every party knows which turn it is to select the next judge. As a general rule, the candidate is proposed by one party and accepted by other parties in parliament.

The rationale behind the D'Hondt system is to allow representation of the great political families in the Court (Socialists, Christian-Democrats and Liberals). Up to 2013, the French language group was composed by judges nominated from the following parties: Socialist party (2), Liberal Party (2), Christian-Socialists (1) and Green party (1).<sup>73</sup> Until the Flemish nationalists could for the first time propose a judge in 2013, the Flemish seats were equally distributed between Socialists, Christian-democrats and Liberals (with two judges per political group).<sup>74</sup> In the Belgian Council of State the judgeship positions are informally distributed along the same system.<sup>75</sup> The composition of Belgium's highest court has reflected the informal but stable equilibrium between the country's big political families.

In its case law, the Belgian Court stressed that its equilibrated composition (linguistically, politically, professionally) strengthened its legitimacy and impartiality.<sup>76</sup>

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<sup>69</sup> Triepel and Kelsen, *Wesen Und Entwicklung Der Staatsgerichtsbarkeit*, 5 and 57.

<sup>70</sup> Delpérée, Francis. 1985. Cour suprême, Cour d'arbitrage ou Cour constitutionnelle?. *Les Cahiers de droit* 26(1), 205-16, 211.

<sup>71</sup> Art. 32, Special Law on the Constitutional Court, 6. January 1989.

<sup>72</sup> Bossuyt, Marc. 2011. *Séparation des pouvoirs et indépendance des cours constitutionnelles et instances équivalentes*. Report for the Belgian Court at the Second World Congress of Constitutional Courts, Rio de Janeiro.

<sup>73</sup> Verdussen, Marc. 2013. Le mode de composition de la Cour constitutionnelle est-il légitime? *Revue belge de droit constitutionnel* 1, 67-86, 81.

<sup>74</sup> Verdussen, *Le mode de composition de la Cour constitutionnelle*, 82.

<sup>75</sup> Leroy, himself a member of the Council of State, estimated that at the time of his writing there were, on the French side, 6 Socialist, 5 Christian Socialist and 4 Liberal party judges, and on the Flemish side, 6 Christian, 5 Socialist, 3 Liberal, 1 Flemish Nationalist (*Volksunie*) judges. Leroy, Michel. 1996. *Contentieux administrative*. Brussels: Bruylant, 117-8.

<sup>76</sup> Belgian Constitutional Court, decision 157/2009 of 13. October 2009. The topic is discussed in more detailed by the former Court president. Bossuyt, Marc. 2014. *The Independence of the Judiciary in Belgium*, in *The Culture of Judicial Independence*, edited by Shetreet, Shimon. Leiden: Brill, 137-43.

The Bosnian Constitutional Court is a hybrid institution with a majority of local and a minority of international judges. It is composed of nine judges.<sup>77</sup> The six national judges are elected by the first chambers of the entities; four of which by the House of Representatives of the FBiH and two by the National Assembly of the RS.<sup>78</sup> Although the Constitution does not mention any ethnic requirements, the FBiH has so far always elected two Bosniaks and two Croats, and the RS two Serbs. The three international judges are nominated by the President of the European Court of Human Rights after consultation with the BiH Presidency.<sup>79</sup> Bosnia's constituent groups are in practice granted parity in the Court, although the population figures substantially differ.<sup>80</sup> This is not by itself illegitimate. Bosnia's constitutional DNA was always one of three co-equal constituent peoples. As well, the regional context in which Bosnia is situated, with two powerful neighbours such as Serbia and Croatia, should not be forgotten. While in Belgium the parity is a result of a textual provision of the special law on the Constitutional Court,<sup>81</sup> in Bosnia the same result is achieved through constitutional convention.<sup>82</sup> In analogy to its political system,<sup>83</sup> Bosnia has a power-sharing court with the presence of outside arbitrators.

The origins of Bosnia's Court are also linked to its progeny, the Yugoslav Constitutional Court. The Constitutional Court in the former SFRY consisted of 14 judges: two from each republic and one for each of the provinces. This means that judges of no national origin in Yugoslavia could neither "in theory nor practice" dominate the Court.<sup>84</sup>

Bosnia, Belgium and the former Yugoslavia represent a model of organizing constitutional courts that one is likely to see in confederal states. Although there are not many confederal states left, I can illustrate my point with the constitutional court of Czechoslovakia and the State Union of Serbia and Montenegro. The model for the Czechoslovak Constitutional Court was the 1968 constitution, which created a court of twelve judges: six Czech and six

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<sup>77</sup> Article 6.1 - Constitution of BiH.

<sup>78</sup> Article 6.1a - Constitution of BiH.

<sup>79</sup> Article 6.1b - Constitution of BiH.

<sup>80</sup> The CIA estimates the following population figures: Bosniaks (48.4), Serbs (32.7), Croats (14.6), Others (4.3). Official but politically highly sensitive census data from the 2013 Bosnian census has not been published as of 22 September 2015. Figures drawn from United States Intelligence Service. 2015. CIA World Fact Book: Bosnia and Herzegovina. Available [here](#) (last updated on 15. September 2015; accessed: 22. September 2015).

<sup>81</sup> Article 31. Special Law on the Constitutional Court.

<sup>82</sup> Feldman, David. 2012. *The Independence of International Judges in National Courts: Lessons from Bosnia and Herzegovina*, in *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, edited by Shetreet, Shimon and Christopher Forsyth. Leiden: Martinus Nijhoff/Brill, 215-29, 219.

<sup>83</sup> Reference is made to the International Community's High Representative for BiH (Annex X, The General Framework Agreement for Peace in Bosnia-Herzegovina [Dayton Agreement]).

<sup>84</sup> Council of Europe. 1994. *Meeting with the Presidents of Constitutional Courts and Other Equivalent Bodies*. Strasbourg: Council of Europe Publishing, 30-1; see as well the statements of Ratko Markovic, former judge of the Constitutional Court of Yugoslavia. N.N. 2005. *Judges Get a Lecture in Constitutional Law*. *Sense Agency*, 13. January 2005 (accessed: 20. June 2016).

Slovak judges.<sup>85</sup> The Constitutional Court existed only on paper, and came into concrete existence in 1991 with post-communist Czechoslovakia.<sup>86</sup> However, it remained fully operational for less than a year and was superseded by the dissolution of the country. The composition of the Czechoslovak Court mirrored the Belgian Court - twelve judges that reflect the dyadic nature of federalism in both countries. Chambers within the Czechoslovak Constitutional Court were composed in a way as to be absolutely paritarian between Czech and Slovak judges.<sup>87</sup> The same logic informed the constitutional court of Serbia and Montenegro: “The Court of Serbia and Montenegro shall include an equal number of judges from both member states.”<sup>88</sup> Four judges were to be from Montenegro and four from Serbia.<sup>89</sup> Although Serbia outnumbers Montenegro in terms of population by a factor of ten to ten, each constituent republic had an equal number of judges, and the seat of the Court was based in the smaller member state.

The Bosnian Constitutional Court seems both to be based on and at the same time inspire Cyprus. The 1960 Constitution of Cyprus created a Supreme Constitutional Court composed by an equal number of Turkish and Greek Cypriote judges, with the president being a foreigner. The Annan Plan (for a future reunited Cyprus) foresaw that the Supreme Court shall “comprise an equal number of judges from each constituent state, and three non-Cypriot judges until otherwise provided by law.”<sup>90</sup> The number of judges would be determined by a ‘special majority law,’<sup>91</sup> in analogy to the special law on Belgium’s constitutional court. Judges would have been elected by the presidential council, which is an institution in which Turkish and Greek Cypriotes were represented on equal terms.

Judicial power sharing may occur in polities that are divided not at national but at sub-national level. The regional administrative court of Bozen/Bolzano in South Tyrol (Italy) is composed of eight judges, four German speakers and four Italian speakers.<sup>92</sup> The Italian central government nominates four judges, two from each language group. The South Tyrolean provincial legislature nominates other four judges, also two from each language group. This is a smart institutional design loosely inspired by an electoral system of inter-ethnic vote pooling: the Italian government nominates as many German speaking judges as the (overwhelmingly) German speaking provincial legislature nominates Italian speaking judges. In case decisions of the regional court are appealed, one German speaker must join the appeals court.<sup>93</sup> Except on the top level of regional courts where the rule is absolute parity, personnel

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<sup>85</sup> Kuklík, Jan. 2015. *Czech Law in Historical Contexts*. Prague: Karolinum Press, 218; Article 94(4) of the Constitutional Act, 27. October 1968. Pehe, Jiri. 1991. Constitutional Court to be Established. *Report on Eastern Europe* 2(11), 9-11.

<sup>86</sup> Pehe, *Constitutional Court to be Established*.

<sup>87</sup> Article 10(1), Act on the Organization of the Constitutional Court of the Czech and Slovak Federative Republic, No. 491/1991, 7. November 1991.

<sup>88</sup> Article 47, Constitutional Charter of the State Union of Serbia and Montenegro.

<sup>89</sup> Article 14, Law on the Court of Serbia and Montenegro (Sl.List Srbije i Crne Gore 26/2003).

<sup>90</sup> Article 7 and Article 36(8). The Comprehensive Settlement of The Cyprus Problem, 31. March 2004 (*Annan Plan*).

<sup>91</sup> Article 25.2.

<sup>92</sup> Art. 2, Legislative Decree 161/1999 of 20. April 1999.

<sup>93</sup> Article 6.

in the judiciary, including judges, must proportionally reflect the ethno-linguistic composition of the population at provincial level.<sup>94</sup>

The point is that the specific institutional model that has been considered for these multi-national federations or divided polities was only the strong power sharing court, and not ordinary colour blind models of staffing an apex court that are regarded as the gold standard for judicial independence that mentioned theoretical accounts aspire to.

While strong power sharing courts reflect the principle of parity between constitutive peoples, weak power sharing courts proportionally reflect the broader population (in their salient cleavages). Switzerland prescribes balanced representation of the three official languages, as well as balanced representation of regions and linguistic minorities, but without setting quotas.<sup>95</sup> Constitutional convention has it that Switzerland's highest court reflects the political composition of parliament, with all judges being member of the designating political party.<sup>96</sup> The Swiss Supreme Federal Tribunal counts 23 German speaking, twelve French speaking and three Italian-speaking judges.<sup>97</sup> Switzerland's highest court closely reflects the proportional strength of language groups in the country, currently slightly corrected by an underrepresentation of German and an overrepresentation of French speaking judges. In the Former Yugoslav Republic of Macedonia, one third of the judges belong to minority communities,<sup>98</sup> thereby slightly over-representing them compared to their population weight. Weak power sharing courts tend to proportionally reflect the population with a slight overrepresentation of smaller communities.

Forms of weak power sharing courts in terms of proportional representation exist also at sub-national level. The UK House of Commons was divided whether parity or the D'Hondt system should be used for nominating judges to higher courts in Northern Ireland.<sup>99</sup> Given the violent past of the IRA, parliament opted for a politically less invasive method of judge selection.<sup>100</sup> However, deliberative efforts were put in place so that all levels of the Northern Ireland judiciary reflect, more or less proportionally, the salient group marker (i.e. the religious balance of the population).<sup>101</sup> The agreement on the normalization of relations between Serbia and Kosovo goes even beyond

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<sup>94</sup> Article 89, Statute of Autonomy.

<sup>95</sup> Article 89, Statute of Autonomy.

<sup>96</sup> Hauser, Robert. 1992. *Das Schweizer Bundesgericht im Vergleich zum Deutschen Bundesverfassungsgerichtshof*, in *Festschrift für Günter Spindel zum 70. Geburtstag*, edited by Seebode, Manfred. Berlin: Walter de Gruyter, 825-48, 833; the system has been refined but political membership is still necessary for election. Interview with Claude Roullier (former judge at Switzerland's highest court). 2014. [Kritik am Wahlverfahren vor der Gesamterneuerung des Bundesgerichts](#). *Blick*, 20. September 2014 (accessed: 20. June 2016).

<sup>97</sup> [Website](#) of the Swiss Supreme Federal Tribunal.

<sup>98</sup> Venice Commission. 1997. The composition of constitutional courts. CDL-STD(1997)020, 9.

<sup>99</sup> See the debates House of Commons debates on the Northern Ireland Justice. They specifically dealt with the appointment commissions and the reflective judiciary on 31. January 2002, available [here](#).

<sup>100</sup> Gee, Graham / Hazell, Robert / Malleson, Kate and Patrick O'Brien. 2015. *The Politics of Judicial Independence in the UK's Changing Constitution*. Cambridge: CUP, 240-3.

<sup>101</sup> McAlinden, Anne-Marie and Clare Dwyer. 2015. *Criminal Justice in Transition: The Northern Ireland Context*. London: Bloomsbury Publishing, 167.

that and institutionalizes a form of partial ethnic self-rule in the justice sector. All cases involving Kosovo Serb majority municipalities will be dealt by a special panel of the Prishtina appellate court to be based in (Serb held) northern Mitrovica, with a majority of Kosovo Serb judges.<sup>102</sup>

Multi-national states explicitly or implicitly consider identitarian categories when appointing judges to their highest courts and might do so by taking overall population figures as reference, which is a feature of weak power sharing courts.

### 2.3. *The function*

Courts have many systemic functions, but I assume that arbitration of salient inter-community conflicts is the most important function in deeply divided societies. The reason I assume this is that when apex courts fail to de-escalate political conflict (which is the reason why they are attributed arbitration function in the first place), this can put political inter-community relations under strain. Examples are the mentioned judgments of the Flemish section of the Council of State and the Belgian Constitutional Court's Brussels-Halle-Vilvoorde judgment,<sup>103</sup> which are interpreted by French-speaking constitutional scholars as 'activist' judgments in which these courts relinquished their pacification function.<sup>104</sup> The latter was the more serious one, causing nearly a decade of entrenched disagreement between language groups over the legal meaning, the interpretation and implementation of the judgment.

Back in the 1980s, Belgium established a Court of Arbitration to provide a legal forum for the resolution of conflicts of competence, and this implied also a legal forum for certain controversial issues for the language conflict. The central function of such a constitutional court can be rendered with the image of a referee that arbitrates decisions between different levels of government. A former president of the Belgian Constitutional Court argued that the Court is one of those institutional expressions of a Belgian culture of compromise that spared the country from a violent internal conflict.<sup>105</sup> Belgian statesman Wilfried Martens wrote that his government expanded the jurisdiction of the Court to individual rights cases so to keep communitarian tensions at bay from the central government.<sup>106</sup> The idea was to de-politicize divisive identity conflicts by offering a legitimate judicial outlet for their resolution. With the transfer of power over education to Belgium's sub-states, the Court was entrusted with protecting Belgium's ideological minorities that became vulnerable to majoritarian capture (Catholics through state schools in the French speaking region and non-Catholics through Catholic schools in the

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<sup>102</sup> Article 10, First agreement of principles governing the normalization of relations between Serbia and Kosovo. Said agreement is an EU brokered treaty between Serbia and its now de facto independent former province.

<sup>103</sup> Belgian Constitutional Court, 73/2003 of 23. May 2003.

<sup>104</sup> Delpérée, Francis. 2011. Après bientôt 30 ans. *Revue Belge de Droit Constitutionnel* 2, 73-6; Uyttendaele, *Les obligations linguistiques des mandataires politiques*; Scholsem, Jean-Claude. 2008. La Problématique De Bruxelles-Hal-Vilvoorde Et La Jurisprudence De La Cour Constitutionnelle. *Fédéralisme Régionalisme* 8(1).

<sup>105</sup> Martens, Paul. 2004. *De la Cour d'Arbitrage*, in *La Constitution belge - Lignes & entrelignes*, edited by Verdussen, Marc. Brussels: Le Cri, 316-25, 317.

<sup>106</sup> Martens, Wilfried. 2006. *Mémoires pour mon pays*. Brussels: Racine, 134.

Dutch speaking region). Scholars have argued that the justification for the existence of the Belgian Constitutional Court is to de-escalate ('pacify') the language conflict.<sup>107</sup>

Patricia Popelier elaborated on how the Court influences and is influenced by the specific context of the Belgian consensus democracy.<sup>108</sup> The Constitutional Court was created as one of the consensus institutions with the intent to keep united a country with otherwise deep divisions.

Bosnia's Constitutional Court is perhaps even more of an 'arbitrator' than its Belgian peer,<sup>109</sup> as it is embroiled with review jurisdiction over central functions or the democratic process. The Bosnian Court controls the procedural<sup>110</sup> and substantive<sup>111</sup> regularity of vital national interest veto rights of constituent peoples and entities. Interestingly, it is also called to judge if the special relations of its entities with kin states respect the Bosnian Constitution, including the principles of sovereignty and independence.<sup>112</sup> As the Venice Commission has noted, the Bosnian Constitutional Court plays an essential role in the functioning of the democratic process in Bosnia.<sup>113</sup>

The international judges within Bosnia's Constitutional Court are essentially (outside) arbitrators. If national judges in Bosnia are divided, the tie-breaking vote falls to international judges. Arbitration is a fitting analogy. The two parties submitting themselves to arbitration nominate an equal number of arbitrators, and agree on an umpire. In the Bosnian case the umpire (international judges) is chosen by outsiders (i.e. the president of the European Court of Human Rights).

The function of the Czechoslovak Constitutional Court, the Court of Serbia and Montenegro and the Cyprus Supreme (Constitutional) Court was to arbitrate in the event of conflicts over the attribution and proper exercise of power between the constituent republics. The Court of Serbia and Montenegro was the highest court of the land and an arbitration organ for all disputes between the

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<sup>107</sup> Delpérée, *Après bientôt 30 ans*.

<sup>108</sup> Popelier, Patricia. 2013. *The Belgian Constitutional Court: Guardian of Consensus Democracy or Venue for Deliberation*, in *Liberæ Cogitationes - Liber amicorum Marc Bossuyt*, edited by Alen, André / Joosten, Veronique / Leysen, Riet / and Willem Verrijdt. Antwerpen: Intersentia, 499-513; Popelier, Patricia and Koen Lemmens. 2015. *The Constitution of Belgium - A Contextual Analysis*. Oxford: Hart [particularly 192-218].

<sup>109</sup> Schneekener, Ulrich. 2008. *Third-party Involvement in Self-Determination Conflicts*, in *Settling Self-Determination Disputes - Complex Power-Sharing in Theory and Practice*, edited by Weller, Marc and Barbara Metzger. Leiden: Brill, 467-500, 477-8 [arguing that the Bosnian Constitutional Court and other institutions of arbitration in Bosnia had the ambivalent effect of breaking deadlock but encouraging political intransigency].

<sup>110</sup> Article IV.3f Constitution [constitutional court oversight over national vital interest veto rights].

<sup>111</sup> See para 6; as well as the Court's decision in U-2/04 of 28. May 2014, para 27 [the Court "should have the role of assisting in de-blocking of the work of the Parliamentary Assembly of Bosnia and Herzegovina by its decision on the merits, if the Parliamentary Assembly is not capable of overcoming the problem by itself."].

<sup>112</sup> Article VI.3a [charging the Court to establish if parallel relations of entities' are in accordance with Bosnia's territorial integrity].

<sup>113</sup> Venice Commission. 2005. Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia-Herzegovina. Opinion no. 344/2005. Strasbourg [referring to the Court as a "guarantor of the functioning of the Parliamentary Assembly"].

constituent republics.<sup>114</sup> As a testament to the confederal logic of the state union, the Court was joined in its deliberations by the constitutional courts of the member states, who took part in the decision making.<sup>115</sup> The Cyprus Supreme Court, under the Annan plan, was considered to be an extreme example of government by judges: all political deadlocks arising between the constituent republics at the federal level had to be decided and solved by that court.<sup>116</sup> Common to power sharing courts is their function, namely to regulate and de-escalate ethno-political conflicts through the means of law.

#### 2.4. *Decision-making by consensus*

A third characteristic of power sharing courts is that no group of judges reflecting one segment of these salient cleavages commands a majority in a power sharing court. Decision-making requires a consensus that goes beyond the boundaries of the group. Belgian apex courts, as well as the hybrid constitutional courts of Bosnia and Kosovo,<sup>117</sup> and the subnational constitutional courts within Bosnia, the regional court of Bozen/Bolzano (South Tyrol/Italy) the Cypriote Supreme Court (according to the constitutional framework), the Court of Serbia and Montenegro (according to the constitutional charter) and the Czechoslovak Constitutional Court are among the courts fitting these criteria.

As well, the internal rules of a constitutional court may contain rules that codify limits to majority decision making. The internal rules of the Bosnian Court have been modified in 2014 with the intent to minimize, at least formally, the power sharing character of the Court. Up to 2014, the Constitutional Court session was to be adjourned if none of the judges representing a constituent people was present, unless the issue “considered [did] not affect the constituent people represented by the absent judges.”<sup>118</sup> The Court explicitly wrote that judges ‘represent’ constituent peoples, in blatant violation to the principle of substantive judicial independence. The rules were amended after input from the High Representative<sup>119</sup> and the EU,<sup>120</sup> with the aim to comply with Strasbourg’s *Sejdic-Finci* verdict.<sup>121</sup> Power sharing in the internal rules brings to the fore the tension between the institutionalization of ethnicity and liberal rights, a subject that will be closely examined in the third part of this paper.

However, limits to majoritarianism need not necessarily to be codified in procedural rules of the Court but result from self-restraint of judges. For

<sup>114</sup> Article 46, Constitutional Charter of the State Union of Serbia and Montenegro. Art. 37, Law on the Court of Serbia and Montenegro (Sl. List Srbije i Crne Gore 26/2003).

<sup>115</sup> Article 49.

<sup>116</sup> Varnava, Andrekos and Hubert Faustmann. 2009. *Reunifying Cyprus: The Annan Plan and Beyond*. London: IB Tauris, 99-100.

<sup>117</sup> Article 152, Constitution of Kosovo [the temporary composition of the Constitutional Court provides for three international judges.] After EU pressure, Kosovo accepted to extend the mandate of international judges even beyond the time limit imposed by Kosovo’s Constitution.

<sup>118</sup> Article 42. [Old] Rules of the Court (Official Gazette of Bosnia and Herzegovina, Nos. 26/01, 6/02 and 1/04), [available here](#).

<sup>119</sup> Interview with a high-ranking legal expert. Sarajevo, 30. April 2014. On file with the author.

<sup>120</sup> The Court wrote that it modified its rules in line with the EU-BiH Structured Dialogue on Justice. Constitutional Court, News of 12. February 2014, available at [www.ustavisud.ba](http://www.ustavisud.ba).

<sup>121</sup> ECtHR [GC], 22. December 2009, nos. 27996/06 and 34836/06, *Sejdic and Finci v. Bosnia-Herzegovina*.

instance, judges of the Bosnian Constitutional Court agreed not to take any decisions without the presence of Bosnian Serb judges. Although the Constitutional Court would have been perfectly able to deliberate without them, and its decision would have been formally without flaw, it decided to wait for the appointment of these judges.<sup>122</sup> The remaining judges knew that decisions of the Court without the representation of Serb judges would have been formally legal but with a very weak (sociological) legitimacy. Limits to majority decision making can be either codified in court rules or be agreed by majority judges in an act of self-restraint.

Contrary to power sharing at the political level where decisions can be blocked, the judicial level has often but not always tie-breaking mechanisms. There are no minority vetoes in Bosnia and Belgium. Decision-making is guaranteed either by uneven number of judges (Bosnia) or astute institutional mechanisms that allow for decision making while at the same time respecting parity (Belgium). As courts have the power of the last word, they would breach the right to a fair trial if they were not able to reach a decision in a case. Interestingly, politicians wanted to extend certain forms of minority veto, in the form of an overlapping majority, from the political process to the decision making procedures within the constitutional court.

A minority veto for judges has been considered in both the Belgian and Bosnian constitutional courts but ultimately rejected for its incompatibility with core principles that govern the judicial system. In Belgium, the draft law on the Constitutional Court foresaw that the Court could only deliberate if a majority of judges from each community was present (that is at the very least a total of eight judges).<sup>123</sup> Further, the Court could only take decisions on the condition that at least two judges from each community were in the majority.<sup>124</sup> Prime Minister Martens explained that the aim of this design was to prevent that there could be any suspicion that sensitive decisions touching the equilibrium between state institutions could be taken by judges from one community only.<sup>125</sup> The Council of State rejected the draft law, as these requirements would block the judicial system. If the judges from one community do not show up or a decision fails to have the necessary vote from both communities, the highest court of the land would be de facto paralyzed.<sup>126</sup> The Belgian Council of State rejected this concurrent majority proposition for the same reasons as later the Venice Commission for Bosnia.

Bosnian politicians and constitutional scholars discussed whether decisions of the Constitutional Court should be valid only under the condition that at least one judge per constituent people was part of the deciding majority. The High Representative put the question to the Venice Commission. The Commission responded negatively by affirming that vetoes would be “alien to the very

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<sup>122</sup> Feldman, *The Independence of International Judges in National Courts*, 222-3.

<sup>123</sup> Article 32.3. of the draft law 435. Doc. par. Senate, 1979-1980, n°435/1.

<sup>124</sup> Article 32.3.2, draft law 435.

<sup>125</sup> Doc. par. Senate, 1979-1980, n°435/1, at 16 [Prime Minister Martens - explanatory statement to the law on institutional reform].

<sup>126</sup> The negative opinion is based on the draft laws 435 and 704 of what became the law of 28. June 1983. Doc. par. Chamber (1979-1980) n°435/1-Annex; Doc. parl. Senate (1980), n°704/1, p.31 and following.

nature of judicial decision making and the principles that flow from this nature.”<sup>127</sup> In Bosnia and Belgium minority vetoes in the Court were considered by the legislator, but ultimately rejected after negative opinions from constitutional advice giving organs;<sup>128</sup> not only for their incompatibility with the nature of judicial decision making but also out of fear that blocking the constitutional court would block the political system.

The Belgian Constitutional Court decides most cases in chambers of seven judges: three judges from each language group respectively and the remaining judge will alternate between language groups on a yearly basis. In the plenum (twelve judges), the tie-breaking vote rotates between both presidents every judicial year. This system is replicated in all Belgian apex courts. The result is that courts have to find a decision and do so by compromise, knowing that majority positions are not fixed but reversed every year.

In Czechoslovakia a chamber of the constitutional court consisted of four judges, two from the Slovak and two from the Czech republic respectively.<sup>129</sup> Decisions therefore could not be taken against the will of judges from one ethnic group acting collectively. In case of parity the case was referred to the plenum. The plenum had several rules to postpone decision making until an agreement could be found, but interestingly it seems that there was no other tie breaking rule except repeating the voting endlessly.<sup>130</sup> In the Court of Serbia and Montenegro, the tie-breaking vote fell to the president.<sup>131</sup> Assuming that the presidency rotated between judges from the two constituent republics (see below), the judges from each constitutive republic acting collectively could never be permanently outvoted.

In South Tyrol, two chambers of four judges each in the regional administrative court are composed by judges from both language groups on a paritarian basis. As in the other cases, this means that no decision (at this level of the judicial procedure) can be taken against judges from one language group acting collectively. South Tyrol has a similar tie breaking rule as Belgium - but only for ‘normal’ procedures. In these cases, the tie breaking vote rests with the president of the Court, which alternates between a German speaker and an Italian speaker (two years each in a term of four years). The tie-breaking vote is suspended in cases that touch ‘sensitive’ issues such as the ‘principle of parity between linguistic groups’ (a catch all phrase including ethnic proportionality requirements, language legislation, and other issues the deciding court has included as falling under the purview of this principle) and

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<sup>127</sup> Venice Commission. 2005. *Draft Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia-Herzegovina*. Opinion 344/2005, para 4.

<sup>128</sup> Velaers, Jan. 1985. *Het Arbitragehof*. Antwerp: Kluwer, paras 211, 212. Velaers refers to the opinions on the draft laws 435 and 704 of what became the law of 28. June 1983. Venice Commission. 2005. *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia-Herzegovina*, no. 344/2005. Strasbourg, 8. November.

<sup>129</sup> Article 10, Act on the Organization of the Constitutional Court of the Czech and Slovak Federative Republic, no. 491/1991 of 7. November 1991.

<sup>130</sup> Articles 4, Procedural Rules of the Czechoslovak Constitutional Court, 51/1992 of 26. March 1992.

<sup>131</sup> Art. 115, Law on the Court of Serbia and Montenegro (Sl.List Srbije i Crne Gore 26/2003).

the provincial/regional budget.<sup>132</sup> In these cases, the regional court must emit an ‘arbitrators award’ with a reinforced majority.<sup>133</sup>

To be clear, that judgment of the regional administrative court does not qualify as an administrative decision but as an ‘arbitration award’. In these cases, the regional court acts as a court of last resort and its decisions cannot be challenged in front of any other court, not even the Constitutional Court.<sup>134</sup> The point is, as the Council of State put it, to require a consensus that goes beyond the confines of one group in ethnically sensitive matters.<sup>135</sup> The downside however is that in matters touching the ‘principle of parity of linguistic groups’ a tie between judges means that the case is rejected.<sup>136</sup> The Belgian system seems smarter in comparative perspective, because it does not allow one group of judges to permanently veto a decision challenging the status quo. The Council ‘saved’ South Tyrol’s power sharing court (first the parity of representation<sup>137</sup> and then the arbitration award<sup>138</sup>) due to the ethno-politically sensitive nature of cases that the court ‘arbitrates’.

The Swiss case is more complicated. Switzerland is a multi-national democracy, but cannot be considered a divided society any more.<sup>139</sup> Nonetheless, it cannot be excluded that language cleavages reflect in judicial decision making. The first public chamber of the Federal Supreme Court deals with the more politically charged fields of law and all conflicts of competence between the different levels of government. Currently it is composed by three German speakers, two French speakers and one Italian speaker.<sup>140</sup> The Swiss parliament approved by large majority a motion to charge the government to make a law for dissenting opinions in its highest court,<sup>141</sup> but as of May 2016 the government still has to take action. It is not clear whether linguistic or political cleavages emerge in its decision making. However, the Swiss Supreme Court is much less a court of arbitration than other cases for a variety of reason: Switzerland has a rather weak form of judicial review, and extensive processes of democratic participation as well as a strong culture of consensus creates less favourable conditions for judicialization. A feature of power sharing courts is to require decision-making beyond the salient cleavages.

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<sup>132</sup> Art. 91, *Statute of Autonomy*.

<sup>133</sup> Article 84, Statute of Autonomy. Council of State, decision n. 960 of 22. February 2003.

<sup>134</sup> Article 84, Statute of Autonomy (jurisdiction of the Constitutional Court is *expressis verbis* excluded) upheld by the Council of State against challenge in decision n. 960 of 22. February 2003.

<sup>135</sup> Article 84, *Statute of Autonomy*.

<sup>136</sup> Art. 9,1, d.P.R. (decree of the President of the Republic), 426/1984.

<sup>137</sup> Council of State (V section), n. 1097 of 7. August 1991.

<sup>138</sup> Council of State (IV section) n. 960 of 22. February 2003.

<sup>139</sup> Stepan, Alfred. 1999. Federalism and Democracy: Beyond the U.S. Model. *Journal of Democracy* 10(4), 19-34, 19; Stepan argued that Switzerland is the most difficult case to classify whether “it is actually multinational or not.” Stepan, Alfred. 2011. *Arguing Comparative Politics*. Oxford: Oxford University Press, 327.

<sup>140</sup> Website of the Swiss Federal Supreme Court.

<sup>141</sup> The federal government asked for green light from parliament to change the law on the Federal Supreme Court to allow judges to express their dissent. The lower and upper chambers recently approved the motion with a large majority. The Federal Government has now the political mandate to change the law. The Federal Supreme Court publicly manifested its objection against allowing dissenting opinions. Upper chamber (*Ständerat*), doc.14.3667, approved in session 18. June 2015.

*2.5. Group rotation of presidency and vice-presidency*

The fourth element of power sharing courts is the distribution of posts of influence between constituent communities in the court.

All Belgian apex courts have two presidents, one each for the two dominant communities. The Council of State has a president and a first-president; they may not belong to the same language group.<sup>142</sup> In the Constitutional Court's plenum, six judges of the Court are French-speakers and six judges Dutch-speakers.

In Bosnia, decision-making is less of a problem but where necessary similar rules to Belgium apply. The unequal number of judges allows for majority decision-making in Bosnia. The new 2014 rules maintain power sharing in the allocation of high offices within the Court (presidency and vice-presidencies),<sup>143</sup> but removed the other references to constituent peoples in decision making. In line with broader efforts to liberalize Bosnia's consociation, a reform of the rules of procedure of Bosnia's Court sought to minimize explicit references to identitarian traits of judges. Still, the positions of presidency and vice-presidencies of the constitutional court rotate according to a group logic.

The same logic informed the Czechoslovak case. The Constitution of 1968 foresaw that positions of influence were to be divided between Czechs and Slovaks: "Should the President of the Constitutional Court be elected from the Czechoslovak Socialist Republic, a citizen of the Slovak Socialist Republic shall be elected as the Vice-President and vice versa."<sup>144</sup> When the constitutional court of democratic Czechoslovakia was established in 1991, the former constitutional text was literally copied and pasted into the new constitutional law.<sup>145</sup> The Cyprus Constitution provides that the international judge should be president of the Court, therefore putting the two national judges in a position of parity. If a vacancy arose and the presidency disagreed on the successor, the member of the presidency to which community the retiring judge belonged would nominate its successor.<sup>146</sup> As mentioned before, the presidency of the regional court in South Tyrol rotates on a two year basis between an Italian and a German speaking judge.

In the Court of Serbia and Montenegro, there was no formal rotation between judges from constituent republics for the seat of the presidency. The president was elected in a special court session by a majority of judges - with the higher age breaking the tie in case of parity of votes.<sup>147</sup> The length of the term of office of the president is exactly half of the full term (three years out of a non-

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<sup>142</sup> Art. 69 and 73 para. 1, Coordinated Laws on the Council of State.

<sup>143</sup> Article 83 (rotation) and Article 86 (election of Vice-Presidents) of the Rules of Procedure (Official Gazette of BiH no. 22/14). See the revised text of the Rules of Procedure established in 2014, available [here](#) [ex Articles 87 and 90-3 of the old Rules of Procedure of the Constitutional Court (Official Gazette of Bosnia and Herzegovina, Nos. 26/01, 6/02 and 1/04)].

<sup>144</sup> Article 95, Constitutional Act, 27. October 1968.

<sup>145</sup> Article 11(2), Constitutional Act on the Constitutional Court of the Czech and Slovak Republic, 27. February 1991.

<sup>146</sup> Article 133, Constitution of Cyprus.

<sup>147</sup> Article 18, Law on the Court of Serbia and Montenegro (Sl. List Srbije i Crne Gore 26/2003).

renewable six-year term for constitutional court judges).<sup>148</sup> In light of the logic of the system and the length of term, rotation of power positions within the Court between judges from different constituent republics would have been likely.

While in the discussed cases power sharing is shared within one institution (mono-institutional pluralism), power sharing is also possible between and not within one judicial institution. In Lebanon, constitutional convention determines that the president of the Court of Cassation is a Maronite Christian, the public prosecutor before the Court of Cassation a Sunni and the President of the Court of Audit a Shi'a.<sup>149</sup> However, this form of judicial power sharing is less paritarian than the cases discussed because the different institutions are not equal in power and prestige.

Another feature of parity esteem would be language requirements within the court. In Belgium, Bosnia, Czechoslovakia, Serbia-Montenegro and Switzerland apex court judges speak or spoke their mother tongue. In Catalonia and South Tyrol judges also need to be bilingual. In Canada the proposal that judges need to be bilingual was unanimously approved by the Quebec assembly, but rejected by the federal parliament for meritocratic considerations.<sup>150</sup> For Quebecois, bilingualism as a condition for Supreme Court judgeship was seen as a matter of justice.<sup>151</sup>

Bilingualism requirements are certainly a softer form of diversity management than power sharing courts, which condition access to judicial positions not necessarily to candidates possessing a certain skill (such as bilingualism), but require the candidate to possess a certain identity marker (such as declaring to belong to a certain language group). Language requirements could be an option to 'unwind' identitarian elements of power sharing courts in polities divided by language cleavages (such as Belgium and South Tyrol). However, space constraints do not allow me to develop this point further.

The broader point is: parity between constituent groups not only informs the composition, but also the internal organization and decision making rules of power sharing courts. Courts that do not reflect the cleavages in its design and decision making rules may not have the broad legitimacy that is necessary to solve salient inter-community conflicts.

### 2.7. *Majoritarian courts as an imperfect arbiter*

Constitutional courts that exercise an arbitration function in a majority-minority conflict but are not power sharing courts may not be regarded as an impartial arbiter. In many countries constitutional courts are also charged with salient cases that pit the majority against a territorially concentrated

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<sup>148</sup> Article 18, Law on the Court of Serbia and Montenegro.

<sup>149</sup> Chalhoub, Elias. 2007. *Promoting the Rule of Law and Integrity in the Arab World Project - Report on the State of Judiciary in Lebanon*. Arab Center for Development of the Rule of Law and Integrity.

<sup>150</sup> Parliament of Canada, bill C-232 (draft law was approved by the House of Commons but perished in the Senate).

<sup>151</sup> Senator Claudette Tardif (sponsor of bill C-232). 2010. Bilingual Supreme Court is a matter of justice. *Toronto Star*, 25. April.

ethnic minority. Recurrent examples are judicial review of Catalonia's Autonomy Statute<sup>152</sup> and self-determination bid,<sup>153</sup> Ukraine's Constitutional Court decision on the secession of Crimea,<sup>154</sup> South Tyrol's autonomy within Italy,<sup>155</sup> Macedonia's Constitutional Court decision on rights of the Macedonian Albanian community,<sup>156</sup> the decision of the Serbian and French constitutional courts on regional autonomy statutes of Vojvodina<sup>157</sup> and Corsica<sup>158</sup> respectively, and many other examples.

Decisions of a state constitutional court on ethnic issues are openly contested in South Tyrol, Quebec, Catalonia, and most of the above mentioned cases. Quebecois lament that the appointment procedures weaken the legitimacy of the Supreme Court when arbitrating disputes between the Canadian majority nation and the French Canadian minority nation. The same lack of legitimacy afflicts decisions taken by territorially competent judges but which are of concern to a much broader polity, such as the above mentioned decisions of the Flemish section of the Council of State on divisive language issues. In all of these cases the legitimacy of the deciding court was perceived as weak, because the composition and decision making rules of these courts did not or did only insufficiently reflect the relevant cleavages.

As a response, minorities have been demanding to have a higher representation in these judicial decision making bodies. Quebecois have consistently been requesting a strong power sharing court: one in which the composition, the decision making rules and the positions of influence are reflective of the dualistic nature of the Canadian polity.<sup>159</sup> South Tyrolians have introduced a draft constitutional law amending the Italian Constitution so that at least one Constitutional Court judge would be expression of a linguistic minority.<sup>160</sup> The argument is that such judge would bring an additional viewpoint to the constitutional court, because he/she would better know and be more sensitive to the legitimate needs of the country's linguistic minorities.<sup>161</sup> South Tyrolean NGO's went further and demanded that South

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<sup>152</sup> Spanish Constitutional Court, no. 31/2010 of 28. June 2010.

<sup>153</sup> Spanish Constitutional court, no. 259/2015 of 2. December 2015.

<sup>154</sup> Ukrainian Constitutional Court, no. 1-13/2014 of 14. March 2014.

<sup>155</sup> South Tyrol will reform the region's 'constitution' (i.e. the Autonomy Statute) with an eye to counter centralizing case law of Italy's Constitutional Court. The author is a member of the *South Tyrol Convention*, a body of citizens selected by the provincial council to provide input for that reform.

<sup>156</sup> Municipal authorities did not implement the judgment on the removal of the Albanian flag; several were killed and hundreds wounded when police forcibly removed the flag from municipal buildings.

<sup>157</sup> The conflict between the Constitutional Court and the Vojvodina Autonomous Region within Serbia over the region's autonomy statute has been spanning over many years. The main Court decisions are IUz-353/2009 of 10. July 2012 and IUo-360/2009 of 5. December 2013.

<sup>158</sup> French Constitutional Council, decision 91-290 DC of 9. May 1991 (on Corsican Autonomy Statute), with principles reaffirmed in decision 2001-454 DC of 17. January 2002.

<sup>159</sup> Brouillet, Eugenie and Yves Tanguay. 2012. Legitimacy of the Constitutional Arbitration Process in a Multinational Federative Regime: The Case of the Supreme Court of Canada. *UBCL Rev.*, 47-101.

<sup>160</sup> Italian Chamber of Deputies, draft constitutional law no. 2490 (submitted by Schullian, Alfreider, Gebhard, Plangger, Ottobre and Oliverio), proposed 25. June 2014 [modifying Article 135 of the Constitution as follows: "One of the judges nominated by parliament is proposed by the linguistic minorities of the Italian Republic".

<sup>161</sup> Draft constitutional law no. 2490, Explanatory report.

Tyrol be given its own constitutional court, that is a court of last instance to interpret the Autonomy Statute and solve competence conflicts with the Italian state.<sup>162</sup> With the sixth reform of the Belgian state, the contentious issue of the Brussels municipalities with language facilities was taken away from the Flemish section and attributed to the General Assembly of the Council of State, composed by an equal number of French and Dutch speaking judges (called ‘councillors’). Paritarian courts attempted to solve contentious issues by compromise and helped to bridge the divide between language groups in legal doctrine and case law.<sup>163</sup> Minorities have been demanding that the composition of apex courts reflect the cleavages that define and divide the broader polity.

The next part discusses criticisms that can be moved against power sharing courts as well as arguments for their rebuttal.

### 3. Criticizing and justifying power sharing courts

This section focuses on five criticisms and their possible justifications for power sharing courts. The first three are fundamental criticisms against power sharing courts. The argument goes that power sharing courts are illegal and illegitimate, at least in their strong form, because they are incompatible with an evolving fundamental rights regime and democratic norms of political equality. The other three objections are that power sharing courts are not meritocratic, based on wrong premises and under-inclusive. These criticisms overlap with those directed at power sharing more generally.

#### 3.1. *Power Sharing Courts – Illegal, undemocratic, unmeritocratic?*

The first criticism concerns the illegality of power sharing courts. The former Cypriote judge of the European Court of Human Rights said that the bi-communitarian Cypriote state to be established by the Annan plan is illegal, because it breaches European equality law. He argued that the paritarian setup in key state institutions, including the Supreme Court, amounts to racial discrimination forbidden under the European Convention of Human Rights: “arrangements, administration and other authorities of the state split on the basis of racist criteria [...] are not in accordance with democratic principles”.<sup>164</sup>

Steiner and Ademovic argued that the constitutional convention of electing Bosnian constitutional court judges on an ethnically paritarian basis is itself unconstitutional.<sup>165</sup> Bardutzky concurred: the composition of the Bosnian Constitutional Court, based on solely territorial considerations but with implicit representation of the three constituent groups following a constitutional convention, might engage the International Convention on the Elimination of All Forms of Racial Discrimination and the International

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<sup>162</sup> Proposition of NGO Brennerbasisdemokratie, presented during the South Tyrol Convention’s public input session for associations, 3. May 2016, Bozen/Bolzano, at 10. Available [here](#).

<sup>163</sup> Velears, *Territorialiteit versus personaliteit: een never ending story?*.

<sup>164</sup> Loucaides, Loukis. 2005. Interviewed by Efthyvoulos, Alex. *Cyprus Weekly*, 15. April 2005 (accessed: 22. May 2016); same argument was made in Varnava and Faustmann, *Reunifying Cyprus: The Annan Plan and Beyond*, 99.

<sup>165</sup> Steiner and Ademovic, *Constitution of Bosnia-Herzegovina - Commentary*, 676.

Covenant on Civil and Political Rights.<sup>166</sup> Steiner and Ademovic qualified ethnic power sharing in the rules of the Court as clearly in breach of the Constitution and international human rights law.<sup>167</sup> Similarly, petitioners have used related arguments against power sharing in South Tyrol's judiciary.<sup>168</sup> There is an evident tension between the consideration of ascriptive categories of membership in judicial selection and the principle of judicial independence.

The second criticism is that power sharing courts are undemocratic. This criticism is tied to the illegality argument discussed before. Power sharing in the political system has been increasingly defined as undemocratic, because it deviates from political equality and limits access to political representation only to candidates possessing a certain social trait. The literature has reiterated this critique repeatedly.<sup>169</sup>

Strong critiques against consociationalism have recently emerged even in what Lijphart considered the most perfect institutional embodiment of his theoretical brainchild - Belgium.<sup>170</sup> For Stefan Sottiaux, Belgium's consensus institutions and procedure distort the will of the majority and should be abolished.<sup>171</sup> He enrolled the European Court's *Sejdic and Finci v. Bosnia-Herzegovina* judgment as authority against power sharing norms. Contrary its more prudent ruling in the Belgian cases, the European Court found that power sharing arrangements for Bosnia's political institutions violated the right to vote and the stand-alone non-discrimination clause. Sottiaux cautioned that the judgment is specific to Bosnia and does not legally question the organization of consensus institutions in his country. He justified his opinion by arguing that Belgium was organized territorially and the identification of language groups followed objective and subjective criteria. As I have argued elsewhere, the more recent *Zornic* judgment<sup>172</sup> put in question the subjective criteria that according to Sottiaux distinguish the Belgian system.<sup>173</sup>

Even if power sharing institutions may not be technically illegal, scholars argued that they form an unjustified deviation from political equality. If one accepts the argument that democracy is about the people and not about the peoples, what justifies a court that is composed with reference to cleavages of group membership and identification? The gist is: if political institutions are

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<sup>166</sup> Bardutzky, Samo. 2010. The Strasbourg Court on the Dayton Constitution: Judgment in the Case of *Sejdić and Finci V. Bosnia and Herzegovina*, 22. December 2009. *European Constitutional Law Review* 6(2) 309-33, 329.

<sup>167</sup> Steiner and Ademovic, *Constitution of Bosnia-Herzegovina - Commentary*, 677.

<sup>168</sup> Italian Council of State (fifth section), decision 1097 of 7. August 1991. As discussed, the Council rejected the case as manifestly ill founded.

<sup>169</sup> Barry, Brian. 1975. The Consociational Model and Its Dangers. *European Journal of Political Research* 3(4), 393-412; Phillips, Anne. 1993. *Democracy and Difference*. Cambridge: Polity Press, 151-6; Noel, Sid. (ed.). 2005. *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*. Montreal: McGill University Press.

<sup>170</sup> Lijphart, Arend. 1981. *Introduction: the Belgian Example of Cultural Coexistence*, in *The Dynamics of a Culturally Divided Society*, edited by Lijphart, Arend. Berkeley: University of California Press, 1-12.

<sup>171</sup> Sottiaux, Stefan. 2011. *De Verenigde Staten Van België - Reflecties over de toekomst van het grondwettelijk recht in de gelaagde rechtsorde*. Mechelen: Kluwer.

<sup>172</sup> ECtHR 15. July 2014, no. 3681/06, *Zornic v. BiH*.

<sup>173</sup> Graziadei, Stefan. 2016. Democracy v. Human Rights - The Strasbourg Court and the Challenge of Power Sharing. *European Constitutional Law Review* 12(1), 54-84.

undemocratic if organized according to the principle of consociational democracy, what makes courts democratic if organized along the same lines?

A third criticism against power sharing courts is based on considerations of merit. For instance, why should in Canada only judges that are perfectly bilingual be allowed to become judges of the Supreme Court, as demanded by Quebec? All documents are translated, so why reducing the pool of candidates only to the ones perfectly bilingual? Or why does the judiciary in South Tyrol and Northern Ireland have to reflect 'essentialist elements' (the ethno-linguistic balance of the population)? The 'meritocratic' argument is that the best names should make it to the top of the judicial system, irrespective of the language that they speak or the ethnic/national/linguistic/religious group they chose to affiliate with. Diversity should be the natural result of a diverse society and not be engineered into the system by design. The 'identitarian' trait of power sharing courts sits uneasily with the principle of meritocracy.

A fourth criticism is that identitarian considerations are incompatible with judicial independence. Including identitarian traits in apex courts design implicitly means acknowledging that judges will vote according to their community/ethnic background. But such a conception of the judicial function cannot be reconciled with judicial independence. Judges ought to be independent and rule according to what the law says irrespective of their background. This in essence Kumm's argument discussed in the second part. The premise for power sharing courts is itself based on a wrong understanding of the judicial function and the independence of judges.

A fifth criticism is that a power sharing system does not fairly reflect society's diversity and only includes those diversities that are politically salient. A power sharing system institutionalizes certain cleavages but ignores others. For instance, the Belgian system of constitutional court nomination prescribes numeric parity between French and Dutch speaking judges. Other diversities, for instance immigrants or Belgians (for instance from the German speaking community) who cannot or do not want to identify with the two dominant groups, are excluded. German speakers in Belgium seem to be a well-protected minority, but are not represented in the main institutions of the federal state (such as government and constitutional court). In South Tyrol, Ladin speakers are constitutionally barred from become judges at the highest regional court. Even where power sharing in court is based on territorial considerations, such as in Czechoslovakia and Bosnia, it is implicitly assumed that all these positions are ethnically predetermined.<sup>174</sup> In Bosnia, only members of constituent peoples can achieve positions of power within the Court. Power sharing includes those who already have power and excludes new diversities or other groups (such as Jews and Roma in Bosnia, Germans in Belgium, Ladins in South Tyrol). How should judges be legitimate dispensers of justice and impartial referees when judicial bodies are not only under-inclusive of societal diversity, but sometimes have eligibility requirements that in law or practice exclude specific groups?

On the other hand, there are several arguments for rebutting these criticisms.

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<sup>174</sup> Kuklík, *Czech Law in Historical Contexts*, 218.

### 3.2. *Power Sharing Courts - Legal and legitimate*

As I have argued elsewhere, recent case law of the European Court of Human Rights pushes consociational power sharing into a grey area, to a certain extent without sufficient justification.<sup>175</sup> However, so far the European Court has not ruled power sharing institutions itself illegal, but merely the electoral rules leading to the composition of governmental or legislative bodies. In the case of Bosnia, the rules for selection of constitutional court judges are entirely territorial. Certain power sharing rules of the Bosnian Court within its procedural rules have been purged as a response to the judgment of the European Court. It is unlikely (also in light of procedural requirements) that anyone in Belgium could mount a successful judicial challenge against the parity in composition of key state organs, including the constitutional court. If that ever happened and the European Court acknowledged similarities with the Bosnian cases, it could distinguish the referred Belgian case by invoking precedent and the democratic consensus around the country's constitutional setup.

The composition of the regional court of Bozen/Bolzano has been challenged for violating judicial independence and the principle of meritocracy, but the Council of State dismissed the case as manifestly ill-founded and refused to engage the Constitutional Court.<sup>176</sup> In a later case, the Council 'saved' the designation of the regional court as a court of final arbitration on politically sensitive cases touching the 'principle of parity between language groups'. The Supreme Court of a united Cyprus would be vulnerable to similar criticism as its Bosnian counterpart, touching the question whether ethnic criteria disguised as territorial ones fall foul of Convention law and whether the mandate for foreign constitutional court judges is compatible with state sovereignty.

As matters currently stand and given the margin of appreciation generally granted in these matters, an international court would likely uphold the rules governing the composition of these courts against challenge with arguments not unlike the ones used by the Belgian Court to defend itself: the parity requirements are not an impairment to but a guarantee for the impartiality of these courts.<sup>177</sup>

The most convincing defence of power sharing courts is that their function justifies their composition. Even if power sharing courts were not illegal, they starkly differ from more 'civic' appointment procedures and decision making rules in most countries. Power sharing courts remain problematic because they sit uneasily with the principle of democratic equality. But could one imagine a court of arbitration where one party chooses more judges than the other? The group who nominates more judges will therefore likely 'win' the case. In the Permanent Court of Arbitration, the whole selection mechanism of arbitrators

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<sup>175</sup> Graziadei, *Democracy v. Human Rights*; O'Leary and McCrudden developed a more fundamental and lengthy critique to the handling of power sharing cases by the European Court, *Courts and Consociations*.

<sup>176</sup> Council of State (fifth section), decision 1097 of 7. August 1991.

<sup>177</sup> Belgian Constitutional Court, 157/2009, B.6.

is based on strict parity.<sup>178</sup> In case of protracted disagreement, the lot would ultimately determine the umpire. The analogy of parity between parties in the Arbitration Court and the Bosnian, Belgian, South Tyrolean, Czechoslovak and Cypriote power sharing courts is striking.

Again, already Kelsen made the argument for parity in courts that adjudicate federal disputes. He argued for parity because disputes between the federal state and federated entities are a question of (political) life and death.<sup>179</sup> Due to the particular salience of these questions, the constitutional court needed to be a neutral arbiter, as its core function is to guarantee the political peace within a country.<sup>180</sup> Kelsen also found that constitutional courts are important referees in protecting minority rights. However, he did not infer from that argument that this would warrant the inclusion of minorities into constitutional courts.

What my analysis of power sharing courts does is interpret Kelsen more functionally. In states which are composed of different constituent nations or where important conflicts take place between a majority and a minority nation, the case for a paritarian court, or at least a proportionally representative one, should be made in reference to these cleavages and not only the territorial cleavages that Kelsen had in mind. Judicial 'narratives' on the constitution are different in each subgroup and are likely to influence a judge's vote in a highly sensitive case. In the specific circumstances of divided societies the suspicion that judges remain biased in favour of their community cannot be ruled out - only courts which are representative of the main cleavages in the political system have the necessary legitimacy to take decisions that have important consequences on societal peace between discrete communities in fragmented polities.

This seems well acknowledged in these societies themselves. In Belgium there is broad consensus that the only imaginable composition of apex courts is one of parity. Although the constitutional text is silent on the ethnic composition of the Court, Bosnian political parties agreed on a constitutional convention to have paritarian composition of all constituent peoples in the Court. In Cyprus it was 'quickly agreed' that the Court should have an equal number of Turkish and Greek Cypriots.<sup>181</sup> Also in Czechoslovakia it was clear that a common constitutional court would have an equal number of Czechs and Slovaks. The parity is not necessarily due to the arbitration function of the court between different territorial organs, but between different groups. The Belgian Court was born as a court of arbitration between different regions, yet no has ever argued that territorial regions or linguistic regions (such as the Brussels region or the German speaking community) and not language groups should nominate the members of the constitutional court. Parity in the highest courts is a deliberate and accepted result to vest courts with functions to arbitrate conflicts between constituent communities.

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<sup>178</sup> The whole selection process is explained in more detail in Butler, William. 1992. *The Hague Permanent Court of Arbitration*, in *International Courts for the Twenty - First Century*, edited by Janis, Mark. The Hague: Kluwer.

<sup>179</sup> Kelsen, *Mitbericht von Professor Dr. Hans Kelsen*, 82.

<sup>180</sup> Kelsen, *Mitbericht von Professor Dr. Hans Kelsen*, 5 and 87.

<sup>181</sup> Varnava and Faustmann, *Reunifying Cyprus: The Annan Plan and Beyond*, 31.

The identitarian composition could be defended by invoking the democracy principle or as a confidence building measure. Apex courts' identitarian traits could be justified under the democracy principle (in the sense of representing societal diversities within the Court).<sup>182</sup> More convincingly, the composition of these courts could be justified by organizational principles of consensus democracies. Or, with Jan Velaers, as a confidence building measure for all communities aimed at 'pacifying' linguistic or national conflicts.<sup>183</sup> The latter justification is more reconcilable with judicial independence than the democracy justification. The function of power sharing courts and the specificities of a consociational democracy are strong arguments in favour of identitarian representation in the Court.

Another response to mentioned criticisms is the adaptability of power sharing systems to take account of other diversities. For instance, the inclusiveness of the Belgian system has been progressively broadened through constitutional convention and constitutional amendment. Due to a constitutional convention, Belgian political parties agreed that the composition of the Court should reflect the composition of the parliament. This allowed the representation of the country's ideological pillars in the court. In 2014, a constitutional amendment was introduced that obliges the legislator to appoint one third of judges of the less represented gender.<sup>184</sup> Also other diversities are not necessarily excluded from power sharing institutions. For instance, a German speaking Belgian became part of the French speaking section of the Belgian Council of State.<sup>185</sup> An equally trilingual German speaker, Yves Kreins, became first president of the Council of State in 2014. In his inaugural speech he pointed out that his historic nomination shows that, contrary to expectations, high judicial offices in the federal state are open also to German speakers.<sup>186</sup> Currently a draft constitutional law is on the way to be approved that would open up top judicial positions in South Tyrol to the tiny Ladin speaking minority. The draft law would not only make possible that Ladin speakers are represented in the province's top court, but includes them into the rotation for the Court presidency.<sup>187</sup> Power sharing systems do not freeze identities once and for all but are flexible enough to accommodate diversity.

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<sup>182</sup> Aman, Fred. 2015. *Diversity in Federal and State Courts in the United States*. Presentation at the conference: The judiciary in territorially and culturally compound systems: organisation and functions. University of Trento. 7-8. May 2015, conference video [here](#) (accessed: 22. September 2015) [Aman argues that the democracy principle justifies a more reflective judiciary].

<sup>183</sup> Velaers, Jan. 2014. *De splitsing van de kieskring BHV en de bijzondere regelingen voor de randgemeenten: de bevoegdheid van de algemene vergadering van de Raad van State, de benoeming van de burgemeesters en de stand still*, in *De zesde staatshervorming: instellingen, bevoegdheden en middelen*, edited by Velaers, Jan / Vanpraet, Jürgen / Peeters, Yannick and Werner Vanderbruwaene. Antwerp: Intersentia, 151-201, 184-5.

<sup>184</sup> Law on the Constitutional Court, Art. 34.5. Earlier, the law stated that the Court needed to have at least one judge of the other sex.

<sup>185</sup> Reference is to Christian Behrendt. Behrendt has been nominated to the Council by Royal Decree of 11. April 2012.

<sup>186</sup> BRF. 2015. Yves Kreins offiziell Erster Vorsitzender des Staatsrates, 26. February 2014. Available [here](#) [it was the first time that a German speaker was nominated president of one of Belgium's apex courts].

<sup>187</sup> Proposal of constitutional law n. 56, Italian Chamber of Deputies, 2013. Available [here](#). In April 2016 the law was discussed by the plenum of the provincial council.

## Conclusion

I started with the claim that consociational democracies are more prone to the denouement of the fiction of impartial legal interpretation, and thus more affected by issues of judge selection. Recent legal theory captured the reflection of society's diversity within judicial institutions as 'identitarian representativeness' (Kumm) and 'input legitimacy' (Sadurski). There is a tension between the principle of judicial independence and the representation of ethnic groups/communities in an apex court. While for some authors the principle of substantive judicial independence forbids 'identitarian' considerations to blur the selection process, other authors find it legitimate to include diversities as a principle of democracy and justice, or at least as an exception to redress historical injustice.

The key contribution of the paper is conceptual: to show the existence of a specific model of organizing constitutional justice in deeply divided polities. Scholarship in the legal sciences recognizes diversity within courts only under the frame of 'minority representation'. I argue however that there is a specific institutional model that goes beyond minority representation, namely power sharing courts.

In light of the function of courts as forums of arbitration between different constituent communities in divided polities, their composition, organization and decision making rules reflect the principle of consociational democracy. For instance, power sharing courts share important features of a consociational democracy: grand coalition between different groups (the paritarian composition of apex courts in Bosnia, Belgium, South Tyrol, Cyprus and Czechoslovakia), minority veto (the necessity of cross-community consent in decision making amounting in practice to a veto for judges from one group acting collectively), and the alternation in power between consociated peoples (the mechanisms against majoritarian capture in allocating positions of presidency and vice-presidency within these courts, as well as formal and informal limiting majoritarian decision making). Different examples from all over Europe stand as a testament to the fact that these are not isolated cases, but form a pattern of sharing power within the judiciary in deeply divided societies that has not been recognized so far.

In the remainder of the paper, I anticipated critiques against and justifications of power sharing courts. The most fundamental critique against power sharing courts is that they are outright illegal. Evolving human rights jurisprudence of the European Court of Human Rights could be used as an argument against power sharing courts by litigants. Other criticisms are that power sharing courts violate substantive judicial independence, are not meritocratic, and are under-inclusive of societal diversity. Even under evolving principles of non-discrimination, it is highly unlikely that power sharing courts would fall foul of European non-discrimination law.

The strongest case for power sharing courts is that in these deeply divided societies there must be no suspicion that the national background of a judge influences his decisions: "Justice needs not only being done, but seeing to be

done.”<sup>188</sup> If courts are expression of only one community (perceived by the other as different if not hostile), the conditions for the legitimacy of law and constitutional adjudication in divided societies are not met.<sup>189</sup> As the central function of constitutional courts in consociational democracies is one of arbitration, the parties will likely require to have an equal say in nominating the judges. Power sharing courts are highly unusual folks in comparative context, and their composition and decision making rules deviate from the principle of political equality, but in deeply divided polities they might well be the most legitimate form of designing an apex court.

Just as consociational democracy is not the antithesis to but merely a different form of democracy, power sharing courts are not illegal or illegitimate but represent a different way of organizing judicial institutions adapted to the specific circumstances of deeply divided polities.

The bottom line is that if an apex court functions as court of arbitration in a divided society, a paritarian composition of the Court and parity in decision-making are recommendable features of its institutional design. This is not to say that a power sharing court cannot evolve to a more ‘civic’ or colour blind model, which is the rule in most states. This is precisely what the Venice Commissions requires for Bosnia - to progressively move from a power-sharing model based on three constituent groups to a civic state.<sup>190</sup> In Belgium there are some voices that argue that power sharing mechanisms and paritarian institutions should be abandoned, so that the country can move to a modern democracy in which citizens not language communities have political equality of representation the institutions of the federal state.<sup>191</sup>

However, as long as Belgium remains a bipolar country based on power sharing between two dominant communities, a power sharing court will be a necessary corollary to the country’s institutional model. As long as Bosnia is a tripolar country based on three equal constituent peoples, the central institutions of the state will be paritarian, both in their composition and in their decision making rules. If Cyprus will reunite, its central institutions, including the Supreme Court, are likely to be the expression of the bipolar character of the future federative state. South Tyrol’s power sharing court is an interesting example, as it might give indications how paritarian institutions can be partially adapted to include a third (and so far marginalized) community.<sup>192</sup> As long as arbitration of conflict between communities remains among the most central tasks of these courts, the institutional model of the power sharing court will be the appropriate one.

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<sup>188</sup> *Rex v. Sussex Justices, Ex parte McCarthy* [1924] K.B. 256, 259.

<sup>189</sup> Schwartz, Alexander. 2008. The Agreement, Liberal Nationalism, and the Legitimacy of Law. *Quest* 7, 119-51.

<sup>190</sup> Venice Commission. 2005. *Opinion on the Constitutional Situation in Bosnia-Herzegovina and the Powers of the High Representative*. Doc. CDL-AD (2005) 004. Venice, 11. March 2005 [in particular para 44, requiring that Bosnia progressively moves from the ethnic to the civic principle of representation].

<sup>191</sup> Rummens, Stefan and Stefan Sottiaux. 2014. Democratic Legitimacy in the Bund or ‘Federation of States’: The Cases of Belgium and the EU. *European Law Journal* 20(4), 568-87.

<sup>192</sup> Proposal for constitutional law n. 56, Italian Chamber of Deputies, 2013, [here](#) available.

If the communitarian conflict becomes less salient, or the arbitration function becomes more and more residual, or evolving standards in international human rights law require it, power-sharing courts can be 'unwound' - for instance by requiring judges to possess certain skills (such as bilingualism) rather than a fixed identitarian trait (such as an affiliation with one group/community).

Institutional devices for accommodating diversity such as power sharing courts can travel or inspire other countries. The idea that every society creates its own institutions particular for their body politic dates back to Aristotle. Also Patricia Popelier argued that Belgium need not to copy institutional arrangements that are more frequent in other federations.<sup>193</sup> However, the power sharing courts model could be applied or provide inspiration for courts in places of deep fragmentation and diversity, such as Lebanon, Libya, Syria, Kosovo, Moldova, Georgia, Cyprus, in particular once these countries acquire sovereignty over all of their territory, which may require extending constituency status to minorities with a powerful kin state - which in turn means that the organization of the political and judicial system will come under pressure to reflect this bipolarity or multipolarity.

If strong power sharing courts are emulated, shortcomings and successes of the different empirical models should be critically evaluated. For instance, the Belgian Court is more apt to pair parity with efficiency than other power sharing courts with no tie breaking mechanism (Czechoslovakia and in part South Tyrol) or with outside arbitrators (Bosnia and Cyprus).

Future research can unearth how power sharing works in judicial institutions in contexts of deep diversity. It would be interesting to find out whether informal power sharing arrangements can be detected behind facially neutral appointment rules to apex courts in divided societies. Due to my limited expertise beyond European cases, I was not able to look whether power sharing exists and how it works in the judiciary of states that have consociational features (Lebanon, Iraq, South Africa, Fiji, India, Ethiopia, ...). It would be high time to take the next step and analyse whether ethnic differences are salient when judges vote on politically salient issues in these courts. This could be done not only in those contexts where dissenting opinions exist, but also in cases such as Belgium where existing rules of alternation might create a changing balance of power between communities that can be detected behind the lines of consensus judgments.

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<sup>193</sup> Popelier, Patricia. 2008. Het Geslacht Der Engelen. Een Dynamisch Perspectief Voor De Vergelijking Van Staatsvormen. *CDPK*, 416-34, 422.

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