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Ethnic Composition of Constitutional Courts in Ethnically Divided Societies: the cases of the Republic of Cyprus and Bosnia-Herzegovina

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Abstract

This thesis explores the reasons that necessitate the ethnically diverse composition of constitutional courts in ethnically divided societies by reference to consociational democracy. It seeks to contribute to the literature on consociational democracy and judicial diversity by examining how the consociational principle of representation may be used to inform the composition of the senior judiciary in deeply divided societies.

In order to support my hypothesis, that judicial diversity of constitutional courts is a necessity in ethnically divided societies, this thesis identifies and critically discusses four reasons. These are the constitutional court's role in constitutional review cases, public trust in the impartiality of the judiciary, public confidence in the court's legitimacy and the improvement in decision-making. A key thesis in the present work is the support for the ethnic composition of constitutional courts in ethnically divided societies which are operating under consociational democracy due to the court's highly important role in the broader political context which render it an important actor of stable democracy and the peace-building process.

For the purposes of this thesis, the functioning, composition and the role of the Supreme Constitutional Court of Cyprus under the 1960 Constitution, the Constitutional Court of Bosnia-Herzegovina under the General Framework Agreement (1995) and the proposed Supreme Court of United Cyprus Republic under the Comprehensive Settlement of the Cyprus Problem (2004) are chosen as case studies. These constitutional courts are examined within their broader political and constitutional context. Using these constitutional courts as case studies and drawing on the analysis of selected constitutional court cases, this thesis argues that the court's diverse composition is significant and relevant due to its decisions in constitutional review cases which have the potential to contribute to stable democracy and the post-conflict peace-building process, given that public confidence in judicial impartiality and legitimacy is in place.

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Finally, I dedicate this thesis to my two strongest role models: my grandmother Destine and my mother Kivanc - two opposite characters! My lovely grandmother, despite being a refugee of war who suffered a lot during the ethnic conflict, is the most peaceful person I have ever known and radiates only love when I am in her presence. My mother whose life is based on a fight; a fight for education and service to humanity as if she can save the world from the misery. I hope one day, I can integrate these two contradictory characters in me in order to serve the upbringing of the peaceful warriors of the next generation.

List of Abbreviations

BiH Bosnia-Herzegovina

EOKA Ethniki Organosis Kipriakou Agonos - National Organization of Cypriot Struggle

ECHR European Convention on Human Rights

ECmHR European Commission of Human Rights

ECtHR European Court of Human Rights

FBiH Federation of Bosnia-Herzegovina

HCJ High Court of Justice

HoR House of Representatives

ICERD International Convention on the Elimination of all Forms of Racial Discrimination

NATO North Atlantic Treaty Organization

OHR Office of the High Representative

PSC Public Service Commission

RoC Republic of Cyprus

RS Republika Srpska

SFRY Socialist Federal Republic of Yugoslavia

SRs Socialist Republics

SCC Supreme Constitutional Court

TMT Turk Mukavement Teskilati (Turkish Resistance Organization)

UCR United Cyprus Republic

UK United Kingdom

UN United Nations

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Republic of Cyprus

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U-3/13 Law on Holidays of the Republika Srpska

U-4/04, the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska

U-10/16, Interim decision on Referandum, 17 September 2016

Table of Legislation

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

The Administration of Justice (Miscellaneous Provisions) Law, Law No.33 of 1964, 9th July 1964

The Villages (Administration and Improvement) Law, Cap.243

Table of Contents

Abstract i
Acknowledgements iii
List of Abbreviations v
Table of Cases vi
Table of Legislation viii
Table of Contents ix
Chapter I. Introduction 1
I. Background to the Study 1
II. Project 4
III. Theoretical Background 9
A. Consociational Democracy 9
B. Federalism 13
C. Methodology 16
D. Brief Historical Context 23
E. Conclusion 24
Chapter II. Theoretical Framework 1
I. Introduction 1
II. Theoretical Framework 3
A. The Theory of Consociational Democracy: 3
A.1. Four Principles of Consociational Democracy 4
A.1.1. Grand Coalition 4
A.2. The Veto 5
A.3. Group Autonomy (or Segmental Autonomy) 6
A.4. Proportionality or Proportional Representation 6
A.5. Discussion 7
B. Federalism 12
B.1. Unity in Diversity 14
B.2. Participation 14
B.3. Autonomy 15
B.4. Subsidiarity 16
C. Majoritarian Democracy 18
III. The Influence of Consociational Principles on the Judiciary 21

A. Grand Coalition 22
B. Veto Right 22
C. Group Autonomy 22
D. Representation 23
E. The Concept of Representation and Judicial Diversity 24
IV.Conclusion 31
Chapter III. Why is Diversity in the Judiciary Necessary? 34
I. Introduction 34
II. Why is Diversity in the Judiciary Necessary? 36
A. Judges' Interpretation of Constitution in Constitutional Review Cases and the Court's Role 36
B. Public Trust in the Impartiality of the Judiciary 48
C. Public Confidence in the Court's Legitimacy 58
D. Potential to Improve the Judicial Decision-Making 61
III. How are Representative Courts established? 64
A. The Merit Principle 64
B. Constitutional Quotas 67
IV. Conclusion 73
Chapter IV. The Case of the Republic of Cyprus: The 1960 Constitution and its Supreme Constitutional Court [1960-1964 75
I. Introduction 75
II. Political History of Ethnic Division in Cyprus 77
A. Internal and international political events before the 1960 Constitution 77
B. Britain's Constitutional Proposals 81
B.1. The Radcliffe Proposals (19th of December 1956) 81
B.2. The Macmillan Plan 83
III. The 1960 Constitution of the Republic of Cyprus 85
A. Basic Structure of the 1960 Constitution 86
B. Assessment of the 1960 Constitution 89
IV. Constitutional Break-Down, Role of the Ethnically Composed Supreme Constitutional Court and Ethnic Conflict 96
A. Constitutional Problems of the Republic 96
B. Separate Municipalities Cases: *Balik Bastan Kokar* 101
C. President Makarios Proposals to amend the 1960 Constitution 112
D. The Case of the Attorney-General of the Republic v. Mustafa Ibrahim and Others: the Death Knells for Ethnically Composed Courts 116

D.1. The facts of the case: 117
D.2.Preliminary Objections of the Respondents' Lawyer and the Legal Issues Arising From the Administration of Justice (Miscellaneous Provisions) Law 1964 (No.33 of 1964) 117
D.3. Court's Reasoning and the Application of the Doctrine of Necessity 119
D.4. Assessment of the Case 123
D.5. Assessment of the Doctrine of Necessity 127
E. Aziz v. Cyprus [Application No. 69949/01] 131
V. Conclusion 133
Chapter V. The functioning of the ethnically composed Constitutional Court of Bosnia-Herzegovina 136
I. Introduction 136
II. The General Framework Agreement for Peace in Bosnia-Herzegovina, known as the Dayton Agreement (1995) 138
A. Political Background of the Dayton Agreement: Socialist Federal Republic of Yugoslavia and the Ethno-nationalist War 138
B. The Dayton Agreement, 1995 139
C. The Government Structure under the BiH Constitution 140
D. The Office of the High Representative (OHR) 142
E. Assessment of the Dayton Agreement Constitution and its Critics 143
F. Identified Weaknesses of the Constitution 146
III. The Constitutional Court of BiH 148
A. Composition of the Constitutional Court 148
B. Judicial appointment of local judges and its relation to judicial independence and impartiality 150
C. The judicial independence of the Constitutional Court judges and the Court's relationship with the OHR 154
D. The Case of Krstan Simic (No K-I-15/10) 157
IV. The Role of the BiH Constitutional Court in Constitutional Review Cases 159
A. Constituent Peoples Case [Case U-5/98 III of 1 July 2000] 160
B. Renaming Cities Case [U-44/01] 168
C. The Case of Milorad Bilbija and Dragan Kalinic, [Application No.AP-953/05] 8 July 2006] 170
D. The Case on the Law on Holidays and the Subsequent Referendum by the Republika Srpska [U-3/13] 173
E. Recent Discussions on the Composition of the BiH Constitutional Court 177
F. Sejdic and Finci Case v. Bosnia-Herzegovina 180

V. Comparing the Supreme Constitutional Court of the 1960 Constitution and the Constitutional Court of the 1995 Dayton Constitution 186
VI. Conclusion 189
Chapter VI. After 1964: Cyprus in need of a federal solution and a federal judiciary and some lessons from Bosnia-Herzegovina 194
I. Introduction 194
II. Can a federal design be a solution to Cyprus' problem and its judiciary? The Annan Plan Constitution (2004) 195
A. Cyprus, 1964-2004: A Brief Political History of the Island and the Road to the Annan Plan 195
B. The Proposed Federal Constitution of the United Cyprus Republic (2004) 199
C. Assessment of the Federal Constitution and its Supreme Court 202
III. The Federal Judiciary 205
A. Federal Judiciary from a Theoretical Perspective 205
B. The Supreme Court under the Annan Plan Constitution 209
IV. The Constitutional Court of Bosnia-Herzegovina vis a vis the proposed Supreme Court of the Annan Plan Constitution 221
V. Conclusion 226
Chapter VII. Conclusion 230
I. Introduction 230
II. Findings 233
III. Limitations of the study 240
IV. Contribution to the Existing Literature 241
V. Recommendations for Policy-Makers and for Further Research 244
A. Ensuring Judicial Impartiality in Diverse Judiciary 244
B. Thorough Examination and Investigation of Other Related Topics 245
C. Reconsideration of the Role of an International Judge 246
D. The option of a New/Modified Form of Consociational Model 246
E. Consider the Influence of Dissenting Opinions Issuance 247
F. Implementation of Constitutional Court Decisions 247
G. Conducting Interviews 247
VI. Concluding Remarks 248
Bibliography 249
List of Appendices 273
Appendix A. Suggested Measure for Facilitating the Smooth Functioning of the State and for the Removal of Certain Causes of Inter-Communal Friction (1963) 273
Appendix B. High-Level Agreement of 12 February 1977 274

Appendix C. The 10-Point Agreement of 19 May 1979.....275

Chapter I. Introduction

I. Background to the Study

Ethnic conflict has become one of the major problems of world politics, especially after the Second World War when the powerful empires started to dissolve resulting in the emergence of many ethnically diverse and new democratic states.[1] Ethnic conflicts that have been taking place in various countries of the world cause major threats not only to these countries but also to neighbouring countries and to international peace. When these threats are actualized, they cause major humanitarian disasters and many deaths, leading to tremendous human suffering and violations of the basic human rights of those who survive. Due to the threat ethnic conflicts pose globally, it has become an international concern to prevent, end, and solve them in order to protect global peace.[2]

Ethnic conflicts usually occur within a State which is composed of different ethnic, national, religious and/or linguistic groups; in other words, between groups that have cultural differences. That does not mean that those states which escape ethnic conflict are composed of a single ethnic group or they are less diverse and homogeneous; conflict is not an automatic response to diversity.[3] However, when different groups who have different ethno-national ideologies compete for power and representation within the same State, ethnic identities become politicized and this leads to societal divisions; thus, ethnic conflict becomes likely. Subsequently, this ethnic conflict amounts to civil wars, violates the basic human rights of all groups and harms democracy. Therefore, regulating politicized ethnic identities in deeply divided societies democratically has become one of the major concerns of 20th century States.

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[1] T.D.Sisk, *Power Sharing and International Mediation in Ethnic Conflicts*, Carnegie Commission on Preventing Ethnic Conflict, Washington, 1996; S.P.Huntington, *Political Order in Changing Societies,* Yale University Press, 1968;p.3

[2] Ibid

[3] Fearon J.D. and Laitin D.,Ethnicity, Insurgency and Civil War, *American Political Science Review,* Vol.97,No.1,February 2003;p.82, p.88; Young C., Deciphering Disorder in Africa: Is Identity the Key? *World Politics, 54*, July 2002; Fish M.S. and Brooks R.S.,Does Diversity Hurt Democracy? *Journal of Democracy,* Vol.15,No.1, January 2004

In an effort to achieve stable democracy and the regulation of their ethnically divided societies certain countries undergo a constitution-drafting process. This work is generally done under the principles of power-sharing democracy. Consociational democracy is a form of power-sharing democracy which has become one of the key constitutional models, applied to conflict-ridden societies especially in the second half of 20th century.[4] In consociational democracy, emphasis is given to the representation of groups, with an expectation that their participation in government would lessen the political tensions within society.[5] Lijphart[6] and other prominent political scientists who have written extensively about consociational democracy, such as Brendan O'Leary and John Garry[7], Sid Noel[8], Jurg Steiner[9] and Kenneth McRae[10] have exclusively focused on the election systems, political relationships between the ethnic groups, regime type and the government structure under consociationalism but they did not examine the judiciary under consociational design.

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4 Malaysia(1955-69), Colombia(1958-1974), Fiji(1970-87), South Tyrol(1972-), Czecho-Slovakia(1989-96), Lebanon(1989-), South-Africa(1993-96); Northern Ireland(1998-), Macedonia(2000-);R.Taylor, The Promise of Consociational Theory in R. Taylor(ed.), *Consociational Theory, McGarry and O'Leary and the Northern Ireland Conflict,* Routledge,London, New York,2009

5 Issacharoff S.,Constitutionalizing Democracy in Fractured Societies, 82 *Texas Law Rev*.,2003-2004;p.1882

6 A.Lijphart, Consociational Democracy, World Politics, Vol.21,No.2.,1969; A.Lijphart, *Democracy in Plural Societies, A Comparative Exploration,* Yale University, 1977; A.Lijphart, *The Wave of Power-Sharing Democracy* in A.Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy,* Oxford University Press, 2002

7 B.O'Leary and J.McGarry, *Politics of Ethnic Conflict Regulation: case studies of protracted ethnic conflicts*, London:Routledge, 1993; J.McGarry and B.O'Leary, *The Northern Ireland Conflict: Consociational Engagements*, Oxford University Press, 2004

8 S.Noel, *From Power-Sharing to Democracy: Post Conflict Institutions in Ethnically Divided Societies,* Montreal, McGill Queen's University Press 2005

9 J.Steiner and R.Dorff, Structure and Process in Consociationalism and Federalism, *The Journal of Federalism,* 15, Spring 1985

10 K.McRae, *Consociational Democracy: Political Accommodation in Segmented Societies*, Toronto:McClelland and Stewart, Carleton Library No.79, 1974

However, the close relationship between the judiciary and the other two government branches had become visible since the entrenchment of the *constitutional judicial review*[11] process to the new constitutions of European States after the Second World War.[12] Many European States entrenched bill of rights for the protection of human rights against authoritarian rulers and envisaged a constitutional review process to supervise governments' actions in their constitutions.[13] This power of the constitutional courts has inevitably led them to being embroiled in political disputes[14] as their decisions have had consequences for the political branches. Thereby, in time, it has started to be acknowledged by scholars -some approving, others challenging- that the judiciary has also become a key actor of political life.[15] Therefore, judges who compose the constitutional court to make a decision in constitutional review cases have become a matter of concern.

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[11] The roots of judicial review can be traced back to *Marbury v. Madison* (1803) Case in which the USA Supreme Court declared that an act of Congress is void if it is inconsistent with the Constitution. In American-style judicial review, concrete constitutional questions can be reviewed by ordinary courts in an ordinary litigation; whereas in European-style constitutional review, constitutional issues can only be dealt by constitutional courts and it is an abstract review. The European-style constitutional review is originated from the writings of Hans Kelsen; K.E.Whittington, The Power of Judicial Review in M.Tushnet, M.A.Graber&S.Levinson, *Oxford Handbook of the US Constitution*, Oxford University Press, 2015

[12] C.N.Tate and T.Vallinder (eds.),*The Global Expansion of Judicial Power,* NYU Press, 1995; A.S.Sweet(ed.), *Governing With Judges*, Oxford University Press, 2000; T.Ginsburg, The Global Spread of Constitutional Review in K.E.Whittington, R.D.Kelemen and G.A.Caldeira, Oxford Handbook of Law and Politics, OUP, 2008; Ferejohn J.E., Constitutional Review in the Global Context, *Legislation and Public Policy*, Vol.6:49, 2002, Sadurski W., Judicial Review and the Protection of Constitutional Rights, *Oxford Journal of Legal Studies*,Vol.22,No.2,Summer 2002; M.Shapiro and A.Stone-Sweet, *On Law, Politics, and Judicialization*, Oxford University Press, 2002

[13] M.Volcansek and C.Lockhart, Explaining Support for Human Rights Protections: A Judicial Role? *Journal of Human Rights*, (11) 2012

[14] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge,Mass.,London,Harvard University Press, 2004; K.Malleson, *The New Judiciary, the effects of expansion and activism*, Aldershot:Dartmouth,c1999; J.A.Griffits, *The Politics of the Judiciary,* London, Fontana,1997

[15] K.Malleson, *The New Judiciary,* the effects of expansion and activism, Aldershot:Dartmouth,c1999; A.S.Sweet, *Governing With Judges*, Oxford University Press, 2000; T.Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian Cases*, Cambridge University Press, 2003; Hilbink L., The Origins of Positive Judicial Independence. World Politics, 64,

II. Project

This thesis aims to examine the application of consociational democracy and elements of federalism, to the constitutional designs of both the Republic of Cyprus (1960) and Bosnia-Herzegovina, (1995), and to explore the design and the functioning of their Constitutional Courts under the consociational design. This will provide an understanding as to how the consociational principles have influenced the senior judiciary and led to the establishment of diverse constitutional courts whose members have different ethnic identities. Thereby, this thesis intends to contribute to the literature on both consociational democracy and judicial diversity by exploring the reasons that require the establishment of ethnically diverse constitutional courts in ethnically divided societies ruled by the principles of consociational democracy.

The investigation of the judiciary under consociational design has not received any genuine interest, although the power, composition and functioning of the executive and the legislative have been examined in depth.[16] This might be attributed to the judiciary's acknowledged independence from the other two government branches. In addition, the assumption that the judiciary has no political role would most probably lead political scientists to refrain from examining its functioning under consociational democracy as this is the work of legal scholars. However, the judiciary is also a branch of government which would definitely be influenced by the constitutional design that would regulate society; hence, its diverse composition and role become all the more important.

Scholarship research has examined the composition of the judiciary under the concept of judicial diversity. Scholars who are involved in examining the merits of a judicial diversity have been mainly concerned with representation in the judiciary in established, stable democracies.[17] Much research has been done on the question of

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Issue 04, October 2012; J.Ferejohn, Judicialization Politics, Politicization Law, Law and Contemporary Problems, Vol.65, No.3,2002

[16] For example, in 2004, Lijphart mentioned the composition of the judiciary only in one sentence; Lijphart A., Constitutional Design For Divided Societies, *Journal of Democracy Volume 15, Number 2, April 2004;*p.105

[17] Malleson K., Diversity in the Judiciary: the Case for Positive Action, *Journal of Law and Society,* Vol.36,No.3,Sept.2009; Rackley E., What a difference difference makes: gendered harms and judicial diversity, *International Journal of the Legal Profession*, Vol.15, No's.1-2,March-July 2008, Hunter R.C, More than Just a Different Face? Judicial Diversity and Decision-making, *Current Legal*

increasing gender diversity in the legal system in general, although other forms of under-representation such as, ethnic, racial, linguistic and/or minority representation generally share the common problem of exclusion. The benefits of judicial diversity have been presented as providing public trust in the impartiality of the judiciary[18] and fostering public trust to the court's legitimacy.[19] Judicial diversity is also considered as a factor that improves the judicial decision-making process.[20] Nevertheless, despite the well-documented benefits of a diverse judiciary[21], its composition, role and functioning in divided societies have not captured the interest of legal scholars who have showed an interest in judicial diversity in established societies. Therefore, the literature on consociational democracy and its subfield of judicial diversity reveals a lacuna in addressing the reasons of ethnically diverse composition of constitutional courts that function in divided societies.

In an attempt to respond to this challenge, it is necessary to put representation in the judiciary at the heart of the matter (as is found in the legislature and the executive). Given that judicial diversity is not satisfied, it may possibly lead to rekindle of violence, since in divided societies the potential of a threat to democratic order is real.[22] Therefore, the concept of judicial diversity, as it operates in established democracies, lacks the understanding of the instability and fragility of divided societies and cannot directly apply to them and ensure diversity, although it offers very useful arguments to be used in explaining why diversity in the judiciary is necessary.

Against this background, in order to fill in the above identified gaps, it is necessary to examine the application of power-sharing democracy, namely, consociational

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Problems, 2015; Ifill S.A.,Racial Diversity on the Bench:Beyond Role Models and Public Confidence,*Wash.&Lee L.Rev.,*405, Vol.57,Issue 2, Article 5, 2000; Feenan D., Women Judges: Gendering Judging, Justifying Diversity, *Journal of Law and Society*, Vol.35,No.4, December 2008

[18] Chapter III,Part II.B

[19] Chapter III,Part II.C

[20] Chapter III,Part II.D

[21] *Supra* fn.17

[22] Hartzell C., Hoddie M. and Rothchild D., Stabilizing the Peace after Civil War: An Investigation of Some Key Variables, *International Organization* 55(1), 2001

democracy and federalism, to the constitutional designs of countries with ethnically divided societies and to explore the design and the functioning of the senior judiciary under these power-sharing designs. In this context and in relation to the political and ethnic issues described above, two ethnically divided societies are under the scope of investigation for the purposes of this thesis: the Republic of Cyprus (RoC) and Bosnia-Herzegovina (BiH). Both Cyprus and Bosnia-Herzegovina have suffered from the pains of ethnic conflict. Whereas ethnic conflict between Greek-Cypriots and Turkish-Cypriots in Cyprus was triggered by the decolonization process of the British Empire and nationalist ideology,[23], in Bosnia-Herzegovina, the ethno-national sentiments, together with the collapse of the socialist bloc led to a massive war between the Serbs, Croats and Bosniacs and to the break-up of the former Yugoslavia in which Bosnia-Herzegovina was part of.[24] In the post-conflict period, both countries had to undergo a constitution-drafting process for the regulation of their ethnically divided societies in order to build peace and stable democracy under the principles of power-sharing democracy and this constitutional design led to the establishment of the diverse constitutional court at the onset of state-building.

By investigating the reasoning of diverse constitutional courts under consociational democracy,[25] it is argued that the whole society has a lot to gain from a diverse judiciary. In doing so, this research supports the thesis that there are important factors that necessitate the diverse composition of constitutional courts and the role of the court in constitutional review cases is the main reason because these cases have an impact (either positive or negative) on the effort to achieve stable democracy.[26] In addition to the constitutional courts' role, this thesis demonstrates how having representative courts is a positive contribution to public trust in the impartiality of the judiciary as well as in the courts' legitimacy, especially by minorities who demand to see that the judicial decision-making process is not dominated by the majority's viewpoint.[27] Consideration is also given to the

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[23] B.O'Malley and I.Craig, *The Cyprus Conspiracy ,America, Espionage and the Turkish Invasion,* Taurus, 1999

[24] S.L. Woodward, *The Balkan Tragedy: chaos and dissolution after the Cold War,* Brooking Institution, Washington,1995

[25] Reference will also be made to federalism when necessary.

[26] Chapter III,Part II.A.

[27] Chapter III,Part II.B.C.

arguments that a diverse court composition improves the decision-making process by reference to the empirical studies conducted in other jurisdictions that have societal divisions.[28] Thereby, this thesis aims to justify the diverse composition of constitutional courts in divided societies by arguing that constitutional courts have the potential to allay the conflict between ethnically divided groups.

The aim of the research approach chosen[29] was to provide answers to the research questions related to the goals of the present thesis seeking to address the necessity of a representative judiciary in the ethnically divided societies of RoC and BiH under consociational democracy. Based on this study's purpose and the existing literature on ethnically divided societies under consociational democracy and the role of a diverse judiciary under this design, four specific research questions related to the study's objectives have been formulated as follows:

a. How have the principles of consociational democracy influenced the composition of the judiciary? (Chapter II)

b. Why judicial diversity is deemed necessary in divided societies and what are the main benefits and disadvantages of having a representative judiciary? What is the relevance of judicial diversity to the RoC and BiH? (Chapter III)

c. How has the theoretical framework of consociational democracy and judicial diversity been applied and worked out in the constitutional structure of Cyprus (1960-1964) and Bosnia-Herzegovina (1995-)? (Chapter IV and V)

d. How was the federal design attempted to be applied as a political solution for Cyprus and its senior judiciary? What are the lessons that the BiH Constitutional Court can teach to the prospective judiciary of federal Cyprus? (Chapter VI)

The research questions as set above will be answered by using the theory of consociational democracy with elements of federalism, which will be analysed in the next section.

This thesis is organized into seven chapters according to the five questions of this research. Chapter I provides an overview of the main theories referred to in this thesis and

[28] Chapter III,Part II.D

[29] Section IV below

discusses the methodological aspects of the study. Chapter II presents the theoretical framework of consociational democracy and federalism by reference to majoritarian democracy and applies the theoretical framework of consociational democracy to the judiciary. Chapter III examines the reasons that necessitate diverse composition of the constitutional courts and aims to justify diverse composition of the judiciary. Against this theoretical background, the next three chapters presents the case-studies. Chapter IV examines the application of the theoretical framework of consociational democracy and the functioning of the diverse judiciary in the context of Cyprus and then, analyses two landmark constitutional court cases that had an impact on the political/constitutional order of the RoC. Chapter V examines the power-sharing design of the BiH Constitution, the composition and functioning of BiH Constitutional Court and also analyses selected constitutional court cases with a view to justify the ethnic composition of the Court. Chapter VI firstly, presents the proposed constitutional design of the United Republic of Cyprus and its Supreme Court and then, the possible lessons that can be transferred from the case of Bosnia-Herzegovina to the case of Cyprus. Chapter VII discusses the key findings from the case studies relating to the importance of the ethnic diversity in the make-up of the judiciary, highlighting its significance in consociational democracies in practice in Cyprus and Bosnia-Herzegovina and provides recommendations for the future research.

III. Theoretical Background

In this section there is a brief explanation of the power-sharing theories used in this study in order to provide a better understanding of the theoretical premises upon which this thesis is based. Consequently, what follows is definition and discussion of what consociational democracy and federalism are.

A. Consociational Democracy

Consociational democracy has been proposed as a political/constitutional model that can provide stable democracy for divided societies where identity politics are dominant.[30] Identity politics refers to power struggles between identities which seek autonomy, expression, recognition and legitimacy, generally, from the State; this political struggle also includes rejecting, repressing and/or displacing other identities that others want to recognize in individuals.[31] Formation of identities has been explained by mainly four schools of thoughts which all have some variations within themselves. In primordialist view, Geertz argued that divided societies are usually divided by group differences which may be based on language, religion, ethnicity, race, ideology, culture, custom, and/or assumed blood ties.[32] In these societies, group members are closely attached to their groups by *primordial loyalties*.[33] Originally, identity has been attempted to be explained by this primordialist conception in which group members believe that they share common ancestry and also common ethnic hatred towards other groups[34] and they assume their (ethnic)

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[30] However, it is originally designed for plural societies, not divided ones; A.Lijphart, *Democracy in Plural Societies, A Comparative Exploration,* Yale University, 1977

[31] Calhoun C., *Social theory and the Politics of Identity* in Calhoun C.(ed.), *Social Theory and the Politics of Identity,* Blackwell, Cambridge, USA, 1994;p.21

[32] C.Geertz (ed.), *Old Societies and New State, The Quest for Modernity in Asia and Africa,* The Free Press, New York, 1963;pp.109-114

[33] Ibid

[34] W.Connor, *Ethno- Nationalism*, Princeton University Press,1994 cited in Ethno-Nationalism in A.Varshney, Ethnicity and Ethnic Conflict in C.Boix&S.C.Stokes, *The Oxford Handbook of Comparative Politics*,OUP,2009

identity as fixed and given.[35] However, this *essentialist* explanation of ethnic conflict has been challenged by the instrumentalist view who argues that it is not the primordial ties, but rather the economic, political and other resources, and the politicians' manipulation of ethnic identity in order to gain power on these resources, cause ethnic conflict.[36] Without the manipulation and mobilization of differences, mere identity has not become a source of ethnic conflict, they argue.[37] On the contrary, by assimilating to the new societies that people immigrate, in today's world many people lose their sense of belonging to their communities and/or homeland.[38]

Thirdly, ethno-symbolists argue that ethnic ties fluctuate and vary from one person to another as a result of immigration and/or intermarriages and they cannot survive in their homogenous form.[39] Ethno-symbolists argue that subjective elements, such as memory, myth, and symbol play a role in the formation of ethnicity/identity, and try to explain peoples' emotional attachment by historical and/or sociological factors, such as culture and tradition.[40] Finally, modernist account considers identity as the construct of the modern times. They argue that nations are the products of urbanization, secularism and the emergence of modern bureaucratic state.[41] Modernists argue that identity can be constructed over a time due to modernity and it is not fixed and mutable. For example, whereas Anderson argues that it is the *print-capitalism* that is responsible for the transformation of the local identities to the national identities[42], Gellner emphasizes the

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[35] *Supra* fn.32, Geertz

[36] A.Varshney, Ethnicity and Ethnic Conflict in C.Boix&S.C.Stokes, *The Oxford Handbook of Comparative Politics*,OUP,2009

[37] ibid

[38] Brass, Ethnicity and Nationalism:Theory and Comparison, Sage Publications,1991

[39] A. D.Smith ,Nationalism, Polity Press, 2001;p.59

[40] ibid

[41] U.Ozkirimli, Theories of Nationalism, A critical Introduction, Palgrave MacMillan(2nd ed.), 2010

[42] B.Anderson, Imagined Communities, *Reflections on the Origin and Spread of Nationalism,* Verso, 1983

influence of industrialism.[43] For Hobsbawm, it is the *invented traditions,* such as a set of practices, implicitly accepted rules or rituals, repeated values and norms which perpetuate the past practices that construct nations and nationalism.[44] Nevertheless, constructed identities can also be internalized and institutionalized.[45] All these theories have valid points to be considered in the formation of identities and these different theories on identity has different policy implication in designing constitutions.[46]

Nevertheless, when different identities are politicized, societies suffer from identity politics and experience divisions. Lustick defines a society as deeply divided[47], if: a) the related ties create a hostile separation of society, b) divisions are based on *terminal identities*[48] with high political salience; c) divisions continue over a considerable time period; d) divisions cover an extensive variety of issues; e) boundaries between competing groups are so sharp that group membership is clear; f) with some exceptions, boundaries and membership are unalterable. As it will be shown later, Lustick's definition is valid for the ethnic conflict of that time in two societies which form the focus of the case studies of this research, Cyprus and Bosnia-Herzegovina.[49] Therefore, both societies had to rely on consociational design in order to overcome their conflict.

Consociational constitutions are designed with an aim to provide political stability to divided societies. In doing so, the sub-groups are empowered constitutionally and given a voice in the political institutions with a hope to keep them within the political system and

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[43] E. Gellner, the coming of a nationalism and its interpretation, the myths of nation and class in G. Balakrishnan, *Mapping the Nation*, Verso Books 2012

[44] Hobsbawm E.J.&Ranger T., *The Invention of Tradition*, Cambridge University Press, 1983;p.1

[45] *Supra* fn.36, A.Varshney

[46] As such, modernist account had important policy implications for consociational constitutions; Supra fn.36,A.Varshney

[47] Lustick I., Stability in Deeply Divided Societies: Consociationalism versus Control, *World Politics*, Vol.31, No. 3, Apr., 1979;p.325

[48] Lustick borrowed the phrase *"terminal identities"* from Rupert Emerson's "*terminal communities"; From Empire To Nation*, Boston: Beacon Press,1960;pp.95-96

[49] Chapter IV,Part II.A and Chapter V,Part II.A Lustick's definition of divided society needs to be re-assessed for the time being in both countries because there are other factors, such as economic that can be considered as a reason of war, rather than ethnicity.

so provide a stable democracy.[50] In his consociational proposal for plural societies, Lijphart emphasized the necessity of elite consensus which requires, *inter alia,* cooperation and/or negotiation in the administration of government.[51] Elite cooperation is based on the assumption that leaders are aware of the dangers of political fragmentation [which might lead to war] and thus, they take remedial action deliberately, rationally and voluntarily.[52] Otherwise, in case of political competition, groups might resort to violence when their political demands are not satisfied, in order to impose their political goals. In turn, the already existing societal divisions can be sharpened and harm democratic stability. Thus, without elite cooperation, consociational democracy would not be able to function even if its main four principles (grand coalition, group autonomy, veto right and proportional representation) are in place.[53]

The logic behind consociational thinking is to share governmental power through a meaningful representation with all groups which have the potential to destabilize democracy if their demand for power and representation is not satisfied. In order to empower the groups, emphasis is given to the rights and representation of groups which would give them political power and in return, enable them to have a say in the governance of not only one section of society but also the whole country; thereby, it is aimed to lessen the political tensions within the society by the formal means of representation. Being represented in government branches would help minorities to protect their communal groups from [possible] abuse by the majority, or at least, lessen their fear of majority tyranny. Thereby, *representation* has become central under consociational design and has come to mean *power* for groups in a divided society ruled by a consociational democracy. Therefore, for this researcher, consociational democracy refers to a set of constitutional tools as well as a political mentality which would provide solutions for various types of identity conflict in divided societies. Its application needs to be facilitated by providing a basic framework (as in the form of written constitution) for the government institutions to function within; this framework would serve to change the previous political culture from

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[50] *Supra fn*.6;A. Lijphart, *Democracy in Plural Societies*

[51] A.Lijphart, *Patterns of Democracy, Government Forms and Performance in Thirty-Six Countries,* Yale University Press, 1999

[52] *Supra fn*.6, Lijphart

[53] Chapter II, Part II.A.

conflict to a consensus culture by a continuous process of being more inclusive and by preventing the hegemony of one group over other groups. Otherwise, smaller groups might be exposed to the domination of the majority and existing divisions within the society can be deteriorated.

The 1960 Constitution of the RoC is a classic example of consociational democracy[54] with all its principles present, and the constitutional design of BiH also very much represents this design with some modifications due to the territorial/federal arrangements on the administration of its Entities.[55] Therefore, constitutional design of consociational democracy and federalism is taken as a theoretical framework for this thesis.

B. Federalism

In addressing the challenge of designing political institutions which would be conducive to stable democracy in deeply divided societies, another power-sharing model that was proposed was federalism. The classic examples of federalism are the United States of America, Canada, Switzerland and Australia in which federalism has evolved naturally.[56] In federal societies, a commonly held idea is that prospective partners can solve a common problem[57] and/or achieve a common goal through federalism.[58] Therefore, the factors that facilitate federalism to come into being and enable its effective functioning are usually associated with the partners' "mutual desire" of solving problems.[59] However, these classic examples of federalism differ from post-conflict federalism by being

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[54] Chapter IV

[55] Chapter V

[56] S.Choudhry and N.Hume, Federalism, devolution and secession: from classical to post-conflict federalism in T.Ginsburg and R.Dixon, *Comparative Constitutional Law,* Edward Elgar Publishing, 2011

[57] Such as economic, military, trade; T.Bahcheli & S.Noel, The Quest for a Political Settlement in Cyprus: Is a Dyadic Federation Viable? *Publius: The Journal of Federalism*, Volume 44, Number

[58] K.C. Wheare, *Federal Government*, London: Oxford University Press, 1953; M.Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism*, OUP Oxford 2012

[59] Ibid

relatively stable, democratic, and very rarely faced domestic threats to their very existence.[60]

The most cited definition of federalism is that of Riker: *"a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions"*.[61] As it is obvious from this definition, in order to talk about federal governance, two levels of administration are necessary. These two levels of governance of federalism is based on the *self-rule* (of the members-states), and *shared-rule* (between the members-states and the central government).[62]

Just like consociationalism, federalism has also been used in conflict management. Federalism's relevance to ethnic conflict regulation has been examined by different authors by referring to countries which have experienced political conflict in accommodating their diversity.[63] In post-conflict federalism, ethnically divided societies seek to settle their political problems under a federal design and thus political problems between the different [ethnic] groups translate to the federal organs as problems of governance.[64] In some cases, minorities and/or smaller ethnic groups challenge the state organs in seeking extensive self-government, from autonomy to secession,[65] whereas majority groups aims to assert more centralized forms of federalism. Nevertheless, in federal constitutions, the goal is to

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[60] *Supra fn.*56, S. Choudhry and N. Hume;pp.357-359

[61] William H. Riker, Federalism Origin, Operation and Significance in Fred I. Greenstein and Nelson W. Polsby (eds.), *Handbook of Political Science,* Vol.5,Governmental Institutions and Processes Reading: Addison-Wesley, 1975

[62] Elazar D.J. Constitution-Making: The Pre-eminently Political Act Constitution, Government and Politics accessed by: http://www.jcpa.org/dje/articles3/constisramer.htm on 08/05/2018

[63] J.McGarry, Federalism (Federation) as a Method of Ethnic Conflict Regulation, Forum of Federations in S.Noel, *From Power-Sharing to Democracy: Post Conflict Institutions in Ethnically Divided Societies,* Montreal, McGill Queen's University Press, 2005; A. Guelke, The Challenge of Ethno-Nationalism, case studies in identity politics; N. Pobric, Ethnic federalism in the Bosnia; S.J.R.Noel, Consociational Model and Canadian Federalism; Peristianis&Vural, Re-examining Federalism and Consociationalism as Constitutional and Political Arrangements for Community Conflicts in Post- Ottoman Lands

[64] *Supra fn.*56, S. Choudhry and N. Hume

[65] Ibid

solve political/ethnic divisions and achieve *unity in diversity* through the application of federal principles, especially by territorial arrangements and without one group assimilating another.

Both consociational democracy and federalism are designed to provide political arrangements and accommodate pluralism through a power-sharing mechanism under a single sovereign state in which the political and territorial integrity of the plural society is maintained; however, they differ in the territorial arrangements. [66] When the *group autonomy* principle of consociational democracy includes territorial arrangements, then, the system becomes federalism.[67] As such, in ethnically divided countries, when ethnic divisions match with territorial divisions, consociational design takes the form of federalism which has ethnically autonomous member-states.[68] Therefore, both designs have conceptual and empirical links because when territorial divisions do not exist to facilitate the implementation of federalism, then corporate federalism (which is a non-territorial form of federalism, thus consociationalism) is being applied, as it happened in 1960 Constitution of Cyprus.[69] Nevertheless, the common feature of both concepts is that they are "non-majoritarian"; in other words, they are not based on majority rule because of sharing the governmental power either with the ethnic groups or the member-states.

Federalism is also relevant for both cases studies of this thesis. Since the signature of the High Level Agreement in 1977, Cyprus is seeking a bi-communal, federal political solution. The recent United Nations proposal in 2004 offered a federal constitution which would be composed of a Greek-Cypriot and a Turkish-Cypriot Constituent-States. Likewise, BiH, although designed according to the consociational mentality, it also embeds federal accommodations due to the territorial arrangements of its Entities. Therefore, federalism is also needed as a theoretical framework for this thesis.

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[66] Lijphart A., Consociation and Federation: Conceptual and Empirical Links, *Canadian Journal of Political Science*, Vol.12, No.3, 1979

[67] Ibid

[68] Ibid

[69] *Supra fn.*6, A.Lijphart, Democracy in Plural Societies

C. Methodology

This section discusses the methodology used in this research. A key aim of this thesis is to answer why judicial diversity is a necessity in ethnically divided societies that are governed by the principles of power-sharing democracy by employing doctrinal, socio-legal and comparative research through the case studies of Cyprus and Bosnia. Limitations of this study are presented next, followed by a brief historical context of the failed consociational democracy in Cyprus and federal-building in both Cyprus and Bosnia.

In order to answer the research question, first of all, doctrinal legal research is employed. Doctrinal research forms the basis of many legal studies and enables the researcher to examine any legal doctrine. It is useful to identify, analyse and synthesise the content of laws[70] by relying on the precedent doctrines which have been applied consistently over a period of time and developed into a body of law slowly and coherently.[71] In the doctrinal method, the essential features of any legislation and/or case law can be examined and the relevant elements are combined to establish a correct and complete statement of the law on the subject studied.[72]

In this thesis, the doctrinal method has been used in examining both the literature on consociational democracy and judicial diversity. Literature on power-sharing design, both consociational democracy and federalism, has been reviewed in order to demonstrate its relevance to the regulation of ethnic conflict and in achieving stable democracy.[73] Additionally, the scholars who examined two power-sharing designs in relation to the

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[70] T.Hutchinson, *Doctrinal Research* in D.Watkins and M.Burton (eds.), *Research Methods in Law,* Routledge, London, 2013;p.9

[71] Ibid

[72] Ibid;p,10

[73] A.Lijphart, Democracy in Plural Societies, *A Comparative Exploration,* Yale University,1977; J.McGarry and B.O'Leary, Northern Ireland Conflict: consociational engagements, OUP,2004; T.D.Sisk, *Power Sharing and International Mediation in Ethnic Conflicts*, Carnegie Commission on Preventing Ethnic Conflict, Washington, 1996; S.Noel, *From Power-Sharing to Democracy: Post Conflict Institutions in Ethnically Divided Societies,* Montreal, McGill Queen's University Press 2005; M.Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism*, OUP Oxford 2012; T.Ginsburg and .Dixon, *Comparative Constitutional Law,* Edward Elgar Publishing, 2011

RoC[74] and BiH[75] are reviewed and the gaps are identified. The main negligence in the literature is the examination of the senior judiciary under consociational constitutions. Only few studies have touched upon the importance of diverse constitutional courts briefly, while examining the constitutional courts' role in divided societies. For example, Horowitz criticized the composition of the Constitutional Courts of Bosnia-Herzegovina and the proposed United Republic of Cyprus (2004) on the basis that their composition indicates the politicization of the courts and the high possibility of the Court acting as a political actor to substitute self-government.[76] In 2013, McCrudden and O'Leary published *Courts and Consociations* and analysed *inter alia* the conflict between communal rights provided by consociational arrangements and human rights, using Bosnia-Herzegovina as one of their case-studies.[77] Their work indicated the power of constitutional courts but did not focus on the composition of the judiciary particularly. Nevertheless, they recognized the performance of courts in consociational designs as a significant determinant of the success or failure of consociational agreements.[78] More importantly, they stated that there has not been any sustained legal theory that is devoted to examining how judges should interpret consociational constitutions.[79] Most recently, Schwartz and Murchison examined the judicial independence and impartiality of constitutional courts in divided societies by choosing BiH as a case study, arguing that the composition of a constitutional court is as important as the content of the constitutional settlement itself despite the challenges of the

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[74] A. Sozen, The fall and the Rise of Consociational Democracy in Cyprus, 5th International Seminar on Democracy and Human Rights in Multiethnic Societies, Institute for Strengthening Democracy in Bosnia, Konjic, BiH, July 8-12,2002; N.Kizilyurek&T.Erhurman, *Federalism in Cyprus: Politics in Search of its Subject*, Isik Kitabevi, Cyprus, 2009

[75] C.Steiner and N.Ademovic, *Constitution of Bosnia and Herzegovina, Commentary*, Konrad Adenauer Stiftung,Rule of Law Program South-East Europe, Sarajevo,2010; Banović &S.Gavrić, The Constitutional Court of BiH and Its Role in the Process of Democratization of the Post-war Political System of Bosnia and Herzegovina, Univerziteta u Sarajevu

[76] Horowitz D.L., Constitutional Courts: a primer for decision makers, *Journal of Democracy,* Vol.17,No.4, October 2006

[77] C. McCrudden and B. O'Leary, *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

[78] Ibid

[79] Ibid

court in functioning impartially.[80] Thereby, it is revealed that there is a gap in examining the composition of the senior judiciary and thus, it is aimed to contribute to the knowledge on consociational democracy by examining the judiciary therein.

Additionally, the literature on judicial diversity has been examined as it has flourished in western democracies, the birth place of the concept.[81] Many scholars support diversity by providing its benefits to the whole society.[82] However, the literature is silent as to how a diverse judiciary is ensured and functions in divided societies. This thesis undertook such work especially in regard to the RoC because examination of the judiciary is absent from this literature. Bosnia-Herzegovina presents a richer literature on the functioning and role of a court[83] but only Grazidei published two articles on the composition of the "*power-sharing courts*".[84] Most recently, the composition of these courts is examined but only in relation to the presence of international judges.[85] It can be seen from above that the doctrinal method is useful both in understanding the literature and also in identifying the gaps.

However, doctrinal legal research has been criticized on the grounds that it requires the researcher to make sense of the legal concepts or cases without understanding the legal system as a whole because the research is based on the legal system as the main source of

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[80] Schwartz A. and Murchison M., Judicial Independence and Impartiality in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia- Herzegovina, June 2016

[81] *Supra fn.*17

[82] Ibid

[83] To cite few: Hodzic E.,Examining the Role of the Constitutional Courts in Post-Yugoslav Transitions, Conceptual Framework and Methodological Issues, ANALITIKA, Center for Social Research, Sarajevo, 2016; Kulenović N., Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation, Analitika, Sarajevo, Working Paper,5/2016

[84] S.Graziadei, Six models for Reforming the Selection of Judges to the BiH Constitutional Court, University of Graz and University of Antwerp, Working paper, No.14, January 2016; Grazidei S., Power-Sharing Courts, *Contemporary Southeastern Europe*, 2016(3)

[85] Schwartz A.D.,International Judges on Constitutional Courts, Cautionary Evidence from Bosnia-Herzegovina, Law & Social Inquiry, Vol.44,Issue:1,2019; J.Marko, Foreign judges: a European perspective in S.N.M.Young and Y.Ghai, Hong Kong's Court of Final Appeal (ed.), Cambridge Univeristy Press, 2014

concepts, categories and criteria.[86] In order to respond to this criticism, many researchers have undertaken hybrid methods which involve perspectives from other disciplines.[87] For example, socio-legal research studies the relationship between law and society.[88] It is concerned with social engineering through the existing social order and is usually involved in examining law in theory and law in practice.[89]

As this thesis examines two specific constitutional contexts that operate in divided societies, it was required to adopt a socio-legal approach in order to escape the confines of the narrow doctrinal approach[90] and be able to describe and analyse legal phenomena in their social, cultural and historical contexts.[91] In this way, firstly, ethnic divisions in the society, as a sociological factor, are considered and secondly, internal and international political factors that influenced the constitution-drafting process are taken into account.[92] Although doctrinal research seems to be contradicting with socio-legal research (as the former is desk-based whereas the latter adopts a more empirical stance), in fact, both methods are necessary for the political and sociological understanding of constitutional law in the context of the RoC and BiH. By adopting a socio-legal approach, it is aimed to lessen the general criticisms of doctrinal research that is dogmatic, rigid and formal.[93] In other words, rather than relying on the strict wording of the constitutional law and constitutional court decisions, the composition and the functioning of the Constitutional Court of Cyprus and BiH have been examined within their peculiar socio-legal and

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[86] P.C.Westerman, Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law,pp.91-94 in M.van Hoecke, *Methodologies of Legal Research*, Hart Publishing, Oxford, Portland, Oregon, 2011

[87] McCrudden C., Legal Research and the Social Sciences, *Law Quarterly Review*, 2006, Oxford Legal Studies Research Paper No.33/2006

[88] Roux T.R., The Incorporation Problem in Interdisciplinary Legal Research

[89] F.Cownie and A. Bradney, *Social Legal Studies*, A challenge to doctrinal approach in Watkins and Burton *supra* fn.50;p.35

[90] M.McConville,W.H.Chui(eds),*Research Methods for Law,* Edinburgh University Press(2nd ed.), 2017

[91] R.Banakar and M. Travers (eds.) *Law and Social Theory*, Oxford, Hart, (2nd ed.) 2013

[92] Chapter IV,Part II.A; Chapter V,Part II.A; Chapter VI,Part II.A

[93] Salter M. and Mason J., *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*, Longman, 2007;pp.108-118

political contexts. Besides, the analysed constitutional court decisions could not be explained without giving consideration to the socio-political factors at work. Therefore, this thesis takes into account the broader political and sociological background in which the power-sharing constitutions were drafted and also, two culture-specific settings in which the two constitutional courts functioned. Considering the examination of the application of power-sharing democracy (a topic of political science) and the analysis of ethnic divisions within the society (a sociological factor)[94], this researcher adopted a socio-legal approach as the most suitable and flexible method.

Finally, this research also has a comparative dimension. Comparative research is generally done with the purpose of comparing national legal systems and improving one's own system; it usually provides the historical background and developments in order to explain the current situation that works in practice.[95] It also suggests focusing on common legal problems in similar legal systems, rather than diverging ones in order to compare practical problem-solving ways in different jurisdictions; this approach has been labelled as the *functionalist method* by Hoecke.[96] Thereby, the societal problem and legal response to that problem which bring the actual result is emphasized in the comparative method.[97] Nevertheless, comparative research does not only compare legal systems but also examines how the law works in context; this law-in-context approach cannot also be independent from other disciplines, (such as socio-legal approach) because it requires connection with the social reality.[98] Although there is no agreed method and/or description in comparative law research, it is generally accepted that comparative law usually presumes similarity rather than difference.[99]

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[94] Chapter IV,Part II.A; Chapter V,Part II.A; Chapter VI,Part II.A

[95] M.van Hoecke, Methodology of Comparative Legal Research, *Law and Method*, December 2015 accessed by https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001 on 10 June 2016

[96] Ibid

[97] Ibid

[98] Ibid

[99] Sartori G., Comparing and Miscomparing, Journal of Theoretical Politics,Vol.3,Iss.3,1991

In this thesis, comparative research is captured by the case-studies.[100] Case studies are a feature of qualitative research[101] which aims to answer a question, assess and describe the concepts, rather than measure it as it happens in quantitative methods.[102] The methodology of this thesis follows *small-n comparison* in which small number of cases are examined[103] (three constitutional designs in two countries), and adopts *most similar cases* approach which allows more explanation for the similar background and/or similar cultural/political characteristics;[104] that is the problem of ethnic divisions and the similar constitutional response to solve it and building peace in this thesis.

For the purpose of this thesis, constitutional designs of the RoC and BiH are compared with a specific relevance to the design of their constitutional courts. The diverse Supreme Constitutional Court of the Republic of Cyprus (RoC), the Constitutional Court of Bosnia-Herzegovina (BiH) and the proposed Supreme Court under the United Cyprus Republic (UCR) have been chosen to be examined as case studies within the constitutional context they operate. What is compared is how the problem of ethnic division was attempted to be solved by a power-sharing design, in other words, by a constitutional recognition of ethnicity, and how this attempt has led to a diverse judiciary with international judges. It is not a common practice of countries to have international judges in their senior judiciary. Hence, the number of case studies is limited. However, a *typical case approach,* which aims to *provide insight into a broader phenomenon,* is undertaken with a purpose that these case studies have the potential to become *typical*[105] for other diverse and/or divided societies. This thesis concentrates on within-case analysis and analyses two constitutional designs individually and then, gives place to a brief cross-case comparison as well. This comparison is also done with an aim to highlight the problems faced in the functioning of

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100 Hirschl R., The Question of Case Selection in Comparative Constitutional Law, Vol.53,Issue:1, Winter,2005

101 B.Gillham, *Case study Research Methods*, Continuum, 2000

102 B.L.Berg, *Qualitative Research Methods for the Social Sciences(5th ed.),* Boston, 2004

103 Lijphart, Comparative Politics and the Comparative Method, *The American Political Science Review*, Vol.65, No.3,Sep.,1971

104 Creutzfeldt N.,Kubal A., Pirie F.,Introduction: exploring the comparative in socio-legal studies, International Journal of Law in Context,12 (4),2016

105 J.Gerring, *Case Study Research: Principles and Practices*, Cambridge:Cambridge University Press,2007;p.91-96

the judiciary and to draw possible lessons either from RoC to BiH or from BiH to the prospective federal solution of Cyprus because BiH has a longer-standing tradition of power-sharing democracy with a diverse judiciary and Cyprus is still seeking for a political solution. As both countries, Cyprus and Bosnia, are still ethnically divided, they provide a fertile ground for the comparison.

As a final note, although Cyprus is a common law country and BiH is a civil law country, this distinction of legal families[106] (that the originally comparative research has brought forth) not so relevant for the case-studies because both countries ratified the ECHR and acknowledged the priority of the Convention over the Constitution for the constitutional protection of the human rights. Additionally, both Constitutions envisaged a centralized form of constitutional review process[107] in which the Constitutional Court was deemed responsible to fulfil this work; this feature is also part of the civil law tradition. Therefore, in terms of constitutional adjudication, Cyprus' constitutional and administrative system had the characteristics of civil law.

In this research, specific limitations of the doctrinal legal research are present. Doctrinal research does not have any transnational standards and does not argue for universal applicability.[108] As Roux has stated, the rationality of research is defined by the *highly localised standards* specific to the legal tradition and even the particular area of law. As this thesis examines two culture-specific contexts, its general conclusions are valid for the ethnically divided Roc and BiH. However, considering the fact that ethnic conflict can only happen in ethnically diverse societies, not in homogenous ones, it could be argued that "ethnic conflict/division" is just another extreme version of "ethnic diversity". As diversity is the main feature of many societies in todays' world,[109] this thesis' findings might apply and teach lessons to other divided societies that have a diverse population. In

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106 V.C.Jackson, Comparative Constitutional Law: Methodologies, in M. Rosenfeld, A.Sajó, Oxford Handbook of Comparative Constitutional Law,OUP, 2012

107 K.E.Whittington, The Power of Judicial Review in M.Tushnet, M.A.Graber&S.Levinson, *Oxford Handbook of the US Constitution*, Oxford University Press, 2015

108 *Supra* fn.88, Roux T.R.;p.57

109 W. Connor (1972) cited in J. Llobera, The Future of Ethno-nations in a United Europe in H. R. Wicker (ed.) *Rethinking Nationalism and Ethnicity,* Oxford, Berg, 1997

that regard, this thesis provides an original contribution towards filling an existing lacuna in the literature meaningfully addressing the existing identified gaps

D. Brief Historical Context

Both Cyprus and Bosnia-Herzegovina experienced violent ethnic conflict and their post-conflict constitutions were originally designed according to the principles of power-sharing democracy. In the 1960 Constitution of Cyprus, all consociational principles, (grand coalition in the executive, veto power of the President and the Vice-President, group autonomy of both communities and representation in all government institutions) were present. However, they were deemed ineffective by the nationalist politicians from both sides and, in 1963, the consociational system broke down due to the ethnic conflict. This break-down, then, was endorsed by the Supreme Court decision in 1964.[110] Since then, the country which was already ethnically divided split once more along territorial lines in 1974 due to the invasion of the northern part of the country by Turkey. Both sides are still searching for a constitutional political solution under the auspices of the United Nation that will unite the country but till today, no solution has been reached. Needless to say, the constitutional accommodations on the judiciary are also part of the negotiation table.

The dissolution process of the former Yugoslavia has also been experienced violently in Bosnia-Herzegovina. Three ethnic groups competed for power in the same territory for more than two years and the war came to an end due to the help of international community to the Bosniacs/Muslims. The Dayton Agreement which ended the war contains the Constitution which was also influenced by consociational democracy with some territorial accommodations that rendered the constitution close to the federal design. Nevertheless, although the Dayton Agreement ended the war, it did not satisfy any of the parties. The Bosniacs considered the Agreement as the "*legitimization*" of Serb aggression; the Croats demanded but could not establish an Entity of their own; and the Serbs regretted the independence of BiH and the break-up of Yugoslavia.[111] What Smith has written for Cyprus almost 60 years ago can also be said for the constitutional situation

[110] The Attorney-General of the Republic v. Mustafa Ibrahim and Others, 1964, C.L.R. 195

[111] D. Feldman, The Nature and Effects of Constitutional Rights in Post-Conflict Bosnia-Herzegovina in C. Harvey and A. Schwartz, *Rights in Divided Societies*, Human Rights Law in Perspective, Hart Publishing, 2012

in BiH: *(...) nations dwell together under its shadow in uneasy juxtaposition, unsure whether this precariously poised structure is about to fall crashing about their ears.*[112] Therefore, both Cyprus and BiH are in need of a constitutional reform; the former to achieve peace and the latter to re-design and legitimize peace.

E. Conclusion

To conclude, the focus of this chapter was to offer the reader the background to the thesis, outlining the theoretical framework of this study, laying down the aims and research questions and discuss the methodology adopted. The following chapter will explore the theoretical framework of consociational and federal models further and thus, lay down the theoretical premises upon which this thesis is based and the application of the principles of consociational democracy to the judiciary.

[112] A.S. de Smith, *New Commonwealth and its Constitutions,* Stevens&Son, 1964

Chapter II. Theoretical Framework

I. Introduction

This chapter has two primary aims. Firstly, it provides the theoretical framework of the current study which is consociational democracy adapted to the case studies so as to include elements both of consociationalism and of federalism. In order to do this, it initially, explores the definitions, main principles and requirements of the two main government models relevant to this thesis, namely consociational democracy and

federalism, and then the limits of majoritarian democracy in providing political stability in divided societies. The work under this part aims to demonstrate the relevance of power-sharing models in providing for a solution in ethnically divided societies for political stability.

Secondly, it examines how consociational principles apply to the judiciary, and identifies the consociational principle of representation as the key principle that influences the composition of the senior judiciary and leads to the establishment of a representative judiciary. The concept of representation is explored with an aim to provide the type/meaning of the representation that judges should undertake in a representative court composition. This work is done under the concept of judicial diversity which representation principle yields and consociational democracy implicitly embeds. Examples coming from the case studies of RoC and BiH to illustrate the theory are provided in order to demonstrate that an adapted/a modified form of consociational theory potentially works when applied to the case-studies.

The chapter concludes that through the application of the consociational principles, consociational democracy has the potential to provide stable democracy in divided societies and the consociational principle of representation is the main avenue which influences and demands the creation of a diverse judiciary under consociational democracy.

II. Theoretical Framework

A. The Theory of Consociational Democracy:

Lijphart, the father of the theory of consociational democracy examined the Netherlands at the end of the 1960's as a model for consociational democracy and argued that stable democracy may be difficult but not impossible in plural societies.[1] He argued that in order to overcome conflict and achieve a stable democracy, group cleavages need to be recognized and actively entrenched in consociational constitutions.[2] Supporters of consociational democracy view the establishment of democratic institutions based upon group recognition and accommodation as a practical necessity to guarantee widespread support of all groups (especially, minority groups) and the stability of democratic institutions.[3] By doing so, all government branches need to share governmental power between the constitutionally recognized groups and provide representation to them. Thereby, state authority can achieve legitimacy by being inclusive.[4] By recognizing and accommodating different [ethnic] groups as fundamental *"building blocks"* of the political system,[5] consociational democracy can be considered as an *"alternative strategy"* to manage ethnic conflict.[6] Therefore, consociational design accommodates differences and provides representation to groups which is fully compatible with democratic values if the primary meaning of democracy is representation in the decision-making process.[7]

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1 Lijphart A., Consociational Democracy, *World Politics,* Vol. 21, No.2. (Jan.,1969); However, in time, Netherlands did not need to rely on consociational model and the political system moved on to majoritarian democracy.

2 A. Lijphart, *Democracy in Plural Societies, A Comparative Exploration,* Yale University, 1977

3 R.H.Pildes, Ethnic Identity and Democratic Institutions: A Dynamic Perspective in S. Choudhry, *Constitutional Designs in Divided Societies*, Oxford University Press, 2008

4 Ibid

5 I. O'Flynn and D. Russell (eds.), *New Challenges for Power-Sharing: Institutional and Social Reform in Divided Societies*, Pluto Press, London, 2005

6 C. McCrudden and B. O'Leary, *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

7 W.A. Lewis, *Politics in West Africa,* London, 1965;pp.74,81

Consociational democracy is considered as an anti-majoritarian model[8] because it shares, disperses, distributes and delegates and sets formal limits to the governmental power. Thereby, it restrains majority rule and prevents hegemony by the majority. While doing so, it aims to achieve democratic stability and peace in divided societies via a consociational arrangement in which all the major parties form a coalition.[9]

Consociational democracy has four principles and these are the grand coalition, the veto, group autonomy and proportionality or proportional representation. The aims and application of these principles will be discussed next.

A.1. Four Principles of Consociational Democracy

In this section, each of the consociational principles is described in turn.

A.1.1. Grand Coalition

The Grand Coalition principle requires all constitutionally recognized groups to be represented at the executive branch in political decision-making;[10] this includes the representation of the opposition in government.[11] Constitutionally recognized groups are usually the ones who were previously conflicted.[12] This principle aims to facilitate the solution of problems arising from differences without public conflict,[13] thus, it requires the cooperation of the political leaders of all constitutionally represented groups.

In the parliamentary systems, this principle can be observed in the cabinet either in the form of the grand coalition or a grand council or committee (with important advisory

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[8] A. Lijphart, *Democracies, Patterns of Majoritarian and Consensus Governments in Twenty-One Countries,* Yale University Press, 1984

[9] *Supra fn.*7, W.A.Lewis;p.74

[10] *Supra* fn.2, A. Lijphart

[11] The electoral system should be designed in a way to provide this representation. S.Wolff, Electoral Systems Design and Power-Sharing Regimes in *Supra* fn.,5 O'Flynn and D. Russell (eds.), *New Challenges for Power-Sharing;* J.McGarry and N.Loizides, Power-Sharing in re-united Cyprus: Centripetal coalitions v.s. proportional sequential coalitions, I-CON (2015)13, 847

[12] As such, only Greek-Cypriots and Turkish-Cypriots were constitutionally recognized by the 1960 Constitution of Cyprus, but not Armenians.

[13] Ehrlich C.E., Democratic Alternatives to Ethnic Conflict: Consociationalism and Neo-Separatism, 26, *Brooklyn Journal of International Law*, 447, 2000-2001

functions), whereas in the presidential systems, it is facilitated by the grand coalition of a president and other top officeholders.[14] Applying this principle in the 1960 Constitution of Cyprus, the grand coalition principle can be envisaged in the Executive which was shared by a Greek-Cypriot President and a Turkish-Cypriot Vice-President and also in the composition of the Council of Ministers in which seven Greek-Cypriots and three Turkish-Cypriots were given a place (Article 46). Thereby, the principle allowed co-decision-making among Greek-Cypriots and Turkish-Cypriots which enjoy political parity as consociational partners.[15]

A.2. The Veto

By the use of the veto right, it is aimed to provide an additional protection for sub-groups and/or constitutionally recognized minorities when their vital interests are at stake.[16] Sub-groups can veto a decision when they consider the decision as a threat to their presence and thereby, they are protected from certain prejudicial changes in the central government in consociational regimes.[17]

The veto right can sometimes be given only to minorities, sometimes to all sub-groups and where there are two consociated partners, it might be mutual.[18] The veto might be an informal and unwritten practice, or a formally agreed rule embedded into the constitution. For example, Article IV/3 of the Bosnia-Herzegovina (BiH) Constitution gave the right to Bosniacs, Croats and Serbs to veto a decision when their vital national interests are at stake.[19]

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[14] *Supra* fn.2, A. Lijphart

[15] In that sense, very small minorities who are not constitutionally recognized are not required or allowed to be represented in the grand coalition or other public institutions; *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

[16] Lijphart A., Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories, University of California*: The Journal of Federalism,*15,(1985)

[17] Steiner H., Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities, 66 *Notre Dame L. Rev.*(1991)

[18] Article 46 of the 1960 Constitution of RoC provided the veto right both to the President and the Vice-President

[19] Chapter V, Section II.E

A.3. Group Autonomy (or Segmental Autonomy)

Group autonomy means that decision-making is delegated to the constitutionally recognized groups as much as possible.[20] Each group should have a high degree of autonomy to run its own internal affairs in cultural matters, especially in the areas of education, religion and language.[21] By allowing each group a certain amount of control over its own affairs, it is aimed to maintain fewer areas of direct conflict between themselves.[22] Application of the group autonomy principle is observed in the 1960 Constitution (Article 87) of the RoC, which envisaged the establishment of the respective Greek-Cypriot and Turkish-Cypriot Communal Chambers for the purpose of administering their distinct cultural/communal affairs.

A.4. Proportionality or Proportional Representation

The principle of representation aims to provide representation in the government branches and in administrative posts for all constitutionally recognized groups in two ways: a) by deliberate over-representation of small groups; b) by parity of representation between the groups.[23] In both of the above cases, the representation of smaller/minority groups is constitutionally secured and in the latter case, representation of the minority is equated to that of the majority. Therefore, although Lijphart and other scholars used the term *proportionality and proportional representation* interchangeably, in practice, the principle has not always been implemented using numerical proportion for the population ratio.

The principle of representation is used to provide for job opportunities in the civil service, police, and the judiciary on the basis of ones' group membership (whether it is ethnic, linguistic or etc.) by the employment of constitutional quotas.[24] For example, the

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[20] *Supra* fn.16 , Lijphart A., Non-Majoritarian Democracy

[21] *Supra* fn.2, A. Lijphart;p.25

[22] *Supra* fn.13, Ehrlich C.E.

[23] *Supra* fn.2, A.Lijphart

[24] Lijphart A., Constitutional Design For Divided Societies, *Journal of Democracy,* Vol.15,No.2, April 2004

1960 Constitution of the RoC (Article 123/1) provided that public service will be shared with a ratio of 60/40 between the Greek-Cypriots and the Turkish-Cypriots.[25]

The reasoning behind this principle is to prevent minority groups from feeling victimized by the unfriendly majority[26] by allowing them to participate in government institutions. The expectation is that by participating in government, minorities would perceive the system as legitimate because they would not be permanent *outsiders* and their presence would contribute to the stabilization of democracy. In Lijphart's words, *"minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime";*[27] on the contrary, their participation would lead to stable democracy. This stable democracy would most probably remain peaceful, absent of actual or potential violence or at least, have a low level of violence.[28] Therefore, the importance of the principle of representation derives from its role in providing the means to keep minorities within the system by providing them with *presence* in the political system.

A.5. Discussion

In essence, consociational democracy aims to regulate group differences by embedding these differences in the constitution of the State and relying on the same differences that it aims to regulate. It does so by providing *"rights"* and *"representation"* to the groups through constitutional accommodations in order to prevent democratic instability, disorder and potential violence. Through the application of consociational principles, governmental power is shared among the constitutionally recognized groups and in turn, they have the right to be represented in government institutions. Therefore, the relevance of the consociational design in divided societies is due to its capacity in

[25] Chapter IV, Section IV,A

[26] *Supra* fn.13, Ehrlich C.E.

[27] A.Lijphart, *Patterns of Democracy, Government Forms and Performance in Thirty-Six Countries,* Yale University Press, 1999;p.32

[28] *Supra* fn.2,A. Lijphart

providing legitimate exercise of political power especially for minorities and thus, providing political stability.[29]

However, consociational democracy has also attracted criticism. It was argued that consociational accommodations institutionalize, thus, freeze collective identities[30] and assume that group members have fixed, single and homogenous traits,[31] whereas each individual is unique in their own right.[32] Thus, consociationalism does not allow new identities to emerge and/or to be constructed. This aspect of consociational accommodations has been regarded as an obstacle in the rise of more integrationist policies in the long run, if the constitution is not structured carefully.[33] Nevertheless, an adapted version of consociationalism can overcome this obstacle by giving the freedom to people to choose to which group they would like to belong to or not to belong to any of the main ethnic groups (i.e. belong in the *"other groups"* category) but still providing the same constitutional rights to all group members when the latter is chosen.

Horowitz, one of the biggest critics of consociational democracy, criticizes consociational democracy on the ground that it puts too much faith in the role of political leaders.[34] He argues that elite cooperation is not realistic because elite competition is the main reason of ethnic conflict in the first place.[35] He states that *incentives* for elite cooperation are still needed because when some group leaders choose to cooperate with leaders of other groups, intra-group competition tends to arise on the (alleged) base that *"group interests have been sold out"*.[36] Elite cooperation is also closely related to the veto

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[29] Issacharoff S., Constitutionalizing Democracy in Fractured Societies, 82 *Texas Law Rev*.,2003-2004; p.1863

[30] A.Finlay, *Governing Ethnic Conflict, Consociation, identity and the price of peace,* Routledge, London and New York, 2011;p.7,p.34

[31] *Supra* fn.3, Pildes R.H.;p.174

[32] C.C. Gould, Diversity and Democracy: Representing Differences in S.Benhabib(ed.) *Democracy and Difference,* Princeton,NJ:Princeton University Press, 2005;pp.182-183

[33] *Supra* fn.3, Pildes R.H.

[34] D.L.Horowitz, *Ethnic Groups in Conflict,* (2nd ed.) University of California Press, 2000;pp.573-574

[35] Ibid

[36] Ibid

right; in the absence of cooperation, veto will always be an option to resort to and thus, will lead to deadlock in the political decision-making.[37] Therefore, it is very important not to sacrifice cooperation for short-term political goals. However, Lijphart's reply to this criticism is that the prospect of avoiding political conflict overrides all other incentives.[38] Hence, in relation to violently divided societies, what needs to be asked is if the prospect of a war is not an incentive in its own right, then what could be considered an incentive to be.

The group autonomy principle is also criticized on the ground that it might lead to ethnic conflict and further divisions by preventing a moderate interaction between the groups.[39] However, the aim of group autonomy is to secure some form of self-rule for the internal/cultural affairs of different groups that will not be subject to other groups' scrutiny or influence, rather than creating isolation and/or disintegration. Nevertheless, it is accepted that there is a risk of abuse towards that direction in any diverse society where there are sharp divisions and hostility.[40]

Perhaps the main criticism of the consociational system is directed to its promotion of group rights and representation compared to individual human rights. As the consociational system grants rights and provides representation to individuals as far as they are a member of a group, it is argued that it neglects the individuals who are not members of constitutionally recognized groups or those who do not wish to identify themselves as a member of any constitutionally recognized groups. This creates the perception that protection of individual human rights is guaranteed as far as the individual is a member of a group. This aspect of the consociational model has been criticized as it contradicts the

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[37] D. Horowitz, Conciliatory Institutions and Constitutional Processes in Post-Conflict States, William and Mary Law Review, 49-121, 2007;p.1213

[38] A. Lijphart, *The Wave of Power-Sharing Democracy* in A.Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy,* Oxford University Press, 2002

[39] R. Aitken, Cementing Divisions, An Assessment of the Impacts of International Interventions and Peace-Building Policies on Ethnic Identities and Divisions, *Policy Studies,* Vol.28,No.3, 2007;pp.247-67

[40] Tarr, A.G., Williams R.F.and Marko J.(eds.), *Federalism, Subnational Constitutions, and Minority Rights,* Westport, Praeger,2004

equality principle and human rights.[41] Equality principle requires individuals to be treated equally without discrimination on the base of race, ethnicity and religion except in cases that differential treatment (that is based on real differences) is needed. However, consociational accommodations require a different treatment (as in the sense of proportional treatment) of group members on the basis of ascriptive criteria, such as ethnicity, in contradiction to the human rights norms and equality principle.[42] Therefore, Wipmann argues that the recognition of group rights has a negative impact on human rights and the equality principle because they lead to favouring one group over another due to group membership.[43]

McCrudden and O'Leary replied to these critics by arguing that consociations do not create a conflict with the equality principle but rather involve a conflict between two different aspects of equality: individual equality and group equality.[44] They argue that individual equality seems to be challenged by consociations because consociations try to improve equality between the consociated groups.[45] Equality of (both majority and minority) groups in power-sharing and increased representation of smaller ethnic groups in government institutions might seem to be challenging individual equality.[46] Therefore, ethnic consociations seem to be creating a conflict with the value of non-discrimination on ethnic grounds.[47] However, when a member of group who relies on their group identity to exercise their [legal] rights, the member [individually] advances their private interest; advancing individual interests in return contributes to the welfare of the whole group as

41 D. Wippman(ed.), Practical and Legal Constraints on Internal Power-Sharing in D. Wippman, *International Law and Ethnic Conflict*, Ithaca, NY:Cornell University Press, 1998

42 Ibid

43 Ibid

44 *Supra* fn.6, C. McCrudden and B. O'Leary

45 Ibid

46 Ibid

47 Ibid

well.[48] In this respect, individual human rights also have a collective/group character because the distinction between the two is not all that clear.[49]

Apart from this philosophical stance, in practice, two points need to be considered in this argument. First, the constitutional protection of group rights is of the utmost importance if it is aimed to reach an agreement on the conditions of peace. Extra protections for groups are also provided with an aim to redress the previous abuse or prevent the prospective abuse and/or a possible tyranny of the majority or the likely secession of minority by providing balance between ethnic groups. Without recognizing group rights, peace agreement cannot materialize. Thus, in the post-conflict period, group rights are vital because individuals (as group members) equate their survival to the survival of their groups.[50] Without this understanding, group rights do not make sense. Secondly, besides group rights, many consociational constitutions, such as the 1960 Constitution of Cyprus and the 1995 Constitution of BiH[51] embedded the bill of rights for the protection of human rights, recognized the human rights that are protected by the ECHR and accepted the superiority of the ECHR to the Constitution. Thus, group rights and individual human rights are protected at the same constitutional level.

Human rights also have several important roles in post-conflict societies.[52] They are means to provide guarantees for the protection of individuals against discrimination because an extreme form of discrimination means war.[53] By the protection of human rights a sense of security is provided for the previously conflicted groups in order to build trust

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[48] *Supra* fn.17, Steiner H.; p.1544; He uses the terms power-sharing, devolution, autonomy interchangeably to refer to autonomy regimes like consociational regime.

[49] Ibid

[50] C.Taylor, *Multiculturalism and The Politics of Recognition,* Princeton, Princeton University Press, 1992;p.61

[51] 1960 Constitution, Part 02; BiH Constitution, Chapter I,Article 1

[52] Parlevliet M.,Bridging the Divide: exploring the relationship between human rights and conflict Management, Centre for Conflict Resolution, Cape Town 11(1), 2002

[53] Ibid

and cooperation.[54] Considering that both group and individual rights serve the same purpose, peace, it is difficult to uphold one right over another as their distinction is somewhat blurred.

Despite the criticisms, the consociational design is still a more adequate model for divided societies. This has been evident by the United Nations' approach to designing post-conflict peace agreements and their constitutions for many war-torn societies as well as the approach of international organizations' recommendations to resolve bloody conflicts.[55] As Steiner put it, power-sharing regimes are the *"least worst"* solutions to intractable problems, perhaps not satisfying the full realization of important ideals but at least ending violence, oppression and/or conflict.[56] Therefore, considering the fact that consociational democracy has the potential to provide stable democracy, its benefits simply outweigh its disadvantages in regulating deeply divided societies; these shortcomings of the design are the price to be paid for the democratic regulation of divided societies without violence. In the absence of consociational principles, either a modified version of consociational democracy or another alternative design, as in the form of federalism, should be designed and applied according to the needs of a given society. The next section examines the latter option.

B. Federalism

Federalism is also a form of government which aims to accommodate differences in order to hold the unity of the polity together. In order to do so, it recognizes, protects and promotes the differences/diversities without aiming to establish a single cultural unit.[57] Federalism neither envisages the assimilation and/or integration of smaller groups to the bigger groups nor allows the secession of smaller groups. This is done by providing a constitutional framework in which the needs and demands of the constituent units are met

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[54] D. Feldman, The Nature and Effects of Constitutional Rights in Post-Conflict Bosnia-Herzegovina in C. Harvey and A. Schwartz, *Rights in Divided Societies*, Human Rights Law in Perspective, Hart Publishing, 2012

[55] Bell C., Power-Sharing and Human Rights Law, *The International Journal of Human Rights*, Vol.17, No.2,2013;p.204; Also,*Supra* fn.6 McCrudden&O'Leary;p.4

[56] *Supra* fn.17, Steiner

[57] N.Kizilyurek&T. Erhurman, *Federalism in Cyprus: Politics in Search of its Subject*, Isik Kitabevi, Cyprus, 2009

while preserving the federal government as a whole. Therefore, federalism prohibits both the majority's hegemony and the minority's secession.[58]. Federalism is being applied in 20 countries with different variations and 40% of the world's population lives under federalism.[59] As such, the USA, Germany, Australia, Nigeria, Brazil, Argentina, India, Canada, Switzerland, the former Yugoslavia and the former Soviet Union are/were all organized under federalism, despite differences in application.

Federalism can be designed either in a centralized or in a decentralized form. What defines the form of federal design is the power that the constitutional design gives to the constituent-units. In centralized federal states, usually, many powers (such as the financial regulation of the State) are entrusted to the central government and only few powers are left to the constituent units; whereas, in decentralized systems, broad powers are given to the constituent-units (such as the right to establish a foreign relationship with other countries as in the BiH Constitution) and central government is entrusted with those powers that is needed for an external sovereignty of the State.[60] Additionally, the constitutional design of federalism varies from asymmetrical to symmetrical federalism but the examination of asymmetric or symmetric federalism is beyond the scope of this thesis.[61] Nevertheless, the literature suggests that the asymmetric federalism, which gives more autonomy to certain constituent units, provides more political stability.[62]

The next section provides the main principles of federalism.

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[58] Ibid

[59] Ibid

[60] M.Burgess, Territorial and Non-Territorial Identities: Multinational Federalism in Multinational Federation,Paper prepared for the conference Multinational Federalism in Perspective: A Viable Model?, UQAM, Montreal, Quebec, Canada, 25-27 September 2009

[61] Symmetric federalism refers to a design in which constituent-states have equal powers under federalism; Aroney N., Types of Federalism, *Max Planck Encyclopedia of Comparative Constitutional Law,2016*

[62] G.U.Duba, Political Accommodation of Ethnic Pluralism in Cyprus: Asymmetric Federalism, Brill, 2014; Watts R., Models of federal power sharing, *International Social Science Journal,*Vol.53, Issue, 167,1999; Agranoff R., *Accommodating Diversity, Asymmetry in Federal States,*Baden:Nomos Verlagsgesellschaft

B.1. Unity in Diversity

Federal states are unions of member-states and/or regions and/or constituent units which may have different cultures, languages, religions or ethnicities.[63] This union does not aim to abolish diversity; but rather to accommodate, reconcile, manage and protect it.[64] In order to ensure unity in diversity, the federal legislature needs to have both the lower and upper houses[65] in accordance with the *self-rule* and *shared-rule* mentality.

B.2. Participation

All member-states are under the sovereignty of the federal government and they all participate effectively in the governance and decision-making processes.[66] In doing so, federalism aims to prevent the marginalization of member-states especially in multicultural federations[67] by accommodating diversity. Otherwise, those member-states/groups which do not get appropriate share of federal power might choose to leave the federal government. Therefore, it is essential to represent diversity in federal institutions in order to avoid the disintegration of the federation.

In federal designs, smaller member-states participate in the government on equal footing. As such, in the USA, Wyoming that has 487,000 population has the same number of senators/representatives in the Senate with California that has 32.4 million population.[68] Participatory rights are required for the protection of smaller member-states.[69] Nevertheless, participation needs to promote integration, not *ethnification* of politics, where one ethnic group constitute one member-state.[70] Whereas, the ethnic member-states must have an effective say in the political decision-making process, they should also be

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63 Livingston, A Note on the Nature of Federalism, *Political Science Quarterly,* Vol.67, No.1, 1952; pp.89-90; K.D.McRae, Comment: Federation, Consociation, Corporatism, An Ammendum to Arend Lijphart, 1979

64 *Supra* fn.62, Watts

65 Mengie L.T., Federalism as an Instrument for Unity and the Protection of Minorities, *Mizan Law Review*, 2016

66 ibid

67 ibid

68 Lee F.E., Representation and Public Policy, *The Journal of Politics,* Vol.60, No.1, Feb., 1998

69 *Supra* fn.65, Mengie L.T.

70 *Supra* fn.40, Tarr, A.G., Williams R.F., Marko J.

prevented from given too much power that yields to deadlock in the functioning of the federal government.[71] Therefore, it is very important for the political system not to function on exclusively (ethnic) rights and regulations in which the participatory rights are mobilized.[72]

B.3. Autonomy

Member-states which constitute the federal state should be autonomous in one region to govern themselves and this autonomy should be secured constitutionally.[73] The federal state does not delegate to and cannot take the power from the entities any time it wishes.[74] The autonomy of the entities is secured as it is derived from the federal constitution and it cannot be removed without the consent of the autonomous entities.[75] Thereby, federal constitutions provide two levels of governance which govern the same country and the same people: federal and regional.

In some cases where ethnic groups are based territorially, federalism is designed as *ethnic federalism;* ethnic federalism is based on the regulation of ethnic groups that is concentrated on one region and giving power to each group, as a member-state, in the central government.[76] The autonomy principle empowers territorially concentrated ethnic groups to govern themselves in certain (constitutionally agreed) matters by the use of legislative power and also provide security and a degree of control to them.[77] However, this autonomy does not amount to a right to establish a separate State.[78] For example, the

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[71] Ibid

[72] ibid

[73] William H. Riker, Federalism Origin, Operation and Significance in Fred I. Greenstein and Nelson W. Polsby (eds.), *Handbook of Political Science,* Vol.5,Governmental Institutions and Processes Reading: Addison-Wesley, 1975

[74] *Supra* fn.57, N.Kizilyurek and T. Erhurman

[75] Ibid

[76] *Supra* fn.65, Mengie L.T.

[77] D.Rothchild and C.Hartzell Security in deeply divided societies: The role of territorial Autonomy Nationalism and ethnic politics, Vol.5,Issue:3-41999 these authors also note that there is a positive correlation between autonomy and stability.

[78] Heintze H.J.,On the Legal Understanding of Autonomy in Autonomy: Applications and Implication, Mark Suksi (ed.) Cambridge: Kluwer Law International, 1998

proposed Greek-Cypriot and Turkish-Cypriot constituent states of the United Republic of Cyprus[79] were designed with this autonomous model in mind.

B.4. Subsidiarity

Federal States provide subsidiary and/or delegation to the member-states. As such, there are two dimensions of governance: the central and the local one. The authority of the member-states comes from the constitution and the member-states are equal and independent in their autonomous areas.[80] As the authority is shared between the central government and the member-states, they all have constitutionally separate competencies.[81]

For a federal design to be implemented, a written constitution and an institution that can solve jurisdictional disputes are needed.[82] Needless to say, this institution is the Supreme Court which is responsible for the resolution of the constitutional cases. These are the structural aspects of federalism. However, for Elazar, federalism is not only restricted to the structural aspect of government structure. It also includes a political culture or in other words, ongoing practice that accompanies the structure; Elazar calls this "*a process*" and argues that federalism requires *"partnership, negotiated cooperation and consensus"* because failing to have this mentality in solving the political problems threatens the integrity of all the federated partners.[83] He argues that when the political process combines with the federal structure, then federalism becomes effective and meaningful.[84] Similarly, Franck also stated that the reason of short life and/or the failure of

[79] Chapter VI, Section II.B.

[80] *Supra* fn.57, N.Kizilyurek and T. Erhurman

[81] Brendan O'Leary, "The Elements of Right-Sizing and Right-Peopling the State", Brendan O'Leary, Ian Lustick, and Thomas Callaghy, (eds.), *Right-sizing the State: The Politics of Moving Borders,* Oxford, 2001

[82] Lijphart A., Consociation and Federation: Conceptual and Empirical Links, *Canadian Journal of Political Science*, Vol.12, No.3, 1979

[83] Elazar D., Federalism and Consociational Regimes, Publius, Vol.15,No.2, Federalism and Consociationalism: A Symposium, 1985

[84] Ibid

federalism is *"the absence of a positive political or ideological commitment to the primary goal of federation as an end in itself"*.[85]

Besides, the character of the society is also very important for the successful application and functioning of federalism. As Livingston states, *"federalism cannot make coherent a society in which the diversities are so great that there can be no basis for integration (...) Societies in which the demand for integration is stronger than the demand for decentralization will produce a set of institutions that is more nearly unitary; and a contrary situation will produce a contrary result*."[86] Therefore, when designing a federal constitution and determining the type of (centralized/decentralized) federal government, these sociological factors need to be taken into account. Nevertheless, federalism offers the political/constitutional tools in order to overcome political conflict and achieve stable democracy.

Federalism has been criticized on the ground that the autonomy principle can lead to secession if much power is granted to the member-states.[87] Thus, any federal system that aims to prevent conflict and/or disintegration needs to find the correct balance between the autonomy of the member-states and the power of the central-state. Additionally, ethnic federalism was found detrimental for political stability as there is a risk of ethnic-member-states to act independently from the central state and declare self-determination with an aim of secession.[88] Furthermore, the equality of the smaller member-states with a larger one (or ones) was criticized as it creates injustice to the larger one. As such, it could be argued that federalism is not democratic enough, if the primary meaning of democracy is the rule of majority. The next section deals with this dilemma.

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[85] T. M. Franck, (ed.), *Why federations Fail: An inquiry into the requisites for successful federalism,* New York: New York University Press, 1968

[86] *Supra* fn.63,Livingston

[87] *Supra* fn.40, Tarr, A.G., Williams R.F., Marko J.

[88] Wondwosen T.&Záhořík J., Federalism in Africa: The Case of Ethnic-based Federalism in Ethiopia, *International Journal of Human Science*s, Vol.5,Issue:2,2008

C. Majoritarian Democracy

Having provided the theoretical background of two types of power-sharing democracy, this section provides the basic understanding of majoritarian democracy briefly and explains why it cannot be a functional model in divided societies.

Democracy, as a minimum standard, is "*a system which rulers are selected by competitive elections*".[89] In elections each citizen can vote according to his/her interest in a multi-party system (at least two relatively matched political parties) and political loyalty is primarily to political parties rather than the individuals.[90] The leading model of majoritarian democracy is known as the Westminster model, that is based on "*competition between political parties, one person-one vote, winners-take-all"* mentality.[91] Democracy and/or democratic government is based on the assumption that a fair election determines a majority and thus, democracy is the right of the majority to govern.[92] Although the theories on democracy have been developed by different theorists in time, the fundamental concept that the minority can become a majority party one day by winning enough votes has remained the same.[93] However, this has not been the case always in practice.

The roots of liberal democracy can be found in the social contract theory in the writings of Rousseau. For Rousseau, the social contract is an agreement between the sovereign people to entrust authority to the State in exchange of the latter's commitment to provide of safety and security to the people it governs.[94] Social contract theory explains the constitution as a product of the "*we, the people*" notion and the constitution takes its authority from the sovereign citizens.[95] Constitutions are *social contracts* between the State

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89 D.Owen, *Democracy* in R.Bellamy&A.Mason(eds), *Political Concepts,* Manchester University Press, 2003

90 Ibid

91 Lijphart A., Majoritarian rule versus democracy in deeply divided societies, *Politikon: South African Journal of Political Studies*, 4:2, 1977

92 *Supra* fn.13, Ehrlich C.E.

93 Ibid

94 G.D.H. Cole, J.J.Rousseau, *The Social Contract and Discourses,* Dent&Sons, London,1913

95 M. Loughlin, *Swords&Scales, An Examination of the Relationship between law and politics,* Hart Publishing, Oxford, 2000

and its citizens, and constitutionalism is based on a *set of pre-constitutional understandings which shape and give rise to the constitutional text*.[96] Hence, political authority is derived from the sovereign people and the people are to rule.

However, traditional understandings of social contract theory are not adequate to explain constitutionalism in divided societies because this initial contract between the ethnic groups (and/or citizens) that compromise the *people*, and between the ethnic groups (citizens) and the State is either absent or based on violence. Firstly, there is a profound disagreement as to *who* the people are and hence, the constitution has to be designed in a way to serve for *all people* in divided societies. As *majority people* give priority to a constitution that adopts the principles of majoritarian democracy and the *minority people* most of the time fight for territorial autonomy, the *"we, the people"* concept is disputed and fragmented. Consequently, any agreement (as in the form of constitution) contains compromises to the dissatisfaction of all groups. Secondly, while reaching a compromise document, third parties' intervention becomes inevitable and sometimes kin states, at other times the international community, such as the United Nations and/or the North Atlantic Treaty Organization (NATO) who are interested in balancing the *peoples'* interest intervene and impose a constitution or at least, influence the constitution-drafting process.[97]

In designing the government institutions which would promote stable democracy in deeply divided societies, majoritarian democracy has been considered as an inadequate model for other reasons as well. Competition between political parties and one person-one vote in divided societies would lead to the organization of political parties in the form of majority-minority dimension; even if there are more than two ethnic groups, there will always be one ethnic group that is numerically *less* compared to the numerically *more* group. In that sense, fair elections would not be "fair" as the numerically less (minority) group will never have the chance to win the elections and take place in the government; thus, the groups' loyalty to the system/regime will weaken. Moreover, the political parties

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[96] Bell C.,Bargaining on Constitutions: Political Settlements and Constitutional State-building, University of Edinburgh, School of Law, Research Paper Series, No.2016/23

[97] Bell C., Peace Agreements: Their Nature and Legal Status, *The American Journal of International Law*,Vol.100,No.2, April 2006; B.O'Leary, Debating Consociational Politics, in S.Noel, From Power-Sharing to Democracy; J.McGarry and B.O'Leary, Northern Ireland Conflict: consociational engagements, the limits to coercive consociationalism

would highly likely be organized on ethnic identity; the party that would win the majority of the seats and come to power would be able to use its power to tyrannize other groups in the society. In case of permanent majority and minority, majoritarian democracy prevents smaller groups from holding governmental power permanently (due to their smaller voting power and one person-one vote rule), even if they are represented through their political parties within the political system.[98] As such, in case of Cyprus in which the population consists of 80% Greek-Cypriots and 20% Turkish-Cypriots, the latter would have no chance to become majority and to be represented in government institutions in the application of the majoritarian democracy. Furthermore, when ethnic groups are emerging from ethnic conflict and/or civil war, there would be hostile feelings between the rulers (from the majority group) and the ruled ones (from minority group) and then, governmental power can expose danger to the latter.[99] Consequently, majoritarian democracy can easily lead to government repression of minorities and/or governments' despotism and thus, the tyranny of the majority.[100]

In response to the despotic governance and/or to their exclusion from government institutions, minority groups are highly likely not to perceive government as legitimate and they might exit and seek solutions outside of the political system for their own political purposes, whether by violence, secession, partition and/or self-determination.[101] In the present work, this researcher does not attempt to provide a definition of democracy, [as it is truly a contested and elusive concept][102] other than acknowledging that the absence of violence is a first and the foremost standard for any democracy type to flourish. This research will refer to a political system as democratic as far as it can regulate conflict,

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[98] T.D.Sisk, *Power Sharing and International Mediation in Ethnic Conflicts*, Carnegie Commission on Preventing Ethnic Conflict, Washington, 1996; Kedouire E., The Cyprus Problem and its Solution, Middle Wastern Studies, Vol.41 No.5, 2005; See Chapter 3

[99] J.S.Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*,(ed.by) H.B.Acton, London:Dent, 1972

[100] L.Guinier, *The Tyranny of the Majority: fundamental fairness in representative democracy,* London:Free Press, 1994; David Beetham, Democracy and Human Rights, pp.108-114

[101] The best example of this situation can be seen in the treatment of Kurdish people and their political parties in Turkey.

[102] D. Beetham, *Democracy and Human Rights*, Cambridge, Polity Press, 1999;p.1

prevent violence and government repression, as a minimum standard as Nordlinger has suggested.[103]

III. The Influence of Consociational Principles on the Judiciary

This part selects consociational theory among the above-mentioned theories and then applies it to the judiciary. Every section examines in a more specific manner how each of consociational principles described above may influence the judiciary and does not involve in the examination of judiciary under federal design. This is because of two reasons: the judiciary under federal design has been examined intensively[104] and also federal judiciary was proposed by the United Nations to Cyprus[105] but neither applied to Cyprus nor Bosnia-Herzegovina which form the case-studies of this thesis.[106]

The examination of the judiciary under the consociational design is a neglected feature of the literature of consociational democracy. This negligence is understandable in light of the principle of the *separation of powers*[107], given that the principle has come to regard the judiciary as an independent branch which is not performing any political role and as functioning separately and independently from the other two branches of government. This being the perception, it is generally held that courts'/judges' traditional role is defined in legal terms; they are required to settle disputes impartially by finding out the facts and by applying law to these facts.[108] Therefore, the perception that "the judges'

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[103] E. A. Nordlinger, *Conflict Regulation in Divided Societies*, 1972

[104] C.R.Sunstein, D. Schkade, L.M.Ellman, A.Sawicki, Are Judges Political?: An Empirical Analysis of the Federal Judiciary,Brookings Institution Press,2006; Scherer N., *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 Nw.U.L. Rev.,587 (2015); R.A.Posner, federal Judiciary, *Strengths and Weaknessess*, Harvard UP, 2017

[105] Chapter VI

[106] Nevertheless, it needs to be noted that the federal principle of participation requires member-states to participate to the Supreme Court of the federal state whereas the autonomy of the member-states allows them to have a judiciary of their own.

[107] The principle of the *separation of powers* originates from Montesquieu's writings who argued that neither of the government branches should exercise the *whole* power of the other in order to prevent arbitrariness and despotic governance. By doing so, it is aimed to prevent rulers' tyranny towards the ruled; Montesquieu, *Esprit des Lois,* Book XI, Chapter 6 cited in E.C.S Wade and G.Phillips, *Constitutional Law* (8th ed.), London: Longman Group Limited, 1970;pp.23-25

[108] Ibid,p.22

duty is to do law and not politics" was not challenged for a long time and the examination of the judiciary was left to legal scholars by the political scientists.

However, the entrenchment of constitutional judicial review into the constitutions challenged all traditional norms and the judiciary also has become a powerful actor of political life due to the expansion of judicial power.[109] In this way, constitutional review has become the main premise where politics and law meet. Therefore, it is essential to examine how political principles of consociationalism may influence the allegedly non-political judiciary.

A. Grand Coalition

The principle of grand coalition is the essence of the consociational system because it provides a share of the executive power by enabling the representation of different groups. The same mentality influences the judiciary and requires judicial power to be *shared* between judges from different backgrounds. In order to share judicial power, diverse courts need to be established and the representation of diverse judges in the court composition needs to be guaranteed constitutionally. Therefore, when applied to the judiciary, the grand coalition principle, in a way, demands a *coalition* of diverse judges in the senior judiciary; so, the sharing of judicial power. For example, the diverse BiH Constitutional Court is a coalition of Serbs, Croats and Bosniac judges (as well as international ones) as a result of this influence.[110]

B. Veto Right

The use of veto demonstrates political factions in the executive, when the conflict is about groups' vital interests. In the judiciary, when there is a disagreement between the judges, they cannot veto each other's decisions. Judges can only issue dissenting opinions and thus, the veto right is not applicable to the judiciary. However, both veto and dissenting opinions show polarization in decision-making; the former regarding the executive and the latter regarding the judicial decision-making.

C. Group Autonomy

The principle of group autonomy may influence the composition of communal courts which are entrusted to resolve in-group cultural disputes, such as, religious affairs

[109] Chapter III, Section II/A

[110] BiH Constitution, Article VI (1)

and/or matrimonial cases. However, this principle is not directly relevant for the composition of the Constitutional Courts because in-group conflicts do not usually have a constitutional character, but rather they are civil conflicts between the group members. As such, the establishment of Communal Courts in Cyprus (1960) with a responsibility to resolve cultural matters[111] was a basic application of this principle to the legal system.

D. Representation

The principle of representation is directly relevant to the composition of the judiciary. As the principle envisages the representation of constitutionally recognized groups in government institutions, the judiciary is not exempt from this. Constitutional courts need to be designed in a way that could provide presence to judges from different backgrounds. In order to do so, constitutional quotas are employed in the judicial appointments process. Thus, the representation principle is facilitated through the use of constitutional quotas. Constitutional quotas define the necessary criteria for the appointments to public bodies; the criteria may be ethnicity, language, religion, race, gender or other criteria, depending on the type of conflict the society had previously suffered from. It has been observed in practice that constitutional courts are usually constructed by equal number of judges from all groups rather than proportional numbers. For example, the Belgian Constitutional Court (composed of equal number of French and Dutch speakers), Canada's Supreme Court[112] (requires three judges from Quebec and three from Ontario) and BiH Constitutional Court are all designed with this principle in mind.[113] As the consociational principle of representation leads to the establishment of a representative judiciary, further examination is needed for the understanding of what representation stands for, who represents who, by what means and in which capacity in the judiciary. Whereas consociational representation in legislature and in executive is designed

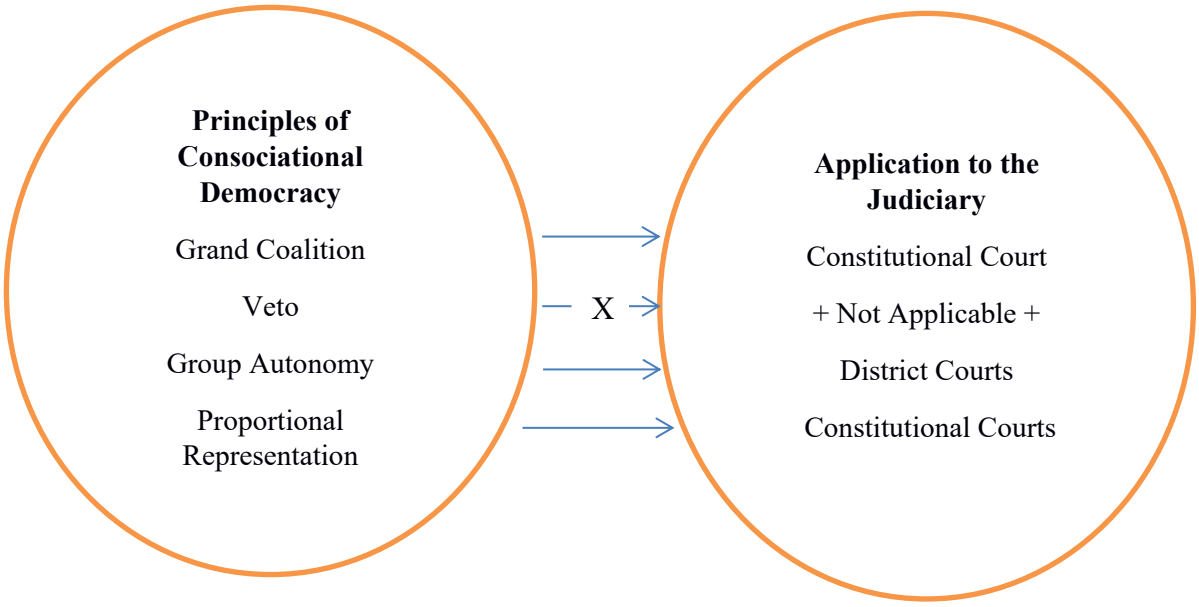
[111] Chapter IV,Section III.B.

[112] Although Canada is based on a federal design, federalism and consociational democracy are not so distinct from one another as they both rely on power-sharing deisgn; Noel S.J.R., Consociational Democracy and Canadian Federalism, *Canadian Journal of Political Science,* Vol.4, No.1, March 1971

[113] S. Choudhry, Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power? in M.Rosenfeld and A.Sajó(eds.), *The Oxford Handbook of Comparative Constitutional Law,* 2012;p.22

to serve for, in essence, the political system's stability and legitimacy (by being inclusive), a representative judiciary contributes to other purposes as well,[114] in addition to legitimacy.

CONCEPTUAL FRAMEWORK



E. The Concept of Representation and Judicial Diversity

In the previous section it was explained how the principle of representation influences the composition of the senior judiciary and stated that it is implicit that in consociational democracy the judiciary should be representative. In this section, besides consociational representation, this study examines the concept of representation with regard to judicial diversity.

As this thesis argues that representation is necessary for a constitutional court's composition, it is vital to provide an understanding of the concept of representation. Consequently, the concept of representation is elaborated in relation to the judges' representative role and the meaning of representation in a court's composition under the consociational design is provided. In the light of the above, it is essential to investigate how one person (a judge) can be said to represent another and also to discuss what it is that they represent. Does a judge represent his/her background and their [political] interests or do they stand for the law/legal system only? If they stand only for the legal system, why do

[114] Chapter III

we need representative courts?[115] These questions are all in need of analysis. Although the meaning of representation in the judiciary differs from representation in the executive and the legislature, (as they have to involve substantive representation of the viewpoints of those who elected them and actively advocate their viewpoints), one can still extrapolate from the latter to the former, as the judiciary is also one of the branches of government. Also, group demands on representation in the executive and the legislature are also valid for representation in the judiciary.

Pildes argues that the most pressing problem of both newly-forming democracies and more established democracies is to design democratic institutions in the midst of heterogeneity, conflict and group difference where various groups more assertively press claims for political recognition, representation and influence.[116] Those [ethnic] groups who have regarded themselves as exploited or excluded from political participation previously, demand representation in government institutions and governments are required to respond to this need at the moment of State-formation by the recognition of these group identities.[117] This process has been called the "*politics of recognition*" by Taylor, who argued that the misrecognition of different identities demonstrates the absence of respect and imposes serious victimization, self-hatred and oppression, whereas in fact, recognition is a *"vital human need"*.[118] Therefore, in fact, *politics of recognition* are a natural consequence of identity politics and it is very important for those who were previously discriminated against, and/or under-represented and/or who had political conflict or even competition for representation in government branches.

In *Politics of Presence,* Phillips, while examining the type of representation in political institutions, argues that the mere presence of a representative with relevant social or other characteristics is sufficient for representation.[119] She states that historically excluded groups are more sensitive to their group interests and how their communities are affected

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[115] Chapter III

[116] *Supra* fn.3, Pildes R.H.

[117] Ibid

[118] Supra fn.50, C.Taylor

[119] A. Phillips, *The Politics of Presence, The Political Representation of Gender, Ethnicity, and Race,* Oxford University Press, 2014

by the governments' policies; thus, they are more likely to address these issues than the majority in the legislature.[120] Through the *politics of presence,* previously excluded people are enabled to engage more directly in political decision-making; so, their presence in the decision-making process can affect and change the character of the issues and policies discussed and consequently, public policy.[121] This is due to the interaction between the groups because the representation of one group either challenges another or creates cooperation; but whatever the outcome is, this dialogue results in representing all viewpoints in society in a more inclusive way and affects political decision-making.[122] In consociational designs, the concept of representation should be understood as a form of *politics of presence* if a smooth functioning of consociation is aimed for. This is because other forms of representation would require the representatives to act on behalf of the interests of the people/group that they represent, and not the interest of the whole country, and this would prevent the flourishing of a consensus culture which is necessary for a stable democracy in a divided society.[123]

When applied to judiciary, the *politics of presence* also requires a representative judiciary which ensures the participation of judges from different backgrounds. Phillips states that this is necessary because the judiciary is historically antagonistic to the representation of women and people from ethnic minorities.[124] However, judges from excluded groups can bring an outsider perspective and experience due to their background and can influence other judges from the majority, especially when identity issues are discussed during constitutional adjudication.[125] In order to enable this participation, courts should be designed in a way to provide representation to people from under-represented groups and thereby, be representative. A representative judiciary has been usually examined under the concept of judicial diversity.

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120 Ibid

121 Ibid

122 Ibid

123 For example, *politics of delegation* requires the representatives to act on behalf of the people they represent for a meaningful representation; Krook M.L., Lovenduski J. and Squires J., Gender Quotas and Models of Political Citizenship, *British Journal of Political Science,* Vol.36, 2009

124 *Supra* fn.119, A.Phillips

125 *Supra* fn.113,S. Choudhry,

Many studies[126] which support representative judiciary/judicial diversity have dealt with the meaning of representation by referring to Pitkin's work, *"The Concept of Representation"* (1967),[127] while trying to determine the type of representation that judges get involved. Pitkin, who wrote from a political perspective, firstly stated that the type and meaning of representation are not separable and argued that in order to determine the real meaning of representation, the context in which the concept is located needs to be known.[128] She defined representation as: *"the making present in some sense of something which is nevertheless not present literally or in fact"*[129] and identified four perspectives on representation:

Firstly, in the *"formalistic view of representation"*, the representative is authorized to act by the represented and the represented is deemed responsible for the consequences of the representative's actions as if it were done by themselves.[130] Representing is an agreement at the onset, before the actual act of representation begins. Under this view, representation is a *"black box"* shaped by the initial giving of authority (which the representative did not have previously) and the representative can do whatever they want.[131] As such, there is no good or bad representation; the representative either represents or not. Pitkin exemplifies all government officers, including judges, either elected or appointed, as the formal representatives of the State.[132] Secondly, in *"descriptive representation (or* "s*tanding for"),* the relation between the represented and the

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[126] To cite few, Rackley E., What a difference difference makes: gendered harms and judicial diversity, *Int'l Journal of the Legal Profession*, Vol.15, No's.1-2,March-July 2008, Hunter R.C, More than Just a Different Face? Judicial Diversity and Decision-making, *Current Legal Problems*, 2015; Ifill S.A.,Racial Diversity on the Bench:Beyond Role Models and Public Confidence,*Wash.&LeeL.Rev.,*405, Vol.57,Issue 2, Article 5,2000; Feenan D., Women Judges: Gendering Judging, Justifying Diversity, *Journal of Law and Society*, Vol.35,No.4, December 2008

[127] H. F. Pitkin, *The Concept of Representation,* University of California Press, 1967

[128] Ibid

[129] Ibid

[130] Ibid

[131] Ibid

[132] Ibid,p.41

representative is based on "*resemblance or reflection*".[133] Representing depends on the representative's characteristics, on what they are or *are like*, on *being* something rather than *doing* something.[134] Thus, the representative stands for the represented by virtue of resemblance and acts as the people would have done, but does not *act for* them. She gives the composition of legislature as an example which represents more or less the mathematical exactness of the different groups of the electorate proportionally.[135] Thirdly, Pitkin suggests *"symbolic representation"* where the representative is a symbol who *"stands for"* a set of feelings or expressions.[136] Symbols usually represent something which is not present in reality. In symbolic representation, the symbolic meaning of the representative for those being represented is important. Lastly, Pitkin argues that *"substantive representation - acting for"* is a form of representation where the representative acts for others, on behalf of others, in the interest of someone else and the nature of that activity is important.[137] Substantive representation fits the active representation of the members of parliament as they act on behalf of their constituencies (or constituent people) for the interest of those who elect them.

As it can be discerned from the above explanation, only the *symbolic* and *descriptive* views of representation are suitable for the representation of judges in courts. This is because substantive representation would create the appearance (or also the reality) of prejudiced judges who are representing or supporting or advocating the values of their own background. *Substantive* representation is also not a suitable form of representation as it might lead the judge to act in the interest of their ethnic background in order to secure the outcome of a case. Acting on behalf of any group is nevertheless against the established legal principles of judicial independence and impartiality which require judges to make decisions free from bias. Therefore, the substantive representation of judges is a threat to their unbiased judicial decision-making.[138] It is for this reason that it is crucial to

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[133] Ibid

[134] Ibid

[135] Ibid,p.61

[136] Ibid,p.92

[137] Ibid,pp.113-114

[138] Although substantive representation may look detrimental for ethnically divided societies, in relation to gender representation some gender studies have suggested that when substantive

understand these differing aspects of representation; otherwise, any assessment on the meaning of the representation of judges would be misleading.

Judicial diversity refers to the representation of under-represented groups (such as ethnic, racial, linguistic, religious, other minority groups and/or women) in the composition of the courts by giving presence to them and enabling their participation.[139] In doing so, judicial diversity can *"enhance the appearance of inclusion and participation"* thus, the appearance of justice and public confidence.[140] For example, some studies have showed how black judges provide *symbolic* pride and inspiration and serve as a symbol of law and justice for members of their group[141] because in symbolic representation, judges also represent the values of society. Another study on gender representation also claims that *symbolic representation* is likely to be seen as the main aim of a diverse judiciary.[142] Ifill argues that this representation does not mean that judges are obliged to adjudicate cases in such a way as to satisfy public demands, even though their representativeness provides a meaningful opportunity to respond to the people they serve.[143] Similarly, Bragaw questions whether judges can be both impartial and representative at the same time

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representation of female judges adds the women's perspective to the decision-making process, it does not lead to a biased decision-making process, rather it enriches the process; *Supra* fn.126, Rackley E.

[139] In this thesis, the term "judicial diversity" and the term "representative judiciary" is used synonymously because when the court is composed in a representative manner, it leads to diverse judiciary. Representative judiciary is not used to refer to a court composition that is determined by the result of an election, although in other contexts, it does not exclude this option

[140] Ifill S. A., Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 *Boston College Law Review*, 95 (1998)

[141] Crockett G.W., Judicial selection and the black experience*,* 58, *Judicature*, 438 (1971); Crockett G.W., Racism in the courts, 20 *J. of Pub. L.* 685 (1970); Smith, The black judge in America: a statistical profile, 57, *Judicature*, 18(1973) cited in B. L. Graham, Judicial recruitment and racial diversity on state courts: an overview, 28 Judicature Volume 74, Number 1 June-July, 1990

[142] S.J.Kenney, Breaking the Silence: Gender Mainstreaming and The Composition of the European Court of Justice, *Feminist Legal Studies,* 10:257–270, Kluwer Law International, 2002; Interestingly, some studies conclude that judges from under-represented groups tend to absorb the general viewpoints of other judges and are influenced by their opinions. Thus, there is a tendency to homogenize the opinions on the bench even if judges are coming from different social, ethnic, racial backgrounds

[143] *Supra* fn.140, S. A. Ifill

and argues that judges should only stand as *"symbols"* for people that they somehow resemble, and this does not require them to decide cases in their favour.[144]

However, substantive form of representation would be the *active representation* of citizens that is usually expected and even demanded from members of the legislature; judges can only *passively represent* parts of the population.[145] As Pitkin has pointed out, in both *descriptive* and *symbolic* representation, the representative is equated to an *inanimate object* that does not need to represent actively or stand for those who he/she represents.[146] Therefore, many arguments are rightfully based on the symbolic representation of judges in order to maintain the respect for judges' independence and impartiality.

Supporters of judicial diversity have criticized the composition of the judiciary which perpetuates the same *faces* from the majority groups.[147] They argue that ethnic and/or racial minorities or women are not proportionally and sufficiently represented, and excluded from government institutions; the reason of this problem is either due to gender inequality or gender differentiation in socialization, or ethnic background or due to past discrimination or institutional deficits in the system.[148] They generally support the policies, such as preferential treatment of some groups, which aim to diversify the judiciary in order to enable the representation of those excluded or disenfranchised. They consistently repeat

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144 S.Bragaw in B. A. Perry, Can the Judiciary Be "Representative"? Insights On Law&Society, Voice of the People Representative Government in the United States, Vol.2,No.1,2001

145 Ibid

146 *Supra* fn.127, Pitkin;p.113

147 Malleson K., Diversity in the Judiciary: the Case for Positive Action, *Journal of Law and Society,* Vol.36,No.3,Sept.2009; Rackley E., What a difference difference makes: gendered harms and judicial diversity, *Int'l Journal of the Legal Profession*, Vol.15, No's.1-2,March-July 2008, Hunter R.C, More than Just a Different Face? Judicial Diversity and Decision-making, *Current Legal Problems*, 2015; Ifill S.A.,Racial Diversity on the Bench:Beyond Role Models and Public Confidence,*Wash.&Lee L.Rev.,*405, Vol.57,Issue 2, Article 5,2000; Feenan D., Women Judges: Gendering Judging, Justifying Diversity, *Journal of Law and Society*, Vol.35,No.4, December 2008; Nicolson D., Affirmative Action in the Legal Profession, *Journal of Law and Society,* Vol.33,N.1,March 2006

148 A.L.Higginbotham, Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge, Duke Law Journal, Vol. 42, No. 5, March 1993; A. Sachs, *Affirmative Action and the New Constitution*, ANC Department of Information and Publicity, 1994

that that judicial diversity is a *"political struggle"* whereby under-represented groups aim to guarantee that they have a voice in judicial decision-making.[149]

It can be observed from the writings of different authors that the examination of *representation* is usually traced back to Pitkin's understanding of *symbolic* representation. There may be different typologies of representation but the basic theoretical background of the concept is provided by Pitkin. Her typology could be valid for the basis of any argument on judicial diversity. However, for the judiciary, the main concern regards judicial impartiality. Yet, a representative judiciary cannot be regarded as *biased* from the onset just because of its diverse composition, just like judges cannot be considered as impartial just because they are sitting in a non-representative court composition. Representation is an important political principle, and its relevance to the judiciary is also important as it includes the viewpoints of the judges from different groups. Nevertheless, representative judges ought to be mere symbols for the public, despite the fact that representation gives *power* to them to have a say in judicial decision-making.

IV.Conclusion

This chapter has provided an analysis of the theories of consociational democracy, federalism and majoritarian democracy and then attempted to justify the potential of consociational democracy in providing stable democracy in divided societies. This is done by highlighting consociational principles that enable a more inclusive government system through the recognition and accommodation of different identities. This researcher argued that despite the various shortcomings of consociational democracy, it still provides more reasonable prospects to settle political conflict due to the sharing of governmental power among different groups, compared to the majoritarian view of democracy which could easily lead to the tyranny of the majority and the secession of the minority.

In examination of the relevance of the consociational principles to the judiciary, the principle of representation has manifested itself as the key principle as it directly influences the composition of the senior judiciary. The principle of representation enables the participation of judges from different backgrounds in the judiciary and leads to the establishment of a diverse judiciary. Therefore, a representative judiciary satisfies one of

[149] Graham B.L., Judicial recruitment and racial diversity on state courts, an overview, *Judicature*, Vol.74, Number 1 June-July, 1990

the requirements of consociational democracy and in a way, it is implicit in the consociational design.

As the principle of representation paves the way to a representative judiciary, arguments from the concept of representation are adopted in order to provide an understanding of the type of representation that judges should undertake. Different meanings of the concept of representation are examined and it is argued that representation of judges in diverse courts should be confined to *descriptive and/or symbolic* representation. In these forms of representation, judges are not required to act on behalf of the interests of their social-background; so, their representative role would not conflict with their judicial independence and impartiality. It is argued that the appeal of a diverse judiciary in divided societies arises as a result of its inclusivity, by giving voice to the previously excluded, under-represented groups by redressing past discrimination.

The next chapter examines the reasons why judicial diversity is necessary in the senior judiciary. This examination will assist in providing a clear understanding of the necessity of judicial diversity in the case-studies of RoC and BiH.

Chapter III. Why is Diversity in the Judiciary Necessary?

The previous Chapter introduced and discussed the two main systems of power-sharing government, those of consociationalism and federalism. These two systems were contrasted with that of majoritarian democracy, which is the main system of government in non-divided societies. As mentioned above, the aim of the present thesis is to focus on the judiciary in divided societies within the context of a federal or consociational arrangement. Given this aim, the present Chapter focusses on the exposition and discussion of judicial diversity, a feature which this thesis argues, is indispensable in order to create the conditions of lasting peace and stable democracy in divided societies. At the same time, it is a key characteristic of both ideal consociational and federal designs and the designs discussed in the case-studies.

I. Introduction

This chapter explores the reasons that necessitate the establishment of a representative judiciary in divided societies by making use of the arguments from the literature on the concept of judicial diversity.150 It argues that the key reasons that render judicial diversity necessary are: a) the role of the constitutional court in constitutional review cases b) public trust in the impartiality of the judiciary; c) public trust in the court's legitimacy and d) improved decision-making. Thus, the aim of this chapter is to show why diversity in the judiciary is necessary not only for the satisfaction of consociational democracy which has been adopted as the theoretical framework throughout this thesis,151 but also for the above-mentioned reasons.

This chapter is divided in two parts. The first part provides the answers to one of this thesis' questions: *why a representative judiciary is deemed necessary in ethnically divided societies that ruled by consociational democracy*. References are made to the case-studies of the Republic of Cyprus (RoC) and Bosnia-Herzegovina (BiH)152 in which the theoretical framework will be applied and tested.153

150 Chapter II, Part III.E.

151 Chapter II, Part II.A.

152 Chapter IV and V

153 Further detail will be provided in Chapters IV and V

First of all, it is argued that the constitutional courts' role in constitutional review cases is the main reason that requires judicial diversity in divided societies. Apart from the courts' traditional role in constitutional review cases in which the governments' actions are supervised, their additional duty in divided societies to observe stable democracy and peace are demonstrated since consociational constitutions of divided societies are designed for this purpose. From this starting point, it is argued that the decision-making process should not be left to judges coming from one single group and it should enable the interpretation of the constitution by judges coming from different backgrounds. Since constitutional court judges fulfil this challenging task by the interpretation of the constitution,[154] judges who interpret the constitution may potentially have extra-constitutional and/or political interests which are also an issue of concern.[155] Thereby, it is argued that it is necessary to include all viewpoints into the decision-making process which would have important political consequences in a divided society. Following on from this, various forms of constitutional interpretation are also discussed, and a proposal is made to follow an interpretation model that would uphold peace as the most important constitutional value. Therefore, in this section, it is argued that the constitutional courts' role in peace jurisprudence is the main reason of composing courts in a diverse manner.

Secondly, the link between judicial diversity and public trust in the impartiality of the judiciary is demonstrated and it is discussed how judicial diversity of the constitutional court reinforces public trust in the impartiality of the judiciary that justice is not done but also *seen to be done*.[156] As a third reason, it is argued that judicial diversity contributes to the public perception on its legitimacy by being inclusive and creating a sense of ownership and lead the public to recourse to the courts for the resolution of their disputes. All these three reasons are provided with an aim to demonstrate the diverse judiciary's contribution to stable democracy. Finally, the fourth section examines the potential of a diverse judiciary to improve the judicial decision-making process and argues that dialogue between diverse judges facilitates a better and richer decision-making process. In order to

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154 Muigai G., Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, 2004(1), East African Law Journal;p.1,para 1

155 Thiankolu M.,The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence,(2005) East African Law Journal, 2

156 *R v.* Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233

justify the arguments, examples are drawn from other jurisdictions that have divided societies.

The second part discusses how a diverse judiciary is ensured by the judicial appointments process, as it is the main gatekeeper of the composition of the judiciary. Firstly, the meaning of the merit principle which is employed in judicial appointments is defined and then, its different constructions in different jurisdictions are provided with a view to its subjective content. Then, the necessity of the utilization of the constitutional quotas is explored in composing diverse courts in divided societies. The alleged conflict between the merit principle and constitutional quotas is discussed and a balance between the two is sought in order to provide alternative solutions in ensuring diversity in divided societies. Although arguments for and against constitutional quotas are presented, this thesis supports the employment of constitutional quotas for the representation of minority groups, at least for a certain period of time, as they are vital in preventing discrimination especially in divided societies.

The chapter concludes with the argument that although judicial diversity seems to be challenging some established legal principles, it is still important as it has the potential to provide an opportunity for stabilizing democracy in divided societies. The challenges that are attributed to a diverse judiciary should be assessed in light of the needs of divided societies.

The key reasons of judicial diversity are addressed explicitly in the following sections.

II. Why is Diversity in the Judiciary Necessary?

A. Judges' Interpretation of Constitution in Constitutional Review Cases and the Court's Role

There is a close link between the constitutional courts' role and composition which requires this research to examine the constitutional courts' role in depth. The importance of the court's composition is derived from the constitutional courts' jurisdiction in constitutional review cases which deemed the Court influential in the political arena. The court, as will be examined below, is entrusted with a duty of resolving disputes that are political in nature; and the resolution of these disputes requires the interpretation of constitution by individual judges. Therefore, the necessity of diverse court composition can only be understood once the constitutional courts' role in constitutional review cases is assessed correctly.

The constitutional court's role in constitutional review cases has manifested itself as one of the main motivations to provide a diverse court composition in divided societies. Constitutional review is the right and/or duty of the constitutional court to interpret the constitution, to decide authoritatively on the constitutionality of laws, executive and administrative acts, and to declare such laws and acts as invalid and unenforceable when they conflict with the constitution.[157] By reviewing the actions of the government, the constitutional courts keep the government in check and prevent the arbitrary actions of the government, uphold a system of *checks and balances,* support governmental stability and the rule of law.[158]

Although in essence constitutional review cases serve the same purpose [that is to uphold the rule of law] both in stable democracies and in deeply divided societies, in the latter, the constitutional court fulfils a more difficult job due to the deep ethnically-motivated political tensions. First of all, the Court functions in a society which is dominated by *identity politics;* identity politics often results in power struggles between identity groups.[159] As the consociational constitution is organised to administer different identity groups, the court is obliged to resolve cases which bear upon the identity politics that are directly related to the political divisions that dominate society. Secondly, as consociational accommodations recognize group rights and representation, there are continuous conflicting social dynamics between the ethnic groups which also might be in need of resolution by the court. Last, but not least, the constitutional court is obliged to interpret a consociational constitution which is usually an annex of a peace agreement that defines the conditions of peace.[160] Interpreting such a constitution inevitably makes the court responsible for peace jurisprudence and safeguarding the peace settlement.[161]

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[157] Ackerman L.W.H., Constitutional Protection of Human Rights, Judicial Review, *Columbia Human Rights Law Review,* Vol.21:59,1989-1990;p;.59

[158] E.C.S Wade and G. Phillips, *Constitutional Law* (8th ed.), London: Longman Group Limited, 1970

[159] Calhoun C., *Social theory and the Politics of Identity* in Calhoun C.(ed.), *Social Theory and the Politics of Identity,* Blackwell, Cambridge, USA, 1994;p.21

[160] Bell C., Peace Agreements: Their Nature and Legal Status, *The American Journal of International Law*,Vol.100,No.2, April 2006

[161] Sapiano J., Courting Peace: Judicial Review and Peace Jurisprudence, University of Edinburgh, School of Law, Research Paper Series, No.2016/23

Therefore, socio-political divisions and the risk of violence make the duty of the court more difficult by requiring resolution of the cases without harming peace and the infant democracy.

Constitutional review has also been influential in protecting human rights. Constitutions with bills of rights enable the rights-based review to be initiated by individual applicants in order to reclaim their human rights when violated by the government or its institutions.[162] Rights-based review is a facet of both majoritarian and consociational democracy, and in the former, it counter-balances the power of the majority. The rights-based review also has political connotations, especially in consociational democracies because when the review is initiated by the minorities (or a member of minority group) against the government, it becomes an effective tool in protecting both their human and group rights and guarantees that they would not be disregarded by the government.[163] In that sense, rights-based review would also serve to scrutinize whether the power is exercised in accordance with the consociational system or not.[164] In consociational designs, the protection of minorities also serves for a stable democracy and this is why elites who have signed the consociational agreement may also find incentives for the judicial empowerment of courts.[165] Otherwise, courts can be used as an instrument of oppression, especially in times of political and/or violent conflict.[166] However, this is more likely to be the case in societies where majoritarian democracy applies and the legislative authority is unrestricted.[167]

As it was stated, in constitutional review cases, constitutional courts examine the constitutionality of government actions and declare them as void, if there is an excess of

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[162] C. Harvey and A. Schwartz, *Rights in Divided Societies*, Human Rights Law in Perspective, Hart Publishing, 2012

[163] Ibid

[164] Ibid

[165] Ibid

[166] Rosenberg G.N., Judicial Independence and the Reality of Political Power, The Review of Politics, Vol.54, No.3, *Special Issue on Public Law*, 1992

[167] Waldron J., The Core of the Case against Judicial Review, *The Yale Law Journal*, Vol.115,No.6, Apr.,2006;pp. 1396-1397

power.[168] By invalidating the unlawful actions of and setting legal boundaries to the government, constitutional courts' power has expanded into politically sensitive areas.[169] Thereby, constitutional courts have also become important actors of the political life with a say in government policies.[170] Thus, they entrusted a political role. Consequently, in time, scholars have started to discuss the judiciary's new political role and the *judicialization* of politics.[171]

Judicialization is the *"expansion of the province of the courts and the judges at the expense of politicians or administrations*".[172] Tate states that one definition of judicialization is *"the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives*.[173] The judicialization of many issues which were previously in the province of politics has empowered the courts to enter and influence political debates. The case of the secession of Quebec from Canada[174] may be the most important example of this process which also highlighted the power of the constitutional courts in resolving such a highly political issue.[175] When looked from this angle, judges are not doing less important work than the politicians because constitutional review cases always have a political nuance.

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[168] T. Bingham, *The Rule of Law,* London, Penguin, 2010

[169] K.Malleson, *The New Judiciary, the effects of expansion and activism*, Aldershot:Dartmouth,c1999

[170] Ibid

[171] Ferejohn J., Judicialization Politics, Politicization Law, *Law and Contemporary Problems,* Vol.65, No.3,2002; C.N.Tate and T.Vallinder (eds.),*The Global Expansion of Judicial Power,* NYU Press, 1995

[172] C.N.Tate and T.Vallinder (eds.),*The Global Expansion of Judicial Power,* NYU Press, 1995

[173] Ibid

[174] Reference re Secession of Quebec, [1998] 2 SCR 217

[175] Similarly, Hirschl argues that constitutional review process has transferred substantial political power from the executive and the legislature to judiciary and in a way, lead to *juristocracy*. He also states that rights-based review is effective in preventing the political tyranny of political majorities; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge,Mass.,London,Harvard University Press, 2004

Besides protecting human rights and opposing majority rule, Sweet argues that one of the functions of constitutional review is to serve for the *pacification* of politics.[176] The political disputes that were fought in a partisan manner in parliaments can be resolved more rationally in the constitutional court[177] because courts are in a better position to settle political conflicts in a more conciliatory way. Judges, given that they are independent and impartial, are not under the daily pressure of politics and they are more able to assess the political disputes in a neutral manner. Likewise, in an extremely politicized society where majority principles dominate, constitutional review also helps to build a more democratic culture by settling conflicts about the constitutionality of any parliamentary act and safeguarding the minority's rights.[178] In divided societies, when identity conflicts are discussed in the constitutional courts, courts can decide according to the constitutional principles rather than political motivations and thereby, contribute to the political process in a more peaceful manner.

This general trend toward judicialization through constitutional review is only one facet of the constitutional courts' involvement into politics both in established and fragile democracies. In the latter, where a consociational constitution is in force, the constitutional court is obliged to interpret a constitution which usually includes the accommodations that are necessary both for the stabilization of democracy and the protection of peace, as a result of being an annex to a peace treaty.[179] In such cases, democracy-building and peace-building come to mean the same effort because the court has to resolve ethnic tensions (especially the ones that arise as a result of the political settlement)[180] when the interests of ethnic groups are in conflict. In such cases, the constitutional court is required to provide a delicate balance in which neither part is winning/losing the case or feeling victimized by the court's decision as far as possible in order not to fuel another ethnic conflict. In other words, while *courting peace,* the court needs to take into account both the terms and

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[176] A.S.Sweet(ed.), *Governing With Judges*, Oxford University press, 2000;p.137

[177] Ibid

[178] Ibid

[179] *Supra* fn.12, Sapiano J.

[180] N. Tiruchelvam and R.Coomaraswamy (ed.), *The Role of the Judiciary in Plural Societies*, Palgrave, Macmillan, 1987; C. Yakinthou, *Political Settlements in Divided Societies, Consociationalism and Cyprus,* Palgrave, MacMillan 2009

conditions of the peace agreement and interpret the constitution in accordance with the peace agreement.[181]

Sapiano, however, argues that sometimes what may be required for democracy may be very different (or sometimes opposite to) the requirements of peace.[182] The first aim of *peace agreement constitutions* is to end violence and reduce the recurrence of violence and this is why sometimes compromises are made in individual rights.[183] For example, the constitutional provisions which forbid the returning of refugees for a specific period of time may be necessary for peace, although these restrictions are against individual human rights, such as, freedom of movement and the right to property (peaceful enjoyment of possessions).[184] However, these restrictions (that also contradict with justice) should be assessed in light of the political settlement and whether they are proportional to the aim sought which is peace. Seen from this perspective, those aspects that contradict with individual human rights (which are also basic tenet of liberal understanding of majoritarian democracy) have secondary importance in divided societies because when there is no peace, there is no prospect of democracy or political stability or any prospect of protecting human rights. This contradiction between peace and democracy, and the higher aim of providing both (through judicial channels), shows how important it is to provide constitutional solutions for the problems of divided societies.[185] Balancing the requirements of peace agreement constitutions and the general constitutional principles to resolve the political tension and uphold peace will be the court's main task.[186] While fulfilling this task, constitutional courts *"interpret and (re)negotiate* the constitution and also *"(re)interpret the peace agreement."* Thereby, they become an important actor of peace-jurisprudence because they have the capacity to mediate the conflicting demands of different ethnic groups and contribute to peace-building. Therefore, the judiciary presents itself as one of the political institutions which aims to secure the stability of peace because

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[181] *Supra* fn.12, Sapiano J.

[182] Ibid

[183] Ibid

[184] D. Wippman(ed.), Practical and Legal Constraints on Internal Power-Sharing in D. Wippman, *International Law and Ethnic Conflict*, Ithaca, NY:Cornell University Press, 1998

[185] *Supra* fn.12, Sapiano J.

[186] Ibid

court decisions inevitably will have consequences on the constitutional/political order of the State which strives for peace.[187]

In some cases, constitutional courts are asked to resolve questions on the basic structure of the constitutional order.[188] This is especially true for the constitutional courts that emerge as a result of a regime change and/or operate in transitional periods.[189] In transitional periods, while observing the political process, the court has to act as a *hedge* to protect democracy and prevent the concentration of power on the hands of one-party and/or military regime or on a single group/community.[190] Issacharoff calls these problems *first-order challenges*[191] to refer to the claims of one ethnic group to have the right to construct its own political relationship outside of the established constitutional/political order[192] and/or one ethnic groups' claim for separation for national independence and/or the claims for separate municipal regulations.[193] In new democracies, where trust and cooperation are absent among the ethnic groups and also between the political actors, the courts are also entrusted with these additional duties to resolve the basic questions on the constitutional order. Thus, following the same reasoning by Issacharof, constitutional courts of new democracies under consociational democracy are also responsible to protect the constitutional order, which is in fact a consociational order, from falling into another ethnic conflict.

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187 For example, in the Case of Robinson v. Secretary , where the dispute was on the date of the election which took place two days after the time limit of the law, the Court relied on the Good Friday Agreement, made a broad interpretation of law and took account the requirements of peace agreement in order to protect the peace and the newly formed stability; Robinson v. Secretary of State for Northern Ireland and Others, 25 July 2002,[2002]UKHL 32

188 Issacharoff S., Managing Conflict through Democracy in *Supra* fn.13,C. Harvey; p.41

189 Ibid

190 Ibid

191 Issacharoff, Constitutional Courts and Democratic Hedging, The Georgetown Law Journal, March 20102010

192 For example, the right of Republika Srpska's right to establish a relationship with other countries, independent from the Bosnia-Herzegovina; Chapter V, Part.IV.D

193 Municipalities cases, Chapter IV Part IV.D.

However, Pildes argues that the constitutional courts may be potential *"unwinders of ethnic political bargains"* where new approaches are needed to be adopted.[194] Although he believes that constitutional courts have a very serious role in divided societies, he states that when new interpretations of laws are required, courts are the only institutions that can be trusted to invalidate laws created to deal with earlier, different circumstances.[195] He believes that political elites that benefit from consociational arrangements will prevent the dissolution of a consociation towards a more integrative system.[196] This is why the contribution of the courts will be needed. However, Pildes also accepts that the constitutional court decisions carry the risk of *fuelling ethnic conflict* if their decision is considered as wrong about the extent of change.[197] Still, resolution of the conflicts in the court would be less detrimental and less visible than the debates in the political arena because in the latter ethnic problems become politically more divisive.[198] Therefore, according to Pildes, one of the duties of constitutional courts in consociational societies is to unwind the consociational system and allow democratic process to develop towards a more integrated constitutional structure. Of course, how constitutional court fulfil its duty would depend on the decision of the court.

The constitutional court has to interpret a constitution in accordance with the peace agreement and thereby, it is deemed responsible for democracy-building and peace jurisprudence. When the court interprets the constitution, by giving priority to democracy and peace building, and takes the objectives of the peace agreement into consideration, it becomes an important instrument of peace as well. Constitutional courts can deteriorate the political process by issuing divisive decisions rather than moderating ones; they might support the [illegal actions of a] regime or oppose it; they might choose to protect minority rights or support the interests of majority.[199] But in all these scenarios, even if they only act

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[194] R.H.Pildes, Ethnic Identity and Democratic Institutions: A Dynamic Perspective in S. Choudhry, *Constitutional Designs in Divided Societies*, Oxford University Press, 2008

[195] Ibid; He gives the Voting Act as an example which excluded black people from the elections in the USA.

[196] Ibid

[197] Ibid

[198] Ibid

[199] *Supra* fn.13, C.Harvey and A.Schwartz

as passive interpreters of the constitution, they act politically because even their passive stance shows their consent to the government's actions. As Justice Bhagwati wrote for the Indian Supreme Court, "*every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political*".[200] Therefore, Issacharof's and Pildes's arguments that the constitutional court has a very serious role and also power to sustain political stability, maintain civil peace and prevent political violence (or in some cases, unwind the ethno-political bargains in the constitutional structure) seem very compelling.[201]

All these scenarios on Court's important role reveal how necessary it is to compose a diverse judiciary. Diverse judges, coming from different backgrounds, might have different perspectives as to how to respect the rule of law. Every judge brings different life experiences and, in some cases, different insights as to how to solve the problems, for example, on minority issues, or how better peace can be protected. In that sense, they may also have different understanding as to how to dispense justice. Thereby, a diverse court is also necessary in preventing one-sided justice which would be implemented by one group; needless to say, in divided societies, this is usually majority. Considering the power of constitutional courts in preventing the tyranny of the majority, it becomes obvious that a judge from the minority is vital in the composition of the court in order to provide a different perspective on minority's issues. Regarding the consociational constitutions which aim to provide stable democracy for post-conflict societies, judges from all different backgrounds should be given presence in court composition to have a say on important constitutional matters with a hope that they presumably will not want to issue decisions that might risk renewed violence. This is why constitutional courts' composition is significant and relevant in divided societies, including the case-studies of this research, RoC and BiH because every judge involves the decision-making process by his/her interpretation of the *peace agreement constitution.*

Both the Supreme Constitutional Court of RoC[202] and the Constitutional Court of BiH[203] were entrusted with the power of constitutional review and their jurisdiction in

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[200] Justice Bhagwati cited in *Supra* fn.31, N. Tiruchelvam and R.Coomaraswamy

[201] *Supra* fn.45, R. Pildes; *Supra* fn.39, Issacharoff S.

[202] Chapter IV.Part IV.B and D.

these cases revealed their power in the constitutional/political order of these countries. In both jurisdictions, these courts functioned/functions with diverse composition under consociational democracy to supervise the governments' actions and presumably to promote stable democracy. The diverse composition of senior judiciary was considered by the constitution-drafters as necessary in order to provide an inclusive design, bring an end to the competition on the representation in government branches and thereby, provide legitimacy to the system as this is in the essence of consociational democracy. Bearing in mind that these Courts' decisions would have an impact on peaceful order, their composition is also important as the decisions would be a result of the interpretation of individual judges from different backgrounds.

Decision-making in the constitutional court is a matter of interpretation of the constitution and constitutional court judges, as the highest distinguished jurists, are responsible for this important work. Interpretation is to give a "legal" meaning to the constitutional text and make sense of the words.[204] Every judge interprets the constitution according to his/her own lenses and according to his understanding of the document. While interpreting the constitution, judges can follow various methods, traditions and/or approaches of constitutional interpretation. Among these methods, *originalist* theory argues that the judges' interpretation should be in harmony with the time that the law was originally enacted;[205] and *structuralists* consider the broader context of constitution as a whole, the power relationship between the government offices (such as the principles of federalism) as well as the minority rights, while trying to give a meaning to a particular constitutional provision.[206] Another method is the *purposive* interpretation which prioritizes core values underlying a particular right and aims to protect these values[207] and

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[203] Chapter V, Part V.

[204] Barak A., Hermeneutics and Constitutional Interpretation, 14, Cardozo L.Review,767(1992)

[205] G.Letsas, A Theory of Interpretation of the European Convention on Human Rights, Oxford University, Oxford, 2007;p.60; Originalists have two sub-model of interpretation. While *textualism* relies on the interpretation of the legal provision at the time of its enactment, *intentionalists* emphasize the intention and/or original understanding of the drafters.

[206] S.A.Barber&J.E.Fleming, *Constitutional Interpretation,* Oxford University Press, 2007; pp.117-121; Finn, American Constitutional law, Essays, (3rd ed.) Rowman & Littlefield Publishers, ,2009 Structuralism also has two sub-models: formalism and functionalism.

[207] J.Goldsworthy, Interpreting Constitutions, OUP,2006;p.293

to further the purpose of the legal text.[208] Finally, a judge who adopts pragmatic interpretation would interpret the constitution in a way to respond to social necessity[209] and he/she would consider the consequences of various decisions and try to provide a solution that would lead to the least negative impact. Although there is no agreed, fixed method for a judge to follow but only *discretion* (albeit a limited one), it is usually an accepted practice for judges to follow the *precedent* while interpreting the constitution. As there are numbers of interpretation models that judges can follow, diversity of judges in a diverse court composition might lead to the adoption of diverse interpretation models.

In depth analysis of the interpretation models are beyond the scope of this thesis; however, this brief examination is provided with an aim to show how an individual judge has the power to influence the decision-making process in constitutional review cases. The difficulties the Court may be faced with would be as a result of the power-sharing constitution that came into being as a result of compromises and with the need of finding balance. In other words, court decisions always carry the risk of satisfying some people, and angering others and this is more likely so when court is composed in an unrepresentative manner. Additionally, it is also the case, when a court interprets a power-sharing constitution that applies to a divided society to build democracy. Daly calls this important duty of the court "*alchemy*" which would transform the empty content of democracy into a functioning, stable democracy by giving spirit to the imperfect, written document by interpreting it case by case.[210] This is why this thesis argues that the *spirit* of all concerned/conflicted groups is needed in the composition of the constitutional court.

Nevertheless, in any method and/or model, a human element, called "judge" is needed. The judge, as an individual, is essentially engaged in interpretive activity.[211] This individual agent can employ judicial restraint and confine himself within the limits of constitutional text contrary to a judge who resorts to judicial activism. This interpretative activity, and thus, decisions stemming from it, is certainly influenced by the beliefs and

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[208] *Supra* fn.52*,* Barak

[209] Posner R.A.,What Has Pragmatism to Offer Law, 63, S.Cal.Law Review,1653(1990);

[210] Daly T.G.,The Alchemists: Courts as Democracy-Builders in Contemporary Thought, University of Edinburgh, School of Law, Research Paper Series, No.2016/23

[211] Fiss O., Limits of Judicial Independence, *Faculty Scholarship Series,* Paper 1333, 1993

values of the individual constitutional interpreter.[212] Although in principle neutral, judges' political background and/or political preferences also have an impact on their interpretation.[213] While interpreting, judges are not required to uphold the values of the majority or the minority, but the basic values of the nation as they reflect basic ideals; still, there is *"No theory of interpretation can prevent mistakes*.[214] In that sense, judges' political stance towards the constitution is very important in fulfilling this work and determining the outcome of the cases, whether correctly or wrongly. In divided societies, judges from different ethnic backgrounds might have different political stances and the interpretation of the constitution might change depending on a judges' background. Therefore, a diverse court is necessary to balance these different political stances into an objective aggregate.

As for the RoC and BiH that are ruled by a power-sharing design, the interpretation has to be made in a way to protect peace and the democratic constitutional order as the first and foremost purpose. In case of conflict, a judge with a more positive attitude towards group rights than individual rights, and who prefers to set limitations on human rights, has to justify his/her interpretation in restricting human rights that his/her decision is proportional to the conditions of peace.[215] On the contrary, where a judge upholds group rights over human rights has to explain his/her decision clearly why protecting group rights over human rights are more proportional to the aim sought, namely peace.[216] In both types of interpretation, peace should be the most important constitutional value to be respected because it is the main value of consociational constitutions. Nevertheless, all interpretation methods (whether textualist, structuralist or pragmatic) should be able to protect democracy and peace, at least in theory. Textualist interpretation should not contradict with

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[212] Fallon R.H., A Constructivist Coherence Theory of Constitutional Interpretation, Harvard Law Review, Vol.100, No.6,(1987)

[213] Posner E.A.,Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform, The University of Chicago Law Review, Vol.75,No.2(Spring, 2008)

[214] *Supra* fn.52*,* Barak

[215] See, Judge Bonello's justification in ECtHR, Grand Chamber, Case of Sejdic and Finci v. Bosnia and Herzegovina (Applications Nos. 27996/06 and 34836/06), 22 December 2009

[216] Dissenting opinion of Serb judge in Constituent Peoples Case is not a good example because he was not concerned with peace but rather the autonomy of one of the Entities of BiH, namely RS; Chapter V,Part.IV.A.

peace because the constitution is written with an aim to achieve peace. Likewise, original and/or pragmatic or structural interpretation can all be employed to serve peace because the origin of the document is the necessity to achieve peace. The structure of the constitution (let us say, federalism) will also be designed for peace and finally, the pragmatic purpose of the constitution is again peace. Hence, judges in the constitutional court of a post-conflict society who are dealing with constitutional review cases need to remind themselves of the actual purpose of the constitution while interpreting it. As the consociational and/or federal constitution is designed to end ethnic conflict, their interpretation should take into account the necessities of peace because once *"mistakes"* are done, sparking violence is inevitable. This is why the composition of the constitutional court becomes important especially in new democracies.

B. Public Trust in the Impartiality of the Judiciary

A diverse judiciary has been considered as one of the factors that increase public trust in the impartiality of the judiciary.[217] Judicial impartiality simply refers to the mental attitude of a judge towards the litigants and it requires the absence of bias, ill-will and fear.[218] Impartiality necessitates taking relevant factors into account in the decision-making process and disregarding irrelevant matters. In order to be considered as independent and impartial, it is held that judges should be above any preference towards any group in society.[219] They are supposed to be neutral arbiters of the law, following legal precedent and applying it to the facts of a case.[220] Impartiality can also be defined from a negative perception as to what it does *not* require. As such, their personal, political or ideological backgrounds are not supposed to play a role in their decisions. Judicial independence, *inter alia,* requires the detachment of judges from the parties of a case and not to be under the

[217] K. R.Johnson and L. Fuentes-Rohwer, A Principled Approach to the Quest for Racial Diversity on the Judiciary, *Davis Legal Studies Research Paper Series*, February 2005

[218] European Commission for Democracy through Law, (Venice Commission), Seminar on the Occasion of the 5th Plenary of the UACCC Scientific Symposium on "Fair Trial", Saana, Yemen, 10-12 November 2008, Strasbourg, 17 December 2008

[219] S. Bragaw in B. A. Perry, Can the Judiciary Be "Representative"? Insights On Law&Society, Voice of the People Representative Government in the United States, Vol.2,No.1, 2001

[220] Ibid

control or influence of them.[221] Judicial impartiality overlaps with judicial independence in some respects: when a judge considers a litigant's different ethnicity (as an irrelevant factor) while making a decision (unless it is a discrimination case) and/or makes a biased decision because of his/her own different ethnicity, then, he/she loses both judicial independence and impartiality.

However, an impartial judge is not totally free from bias or past experiences. As Griffith states they have opinions about the Vietnam war, student movements or current political affairs.[222] It is questioned, for example, how impartial an openly gay judge can be when asked to consider whether gay couples should adopt a child or a devout Catholic judge while deciding on the "the right to die".[223] Impartiality does not require an impersonal and dispassionate perception, as it is an impossible value to be achieved.[224] Besides all, judges are also human who are subject to the mistakes of a human mind.[225] True impartiality does not mean that judges have no sympathies, antipathies, opinions or attitudes; it just means that despite their own viewpoint, they can still decide with an open mind.[226] What is really important is to what extent judges' perspectives and/or their own background could influence the cases while they are sitting in their adjudicating capacities.

Nevertheless, these concerns are closely related to what is understood by "impartiality". It is argued that expecting judges to be purely impartial is nothing more

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[221] *Supra* fn.62,Fiss O.

[222] J.A.G. Griffith, Judges in Politics: England, *Government and Opposition,* 1968 in S. Shetreet *Judges on Trial: A study of the Appointment and Accountability of the English Judiciary,* North Holland Publishing Company,1976

[223] K.Malleson in T. Ward, *Justice Matters, Independence, Accountability and the Irish Judiciary,* International Human Rights, Standards on Judicial Independence and Impartiality, Irish Council for Civil Liberties, 2007;p.79

[224] T.Nagel, *The View From Nowhere*, New York, Oxford, Oxford University Press,1986

[225] P.S. Karlan, *Two Concepts of Judicial Independence*, *Two Concepts of Judicial Independence,* Preliminary Draft, 08/08/1998, accessed by: http://www.usc.edu/dept/law/symposia/judicial/pdf/karlan.pdf

[226] K.Mason, Unconscious Judicial Prejudice, Supreme and Federal Courts Judges' Conference, January 2001 accessed by: file:///F:/April%202013/K.Mason-Unconscious%20Judicial%20Prejudice.htm on 28/05/2016

than a dream.[227] True impartiality (of any human mind) is a *utopia*[228] and it is impossible to construct it. It is also argued that in divided societies, judicial impartiality is a *myth*.[229]

Nevertheless, judicial independence and impartiality have been considered as the ideal conditions for a court to function and the central tenets in gathering public trust. However, since the 1990's, in established democracies, it has started to be questioned whether judicial independence and impartiality is sufficient to gather public trust or it needs to be supported by judicial diversity. The concerns regarding judicial diversity might be due to the pluralization of societies, which together brought about an increasing demand of different groups to be represented in government institutions, as well as a result of the active role and increasing number of women barristers in legal practice but not on the bench.[230] In established democracies, policies to increase diversity were sought and affirmative action was offered as a solution,[231] whereas in divided societies a diverse judiciary is usually envisaged at the onset of the State-building in order to gather public trust of all groups at initial stages because of the mistrust among the ethnic groups.[232]

Judicial diversity is a necessity because the *politics of presence* are also relevant for the composition of the judiciary and for its perceived impartiality.[233] Phillips argued that although the judiciary regards itself as "*above partial interests*", it is generally not welcoming to women and ethnic minorities.[234] The judiciary is usually dominated by white, male judges and the continuous appointments of people from similar background

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[227] I.M.Young, *Justice and the Politics of Difference*, Princeton University Press, Princeton, New Jersey, 1990;p.198

[228] *Supra* fn.71, T.Nagel

[229] Schwartz A. and Murchison M., Judicial Independence and Impartiality in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia- Herzegovina, June 2016

[230] Bocker A. and Leeuwen L. G., Ethnic minority representation in the judiciary: diversity among judges in old and new countries of immigration, *The Judiciary Quarterly,* 2007

[231] Malleson M., Diversity in the Judiciary: The Case for Positive Action, Journal of Law and Society Vol.36, No.3 September 2009

[232] Chapters IV and V

[233] A. Phillips, *The Politics of Presence, The Political Representation of Gender, Ethnicity, and Race,* Oxford University Press, 2014

[234] Ibid

have led minorities and/or under-represented groups to question the impartiality of the judges—whether they are really neutral or whether they serve their advantageous backgrounds. Those who support diversity argue that diverse judges bring their histories, affiliations, religions, different perspectives and thus, different life experiences to the bench and thereby, they provide a better understanding of different life experiences in society.[235] This is not to say that diverse judges protect the interests of their background and decide cases accordingly. It rather came to mean traditional norms of impartiality (such as, *being above everything*) can be challenged and/or enriched by including other perspectives in all walks of society. Therefore, while aiming for judicial diversity, the traditional views on impartiality should be re-assessed.

Regarding ethnically divided societies, the first and foremost condition of judicial impartiality is to remain unbiased towards people from other ethnicities because hostile feelings, especially nationalistic anger, are prevalent among ethnic groups during the early stages of a post-conflict period. Although there is no certainty that judges from one [ethnic] group would always think, adjudicate and decide cases in the same way, it is argued that judge candidates who are critics of their own group and have sympathy for the *other ethnic groups* have less chance to be appointed to prestigious posts in government institutions, such as constitutional court judgeships.[236] As a consequence, those who are appointed are more likely to have political affiliations previous to their appointment and also they are prone to share similar opinions with those who appointed them while adjudicating the cases.[237] In such cases, when the society is split in a majority-minority division, then, the minority groups have a reason to fear (whether their fear is grounded or imagined), that the judges from majority groups would not be able to adjudicate the cases

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[235] Ibid

[236] This is partly due to the appointment body which is a political body; constitutional courts' appointments are usually done by the political bodies (either the legislature or the executive). Thus, politicians prevent the appointment of judges with *immoderate* ideological views; *Supra* fn.13; Ferejohn J., Judicializing Politics; Ferejohn writes for American context but in divided societies, *immoderate* may mean *critics/opponents* of their own groups. Likewise, in a society where there is minority-majority relation, members of minorities have less chance to be appointed, if the appointment body is dominated by the members of the majority group.

[237] When the appointments are made by the President, they are likely to appoint someone whose concept of justice is close to their own and who is likely to advance rather than obstruct the policies of their government. *Supra* fn.62, Fiss O., Limits of Judicial Independence

impartially and their rights and interests may not be respected and protected by the judges from other groups.[238] This is why the judiciary (that is also dealing with highly political constitutional review cases) cannot be left to the hands of one ethnic group and the presence of judges from different backgrounds (even if it is symbolic) is essential to gather public trust of all groups.

There is an additional difficulty in maintaining public trust in impartiality in divided societies due to the prevalent identity politics. Judges themselves are [ethnic] *identity-holders* because their ethnic identity played a role in their appointment due to the use of quotas.[239] Also, they sit to hear the cases that involve "*identity-issues*" in which different groups in society are in conflict. Thus, gathering the public trust of the whole society (that is composed of different groups) becomes more difficult because different groups have different expectations from courts and also may perceive judicial impartiality in different manners. As such, whereas public confidence in judicial impartiality of group X is maintained in relation to judge X, the same groups' public trust in judicial impartiality of judge Y judge may be absent. In that sense, it is not wrong to claim that even public confidence in judicial impartiality may be divided in such societies. This constitutes another reason to compose the judiciary in a representative fashion because a non-representative judiciary cannot gather public trust of all groups. Thus, in order to approach the parties fairly and decide free from bias, judges are in need of working with a different [strong] mind-set to detect and eliminate any implicit ethnic bias, transcend the influence of their own ethnic background and preserve their integrity while sitting in a constitutional court. This should be so even if ethnic loyalties cannot be very easily abandoned.[240] Otherwise, they should recuse themselves.[241]

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[238] W.Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe,* London: Springer, 2014;pp.304-328

[239] Chapter IV,Part II.B.

[240] *Supra* fn.31, N.Tiruchelvam and R. Coomaraswamy,

[241] Implicit bias is most difficult to detect if a judge does not write or verbally express an opinion on the subject; See, Lord Hope of Craighead, What happens when the judge speaks out? Holdsworth Club Presidential Address, 19 February 2010, Birmingham Law School;pp.7-8

The above scenario is also valid for the case-studies of RoC and BiH.[242] In both countries, it was predicted that unrepresentative judiciary would not be perceived as impartial. As the public is divided into different ethnic camps, they all demand to see someone in the senior judiciary from their own community in order to trust that they have a say in the justice system and their rights and interests are also protected, even if the judges should only symbolically represent them.

In order to provide empirical evidence for this argument beyond the case studies in this thesis, other jurisdictions that were politically divided as a result of violent conflict are looked at. Northern Ireland provides one example. During the Troubles in Northern Ireland, the discriminatory treatment of Catholics was incontrovertible.[243] It is argued that the non-representative judiciary (that was composed of England appointed-English/protestant judges) was used as an instrument of repression rather than to provide fairness and justice for all.[244] In this period, courts were almost entirely staffed by Protestant and Unionist judges, some of whom had held political positions as Unionist MPs before joining the bench.[245] Catholic people claimed that their rights were not protected by the English/Protestant judges, and they did not have faith in the impartiality of the judiciary. Northern Ireland's legal system and its courts were criticized on the basis of bias or threat of bias, partly because of the courts' composition before the Good Friday Agreement (1998).[246] Therefore, the unrepresentative judiciary was not perceived as impartial and was not able to gather the public trust of Irish Catholics.

Another example that supports the argument that a non-representative judiciary cannot gather public trust for impartiality is that of the courts of racially divided South Africa during the apartheid regime. Before the establishment of the new Constitutional Court in 1994, the composition of the South-African Constitutional Court did not accord presence

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[242] Chapters IV, Part Part II.B. and Chapter V, Part III.B.

[243] B.Dickson, The Protection of Human Rights, Lessons from Northern Ireland, The Paul Sieghart Memorial Lecture, British Institute of Human Rights, King's College, London, 6 April 2000

[244] Ibid

[245] K.Boyle, T.Hadden, and P.Hillyard, *Law and State: The Case of Northern Ireland*,Martin Robertson,1975; Public trust of Protestants in the impartiality of the judiciary was also low.

[246] Ibid

to judges from black community and thus, did not reflect the composition of the country. The unrepresentative judiciary, which was composed of only white men damaged public trust in the Court's impartiality as well as its own reputation as the legal system was used racially by white people to oppress black people. Nelson Mandela's statement to the court in 1962 is a clear example that shows black peoples' distrust to the unrepresentative judiciary. Mandela, during his trial for inciting persons to strike illegally and leaving the country without a valid passport, rejected to be judged before a "*white court*" revealing his distrust to the impartiality of a non-representative (white) court composition towards black litigants.[247] He stated that discrimination against and oppression of black people in the country was prevalent which showed that the court, which was dealing with his case, could not be fair and impartial towards him.[248] He attributed the problem of the non-representative composition of the court to the judicial appointments process which also operated unfairly and on the basis of discrimination.[249] Mandela's trial is one of the best examples of how the government institutions of divided societies can lead to the exclusion and repression of the members of other groups and why representation is very important for these oppressed groups. As Justice Higginbotham argued in such settings, marginalized groups tend to see the judges as the representatives of the interests of the ruling group and the non-representative courts are regarded as the guarantors of the [undesirable] *status quo*.[250] Therefore, the lesson that can be taken from South Africa is that public confidence in the impartiality of the judiciary in divided societies can only be maintained through a representative judiciary.

Many empirical studies, such as surveys, which have been carried out in the United States of America (USA, as another racially divided society) have showed that public confidence of African-Americans and Hispanic people in the judiciary which is mainly

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[247] Black Man in a White Court, Nelson Mandela's First Court Statement, 1962, accessed by: http://www.un.org/en/events/mandeladay/court_statement_1962.shtml on 25/03/2016

[248] Ibid

[249] Ibid; Mandela also stated that the laws that were being used to judge him were a product of a parliament which was also not representative of all Africans and revealed his distrust also to the legal system, the Legislature and to the laws that are made by the Parliament, on the basis that they did not hold legitimacy in the eyes of black people.

[250] Higginbotham L., Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge, *Duke Law Journal*, Vol. 42:1028, 1993

composed of white judges (thus, has an unrepresentative character) is very low.[251] Racial minorities believe that through racial diversity in the judiciary they would have the right to have a say in the justice system and thus, they would have more confidence in the system. Under-representation of one group in the judiciary leads to suspicion and creates the perception that bias and discrimination are present somewhere in the legal system.[252] The American Bar Association states that a *"judiciary that reflects and resembles the people who utilize it, (...) understands the heritage, history, culture, nuances and life experiences of a typical court user"*; this can enhance public trust in and respect for the judiciary.[253] For example, a National Survey (1999) that is conducted with public-hearing participants and was the largest survey in the USA that represent the population ratio in the society (in terms of Hispanics, Afro-Americans and Whites) revealed that when the composition of the judiciary reflects the make-up of the community, citizens' trust in the judiciary is strengthened.[254] As such, not having a black judge in the judiciary is one of the reasons of distrust of the black community in the impartiality of the judiciary and to hold a negative perception about the justice system.[255] Additionally, the same survey revealed that black community consider the judges as *out of touch with their community*.[256] Therefore, it is evident that diverse composition reinforces public confidence in the impartiality of the

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[251] S.C.Benesh&S.Howell, Confidence in the Courts: A Comparison of Users and Non-Users, 19 *Behav.Sci.&Law,* 199, 2001; T.Flanagan, E.F.McGarrell,& E.J.Brown, Public Perceptions of the Criminal Courts: The Role of Demographic and Related Attitudinal Variables, 22 *J.RES. Crime&Delinq.* 66, 1985; G.Caldeira, Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court, 80, *Amer.Pol.Sci.Rev.* 1209, 1986; T.Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions, 19 *Behav.Sci.&Law* 215, 2001

[252] A.H. Boss, The ABA Presidential Summit on Diversity in the Legal Profession, The Next Steps, *Judges Journal*, 27 Fall 2009

[253] Ibid

[254] How the Public Views the State Courts: A 1999 National Survey in E. Neely, Racial and Ethnic Bias in the Courts: Impressions from Public Hearings, *Court Review: The Journal of the American Judges* Association, 2004, Vol.40, Issue:3-4

[255] Ibid

[256] D.B.Rottman&A.J.Tomkins, Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges, *Court Review*, Fall 1999

judiciary by showing that the courts are not the prerogative of one group and different perspectives are given place in judicial decision-making.

However, although diverse judiciary is aimed to gather public trust in impartiality, ironically, it is also criticized as a threat to it. It is argued that those judges who would be appointed for the purposes of representation might be more concerned with their *representative* role than their impartiality.[257] Critics have claimed that diverse judges would feel compelled to protect people from their own community and would be prejudiced towards other groups in society.[258] When/If judges are more concerned about their social background (and not the law), they would act upon the wishes of their social background and then, they cannot adjudicate the cases impartially. Opponents of diversity also argue that if the judges represent the law or the legal system, they would be required to interpret and apply the law in a similar pattern and reach similar outcomes regardless of their background.[259] Therefore, concerns on judicial impartiality have prevented the creation of a more diverse judiciary and the means to achieve it.

In reply to this criticism, Ifill states that it does not mean that diverse judges are not impartial.[260] Judges are independent decision-makers who decide regardless of public opinion and perceiving them to act with community concerns harms their perceived impartiality,[261] even though not their actual impartiality. The shared characteristics, such as racial identity, of the judge and the litigant cannot be considered as a reason for the disqualification of the judge because of bias.[262] *"White and male"* judges who have been in charge for centuries, were never required to prove their impartiality prior to their

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257 Horowitz D.L., Constitutional Courts: a primer for decision makers, *Journal of Democracy,* Vol.17,No.4, October 2006

258 Ibid

259 F.I.Michelman, Dilemmas of Belonging: Moral Truth, Human Rights, and Why We might not want a representative judiciary; (2000) 47, *UCLA Law Review,* 1221

260 Ifill S. A., Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 *Boston College Law Review*, 95 (1998)

261 Ibid

262 Higginbotham's decision in denying disqualification Commonwealth of Pa. v. Local U. 542, Int. U. of Op. Eng., 388 F. Supp. 155 (E.D. Pa. 1974) v. U.S. District Court for the Eastern District of Pennsylvania, December 4, 1974

appointment whereas impartiality of judges from under-represented groups has always been questioned at any time they are about to be appointed.[263] Supporters of diversity argue that if there was sufficient and significant representation within the judiciary, those diverse judges would start to be seen as individuals who can separate "identity", and "impartiality and competency".[264] Thus, increased representation would help those diverse judges to be considered as individuals who are entitled to their own opinions rather than their communities'.

Still, it is important to be conscious while making a decision. Judges should have *"a more or less developed capacity to eliminate their prejudices from the consideration of cases"* because it is their obligation to resist any tendency to decide according to their political or other prejudices.[265] In order to prevent the decision-making process from the influence of judges' previous experiences, which might yield to bias, judges should check their mind-set constantly[266] and recuse themselves in case of doubt. In Frank's words: "*to recognize the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect"*.[267] Therefore, impartiality also requires constant questioning of one's self and consciousness of their possible prejudices. This may help judges put themselves in a correct mind-set in case of ethnic bias. Considering the fact that judges are also humans with life experiences, they are also prone to human mistakes. These mistakes (as in the form of prejudices) can be lessened or prevented when judges are aware of them and disregard them while adjudicating the cases before them.

It can be understood that many scholars accept that judicial impartiality does not require an empty mind as this is impossible. Rather than pursuing an elusive concept of impartiality, it is more rational to accept that whoever sits on the bench has a previous life experience and preconceptions on different topics. Therefore, if it is accepted that every judge has some sort of opinion on different issues, it would be a more appropriate way to

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263 *Supra* fn.103, A.H.Boss

264 Ibid

265 J.N.Frank, *Law and the Modern Mind,* New York: Tudor Publishing,1930

266 Ibid

267 Ibid

include a wider range of opinions in the judiciary.[268] The aim for a constitutional court judge should be to act as independent-minded as possible in order to be perceived as impartial and transcend their own ethnic identity; if not, they would have to recuse themselves from the case. Otherwise, the accusation of ethnic bias would always be a problem.

C. Public Confidence in the Court's Legitimacy

Issacharoff states that constitutional devices for government organization have to be structured in such a way as to embrace all groups and enable their participation in order to avoid the risk of the tyranny of the majority and also to protect individual dignity.[269] This is a matter of fostering legitimacy because when representation is not placed in divided societies, the break-down of government institutions can easily be triggered by the lack of legitimacy.[270] Therefore, in order to gather public confidence to the legitimacy of the judiciary, courts needs to be composed in an inclusive way and be representative.

The legitimacy of courts refers to the public perception that the courts belong to and serve for the whole society, not only for the privileged sections and/or for the interests of the majority groups of the society. Thereby, legitimacy of the courts reinforces the public perception that the courts are "*our courts*", not "*their courts*".[271] In turn, when the courts are considered legitimate, then, the public makes use of them rather than seeking other solutions, such as pursuing an individualized form justice or resorting to violence. Consequently, the courts' perceived legitimacy ensures respect for and voluntary compliance with their decisions.[272] Nevertheless, public confidence in courts' legitimacy can be damaged, if the court cannot issue impartial decisions even if its composition is diverse. In that sense, public confidence in court's impartiality and legitimacy overlaps.

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[268] Malleson K., Safeguarding Judicial Impartiality, *Legal Studies,* Vol.22, No.1,2002

[269] Issacharoff S., Constitutionalizing Democracy in Fractured Societies, 82, *Texas Law Rev.*,2003-2004

[270] Ibid

[271] A.Sachs, *Affirmative Action and the New Constitution*, ANC Department of Information and Publicity, 1994

[272] *Supra* fn.68, K. R.Johnson and L. Fuentes-Rohwer

Philips argues that the legitimacy of the judiciary depends on its composition and this is more likely to be the case for constitutional courts which deal with very important cases because certain decisions can only be legitimated by the representatives of those who take them.[273] In divided societies, even if constitutional courts act politically or in an activist manner, they are still powerful and legitimate decision-makers due to their responsibility to protect and uphold the constitution which is designed to serve for peace as well.[274] By reviewing and protecting the *peace agreement constitution* (which is the primary condition for a constitutional order to persist), the constitutional court becomes a legitimate device in supporting the peace and the [consociational] elite pact agreement.[275] When this work is done by judges from different backgrounds, then, a diverse judiciary contributes to the court's legitimacy.

However, Horowitz criticizes the diverse judiciary and argues that it would lead to the politicization of the court and its decisions.[276] He states that constitutional courts should be carefully designed and properly limited, in order to not become *"an object of political struggle"* and weaken democracy because when the courts' legitimacy is doubted, they are not able to promote constitutional democracy.[277] However, supporters of diverse judiciary rely on a similar reasoning and argue that the court would not be able to obtain legitimacy if it has an unrepresentative design; they, thus, hold that unrepresentative court would not be able to contribute to the building of new democracy. When Horowitz's concern on *political struggle* is considered in the light of the previous political conflict in representation in divided societies, it is understood that these accommodations on diversity are offered as a solution to the previous problem and not entrenched with an aim to create more political struggle.[278] Therefore, although supporters and critics of diverse composition aim to construct legitimacy for courts, their perception on how to do it is different.

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[273] *Supra* fn.84, A.Phillips

[274] *Supra* fn.12, Sapiano J.

[275] Ibid

[276] Supra fn.108, Horowitz D.L.

[277] Ibid

[278] This has been the case both in Cyprus and Bosnia-Herzegovina.

The courts' legitimacy is also one way of contributing to constitutional democracy, political stability and peace because without a public perception of legitimacy of the courts, individuals are more prone to choose to exit the political system and employ alternative means of dispute resolution, such as violence.[279] As Lee has stated, when public trust is absent or undermined, disputants may transfer their conflicts from the courts to the streets easily which in turn may destroy *any* democracy.[280] For example, one study found that the way institutions are designed may increase insecurities among conflicting groups and also increase the incentives of individuals to address their grievances by returning to violence.[281] On the contrary, the [inclusive] design of institutions can help to lower individual incentives to re-join rebel groups by addressing insecurities pertaining to political participation that prevail at the end of the conflict.[282] Therefore, by following similar reasoning, in order to foster public confidence in the court's legitimacy (and thereby, reduce the risk of violence), a diverse composition of the judiciary is essential.

As for the case-studies of this thesis, diverse judiciaries of the RoC and BiH were deemed necessary for the purposes of, *inter alia,* legitimacy. The constitutional courts in these countries would not be able to gather public trust of whole society if they were designed in an unrepresentative manner and given to the hands of one ethnic group. Also, neither the 1960 Constitution nor the Dayton Agreement Constitution would have been possible to be put into action without giving presence to all warring parties in all government institutions. Therefore, as will be examined later,[283] a diverse judiciary was envisaged at the onset of the State-building with an aim to provide legitimacy to both constitutional courts.

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279 T.R.Tyler, *Why People Obey the Law*, Yale University Press, 1990

280 H.P.Lee, *Judiciaries in Comparative Perspective,* Cambridge University press,2001;p.541

281 Hartzell C., Hoddie M. and Rothchild D., Stabilizing the Peace after Civil War: An Investigation of Some Key Variables, *International Organization* 55(1), 2001; They use the word *"weak" institutions* to refer to absence of the legitimacy of the institutions.

282 B.F.Walter, Does conflict beget conflict? Explaining recurring civil war, *Journal of Peace Research,* 2004;p.385

283 Chapter IV. and Chapter V.

Beyond the importance of diversity to the legitimacy of courts, research has also shown its potential in improving the decision-making process[284] which is the focus of discussion next.

D. Potential to Improve the Judicial Decision-Making

An important question in debates regarding judicial diversity is whether it would make any difference to judicial decision-making.[285] There are several basic arguments as to why designing diverse courts may potentially improve the judicial decision-making process by including different viewpoints of the judges from different social backgrounds. This will result in the decision-making process being enriched by the inclusion of the substantive opinions of different groups in society. In addition, the qualities that non-traditional/diverse judges can bring are those such as minority language, culture, religion, tradition, knowledge, gender perspective and experience which can be useful in the decision-making process.[286] The inclusion of different, especially previously excluded viewpoints can also be helpful in understanding particular issues, let us say minority issues, because the opinion of judges from different backgrounds would not be too far away from the perspectives of those who would be affected by their decisions.[287]

This improved decision-making, in return, can contribute to the legitimizing of the values of under-represented groups by ensuring that *"a single set of values or views do not dominate judicial decision-making"*.[288] In other words, the hegemony of the majority's values/norms can be prevented by including judges from different backgrounds and the judicial decision-making process can both be improved and minority values can be seen as

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[284] Shikhelman V.,Diversity and Decision-Making in International Judicial Institutions: the United Nations Human Rights Committee as a Case Study, (2018) Berkeley Journal of International Law, 36(1)

[285] See for example BBC Radio 4, Law in Action, 'The Neuberger Experiment' (20 June 2013) < http://www.bbc.co.uk/programmes/b02x7t3w > House of Lords Select Committee on the Constitution, *Judicial Appointments* (HL 2012, 72)

[286] Hunter R.C, More than Just a Different Face? Judicial Diversity and Decision-making, *Current Legal Problems*, 2015

[287] C. Thomas, Judicial Diversity in the United Kingdom and Other Jurisdictions, A review of Research, policies and Practices, The Commission for Judicial Appointments, November 2005

[288] Supra fn.111, Ifill S. A.

legitimate. In that sense, the court's legitimacy and better decision-making are also related to one another. For example, the standard that identifies *"reasonable man"* in civil and criminal cases can be reconstructed by a diverse court composition as this *"reasonable man"* is defined by the values, experiences and motivation of white, middle class, male judges.[289] Therefore, lack of diversity, in this context, excludes and/or restricts the perspectives of *reasonable* blacks, lesbians, women and/or members of minority groups. Another example may be the circumcision of Muslim boys, let us say, in a religiously divided society composed of Muslims and Christians. From the latter's perspective, the practice can be considered as a crime as it causes bodily harm to a child, whereas for Muslim parents, this is an obligation according to their religion in order to raise their son as Muslim. If the Parliament (composed of a majority of Christians) passes a law to ban the practice or criminalise it, and if the representatives of the Muslim community apply to the constitutional court to invalidate the law, the presence of a Muslim judge would be beneficial to provide understanding why this practice is so important for that community.

Three different studies have shown the potential of representative courts in improving the decision-making process. One study on racial diversity has revealed that a minority (black) judge in a mixed court may moderate anti-minority views, offer alternative perspectives and lower the bias toward minorities.[290] Similarly, another empirical study has demonstrated that minority judges can confront stereotypes, restrict improper discussion on minorities and provide additional information.[291] The third study tested the effect of racial, gender and ideological diversity in the United States Appeal Courts in affirmative action cases and examined whether the presence of a minority judge can change the deliberation process of the other two judges on a three-judge panel.[292] The findings revealed that a single-non-white judge in a three-judge panel increased the probability of two white judges

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289 G. Maharaj, *Between Unity and Diversity: Essays on nation-building in post-apartheid South Africa,* Cape Town, 1999

290 *Supra* fn.68, Johnson K.R. and L. Fuentes-Rohwer

291 S.R.L.Vargas, Does a Diverse Bench Attain a Rule of Law that is Inclusive? The Empirical Data and Possibilities of a Process Theory Model of Judging" 10 *Michigan Journal of Race&Law* (2004

292 C.M.Cameron and C.P.Cummings, Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971-1999, Department of Political Science Columbia University, March 30, 2003

voting in favour of affirmative action by 15%.[293] Likewise, research that was conducted on the ethnic composition of the criminal appeals in Israel (another religiously divided society) has found out that the panels that has at least one Arab judge, compared to all-Jewish panels, are more lenient to Arab defendants.[294] Therefore, these studies suggest that creating diverse courts may also affect the voting behaviour of other judges and also the outcome of cases through the interaction with other judges in the decision-making process.

Table 1. Taken from Grossman et all., 2014

	Defendant appeals with more lenient verdict (%)		
	Jewish	Arab	Total
All-Jewish	39.4	24.0	273
Mixed-panel	36.2	35.6	177
Total	268	182	450

Note: Defendant appeals (n = 450).

Although it is argued that the presence of a diverse judge cannot affect the outcome of cases directly, the decision-making process can also diversify and the final decision can change as well due to the variety of the topics discussed. For example, some feminist scholars argue that the substance of the decisions can be written entirely differently by undertaking a feminist interpretation of the law and this interpretation can also change the outcome of cases.[295] However, in order to interpret the law from a feminist perspective, feminist law-making in the legislature is required in the first place and even before that gender quotas are needed in the elections of the parliament members.

In light of the above arguments, it is evidenced that a representative court is not only established in order to satisfy consociational principle of representation but there are also other compelling reasons for a constitutional court to be composed in a representative manner in divided societies; the more important of which is the constitutional court's role

[293] Ibid; This specific study also concluded that diverse courts are more likely to analyse wider issues.

[294] Grossman G., Gazal-Ayal O., Pimentel S. and Weinstein J.,Descriptive Representation and Judicial Outcomes in Multi-Ethnic Societies, September 28, 2014; It was also observed 14-20% reduction in incarceration and a 15-26% reduction in prison sentencing.

[295] In order to advance their argument, R.Hunter, C.McGlyn and E.Rackley published the *Feminist Judgements, From Theory to Practice* in 2010 (Hart Publishing) which 15 court decisions were re-written from the feminist perspective.

in interpreting the constitution in accordance with the peace agreement. Therefore, it is also necessary to examine how these courts are established. The next section particularly concerns the judicial appointments process, the role of the merit principle and the necessity of the constitutional quotas in judicial appointments in divided societies.

III. How are Representative Courts established?

A. The Merit Principle

The judicial appointment process is traditionally based on the merit principle. Originally, the merit principle was constructed in the context of discrimination law to provide equal opportunity in the distribution of employment by taking the relevant factors into account; a further aim was to eliminate discrimination by excluding cronyism, political favouritism and nepotism.[296] By the application of the merit principle, it is aimed to select and appoint the most qualified candidate among the meritorious ones. A negative approach can also be used to define merit in order to identify what is *not* needed in judges; as such, the political views of the judge candidates are not [at least, should not be] part of merit.[297] This was due to the concern that if other factors were allowed to be considered, the appointments process could be abused for other purposes.[298] For example, executive and/or other interest groups would try to influence the appointment process and ensure the appointment of a judge who shares the same political views with them.[299] Thus, the merit principle came to refer to professional qualifications, skills and experiences.

However, in practice, different jurisdictions have adopted different criteria to define merit. For example, in civil law countries, (e.g. France and Germany) judges are recruited directly from university and advance through a structured career system which is based on written and oral exams and judicial training.[300] In the USA, merit was constructed as early

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296 C.McCrudden, Merit Principles, *Oxford Journal of Legal Studies*, Vol.18, Winter 1998

297 *Supra* fn.20, K. Malleson, *The New Judiciary;*p.97

298 K.Malleson, Rethinking the Merit Principle in Judicial Selection, *Journal of Law and Society*, Vol.33, No.1, March 2006; J.A.G Griffith, *The Politics* of Judiciary, (5th ed,) Fontana Press, 1977

299 Ibid

300 UK Department for Constitutional Affairs, Constitutional reform: a new way of appointing judges, CP10/03, July 2003

as the 1940's through the Missouri Plan which involved retention elections;[301] then, in the 1970's, judicial nominating commissions were introduced in which the executive appointed judges based on nominations made by an independent nominating commission for federal court appointments.[302] However, it is observed that no two states in the USA have adopted merit selection in quite the same way and there is uncertainty over what the word merit means with respect to judicial selection.[303]

Another example of the construction of the merit principle in judicial appointments is from the racially divided South Africa. In South Africa, before 1994, the judiciary was dominated by white, male, middle and upper class Afrikaans-speaking judges.[304] In 1994, there were only three black and two female judges among more than two hundred judges.[305] During the interim constitution [1993-1996], racial and gender diversity was assessed together with integrity, competence and merit, and a balance was sought.[306] After the establishment of the Judicial Service Commission (JSC) in 1994, judicial appointments process proceeds with interviews with the judgeship candidates.[307] The South African Constitution neither envisages quotas for judicial selection nor defines merit principle but judgeship candidates are assessed against one another and also according to the needs of the judiciary.[308] As such when one of the two candidates can enhance the diversity of the judiciary and holds comparable qualifications to the other one, the JSC appoints the

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301 Bierman L.,Beyond Merit Selection, *Fordham Urban Law Journal*,Vol.29,Issue 3, 2001

302 C.Thomas, Judicial Diversity in the United Kingdom and Other Jurisdictions; American nominating commissions usually submit a shortlist of nominees to the executive.

303 *Supra* fn.152, Bierman L.

304 Andrews P.E., South African Appointments Process, *Osgoode Hall Law Journal*, Vol.44, No.3, Fall,2006

305 Ibid

306 Ibid

307 F.Du Bois Judicial Selection in Post-Apartheid in Africa, in K. Malleson&Russell, Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World

308 Cowen S., Judicial Selection in South Africa: a timely debate, Democratic Governance and Rights Unit, Working Paper Series, 2013 accessed by: http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Judicial%20Selection%20in%20SA%2028%20August%20print-ready.pdf on 08/01/2017

former.[309] As a consequence, the South African Constitutional Court had a very diverse composition with judges from different backgrounds, including judges with disability and with a non-heterosexual orientation.[310] However, since 2006, there has been a growing criticism towards the partisan appointments and thus, the impartiality and independence of constitutional court judges.[311] The recently published Cape Town Principles state that there should be independent and diverse commissions that are responsible for the appointment of judges in order to apply transparent criteria and a transparent selection process as these are necessary for public confidence.[312]

Although the merit principle is accepted almost universally, it has also been criticized as it does not rely on an objective criterion and it is in need of re-definition.[313] Merit has no single, universal set of rules that define it and in that sense it is a problematic and/or subjective concept. Rhode argues that merit is socially constructed; this social construction covers various factors, such as family background, educational circumstances, natural talent, economic means and gender-role socialization which usually people have no control of.[314] As various factors (such as personal connections and/or gender stereotypes) influence the appointors' choices, it is difficult for individuals to claim and prove that they deserve the position that they have the qualification for.[315] This is more likely to be the case when a candidate is not appointed.

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309 Ibid

310 *Supra* fn.155,Andrews P.E.

311 Roux T., The South African Constitutional Court's Democratic Rights Jurisprudence, *Constitutional Court Review,* Vol.5, 2014

312 The Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth, Bingham Centre for the Rule of Law, February 2016;

313 Nicolson D., Affirmative Action in the Legal Profession, *Journal of Law and Society,* Vol.33,N.1,March 2006

314 D.L.Rhode, *Justice and Gender : Sex Discrimination and the Law*, Harvard University Press, 2009;p.186

315 Ibid

Nicolson criticizes the merit principle as it only serves for the appointments of advantaged groups (such as white, middle-class men) who have a good network.[316] He argues that the way the merit principle is utilized in appointments excludes people from socially disadvantaged groups, such as black, women and/or minorities who do not have the same advantages with those who are appointed due to their social backgrounds and thus perpetuates past injustices by serving for the advantage of its *"fortunate beneficiaries*.[317] He suggests that if a member of a disadvantaged group can still compete with someone from an advantaged group and holds almost equal qualifications, this should be enough justification for their appointment; the non-appointment of the, for example, white, middle-class male does not amount to reverse discrimination but only to the prevention of him from benefiting more from his background.[318]

In this context, the argument is not against the use of merit principle; rather, the way it is used. It is aimed to demonstrate that the subjective character of the merit principle begs question and a clearer definition of merit principle is needed in order not to face the criticism of partisan appointments, especially in divided countries where trust between the communities is lacking and is therefore needed. Therefore, the qualities that the merit principle requires in a judge candidate needs to be defined clearly whether it is a university, experience, lawyering skills or any elements of all.

B. Constitutional Quotas

As this thesis argues for judicial diversity, the tools that support it need to be examined from a closer angle. A diverse judiciary under a consociational design is generally established by the implementation of constitutional quotas at the onset of state-building in order to guarantee the representation of all groups. Constitutional quotas give consideration to the social background of the candidate, such as ethnicity, race and language in the appointments.[319] These factors usually describe the necessary element for judges to be appointed according to society's needs; something which usually reflects

316 *Supra* fn.164, Nicolson D.

317 Ibid

318 Ibid

319 A. Jarstad, *Changing the Game: Consociational Theory and Ethnic Quotas in Cyprus and New Zealand,* Doctoral Dissertation, Department of Peace and Conflict Research, Uppsala University, Uppsala, 2001

society's divisions. Thus, specific concern is given to what is considered as necessary for the purposes of inclusiveness because without being inclusive, government institutions cannot hold legitimacy.[320]

The composition of the senior judiciary is usually designed to yield an equal number of judges from all groups. Application of the quotas does not mean that the appointments process disregards the merit principle; rather both merit and quotas apply together to establish a diverse judiciary. The most meritorious candidate is chosen among one specific group and the representation of all constitutionally recognized groups is enabled.[321] Thereby, by the use of quotas, the judiciary reflects the society it serves.

Quotas usually state the number of judges to be appointed from each group and are embedded into the constitution as a constitutional requirement during the constitution-drafting process. The logic of quotas in divided societies is to give preference to group members who were previously disadvantaged or have the risk of being disadvantaged in the future because of their race, ethnicity or language in recruitments and appointments. In doing so, quotas can *mitigate the influence of (...) biases and blindness in institutions and decision-makers*[322] and provide access to previously discriminated groups in public offices, including the judiciary. Justice Sachs argues that, contrary to some arguments that this sort of affirmative action leads to reverse discrimination, in fact, these policies provide justice by redressing previous discrimination; and this is why, in many instances, past discrimination is not even needed to be proven.[323]

Constitutional quotas have been considered as part of affirmative action policies in western democracies. Affirmative action programmes, in general, aim to relieve inequality and redress imbalance and increase the representation of under-represented groups in the employment sector by using, for example, gender and/or ethnicity as an element in the

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320 Constitutional quotas under a consociational design are generally used not only for the composition of the judiciary but also for other government institutions; Chapter IV, Part III.A.,Chapter V, Part II.C.

321 Chapter V, Part III.B.

322 *Supra* fn.78,I.M.Young

323 *Supra* fn.122, A.Sachs

decision-making process.[324] Affirmative policies vary from limited "*soft*" initiatives which aim to encourage people from under-represented groups to apply for judicial posts and enrich the candidate pools, to *"strong"* policies which envisage rigid preferential treatment of certain groups.[325] Constitutional quotas are accepted as part of the latter practice and are usually not supported in western democracies due to the established place of the merit principle. However, what are recognized as *hard* policies in established democracies are the norm in consociational democracies that apply to divided, post-conflict societies.

Supporters of quotas argue that constitutional quotas are means to redress past abuse, previous discrimination and end exclusion because non-representation of some groups in society had played a significant role in the silencing of these groups and hence in creating ethnic conflict in the first place.[326] Thus, quotas are just another tool that end, rather than sustain discrimination[327] and prevent the domination of government institutions by the majority. The lack of representation of minority groups in the government institution that caused the ethnic conflict can only be remedied by constitutional quotas. Looked from this perspective, quotas can also serve for the broader aim of stable democracy and peace by relieving inequality and providing legitimacy to the system in divided societies. Strict implementation of the equality principle, where the conditions are not equal, would only lead to a system dominated by majority at the expense of non-representation of minorities in divided societies. This does not mean that the members of the under-represented groups do not have the necessary qualifications which the merit principle requires because the in-group competition between the most meritorious ones still exists. But the aim is to emphasize that it was the past discrimination and non-representation of minorities that led these groups not to have access to the education and/or other resources as easily as the majority group would have had. Besides past abuse of the system, the future risk of discrimination and/or minorities' fear of discrimination and/or the mistrust between the conflicted groups are also valid reasons to adopt quotas.

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[324] *Supra* fn.31 N.Tiruchelvam and R. Coomaraswamy

[325] *Supra* fn.82, K. Malleson

[326] *Supra* fn.122, A.Sachs; Also Supra fn.101, A.L. Higginbotham; T.Sowell, Affirmative Action Around the World, An Empirical Study, Yale University Press, 2004

[327] *Supra* fn.164, Nicolson D.

Jarstad argues that quotas provide guarantees that one group cannot dominate and/or exterminate the other group and in doing so, groups feel more secure.[328] She also states that quotas are relevant to the broader political system because they are expected to influence the political leaders' attitude from conflict to cooperation and thereby, providing political stability.[329] When seen from this perspective, the use of quotas can be justified on the ground that quotas are necessary in redressing previous discrimination and/or eliminating the possibility of future discrimination, providing a sense of security and thus, political stability. Therefore, it is argued that when social divisions are taken into account which necessitate the utilization of constitutional quotas, quotas have valid justifications in being applied. Otherwise, in the absence of quotas, criticisms that were directed to the South African Constitutional Court -as it has undergone to partisan appointments- can always be present.

However, quotas are criticized on the basis of diluting the merit principle and lowering the quality of the bench.[330] Horowitz, for example, considered quotas as *illegitimate* as he believes that they are against the equal treatment of individuals due to the consideration of, for example, ethnicity.[331] It is also argued that quotas create injustice to individual applicants[332] because the equality principle requires that the law should apply equally to all people, save to the extent that objective differences justify differential treatment (such as the different status of as children, prisoners, mentally ill.[333] Thus, for critics, ethnicity (or any characteristic that is taken as a basis for quotas) could not be considered as an objective difference which requires differential treatment. Moreover, it is also criticized that when the quotas provide equal opportunity to the members of the minority groups and raise their representation to an equal level with the representation of the majority, the

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328 *Supra* fn.170,A.Jarstad

329 Ibid

330 In a discussion on racial quotas for black judges in England, Lord MacKay refused the idea as it lowers the quality of bench; Lord Mackay in R.Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office,* Clarendon Press, Oxford, 1993

331 D.L.Horowitz, *Ethnic Groups in Conflict,* (2nd ed.) University of California Press, 2000;p.657

332 R.H.Fallon, To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination, *Boston University Law Review,* Vol.60, 1980

333 *Supra* fn.19,T. Bingham

equality principle conflicts with minority overrepresentation. This is more likely to be the case when a society is divided on a sharp minority-majority axis (i.e. 80%-20%) and the judges are appointed on equal numbers.[334] Specifically to judicial appointments, the problematic aspect might be when a less meritorious candidate from a minority is appointed to a judgeship position over a candidate from the majority who is more qualified. However, considering the above-mentioned discussions on the construction of merit and its vagueness, it is not clear if it can be said definitively who is more meritorious.

Another problem in divided societies might be the resentment of the majority group to the quotas and thus, it is important to find a balance between the merit and the quotas and/or to apply them together or to propose alternative solutions. Malleson, though writing for England, examines three approaches for judicial appointments in order to increase diversity while respecting the merit principle.[335] Firstly, she states that the *maximalist* approach holds that there is always one best candidate in any particular selection decision and regardless of any other consideration, they must be appointed.[336] In order to apply the maximalist approach, qualifications should be objectively measurable but this is rarely the case in practice, she states. Secondly, she describes the *minimalist* approach which suggests the appointment of a candidate who has a certain standard of qualifications and comes from an under-represented group even though they are not the highest-quality candidate.[337] Finally, she offers the *tie-breaker* approach which holds that less qualified candidates should not be appointed when there are more qualified candidates; but where two or more candidates have almost equal qualifications and one is from an ethnic minority group, the latter's disadvantaged status should serve as a tie-breaker to her advantage.[338] Although the *tie-breaker* seems to be an alternative strategy to quotas in judicial appointments, the problem is that very rarely do two candidates have truly equal qualifications in practice.[339] Nevertheless, one way to increase diversity in divided

[334] This was the case in the 1960 Constitution of RoC.

[335] Supra fn.149, Malleson K.

[336] Ibid

[337] Ibid

[338] Ibid

[339] House of Lords, Select Committee on the Constitution, 25th Report of Session 2010–12, Judicial Appointments, Report, Printed 7 March 2012, Published 28 March 2012

societies is to follow the tie-breaker approach, if the quotas are not likely to be approved by the majority.

Nevertheless, this researcher proposes the entrenchment of constitutional quotas into the constitution for a specific time period, such as ten years. After the termination of the time limit, the tie-breaker approach could be followed. The application of quotas at least for ten years on the basis of four years of university education and six years of experience in practice will give enough time for any community to educate and to train its members to hold the necessary qualifications for such a prestigious job; thus, the society will prepare the candidates to compete solely on the basis of merit with, but by only giving consideration to the tie-breaker approach. Still, the tie-breaker might create some problems for the underrepresented groups because it would remain in the discretion of the appointment body and would not be enforced constitutionally; thus, it would not be binding on the appointment body as quotas would have been.[340] Therefore, quotas are needed in the initial stages of post-conflict period because they guarantee the representation of minorities in the judiciary where non-representation is subject to criticism and the public trust of minorities in the judiciary is low.[341] In such cases, this researcher supports the use of constitutional quotas with a sunset clause and not in the form of eternity clause.[342]

Having outlined the construction of merit and after reviewing the arguments for and against constitutional quotas and finally the benefits that can be derived from constitutional quotas, [thus, from a representative judiciary], it is argued that a representative judiciary which is created through the application of constitutional quotas does not necessarily lead to a lowering of the merit principle. Although quotas seem to be a departure from a strict merit principle, they do not ultimately mean the appointment of less qualified judges. In

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[340] Nevertheless, this feature can still be the advantage of tie-breaker approach because compared to quotas, it would probably raise fewer questions to the merit principle as it would not be used permanently and in a strict constitutional manner.

[341] E.Rackley in House of Lords, Select Committee on the Constitution, Judicial Appointments Process Written Evidence

[342] For the disadvantages of eternity clauses, S.Suteu, Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits, Edinburgh Research Paper Series, No.2016/23

any case all the candidates are evaluated on the basis of merit.[343] Quota supporters have never been proposed to appoint less qualified candidates over more qualified ones just because of their membership of an under-represented target group.[344]

IV. Conclusion

This chapter demonstrated why judicial diversity is necessary, by making use of arguments from the literature on the concept of judicial diversity. First of all, the close link between the constitutional courts' composition and jurisdiction in constitutional review cases is demonstrated, as the necessity of diversity cannot be assessed correctly without taking the court's role in constitutional review cases into account. The exploration of constitutional review cases has demonstrated the constitutional courts' power in protecting human rights and settling limits to the governments' actions; but more importantly and in relation to divided societies in influencing stable democracy and the peace-building process. Regarding the divided societies under consociational democracy where identity politics are prevalent, constitutional courts assumed an additional duty of preventing political violence, sustaining democratic stability and maintaining peace. In such a context where the court assumed important political powers – through the interpretation of *peace agreement constitution* – it is argued that the diverse composition of the judiciary is vital in preventing the oppression of minorities and one-sided justice of the majorities. Thereby, while the court mediates the political tension between different groups in constitutional review cases, it needs to provide presence to judges from these different groups and enable the discussion of different perspectives on peace during adjudication in order to fulfil its *conflict reducing* duty. This can all be done by the interpretation of the constitution by individual judges and in a way to uphold the peace as the most important constitutional norm to be protected. Therefore, this researcher has argued that constitutional review cases should not be left to the interpretation of one ethnic group and/or majority group and should include the viewpoints of all groups who have the potential to destabilize the political/consociational system.

In the subsequent parts, it was shown how public confidence in impartiality and in legitimacy can be maintained by establishing a diverse judiciary. Evidence is provided from other jurisdictions to show that sub-groups believe that they have a voice in the

[343] Supra fn.149, Malleson K.

[344] *Supra* fn.177, T.Sowell

justice system and their opinions are also respected through judicial diversity.[345] Also, it is demonstrated that judicial diversity of courts contributes to the court's perceived legitimacy by including judges from under-represented and/or discriminated groups and provide legitimacy to their viewpoints. Therefore, when courts are considered as impartial and legitimate institutions through their diversity, the public makes use of courts, instead of resorting to violence for the resolution of disputes; this is more likely so in divided societies. Given that stable democracy can only flourish in the absence of violence, a diverse, impartial and legitimate judiciary becomes an essential part of the democratic mechanism with the benefits that it offers. All these positive inputs of a diverse court composition eventually assist the whole society in resolving its problems within the legal boundaries. Therefore, compared to established democracies, that do not have the risk of violence, in divided societies, a diverse judiciary has a lot more to offer; building stable democracy and protecting peace is the court's first and foremost contribution.

Finally, in line with previous studies,[346] it is shown that the judicial decision-making process can also be improved and become less prejudiced when judges from different backgrounds interact with each another while sitting in diverse courts. These last three reasons that necessitate judicial diversity are also positive contributions of it to the whole society.

In examination how representative courts are established in divided societies, the use of quotas in judicial appointments have manifested themselves as necessary tools in providing representation in the judiciary. Although judicial appointments are traditionally based on the merit principle, the arguments are provided to explain why only the merit principle (without quotas) can be detrimental for divided societies which are in need of representation. It is argued that the merit principle can be used for the purpose of exclusion of smaller/minority groups and perpetuate the appointment of the people from advantageous and/or majority groups. As the root cause of conflict in a divided society is the exclusion of some groups, the utilization of quotas has valid justification to be used for. Therefore, quotas are defended on the basis of redressing previous discrimination and prevent prospective discrimination and as a result, providing security and political stability.

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[345] Part II

[346] *Supra* fn.145, Grossman et all.

After all, the merit principle needs to be redefined with constitutional quotas, assessed according to the needs of divided societies and applied together with the quotas.

In response to the argument that judicial appointments that operate with quotas lead to the appointment of biased judges, it is illustrated that pure impartiality has never been possible in the first place and only the awareness of a judge might reduce the risk of biased decision-making or judges can recuse themselves. Also, it is reiterated that judges' representation is limited, and should be limited, to symbolic representation and this does not require judges to act on behalf of their own backgrounds.

After all, when possible problems associated with representative court composition are assessed together with the diverse court's positive contributions, the advantages of a representative judiciary simply outweigh its disadvantages. Besides, considering the role of the constitutional court in *peace jurisprudence* which deems the court as an instrument of peace, this work strongly supports the diverse composition of the constitutional court in divided societies. The challenges attributed to a representative court are the price to be paid for keeping all the groups within the political system and not oppressing them through the tyranny of the majority or risk the violence of the minority. This can only be done by providing them representation because representation has come to mean *power* for conflicted groups in divided societies and no group would choose to feel powerless.

Chapter IV. The Case of the Republic of Cyprus: The 1960 Constitution and its Supreme Constitutional Court [1960-1964]

I. Introduction

This chapter presents the first case study of this thesis and examines the role, ethnic composition and functioning of the Supreme Constitutional Court of the Republic of Cyprus under the 1960 Constitution from 1960 to 1964.

This chapter consists of three parts. The first part provides the socio-legal perspective for the political background to the 1960 Constitution and explains how internal and international socio-political events influenced the pre-constitutional, colonial order and paved the way to the drafting of the 1960 Constitution.

The second part demonstrates how the theoretical framework of consociational democracy[1] was applied in the 1960 Constitution and the associated constitutional problems which mainly concerned the representation of the two communities. Following the application of the theoretical framework there is an examination of the way the consociational principle of representation has influenced the constitutional provisions governing the arrangements for the composition of the judiciary and why an ethnically diverse constitutional court composition was considered necessary in the ethnically divided Cypriot society. Besides being necessary, in the third part, the main benefits and disadvantages of a diverse judiciary are discussed through the analysis of two landmark cases. The first one is a set of cases on the establishment of separate Turkish-Cypriot municipalities, known as the *Municipalities case*[2] in the literature and heard by a diverse Supreme Constitutional Court. The second case is *Mustafa Ibrahim*[3] in which *inter alia* the constitutionality of the newly established non-representative Supreme Court was debated within the case itself. The interpretation of the 1960 Constitution by the local judges is examined in order to assess if and how their ethnic background influenced their decision-making process and what kind of impact diverse Supreme decisions had on the political/constitutional order of the Republic. The cases examined provide evidence for the conclusion that constitutional courts have the power to influence the political order and stable democracy through the decisions they deliver and therefore their design is of utmost importance.

Finally, Aziz v. Cyprus case [Application No.69949/01] before the European Court of Human Rights was examined to provide evidence for the arbitrary application of the doctrine of necessity by the Greek-Cypriot judges in the Supreme Court when the Turkish-Cypriots' constitutional rights were at stake.

The chapter proceeds with a brief examination of the political history of Cyprus' ethnic division prior 1960 in order to appreciate the conditions necessitating the creation of the 1960 Constitution.

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1 Chapter II, Part II.A.

2 Case No: 10/1963, 11/1963, 12/1963, 13/1963

3 The Attorney-General of the Republic v. Mustafa Ibrahim and Others, 1964,C.L.R.195

II. Political History of Ethnic Division in Cyprus

A. Internal and international political events before the 1960 Constitution

In 1878 Cyprus was leased by the Ottoman Empire to the British Empire in exchange for British guarantees to protect the Ottomans from a possible Russian aggression.[4] The British Empire codified a constitution firstly on 14th September 1878 by Order in Council and established a Legislative and an Executive Council without any elected Cypriot representatives.[5] In 1879, the British administration established the Courts of Justice and then, in 1882 the Ottoman ecclesiastical courts (*ser'i mahkeme*) were abolished.[6] The composition of the Legislative Council was changed in 1882 so that it would be composed of 6 (British) official members and 12 elected Cypriot (nine Greek-Cypriots and three Turkish-Cypriots) members.[7] Later, in 1894, the British administration allowed the representation of 3 Cypriots (2 Greek-Cypriot and 1 Turkish-Cypriot) to the Executive Council as well.[8] Therefore, the British administration provided representation of the two main ethnic communities in the government councils as early as the 1880's. However, these arrangements did not satisfy many Greek-Cypriots as they found themselves in a permanent opposition in important decisions due to the casting vote of the English Head of the Councils and the Turkish-Cypriots' voting with British officials.[9]

However, in 1931, while voting for new tax legislation, one Turkish-Cypriot member of the Legislative Council joined the Greek-Cypriot members and voted against the British proposal on taxation.[10] As a consequence, the British administration could not enforce the tax legislation and imposed it by the Order-in-Council. In response, Greek-

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4 The Cyprus Convention, 4 June 1878 cited in A. Gazioglu, *Ingiliz Idaresinde Kibris, Statu ve Anayasa Meseleleri, 1878-1960, Cilt 1 (Cyprus under the British Rule, Statute and Constitutional Matters, 1878-1960, Vol.1),* Nicosia, 1960

5 Ibid

6 Ibid

7 Ibid

8 Ibid

9 S.Soulioti, *Fettered Independence, Cyprus, 1878-196*, Volume I: The Narrative, University of Minnesota, 2006

10 Nevzat A., Ronald Storrs and Misirlizade Necati:The Governor's Encounter with the 'Thirteenth Greek, The Cyprus Review Vol.23:2,Fall 2011

Cypriots rebelled against the British administration in October 1931; their riots were accompanied by demands on *"Enosis"* which was the political goal of uniting Cyprus with the Kingdom of Greece.[11] To supress the riots, the British administration suspended all constitutional liberties and excessive powers were entrusted to the Governor. The Governor was also the leading figure in the judiciary[12] because judges' promotions and removals were subject to Confidential Reports which were written by the Chief Justice and approved by the Governor.[13] As a result, it is argued that in this period Cyprus experienced "*gubernatorial autocracy*" as a consequence of "*constitutional regression*".[14] Until the 1960 independence, the constitutional order had never been fully restored due to the continuous demands on self-determination and Enosis by the Greek-Cypriots. Although Greece applied to the United Nations for *self-determination* for the people of Cyprus, the UN did not grant the right to self-determination to Greek-Cypriots.[15]

After being unsuccessful in the UN, Greek-Cypriots established an underground organization called EOKA *(Ethniki Organosis Kipriakou Agonos/National Organization of Cypriot Struggle)* which started an armed campaign on the 1st April 1955 with the aim of achieving self-determination, independence and *Enosis.* EOKA, in nature, was an anti-colonialist, anti-communist and ethno-nationalist organization which was employing guerrilla warfare tactics.[16] However, the British administration considered the EOKA movement as "terrorist" with its goal limited to the protection of the Greek-Cypriots' interests and supported by Greece.[17] In order to counter EOKA's violence and balance the

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[11] *Supra* fn.9,S.Soulioti

[12] Ibid

[13] The Inns of Court, Conservative and Unionist Society, *British Colonial Judges,* Sweet and Maxwell, 1956

[14] M. Wights, *British Colonial Constitutions*, Oxford Clarendon Press, 1952;p.20

[15] J.S. Joseph, *Cyprus: Ethnic Conflict and International Politics, From Independence to the Threshold of the European Union,* Macmillan,Basingstoke,1997; Greece applied to the UN five times until 1958

[16] A.Suhrke and L.G. Noble, *Ethnic Conflict in International Relations,* Praeger, New York, 1977;p.44

[17] B. Simpson, *Human Rights and the End of Empire, Britain and the Genesis of the European Convention,* Oxford University Press, 2001

Greek pressure, Britain invited Turkey and Greece to a Tripartite (London) Conference in August 1955, stating that the constitutional status of Cyprus and the common interests of the three powers in the Eastern Mediterranean would be discussed.[18] However, Britain's invitation to Turkey introduced it to the Cyprus problem and gave it the right to have a say in the future of Cyprus and of the Turkish-Cypriots, despite having given up its rights in Cyprus in the Treaty of Lausanne in 1923.[19] Britain offered limited self-government to Cyprus, where the Governor would be the sole authority for foreign affairs, defence and security.[20] However, neither Turkey nor Greece accepted the proposals and the Conference was suspended. According to the British historian Holland, it was the Tripartite Conference that set Greek-Cypriots and Turkish-Cypriots against each other because Britain mentioned partition of the island in this Conference and Turkey adopted this policy (partition) as a political solution from Britain.[21] After the Conference failed, in order to oppose EOKA's violence, in November 1955, the British administration enforced the Emergency Powers which denied fundamental human rights to all Cypriots.[22]

Besides the internal constitutional problems on the island, international politics witnessed the decolonization of the British Empire from 1945 onwards, a fact that coincided with the beginning of the Cold War.[23] Both the Cold War and Britain's loss of power in the Middle East and the Eastern Mediterranean increased the island's strategic importance and required Britain to secure a close presence (or at least a military base) in Cyprus in order to avoid and/or limit Soviet expansion into that area.

Nevertheless, it needs to be noted that there was inter-communal cooperation between Greek-Cypriots and Turkish-Cypriots, although inter-communal violence began

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[18] C.G.Tornaritis, *Cyprus and its Constitutional and Other Legal problems,* 2nd ed. Nicosia, 1980

[19] A.Aktar, N.Kizilyurek, U. Ozkirimli, *Nationalism in the Troubled Triangle,* Palgrave, Macmillan, 2010;p.175

[20] R.Holland, *Britain and the Revolt in Cyprus,1954-1959,* Oxford: Clarendon Press, 1998

[21] Ibid

[22] Commons Sitting of 21 December 1956, Cyprus (Emergency Regulations) HC Deb 21 December 1956, Vol.562, cc1609-40; accessed by: http://hansard.millbanksystems.com/commons/1956/dec/21/cyprus-emergency-regulations

[23] B. O'Malley and I. Craig, *The Cyprus Conspiracy*, (Taurus, 1999); C. Hitchens, *Cyprus,* Quartet Books, 1984

after 1955's. Having lived together for almost four centuries, the two communities were not so distinct culturally. Although inter-marriages were low (due to the religious concerns), there was no inter-communal violence up until the use of ethnicity by the nationalist politicians respectively in order to mobilize their ethnic groups. Cooperation was observed in the trade union *(PEO; The Pan-Cypriot Labour Federation)* which was the only trade union in the island, joined by the Turkish-Cypriots as well.[24] However, intercommunal cooperation was not allowed to flourish and those who supported cooperation were suppressed by the respective nationalist politicians in power. It is documented that both EOKA and Turkish-Cypriot nationalists killed many people from their own ethnic groups who supported the unity of the two communities and refused to join the nationalist camps.[25] Nationalism in this period was associated by the feelings of alliance/loyalty to the motherland and by feeling Greek and Turkish, rather than "Cypriot"; thus it was based on a primordialist perception of ethnic identity.[26] Nevertheless, due to the use of these nationalistic feelings to mobilize respective ethnic groups, it was also in compliance with the instrumentalist view.[27]

As for the judicial culture of the colonial time, it was observed that the judiciary was composed of the barristers and judges from the upper social class generally educated in England and also cooperating with the British administration.[28] For example, Mr. Tornaritis was a colonial judge before independence, became an Attorney-General in the

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[24] Bozkurt U. and Trimikliniotis N.(2014) Incorporating a Class Analysis within the National Question: Rethinking Ethnicity, Class, and Nationalism in Cyprus, *Nationalism and Ethnic Politics*, 2014, 20:2

[25] C.Foley, *Legacy of Strife, Cyprus from rebellion to civil war*, Penguin Books, 1964; This practice has continued even after the post-independence period and the two prominent Turkish-Cypriots (Ayhan Hikmet and Muzaffer Gurkan) who supported the unity of Greek-Cypriots and Turkish-Cypriots assassinated by the TMT.

[26] Chapter I, Part III.A.

[27] Chapter I,Part III.A.

[28] N.Peristianis, *Between Nation and State, Nation, Nationalism, State, and National Identity in Cyprus,* A thesis submitted in partial fulfilment of the Requirements of Middlesex University for the degree of Doctor of Philosophy, June 2008; The best examples are the R.R.Denktas and G.Clerides who became their community's leader later.

post-independence period;[29] he was coming from a tradition of judiciary being subservient to the wishes of the Executive.[30] As it will be detailed later, this tradition has also extended well beyond to the independence period.

Against the background described above the focus next is on the various Constitutional proposals that paved the road to the drafting of the 1960 Constitution.

B. Britain's Constitutional Proposals

B.1. The Radcliffe Proposals (19th of December 1956)

Britain appointed Lord Radcliffe in 1956 to draft a constitution for Cyprus to embody the preservation of British sovereignty, the use of Cyprus as a military base when necessary and the principles of liberal democracy.[31] The proposals were based on a system of diarchy for the administration of Cyprus. There would be a Governor, who would have legislative and executive power in his reserved fields (external affairs, defence and internal security)[32] and a local self-governing body. There would also be a Joint Council who would solve the problems arising out of diarchy between the Governor and the local legislature.[33]

Specific to the judiciary, Radcliffe envisaged the establishment of a Supreme Court and a Tribunal of Guarantees. The Supreme Court would have jurisdiction to determine whether any bill passed by the Legislative Assembly was against to the Constitution. The Supreme Court would also have the jurisdiction to decide when/if the repugnance question was arising in any proceeding in a Court of Law and transferred to it. A law or any part of it should not have any legislative effect, if regarded as repugnant, unless the Supreme Court decided that such parts of the bill were capable of being a law. These provisions

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[29] Biography, http://www.kypros.org/Documents/Tornaritis/biography.html

[30] Supra fn.13, The Inns of Court

[31] National Archives, *Constitutional Proposal For Cyprus, Report Submitted to the Secretary of State for the Colonies by the Right Hon. Lord Radcliffe,* G.B.E., *50776, SECRET, HC Deb 16 November 1956, Secret C.P.(56)264, Copy No.54, Catalogue Reference: CAB/129/84*

[32] Ibid

[33] Ibid

were early examples of the constitutional review process in Cyprus.[34] The Supreme Court would be composed of a Chief Justice and two other local judges who would be appointed by the Governor after consultation with the Chief Minister. The Chief Justice ought not to be a Cypriot and ought not to have any affinity to either the Greek-Cypriot or the Turkish-Cypriot communities in order to appear neutral. For Radcliffe, the presence of a neutral President was deemed necessary for the public to trust the judges' impartiality. The number of Greek-Cypriot and Turkish-Cypriot judges would always be equal. As may be discerned from the proposals, a foreign judge was deemed necessary for the purposes of public trust in the Court's impartiality that the justice is not only done but seen to be done, whereas the local judges' possible bias was assumed from the beginning and confined to equal numbers. This was the first time when the composition of a court which would deal with constitutional matters was a matter of concern.

A Tribunal of Guarantees would also be established with the power to investigate the complaints of discrimination or other violations of fundamental rights. The Tribunal would also be composed of an equal number of Greek-Cypriots and Turkish-Cypriots and a non-Cypriot Chairman; all would be appointed by the Governor after consulting with the Chief Justice and the Chief Minister.[35]

The design of the proposed Supreme Court and the Tribunal of Guarantees was the first written constitutional proposal of an ethnically diverse court composition for Cyprus' judiciary although the diverse composition of the judiciary already existed in practice before independence.[36] Also, Lord Radcliffe was the first to propose an international judge and an equal number of judges from the two communities, something which later became known as constitutional quotas in the literature. The Radcliffe Proposals were not accepted by the Greek-Cypriot leader Makarios because the Proposals also envisaged the separate

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[34] During the colonial time, there were common law remedies of *habeas corpus, mandamus, prohibition and certiorari and quo warranto* against the decision of the administration; Z.M.Nedjati, *Cyprus Administrative Law*, (1st ed.),1970, Nicosia, Cyprus

[35] *Supra* fn.31, National Archives

[36] E.Erginel, *Collected Judgements of the Chief Justice Zeka,* Vol.1, Nicosia Cyprus, 2011; During the 1950's, the Cypriot judiciary was composed of Greek-Cypriot, Turkish-Cypriot and British judges and they were dealing with cases irrespective of ethnic criteria.

application of the self-determination principle which would come to mean territorial partition of the island in the longer term; Greece also rejected the proposals.[37]

B.2. The Macmillan Plan

In 1957, with the initiative of the General Secretary of the NATO, Britain, Greece and Turkey started to negotiate another constitutional proposal for Cyprus. Following that, Britain announced the Macmillan Plan in June 1958. The Plan proposed a *"Tridominium"* administration under which Britain, Greece and Turkey would share the sovereignty of the island for seven years and at the end of this period a new state would be established.[38] Under the Macmillan Plan, the Governor's Council would be responsible for the internal administration and the Governor would have reserved powers in external affairs, defence and internal security, in consultation with Greece and Turkey.[39] Besides, both communities would have their own House of Representatives.[40] Moreover, the representatives of the Greek and Turkish government would be able to submit any legislation that they considered discriminatory to an impartial tribunal.[41] Turkey accepted the Plan[42] but Greece rejected it as the Plan would grant *de jure* presence to Turkey on the island.[43] Makarios also rejected the Plan as it was silent on the application of self-determination.[44] However, the British government declared that it would unilaterally implement the Plan and started to take necessary steps although it would have been impossible to do so without the cooperation of the Greek-Cypriot community and Greece.

After the rejection of Plan, violence between EOKA and the British administration escalated once more. In order to oppose EOKA attacks, the British administration

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37 *Supra* fn.9, S. Soulioti,

38 M. Tamkoc, *The Turkish Cypriot State: the embodiment of the right of self-determination*, K. Rustem & Brothers, 1988;p.50

39 R.Stephens, *Cyprus: A Place of Arms, Power Politics and Ethnic Conflict in the Eastern Mediterranean,* Pall Mall Press, 1966

40 ibid

41 ibid

42 *Supra* fn.4 A. Gazioglu

43 *Supra* fn.9, S. Soulioti

44 Ibid

implemented its notorious "*divide and rule"* policy and set up a new auxiliary police force composed solely of Turkish-Cypriots, coming from the uneducated, lower social class;[45] thus, easy to manipulate for political purposes. This led to direct confrontation between "Turkish-Cypriot police" and "Greek-Cypriot rebels". As a result, Turkish-Cypriots began to consider Greek-Cypriots (as in the form of EOKA) as a threat to their identity and existence on the island because if EOKA achieved Enosis, they would come to live in a Greek-controlled government. Under these conditions, Turkish-Cypriots set up their own underground organisation, TMT (Turkish Resistance Organization) on the 1st of August 1958, and armed themselves with the help of Turkey due to the increasing hostility between the Greek-Cypriots.[46] Just like EOKA, TMT was an anti-communist and ethno-nationalist organization which also employed guerrilla warfare tactics.[47] TMT advocated "*Taksim"* (partition) of the island and demanded self-determination for Turkish-Cypriots, if it were to be granted to the Greek-Cypriots. Thus, Turkish-Cypriots and the TMT were considered as a major obstacle in achieving self-determination and independence by Greek-Cypriots. Therefore, due to the politicization of the Greek and Turkish ethnic identity firstly by the British administration and then by their respective political leaders, the two communities were divided by ethnic violence in Cyprus.

At the end of 1958, the future political/constitutional status of Cyprus was still uncertain. However, the Tripartite Conference introduced Turkey into the Cyprus conflict as one of the interested parties. Then, the Radcliffe Proposals emphasized the diarchic (or in the Cyprus political terminology, bi-communal) composition of society and offered possible constitutional accommodations for government branches, including judiciary, according to this approach. Finally, the Macmillan Plan showed that the British government was ready to share the sovereignty of the island with Greece and Turkey but not relinquish it totally. Therefore, these proposals did ultimately pave the way for the drafting of the 1960 Constitution for Cyprus and showed that the new constitution would

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[45] F.Madden, *The End of the Empire, Dependencies since 1948*, Select Documents on the Constitutional History of British Empire and Commonwealth, Volume III, Documents in Imperial History, Greenwood, 2000

[46] S. Uludag, *Cyprus; The Untold Stories; a reader,* Mannheim: Bibliopolis, 2005

[47] Nevertheless, TMT was not anti-colonialists because their members were cooperating with the British authorities.

obviously entitle some rights to Turkey and Greece; it would be based on a bi-communal structure and it would not totally diminish Britain's presence on the island.

After providing the socio-political and historical factors of Cyprus' constitutionalism, the next part focusses on the 1960 Constitution of the RoC which sought to provide a delicate balance and a compromise between the two deeply divided ethnic communities, between the international powers, and also between the Cypriot people and Britain's international interests.

III. The 1960 Constitution of the Republic of Cyprus

The Zurich Agreement was signed on the 11th February 1959 and drew the basic structure of the new republic. The leaders of the Greek-Cypriot and Turkish-Cypriot communities were invited to negotiate the agreements after they had been negotiated by the Greece, Turkey and UK leaders, and the London Agreement, by which the Republic of Cyprus was established, was signed on the 19th February 1959. The Transitional Committee was entrusted to prepare the government machinery for the upcoming independence and the London Joint Committee was responsible to draft the final (international) treaties.[48] The Joint Constitutional Commission (JCC) was established to draft and incorporate twenty-seven basic, unalterable articles into the Constitution. The JCC was composed of one Swiss legal adviser, two Greek and two Turkish members, one Greek-Cypriot and one Turkish-Cypriot member.[49] The Constitution and the relevant treaties were signed on the 6th April 1960. Finally, the British government transferred the sovereignty by virtue of an Order in Council (S.I.1960, No.1368) made under the Cyprus Act, 1960 and granted independence to Cyprus on the 16th August, 1960.[50]

The 1960 Constitution was accompanied by three international treaties. The Treaty of Guarantee[51] granted the authority to Greece, Turkey and the UK to take action together or unilaterally, in order to re-establish the violated constitutional order of the Republic (Article 4). The Treaty of Alliance granted the power to Turkey and Greece to have their soldiers on the island. Finally, the Treaty of Establishment drew the boundaries of the

[48] N. Crawshaw, The Republic of Cyprus, *The World Today*, Vol.16, No.12, Dec., 1960

[49] Ibid

[50] A.S. de Smith, *New Commonwealth and its Constitutions,* Stevens and Son, 1964

[51] It was signed between Cyprus on one part, and Turkey, Greece and the UK on the other part.

Republic and granted Britain absolute sovereignty in two military base areas (Akrotiri and Dhekelia).

A. Basic Structure of the 1960 Constitution

The 1960 Constitution, firstly, recognized the two ethnic communities, namely the Greek-Cypriot community and the Turkish-Cypriot community[52] and required individuals to choose one of the two to belong to.[53] By the constitutional recognition of two ethnic groups, the administration of government was based on ethnic lines.

The 1960 Constitution was the supreme law -*Grundnorm*-[54] Article 179 of the Republic and it was structured as follows: The RoC was a presidential regime; the executive power would be shared by a Greek-Cypriot President and a Turkish-Cypriot Vice-President.[55] Both of them would have veto power over decisions of the Council of Ministers concerning foreign affairs, defence and security.[56] There would be a Council of Ministers, appointed by the President and the Vice-President which would be composed of 7 Greek-Cypriot and 3 Turkish-Cypriot members and the Ministers would be chosen from outside of the House of Representatives.[57] Either the Ministry of Foreign affairs or the Ministry of Defence or the Ministry of Finance should be entrusted to a Turkish-Cypriot but the President and the Vice-President might replace this system by a system of rotation, if they would agree.[58] The first President of the Republic was Archbishop Makarios, and the first Vice-President was Dr. Fazil Kucuk.

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[52] Article 2; Article 2 of the Constitution used the term "Greek" and "Turkish" but in order to avoid confusion with the Greeks from Greece and the Turks from Turkey, this researcher will use Greek-Cypriot and Turkish-Cypriot to refer to the island's communities throughout this thesis

[53] The smaller communities were required to choose to belong to one of the constitutionally recognized communities (Article 2(3). There was a procedure for those who may wish to change his/her community or not to choose any community in Article 2(5)(6)

[54] K.Chrysostomides *The Republic of Cyprus: A Study in International Law,* The Hague:Martinus Nijhoff Publishers, 2000

[55] Article 1

[56] Article 48(d)

[57] Article 46

[58] Article 46

The legislative power was exercised by the House of Representatives (HoR)[59] which was composed of 35 Greek-Cypriots and 15 Turkish-Cypriots.[60] In order to amend or repeal the basic articles of the Constitution, a law would have to be passed by a majority vote comprising at least two-thirds of the HoR both from the Greek-Cypriot Community and from the Turkish-Cypriot Community.[61] Besides the HoR, a Greek-Cypriot and a Turkish-Cypriot Communal Chamber[62] would be established to exercise legislative powers only for their own community regarding the matters of, *inter alia,* education, religion and culture.[63] The Communal Chambers did not have any authority to enact a legislation contrary to the interests of the security of the Republic or to the constitutional order or against the fundamental rights and liberties guaranteed by the Constitution.[64] Whereas they had the authority to issue specific rules and regulations for their respective communities, the HoR was the supreme law-making institution with very broad, inclusive and general legislative authority.[65] Therefore, the legislative diarchy was evident in the Constitution.

The judicial power was vested in the Supreme Constitutional Court (SCC), the High Court of Justice and the subordinate courts. The SCC was to be composed of one Greek-Cypriot, one Turkish-Cypriot and one foreign President; all of them ought to be appointed by the President and the Vice-President of the Republic jointly.[66] The first (and the last) President of the SCC was a West German citizen, public lawyer Dr. Ernst Forsthoff.

The SCC had exclusive jurisdiction to determine the constitutionality of any legislation which was stated in the constitution.[67] The SCC had the authority, *inter alia,* to examine

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[59] Article 61

[60] Article 62/1

[61] Article 182/3

[62] Article 86

[63] Article 87

[64] Article 87/3

[65] Papastathopoulos C.D., Constitutionalism and Communalism: The Case of Cyprus, *The University of Toronto Law Journal*, Vol.16,No.1,1965

[66] Article 133

[67] Articles from 137 to 151

the discrimination cases (Article 137 and 140), budgeting issues (Article 138), conflicts among the government organs (Article 139) and the constitutionality of any law or decision of either of the Communal Chambers (Article 142), as well as the constitutionality of any law or decision raised in any judicial proceedings (Article 144). Moreover, the SCC also had the authority in administrative matters to determine the constitutionality of a decision, an act or omission of any organ, authority or person which was exercising any executive or administrative authority or to determine any law which was made in excess or in abuse of powers vested in such organ or authority or person (Article 146/1). Therefore, the constitutional review process was entrenched into the 1960 Constitution and the SCC was deemed responsible for this process. The SCC could declare an annulment of an administrative act or decision on the ground that it was done through an excess or abuse of power, illegality, and/or unconstitutionality. Article 146 was the main provision based on which a substantial volume of administrative matters was challenged.[68]

The judicial power, which was not exercised by the SCC and the communal courts, was to be exercised by a High Court of Justice (HCJ) and subordinate courts. The HCJ was composed of two Greek-Cypriots, one Turkish-Cypriot and one foreign President.[69] The foreign judge could not be a subject or a citizen of the Republic or of Greece or of Turkey or of the UK and its Colonies.[70] All judges ought to have high professional and moral standards.[71] The foreign president had two votes when the votes were equal[72] and the first president of the Court was the Canadian judge, John L. Wilson. The HCJ was the highest appellate court which had the jurisdiction to determine all appeals from any court other than the SCC.[73] The HCJ was also responsible to determine the composition of the subordinate courts (the District and the Assize Courts) both in civil and criminal cases when the parties of a case were from different communities.[74] In such cases, the

[68] *Supra* fn.34, Z.M.Nedjati

[69] Article 153/1

[70] Article153/3

[71] Article 153/5

[72] Article 157/1

[73] Article 155/1

[74] Article 155/3

subordinate courts would be composed of judges belonging to either community.[75] Therefore, ethnic diversity (subject to the conditions stated in the Constitution) of the subordinate courts were also entrenched into the Constitution at the onset. These constitutional provisions on ethnic diversity were on one hand reflecting the deeply rooted communal mistrust between the two ethnic groups and on the other hand showing the attempt of constitution-drafters to gather both communities' trust by designing ethnically mixed courts.[76]

The legal system was based on common law with civil law modifications.[77] While the adversarial system and British common law traditions applied to the trial system of civil and criminal proceedings,[78] the continental inquisitorial system applied to the proceedings of constitutional review of administrative action.[79] In this respect, the system of the French *Conseil d'Etat* was taken as a model for the constitutional review of administrative actions under the jurisdiction of the SCC.[80]

The 1960 Constitution, just like any other constitution, had its weaknesses which could arguably be supported with the goodwill and mutual trust of both communities, as is the case with all consociational designs. By applying the theoretical framework employed by this thesis, the assessment of the 1960 Constitution is conducted next.

B. Assessment of the 1960 Constitution

The 1960 Constitution was a compromise between the ethnic groups and this balance was sought and applied through the principles of consociational democracy. As such:

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[75] Articles 155/3, 159/1, 159/2, 159/3, 159/4

[76] There were also the Communal Courts which had the authority to hear civil disputes related to personal status (matrimonial matters and religious issues). These were not required to be ethnically diverse.

[77] A. Sozen, The fall and the Rise of Consociational Democracy in Cyprus, 5th International Seminar on Democracy and Human Rights in Multiethnic Societies, Institute for Strengthening Democracy in Bosnia, Konjic, BiH, July 8-12, 2002

[78] Except in jury trials

[79] *Supra* fn.34,Z. M. Nedjati

[80] Ibid

All principles of consociational democracy were observed in the 1960 Constitution[81] even though their application in practice remained problematic. For example, the composition of the executive reflected the principle of Grand Coalition which allows smaller groups (Turkish-Cypriots) to share governmental power and to be represented in government; in order for the government to function smoothly, President Makarios and Vice-President Dr. Kucuk were required to cooperate and find practical solutions to political problems. The Veto right was granted both to the President and the Vice-President in the areas of foreign affairs, defence and security. Moreover, both Greek-Cypriot and Turkish-Cypriot communities had Group Autonomy to administer their own internal, cultural affairs through the Communal Chambers and their Communal Courts. Finally, the principle of Representation manifested itself in the composition of the legislature, judiciary, public service, armed forces and police. This principle was facilitated by the use of constitutional quotas based on ethnicity and it was varying between the 30/70 and 40/60 ratio. In the Cyprus context, quotas were employed not with a purpose to redress the previous discrimination of any sub-group, as this was not the case during the British rule,[82] but rather, they were employed in a prospective manner in order to eliminate the fear of discrimination of the numerically smaller Turkish-Cypriot community by the numerically dominant Greek-Cypriot community; thereby, to prevent the potential tyranny of the Greek-Cypriot community. Quotas were also entrenched with a hope to provide legitimacy to the political system for the Turkish-Cypriots by rendering them a part of the existing political system; thereby, preventing their demands for partition.[83] Therefore, these consociational accommodations, in essence, aimed to avoid the two irreconcilable political demands *(Enosis and Taksim)* in order to maintain stable democracy.

As the 1960 Constitution recognized two ethnic groups, communalism was also entrenched to the 1960 Constitution and the communal administration of these two ethnic groups was enabled through the communal provisions. Although it was claimed that the communal administration was too rigid,[84] at least, it provided a constitutional basis for the two communities to work within. From a negative perspective, the need of communalism,

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[81] Chapter II, Part II

[82] At least, there was no report of discrimination in that period.

[83] Chapter III, Part III.B.

[84] *Supra* fn.50,A.S.de Smith

as in the form of consociationalism, is derived from the communal distrust and dominated the whole document through the accommodation of group rights and representations in all government institutions. However, from a positive perspective, this consociational arrangement was an effort to provide compromises and an ethnic balance in all government branches, even though the Turkish-Cypriots were entrusted with increased representation (compared to their population ratio) in every government institution. Nevertheless, due to the Radcliffe proposal's similarity to the consociational design of the 1960 Constitution, it is not clear whether the constitution-drafters aimed at consociational democracy or whether they were influenced by Radcliffe's proposal. Yet, this consociational design that is based on communal rights became the basic framework of the 1960 Constitution.

Nevertheless, the 1960 Constitution was not only influenced by the consociational principles but also from the international powers, as the Constitution was the result of the negotiations between Turkey and Greece. President Makarios has repeatedly claimed that the Agreements and the Constitution were imposed on him[85] because there was minimum representation and limited involvement of the leaders from both communities. As the Constitution lacked the necessary approval of the Greek-Cypriot President from the beginning, his criticism opened the discussion on the legitimacy of the 1960 Constitution. Yet, it is usually recognized that the legitimacy of the political system is very important for the durability and stability of democracy and a peaceful state after the peace agreement.[86] Moreover, due to the domination of the constitution-drafting by the so-called *motherlands* and Britain, the 1960 Constitution and the associated international treaties also served the military interests of Britain, Turkey, Greece and NATO, by granting them the right to have their soldiers on the island. When the powers of these international actors are assessed together with the need of solving ethnic conflict, it is understood that the Constitution had the double task on the one hand, to maintain peace between all interested parties, and on the other hand to provide a basic framework for the internal administration of the country; this is called *peace agreement constitution* by Sapiano.[87] In relation to this last point, Bell

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[85] *Supra* fn.54,K.Chrysostomides;p.58

[86] Belloni R and Deane S., From Belfast to Bosnia: Piecemeal Peace-making and the Role of Institutional Learning, 2005, *Civil Wars*, 7:3

[87] Sapiano J., Courting Peace: Judicial Review and Peace Jurisprudence Constitution-making and Political Settlements in Times of Transition, Edinburgh University, School of Law, Research Paper Series No 2016/23

states that the experience of transitional constitution-making is in need to be evaluated together with the divisions between the ethnic groups who compete to own or to share State power, as well as the preferences of international actors that influence the post-conflict political settlement.[88] In that sense, the 1960 Constitution was a transitional and post-conflict peace agreement constitution. When all these points are considered together, it becomes obvious that the 1960 Constitution neither emerged as a result of the social contract nor was it the product of the *sovereign people,* as the constituent powers.[89]

Of course, this internationalisation process of constitution-making (as well as the country's political history) had consequences on the constitutional accommodations on the judiciary. In the 1960 Constitution, the design of the judiciary was not exempt from the consociational design and in the senior judiciary (the SCC and the HCJ), judicial power was shared between the Greek-Cypriot and the Turkish-Cypriot judges as well as non-Cypriot judges. As it was stated above, in the pre-independence period, the courts were ethnically diverse in practice; hence, in the post-conflict period, this composition was institutionalized formally by the ethnic quotas in the Constitution and the representation of the Greek-Cypriot and Turkish-Cypriot judges was guaranteed by indicating their numbers and their ethnic background. In that sense, the constitutional accommodations prevented the appointment of people from other smaller groups (such as, Maronites, Armenians and Latins) to the court composition, unless they opted to belong to either the Turkish-Cypriot or the Greek-Cypriot community; but this was a constitutional requirement if they were to have constitutional rights and representation. The requirement of having a diverse court composition in certain circumstances in District and Assize Courts was also the extension of the consociational principle of representation. Moreover, the non-diverse composition of the Communal Courts was a result of the Group Autonomy principle which granted a great deal of autonomy to each community to deal with their communal administration.

Having a diverse composition was deemed necessary in order to provide the appearance of impartiality that *justice would be seen to be done* both for Greek-Cypriots

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[88] Bell C., Bargaining on Constitutions: Political Settlements and Constitutional State-building in Constitution-making and Political Settlements in Times of Transition, Edinburgh University, School of Law, Research Paper Series No 2016/23

[89] Chapter II, Part II.C.

and Turkish-Cypriots.[90] Without having a judge from their own communities, the two ethnic communities would highly likely mistrust the judiciary. Additionally, the judiciary's diversity was going to contribute to its legitimacy and thus, to make use of the courts. As a consequence, the diverse composition of the SCC was deemed so vital that it was entrenched to those basic, unalterable provisions of the 1960 Constitution.

In terms of the jurisdiction, the SCC was entrusted with the power of constitutional review and it was obvious from the beginning that it would be called upon to manage political tensions in ethnically motivated political cases.[91] Article 139/2 stated that the people and the political organs that could initiate constitutional review cases, if involved in conflict or contest.[92] The subsequent articles were also linked to the question of who can initiate these constitutional review cases and stated that it is the President and the Vice-President who had the right to appeal to the SCC.[93] This group of people were politicians who were representing their ethnic communities and they would appeal to this route to advance their ethno-political goals in times of constitutional crisis. Therefore, the hearing and the outcome of such inherently political cases could not be left to the viewpoint of only one community and the SCC was in need of being diverse in order to be inclusive. This was also due to the assumption that the conflicts that would reach the SCC would be very political in nature, as the relationship between the ethnic communities had a political character.

The other prominent feature of the SCC and the HCJ was the presence of the international judges which -to this day- lacks any explanation on their constitutional necessity, except Radcliffe's comments in 1956 that "*An international judge ought to be given a presence for the purposes of impartiality"*.[94] However, it is questionable whether being "an international judge" is a sufficient requirement for being accepted as impartial especially at a time when many international actors have an interest on Cyprus. For

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[90] Chapter III,Part II.B and C.

[91] Chapter III,Part II.A.

[92] These were the President, Vice President, the House of Representatives, one of, or both the Communal Chambers or any other organ or authority of the Republic

[93] Article 140/, 141/1, 142/1, 143/1 (include 1/5th of the House of Representatives)

[94] *Supra* fn.31, National Archives

example, although German President Forsthoff's name was agreed by both communities, he, later was harshly criticized by Greek-Cypriots as he was a supporter of Nazism due to his previous publications in Germany at Heidelberg University.[95] The presence of international judges was deemed necessary because of the assumption that the equal number of judges from the two communities would inevitably result in a deadlock due to ethnic voting, and the international judges would be expected to break the deadlock. This concern was mainly due to the possible conflict of political interests between the two ethnic communities which would end up being resolved in the constitutional court and the local judges' possible prejudices towards the *other side.* In that sense, the ethnic bias of the local judges (which would lead to deadlock in judicial decision-making) is predicted from the beginning. Therefore, the international judges would be deemed necessary, may be not because of their assumed impartiality but because of a need of a *tie-breaker* to break any possible deadlock and also to neutralize the influence of local judges' ethnic bias in the decision-making process. Also, due to the numbers of the judges, it was obvious that whoever joined the decision of the international judge, his/her vote would prevail.

The consociational accommodations of the 1960 Constitution have been criticized on many grounds by right-wing, nationalist Greek-Cypriot scholars.[96] It is argued that the Constitution is undemocratic because it does not provide for majority rule. The objection was that "democracy" is rule by the majority, which in this case would translate into rule by the dominant community, the Greek-Cypriots. Moreover, it has also been argued that the veto right of the Vice-President (who represents the minority) had the power to block the executive decisions of the President (which represents the majority) and the Council of Ministers, and cause constitutional deadlock in case of disagreement between the President and the Vice-President; thus, eventually subjecting the will of the majority to the whim of the minority.[97] Furthermore, the necessary ratio (2/3 of both communities) in the House of Representatives to amend the constitutional provisions and the unalterable articles were also considered as rigid and as a restriction on the majority's will.[98] The increased

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[95] *Supra* fn.9,S.Soulioti

[96] *Supra* fn.54,Chrysostomides*;* G.M.Pikis, *Constitutionalism, Human Rights, Separation of Powers, The Cyprus Precedent,* Martinus Nijhoff Publishers, Leiden, Boston, 2006

[97] *Supra* fn.18, C.G.Tornaritis

[98] Ibid

representation of Turkish-Cypriots was also considered as a form of discrimination against Greek-Cypriots.[99] However, as it was stated in the first chapter, it is in the essence of the consociational design to disseminate power in various means and not to give all power to the hands of majority.[100] Even these critics revealed how important it is to have a power-sharing design in order to prevent the hegemony/repression of the majority. The dissatisfied part only made it obvious that the minority community not only need protection but also political power through representation in the government institutions. Nevertheless, Trimikliniotis offers a pointed comment on this topic, which ought not to be ignored: *"Democracy cannot be reduced to mere majoritarian rule, as the Greek Cypriot ethno-national perspective wants, nor can it be reduced to a rigid ethnic-communal based system as the Turkish Cypriot ethno-national perspective desires"*.[101] Therefore, the main problem between the Turkish-Cypriots and the Greek-Cypriots in the post-independence period was their interpretation of the Constitution for their own political purposes in order to advance their respective communal interests.

The 1960 Constitution, just like any other constitution, was neither a perfect legal document nor a cure for past ethno-nationalist illnesses. The state's effective functioning required the cooperation and mutual trust of both communities, as is the case with all consociational models. However, due to communal mistrust and different political ideologies (*Enosis v. Taksim*) of the communities, many of the constitutional problems had been visible from the beginning. After all, the Constitution itself was a product of a compromise which could not be implemented without the compromise and good spirit of both parties. However, as will be shown in the next part, good spirit was absent from both sides from the beginning because, in fact, the 1960 Constitution was not the product of compromise among Greek-Cypriots and Turkish-Cypriots, but between Greece and Turkey.

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[99] The problem of the 70 to 30 Ratio: The Greek Cypriot Case cited in S. Kyriakides, *Cyprus: Constitutionalism and Crisis Government,* University of Pennsylvania Press, 1968

[100] Chapter II, Part II.A; Lijphart also stated that there was/is a strong tendency in political science to equate democracy solely with majoritarian democracy and to fail to recognize consensus democracy as an alternative and equally legitimate typeA.Lijphart, *Patterns of Democracy: Government Forms and Performance in 36 Countries*, Yale University Press, 1999

[101] N. Trimikliniotis, Annan V: Rethinking the Viability of the Constitutional Arrangement and its Future Importance, January 2009, Symfiliosi, Cyprus

IV. Constitutional Break-Down, Role of the Ethnically Composed Supreme Constitutional Court and Ethnic Conflict

The previous section examined the 1960 Constitution and how the aim of achieving ethnic balance in government institutions led to the composition of all public bodies being based on the principles of consociational democracy. This part explores the reasons why these ethnically composed institutions proved to be problematic and came to an end within a few years. There were four main constitutional problems in the administration of government. These were: the composition of the public service, the inability to enact the tax legislation, the establishment of separate municipalities and the composition of the army units. These problems were all related to one another because one problem triggered another one. The first three problems were referred to the SCC for resolution. On those which were referred, I will focus on the problem of establishing separate Turkish-Cypriot municipalities, the functioning of the SCC and the judicial behaviour of the local judges.

A. Constitutional Problems of the Republic

The first constitutional problem arose in relation to the appointment of the Public Service servants in the spring of 1961. Article 123(1) envisaged 70% Greek-Cypriots and 30% Turkish-Cypriots in the composition of the Public Service. In order to appoint public servants[102], the Public Service Commission (PSC) was established.[103] The Commission had to make decisions by an absolute majority vote[104] which was to include the votes of at least two of its Turkish-Cypriot members,[105] while appointing or promoting in a new or vacant post.

Turkish-Cypriots had concerns that the allocations to the public service were not being filled according to the constitutional ratio. For them, the strict application of the 70/30 ratio and in some cases, a higher ratio (2/1) was necessary until the representation reached the 70/30 ratio in order to restore equity, promote dignity of their community and also to avoid

[102] Article 125/1

[103] Article 124

[104] Article 125 (3)(1)

[105] Article 125 (3)(2)

discrimination against them.[106] On the other hand, Greek-Cypriots believed that the 70/30 ratio would create discrimination against them because the strict application of the 70/30 ratio could lead to the firing of Greek-Cypriot civil servants not because of their inability but because of their ethnic origin[107]; and this would be a violation of their human rights.[108] Besides they claimed that the merit principle should be followed and Greek-Cypriots should be appointed as they have better qualifications and more numbers of qualified persons.[109]

In the appointment process, the PSC members wanted to support the applicants who were coming from their respective communities and disregard the constitutional quotas. In doing so, the PSC members were divided along ethnic lines and had serious disagreements. As a constitutional requirement, if the PSC could not make a decision by the necessary majority vote, it had to refer the problem to the SCC for its resolution.[110] Consequently, there were 2,000 cases about the civil service appointments which had been contested on communal grounds before the SCC by 1963.[111] The SCC heard five of the twenty-seven cases which the PSC had filed but it did not issue any decision.[112] As the PSC initiated 27 cases, other thousands of cases should have been initiated by the individual Greek-Cypriot or Turkish-Cypriot applicants. It is predictable that the contested accommodations were the consociational accommodations which aimed to provide communal representation through quotas. Thus, if that was the case, the SCC was, most probably, asked to decide on the constitutionality of the consociational quotas. However, no decision was issued by the SCC by 1963. The SCC's passive stance to the cases can either be interpreted as a reluctance on

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[106] The Turkish Case 70:30 and the Greek Tactics, Press Liaison Office of the Turkish Communal Chamber, 1963 cited in S. Kyriakides, *Cyprus: Constitutionalism and Crisis Government,* University of Pennsylvania Press, 1968.

[107] *Supra* fn.99, The problem of the 70 to 30 Ratio: The Greek Cypriot Case in S. Kyriakides

[108] *Supra* fn.96, G.M.Pikis

[109] *Supra* fn.99, The problem of the 70 to 30 Ratio: The Greek Cypriot Case in S. Kyriakides

[110] Article 125 (3)(2)

[111] P.N.Vanezis, *Cyprus, The Unfinished Agony*, Abelard-Schuman, 1977;p.20; The author stated that it is not known to him whether the majority of the plaintiffs were Greek-Cypriots or Turkish-Cypriots.

[112] Eleftheria Newspaper, 26 April 1962 cited in *Supra* fn.99, S.Kyriakides, *Cyprus, Constitutionalism and Crisis Government*

the part of the court (all judges) that they did not want to be involved into the political problem and chose to wait until politicians found a solution or there may have been heated debates behind the closed doors of the court due to disagreements between the local judges. It might be the case that the local judges did not want to issue divisive decisions and create *winners* and *losers* in the cases which would not contribute to the moderation of an implicitly political problem. Therefore, the constitutional status of quotas in the public service remained theoretical and vague.

Nevertheless, the problem faced in appointments cannot be attributed to the Constitution or to the constitutional quotas. The problem was the lack of goodwill of the two communities. Greek-Cypriots were reluctant to implement the constitutional provisions at the expense of Greek-Cypriot public servants who were already working whereas Turkish-Cypriots did not show any patience, at least until they would have sufficient number of qualified/trained people, for the implementation of the quotas.

The second contested area between the Greek-Cypriots and the Turkish-Cypriots was the inability to adopt the income tax legislation. Article 78(2) of the Constitution required the separate simple majority votes of the Representatives of the Greek-Cypriot and the Turkish-Cypriot Communities respectively when, *inter alia,* any law imposing duties or taxes would be adopted. When the previous colonial law on taxes ceased to be enforced by the 31st December, 1960 (Article 188/2), the House was required to pass a new legislation for the collection of taxes from that date onwards. However, due to disagreements between the Greek-Cypriots and the Turkish-Cypriot Representatives, the House extended the previous colonial law -*Laws Imposing Duties or Taxes (Continuation of Provisions) Laws of 1960*-until the 31st March 1961.[113] By that date, no agreement had been reached and the House could not adopt any legislation for the collection of taxes and also could not extend the previous law due to the lack of the "*separate simple majority vote*". As there was no separate simple majority vote for the respective proposals as well, no law on tax legislation was enacted and the government could not collect taxes.

Following the failure in adopting tax legislation in the HoR, in December 1961, both communities enacted their own tax regulations through their Communal Chambers[114]

[113] *Supra* fn.99, S.Kyriakides

[114] Article 61 of the 1960 Constitution stated that the legislative power should be exercised by the HOR in all matters except those expressly reserved to the Communal Chambers under this

to apply to their own communities only.[115] The SCC examined the legality of the actions of both Communal Chambers in subsequent cases and upheld them as constitutional.[116] There was also a third type of taxation for foreigners through the legislation of the HoR.[117] These cases are not examined in detail as they did not have a substantial impact on the constitutional order of the Republic, other than showing the already obvious political disagreements of the two ethnic groups in the government administration. However, the deadlock on tax legislation had deprived the government of its revenue for a long time; the Communal Chambers covered this opportunity and the taxation system worked ethnically and separately.[118] The decision and the approval of the SCC on the ethnically separate taxation system, in fact, revealed the Court's tolerance with the different fiscal administration of the two ethnic groups and they did not consider the application of ethnically separate tax legislations as harmful for the administration of the country as long as it was done according to the legal procedure. If that was not what SCC had in mind, then the SCC had assumed that in the absence of any avenue for income, the Republic would not be able to continue to exist; therefore, the Court might consider the political consequences of such a situation and approve these different regulations.

Another constitutional problem arose in the establishment of the national army. Article 129(1) of the 1960 Constitution stated that the Republic's army should be composed of two thousand men; sixty percent should be Greek-Cypriot and forty percent should be Turkish-Cypriot. However, this article did not indicate whether units within the army should be integrated or not. From the very beginning, President Makarios supported the idea of

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Constitution. Accordingly, Article 87 authorized the Communal Chambers to impose personal taxes and fees on their members

115 The Greek-Cypriot Communal Chamber passed legislation on the 20th December 1961 which imposed a "Personal Contribution" upon the Greek-Cypriot community members. On the other hand, the Turkish-Cypriot Communal Chamber passed its own income tax law too; Swan G.S., Constitutional Majority Rule and the Cyprus Constitution: The 1983 Cyprus Crisis in Critical Perspective, *Third World L.J.,* Vol.5, Issue(1), 1984

116 Regarding the Greek-Cypriot Communal Chamber, Haji Kyriacos and Sons Ltd. of Famagusta, Case No.298/62, in *Reports of Cases of the Supreme Constitutional Court of Cyprus,* Cyprus: The Printing Office of the Republic, 1963, Vol.5

117 Evriviades M.L., The Legal Dimension of the Cyprus Conflict*, 10 Tex. Int'l L.J.*,1975;p.244

118 Adams T.W.,The First Republic of Cyprus: A Review of an Unworkable Constitution, *The Western Political Quarterly*, Vol.19, No.3,1966

complete integration of the two ethnic communities at all levels of the military hierarchy in contrast to Dr. Kucuk who favoured separate units for each ethnic group.[119] The issue was debated in the Council of Ministers and the Council voted to establish an ethnically integrated army.[120] However, the Vice President, relying on his constitutional right under Article 57/2, returned the decision to the Council for "*reconsideration*".[121] The Council reiterated its decision for an integrated army.[122] This time Dr. Kucuk relied on his constitutional right of veto [Article 49(d), 50 and 57(2)] on the 20th October 1961 and vetoed the decision of an integrated army, on the basis that an integrated army would not be able to function and to be quartered together due to the linguistic and religious differences of the two communities.[123] Therefore, his veto ceased the establishment of an integrated army. The Vice-President's veto led to a deadlock and provided further evidence that the two sides were not willing to compromise in order to find moderate solutions to state affairs. However, it is argued that the non-establishment of the national army accelerated the establishment of para-military groups in both communities.[124]

These constitutional problems confirmed that the Cypriot communities were still ethnically divided after the establishment of the common, bi-communal Republic and almost in every case, identity politics and/or representation of the communal identity were at stake. Who has the right/power to be represented, with what ratio and in which institution? These were the basic questions of the two ethnic communities in the administration of the country. Apart from tax legislation, all problems were related to representation and in fact, even the tax problem arose as a result of representation in the legislature due to the requirement of *simple majority vote* of the ethnic representatives. Nevertheless, the biggest constitutional problem was yet to come.

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119 Ibid

120 *Supra* fn.99, S. Kyriakides

121 Ibid

122 Ibid

123 Ibid

124 Ibid

B. Separate Municipalities Cases: *Balik Bastan Kokar*[125]

The most contentious issue in government concerned the establishment of separate Turkish-Cypriot municipalities in the five largest towns.[126]

Before independence, municipalities were unified under *the Municipal Corporations Law* until 1958.[127] However, during the ethnic conflict Turkish-Cypriots established their own municipalities in 1958 and then the British Administration recognized them as *de jure* by enacting *Law No.33/1959, The Turkish Municipal Committees (Temporary Provision) Law.*[128] Hence, when the new Republic was established, there were already two types of administration for municipalities.

The 1960 Constitution required the creation of separate municipalities in Nicosia, Limassol, Famagusta, Larnaca and Paphos. In order to implement the relevant Articles (173-177) and establish separate Turkish-Cypriot municipalities, legislation by the HoR was necessary.[129] Moreover, the Constitution required that the laws relating to municipal administration had to be supported by subsidiary legislation and certain administrative measures of the Communal Chambers.[130] Finally, the establishment of separate municipalities was included in the basic structure of the Zurich Agreement (1959) and enshrined in the 1960 Constitution as unalterable articles.

According to Article 188(2) of the Constitution, the existing colonial laws for the municipalities would be in force for six months after independence. Thus, after six months the House was required to pass legislation and provide the necessary rules for the establishment and the administration of separate municipalities. However, the President and Vice-President had disagreements on the necessity of geographical separation and the House passed *the Municipalities Law (Continuation Law) No.10/1961* to enforce the

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125 Turkish Proverb: *A fish rots from the head down:* referring that the problems are to be traced back to the people at the top of the authority.

126 Municipalities were the administrative bodies which were established for the organisation of local government; D. W.Markides, *Cyprus, 1957/1963, From Colonial Conflic to Consitutional Crisis*, University of Minnesota, 2001

127 *Supra* fn.99, S. Kyriakides

128 Ibid

129 *Supra* fn.34.Nedjati;pp.54-55

130 Article 87(1)(g); Article 89

previous colonial law.[131] This law was extended for eight times until the 31st December 1962 because of the lack of compromise between the President and Vice-President. While the President argued that geographically separate municipalities would be impractical, the Vice-President argued that in the large cities, Turkish-Cypriots were already separated from Greek-Cypriots geographically.[132] Eventually, when the continuation law ceased to be in force, the House did not enact any legislation; thus, separate municipalities did not come into being.

As there was no legislation by the House, the Greek-Cypriot members of the Council of Ministers issued an order on the 2nd January 1963 and declared municipal areas as "*Improvement Areas*" and made appointments to the "*Improvement Boards*" in these five largest towns[133] in order to reinstate the previous law and fill the gap left by the previous Municipalities Law [10/61] which expired on the 31st December 1962. As the Council's decision did not envisage the creation of separate municipalities, the Turkish-Cypriot Communal Chamber applied to the SCC to invalidate the Council's Order.[134] The Turkish-Cypriot Communal Chamber argued that the *Improvement Boards* were unconstitutional because the Council of Ministers did not have the power and/or competence to issue such an Order; the Law on Improvement Areas would not allow Turkish-Cypriots to control the administration of their own quarters in these five towns; and the Law on Villages could not be extended to the "towns".[135] The Greek-Cypriot respondent argued *inter alia* that as there was no idea of any administration of municipalities, there was no conflict or contest on the regulation of administration because municipalities had ceased to exist due to the lack of legislation.[136] The respondent also claimed that there was a "state of necessity" which provided as a legal basis (outside of Article 183 which provides extraordinary powers for the Council in times of Emergency)

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131 *Supra* fn.99, S. Kyriakides

132 Ibid

133 The Villages (Administration and Improvement) Law, Cap.243

134 Turkish Communal Chamber and/through its Social and municipal affairs office v. Council of Ministers, Case No.10/63, filed on 30 January 1963

135 Case No.10/63; Pages:64-66

136 Case No.10/63;p.76

for the Council to issue the aforementioned Order; but this claim was rejected by the Court as there was no proclamation of emergency and/or state of emergency.[137]

The SCC, *inter alia,* firstly, examined and decided that there was a conflict and contest of competence and power between the Council of Ministers and the House of Representatives, and also between the Council of Ministers and the Communal Chambers in the sense of Article 139/1. This is because of the Order of the Council of Ministers (as an executive authority) which usurped the competence of the Turkish Communal Chambers' (as a legislative organ) that is responsible to enact subsidiary legislation for the administration of the municipalities.[138] Besides, the Court stated that the said Order is also in conflict with the House of Representatives because the House is the responsible organ to enact new legislation and to implement the municipalities (Article 188/2).[139] Therefore the Court found that there is a conflict between these government organs because the Council of Ministers did not have the power to make such Order. Moreover, the Court stated that the said Order constituted both a "conflict" of power and competence between the government organs according to Article 139.[140] While assessing what falls within the meaning of municipalities according to Article 173/1, the Court stated that municipalities are *not certain existing administrative bodies*; rather they refer to administrative bodies or organisations which were established for the administration of towns; towns are certain places of condensed human inhibition which by their very existence require certain specific administrative functions and provisions.[141] Therefore, the Court declared by majority that the Council of Ministers had engaged with the administration of towns without a legal authorisation and thus, the applicant had the right to recourse under Article 139.[142] The Court also declared the administration of towns could only be regulated by a law according

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[137] Case No.10/63;p.77

[138] Case No.10/63;pp.68-70

[139] Case No.10/63;pp.71

[140] Article 139/1: The Supreme Constitutional Court shall have jurisdiction to adjudicate finally on a recourse made in connection with any matter relating to any conflict or contest of power or competence arising between the House of Representatives and the Communal Chambers or any one of them and between any organs of, or authorities in the Republic. (…)

[141] Case No.10/63;p.72

[142] Case No.10/63;p.73

to the Constitution. In sum, the Court declared that the Order of the Council of Ministers of the 2nd January 1963 which declared the Municipalities as Improvement Areas is *void ab initio*.

However, in this case the Court made its decision by majority because after three years of unanimity, Greek-Cypriot Justice Triantafyllides dissented for the first time. First of all, Justice Triantafyllides stated that an applicant who would like to recourse to the SCC under Article 139 should have to be involved in the conflict. As the Turkish-Cypriot Communal Chamber was not involved in the conflict, the applicant could not make use of Article 139. Then, the Justice stated that there was no conflict and contest of powers within the meaning of Article 139 because municipalities were not organs within the meaning of Article 173. Justice Triantafyllides, interpreted Article 173 in a way that this Article did not give Turkish-Cypriots a right to have separate municipalities unless there were "factual" towns as local governments. He, more interestingly, declared that Turkish-Cypriots did not have a positive right to have local autonomy *against* the Republic.[143] While examining the competence of the Communal Chambers, Justice Triantafyllides stated that the Communal Chambers could not exercise any competence under Articles 87/1/h[144] and 89/1/c[145] because there were no municipalities at all.[146] For the administration of Municipalities, the House of Representative should enact a legislation.[147] As there is no such legislation, he stated that Turkish-Cypriot Communal Chambers' competence had not been affected or involved; it was not part of the conflict and thus, it

[143] Case No.10/63;p.96

[144] Article 87/1:The Communal Chambers shall, in relation to their respective Community, have competence to exercise within the limits of this Constitution and subject to paragraph 3 of this Article, legislative power solely with regard to the following matters: (h) in matters relating to the exercise of the authority of control of producers' and consumers' co-operatives and credit establishments and of supervision in their functions of municipalities consisting solely of their respective Community, vested in them by this Constitution:

[145] Article 89/1: The Communal Chambers shall, in relation to their respective Community, also have competence: c) to promote the aims pursued by municipalities composed solely of members of their respective Community and to supervise - in their functions such municipalities to which the laws shall apply

[146] Case No.10/63;p.97

[147] Case No.10/63;p.97

was not competent to make such a recourse under Article 139. As a consequence, the application should be dismissed.

In light of clear constitutional provisions, it was obvious that there was a conflict and/or contest of power between the aforementioned government organs and thus, the case clearly fell within the jurisdiction of the SCC. However, the dissenting opinion of the Greek-Cypriot judge was highly likely shadowed by his ethnic background and his community's political viewpoints because Article 173/1 did not state any condition for the establishment of the separate municipalities. The right to establish separate municipalities was clearly stated in the Constitution regardless of the existence of the towns. Similarly, assessing the situation as one of municipal autonomy of Turkish-Cypriots *against* the Republic also revealed what he understood about *"separate Turkish-Cypriot municipalities".* It seems that his constitutional interpretation was blurred by political fears that the Turkish-Cypriots' local autonomy in one place is *against* the State, forgetting the fact that Turkish-Cypriots were also part/founders of the same State. This is also evident in his later assessment while arguing: *(...) constitutional order includes the notion that the territory of the Republic is one and indivisible; therefore, there is no possibility or legal basis for any authority (...) to possess territorial competence over any specific part of the territory of the Republic, such as towns.*[148] It is understood that his interpretation was ethnically biased due to the fear of granting Turkish-Cypriots territorial autonomy. Thus, the dissenting opinion of Justice Triantafyllides had nothing substantial to be defended other than his political concerns. However, it was important because after three years of coming into operation, this was the first dissenting opinion of the Court.

Another interesting point in this case is the Respondents' argument that there is an emergency situation in the Republic and in these cases, it is a matter of "necessity" for the Council of Ministers to act beyond its powers and make a decision. This argument was also rejected by the Court as the there was no proclamation of emergency within the meaning of Article 183.[149] As it will be seen later, the argument on "necessity" has become the main problem in *M.Ibrahim* Case.[150]

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[148] Case No.10/63;p.89

[149] Case No.10/63;p.77

[150] The Attorney-General of the Republic v. Mustafa Ibrahim and Others, 1964, C.L.R. 195

In the meantime, the Turkish-Cypriot Communal Chamber passed the "*Turkish Municipal Corporations Law*" on the 31st December 1962 in order to legitimize Turkish-Cypriot municipalities in the five main towns. This time, the House of Representatives applied to the SCC and claimed unconstitutionality of the Law.[151] The applicant argued that it is only the House of Representatives who had a legislative power and the Turkish-Cypriot Communal Chamber had no power or competence to make a law about municipalities, and the "*Turkish Municipal Corporations Law*" was against the Constitution's basic structure and constitutional provisions.[152] The application also argued that the present case had not been made validly because there was no decision of the House of Representatives which was taken by separate simple majority of the Greek-Cypriot and Turkish-Cypriot Representatives as required by Article 78/2.[153] The said Law was also lacking the proper publication in the RoC's Official Gazette. The SCC agreed with the applicant and declared, by majority, that the Law was *void ab initio* on the ground that the Communal Chamber could only act *"after general legislation of the House of Representatives concerning the municipalities (...) had been made"*.[154] Therefore, no Turkish municipality had been validly established.

However, this time, Turkish-Cypriot Justice Munir dissented because he held the opinion that the Municipalities (Continuation) Law was still in force.[155] As it was stated in the introduction of this section, the *Municipalities (Continuation) Law 10/61* had already expired on the 31st March 1961 and this is why both parties started to take action for and against the establishment of the separate municipalities. This clear fact should not have been a base of a dissenting opinion. Such reasoning can only show that the Turkish-Cypriot judge was just as politically biased as judge Triantafyllides because of the Turkish-

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151 Case 12/63, The House of Representatives and the Turkish Communal Chamber and/or the Executive Committee of the Turkish Communal Chamber, filed on 31 January 1963

152 Case 12/63;p.126

153 Article 78/2: Any modification of the Electoral Law and the adoption of any law relating to the municipalities and of any law imposing duties or taxes shall require a separate simple majority of the Representatives elected by the Greek and the Turkish Communities respectively taking part in the vote.

154 Case 12/63;p.128

155 Case 12/63;p.129

Cypriot community's ongoing political wish of having a separate/autonomous territory even after the establishment of the RoC.

There were two more cases before the SCC. One of them was initiated by the Mayor and Members of the Turkish-Cypriot Nicosia Municipal Council against the Council of Ministers, the Interior Minister and the Nicosia Improvement Board to invalidate the creation of the Nicosia Improvement Board.[156] The other one was the application of the Turkish-Cypriot Members of the House of Representatives against the Council of Ministers in order to invalidate the Order of the Council's on the *Improvement Boards*.[157] The SCC dismissed both applications on the technical ground that the applicants did not constitute an organ or authority capable of making that recourse under Article 139/3/d of the Constitution,[158] so, they did not have the constitutional right to make such an application. In sum, the SCC declared that no legal municipality (neither the Turkish-Cypriot Municipalities nor the Improvement Areas) had been validly established on the 25th April 1963. As the Court did not have the authority to urge the government to pass effective legislation, the municipalities issue remained unresolved by April 1963.

The *Municipalities cases* (10/63 and 12/63) rendered the Court a place where divisive political ideologies were discussed implicitly, under the disguise of law because these cases had highly political connotations. From the beginning, President Makarios supported a more integrated and unitary state[159] and feared that separate municipalities would give more authority to the Turkish-Cypriots at the local level[160] which could pave

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156 Members of the Turkish Community and as Inhabitants of the Town of Nicosia and as the Mayor and Members of the Turkish Municipal Council of Nicosia v. the Council of Ministers, the Minister of the Interior and the Improvement Board of Nicosia, Case 11/63, filed on 30th January 1963

157 The Turkish Members of the House of Representatives against the Council of Ministers v. The Council of Ministers, Case 13/63, filed on 31st January 1963

158 Article 139/3: Recourse to the Court under paragraph 1 of this Article may be made by (a) the President or the Vice-President of the Republic; (b) the House of Representatives; or (c) one of, or both the Communal Chambers; or (d) any other organ of, or authority in, the Republic, if involved in such conflict or contest.

159 *Supra* fn.126, D.W.Markides,

160 Ehrlich T., Cyprus, the Warlike Isle: Origins and Elements of the Current Crisis, *Stanford Law Review,* Vol 18,No.6,1966

the way to geographical partition (*Taksim*).[161] On the other hand, Vice-President Dr. Kucuk strongly demanded the strict implementation of the municipalities' geographical separation either due to the fear of domination or due to the implicit goal of partition. Nevertheless, it needs to be remembered that the geographical division had already started with the 1955 ethnic conflict. The Constitution was silent on geographical separation, but clearly used the word "separate". If this separation refers to administrative separation but not a physical one, it would be difficult to administer municipalities separately if the two communities were already mixed geographically. Therefore, it is not possible to interpret this separation as any other form of separation if it was not a geographical one. As one author commented, Turkish-Cypriots wanted to test *"how far the Greeks genuinely accepted the separate [ethnic] identity of the Turkish community"* through the municipalities' issue.[162] Therefore, these constitutional review cases were the mere reflection of the political conflict between the two communities. The motivations of the respective politicians who initiated these constitutional review cases were obviously political and the local judges' interpretation of the constitutional provisions was also reflecting their ethnic concerns. Therefore, it is not difficult to observe the dominant role of ethnic background in the local judges' interpretation and their involvement in substantive representation of their ethnic background. As a result, ethnic bias of the dissenting judges led to split votes for the first time and the dissenting opinions served political purposes.

The local judges' dissenting opinions in the applications of the *"other"* community revealed certain important problems within the SCC's functioning. Upon the appointment of the SCC President, the first thing that was discussed was whether to issue dissenting opinions or not. President Forsthoff, who was coming from a civil law tradition, suggested adopting a civil law tradition and not to give dissenting opinions.[163] His concern was that dissenting opinions could weaken the Court's ability to reduce factions between the communities and thus, cause more difficulty for the Court's work and more importantly,

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[161] Milliyet (Turkish Newspaper), 3 January 1963 cited in S. Bolukbasi, The Cyprus Dispute and the United Nations: Peaceful Non-Settlement Between 1954 and 1996, *International Journal of Middle East Studies*, Vol.30,Issue.30,1998

[162] *Supra* fn.39, R.Stephens

[163] Supra fn.160, T.Ehrlich

prevent the Court's role as an *"important moderating influence"*.[164] Therefore, all judges agreed that the SCC would give its rulings unanimously in order to fulfil this mediating role; in more than one hundred cases (which were challenged on communal grounds), the SCC gave unanimous decisions.[165] The judges' initial agreement reveals that they were, in fact, aware that they would be required to hear and resolve conflicts of political nature and their decisions would have political consequences. Thus, it might be argued that they wanted to contribute political moderation by showing their unity in the Court's functioning and also their agreement in the outcome of the cases. This could only be done by acting as one body, without dissenting opinions, rather than acting as separate individuals and issuing dissenting opinions in the court. However, in the *Municipalities* cases, both Turkish-Cypriot and Greek-Cypriot judges violated their agreement when their respective community's interests were at stake.

Dissenting opinions can in no way be considered as a threat to the Court's functioning or political stability in common law countries and/or in established democracies as they are the basic feature of the common law system. However, they clearly showed the ethnic divisions within the SCC's functioning in the Cyprus context, especially when considering the fact that these dissenting opinions had nothing substantial to rely on. Dissenting opinions, in appearance, were only the different interpretations of the Constitution (as explained in Chapter III,II.A.) but when these different interpretations were influenced by ethnic concerns, they became "ethnic interpretations" which clearly constituted biased interpretations of the Constitution by the Cypriot judges. Their interpretation aimed to protect/advance their respective communal interests by approving the constitutionality of the unconstitutional actions of their respective politicians; their judicial behaviour was far from neutral. Therefore, the Municipalities cases became the first case in which the SCC gave its ruling by majority and was divided along ethnic lines, showing that the diverse judiciary had started to break down.

It is understood that the Greek-Cypriot and Turkish-Cypriot judges were not impartial because they were more concerned as to whom they were representing. The dilemma of upholding the law or acting on behalf of their community's interest was apparent. However, an advantage of legal writing is that legal opinions do not allow the

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[164] Ibid

[165] Ibid

reader to detect, to claim and/or to prove ethnic bias explicitly. Ethnic bias is usually implicit and implicit bias is part of what is considered subjective impartiality; it refers to the judges' personal prejudices and/or ideological perspectives which lead to subjective decisions and thus, it is against the right to a fair trial.[166] Someone alien to the political conditions of Cyprus can consider the case as a standard constitutional case in which the judges have different opinions on different issues and interpret the Constitution differently. However, considering the political divisions in society and the profound political disagreements between the President and the Vice-President on the country's administration, it is not wrong to claim that judges were influenced by the prevailing political conditions and did not decide impartially. As Adams has rightly stated in relation to public service appointments, a Cypriot public officer could easily find themselves in the dilemma of upholding the letter of the law and risking political reprisals and private sanctions, or supporting their community and violating their oath of office.[167] It is saddening to remark that constitutional court judges, as the Republic's highest public officers, who were obliged to be independent and impartial, were caught in a similar impasse and they could not escape from ethnic considerations. Therefore, recalling Pitkin's classification,[168] Cypriot judges were involved in *substantive* representation by *acting on behalf of* their political leaders' aims. Nevertheless, due to the presence of the international judge, the decisions reached were correct. The cases had an impact on the constitutional order because neither the unified nor the separate municipalities in these five towns attained any legal base. Moreover, the *Municipalities* cases caused more mistrust for both communities. The cases were one of the most important indicator that the consociational constitution had started to break down because the Court responsible to resolve political disagreements between the government branches, as a neutral arbiter, had found itself in political disagreements as well. Arguably although the Court's decisions were right, internal, ethnic division (but not ethnic diversity) added another [legal] layer to the already existing political conflict.

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[166] T. Ward, *Justice Matters, Independence, Accountability and the Irish Judiciary,* International Human Rights, Standards on Judicial Independence and Impartiality, Irish Council for Civil Liberties, 2007

[167] *Supra* fn.118, Adams T.W.

[168] Chapter II,Part III.E.

Another dimension of the *Municipalities* cases was that it revealed the importance of the presence of an international judge in the court's composition. Prof. Forsthoff served as an impartial arbiter in all applications. Regardless of dissenting opinions, Prof. Forsthoff applied the constitutional provisions properly to each specific case and reached the correct decision (by the support of one local judge in each application); thus, he was the key judge in reaching the correct decisions. This would have not been possible under an unrepresentative court composition because he also served as a *tie-breaker* due to the equal number of votes. Therefore, although the presence of international judges in national courts is subject to criticism, as they are against the national sovereignty,[169] they were deemed necessary due to the political atmosphere of that time.

Even though the local judges had the apparent risks of losing impartiality, it is still difficult to argue for a non-representative court composition in the deeply divided Cypriot society of the time, especially when remembering the Court's role and potential capacity to moderate political disputes. In case of equal representation of both communities, deadlock in the decision-making process would be inevitable. It was claimed that before the *Municipalities Cases*, the SCC functioned smoothly;[170] but the local judges had become ethnically polarized as a result of the deterioration of the political conditions and the Court's decisions, which in return, deteriorated the political conflict as well. Therefore, a mixed composition of the SCC is inevitable for two reasons: due to the court's political role and due to the political divisions in society that pose a threat to the judges' impartial decision-making. The risk of bias is not a reason to support an unrepresentative court design; on the contrary, it is a reason to argue for an ethnically diverse court composition with an international judge. In the absence of a third alternative way of composing courts, the representative composition seems to serve at least a more legitimate design due to its inclusive appearance.

Nevertheless, before the SCC gave its ruling, President Makarios had publicly stated that he would not comply with a court decision which would support the establishment of separate Turkish-Cypriot municipalities.[171] Consequently, tensions within

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[169] Chapter VI, Part III.B.

[170] *Supra* fn.159, T. Ehrlich

[171] Z.M.Nedjatigil, *Cyprus: Constitutional Proposals and Developments*, 1977

the SCC and political pressure[172] on Prof. Fortshoff and his assistant caused the Professor to resign[173] from his post on the 21st May 1963, just after the Municipalities cases' decision was delivered. After his resignation, Prof. Forsthoff publicly blamed the Greek-Cypriot leadership and especially Makarios in his interviews for interference in the Court's work.[174] He stated that the Greek-Cypriots tried to exercise political pressure to influence his decisions, attacked everyone, even himself as a judge allegedly for being pro-Turkish and put spies to follow him and his assistants everywhere.[175] Yet, he added that he always tried to balance the interests of both communities very carefully and to find out compromise solutions in the cases before him.[176] However, Vanezis states that the *Municipalities* Cases was the *"first spark"* of ethnic conflict in the post-independence period.[177] Therefore, the SCC's decision in a way prepared the road to the upcoming violent conflict.

President Makarios proposals in an effort to amend the 1960 Constitution sparked more tensions between the two communities and this is the focus of discussion next.

C. President Makarios Proposals to amend the 1960 Constitution

In November 1963, President Makarios proposed thirteen amendments to change the 1960 Constitution. Eight of them were related to the Constitution's unalterable articles.[178] For him, these constitutional amendments were necessary for the government's smooth functioning. For example, he proposed to abolish separate communal institutions such as the Communal Chambers and the numerical representation of both communities in

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[172] *Supra* fn.50, A.S.de Smith*;* p.294-295

[173] *Supra* fn.159, T.Ehrlich

[174] A.Sammoutis, Relations between Cyprus and Germany (1960- 1968), dissertation presented to the Faculty of Arts in University of Malta for the degree of Master of Arts in Contemporary Diplomacy,2007

[175] Ibid; This led to German Foreign Ministry, through friendly channels, to recommend to the Professor to refrain from attacking the RoC/Greek-Cypriot government openly.

[176] Interview (30/12/1963) cited in *Supra* fn.99, S. Kyriakides

[177] *Supra* fn.111, P.N.Vanezis;p.23

[178]Appendix A. Suggested Measure for Facilitating the Smooth Functioning of the State and for the Removal of Certain Causes of Inter-Communal Friction (1963)

mixed communal institutions, such as the Police, Gendarmerie and Judiciary. These amendments targeted the consociational Constitution and the bi-communal nature of the government institutions. If accepted, these amendments would give a way to the creation of an integrated unitary state where the Greek-Cypriot majority would rule and grant minority rights to the Turkish-Cypriots.

In relation to the jurisdiction and composition of the Judiciary, Makarios proposed to *unify the administration of justice*, and abolish the communal administration of the justice system. He argued:

"The Constitution separates the administration of Justice on the basis of communal criteria (...) This division is (...) detrimental to the cause of Justice. The very concept of Justice defies separation. The mere fact that a Greek must be tried by a Greek and a Turk by a Turk is in itself a slur on the impartiality and integrity of the Judges. It is inevitable that when a Judge assumes jurisdiction on the basis of communal criteria he begins to think that the interests of his community stand in danger of being jeopardized and that he is there to protect such interests. The Judge will, therefore, gradually lose the sense of being a judge above communal criteria. (...) Thus, Justice will not only cease to be done but will also cease to be seen to be done (...).There is (...) no reason for the imposition of restrictions on the jurisdiction of the Judges of the Republic, on communal criteria, thus establishing a system which is bound to undermine justice and is most impracticable in its application."[179]

The President's argument was a clear description of the justice system of that time and he was trying to show the divisive nature of the "ethnic origin" in the judges' appointments and jurisdiction. What he considered as a risk, judicial bias, was in fact a reality and the *Municipalities* Cases was the best example of his argument. However, given the political tensions prevailing between the communities at that time and the sensitivity of the cases, arguing that all Makarios wanted was a *smooth functioning* of government and the impartial application of justice is not convincing because *smooth* might mean the functioning of government by the Greek-Cypriots. Moreover, what he considered as *divisive* (ethnic administration) and/or *slur* (risk of political bias) was the main reason to grant Turkish-Cypriots representation in the judiciary. Only through the participation of

[179] President Makarios Proposals, Point 7, Booklet, 1963

Turkish-Cypriot judges to the courts, Turkish-Cypriot community would perceive the judiciary as legitimate and trust the justice system. Furthermore, if judges were likely to be biased (as in the sense of protecting their community), abolishing ethnic criteria in the justice system would neither increase their impartiality and/or prevent their ethnic prejudice nor make the public (all Cypriots) trust in the judiciary more. On the contrary, depending on who would sit in the court, the cases would be influenced either by the prejudices of the Turkish-Cypriot or Greek-Cypriot judges and the litigants from one community would not trust the judges from the other community. For example, in criminal law cases in which Greek-Cypriots would be judged before a Turkish-Cypriot judge (or *vice versa*), they would highly likely be sentenced more harshly.[180] However, presuming that Greek-Cypriots would benefit more due to their numerical strength in his proposed system, the President saw no harm in proceeding with his proposals.

The Turkish-Cypriot leadership considered Makarios' proposals as an attack on their political equality and believed that their communal rights and representation would be abolished if the proposals were accepted.[181] They also considered these proposals detrimental in that they would enable Greek-Cypriot dominance through their numerical strength.[182] Nevertheless, the Vice-President asked for time to consider the proposals, promising to respond by the end of December 1963; however, Turkey rejected the proposals on the 16th December 1963 stating that the proposals were undermining the 1960 Constitution.[183] Within days, inter-communal violence broke out. From there on, historical accounts vary depending on one's standpoint. Turkish-Cypriots argued that due to the geographical separation and the life-threatening conditions, they were unable to attend to their government posts, whereas Greek-Cypriots argued that Turkish-Cypriot Representatives left their posts deliberately to achieve partition. Regardless of the reason, in the absence of Turkish-Cypriots, government started to be administered solely by

[180] See Grossman *et. all* in Chapter III,II.B and D

[181] *Supra* fn.77,A.Sozen

[182] Ibid

[183] E. Solsten(ed.), *Cyprus: a country study*, GPO for the Library of Congress(4th ed.), Washington, 1993

Greek-Cypriots and the House of Representatives, lacking its Turkish-Cypriots members, enacted new legislations to give effect to Makarios' proposals.[184]

As for the Judiciary, *the Administration of Justice (Miscellaneous Provisions) Law 1964 (No.33 of 1964)*[185] was enacted on the 9th July 1964. Its Preamble stated that *"recent events"* prevented the SCC and HCJ functioning and this new law is necessary for the administration of justice without any obstacle.

Article 12 of the Law 33/1964 stated:

"Article 12: 1.Any Court, established by the Courts of Justice Law, 1960, or any other Law shall, in the exercise of its civil or criminal jurisdiction under such Law, be composed of such judge or judges, irrespective of the community to which the parties to the proceedings belong, as the Court may direct. 2. Any judge of a District Court may hear and determine any case falling within his jurisdiction irrespective of the community to which the parties to the proceedings belong".

On face value, the Law seemed to be neutral. As such, the court's composition and jurisdiction would not be affected by the litigant's ethnicity. Even if both parties of the case were Turkish-Cypriot, a Greek-Cypriot judge could hear the case (regardless of the linguistic differences). The opposite was true for the Greek-Cypriot litigants as well as long as Turkish-Cypriot judges could hold office in a Greek-Cypriot owned State. However, in practice, this meant that the presence of Turkish-Cypriot judges was no longer required either at the appeal court level or at the district courts even if both parties of the case were Turkish-Cypriot. Thereby, by using the word "*irrespective of the community*", the new Law 33/1964, abolished the ethnic criteria which were a constitutional requirement and so, ended the necessity of the courts' diverse composition. Therefore, as a result of the new law, in practice, the Turkish-Cypriot and/or Greek-Cypriot judges were not required to jointly sit and hear the cases either in constitutional court cases or in district courts when the litigants were of different ethnic backgrounds.

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184 For example, on the 31st March 1965, the House of Representatives abolished the Communal Courts and transferred their jurisdiction to the regular courts of the Republic; *Supra* fn.99, S.Kyriakides

185 Hereinafter Law 33/1964

The Turkish-Cypriot judges were already absent from the courts' composition between December 1963 and June 1964 due to the ethnic conflict. After June 1964, when ethnic tensions were eased, they resumed their duties but their numbers were reduced.[186] After June 1964, the Turkish-Cypriot judges began to attend to the Courts.[187] However, on the 2nd June 1966, Turkish-Cypriot judges were stopped by the Greek-Cypriot police at the check point near the law courts and prevented from attending the courts; one of the judges, Ulfet Emin who succeeded in getting through to the court was removed from his chambers at gunpoint and taken back to the check point.[188] Finally, in addition to the executive and legislature branches, by June 1966, the judiciary had also lost its consociational nature by excluding Turkish-Cypriot judges.[189] This revealed the last throes of ethnically composed courts in Cyprus and the next section which deals with the landmark case of Mustafa Ibrahim will reflect exactly this.

D. The Case of the Attorney-General of the Republic v. Mustafa Ibrahim and Others:[190] the Death Knells for Ethnically Composed Courts

Law 33/1964 *inter alia,* united the SCC and the HCJ under the umbrella of a single Supreme Court[191] and this newly formed Supreme Court became the highest appellate court of the Republic with the existing members of the previous SCC and HCJ.[192] The new Supreme Court was entrusted to exercise the jurisdiction and powers of the previous SCC

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186 U.N.Doc.No.S/6102, (I964); para.95-97

187 Letter From Andreas Frangos, Counsellor, Embassy of Cyprus, Washington, to the Author, Nov. 30, I965 cited in *Supra* fn.160, Ehrlich T.

188 Z.M.Necatigil, *The Cyprus Conflict: a lawyer's view,* Nicosia, Cyprus, 1982 (2nd ed.), 1981

189 In 2007, Ulfet Emin successfully sued the Finance Ministry for his lost salaries and retirement benefits [Case No. 1473/2005, judgement delivered on 21st March 2007] but the Ministry refused to make payment to him. In 2012, Emin sued the Ministry successfully again for his pensions [Case No. 364/2012]; C. Demetriou, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Cyprus, 1st January 2014

190 The Attorney-General of the Republic v. Mustafa Ibrahim and Others (1964) Cyprus Law Reports 195

191 Law 33/1964, Article 3(1)

192 Law 33/1964, Article 3(3)

and HCJ[193] and thus, it had the jurisdiction of both constitutional review cases and appeal cases. According to the new Law 33/1964, the judicial office ought to be "*vacant*", *inter alia,* if its holder refused to act in it and the President of the RoC was deemed responsible to appoint a new judge to fill the office, in consultation with the Court.[194]

When the new Supreme Court was established, the Turkish-Cypriot judge, Justice Mehmet Zekia became President (Chief Justice) of the new Supreme Court because he was holding the highest rank.[195] As it was stated above, there were also other Turkish-Cypriot judges who returned to their posts in June 1964. However, when the Court was composed to hear the *Mustafa Ibrahim case*, no Turkish-Cypriot judge was appointed to its composition and the new Supreme Court in this case was composed of solely three Greek-Cypriot judges.

D.1. The facts of the case:

On the 25th April 1964 four Turkish-Cypriots were arrested by the Greek-Cypriot police while in possession of guns and ammunition. They were released on bail by order of the District Courts (Kyrenia, Paphos and Limassol) pending their trial by the Assize Courts. However, the Attorney-General appealed to the new Supreme Court against the order of these District Courts, granting bail to the defendants, by raising specific articles of the Criminal Code and by referring to the *"prevailing conditions"* in the Republic.[196] Before the hearing on the merits of the appeal, the respondents' lawyer raised preliminary objections. The Appeal was allowed and the Order for bail was set aside.

D.2.Preliminary Objections of the Respondents' Lawyer and the Legal Issues Arising From the Administration of Justice (Miscellaneous Provisions) Law 1964 (No.33 of 1964)

The Respondents' lawyer argued:[197]

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193 Law 33/1964, Article 9

194 Law 33/1964, Article 4

195 *Supra* fn.36, E.Erginel

196 The Attorney-General of the Republic v. Mustafa Ibrahim and Others (1964) Cyprus Law Reports 195

197 Ibid;p.1-2

a) the provisions of Law 33/1964 setting up a new Supreme Court (SC) were contrary to the 1960 Constitution; so the new SC as constituted had no jurisdiction to hear the appeals;

b) the composition of the new SC was contrary to Articles 133(1) and 153(1) of the Constitution, which required an ethnically diverse court composition;

c) the provisions of Law 33/1964 which set out the jurisdiction and powers of the new Supreme Court were contrary to Articles 146 and 152 of the Constitution which stated the jurisdictions of the SCC, the HCJ and the district courts;

d) Law 33/1964, which provided that civil and criminal courts should exercise jurisdiction irrespective of the community of the parties, was contrary to the Articles 159(1)(2) and 155(3) of the Constitution which required the ethnic composition of the courts where the parties belong to different ethnicities;

e) Law 33/1964, which provided the supremacy of the Law 33/1964 (itself) to any other law,[198] was contrary to Article 179(1)(2) of the Constitution which explicitly stated the Constitution's supremacy;

f) even if Law 33/1964 was assumed as valid, the present composition of the new SC was against the Law itself, because Law 33/1964 required the full bench of five judges to hear constitutionality matters;[199] the present composition of the SC by three judges was empowered to hear appeals, but not constitutionality questions. Therefore, the lawyer challenged the composition, jurisdiction and constitutionality of the new SC that was dealing with the case as well as the constitutional validity of the Law 33/1964 and argued that Law 33/1964 had not come into force.

The new SC dismissed these objections and held that Law 33/1964 had been validly enacted and the merger of the jurisdictions of the previous SCC and the HCJ was validly established under the new Law 33/1964. The SC also stated that the three judges were duly nominated and fully authorised to hear an appeal, including the constitutional matters raised in it. Finally, the SC also stated that *"the legal doctrine of necessity should be read into the provisions of the written Constitution of Cyprus"* and the Court [itself] was responsible to transform this *"legal theory into living law, applied to the facts of daily*

[198] 198 Law 33/1964, Article 15

[199] Law 33/1964, Article 3(2)

life for the preservation of social order".[200] Therefore, the Court employed the *doctrine of necessity* and justified the enactment of Law 33/1964.

D.3. Court's Reasoning and the Application of the Doctrine of Necessity

During the hearing of the case the Attorney-General based his argument on the doctrine of necessity as there were *exceptional circumstances* on the island. In return, the respondents' lawyer argued that there was no "Proclamation of Emergency" which the Council of Ministers issued under Article 183; in the absence of such a proclamation, he argued, the doctrine of necessity could not justify a departure from the Constitution. However, the Court stated that Article 183, which provided the Proclamation of Emergency, was completely inadequate to meet the present emergency and did not include any provisions regarding the administration of justice and the future functioning of the courts. Therefore, the Court accepted the Attorney-Generals' argument and applied the doctrine of necessity to the case.

Initially, when outlining the context for the application of the doctrine of necessity, the new SC described the *"prevailing conditions"* in the Republic and stated that there was an armed rebellion against the State by insurgents (Turkish-Cypriots) that had been continuing for several months. The Court took judicial notice of such conditions and stated that in order to fully and correctly appraise the legal issues, the factual backgrounds of the case should be considered in light of this reality. Following the explanation of the *"prevailing conditions"* the Court went on to deal with the merits of the objections raised for the composition of the new SC by the respondents' lawyer.

Justice Vassiliades stated that the SCC had not been functioning since August 1963 and the HCJ since June 1964. Therefore, the administration of justice was in danger of collapse "*regardless of the reason*".[201] He accepted the Attorney-General's argument: *"the new Law was enacted on the principle of the law of necessity for the preservation of fundamental services in the State. The preservation of the administration of justice itself, in this case"*.[202] Moreover, he stated that although the argument of the respondents' lawyer on the unconstitutionality of the composition of the Court (due to Articles 133/1 and 153/1) was not contested by the Attorney-General, and the new Law was not published in both

[200] M.Ibrahim,p.2

[201] M.Ibrahim,p.8

[202] M.Ibrahim,p.8

official languages, "*the evil inflicted by such omission was not disproportionate to the evil avoided";* thus, these omissions were also justified by the law of necessity.[203] Therefore, he concluded that although Law 33/1964 was not in accordance with certain constitutional provisions, the validity of the Law 33/1964 could be defended by the doctrine of necessity.

Justice Triantafyllides gave his separate opinion although he was in full agreement with Justice Vassiliades. He reiterated the non-attendance of Turkish-Cypriot judges to the District Courts and Assize Courts and stated that due to their absence, it was impossible to establish mixed courts as required by Article 159 of the Constitution.[204] Although he acknowledged that the Turkish-Cypriot judges had resumed their duties by June 1964, he stated that there was always a possibility that they might abstain themselves in the future. In such possibility, *"The administration of justice and consequently the protection of the rule of law and the preservation of public order could no longer be effectively achieved"* Justice Triantafyllides stated.[205] Thus, the Law 33/1964 enabled the administration of justice to carry on without the presence of Turkish-Cypriot judges. He concluded that even if Law 33/1964 were inconsistent with the Constitution, the doctrine of necessity rendered it valid. The doctrine of necessity should be employed in order to protect *"supreme public interest"* for the *"salvation of the state and its people".*[206]

Justice Josephides also gave a separate opinion in accordance with the other two judges. He also emphasized the non-functioning of the SCC and the HCJ because of the resignations of the foreign judges and because of the non-attendance of the Turkish-Cypriot judges. He most importantly stated that considering *"the proportion of the Turkish-Cypriot citizens of the Republic to the total population and the present composition and powers of the Supreme Court established under Law 33/1964"*, in enacting Law 33/1964, the Legislature did not intend to abolish any of the constitutional safeguards of the Turkish-Cypriot community, but to meet an "*imperative and inevitable necessity*".[207]

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[203] M.Ibrahim,p.12

[204] M.Ibrahim,p.18

[205] M.Ibrahim,p.18

[206] M.Ibrahim,p.21

[207] M.Ibrahim,p.35

In terms of academic reference, the Court cited, *inter alia,* Dr. Glanville Williams' chapter, *The Defence of Necessity*.[208] For the theoretical basis of necessity Justice Vassiliades quoted:

"In a manner of speaking the whole law is based upon social necessity; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable social needs. (...). What we have to study is how far the notion of necessity can create new rules or serve as an excuse for dispensing with the strict law, where the exigency requires it." (...) "The law, in a word, includes the doctrine of necessity; the defence of necessity is an implied exception to particular rules of law.

Similarly, Justice Triantafyllides stated that after examining the literature from other countries, he held that the doctrine in public law is a source of authority for acting in a manner which was not regulated by law but required in prevailing circumstances by supreme public interest for the salvation of the State and its people.[209] Justice Triantafyllides stated that the 1960 Constitution was not a result of "*the exercise of the original right*" of the Cypriot people but a result of an international agreement (Zurich) without the participation of the Cypriot leaders.[210] Therefore, he criticized the Constitution and its drafting process as it was neither an expression of the free will of the Cypriot people nor made by a Constituent Assembly. Similarly, Justice Vassiliades emphasized that the 1960 Constitution came into being as a result of the *"interest of foreign powers"* and provided unalterable articles that were inconsistent with *"human nature (...) a creature of evolution and change*".[211] Just like President Makarios, he criticized the judicial system as it was *"lamentably divided, and deplorably based on communal discrimination"*.[212]

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[208] G. Williams, The Defence of Necessity in Current Legal Problems in G.W.Keeton and G.Schwarzenberger, *Current Legal Problems*, 1953, Vol.6, London:Stevens; Most of the examples that the Court relied upon were taken from private law relations rather than public, although Williams stated that the doctrine has a narrower scope in public than private law.

[209] E.S.Corwin, The Higher Law Background of American Constitutional Law, *The Harvard Law Review Association,* Vol.42, No.(3), 1929

[210] M.Ibrahim,p.23

[211] M.Ibrahim,pp.8-10

[212] M.Ibrahim,p.32

Justice Josephides also stated that the law of necessity was based on "*salus populi est suprema lex*"[213] and that in abnormal conditions the State has the power and the duty to take exceptional measures for the country's salvation. After examining the law of necessity in Greece, Italy, Germany and France, he added that judicial decisions in various countries had recognized this principle.[214] He classified four conditions for the doctrine of necessity: a) an imperative and inevitable necessity or exceptional circumstances; b) no other remedy to apply; c) the measure taken must be proportionate to the necessity; d) it must be of a temporary character limited to the duration of the exceptional circumstances.

Justice Josephides also cited Williams to support his decision:

(...) defence of necessity involves a choice of the lesser evil. It requires a judgment of value, adjudication between competing "goods" and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.[215]

As a result, all three judges of the Court accepted the doctrine as a part of law and saw no harm in applying it to the case before them.

In *Mustafa Ibrahim,* all three judges agreed on the legal reasoning, on the application of Law 33/64 and the doctrine of necessity, and on the case outcome. Therefore, it is not clear why they issued three separate opinions. If separate opinions are *dissenting opinions*, they are given when a judge disagrees with the reasoning and the decision of the majority;[216] but this was not an issue in this case. Thus, in this case, separate opinions cannot be classified as dissenting opinions. These separate opinions cannot also be considered as *concurring opinions* because concurring opinions are given when judges

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213 The welfare of the people shall be the supreme law.

214 He cited: In France, the Case of "*Syndicat national des chemins de fer de France, etc*." 18th July 1913, Rec. 875 and the Case of Heyries (C.E. 28 June 1918, Rec.651); In Greece, the principle of the law of necessity has been accepted both by the "Arios Pagos" (the Supreme Court) and the "Symvoulion Epikratias" (Conseil d'Etat). Greece's Conseil d'Etat recognized the principle in cases of 2/1945, 13/1945 and 68/1945; Justice Josephides also stated that in Italy (C.Mortati, "Diritto Pubblico", 1962; and R.Alessi, "Diritto Amministrativo Italiano", 1960), and in Germany (Jellinek, "Gesetz und Verordung", 1887), scholars accepted the doctrine as part of the law.

215 *Supra* fn.208, G. Williams

216 Laffranque J., Dissenting Opinions and Judicial Independence, *Juridica International,* VIII, 2003

agree with the outcome of the case but not with the reasoning.[217] This was not the situation either. In *Mustafa Ibrahim* it is not clear why the judges issued separate opinions. These three separate (but similar) opinions should be due to the political nuance of the case, more correctly due to the important consequences that the application of the doctrine of necessity would have on the constitutional order. Most probably, it is assumed that the lengthy explanations and repetitive reasoning which was supported by academic citations and the practice of other countries in different cases would serve to convince the public that the Court decision was the correct and an impartial decision. Given that separate opinions are not given when judges are in full agreement on the reasoning and on the decision, this was an interesting feature that is peculiar to *Mustafa Ibrahim.*

The following two sections provide an assessment of this case and the doctrine of necessity.

D.4. Assessment of the Case

The judgement can be criticized on the following grounds:

First of all, it is necessary to state that the Courts' depiction of "prevailing conditions" -which was taken as judicial notice and also as central to the invocation of the doctrine of necessity- was not reflecting the real conditions on the island. The Court's description was based on a politically motivated interpretation of the events on the ground. It was true that there was an exceptional situation on the island due to the armed conflict. However, instead of stating that there were two ethnic groups who were competing for power through the use of violence (in order to achieve their respective political goals), the Court drew a picture of Turkish-Cypriot rebels who were fighting against the State which is administered by the Greek-Cypriots, forgetting that the Turkish-Cypriots were also co-founders of the State, even though their participation to the government institutions had temporarily ceased due to ethnic violence.

Secondly, the Court accepted the doctrine of necessity to protect the *"supreme public interest"* for the *"salvation of state and its people"*. However, the State that was protected by the doctrine of necessity was no longer the State established by the international agreements and the 1960 Constitution. The State originally had a bi-communal character, but soon after the armed conflict and in the absence of Turkish-

[217] Ibid

Cypriots it began to be administered only by Greek-Cypriots. Thus, the "salvation" was for the State which was controlled by the Greek-Cypriot representatives and only for the Greek-Cypriot people. Additionally, it was obvious from the Court's wording that the *"supreme public* interest" referred to the public interest of the Greek-Cypriot people at the expense of the public interest and constitutional rights of the Turkish-Cypriot people, as the latter were already considered as *insurgents*. Recalling William's assessment on *value judgement,* Greek-Cypriots' values (on the administration of government, preferably, majoritarian democracy) were upheld whereas Turkish-Cypriots' values (their constitutional rights and representation) were sacrificed. In that sense, Justice Josephides' statement that the new changes did not abolish the constitutional rights of the Turkish-Cypriots was paradoxical and was not reflecting the truth because after the Court's invocation of necessity, the Turkish-Cypriots' constitutional rights were suspended. This led to the creation of a dual legal system: one that was written in the Constitution (instrumental), existing in name only but not implemented; and the other one that was taking place in practice.[218]

Thirdly, it was true that the administration of justice was in danger due to the Courts' non-functioning. This was partly due to the resignation of Prof. Forsthoff (even before the ethnic conflict) and partly due to the Turkish-Cypriot judges' temporary absence. The non-appointment of the new international judges to the SCC and the HCJ was another problem as well. The Court examined the reasons for the Turkish-Cypriot judges' absence and accepted that some could not attend their duties because of the armed conflict but it did not attribute any responsibility to the Government which did not provide for the security of Turkish-Cypriot judges, in order to revert the conditions back to normal or at least lessen the threat of violence. The Court also refrained from examining the reasons of not appointing the international judges. It is understood that the Court ignored to examine the other reasons of the Courts' non-functioning, most probably due to the fact that the Government itself was also contributing to this *"danger of collapse"* (thus, to the application of the doctrine of necessity) by not making the necessary appointments and

[218] A.Markides, The Republic of Cyprus in Kortmann C. and Fleuren J., Voermans W.(eds), *Constitutional law of 10 EU member states:the 2004 Enlargement,* Kluwer Law International, 2007

also by not providing for the Turkish-Cypriot judges' safety and security.[219] These two instances of negligence on the part of the Government showed that the Government itself was provoking the situation, may be not to the extent of breaking down the administration of justice, but to aggravate the conditions for the application of the doctrine of necessity.

More importantly, the Court did not state any reason why the Court -itself- was composed of only Greek-Cypriot judges and why there were no Turkish-Cypriot judges in its composition, although it acknowledged that the Turkish-Cypriot judges were back to their duties and the administration of justice started to work normally. Besides, it was not explained why the President of the new SC, who happened to be a Turkish-Cypriot judge, was not appointed to the composition of the current case to hear the case. This caused speculations that the court had been composed of only Greek-Cypriot judges purposely to secure the outcome of the case. As the intention was obvious, it is not possible to talk about the negligence of the Court. Rather, it only demonstrates the political motivations of the Greek-Cypriot judges in their interpretation/assessment. The Greek-Cypriot judges refrained to examine the matters that they could not answer neutrally because they were politically biased. Examination of this matter was disregarded because if it was not, the Court had to provide an explanation for its own composition and jurisdiction as well as whether it had the authority to hear the case. To this day, no explanation has been provided as to why there was no Turkish-Cypriot judge in the Court's composition.

In relation to the changes in the administration of justice, judicial diversity which was a constitutional requirement was abolished through the unilaterally enacted Law 33/1964. The Law has come to mean that the presence of Turkish-Cypriot judges was no longer necessary in the courts' composition. Contrary to the constitution, the representation of Turkish-Cypriot judges in the judiciary was abolished not by a constitutional amendment (which was impossible in any way) but by the unilaterally and unconstitutionally enacted Law 33/1964 together with the application of the doctrine of necessity. The Law was not considered as legitimate by the Turkish-Cypriots as it was enacted by the Legislature which was composed of solely Greek-Cypriot representatives, contrary to the 1960 Constitution's wording and spirit. However, for the Court, the

[219] For example, when the Turkish-Cypriot Representatives of the House wanted to return the House, it was rejected by the Greek-Cypriot Representative, G.Clerides; Ozersay K., The Excuse of State Necessity And Its Implications on the Cyprus Conflict, *Perceptions,* Winter, 2004-2005

doctrine of necessity cleared all the omissions of Law and justified all unconstitutional government actions.

Above all, in this case the Court also had to decide for its own constitutionality. According to the established legal principle of *nemo judex in causa sua* in order for a court to be considered as impartial, *"no man can be a judge of his own case"*. This is the basic requirement of a fair trial. The principle requires the judge not to sit to hear any case where their interest is at stake and/or when they have an interest in the outcome or in the cause of the case because their decision-making process can be influenced by other factors[220] and they cannot decide impartially. In such a situation, disqualification and/or recusal of the judge are required. Hence, it is questionable how the court could make an impartial and fair decision in a case where its own establishment, composition, jurisdiction and constitutional status is at stake. If the judges were really impartial, would this not require them to dismiss the Court itself on the basis of lacking constitutional status? If the Court dismissed itself, what would be the political consequences of such a decision? Was there any chance that the President would reconsider his proposals to amend the Constitution and the Legislature to stop enacting laws to give effect to President's proposals? Or was there any possibility to re-establish and re-compose the Court and re-hear the case with Turkish-Cypriot and international judges?

The decision of the non-diverse Supreme Court had serious consequences for the constitutional system of the Republic and the constitutional structure has since then changed profoundly and unilaterally. The case was obviously a politically nuanced case in which the constitutional review process served to endorse the constitutionality of the unconstitutional government actions (Law 33/1964) and also to apply the doctrine of necessity for the political aims of one ethnic group at the expense of the other. Therefore, after *Mustafa Ibrahim* case, the last castle of consociational democracy, the judiciary, had broken down.

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220 P.S. Karlan, *Two Concepts of Judicial Independence*, *Two Concepts of Judicial Independence,* Preliminary Draft, 08/08/1998, accessed by: http://www.usc.edu/dept/law/symposia/judicial/pdf/karlan.pdf; Guidelines for Judicial Conduct, New Zealand, 1 June 2011; F. Phillips, *The Modern Judiciary: Challenges, Stresses and Strains,* Hill Publishing, 2010, Chapter 7

D.5. Assessment of the Doctrine of Necessity

In terms of theoretical debate, it is true that Williams supported the doctrine of necessity academically. However, he also gave place to counter-arguments. He added that those who were against the doctrine had the *"fear of abuse"*, because "*necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves"*.[221] He stated that the moral attitude in Cicero's words cannot be denied: *"it is better to receive than to inflict an injury and also the moral question whether the end can justify the means*".[222] When these concerns on the abusive nature of the doctrine apply to national emergency situations, Williams stated that its application is less preferable because Parliament can act in such circumstances.[223] His statement is consistent with the respondents' lawyer argument who claimed the Proclamation of Emergency by the Council of Ministers, (who had the constitutional right to declare proclamation) would have been a more constitutional (thus, a more appropriate) way to be followed, rather than the Court's invocation of the doctrine of necessity.

Williams stated that *"necessity cannot be used to set aside the values expressed in the law; it can only qualify and modify them"*.[224] It is obvious that Williams was concerned that the doctrine of necessity could be misinterpreted and/or abused to overcome the law and/or reduce the quality of the law. Likewise, he asserted that *"since the defence of necessity involves a collision of interests and a consequential judgment of value, it is capable of raising problems of great ethical and social difficulty*".[225] When applied to the context of Cyprus, the abused law was the constitutional law and the abused values were the consociational values, namely, the bi-communal composition of the government institutions which provided power and representation to both communities and the conflicted interests were the interests of the numerical minority and the majority;

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[221] William Pitt, Speech in the House of Commons, November 18, 1783 cited in *Supra* fn.208, G.Williams

[222] *Supra* fn.208,G. Williams;p.225

[223] Ibid;p.228

[224] Ibid;p.232

[225] G. Williams, Criminal Law: The General Part, 1953, p.570 cited in M. Travis, *The Compulsion Element in a Defence of Necessity,* October 2000, accessed by: http://homepages.ihug.co.nz/~ttpbst/me/writing/compulsion.htm on 03/05/2015

upholding one over another did not serve to qualify the values of either of them, but rather led to more conflict, more oppression, more resistance, thus more ethnic violence.

Stavsky has argued that the Supreme Court applied necessity in order to justify significant alterations of the 1960 Constitution.[226] He has stated that the doctrine *"legitimized extensive revision of non-amendable provisions of the constitution",* one of them being the establishment of the Supreme Court that heard the case.[227] He has also added that the three judges of the new SC took notice of the emergency circumstances when the House of Representatives enacted Law 33/1964 which re-structured the Judiciary, although any law that passed by Turkish-Cypriots or Greek-Cypriots alone cannot constitute a legislative action according to the Constitution.[228] However, the Supreme Courts' decision to uphold the constitutionality of Law 33/1964 did not only serve to maintain the Court's own existence and authority, but it also removed the restrictions on amending the Constitution and enabled the government to be controlled by Greek-Cypriots effectively, without the participation of Turkish-Cypriots.[229] The Court also did not question the reason of the absence of the Turkish-Cypriot members of the House of Representatives when Law 33/1964 was adopted.[230] As for the composition of the new SC, Stavsky argued that the Court's statement on the capacity of the Court to make a decision with three Greek-Cypriot judges is not convincing; it is not known whether the Turkish-Cypriot judges chose to abstain from the Court or they were prevented from participating. It would be irrational for the Turkish-Cypriot judges to abstain from the Court's composition in such an important case even if their numbers (two: one from the HCJ and one from the SCC compared to three Greek-Cypriot members: two from the HCJ and one from the SCC) would not change the outcome of the case, especially in the absence of an international judge.

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226 Stavsky M.M., The Doctrine of State Necessity in Pakistan, *Cornell International Law Journal,* Vol.16, 1983

227 Ibid

228 Ibid

229 Ibid

230 Ibid

Ozersay has also subsequently argued that the Court neither inquired if any effort had been made to negotiate and convince the Vice-President to participate in government[231] nor stated any reason for the non-appointment of the non-Cypriot judges; it only stated the uncooperative attitude of the Vice-President. Ozersay is of the opinion that the new SC in *Mustafa Ibrahim* had to confirm the conformity of Law 33/1964 to the Constitution and apply the doctrine of necessity because if it had rejected it and declared the unconstitutionality of Law 33/1964, it would have accepted the unconstitutional status of the Court itself.[232] Therefore, the new Court had no other course than applying the doctrine and justifying its own existence because it was not restructured constitutionally.[233] It is also obvious that by deciding on its own composition and by deciding that the unconstitutional Law 33/1964 is constitutional, the Court did not provide a fair trial to the litigants.

Furthermore, the Court neither inquired if any effort had been made to negotiate and convince the Vice-President to participate in government[234] nor stated any reason for the non-appointment of the non-Cypriot judges; it only stated the uncooperative attitude of the Vice-President. The Court also did not question the reason of the absence of the Turkish-Cypriot members of the House of Representatives when the Law 33/1964 was adopted.[235] Therefore, in my opinion, the Court misapplied the doctrine of necessity in order to secure Greek-Cypriot control of government.

Finally, when Justice Josephides summarized the four conditions for the doctrine of necessity, he examined the exceptional circumstances but refrained from examining "*no other remedy to apply*". There was a real gap here that could only be filled by the respondents' lawyer argument that the Proclamation of Emergency could be applied, and the negligence of this available remedy could only be considered as a deficiency. Besides, arguing that the measure taken (the suspension of the rights and representation of the

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[231] *Supra* fn.219, K.Ozersay

[232] Ibid

[233] Article 182 of the 1960 Constitution states that the basic articles (such as the composition of the judiciary) can only be amended by a law which would be voted by the simple separate majority vote compromising at least 2/3 of the Greek-Cypriot and Turkish-Cypriot Representatives.

[234] *Supra* fn.219, K.Ozersay

[235] *Supra* fn.226, M.M.Stavsky

Turkish-Cypriots) are proportionate to the necessity (armed conflict) has no base to be relied on. On the contrary, if only Turkish-Cypriots were to be blamed for the violence, endorsing their removal from government by the Court could only lead to more violence as they could no longer see the government as the legitimate government in which they used to be partners of. The fourth condition of Josephides, "*temporariness*", is also vague as it is difficult to predict when the exceptional circumstances would cease to exist. As was observed, even after 55 years, the legal system of the RoC continues to operate on the basis of the doctrine of necessity.

Regardless of the [communal or discriminative] character of the right to be tried by a judge from one's own community, being left to the discretion of a judge from the other community, especially when the ethnic conflict was ongoing, created more suspicion for Turkish-Cypriots. The wrong implementation of the doctrine of necessity significantly departed from the consociational spirit of the 1960 constitution and it was abused for political purposes to cease the bi-communal character of the RoC. To conclude, the Greek-Cypriot judges were politically biased and they wrongly instituted the doctrine of necessity in light of the above arguments. A completely opposite verdict could have been written if the Greek-Cypriot judges were not biased, if they cited counter-views on the doctrine of necessity and only if they were not aiming to suspend the Turkish-Cypriots' rights or to enable the implementation of the majority rule for the administration of government. After all, the misapplication of the doctrine of necessity served to secure Greek-Cypriot control of government. That is why the ethnic composition of courts dealing with constitutional matters is necessary because an unrepresentative composition may cause disastrous effects on the State's political and constitutional order. The ethnically diverse court composition which was offered and took part as a constitutional solution to the previous ethnic conflict, came to an end in the period of another ethnic conflict. Hence, Turkish-Cypriot litigants were left to the mercy of Greek-Cypriot judges. In turn, this situation helped Turkish-Cypriot nationalists strengthen their discourse by repeatedly planting fear to the Turkish-Cypriot community that they would be arrested and judged by Greek-Cypriots and lose their freedom arbitrarily.[236] Therefore, the Law 33/1964 and the misapplication of the doctrine of necessity caused concerns that the administration of justice was not impartial and there was ethnic bias by Greek-Cypriot judges. This bias was evident in two ways:

[236] This was part of the political propaganda of the then Turkish-Cypriot leader, R.R.Denktash, *The Cyprus Triangle*, Allen&Unwin, 1982

political conflict shadowed the judges' impartiality; in consequence, the judges' biased decision changed the nature of the political conflict from a problem of a bi-communal society to a conflict between an insurgent minority and governing majority. Therefore, due to the dangers posed by unrepresentative constitutional courts, the ethnic composition of Courts with the presence of international judges is essential and vital. The politicization of the decision-making process seems to be inevitable but it should not be a reason to abandon diverse composition; on the contrary, it is the main reason for which the Court should have an ethnically diverse composition.[237]

E. Aziz v. Cyprus [Application No. 69949/01]

This new constitutional structure of the Republic that has been based on the doctrine of necessity has been contested in the ECtHR after thirty-seven years. In this case, the applicant sought for a solution for the violation of his voting rights under Article 3 of Protocol No.1, taken alone or in conjunction with Article 14.[238] Initially, the Turkish-Cypriot applicant unsuccessfully attempted to register himself in a Greek-Cypriot electoral roll but his application was rejected by the government. Following this, he applied to the Supreme Court of the RoC, arguing that after the dissolution of the Communal Chambers, the government did not provide a separate electoral roll for the Turkish-Cypriots to exercise their voting rights which were a constitutional requirement under the 1960 Constitution. His subsequent application to the Supreme Court was also rejected on the ground that a democratic system does not allow the Court to make constitutional reform which would also be an act against the separation of powers on which the Constitution is based. Additionally, the Court stated that the applicant cannot rely on the doctrine of necessity because the judiciary's work is to determine the constitutionality of laws; not to undertake the work of legislature or to tackle the constitutional statutes. Therefore, the Court dismissed the application.

Before the ECtHR, the applicant argued that the Supreme Court, instead of applying the doctrine of necessity, interpreted the constitution and relevant legislation in a restrictive manner. In return, the government invoked the margin of appreciation, claiming

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[237] Chapter III,Part II.A.

[238] Article 3 of Protocol No.1: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

that it had not been the electoral system, but rather the absence of the Turkish-Cypriot community that prevented the applicant from voting in his capacity as a member of the Turkish-Cypriot community for the legislature. The ECtHR, after reviewing the general principles of the margin of appreciation [para 25] and acknowledging its application in some cases [para 28], noted that the regulations should not exclude some persons from political life; thus, Article 3 of Protocol No.1 is violated. As for the violation of Article 14 of the Convention, the applicant claimed that he is discriminated against from voting rights due to his national origin. The ECtHR stated that although States enjoy a margin of appreciation, when differential treatment "*has no objective and reasonable justification"* or if there is not a *"reasonable relationship of proportionality between the means employed and the aim sought to be realised*", then, the treatment is discriminatory [para 34]. In the present Case, the Court found an inequality of treatment in the enjoyment of the voting rights due to the applicant's national origin and thus, a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No.1. Finally, the Court advised the Cypriot Government to take measures and fulfil their Convention obligations in order to secure the right to vote.

The case was a clear indicator to show the arbitrariness of the unrepresentative Supreme Court in applying or not applying the doctrine of necessity and abuse the legal system for the wishes of government. If the Supreme Court wished to grant the electoral right to the applicant, it could easily invoke the doctrine of necessity, as a traditional route and provide the basic human right. However, although in *M.Ibrahim* the doctrine applied to change the constitutional system as a whole, in this case, the Court, ironically, declared its inability to make *constitutional reform.* The ECtHR's decision was a positive contribution to redress the violation of the Turkish-Cypriots' rights in the post-1964 era. However, at the same time, the ECtHR, in a way, legitimated the doctrine, and the electoral law in which the Turkish-Cypriots cannot vote in a separate electoral roll which was a constitutional requirement until its suspension.[239] As Constantinou rightfully argued the ECHR *reversed an exception by normalizing another exception which allows the "democratic" rationale for the post-1963 state of exception to continue.*[240] However, as Trimikliniotis stated the ECtHR's decision does not mean that *"the end of the road for the*

[239] C.M.Constantinou, On the Cypriot States of Exception, *International Political Sociology* (2008)2

[240] Ibid

de-legitimization process of the law of necessity has been reached".[241] Therefore, the Aziz Case demonstrated the Greek-Cypriot judges' ethnic bias towards the Turkish-Cypriot applicants once more; and so, their failure in protecting their fundamental human rights regarding their electoral rights. This again reminds the dangers of the unrepresentative court which might operate on the basis of ethnic bias of local judges towards the *other ethnicity*. Additionally, the case also revealed the necessity of formulating a consociational arrangement which provides rights and representation to all existing communities (as well as to the smaller ones) in order for the consociational system to be accepted as legitimate and democratic, and not to collapse as a result of a challenge in a court.[242]

V. Conclusion

In this chapter, the functioning of the ethnically diverse Constitutional Court under the 1960 Constitution of the RoC is examined. The 1960 Constitution was designed to accommodate the different ethnic interests of the two ethnic communities and it was a compromise document between *Enosis and Taksim* and also between international interests. This *peace agreement constitution* aimed to provide ethnic balance between the Greek and Turkish Cypriots under the principles of consociational democracy and so, stable democracy and peace. Therefore, the partnership was required for the government to function smoothly. However, within a short time, this ethnic partnership proved to be problematic and the Constitutional Court was called upon to resolve ethno-political tensions under the guise of constitutional disputes.

The judicial branch under the 1960 Constitution had the characteristics of consociational design and it was ethnically diverse with the presence of an international judge. Although the diverse design was deemed necessary for the judiciary's perceived legitimacy and impartiality, in other words, for the public trust, the Court's functioning proved the contrary. The analysis of the two landmark constitutional court cases revealed problems in maintaining local judges' impartiality.

The *Municipalities* cases revealed the ethnic bias of the local judges, both Greek-Cypriot and Turkish-Cypriot judges when their community interests were at stake. Judges from both communities engaged in substantive representation of their communities and

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[241] N. Trimikliniotis (2007),The Cypriot 'Doctrine of Necessity, Politis (Cypriot Daily), September 2 cited in *Supra* fn.239, C.M.Constantinou

[242] In relation to this point, see Sejdic&Finci Case in Chapter V,Part IV.F.

split along ethnic lines. It is understood that the local judges were not able to transcend their ethnic identity because the *Municipalities* cases were more about the political aims of the respective Greek-Cypriot and Turkish-Cypriot leadership as they were in conflict in relation to the establishment of the separate Turkish-Cypriot municipalities. Still, the Court was able to issue the correct decision due to its diverse composition with an international judge. However, the dissenting opinions of the local judges, issued for the first time, showed that they were heavily influenced by the deterioration of the political conditions and were shadowed with political interests. In return, dissenting opinions also had a negative impact on the political conditions. Nevertheless, this case demonstrated the importance of a diverse constitutional court and especially the necessity of the international judge both in reaching the correct decision and also avoiding a deadlock due to the local judges' ethnic voting. However, this case sparked the ethnic conflict which had repercussions on another case, that of *Mustafa Ibrahim.*

Mustafa Ibrahim provided the evidence of how detrimental the unrepresentative constitutional court composition could be for the constitutional and political order of the ethnically divided society. The newly established unrepresentative Supreme Court's misapplication of the doctrine of the necessity, and the unilaterally and the unconstitutionally enacted Law 33/1964, not only abolished ethnic diversity in the judiciary but also abolished the consociational design *in toto.* Thereby, the Court caused irreversible consequences on the constitutional order by suspending Turkish-Cypriots' rights and representation. The Greek-Cypriot judges' judicial behaviour and the Court's decision in this case were far from impartial. Although the *Municipalities case* has also revealed the ethnic bias of local judges, *Mustafa Ibrahim* has put these ethnic prejudices to the spotlight as the constitutional order has undergone massive changes after the implementation of the doctrine of necessity. Nevertheless, both cases constitute evidence as to why ethically divided societies need a diverse judiciary with international judges in their constitutional court. The hypothesis may be made that were the Court ethnically diverse, the Republic would not have undergone massive political/constitutional changes and would not have abolished the Turkish-Cypriot members/judges in the government institutions.

Finally, the Aziz Case before the ECtHR demonstrated the arbitrary application of the doctrine of necessity by the Greek-Cypriot judges in the Supreme Court, allowing the constitutional system to operate on the basis of human rights violations of the Turkish-Cypriots regarding their voting rights. The ECtHR acknowledged the discriminatory

treatment and found violation of the electoral rights; however, at the same time, the ECtHR's decision revealed its recognition of the doctrine of necessity in the constitutional order of the RoC. This case also emphasized how non-representative constitutional courts can be used as an instrument of oppression in times of constitutional crisis and/or in the post-conflict era. Therefore, it is argued that the diverse composition of the constitutional court is still necessary in ethnically divided societies because of the Court's role in resolving inherently political cases and its potential contribution to the moderation of ethnic tensions, even though the Court's failure was observed in the case-study of the RoC.

Chapter V. The functioning of the ethnically composed Constitutional Court of Bosnia-Herzegovina

I. Introduction

This chapter presents the second case study of this thesis. It examines the functioning of the ethnically diverse Bosnia-Herzegovina Constitutional Court and its role in the democratization process through the analysis of selected cases. It aims to demonstrate the application of the theoretical framework of consociational democracy[1] to the Bosnia-Herzegovina context and the functioning of the Constitutional Court under this design. The chapter also demonstrates how the judicial decision-making process and the decisions of the Constitutional Court are influenced by its own composition in constitutional review cases, and also sketches the relationship between the Court's composition and judicial independence and impartiality. This chapter argues that the diverse composition of the Constitutional Court in the ethnically divided BiH society is necessary in order to achieve stable democracy, peace-building and reconstructing the multi-ethnic society due to the impact of the Constitutional Court's decisions on the political order.

The first part of the chapter provides the political and historical background that led to the General Framework Agreement for Peace in Bosnia-Herzegovina. By doing so, it is aimed to show how the conflict was settled by the establishment of a new state based on the principles of power-sharing democracy and the important role and application of the consociational principle of representation in composing government institutions, especially the Constitutional Court. Then, the chapter presents and discusses the power-sharing structure of the BiH government and the *sui generis* presence and role of the Office of the High Representative in the constitutional system. By this, an attempt is made to show the internationalization process of the BiH's constitution-drafting and the problems associated with it as well as assessing the shortcomings of the BiH Constitution.

The next part focuses on the composition of the Constitutional Court and the judicial appointments process which determines the Court's composition. The political influence on the judicial appointments, the subsequent appointments of nationalist judges and the conflict between judicial diversity and judges' impartiality is also examined. At a

[1] Chapter II,Part II.A.

later stage, the Court's controversial relationship with the OHR is also discussed. Finally, the difficulty of maintaining judicial independence and the impartiality of the local judges is analysed through the case of the dismissed Constitutional Court judge Krstan Simic (No K-I-15/10). By this examination, it is aimed to show how the judicial appointments, judicial diversity and judicial independence and impartiality are all linked to one another and also the dangers of an unrepresentative court mainly because of the prevalent identity politics in the BiH State.[2]

In the third part, the chapter examines the role and functioning of the Constitutional Court and analyses the impact of the Court decisions in the democracy-building process in the post-conflict era. Four important constitutional court cases are analysed in order to emphasize the importance of the Court's diverse composition in constitutional review cases. While undertaking this work, the interpretation of local judges in the politically motivated constitutional review cases[3] and the role of the ethnic background on judges' decision-making process is analysed by analysing their voting patterns from selected case law. Also, the re-composition of the court without international judges is discussed. Besides, the Sejdic and Finci Case [Applications Nos. 27996/06 and 34836/06] that was heard by the European Court of Human Rights (ECtHR) is also analysed to extrapolate lessons for the composition of the judiciary based on constitutional quotas, presenting the challenges as they are reflected in practice.

Finally, the Supreme Constitutional Court under the 1960 Constitution of Cyprus and the Constitutional Court under the 1995 Dayton Constitution are compared to draw lessons from one another.

It is shown that the BiH Constitutional Court has an important political power in influencing political stability. The Court is capable of being the possible source of either reconciliation or further conflict, depending on the decision it delivers. Its positive or negative contribution to the process also depends on its decisions that are taken by diverse composition. Therefore, this chapter concludes that the Court's diverse composition is essential in the post-conflict peace-building process due to the Court's role in resolving

[2] For politics of identity, see Chaper I,Part III.A.

[3] Chapter III, Part II.A

ethno-political disputes, despite the problems faced with maintaining judges' independence and impartiality.

II. The General Framework Agreement for Peace in Bosnia-Herzegovina, known as the Dayton Agreement (1995)

A. Political Background of the Dayton Agreement: Socialist Federal Republic of Yugoslavia and the Ethno-nationalist War

The state of BiH was established as a result of the break-up of the former Socialist Federal Republic of Yugoslavia (SFRY). Before its collapse, the SFRY was composed of six Socialist Republics (SRs). These were the SR of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and they all had a considerable amount of governmental autonomy in their internal administration.[4] In each of these SRs, there were minority populations of other ethnic groups and ethnic diversity was a prominent feature of the former SFRY.[5] These ethnic groups lived side-by-side most of the time in harmony but they were not immune to ethno-nationalist competition.[6] It was believed that these ethno-nationalist tendencies have not become salient due to the economic strength of the country,[7] due to socialism, and also due to the strong leadership of the President Josip Broz Tito.[8] The integrity of the State was maintained under the idea/ideal of *"socialist man"* which served to allay the ethnic, national, religious and cultural differences of the Yugoslavian communities.[9] However, the collapse of the Soviets and the Communist Bloc -which Yugoslavia had close political and cultural ties with- in 1989, and economic problems influenced the relationship between the ethnic groups. Consequently, ethno-

4 D. Feldman, The Nature and Effects of Constitutional Rights in Post-Conflict Bosnia-Herzegovina in C. Harvey and A. Schwartz, *Rights in Divided Societies*, Human Rights Law in Perspective, Hart Publishing, 2012

5 Ibid

6 Ibid

7 S.Woodward, *Balkan Tragedy, Chaos and Dissolution After the Cold War*, Brooking Ins.Press,1995

8 *Supra* fn.4,D.Feldman

9 Ibid

nationalist tensions resurfaced and the SRs aimed to obtain their independence from the SFRY.[10]

The government of the SR of Bosnia-Herzegovina declared sovereignty on the 15th October 1991.[11] This was followed by a referendum for independence (1st March, 1992) and subsequent declaration of independence (3rd March 1992)[12] from Yugoslavia. The United States and a number of European states recognized the new state on the 6th April 1992.[13] However, Bosnian Serbs, who were loyal to SFRY, boycotted the referendum and the declaration of independence.[14] Shortly after, violence erupted between the Serbs, Croats and Bosniacs and led to generalised warfare in the territory of Bosnia-Herzegovina. The war lasted for three and a half years and led to the death of a quarter of a million people.

B. The Dayton Agreement, 1995

The Dayton Agreement was signed in Dayton on the 14th December 1995 between the Republic of Bosnia-Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.[15] It recognized the territorial integrity and the political independence of the new state, Bosnia-Herzegovina (BiH).[16] According to the agreement, BiH is composed of two Entities: The Federation of Bosnia-Herzegovina (FBiH) and the Republika Srpska (RS). The Entities have the power and authority which is not assigned to the state-wide institutions and they also have self-governing institutions, including the legislative,

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[10] Ibid

[11] The World Factbook, Central Intelligence Agency, accessed by: https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/geos/bk.html on the 2nd June 2015

[12] Approximately, 63.4 % of the population voted in the referendum and 99.7 % of the voters voted for independence; A Report Prepared by the Staff of the Commission on Security and Cooperation in Europe, The Referendum on Independence in Bosnia-Herzegovina February 29-March 1, 1992, 102nd Congress, the 1st Session

[13] *Supra* fn.4,D.Feldman

[14] Ibid

[15] United Nations, General Assembly Security Council, Fiftieth Session, Fiftieth Year, Agenda item 28, The Situation in Bosnia and Herzegovina, A/50/79C S/1995/999, 30 November 1995

[16] The General Framework Agreement for Peace in Bosnia-Herzegovina, Article I

executive and judiciary.[17] The central state has purely those powers which are necessary to constitute and exercise external aspects of state sovereignty.[18] Therefore, the power of the BiH State is broadly decentralized.

C. The Government Structure under the BiH Constitution

Annex 4 of the Dayton Agreement provides the Constitution of BiH. The Constitution reflects a traditional example of power-sharing settlement (with consociational, federal and confederal elements) in which the three main ethnic groups are entrusted with power-sharing provisions, self-governing rights and representation in government branches.[19]

The application of consociational democracy can be seen in the composition of the executive branch: the Executive power of the state is carried out by its Presidency which is composed of three members: one Bosniac and one Croat who are elected directly from the territory of the FBiH and one Serb who is elected directly from the territory of the RS.[20] In order to take a decision, consensus is required; this is the case in consociational settlements.

Moreover, the legislature also exhibits the features of the consociational (and federal) design because it is bi-cameral.[21] The legislature consists of two parliamentary chambers: the House of Peoples and the House of Representatives;[22] any legislation must be passed by both houses in order to be enacted.[23] The House of Peoples is composed of 15 Delegates, 2/3 from the FBiH (five Bosniacs and five Croats) and 1/3 from the RS (five

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17 Sebastian S., Leaving Dayton Behind, Constitutional Reform in Bosnia and Herzegovina, 46, Working Paper, FRIDE, November 2007

18 Y. P. Ghai, Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy in A. Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy,* Oxford University Press, 2002

19 Chapter II,Part II.A.

20 Annex 4, Article V

21 Article IV (3)(c)

22 Article IV

23 Article IV (3)(c)

Serbs).[24] The Delegates are elected by the legislative bodies of the Entities. The House of Representatives has 42 members; 28 members from the FBiH and 14 members from the RS and they are elected in entity-wide polls.[25]

Table 1. The government structure of Bosnia-Herzegovina

BiH Government Structure		
	Consociational features	**Federal features**
Executive: Presidency (1+1+1)	x	x
Legislature: Parliamentary Assembly	x (House of Peoples and House of Representatives)	x (Bicameral)
Judiciary: Constitutional Court	x	

The judicial power is exercised by the BiH Constitutional Court. The Constitutional Court is responsible to uphold the Constitution.[26] The Court is composed of nine judges: four selected by the House of Representatives of the FBiH, two by the National Assembly of the RS and three appointed by the President of the ECtHR, after consultation with the BiH Presidency.[27] Although the six national judges who are selected by the Entities are not constitutionally required to have any particular ethnic background, in practice two judges are Bosniacs, two Croats and two Serbs.[28] The other three international judges should not come from BiH or any neighbouring state.[29]

The Court is entrusted with constitutional review cases[30] and has jurisdiction to decide any dispute under the Constitution between the Entities, or between BiH and an

[24] Article IV(1)

[25] Article IV (2)(a)

[26] Article VI(3)

[27] Article VI (1)

[28] S. Choudhry and R. Stacey, Independent or Dependent? Constitutional Courts in Divided Societies in C. Harvey and A. Schwartz, *Rights in Divided Societies*, Human Rights Law in Perspective, Hart Publishing, 2012

[29] Article VI (1)(b)

[30] Chapter III,Part II.A.

Entity or Entities, or between the institutions of BiH.[31] An Entity's decision to establish a special parallel relationship with a neighbouring state, including issues of sovereignty and territorial integrity of BiH is also included in the Court's jurisdiction.[32] The Court is also responsible to decide on the constitutionality of any provision of an Entity's constitution or law.[33] Finally, the Court has jurisdiction to decide whether a law on whose validity that court's decision depends is compatible with the Constitution, the ECHR and its protocols, the laws of BiH, or a general rule of public international law.[34] The specific group of people [which are politicians] that can refer these issues to the Court is identified by the Constitution.[35]

Table 2. The Judiciary

Judiciary				
Composition:	2 Croat	2 Serb	2 Bosniac	3 International Judges
Jurisdiction:	Constitutional Review Cases			
Appointments:	By the Parliament		-	by the President of the ECtHR

As can be seen from the constitutional design of the government, all governmental power is shared between the three ethnic groups in all government institutions and the BiH Constitution does not allow one ethnic group to monopolize the power.

D. The Office of the High Representative (OHR)

Annex 10 of the Dayton Agreement, namely, the Agreement on the Civilian Implementation of the Peace Settlement established the Office of the Hight Representative.[36] The OHR's main role, *inter alia,* is to supervise and facilitate the implementation of the civilian aspects of the peace settlement.[37] The OHR originally was

31 Article VI(3)(a)

32 Article VI(3)(a)

33 Article VI(3)(a)

34 Article IV(3)(c)

35 Article IV(3)(a)

36 Hereinafter OHR

37 Annex X, Article II(1) Annex X, Article II(1)

not exercising legally binding powers and its powers were deemed insufficient to move the peace process forward. However, since the decision of the Peace Implementation Council in Bonn[38] on the 10th December 1997, more powers have been entrusted to the OHR and it has started to intervene more often in the domestic order of BiH by imposing its decrees and/or regulations.[39] Therefore, although the OHR is not a branch of government, but only a representative of the international community, its interference in BiH politics has rendered it superior to other government branches after the Bonn Powers and it has started to develop a controversial relationship with all government branches, including the judiciary.

E. Assessment of the Dayton Agreement Constitution and its Critics

The BiH Constitution is an example of the application of consociational democracy with some modifications. It embeds all principles of consociational democracy and also envisages some elements of federalism[40] and confederalism.[41] The common characteristics of these constitutional designs are that they all rely on a sharing of governmental power. Previously, it was shown that consociational democracy offers reasonable prospects for divided societies to achieve stable democracy[42] and the case of BiH facilitates the implementation of the conscociational regime, as there were (and still are) politically salient ethno-national and religious divisions in society. In the institutional framework of the BiH Constitution, the principle of grand coalition can be seen in the composition of the executive which is composed of three members from three ethnic groups. The right of veto in vital interest areas was entrusted to all three ethnic groups as well.[43] Moreover, the group autonomy principle is evident in the autonomy of the groups which were

[38] Hereinafter, the Bonn Powers

[39] C. McCrudden and B. O'Leary, *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

[40] C.Steiner and N.Ademovic, *Constitution of Bosnia and Herzegovina, Commentary*, Konrad Adenauer Stiftung e.v.,Rule of Law Program South-East Europe, Sarajevo, 2010

[41] J. Tonge, *Comparative Peace Process*, *Confederalism and Consociation in Bosnia-Herzegovina,* Polity Press, 2014; Chapter 7; S.Bose, Contested Lands, Israel-Palestine, Kashmir, Bosnia, Cyprus and Sri Lanka, Harvard University Press, Cambridge, London,2007

[42] Chapter II, Part II.A.B.

[43] Article V(2)(d)

concentrated territorially in the Entities. The Serbs are autonomous in the territory of Republika Srpska, and the Croats and Bosniacs have considerable autonomy in the cantons of the Federation of Bosnia-Herzegovina. The Constitution also accommodates the group rights of Bosniacs, Serbs and Croats by pre-determining them and granting them proportional representation in the central government institutions. The principle of representation is facilitated through the territorial quotas and provides representation to all ethnic groups in the government branches. By applying this consociational system in the BiH State, all groups are required to share governmental power and are prevented from using majoritarian democracy[44] to exercise control over public institutions and dominate other (smaller) groups. Therefore, it can be said that ethnic representation is at the heart of the BiH Constitution. This power-sharing system was a compromise between the three conflicted ethnic groups due to the need of providing balance between themselves.

Besides the consociational principles, some features of federalism can be seen in the territorial arrangements due to the territorial autonomy of the Entities which requires two levels of governance in the administration: one in the Entity level and one in the central government.[45] Those who argue that the BiH Constitution has confederal elements emphasize the right of the RS to establish a special parallel relationship with any country.[46] Nevertheless, the BiH Entities cannot be considered as a State on their own which the case is in the confederal designs.

The general criticism of consociational democracy that it conflicts with individual human rights[47] was also directed against the BiH consociational system as a result of the constitutional quotas. In the post-conflict period, as a result of previously deeply-entrenched identity politics, the Constitution institutionalized ethnicity and granted rights and representation to the ethnic groups in government institutions[48] as this was vital for the

[44] Chapter II, Part II.C.

[45] Chapter II, Part II.B.

[46] *Supra* fn.41, Tonge and Bose; Article III/2

[47] Chapter II, Part II.A.

[48] F. Bieber, Institutionalizing Ethnicity in the Western Balkans: managing change in deeply divided soceities, Flensbutg, 2004 (ECMI Working Paper, 19)

survival of all groups;[49] thus, group rights were prevalent. Besides group rights, the BiH Constitution also provided extensive protections for individual human rights by establishing the Human Rights Commission,[50] by the entrenchment of the bill of rights and the principle of non-discrimination[51] and also by recognizing the priority of the ECHR and its Protocols in BiH.[52] Human rights have several important roles in post-conflict societies. They are means to provide guarantees for the protection of individuals against discrimination because an extreme form of discrimination means war.[53] By the protection of human rights a sense of security is provided for the previously conflicted groups in order to build trust and cooperation.[54] Seen from this perspective, both group rights and human rights serve for the same purpose of providing security and thus, should have almost the same value. However, the mutual existence of human and group rights exposes continuous tensions between the two.[55] Nevertheless, rather than focusing on the clash between these two different forms of rights and/or choosing one form of rights over another, the constitutional provisions on group and human rights in the Dayton Constitution must be understood as a compromise between the opposing demands of "*ethnic separation and ethnic cleansing of power*".[56] Without this understanding, the work of the Constitutional Court, in protecting both rights when they clash, cannot be assessed correctly.

Another criticism was directed at the presence and the actions of the OHR. The OHR and/or any other similar office is not familiar to consociational designs and it can only be explained by the internationalisation process that made the Dayton Agreement

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[49] C.Taylor, *Multiculturalism and The Politics of Recognition,* Princeton, Princeton University Press, 1992;p.61

[50] Annex 6

[51] Annex 4,Article II/4

[52] Annex 4, Article II

[53] Parlevliet M.,Bridging the Divide: exploring the relationship between human rights and conflict Management, Centre for Conflict Resolution, Cape Town 11(1), 2002

[54] Supra fn.4, D. Feldman,

[55] Chapter II,Part II.A.

[56] C. Bell, *Peace Agreements and Human Rights,* Oxford University Press, 2003

possible and the need to ensure that BiH is a functioning state. For example, the Council of Europe criticized the OHR's extensive power to enforce its decisions without any accountability and without any obligation to justify their validity or provide any legal recourse.[57] According to the Council, the OHR has been acting as a *supreme institution*, especially after the aforementioned Bonn powers and this does not comply with democratic principles.[58] As such, after the Bonn powers, the OHR has started to pass binding laws and remove locally elected officials from office [if they were deemed to obstruct the implementation of the Dayton Agreement]; in one instance, it imposed a provision to end the rotation principle in the Council of Ministers (in December 2002) on the basis that non-rotation would provide more political stability and in another instance, he dismissed the veto right.[59] These actions were not only unconstitutional but also *un-consociational.* As there was no mechanism to hold the OHR responsible and/or to check the legality of its actions, its actions were not in accordance with the democratic principles of legal accountability.[60] As a consequence, in time, the OHR has developed a controversial relationship with the judiciary as well.

F. Identified Weaknesses of the Constitution

The Dayton Agreement has also been criticized as lacking legitimacy. It was argued that the BiH Constitution is a result of the international law principle of *"state consent",* not as a result of constitutional law principle of *"popular sovereignty"* due to the internationalization process of the Dayton Agreement.[61] It was also stated that due to the constituent power of the international community, the BiH Constitution suffers from a *"legitimacy deficit"* and this deficit has reduced the Constitution's capacity to achieve

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[57] Parliamentary Assembly, Council of Europe, Resolution 1384 (2004)1 Strengthening of democratic institutions in BiH, 23 June 2004 (20th Sitting), Doc.10196, Political Affairs Committee;para.13

[58] Ibid

[59] Belloni R and Deane S., From Belfast to Bosnia: Piecemeal Peace-making and the Role of Institutional Learning, 2005, *Civil Wars*, 7:3

[60] Weller M. and S. Wolff, Bosnia and Herzegovina ten years after Dayton: Lessons for internationalized state building, *Ethnopolitics*, 5:1, (2006)

[61] Grewe C. and Riegner M., Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared, Max Planck Yearbook of UN Law, Vol.15, 2011, Martinus Nijhoff Publishers, Leiden, Boston

significant constitutional functions.[62] Civil society played no role whatsoever in the peace process and the political leaders (who were responsible for the war itself) signed the Dayton Agreement as the *"self-appointed interpreters of the interests of their respective ethnic constituencies"*[63] rather than the representatives of the whole country and the peace process itself.

Similarly, Steiner and Ademovic also criticize the enforcement process of the Constitution as the document was not ratified or approved by the people of BiH who were going to implement it, but rather signed by the Presidents of the Republics of Serbia, Croatia, the new state BiH and two foreign officials.[64] As the peace process was under the control of the international community, the implementation of the Dayton Agreement and its Constitution have undergone serious deadlocks and have required the continuous intervention of the international community under the guise of the OHR, for the stabilization of the political order.[65] Therefore, it is also evident that the Dayton Constitution does not correspond to the *social contract* theory which depends on the original right and/or the will of the sovereign people[66] because the original constituent power of the BiH Constitution was derived from the international actors.

The success of BiH constitutional design in practice is open to debate. The employment of quotas or at least the way it works in BiH, exposes certain problems for the group of people who are recognized as *"Others"* in the Constitution. The group *Others* are either the children of mixed marriages or smaller minority groups or those who did not want to identify themselves as members of any ethnic group. Thus, although the Constitution recognizes territorial quotas, due to the ethnic allocation of the government institutions, *Others* were prevented from election and/or appointment to government institutions because these government posts are assigned only to Serbs, Croats and Bosniacs. As a result, in the last 20 years, no one from *Others* were appointed to the the Constitutional Court. Moreover, the ethnic accommodations of the Constitution caused

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62 Ibid

63 Ibid

64 *Supra* fn.40, C.Steiner and N.Ademovic

65 Ibid

66 Chapter II,Part II.C.

problems for the constituent people who happen to be a minority in one of the territories of the Entities. For example, a Croat or a Bosniac resident in the RS, or a Serb in the FBiH could not be elected to the House of Peoples or to the Presidency, as these posts were reserved to people from majority groups.[67]

Having presented the various shortcomings of the BiH Constitution and their impact on the constitutional order, the focus next is on the Constitutional Court composition and the judicial appointments process which determines this composition.

III. The Constitutional Court of BiH

A. Composition of the Constitutional Court

Through the application of the consociational principle of representation to the judiciary,[68] the members of the three ethnic groups were granted presence in the Constitutional Court. Thereby, the ethnic diversity of the court was ensured constitutionally and the judicial power was shared. The reasoning behind this ethnic diversity was due to the need to provide the public perception of legitimacy to the judiciary. It is also held that only through a diverse composition, the judiciary can gather the public trust of all ethnic groups in the impartiality of the judiciary and reinforce the belief that *justice is done, or at least seen to be done*. Therefore, judicial diversity, in other words, ethnic balance, could contribute both to the court's perceived legitimacy and impartiality.[69]

However, although the presence of all ethnic groups was seen as a requirement to gather public trust, the constitution-drafters, most probably, considered the risk of local judges being prone to be biased as well. As a result, international judges were given place in the court composition as well. Thereby, it is aimed to neutralize or at least lessen the influence of local judges' possible ethnic bias to dominate the decision-making process by the presence of, the numerically superior and the [allegedly] neutral opinion of the international judges. As such, when all international judges vote in the same manner and are supported by two local judges (from the same ethnic background), the decision of the

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[67] This was the case until the implementation of the decision in the Constituent Peoples Case [U5/98].

[68] Chapter II,Part III.D.

[69] Chapter III,Part II.B. and C.

other four local judges from two ethnic groups (who presumably vote in the same manner) would be outvoted and the decision of the international judges (three) would prevail. In such a scenario, what would be prevented was the dominance of the Serb-Croat camp in the decision-making as it was predictable that Bosniac judges would be less likely to vote in a similar pattern with them especially in politically motivated constitutional review cases. This possibility demonstrates that the constitutional arrangements on the Court's design and the concerns on the local judges' impartiality are very much connected. Besides, when the Court's role in politically nuanced constitutional review cases is considered, it becomes obvious that constitution-drafters aimed to lessen the political influence of the local judges on the Court's decisions by including international judges. Nevertheless, as will be shown in the cases analysed below[70] the presence of the international judges could not insulate the Court and its judges from political influence which in the BiH context translates into the protection of ethno-political interests.

The presence of international judges has been criticized as against national sovereignty[71] because they would have the power to review the constitutionality of legislation which passed as an exercise of "popular sovereignty".[72] The presence of the international judges has also been criticized as their existence is a result of the internationalization process of constitution-drafting. Although it is recognized that local ownership of institutions is necessary if a stable democracy is the real goal in the longer term,[73] it is also stated that the removal of international judges would not serve to increase BiH's sovereignty; rather it would weaken the independence of the Court because the ECtHR-appointed international judges would bring more credibility and integrity that ought not to be sacrificed.[74] Nevertheless, the Constitution leaves an open door to change the composition of the Court by stating that after the initial appointment of judges, the

[70] See, Case [U 5-98] and [U-3/13]

[71] It was claimed that the Russian delegates in Contact Group during the negotiations in Dayton voiced this concern but no attention was paid to them; *Supra* fn.40, C. Steiner and N. Ademovic

[72] J.Marko, Foreign judges: a European perspective in S.N.M.Young and Y.Ghai, Hong Kong's Court of Final Appeal (ed.), Cambridge University Press, 2014; p.637

[73] *Supra* fn.59.,Belloni and Diane

[74] International Crisis Group, Courting Disaster: The Misrule of Law in Bosnia-Herzegovina, Balkans Report, 127, 25 March 2002

Parliamentary Assembly may provide a different method of selection of the three international judges who are selected by the President of the ECtHR.[75] However, the BiH Parliamentary has not passed any legislation in this direction although the Serb politicians, especially the President of RS, continuously protest the presence of international judges.[76]

B. Judicial appointment of local judges and its relation to judicial independence and impartiality

The appointment process of local judges to the Constitutional Court is a matter of concern as it does not show any evidence of objective criteria and causes doubts on the judges' qualifications, independence, impartiality and integrity. This is partly due to the body responsible for judicial appointments and partly due to the wording of the Constitution which defines very vague criteria for the appointments.

The Constitutional Court judges are appointed by the Parliaments of the Entities,[77] on the basis of the territorial quotas. The compositions of these legislative bodies in both Entities are populated with nationalist politicians as nationalism was also prevalent after the war.[78] Consequently, all political institutions in both Entities are controlled by ethno-nationalist politicians who have an influence on judicial appointments.[79] Thereby, the judicial appointments give the power to the political parties to select the judge who is close to their political views or whom they consider as someone who would protect their ethno-political interests.[80] Although Parliament does not always appoint candidates who lack the best qualifications, the expectation on the part of the politicians (the protection of the interests of the ethnic community) and the awareness of this expectation by the appointed judge leads to the appointment of judges who have ethno-nationalist tendencies at the

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[75] Article VI (1)(d)

[76] Freedom House, Bosnia-Herzegovina, accessed on https://freedomhouse.org/report/freedom-world/2018/bosnia-and-herzegovina 5 June 2018

[77] Article VI (1)(a)

[78] Aolain F.N.,The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis, 19 *Mich. J. Int'l Law*, 957, 1997-1997

[79] Ibid

[80] Centre for Investigative Reporting, Politics Intrudes on Judge Selection, 23 June 2008, accessed by:https://www.cin.ba/en/mijesanje-politike-u-izbor-sudija/ on the 17th July, 2016

onset.[81] Therefore, by the distribution of the ethnic seats only to those candidates that would support their community, the composition of the Constitutional Court has become a mere reflection of nationalist politics.

The second problem of judicial appointments is due to the vague criterion that is sought in the judgeship candidates. The only constitutional requirement for the appointment is to be a *"distinguished jurist of high moral standing"*[82] and there is no other objective criterion to be relied on the appointments. Although it was previously argued[83] that the merit principle is also vague and serves for the appointment of a person from an advantaged group, at least it provides some guidance, such as education, qualification and/or experience in judicial appointments. The criterion of "*moral standard*" is subjective and lacks a clear definition for the qualifications.[84] Moral standard before the war might mean someone who is non-nationalist and serves for Yugoslavia's integrity whereas in the post-war BiH context, a moral standard can refer to someone who is nationalist and protect the ethno-national interests of their community. For example, the internationally-sponsored Independent Judicial Commission (IJC) -which was established by the OHR to supervise the judicial and legal reforms- stated that in BiH 90% of sitting judges and 77% of sitting prosecutors gained office not because of their qualifications but because of the political parties' control of judicial appointments.[85] Therefore, the *moral standard* is a very slippery term as it does not have an agreed meaning and has usually led to the selection of partisan candidates over qualified ones.[86] Consequently, judicial appointments by Parliament together with a vague criterion have created suspicion on the qualities as well as the

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[81] Ibid

[82] Article VI (1)(b)

[83] Chapter III, Part III.A.

[84] Especially in relation to divided societies, whom some people call *"hero"* is whom the other people call *"terrorist".* See also, Grazidei S., Power-Sharing Courts, *Contemporary South-eastern Europe*, 2016(3); He states that if judges agree with other judges from the other community, they are called "*traitors"*

[85] The OHR, Discussion Paper on the Selection Process For the Interim High Judicial Council;p.3 accessed by: https://www.esiweb.org/pdf/esi_europeanraj_judicialreform_id_2.pdf On the 03/08/2017

[86] *Supra* fn.80,Centre for Investigative Reporting

independence and impartiality of the local judges because of the assumption that their decision-making might be very much influenced by the politicians who appointed them.

In June 2008, the then OHR Miroslav Lajčak (2007-2009) wrote a letter to the Parliamentary Commission of BiH, a body responsible to assess the judge candidates, and asked the Commission to select the candidates on objective criteria such as merit which includes education, moral integrity, ability, efficiency and experience.[87] He also stated that a *"better definition of qualifications"* is needed for the transparency of judge selection and also for the integrity of the Constitutional Court.[88] However, the OHR's recommendations were not followed and there are examples that show that judicial appointments are still based on the political connections between the politicians and the appointee as many appointees had either political affiliations or a previous political background in nationalist political parties rather than good legal qualifications.[89]

The appointment of Mirsad Ceman by the FBiH is a good example. Mr. Ceman was considered as the candidate who had the least professional qualifications and minimum experience compared to the other candidates.[90] But he was a long-time and high official Member of Parliament of the political party SDA (Democratic Action Party) in FBiH.[91] He was appointed as a judge to the Constitutional Court in June 2008, after eliminating two more professionally experienced candidates.[92] After his appointment, Ceman himself stated that *"politics are not irrelevant because members of Parliament choose the judge",* but adding that he does not believe that he was appointed because of his political

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87 Ibid

88 Ibid

89 Ibid

90 Centre for Investigative Reporting, MPs Again Put Politics over Qualifications for Judgeship, 30 June 2008, accessed by, https://www.cin.ba/en/politicka-pripadnost-vaznija-od-strucnosti/ on the 15th July, 2016

91 Ibid; SDA is the right-wing nationalist party.

92 Ibid; These were Damir Arnaut and Faris Vehabović. Arnout holds a PhD from the USA and he was the advisor of constitutional and legal matters for BiH Presidency member Haris Silajdžić. Vehabović was a former lawyer for the office of the Human Rights Ombudsman, a former registrar for the BiH Constitutional Court and a judge in the Constitutional Court of FBiH. Compared to these two distinguished legal experts, Ceman spent his legal career in a spark plug company.

connections.[93] After Ceman's appointment many parliament members pointed out that his appointment was solely due to his political background; some believed that his political experience would make him a good judge, others hoped that he is able to distinguish legal arguments from political desires.[94] Although it cannot be definitively claimed that he will not be independent and impartial, his appointment over other two better qualified candidates due to his political career in a nationalist political party has created suspicions from the beginning about his judicial impartiality and competence. As such, Arnaut stated that the problem in BiH is that political affiliation is the "sole" criterion in determining the election of judges.[95] Similarly, Vehabović stated that this political influence on the appointments has become *"an epidemic fatal"* in the functioning of the Court to an extent that it also harms public trust.[96] It has, however, been suggested that the continuous appointment of right-wing nationalist judges who did not hold the professional pre-requisites for the job was also due to the immigration of the qualified judges who left the country during the war.[97]

The Judicial System Assessment Program (JSAP) found that during the period of 1998-2000 *"judges were not independent, did not consider themselves independent and were not treated as such by other institutions",* adding that one reason for the problem was the judicial appointments process.[98] Local politicians exert influence *"in a surprisingly blatant manner"* over the judiciary by sending letters about specific cases.[99] However, when judges act independently and professionally while hearing the cases involving important figures, they face dismissal attempts and/or physical assault.[100] Both Freedom

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[93] Ibid

[94] Ibid

[95] Ibid

[96] Ibid

[97] V.Devine and H.Mathisen, Corruption in Bosnia and Herzegovina, Options for Swedish Development Cooperation 2006-2010, CMI, CHR:Michelsen Institute,2005

[98] Ibid

[99] Ibid

[100] N. Kahvedzic and S. Losic, Corruption in Bosnia and Herzegovina, Master thesis in Economics Department of Management and Engineering, The University of Linkoping, 2010

House[101] and the Organization for Security and Cooperation in Europe advised political representatives to refrain from exerting any improper influence or pressure to the judges, court and the judicial process, and to respect to the independence and integrity of the BiH judiciary.[102]

C. The judicial independence of the Constitutional Court judges and the Court's relationship with the OHR

The Constitutional Court judges' individual independence and the Court's institutional independence have been under threat by the OHR. After the above-mentioned Bonn powers, the OHR started to interfere in the functioning of the judiciary by issuing decrees without any constitutional authority to do so. For example, the OHR dismissed/prevented the appointment of two Serb judges to the Constitutional Court,[103] although he did not have such an authority, and led the RS to complain regarding its decision to the UN.[104] In another instance, the OHR forced the international judges of the Court to dismiss the Court's President by making telephone calls to at least one international judge.[105] However, when the OHR's pressure was not supported by the three international judges, he issued an order and reduced their salaries.[106] The OHR's actions are disastrous for the independence of judges, as it is almost universally recognized that

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101 Freedom House, Judicial Framework and Independence, Bosnia and Herzegovina, 2008 accessed by https://freedomhouse.org/report/nations-transit/2008/bosnia-and-herzegovina on the 22nd July, 2016

102 Organization for Security and Cooperation in Europe, Spot Report, Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions, Mission to BiH, December 2009

103 *Supra* fn.60 Weller M. and S. Wolff

104 The 5th Report of RS to the UN SC: Reply to High Representative's Letter, and Special Report of 4 May 2011 to the UNSC, May 2011; BiH Dayton Project, The High Representative's Assault on Judicial Independence, RS Government, April 16, 2011 accessed by http://www.bihdaytonproject.com/?p=321 on the 20th July, 2016

105 M.Parish, *A free city in the Balkans:*reconstructing a divided society in Bosnia, I.B.Tauris, London 2010

106 Ibid

judges' salaries are part of their judicial independence.[107] These examples show under which circumstances the constitutional court judges function.

In their influential article, Knaus and Martin label the OHR as the *"European Raj"* and depict the excessive influence of the OHR on the country and also on the judiciary in the form of *judicial reform.*[108] They gave the OHR's unsuccessful, so-called judicial reform initiative as an example which aimed to clean the Bosnian judiciary from corrupt judges, supervise the judicial reform and restore public confidence in 2000.[109] However, by 2002, only six judges and prosecutors were dismissed in the whole country and it became clear that this reform did not cause the intended results[110] because it was believed that corruption in the judiciary was much more prevalent. After this failed initiative the OHR decreed that all members of the judiciary should resign and reapply, including the judges who had been assured life tenure.[111] This OHR's decision has also been reported as a threat to judicial independence by the Helsinki Committee.[112] Although the OHR did not fire the Constitutional Court judges, there is no guarantee that it will not do so in the future.

Similarly, the Council of Europe criticized these actions of the OHR on the basis that the removal of judges should be carried out by a disciplinary procedure which was already included in the legislation previously by the OHR itself.[113] The Council also noted that if the major problems were not being solved in a constitutional and legal manner by the international community itself, they should not expect the local politicians to abide by

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[107] A.Seibert-Fohr (ed.), *Judicial Independence in Transition, Strengthening the Rule of Law in OSCE region,*Springer Berlin Heidelberg, 2012

[108] G.Knaus & F. Martin, Travails of the European Raj, *Journal of Democracy*, Vol.14, Number 3, July 2003

[109] Ibid

[110] Ibid

[111] Ibid

[112] Helsinki Committee for Human Rights in Bosnia and Herzegovina, Report on the State of Human Rights in BiH; Analysis for the period from January to December 2003 cited in *Supra* fn.104*,* BiH Dayton Project

[113] Supra fn.57, Council of Europe, Resolution 1384(2004)1

these principles.[114] The OHR's decision and/or the procedures, such as firing all judges, is against the rule of law; this is because one of the key components of the rule of law is predictability.[115] Moreover, these actions are also against the institutional independence of the judiciary, which is also a necessary component of the rule of law. Its decrees showed that judges do not work under a safe environment independently as they are under the pressure of the OHR's possible actions. Although eliminating corrupt judges could be a positive contribution to public confidence in the justice system, the procedure that the OHR followed and its unaccountable manner are not in compliance with the principles of the rule of law. The OHR's actions in relation to the judiciary have also been criticized by the RS[116], the Council of Europe,[117], the International Crisis Group,[118] the Minority Rights Group[119] and the Venice Commission.[120]

In relation to the Constitutional Court judges, the OHR continued to cause some controversies by also intervening to the work of the judges and to the functioning of the Constitutional Court. Prof. Joseph Marko who was a judge in the BiH Constitutional Court stated that during his term in the Court, the OHR contacted Constitutional Court judges many times to make his wishes known.[121] Steiner and Ademovic also stated that the Constitutional Court judges, as a usual practice, have been taking the OHR's opinion

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[114] Ibid

[115] As Bingham stated, principles of the rule of law, *inter alia*, include: predictability of law, non-discretionary practice of officials, fairness of law, judicial review, respect for fundamental human rights, accessibility of disputes resolution and fair trial; T. Bingham, *The Rule of Law,* London, Penguin, 2010

[116] Supra fn.104, The 5th Report of Republika Srpska to the UN SC

[117] ibid; Also,Supra fn.57, Council of Europe, Resolution 1384 (2004)1

[118] *Supra* fn.74, International Crisis Group

[119] Minority Rights Group International, The status of constituent peoples and minorities in Bosnia and Herzegovina, Workshop, Published April 2003

[120] European Commission for Democracy Through Law (Venice Commission), Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, 91st Plenary Session (Venice, 15-16 June 2012), Strasbourg, 18 June 2012, Opinion No.648/2011, CDL-AD(2012)014

[121] *Supra* fn.104, BiH Dayton Project

before making a decision in cases where the power of the OHR is at stake;[122] something which is against the fair trial principles. In one case, when the Constitutional Court did not seek the OHR's opinion, the OHR intervened before the decision was issued and persuaded the President and the two Vice Presidents of the Court to ask for a review of the decision at a new, plenary session of the Court.[123] Under these circumstances, in which on the one hand, judges are under the influence of the political parties who appointed them and on the other hand, under the pressure of the OHR, it is difficult to assume how the Court can adjudicate cases independently and impartially and uphold the rule of law. The above-mentioned challenges facing the functioning of the judiciary are reflected in the *Krstan Simic case,* which is the focus of next discussion.

D. The Case of Krstan Simic (No K-I-15/10)

The case of Krstan Simic is a striking example that illustrates how political affiliations can influence judges' impartiality and integrity and allow political influence to dominate judges' decisions. Mr. Simic was a member of a political party, The Alliance of Independent Social Democrats (SNSD), in RS before his appointment as a judge to the BiH Constitutional Court. In 2010, in a dismissal proposal,[124] it was claimed that his actions undermined the reputation of the Constitutional Court, Constitutional Court judges and his own dignity.[125] These actions included writing letters to representatives of political parties and executive authorities, giving interviews to a magazine and organizing a press conference without permission.[126] The dismissal proposal also claimed that Mr. Simic gave the impression that he still had connections with his previous political party and its president, and he would like to preserve these connections. Thereby, it was also claimed that Mr. Simic's actions would ultimately lead to an appearance of possible preferential treatment of one of the parties. For example, in his letter to the RS President, Milorad Dodik, Mr. Simic wrote that he is still in service for him and the President should make use

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[122] *Supra* fn.40, Steiner and Ademovic

[123] Ibid; However, before that could happen, new judges took office, and the new Court ruled that the plenary review session could not be held because it had, in effect, been requested by the OHR who had no power to do so.

[124] It was initiated by the Parent Form of RS-BiH.

[125] No.K-I-15/10,Para.23

[126] No.K-I-15/10,Para.24

of his service more often. Furthermore, Mr. Simic also gave his opinion about some specific cases publicly; an act which questioned his impartiality. It was thus claimed that his behaviours were inappropriate for a constitutional court judge and his dismissal was proposed.[127]

The Constitutional Court firstly emphasized its own working conditions as "*highly complex legal and political"* and then decided that such connections between a judge and executive authorities were incompatible with the *institutional and operative independence* of the Court.[128] The Court also stated that the Constitutional Court decisions have *"a significant impact on political processes within the state"*, *"often involving legislative or executive authorities at the state -or entity-level as direct participants"*; so, would be for the public interest that the Court ought to protect its reputation, independence and impartiality.[129] Therefore, on the 8th May 2010, the Court decided that Mr. Simic's behaviours inflicted great damage to the Court's reputation and undermined public confidence to the Court's independence and impartiality, and dismissed him from his position by the consensus of all judges due to his political affiliation with his former party leader.[130]

Mr. Simic's case is only one example that has provided evidence of the political connection between a judge and a politician. His possible prejudices were easily detected due to his written letter and his open, public statements. However, most of the time it is very difficult to prove, even to detect such connections between judges and politicians occurring behind the scenes and publicly unknown. The case of Mr. Simic also shows how an unrepresentative court composition might be a danger to the impartial and independent decision-making process. If the process was dominated by the political concerns of one

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[127] BiH Constitutional Court received a letter on the 30th November 2009 from the Parent's Forum of RS-BiH from Banja Luka, accompanied by another letter, which was written by Mr. Simic and addressed to the President of the SNSD political party and also to the Prime Minister of RS, Milorad Dodik.

[128] Dismissal Decision, 8 May 2010, Para.56

[129] Dismissal Decision, Para.49

[130] Article VI (1)(c) states that Constitutional Court judges are initially appointed for five years and serve during this period if they do no resign or are not removed for a reason by consensus of the other judges

specific group of judges who are not able to move away from identitarian concerns,[131] then, an unrepresentative court would serve to endorse the political aims of that group. In that sense, having a representative court would prevent the hegemony of one single perspective and/or bias of one single group. Therefore, the *Simic* Case has shown how dangerous a non-representative Court composition could be especially when the local judges carry ethnic bias and why ethnic diversity in the Court composition is necessary.[132]

IV. The Role of the BiH Constitutional Court in Constitutional Review Cases

The BiH Constitutional Court proved its important role in the constitutional/political order since applications concerning constitutional review cases started to be initiated. While fulfilling its role, it has become apparent that the Court's composition is also very important in determining the outcome of the cases. Every judge contributes to the decision-making process according to their interpretation of the Constitution. On a positive side, it can contribute to the peaceful order, democratization process and the stabilization of political life in the post-conflict, transitional period. On the negative side, the constitutional court's decisions can be detrimental on political life, aggravate already existing ethnic tensions and undermine the peaceful conditions. In order to assess which way the court would contribute, this part analyses important constitutional cases which have had an effect on the constitutional order of the post-conflict BiH society. This analysis may help to discuss whether judicial diversity is a necessity and beneficial, whether the local judges were able to remove their *ethnic lenses* and adjudicate cases impartially, and also whether the Court's decision has a positive or negative impact on BiH's political life. Although a small selection of cases is employed, not much has changed in BiH politics in the last 20 years which covers the time range of these cases and the composition and the functioning of the Constitutional Court remained the same since its establishment. The cases cited in this section highlight the following controversial issues: (a) power-sharing design of the BiH Constitution; (b) local judges' approach to ethnic problems; (c) Courts' decisions challenging the power of OHR; (d) potential impact of ethnic bias. What follows is a discussion of each problematic issue mentioned above with reference to the case-law that illustrates these challenges while highlighting the

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131 *Supra* fn.28,S. Choudhry and R. Stacey,

132 The case also demonstrated that even the life tenure(Article VI(1)(c) of a constitutional court judge did not serve for his judicial independence and impartiality to cut his political connection.

Court's political influence through its decisions and the controversial implementation of the Court's decision by the Entities and the OHR.

A. Constituent Peoples Case [Case U-5/98 III of 1 July 2000]

In BiH, the Constitutional Court *asserted itself as a powerful and important player of politics*[133] as early as 2000 in the Constituent Peoples Case [Case U-5/98]. The Constituent Peoples case was initiated by the then-Chairman of the Presidency of BiH, Alija Izetbegovic in March 1998.[134] Mr. Izetbegovic applied to the Constitutional Court and asked, *inter alia,* for the evaluation of the consistency of the Constitution of the FBiH and RS and their respective Preambles with the BiH State Constitution. The applicant challenged, *inter alia,* the Preamble of the RS Constitution which declares the *"inalienable right of the Serb people to self-determination"* and that *"RS is the State of the Serb people".*[135] He also challenged the Preamble of the FBiH Constitution which recognizes only Bosniacs and Croats as *"constituent peoples".* The applicant claimed that these provisions are in contradiction with the Preamble of BiH Constitution, which recognizes three constituent peoples, Bosniacs, Croats and Serbs (along with *Others*) as citizens of the state of Bosnia-Herzegovina. He argued that these clauses in the Preambles of the Entity Constitutions are the very basis of the discrimination against the Bosnian Serbs in the FBiH, and Bosniacs and Bosnian Croats in the RS and they are in conflict with the State Constitution. Therefore, in the *Constituent Peoples* case, the Constitutional Court was confronted with the question of what status the constituent peoples have within the two Entities and also the validity of the ethnic allocations of the power-sharing design of the BiH Constitution.

There were four related applications before the Court and the Court issued four distinct partial decisions. In relation to the application above [U-5/98 III], a decision was delivered on the 1st July 2000 (third decision). The Court stated that the two Entity Constitutions had cast doubt on the equal status of the ethnicities by privileging the Serb population in the RS and Croats and Bosniacs in the FBiH respectively.[136] The Court also

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133 A.Schwartz and M.Murchison, Judicial Independence and Impartiality in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia- Herzegovina, June 2016

134 Article VI(3)(a) states the Court's jurisdiction.

135 U-5/98, Constituent Peoples, Partial Decision July 1, 2000

136 U-5/98; Para 47

added that the Entities were not to be equated with the territory of a particular constituent people and the three constituent peoples should enjoy equal collective rights in both Entities.[137] Many provisions in both Entity constitutions such as privileges of constituent peoples were invalidated by the Constitutional Court.

The Court, while examining whether the ethnic allocations of the BiH's constitutional structure were in compliance with the requirements of democratic States, stated:

"*(...) Segregation is, in principle, not a legitimate aim in a democratic society. It is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society (...). Territorial delimitation thus must not serve as an instrument of ethnic segregation, but -quite contrary- must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such".*[138]

The Court declared that those provisions of the Entity Constitutions which identified only particular ethnic groups as "*constituent peoples*" of each Entity and used ethnicity as the sole criterion for citizenship of the Entity were unconstitutional. After examining the power-sharing mechanism of the BiH Constitution, the Court concluded: *"the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation".*[139] Thus, the Court declared that all ethnic groups, including *Others*, are "constituent peoples" and thus, equal, regardless of where they reside.

The Court had the opinion that the provisions which designate each of the entities as *"the state of"* one or other particular people exhibits a *"purposeful discriminatory practice (...) with the effect of upholding the results of past ethnic cleansing".*[140] In

[137] U-5/98; Para 44, 56

[138] U-5/98; Para 57

[139] U-5/98; Para 60

[140] U-5/98; Para 61

examining whether there might be a compromise between group rights and individual rights, the Court recognized and legitimized group rights as long as they did not violate individual human rights across the territory of BiH but also stated that it is the groups - namely, the peoples- that enjoy equality.[141] Thereby, the Court affirmed the principle of equality of the three constituent peoples throughout the territory of BiH. As such, in relation to the FBiH Constitution, the Court added that it is not constitutional to reserve legislative, executive or judicial posts exclusively for Bosniacs and Croats and invalidated these provisions;[142] these provisions are also a violation of the ECHR and the Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination, (ICERD). Therefore, the Court's decision was to serve for the effective equality of the three main ethnic groups, Bosniacs, Croats and Serbs, in both Entities.

The Court's decision provided the broadest discussion of the tension between ethnic power-assignments and the viability of democratic governance.[143] Although the other three decisions highlighted related themes [such as the ability of the RS to implement its own foreign policy and sign its own international treaty obligations,] this third decision addressed *"the dedication of the entities to be the governmental embodiment of ethnic power"* as Issacharoff called it.[144] The decision was radical because on the one hand, it recognized the collective equality of all ethnic groups in the whole BiH territory. On the other hand, it declared that this collective equality should not mean collective domination of one group over another in any Entity.[145] By recognizing the co-existence of group rights that protect both groups themselves and group members (as individuals), the Court aimed to prevent the subjugation of the rights of group members by the will of the majority in each of the Entity's territory.[146] In that sense, the Court's decision departed from the

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[141] U-5/98; Para 59

[142] U-5/98; Para 105-127

[143] Issacharoff S., Constitutionalizing Democracy in Fractured Societies, 82 *Texas Law Rev.*,2003-2004

[144] Ibid

[145] Rosenberg S.P, Promoting Equality After Genocide, (2007)16 *Tulane Journal of International and Comparative Law;*p.385

[146] A.M.Mansfield, Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina, *Columbia Law Review*, Vol.103, No.8,2003

Constitution's power-sharing accommodations and restricted consociationalism as far as it creates a conflict with individual rights. Thus, the Court, in a way, attempted to find a balance between ethnic group rights and individual rights.

McCrudden and O'Leary have also stated that the Courts' decision is the most significant development since the signing of the Dayton Agreement as it has provided legal equality to Serbs, Croats and Bosniacs and also *Others* throughout the BiH territory.[147] Although the Court did not specify which institutions and procedures would be followed and fulfilled, the decision required changes in the constitutional structure that were not originally envisaged by the Dayton Agreement and in a way open the constitutional accommodations of Dayton to debate. Since the Court invalidated ethnic reservations of the BiH Constitution and departed from the original power-sharing accommodations of the Constitution, the Court's decision confirms Pildes' argument that the constitutional courts can be "*unwinders*" of the ethno-political power-sharing bargains.[148]

At first sight, it can be observed that the Court aimed to contribute to the equal treatment of all citizens regardless of their ethnic background and regardless of which Entity they lived in. This was a broad interpretation of the Constitution that is based on ethnic power-sharing. However, the Court's decision was not unanimous and it was taken by majority (5/4); the opinions were divided along ethnic lines. The votes of the three international judges and the two Bosniac judges comprised the majority of votes and the Serb and Croat judges issued dissenting opinions.[149] All local judges' interpretations reflected each ethnic groups' political concerns. From the beginning of the establishment of the BiH State, the Bosniac political leaders were in favour of a more integrated/centralized State that would be based on the rights of citizens rather than ethnic groups' due to their numerical strength.[150] Thus, the Bosniac judges' decision on the

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147 *Supra* fn.39, C. Mccrudden and B. O'Leary

148 R.H.Pildes, Ethnic Identity and Democratic Institutions: A Dynamic Perspective in S. Choudhry, *Constitutional Designs in Divided Societies*, Oxford University Press, 2008

149 The Court was composed of the Bosniac judges, President Kasim Begic and Ismet Dautbasic; Croat judges Zvonko Miljko and Mirko Zovko; Serb judges Vitomir Popovic and Mirko Zovko; and international judges Joseph Marko (from Austria) and Louis Favoreu (from France) and Hans Danelius (from Sweeden). Dr. Danelius issued a concurring opinion

150 *Supra* fn.39, McCrudden and O'Leary, *Courts and Consociations*

unconstitutionality of the ethnic aspects of the Preambles supported their political leaders' standpoint.

On the other hand, the Serb judges' dissenting opinion stated that if the majority's interpretation were correct any citizen of BiH would be eligible to be elected to any government institution without being elected by the Entities and/or Entity people. However, as Judge Popovic argued, the constitutional provisions, even the ones on the current composition of the Court, were not based on such a mentality.[151] Popovic's interpretation was reasonable and in line with upholding and protecting the consociational constitution. However, when he went on to declare that both Entities are independent states with internal sovereignty, it is understood that he was not concerned with the protection of the consociational design, because the Constitution did not envisage the independence of the Entities; this is far from the reality.[152] Therefore, his interpretation of the Constitution was also conforming Serb politicians' goal as the latter aimed to preserve the *status quo* in the RS and protect the ethnic privileges and the autonomy of Serbs with a hope of secession at a future date as evidenced by the subsequent declarations in the media.[153]

Similarly, Serb judge Savić, while examining the merits of the case, argued that if Serbs, Croats and Bosniacs were constituent (in other words, equal) in both Entities, then the rationale behind the Entities would cease to exist;[154] something which was not what the Dayton Constitution aimed for. Thus, she argued that the autonomy of the Entities (of Serbs in RS and Croats and Bosniacs in the FBiH) should be protected, rather than a creating an integrated State structure which guarantees the rights of all citizens in both Entities. She also stated that the Constitutional Court does not have the power to act as a legislator and change the constitution[155] and thus, the application should be dismissed in order to protect the State of BiH. However, the Court did not change the Constitution but

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151 Judge Popovic, U-5/98; Page79-80,

152 U-5/98; Page 80-81

153 *Supra* fn.76, Freedom House

154 U-5/98, Separate Opinion of Judge Snjezena Savic

155 Although she was the President of the Court, continued to express her opposition publicly, tried to sabotage the implementation of the Court's decision and protest the renewal of the mandates of the international judges; *Supra* fn.74,International Crisis Group

only declared the unconstitutionality of some provisions of the Preambles and the Entity Constitutions *vis a vis* the BiH Constitution and left it to the government to take the necessary steps.

Similarly, the Croat politicians wanted to have an Entity of their own during the peace negotiations and later to preserve the ethnic autonomy of Croats in the cantons in the territory of the FBiH.[156] The Croat judge Miljko's interpretation of the Dayton Constitution was confirming this concern. He was more concerned with the state structure, the status of cantons within the FBiH and with the protection of the *status quo*.[157] Judge Miljko did not accept the problems in the institutional structures of the Constitution but rather attributed the constitutional problem to the heavy influence of war and the international community. He described the BiH constitutional structure as a "*compromise solution"* which aimed to resolve the *"national issue which was the crucial constitutional problem"* within the governmental system; something which is true to some degree. He stated that the international agreements[158] that were taken into account by the majority in this case are *"totally beside the point"* and could not be applied to the constitutional problems of BiH,[159] despite the fact that BiH is a signatory of these international agreements and conventions. He also stated that the majority cannot rely on the examples from Canada, Switzerland and Belgium to make a decision because these examples are incomparable to the BiH constitutional problems as they represent specific contexts.[160] Judge Miljko might be right in his assessment on the cultural differences in the constitutional contexts; however, BiH cannot disregard the international agreements that it has signed previously, including the ECHR which is force in BiH for the protection of individual human rights. Finally, the other dissenting opinion also regarded the majority's conclusion as a *"threat"* to the ethnic character of the Entities[161] and aimed to uphold the continuation of the ethnic

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156 *Supra* fn.4,D.Feldman

157 U-5/98; Page 47

158 International Convention on the Elimination of all Forms of Racial Discrimination, the European Chapter for Regional Languages or Languages of Minorities and the Framework Convention for the Protection of National Minorities.

159 U-5/98, Separate Opinion of Judge Zvonko Miljko

160 Ibid;Page 49

161 U-5/98, Dissenting Opinion of Mirko Zovko

accommodations in the constitutional structure. Therefore, all local judges' interpretations of the Constitution were according to their ethnic interests and the dissenting opinions have been used for this purpose to uphold the rationale of ethnic consociation over individual rights.

It can be argued that the Court decision has contributed (at least, tried to contribute) to the political integration process by giving equal protection to individual human rights of all group members all along the BiH territory. This could have been a positive contribution to the democratisation process because democracy also covers the protection of human rights. However, the decision was only possible due to the presence of international judges. If the Court was composed without international judges and/or if the Court was composed from solely the Serb or Croat judges, it would not be able to issue the decision as it was and the numerical minority group in one territory would continue to be discriminated due to their ethnicity. The presence and voting power of the international judges which was supported by the two Bosniac judges were the main reason for the decision being what it was. Therefore, the Case, on the one hand revealed the importance of the diverse Court composition and on the other hand cast a doubt on the local judges' impartiality when their groups' political interests were at stake. Furthermore this polarization between the local judges also highlighted the influence of the ethnic background on their interpretation and therefore, the necessity of international judges.

The decision of the *Constituent Peoples Case* showed the Court's power in changing and/or challenging and/or advancing (depending on one's perspective) the constitutional order because the decision, in fact, declared that the basic structure of the Dayton Constitution was unconstitutional[162] and opened it to debate. Although the judicial decision-making process is politicized due to the perceived ethnic bias of the local judges, still a diverse composition is necessary in order to prevent one-sided justice. Therefore, means need to be sought to increase local judges' independence and impartiality that sit in diverse courts.

Following the Court's decision, no action has been taken by the Entities to harmonise their respective Preambles and the Constitutions with the BiH Constitution. Later, with the interference of the OHR, the Sarajevo Agreement on the implementation of

[162] Hayden R.M. Democracy without a Demos? The Bosnian Constitutional Experiment and the Intentional Construction of Nonfunctioning States, (2005) 19 East European Politics&Societies

the Court's judgement was concluded in March 2002.[163] According to the Sarajevo Agreement, in each one of the Entities, upper chambers were to be established on the basis of parity regardless of the population.[164]As such, an upper house (second assembly, the Council of Peoples) was created in the RS, composed of an equal number of Serbs, Croats and Bosniacs.[165] Moreover, in order to give effect to the Courts' prohibition on ethnic domination in the government structure, the Sarajevo Agreement provided for the "proportionate representation" of the three constituent peoples and *Others* in government institutions (from the municipal to the Entity level) according to the 1991 census which reflects the population before the war.[166] However, the Sarajevo Agreement was also not implemented and this time the OHR imposed constitutional amendments to both Entities and introduced mandatory quotas for the representation of the three ethnic groups and of *Others* in the government institutions of the Entities.[167] As the Court's decision was implemented after the impositions of the OHR, rather than the cooperation of the political leaders, it is still seen as artificial and lacking legitimacy because the necessary cooperation of the political leaders of the three ethnic groups was missing; this is necessary if a real change towards political integration is aimed for.

To conclude, the division of the judges along ethnic lines was a mere reflection of the divisive politics in the BiH State. In the *Constituent Peoples* case, the Court's decision on the constitutional order and the judges' ethnic voting clearly signify why ethnic representation is essential in the judiciary. This is due to the Court's role in reconstructing the constitutional order and building a democratic State. In this case, the decision of the Court was a move towards the disintegration of the consociational system. In that sense, the Serb judges were right in claiming that if that was the aim of the drafters of the Dayton

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[163] International Crisis Group, Implementing Equality: The Constituent Peoples Decision in Bosnia-Herzegovina, Report No.128, 16 April 2002

[164] European Commission For Democracy through Law (Venice Commission), Comments on the Implementation of Decision U5/98 (Constituent Peoples) of the Constitutional Court of BiH by the Amendments to the Constitution of the Republika Srpska

[165] *Supra* fn.59.,Belloni and Diane

[166] Ibid

[167] D. Banović &S. Gavrić, The Constitutional Court of Bosnia and Herzegovina and Its Role in the Process of Democratization of the Post-war Political System of Bosnia and Herzegovina, Univerziteta u Sarajevu

Agreement, there was no need of establishing the Entities. However, if the primary aim was peace-building, then balance needs to be sought whether the protection of the human rights is proportional to the aim sought; and whether the numerically minority people in one Entity would perceive the system as more legitimate or this would cause more resentment on the part of the majority and thus, spark violence in the given Entity. In any case, fundamental human rights should not be sacrificed for any reason.

The discussion next focusses on the second problematic issue, that of local judges' approach to ethnic problems and ethno-political disputes.

B. Renaming Cities Case [U-44/01]

The National Assembly of the RS renamed various cities and municipalities which fell within the territory of the RS during and after the war. The legislation added prefixes to the names or changed the names entirely in order to emphasize that they were Serb cities or municipalities: as such Drvar became Srpski Drvar.[168] On the 31st July 2001, Sejfudin Tokic´, the then Deputy Chair of the House of Peoples of the BiH Parliamentary Assembly, applied to the Constitutional Court and sought a review on the compatibility of the RS's name-changing legislation with the BiH Constitution. The applicant claimed that those name changes were an attempt to imply or assert the "*superiority"* of one ethnic group, Serbs, or *"exclusive entitlement of one constituent people"*. He argued that the legislation violated Article 14 of the ECHR (prohibition of discrimination) and rights arising from Annex I of the BiH Constitution (international agreements) and the constitutional rights of refugees and displaced persons and their freedom from discrimination in relation to the enjoyment of that right.

The applicant referred to the Constitutional Court's Decision in the *Constituent Peoples Case* which prohibited the privilege and/or domination of any of the constituent peoples' *"in governmental structures or any ethnic homogenization through segregation based on territorial separation"*.[169] His argument was accepted by the Court.[170] The Court

[168] Article 11 of the Law on Territorial Organization and Local Self-Government (Official Gazette of the Republika Srpska Nos.11/94 as amended by Art.1, Law on Amendments to the Law on Territorial Organization and Local Self-Government, Official Gazette, No.6/95, and the corrected version of Art.2, Law on Amendments to the Law on Territorial Organization and Local Self-Government, Official Gazette RS, No.15/96

[169] U-44/01; Para 25

cited the case-law of the ECHR and stated that any act or regulation is *"discriminatory if it makes a distinction between individuals or groups who are in a similar situation and if this distinction lacks objective and reasonable justification, or if there is no reasonable proportionality between the means used and the aim sought to be realized"*.[171]

The Court examined whether there was an objective and rational justification for renaming the cities[172] but did not answer affirmatively. The Court declared that being within the territory of RS and having the Serb origin as a majority of inhabitants cannot be accepted as being objective and reasonable because they stand against the basic constitutional principle of the equality of the constituent peoples throughout the territory of Bosnia-Herzegovina.[173] Therefore, the Court concluded that the RS legislation amounted to unjustified discrimination according to the constitutional provisions[174] as it aimed to treat Bosniacs and Croats less favourably than Serbs by disregarding the constitutional principles of individual and collective equality of the treatment of all three constituent peoples.

The case seems to be an ordinary constitutional review case but its importance is due to the fact that the decision was unanimous. Many years after its establishment, the Court finally achieved to issue a unanimous decision, rather than a decision with a majority vote.[175] David Feldman, who was one of the foreign judges to hear this case, argued that this newfound unanimity might show that a new constitutional approach in which the loyalty to legal professionalism and loyalty to the BiH Constitution, rather than loyalty to entities and/or peoples (ethnicities) could prevail.[176] Therefore, the Court's commitment to prevent discrimination and issuing a decision towards this direction by the agreement of all

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[170] U-44/01; Para 47

[171] The Belgian linguistic case, ECHR, Judgement of 23 July, 1968, Series A., Vol.6

[172] U-44/01; Para 51; RS did not submit any reason.

[173] U-44/01; Para 51

[174] Article II(3)(4)(5) of the BiH Constitution; Para 55

[175] The composition of the Court was as follows: Mr. Mato Tadić, President, Mr. Ćazim Sadiković, Vice-President, Mr. Miodrag Simović, Vice-President, Ms. Hatidža Hadžiosmanović, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić

[176] D.Feldman, Renaming cities in Bonia-Herzegovina, ICON, Vol.3,No.4, 2005

judges showed both the positive contribution of a diverse court composition and also how judges might abandon ethnic voting in time.

Another important aspect of the decision is that before its first session of the case, the then OHR issued a decision to annul the appointment of the two Serbs judges selected by the RS National Assembly.[177] However, the remaining judges decided not to hear the case in the absence of the Serb judges, since the case had constitutional, political and symbolic importance to the RS and the Serb people.[178] The two Serb judges could not join the Court until December 2003 and the Court waited for their participation to conclude its substantive deliberations in February 2004.[179] This was one of the early signs of how the OHR could create problems for the Court's functioning and composition, although the ethnic composition of the Court is required by the Dayton Constitution. Therefore, by this case, it was observed that when commitment to the law, the Constitution and legal principles prevail, all local judges of the Court could moderate ethno-political disputes.

The next case illustrates the third controversial issue which is the Courts' decisions versus the power of OHR.

C. The Case of Milorad Bilbija and Dragan Kalinic, [Application No.AP-953/05] 8 July 2006]

The case was initiated by the appellants due to their removal from their posts by the OHR. Mr. Bilbija was an officer in the Intelligence and Security Agency and he was dismissed from his office and was prevented from holding any other public position until another decision by the OHR in December 2004[180] on the basis that he obstructed the prosecution of the war crimes in RS. Mr. Bilbija had previously sought a review for administrative disputes from the Constitutional Court but the Court declared that the application was not reviewable because the OHR was not an institution of the BiH within

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177 Decision annulling the appointment of two judges from RS to the BiH Constitutional Court, September 16, 2002; accessed by: http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=27944

178 *Supra* fn.176, D.Feldman

179 Ibid

180 No.317/04 of 16 December 2004

the meaning of Article 4 of the Administrative Disputes Law[181] and also, the OHR's actions cannot be reviewable under the Dayton Agreement.[182] Similarly, the OHR dismissed Dragan Kalinic from the post of the Chairman of the National Assembly of RS and from being president of the Serb Democratic Party and barred him from any public position[183] on the basis that he and his party had supported and sustained individuals who were indicted under the International Criminal Tribunal for the Former Yugoslavia. Kalinic's previous applications were rejected by the Constitutional Court as premature.[184] These two cases were merged because they were based on the same factual and legal grounds.[185]

The applications were based on a violation of many human rights as well as the OHR's intervention to and substituting his decisions to those of local authorities. The appellants claimed that the OHR's decision should be deemed a decision of the state of BiH. The Court considered whether the special status of the OHR or the sources of his authority in the Dayton Agreement and various resolutions of the UN Security Council deprived the claimants of rights under the BiH Constitution or prevented positive obligations of the State of BiH to protect any such rights.[186] The Court found that the BiH State did not provide any protection for the individual human rights when/if they were negatively affected by the OHR's decisions.[187] The decision was paradoxical since the ECHR is in force and the Court could easily refer to the Convention for the protection of human rights.

The Court referred to the Venice Commission's Opinion which criticized the unaccountable status of the OHR, as a political body, which takes decisions concerning the rights of individuals, but is not subject to any fair hearing or scrutiny by an independent

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[181] Application No.AP-953/05;Para 10

[182] Ibid;Para 10

[183] Ibid;Para 12

[184] Ibid;Para 13

[185] Ibid;Para 3

[186] Ibid;Para 56

[187] Ibid;Para 73

court.[188] The Court stated that even though the BiH transferred its competencies to international organizations, it has a positive obligation to protect individual rights and freedoms.[189] After considering the relevant law and the decision of the ordinary courts (relevant to this case), the Court declared that although the appellants had an arguable claim, the Court was not competent to review the OHR's decisions and the Court's jurisdiction was limited to examining whether the appellants have had an effective remedy available under Article 13 of the ECHR.[190] It was concluded that there was no effective remedy against the decisions of the OHR available within the existing legal system of BiH[191] and the appellants' right to an effective legal remedy under Article 13 of the ECHR had been violated. Thereby, the Court attributed the problem to the legal system of BiH but not to the OHR.

The decision of the Court is important because until this decision, the Court was rejecting appeals against the decisions of the OHR and this was the first time that the Court was involved in examining the decisions of the OHR and its status within the BiH constitutional order. More importantly, the Court's decision was, again, unanimous which shows the discomfort on the part of all the judges (local and international) against the decrees of the OHR. This means that all judges agreed that the OHR should be held accountable for his decisions and/or at least the state of BiH should provide a legal remedy to the people whose human rights are violated by the decisions of the OHR. However, after the Court's decision, the OHR issued another Order and nullified the decision of the Court in March 2007,[192] reiterating its *superior* stance to the government institutions by referring to the international agreements which gave him the power and prevented any other possible attempt of the Court that would review and/or challenge his actions.[193]

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[188] Venice Commission, Adopted at 62nd Plenary Session, 11-12 March 2005 cited in Para 25

[189] Application No.AP-953/05Para 53

[190] Ibid;Para 40

[191] Ibid;Para 51,74

[192] Order on the Implementation of the Decision of the Constitutional Court of BiH in the Appeal of Milorad Bilbija et al, No. AP-953/05, 03/23/2007 accessed by: http://www.ohr.int/?p=64783 accessed: 08/07/2016

[193] High Representative Issues Order Concerning Implementation of Constitutional Court Decision AP-953/05, 03/23/2007 accessed by http://www.ohr.int/?p=39553 on the 08/07/2016

The decision of the Court and the furious reaction of the OHR revealed the unrest between the judges and the OHR. The Constitutional Court is (or at least is supposed to be) the highest judicial organ which has the power to review the actions of all BiH institutions and this has also been mentioned in the decision. However, the OHR's ambiguous stance in the constitutional order and its annulment of the decision demonstrated that the OHR neither accepts to be reviewed nor respects the Court's decision. The OHR acts as the highest organ whereas it is only supposed to represent the international community and facilitate the peace implementation programme.[194] This situation begs the question as to whether there could be more appropriate ways to facilitate peace programme without violating individuals' human rights and the Court's independence. Nevertheless, it became apparent that the Court was unable to provide effective remedy for the violated human rights under the ECHR due to the OHR's holding of the upper hand. In light of the case presented above, it can be observed that there are some instances that the Court's power is limited in protecting human rights due to the OHR's superior stance which rendered both the Court's unanimous decision and its composition meaningless, despite the fact that all local judges (who acted with ethnic bias previously) agreed that the Serb public officers' human rights are violated.

In the next case the focus of discussion is the fourth problematic issue of the potential impact of ethnic bias as previously mentioned.[195]

D. The Case on the Law on Holidays and the Subsequent Referendum by the Republika Srpska [U-3/13]

In this case, a member of the BiH Presidency applied to the Constitutional Court and sought a review of Article 3(b) and 2(b) of the *Law on Holidays of the Republika Srpska*[196] which declared 9th January as a holiday.[197] The applicant *inter alia* claimed that 9th January has a discriminatory character because what is celebrated on that date is the RS establishment which was created as a result of ethnic cleansing, the domination of the

194 In 2009, the OHR removed the ban imposed on Dragan Kalinic.

195 Chapter III, Part II.B.

196 Official Gazette of the RS, No.43/07

197 The applicant, later in a public hearing, withdrew his request to review of constitutionality of Article 2(b) of the Law on Holidays

Serbs and exclusion of other people.[198] He claimed that the date is celebrated by Serbs only and neglects and discriminates other people. In his opinion, any holiday which belongs to only one or two of the three constituent people creates exclusion, restriction and/or privilege on the grounds of ethnic or national origin.[199] Therefore, he claimed that the Law is against Article 14 of the ECHR, Article 1 of Protocol No.12 to the ECHR and Article II(4) of the BiH Constitution in conjunction with Article 1(1) and Article 2(a) and (c) of the ICERD.[200] The applicant also claimed that the aforementioned Law is also against the Constitutional Court's decision in U-4/04 which *inter alia* found that *the Law on the Family Patron-Saint's Days and Church Holidays of the RS* which stipulated that 9th January as a holiday is unconstitutional.[201] Therefore, the applicant asked the Court to order the National Assembly of RS to harmonize the challenged provision with the BiH Constitution.[202]

In its deliberations, the Court cited the case Law of the ECHR and also asked an opinion from the Venice Commission, as *amicus curiae.* The Venice Commission's opinion was that although the Law seems to be neutral in its face value, it has a discriminatory character due to two reasons.[203] Firstly, the Law is linked to only one people (Serbs) and at the same time, it imposed relatively high fines to people who wanted to work on this day in order to prevent them from working. Secondly, the date is associated with the unfortunate events of the civil war which provokes humiliating feelings among other people. The Court also asked the written opinion of the Caucuses in the Council of Peoples of the RS and they also indicated that the 9th January would never be accepted as a

198 U-3/13; Para 13

199 U-3/13; Para 14

200 All articles prohibit the discrimination.

201 In Case U-4/04, the Court reviewed the constitutionality of the Laws of the Entities on the flags, coat of arms and anthems whether these official symbols represent the multi-ethnic character of the Entities.

202 U-3/13; Para 22

203 European Commission for Democracy through Law, Opinion No.736/2013, CDL-AD(2013)027, Amicus Curiae Brief, For the Constitutional Court of BiH on the Compatibility with the Non-Discrimination Principle of the Selection of the Republic Day of the Republika Srpska, 96th Plenary Session, Venice 11-12 October 2013

holiday to be celebrated.[204] After examining the relevant law, international agreements, the RS National Assembly's reply and the Venice Commission's opinion,[205] the Court stated that the aforementioned Law violated the constitutional obligation of non-discrimination in terms of the rights of groups.[206]

In this case, the local judges, once more, split along ethnic lines. Serb judges Simović and Knežević, issued dissenting opinions to support[207] the constitutionality of the said Law. Simović stated that the Court's consideration of the political events between 1992 and 1995 cannot be a base for the Court's decision as there is no agreement regarding the nature of these political events.[208] He cited a few examples from the ECtHR case law[209] in relation to the right to freedom of religion and he concluded that there is no discrimination in the said Law and the application should be dismissed. Likewise, judge Knezević argued that the case should not even be admissible on the basis that the said Law has no ethnic or religious character and is a neutral law. He stated that the Court, by declaring the unconstitutionality of the law, in fact, declared the unconstitutionality of *"a non-existing norm"*[210] because there are no existing legal norms, but only the applicant's humiliated feelings. He stated that the Court cannot decide according to the applicants' feelings. Just like judge Simovic, judge Knezević argued that by relying on disputable historical events, the applicants were asking the *constitutional review of history* -which is not possible- and the application should be dismissed. Therefore, the ethnic polarization/divisions within the Court were highlighted once more as the Serb judges acted to defend the *cultural interest* of the Serb community.

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[204] U-3/13; Para 39

[205] U-3/13; Para 95

[206] U-3/13; Para 96

[207] One of the Croat judges was not in the Court and the other one did not issue a dissenting opinion.

[208] Dissenting Opinion, Para 2

[209] Hasan and Eylem Zengin v. Turkey, 1448/04, 9/10/2007 [Section II]; Lautsi and Others v. Italy, Application No.30814/06, 18/03/2011

[210] Separate Dissenting Opinion of Vice-President Zlatko M. Knežević;p.42

However, subsequent events, after the Court's decision, became even more complicated. The Serb politicians from RS declared that they would hold a referendum on this issue and started to take the necessary steps. In the meantime, RS's President Dodik was protesting the Court, declaring his aim to terminate the mandate of international judges and vowing for the independence of the RS from BiH.[211] In return, the Bosniac politicians applied to the Constitutional Court for an interim measure against *RS's Decision to Call for a Republic Referendum*.[212] The application claimed that RS's decision to hold a referendum is against the BiH Constitution and the division of responsibilities between the State and Entities. The Court issued a decision on interim measure and banned the referendum.[213] However, the RS did not respect the Court decision and held a referendum. The RS's non-compliance with the Court's decision reveals how the Court lost its legitimacy (despite its diversity) in the eyes of the Serb people in time due to the continuous support of the international judges to the Bosniac cause by their domination of the decision-making process. Although diverse, the Court has become, in a way, the forum where the wishes of the Bosniac politicians are endorsed through the use of the Court with the help of international judges. Considering the RS politicians' political goal to establish an independent RS, the Court did not have much room to decide otherwise. Nevertheless, these cases demonstrated that the ethnic divisions of the country still have an influence on the Court's functioning as the judges are divided in two different camps in the Court, citing Knezevic's words, in *politically coloured* issues.[214] Therefore, despite its ethnic diversity the Court seems to have lost its authority and legitimacy, at least for the Serb people, as well as its power in reconstructing the divided society and the State.

It could be argued that on the one hand, it is ironic for the Court to decide on the constitutionality of a traditional holiday that has been celebrated for centuries since the acceptance of Orthodox religion and try to prevent the celebration of the said holiday by a

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211 Bosnian Serbs Plan Challenge to Constitutional Court, accessed by http://www.balkaninsight.com/en/article/bosnian-serb-leaders-pledge-to-change-bosnia-s-constitutional-court-11-30-2015-1 on 02/07/2017

212 No.02/1-021-894/16 of 15 July 2016 (*Official Gazette of the Republika Srpska*, 68/16)

213 Decision on Interim Measure, U-10/16, 17 September 2016

214 Knezevic was one the Vice-President of the BiH Constitutional Court who heard the case and issued a separate dissenting opinion.

decision. On the other hand, it is also controversial for RS to impose fines to people (Bosniacs) who are not celebrating that day because of the dates' association with bitter memories of war and humiliating feelings. Last but not least, the controversy is to occupy the BiH Court with such a trivial matter not because it is a very important constitutional problem but just because of the divided ethno-religious sentiments within society and the power struggles among the politicians and the ethnic groups. Therefore, the case revealed the Court's failure not only in gathering public trust but also commanding respect and implementing its decisions. After all, the decisions of the Court seem to be a mere reflection of BiH politics that is still dominated by the influence of the ethno-national policies and politicians.

Following this case there has been much debate on the issue of the composition of the BiH Constitutional Court and particularly to its reconstruction without international judges, an issue that will be examined next.

E. Recent Discussions on the Composition of the BiH Constitutional Court

After the aforementioned case, the removal of the international judges and re-designing the Court became one of the main targets of RS and some Croat politicians. Needless to say, the process, if there will ever be one, needs to be regulated through constitutional amendments and not by ordinary law.[215] The Constitution states that after the initial appointment of judges, the Parliamentary Assembly may provide a different selection method of the three international judges who are selected by the ECtHR President.[216] However, neither the BiH Parliamentary has passed any legislation in this direction nor have the Serb politicians taken any initiative to discuss the matter with other ethnic groups, expect for protesting their presence continuously.[217]

The ongoing dissatisfaction with the international judges has become intensified after the aforementioned case U-3/13. The root of the problems, as RS politicians claim, is that

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[215] Engelhart K., Bosnia's Three-Headed Beast: Sejdić and Finci v. Bosnia and Herzegovina and the case for "reasonable" discrimination

[216] Article VI (1)(d) ; Constitutional Court judge Galic held the opinion that only Constitutional Court can remove international judges; V. Galic, Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies, Second Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 16-18 January 2011

[217] *Supra* fn.76, Freedom House

due to the voting powers of international judges (which are joined by the Bosniac judges), they block the will of the RS politicians to implement their policies and allow the main Bosniac political party (SDA) to rule the country through the use of the Constitutional Court.[218] This situation raised questions on the impartiality of international judges as well, as early as 1998 with the *Constituent Peoples* Case. For example, Judge Popovic criticized the decision of the international judge, J.Marko because he had already given a different opinion on the regulation of the Entities to the Venice Commission previously. Although the international judges' constitutional expertise is much applauded, they usually seem to be much sympathetic to the Bosniacs' political cause.[219] They also seem to uphold human rights over group rights as a result of their legal training which is usually in harmony with ECHR standards. In these circumstances, it seems like the Constitutional Court is being used to advance Bosniac politicians' goals and in a way, it served to the rule of the majority by the use of the judiciary, contrary to the Dayton's power-sharing spirit.

Very few scholars have examined whether it is possible to reconstruct the court without international judges. As such, Graziadei examined whether the model of the Constitutional Court of Belgium, *inter alia,* can be applied to the BiH Court.[220] In Belgium, the Court's composition is made up of equal numbers of politicians and lawyers and also from an equal number of participants from each of the main linguistic group (Dutch and French speakers); this system was deemed workable and successful for Belgium.[221] However, when applied to the BiH context, the presence of politicians in the Court cannot be considered as desirable after all the aforementioned problems in the impartial adjudicating of the cases due to the political influence. The models' success in Belgium might be due to the willingness of the parties to resolve conflicts without inciting and/or exaggerating political problems. However, in the absence of goodwill in the BiH context, such a court composition can only yield more problems and a further politicisation of the Court decisions. Graziadei has also analysed, *inter alia,* the German model as it is one of the

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218 S.Graziadei, Six models for Reforming the Selection of Judges to the BiH Constitutional Court, University of Graz and University of Antwerp, Working paper, No.14, January 2016

219 Marko J. Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina, *European Diversity and Autonomy Papers*4/2005

220 *Supra* fn.218, S.Graziadei

221 Ibid

most respected constitutional court models in the world.[222] The judicial appointment of a constitutional court judge in Germany requires the largest political parties to agree informally on the judge. This also seems to be too advanced for BiH as politicians cannot find common grounds on even unimportant matters as to which day should be celebrated as a holiday. Furthermore, in the d'Hondt system judges are appointed in two ways: either according to parliamentary representation or through population figures. In the model of appointment through parliamentary representation, a judge candidate needs to be proposed by a political party and confirmed by a simple majority in the House of Representatives and in the House of Peoples.[223] Although the model seems to serve for a diverse judiciary without international judges, it runs the risk of the possible vital interest veto of the Caucuses in the House of Peoples in the BiH context.[224] In the second method (population figures) of the d'Hondt model, constitutional quotas are used. Although the second model can lead to a court composition with equal representation of ethnic groups without international judges, this might lead to the Serb-Croat camp dominating the decision-making process due to their numerical strength *vis a vis* Bosniac judges (4/2). It is predictable from the onset that such a constitutional reform for the composition of the Court will not be accepted by the Bosniac politicians or by the international community. Against this background, it is obvious that any model for judicial appointments to the Constitutional Courts will have its own disadvantages. Nevertheless, Grazidei, despite acknowledging the problems in the composition of the *power-sharing courts*, argues that the identitarian representation in the Court can only be justified by its function and by consensus democracy which aims to pacify ethnic conflicts.[225]

In another article, Schwartz argued that international judges harmed the Court's authority by doing strategic mistakes and questioned their impartiality.[226] He argued that although international judges are required to mitigate the influence of ethno-politics in the outcome of split decisions, they also have their own political affinities before their

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[222] Ibid

[223] Ibid

[224] Ibid

[225] Grazidei S., Power-Sharing Courts, Contemporary Southeastern Europe, 2016(3)1

[226] *Supra* fn.85, Schwartz A.D.

appointment.[227] As such, those judges who are appointed from the Western European countries have similar prejudices with Bosniacs towards Serbs and Croats. In his examination of abstract review cases, Schwartz found out that international judges are more likely to find a constitutional violation when the application is done by a Bosniac, and less likely to find a violation when the application is by a Serb.[228] This is in contrast to the claim of the previous international judge of the Court, Joseph Marko, who believes that international judges were successful both in being neutral and in importing their legal knowledge on the protection of human rights.[229]

Nevertheless, the court composition can also be reformed without removing the international judges but by adding additional requirements, such as, previous experience in conflict resolution or (as Judge Marko suggests[230]) in the international courts. Also, focus can be given to the international judges' personality not their nationality. As a matter of principle, political leaders of all ethnic groups can also agree to suggest a name to the ECtHR whose appointment they all approve in order not to challenge the appointed judges' neutrality later. In this way, the impartiality of the international judges can be trusted even if it cannot be assured.

Closely related to the above is the fifth problematic issue that of power-sharing accommodations of the Dayton Constitution and the ECHR perspective illustrated in the case study next.

F. Sejdic and Finci Case v. Bosnia-Herzegovina

Although it is not a case of BiH Constitutional Court, the Sejdic and Finci case sheds light on the value of the constitutional quotas from the ECHR perspective. The case was initiated from the applications of Mr. Sejdic and Mr. Finci, two BiH citizens, one being a member of Roma community and the other from the Jewish community.[231] They applied to the ECtHR and challenged the provisions of the BiH Constitution as it restricts the

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227 Ibid

228 Ibid

229 *Supra* fn.72, J. Marko

230 Ibid

231 ECtHR, Grand Chamber, Case of Sejdic and Finci v. Bosnia and Herzegovina (Applications Nos. 27996/06 and 34836/06), 22 December 2009

membership of the House of Peoples and the Presidency to "constituent peoples" (Bosniacs, Serbs and Croats) and thus, excluding them on the basis of their identity. They argued that these constitutional provisions are inconsistent with Articles 3, 13 and 14 of the ECHR in conjunction with Article 3 of Protocol 1 of the ECHR (right to free elections) and Article 1 of Protocol No.12.

The appellants previously applied to the BiH Constitutional Court on the basis that they are discriminated due to their -Roma and Jewish- origin but the Constitutional Court stated in two decisions that it did not have competence to decide whether any constitutional provisions (or laws under them) conformed to the ECHR;[232] thus, declared the case inadmissible. Considering the BiH Constitutional Court examined "effective remedy" under the ECtHR in case of *Bilbija and Kalinic,* one year before this case, the Court's decision in Sejdic and Finci was odd.

During the hearing of the case in ECtHR, the BiH government argued, *inter alia,* that these specific power-sharing arguments were required for the restoration of peace and the moment was still ripe for a change towards a majoritarian rule in BiH.[233] For the BiH government, these violations of human rights were justifiable in the broader context of BiH ethnic politics. The BiH government also argued that changing the essence of the constitution in relation to the executive and the legislative would challenge both the international and inter-ethnic aspects of the Dayton Agreement and would lead the country to civil war. Thus, the government submitted that the difference in treatment was justified in the circumstances of BiH.[234]

The ECtHR examined the ethnic accommodations of the BiH power-sharing Constitution in order to decide whether the differential treatment of Sejdic and Finci could be justified by the particular circumstances of the BiH.[235] The Court asked the opinion of

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[232] U5/04 of 31 March 2006 and U13/05 of 26 May 2006

[233] Para 34

[234] Para 35

[235] The ECHR and its protocols are in force in BiH (Article II of theBiH Constitution) In July 2002, BiH ratified the ECHR, including Protocol No. 1 (which includes the right to property, right to education and the right to free elections) and it entered into force immediately. In July 2003, BiH ratified Protocol No. 12 (which includes general prohibition of discrimination) and it came into force in April 2005. Therefore, BiH on one hand is required to comply with its ECHR obligations

the Venice Commission, the Advice on Individual Rights in Europe, the Open Society Justice Initiative and they all submitted *amicus curiae*. They all held that in this case, the prohibition of discrimination had been violated. The ECtHR held that the exclusion of non-constituent peoples, such as the appellants to stand for election to the House of Peoples of BiH indeed amounted to a violation of Convention rights (Article 14 of the ECHR, in conjunction with Article 3 of Protocol No.1 to the Convention). The ECtHR stated that the government cannot rely on these arguments a decade after the civil war ended because there have been positive developments even though the political challenges remain.[236] It also stated that due to the country's progress in post-conflict reconstruction, this differentiation between the constituent peoples and "Others" had lost its objective and reasonable justification. Therefore, the Court found this restriction incompatible with the human rights of equality and anti-discrimination that the ECHR protects, but did not state in which way the BiH Constitution and relevant laws should be amended in order to comply with its decision.

This case was the first case in which the ECtHR declared that a constitutional provision of a state party is in violation of the Article 1 of Protocol 12 by a Member State because the Court generally refers to the *margin of appreciation*[237] and leaves electoral matters to the discretion of the States.[238] However, in this case, the ECtHR stated that the margin of appreciation is limited when it comes to discrimination on ethnic grounds. The Court's decision is remarkable because it required the BiH government to change its electoral law and enable the participation of other smaller ethnic groups to the elections. Nevertheless, the Court was not unanimous in its decision.

In his partly dissenting opinion, Judge Mijović, firstly summarized the historical background of BiH and stated that power-sharing elements in the government branches are

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and on the other hand it has upheld its power-sharing constitution which relies on the ethnic distribution of power and ethnic consociationalism.

[236] Para 47

[237] The margin of appreciation is developed as a result of the case law of the ECtHR and the European Commission and not from the Convention. It refers to States' discretion to interfere with or limit human rights in specific instances; Sweeney J.A., Margins of appreciation: cultural relativity and the ECHR in the post-Cold War era, 2005, *International and Comparative Law Quarterly*,54(2)

[238] *Supra* fn.39, C.McCrudden and O'Leary

the provisions that enabled the Dayton Agreement to come into force and establish peace in the first place.[239] Although these norms might seem to be challenging the non-discrimination norms, the same norms were required to achieve peace, stability and legitimacy, she continued. After analysing the general political situation in BiH, she stated that BiH does not function as an independent, sovereign and stable State. Society is still divided along ethnic lines, the nationalist discourse is on the rise and no progress has been made towards reconciliation and peace since the war had ended. For Mijović, these are the reasons that the country is still under the supervision of the international community and the mandate of the OHR has been extended. After referring to the Venice Commission analysis on the situation in BiH, she added: "*the peace has been achieved, but the stability factor remains questionable*". Therefore, she argued that the fragile political situation in BiH justifies the ethnic power-sharing accommodations of the BiH Constitution.[240] Lastly, she cautions that even if the passing time could contribute to the peace process, it is questionable whether the ECtHR has the authority to decide for this.

Similarly, the dissenting opinion of Judge Bonello also emphasized the fragility and weakness of the peaceful relations between the dominant ethnic groups and stated that although equality and non-discrimination are invaluable values, national peace and reconciliation are at least equally so. He criticized the majority's opinion that the political situation in BiH has now changed and the previous delicate *tripartite equilibrium* does not need to prevail. He stated that in traumatic revolutionary events, it is not for the ECtHR to decide when the transitional period is over or when a state of national emergency is past and everything is back to normal. The ECtHR is not in a better place than the national authorities to evaluate the point in time *"when previous fractures consolidate, when historical resentments quell and when generational discords harmonise"*. Apart from showing a great doubt towards successful transition from conflict to stability, Judge Bonello has also questioned whether the rights of Sejdic and Finci for standing election were so *absolute and compelling* that the invalidation of the Dayton Constitution, which provided peace, security and public order to the whole population, including themselves, should be re-considered. Finally, the judge warned that by this decision, the ECtHR is

[239] Judge Mijovic issued a partly concurring and partly dissenting opinion which was joined by Judge Hajiyev.

[240] Applications No's 27996/06 and 34836/06, Partly Concurring and Partly Dissenting Opinion of Judge Mijovic, Joined by Hajiyev, 22 December 2009

requesting the revision of the Dayton Constitution which could also turn out to be the Court's failure, when/if the ECtHR's decision is not implemented by the BiH government.[241]

The power-sharing arrangements of BiH Constitution were seen both as desirable and necessary if a comprehensive peace agreement were to be secured. In other words, these institutional aspects of the BiH Constitution created the necessary compromises for Bosniacs, Croats and Serbs to peacefully co-exist.[242] However, *"the very rules that have been alleged as being incompatible with human rights standards (...) were also the rules that had made an agreement possible".*[243] Given that the ECtHR is an institution responsible to protect individual human rights and obliged to decide according to its Convention, this is not a big surprise. However, controversial issues will arise, when/if the decision is to be implemented, because this would require a major deviation from consociational principles affecting the group rights of all ethnic groups. Therefore, there is always a risk of violence when/if main ethnic groups oppose the required constitutional change.

The problematic aspect of the case was the Court's miscalculation on the political situation in BiH. It is difficult to argue that BiH, now, has a stable democracy just because of the absence of violence; the absence of violence might have other reasons such as the presence of the peacekeeping army of the Stabilisation Force in Bosnia and Herzegovina (SFOR) which consists of the forces of NATO and other countries. Nationalism, which was the main reason for the war, is on the rise[244] as there has been and still is increasing support to nationalist parties by all ethnic groups and this is evident from the election results. Moreover, problems in refugee returns have been observed which required the OHR to intervene and in some cases dismiss some politicians who obstructed refugee returns.[245] Therefore, although much criticized, in the absence of the OHR and/or international community, the BiH government is very likely to be dysfunctional and at

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241 Dissenting Opinion of Judge Giovanni Bonello in Applications No's 27996/06 and 34836/06

242 Supra fn.39, C. McCrudden and B. O'Leary

243 G.Nystuen., *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement,* The Hague:Martinus Nijhoff 2005

244 Ibid

245 Ibid

worst, to engage in another war. Thus, the ECtHR's assessment of the political situation that BiH is ready to abandon the power-sharing accommodations on group rights and move towards a more individual rights-based approach was not realistic. Besides, comparing the low possibility of a Jew and a Roma person to be elected (due to their numerical minority), by asking the revision of the Dayton Constitution, the Court has made all warring parties reconsider their political situation.

The Court's involvement into the very essence of the Dayton Constitution to enforce human rights created problems for BiH's power-sharing model and for the necessary representation of constituent peoples and inevitable exclusion of the non-constituent groups. Arguing that the political climate and so the constitutional structure in BiH is ready to change is not only controversial but also paradoxical as the ECtHR is not in a place to decide whether the domestic setting has changed towards a more peaceful and stable situation. Moreover, the Court's decision, although positive for the protection of human rights of other smaller groups, relied mainly on political reasons.

As the dissenting opinions in the ECtHR and the subsequent reluctance of the BiH government to implement the Court's decision have demonstrated, it would have been better to apply the margin of appreciation and leave it to the BiH government to decide when/if they are ready to transform their political culture to one which mirrors the majoritarian system that relies on *identity though citizenship,* -rather than the one based on ethnic group identity- if such a time would ever come. This is also necessary in order to provide the domestic ownership for BiH politicians and also for the public at large to accept the constitutional changes as legitimate. After all, the Case was a clear example of how individual human rights standards might contradict consociational arrangements but at the same it shows why there is an engagement in consociational agreements in the first place, that is to end violence and provide peace. Nevertheless, the case is a clear indicator of the need to find a delicate balance between the human rights of smaller ethnic groups and the group rights of the warring ethnic groups, and also modify the consociational design for the protection of the former.

After the ECtHR's decision, the BiH government did not take the necessary steps to comply with the decision and enable the participation of smaller groups to the elections to the executive and the legislature, although it had committed to do so until 2013. This is also enough evidence to show that the politicians are not ready to *unwind* the consociational system. However, in January 2018, Nermina Kapentanovic (a member of the Bosnian Joint Parliamentary Committee on European Integration) stated that the

European Council may impose sanctions to BiH for not complying with the Court's decision.[246]

The Sejdic and Finci Case is important as far as it teaches a lesson for the composition of the judiciary which is based on constitutional quotas. It also provides a ground to discuss whether the same power-sharing accommodations on the composition of the judiciary contradict the human rights of the non-appointed judge candidates due to their ethnic background as well. Although judicial quotas are not ethnic but rather territorial, as was stated, in practice, appointed judges have always come from the three main ethnic groups. It remains to be seen what the Court's decision would be if someone from a smaller ethnic group claimed discrimination due to their non-appointment. Moreover, if the political rights (which the ECHR protects) include *access to public posts* and if one accepts that the judgeship position is also a public post, then, the restriction on appointments based on ethnic criteria might amount to a violation of political rights as per the ECHR.

V. Comparing the Supreme Constitutional Court of the 1960 Constitution and the Constitutional Court of the 1995 Dayton Constitution

The similar political conditions of ethnic division prevailing both in Cyprus and Bosnia-Herzegovina have affected their post-conflict constitutional designs in which their constitutional courts function therein. Both Cyprus and Bosnia-Herzegovina did not have prior experience with majoritarian democracy and the first form of democracy they experienced was power-sharing democracy. Thus, both countries had to undergo a transitional period in order build their government institutions, including the judiciary, according to the principles of power-sharing democracy. Needless to say, this transitional period was heavily influenced by the international actors that have an interest in the political solution.

Just like the constitution-drafting process, the composition of the judiciary was also influenced by the internationalisation process of State-building. Both Constitutions envisaged an ethnically diverse constitutional court with the presence of international judges. They both recognized main ethnic groups, and the judicial power was shared between these groups through the application of constitutional quotas. Equal representation

[246] The Council of Europe may Impose Sanctions on Bosnia and Herzegovina accessed by: https://www.novinite.com/articles/186633/The+Council+of+Europe+may+Impose+Sanctions+on+Bosnia+and+Herzegovina 02/02/2018

of the ethnic groups was ensured by the constitutional quotas; in Cyprus (1960), quotas were based on ethnicity, whereas in BiH, they are territorial. Additionally, international judges were deemed necessary as a tie-breaking mechanism. In both constitutional designs, other smaller groups' representation was not required by the constitutional quotas and in practice no person from a smaller group has been appointed to the BiH Constitutional Court. This practice demonstrates that if the life of RoC (in its original form) was longer, it would most probably follow the same practice of not appointing someone from smaller ethnic/religious communities.

In terms of the jurisdiction of the constitutional courts, both courts had/have the power of constitutional review and through these cases they were deemed responsible to observe the post-conflict peace-building process which is very political in nature.[247] The examination of the selected cases (in Chapter IV and V) revealed that the most problematic aspect was the implicit ethnic bias of the local judges. Local judges undertook substantive representation[248] and acted politically to protect what they deemed their ethnic group's interest. Rather than a neutral interpretation of the Constitution, they were involved in ethnically biased interpretations and advocated their respective political leaders' standpoints. Although it is difficult to explicitly claim and prove that the judges were politically biased, when the Court decisions and dissenting opinions are read together with the political conjecture of 1960's Cyprus and post-conflict BiH, it becomes clearer that the local judges' interpretations in many cases were ethnically tainted. Besides local judges, international judges in both countries were also accused of supporting one side and not being impartial. This has led to arguments about their necessity.

Although, the presence of international judges in Cyprus' SCC was not criticized initially, during the course of time, when the German President did not issue decisions to the satisfaction of the Greek-Cypriot politicians in the Municipalities case (10/63), he was blamed for being pro-Turkish. Similarly, in Bosnia, Serb politicians (as well as some Croats) are protesting international judges as being pro-Bosniac,[249] by sending letters to the UN. The demand of the termination of the international judges' term and the non-

[247] Chapter III, Part II.A.

[248] Chapter II, Part IV.E.

[249] *Supra* fn., Schwartz A.D

appointment of the new ones still continues. Likewise, after the violent clashes in 1963 in Cyprus, Greek-Cypriots, who assumed the unilateral administration of the RoC, did not appoint any international judges to the newly established Supreme Court. The debates on the presence of international judges are all due to the Court's role in important political cases in constitutional review cases because there was not much protest about the presence of an international judge in the High Court of Justice in Cyprus which was dealing with the appeals of criminal and civil cases. Therefore, in both countries, those who are against the presence of international judges argue that international judges are not impartial as they are in favour of one ethnic group over another and their profound influence on the outcome of the political cases is undesirable. However, to this day, no offer has been made as to how to re-structure the BiH Constitutional Court that would yield to constitutional amendment.

Another problematic aspect in both settings is the difficulties both Courts experienced in ensuring respect and implementing their decisions. In Cyprus, SCC's decision in the Municipalities cases was not respected, and after the Court's decision, the government took actions to establish the Improvement Boards, contrary to the Court's decision. Likewise, in BiH, the decision of the Court in the Constituent Peoples Case was implemented only after the OHR's imposition of laws to the Entities after a long time. In addition, the OHR reacted and disrespected the Court's decision in the *Kalinic and Bilbija Case* and the RS did not comply with the Court's decision in not pursuing the referenda in the interim decision [U-10/16]. Therefore, it is understood that both countries have had problems in securing respect and implementing the Court's decisions.

Nevertheless, in both countries, constitutional courts had asserted themselves as important actors of political life. In Cyprus, it was the SCC's invocation of the doctrine of necessity that changed the constitutions' consociational feature towards a majoritarian one, whereas in BiH, the Constitutional Court decision in Constituent Peoples invalidated the ethnic character of the Entities and pushed the constitutional design towards a more integrated system. Thus, in both countries it was the Constitutional Courts who changed the constitutional system *in toto*; in Cyprus the procedure (invocation of doctrine of necessity) was apparently lawless for Turkish-Cypriots; whereas in BiH the Court decision (although not approved by Serbs and Croats) was more legitimate in terms of the legal procedure. Therefore, the impact of Constitutional Court decisions on the political order was visible in both settings.

The common feature of both constitutions was their negligence of the people who would not wish to identify themselves with any ethnic group. These people could not enjoy the same constitutional rights and representation with those who were constitutionally recognized. In 1960 Cyprus' experience, the smaller minority groups were given the option to choose to be part of one of the ethnic communities, whereas in BiH, they were classified as *Others*. As was seen in practice, these people were not required to participate in government institutions under the name of their own ethnic background. This had consequences on the judiciary and the Cypriot senior judiciary was composed of solely Turkish-Cypriots and Greek-Cypriots as a constitutional requirement; even if someone from smaller communities had to be appointed, he could only be appointed under the name of one of these constitutionally recognized groups that they chose to belong to. In BiH, although the constitutional quota was territorial, in practice, the judiciary continued to be composed of solely Serbs, Croats and Bosniacs. Even after 20 years, no one from the smaller minorities has been appointed which is kind of unfair when one considers the presence of international judges. The Sejdic and Finci Case before the ECtHR is a good example to draw lesson from BiH to Cyprus because any court composition that is based on ethnic quotas could face challenges as it prevents the appointment/election of smaller groups to government branches and discriminates against them.

As a final note, it needs to be pointed out that both constitutional settings require good intention to function smoothly. As Prof. Forstoff stated for Cyprus: *"Every constitution can have its peculiar problems. There is no constitution in the world which has not got its particular problems and difficulties. This is primarily a question of good will. If there is good-will, a constitution can be implemented, and the Constitution [of Cyprus] is capable of being implemented."*[250] His words can extend well beyond to BiH. Despite the problems in the functioning of the government and the discontent of all Bosnian political leadership, they could not agree to a constitutional reform and they have become the prisoners of their coerced consociational choice.

VI. Conclusion

This chapter examined the functioning of the ethnically diverse BiH Constitutional Court under the power-sharing design of the 1995 Dayton Constitution. It is argued that the

[250] Prof.Forstoff interview in Z. Stravinides, *The Cyprus Conflict, National Identity and Statehood* (2nd ed.), 1999;p.53

Constitutional Court's diverse composition was necessary in providing legitimacy for the institution and gathering the public trust of all ethnic groups in the impartiality of the judiciary that justice is done or seen to be done. The inclusive design of the judiciary that gave place to all viewpoints was one of the reasons that made the Dayton Agreement possible.

However, the diverse Constitutional Court was faced with some problems firstly due to its composition and then, in its functioning. The first problem arose as a result of the judicial appointments process which was influenced heavily by the nationalist politicians and led to the appointment of judges who had political connections. As a consequence, individual judges fell victim to what was deemed as "national" and/or political concerns. This practice was evidenced by the Simic Case (No K-I-15/10) in which a constitutional court judge was dismissed by the Constitutional Court due to his political connections which damaged both the Court's and his own integrity. Besides political influence on appointments, the threat of the OHR to the independent functioning of the Court is also present. It was documented that the OHR has intervened to the Court's composition, functioning, decision-making and has attempted to, sometimes successfully and other times not, to secure the decision in a way it prefers it to be.

However, the BiH Constitutional Court was entrusted to resolve important political matters through the course of the constitutional review process; both abstract review and concrete review were in the Court's jurisdiction. In these cases, the Court inevitably made decisions that involve the political relationship between the three ethnic groups and these decisions had an impact on the constitutional/political order. As such, *the Constituent Peoples Case* [U-5/98] showed the Court's political power in unwinding the consociational settlement and moving towards a more integrated state, despite the fact that the Case also revealed the ethnic bias of local judges. The different interpretation of the local judges towards the BiH power-sharing structure in this case revealed the influence of their ethnic background in the decision-making process.[251] Both the majority and dissenting opinions were used to advance the political viewpoints of the respective ethnic groups and they were biased. Although, the Renaming Cities Case, [U-44/01] was a step to abandon ethnic voting and move towards a more impartial decision-making, the Bilbija and Kalinic Case [Application No.AP-953/05] demonstrated the OHR's threat to judicial independence and

[251] Chapter IV, Municipalities Cases(IV.IV.B.); also M.Ibrahim Case (IV.IV.D)

impartiality of local judges. In the latter case, although all court members voted in the same vein to protect the human rights of the applicants that were violated by the OHR, the OHR invalidated the Court's decision by a decree and posed more problems for the judicial independence and impartiality of judges. This case also revealed that the OHR's decrees rendered not only the decision but also the Court's composition meaningless and ineffective. The last constitutional court case, Law on Holidays [U-3/13]and the related interim decision [U-10/16] proved that the local judges could not escape ethnic voting even after many years after the end of the war and all local judges involved the interpretation of *9th January* by their political and historical understanding of events and once more split upon ethnic lines.

In all analysed cases, the Court's diversity was the main factor in reaching correct decisions, finding balance between the protection of individual human rights and group rights and/or declaring an effective remedy for the violated human rights, even if decisions were not always implemented. As the decisions reached were due to the presence of international judges, then, their presence started to be criticized as they are lenient to the Bosniac cause and the Court was being used to advance this purpose by Serb politicians. The subsequent discussions as to how to re-compose the Court remained futile.

Although it is difficult to prove conclusively (as it happened in Simic Case, No K-I-15/10) that the local judges were ethnically biased (as ethnic bias is implicit), as was observed the dissenting opinions were influenced by ethno-political and religious sentiments. Consequently, analysis of the functioning of the diverse Constitutional Court revealed that the biggest problem is maintaining local judges' impartiality. Therefore, although the Court's diversity was necessary to foster public trust in impartiality and legitimacy initially, ethnic voting affected the public trust and the Court's perceived legitimacy which consequently caused problems in implementing its decisions in time.

However, considering the Constitutional Court's role in building a constitutional system that serves all citizens, constructing an infant democracy and re-constructing a multi-ethnic society, it is still difficult to argue for the abandonment of a diverse judiciary. Diverse composition is needed because the absence of one group would neither make the Dayton Agreement acceptable in the first place nor increase the impartiality of another one. Also, non-participation of even one *(ethnic)* opinion could lead to total unrest on the part of the absentee group and lose whatever is left for legitimacy and public trust. In turn, seeking

violent means for dispute resolution could become an option and consequently, cause more disaster. This is not a price that the Bosnians can pay especially at a time that they are still trying to overcome the pains of war. The Court's failure so far does not mean that it does not have the power to contribute to stable democracy. The Court can still help the democratization process positively if only the local judges are willing to abandon ethnic voting. Thus, instead of abolishing judicial diversity and/or removing the international judges, constitutional tools to increase judges' independence and impartiality and also a new judicial appointment procedure need to be investigated.

In the analysis of the Sejdic and Finci Case, the possible challenges that the BiH Constitutional Court could face is extrapolated to highlight the need of representation of smaller communities/groups in the composition of the government and also in the judiciary and the territorial quotas should not be used to satisfy ethnic representation and should also provide representation to smaller groups in the judiciary.[252]

Finally, the comparison of the SCC under the 1960 Constitution and the BiH Constitutional Court revealed that the composition of the latter might be inspired by the Cyprus' SCC as they were/are the only two standing constitutional courts with international judges. However, in both settings local judges' ethnic bias remained the main problem that needs to be resolved either through the judicial appointments process and/or by other constitutional procedure.

[252] Chapter VII, Recommendations

Chapter VI. After 1964: Cyprus in need of a federal solution and a federal judiciary and some lessons from Bosnia-Herzegovina

I. Introduction

This chapter presents the third case-study, the proposed Constitution under the *Comprehensive Settlement for the Cyprus Problem* (2004), known as Annan Plan and illustrates how the theoretical framework of federalism was proposed to be applied to unify the territorially and ethnically divided Cyprus under the United Cyprus Republic (UCR). It, then, examines the proposed Supreme Court under the Annan Plan and compares it to the BiH Constitutional Court.

In the first part, the subsequent political events after the consociational break-down in 1964 until 2004 are outlined in order to provide a better understanding of the divisive socio-political factors that required another power-sharing (federal) constitution for the political solution of the Cypriot problem. In the second part the federal government structure under the proposed Annan Plan Constitution is analysed, and the relevance of federalism for unifying Cyprus and its links with the previous 1960 Constitution is discussed.

In the third part, there is specific reference to the Supreme Court under the Annan Plan Constitution and an examination of the Court's composition and jurisdiction. This part is also aimed to assess whether the constitutional accommodations for the judiciary under the proposed Annan Plan Constitution are a more elaborated version of the 1960 Constitution. The pros and cons of the federal judiciary from the theoretical perspective and then, the different standpoints of the two communities with regards to the proposed composition and expected functions of the Cypriot judiciary are also assessed.

In the final part, lessons are drawn from the experience of the Bosnia-Herzegovina's Constitutional Court with an aim to discuss whether the composition of the BiH Constitutional Court could be a model for Cyprus' future judiciary due to the lack of empirical evidence as the Annan Plan was not implemented. By this, it is aimed to address the benefits and the challenges faced in maintaining the judicial independence and impartiality of the ethnically diverse federal judiciary in order to answer whether a diverse judiciary for the prospective federal solution is still necessary. It is concluded that due to its role in protecting the federal system, the diverse composition of a federal supreme court should be of utmost importance, despite the possible disadvantages.

II. Can a federal design be a solution to Cyprus' problem and its judiciary? The Annan Plan Constitution (2004)

A. Cyprus, 1964-2004: A Brief Political History of the Island and the Road to the Annan Plan

Since the decision of the Supreme Court in *Mustafa Ibrahim* in 1964, in which doctrine of necessity was invoked, the consociational structure of the RoC has been broken down. During the height of ethnic conflict in 1964, the United Nations passed a resolution which recognized the RoC, as the only legitimate government on the island although it was led by Greek-Cypriots only.[1] The two communities experienced armed conflict between 1963 and 1967, with the help and provocation of their respective "motherlands", Greece and Turkey. However, after 1967, due to the political conflict over the island's future between the Greek-Cypriot political leadership and the Greek government (who was led by a military junta at the time), the tension between the Greek and Turkish-Cypriots eased but it continued until 1974.[2] The Greek military junta staged a *coup d'état* against President Makarios to overthrow him on the 15th July 1974.[3] The aftermath was the invasion and occupation of the north part of the island by Turkey on the 20th July 1974, arguing that this was Turkey's right under the Treaty of Guarantee.[4] Although the UN called for respect for the sovereignty, independence and territorial integrity of the RoC[5], the island was partitioned into two ethnic territories, since most Turkish-Cypriots moved to the north and most Greek-Cypriots to the south of the island during the war, with a buffer zone being drawn by the UN between the north and south. On the 13th February 1975, following the

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1 UN Resolution 186 of 4 March 1964

2 M. Drousiotis, *Cyprus 1974 the Greek Coup and the Turkish Invasion,* Peleus, 2009; Y. Papadakis, N. Peristianis and G.Welz, *Modern History and an Island in Conflict*, US: Indiana University Press, 2006

3 Ibid

4 The Treaty of Guarantee, Article IV: *In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty*.

5 UN SC Resolution 353 of 20 July 1974

invasion of Turkey, the Turkish Cypriot Federal State was announced by the then Turkish-Cypriot leader Rauf Denktash. The UN Security Council expressed its dissatisfaction with this declaration.[6] Later, on the 15th November 1983, the Turkish Republic of Northern Cyprus was established *de facto*; this has also been declared illegal and its recognition by other states has been banned by the UN Security Council.[7]

For almost sixty years, (except 1960-1963) the two communities are in search of reunion and peace on the island under the auspices of the UN. Makarios, the then President of the RoC, and Rauf Denktash, the then Turkish-Cypriot leader, signed the Third Vienna Agreement in August 1975, which concerned the humanitarian treatment of people who were not displaced during the war and wanted to cross the checkpoints later. They also signed the High Level Agreement of the 12th February 1977 with an aim to establish an independent, non-aligned and bi-communal Federal Republic.[8] Later, the then President of RoC, Mr. Kyprianou, and Denktash signed the 10-Point Agreement on the 19th May 1979 and reiterated that the basis of the talks would be the High Level Agreement of 1977.[9] Since then, no agreement has been reached between the parties and the two Agreements (1977 and 1979) have been the basic parameters of a possible political and constitutional solution. As a result, the intercommunal negotiations and the subsequent UN proposals to solve the Cyprus problem have aimed at creating a bi-communal and bi-zonal federal State with a single sovereignty.[10] Therefore, the UN has tried to reunite the two communities under a federal design in its subsequent proposals.

In the post-1964 period, the composition of the Constitutional Court was one of the topics negotiated during the intercommunal talks. The discussion was on the jurisdiction and the number of the local judges in the constitutional court and there was no discussion on the presence of an international judge in the constitutional court's composition. The

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6 UN SC Resolution 367 of 1975

7 UN Security Council Resolution 541/83, 18 November 1983

8 Appendix B,The High Level Agreement, 1977

9 Appendix C, The Ten Point Agreement, 1979

10 The bizonality principle is subject to debate as the term was not used in either Agreements but Article 2 of the High Level Agreement (1977) stated that *special territorial arrangements are needed for the territorial administration.*

concerns on the role of the judiciary may be seen as early as March 1965, in UN mediator Galo Plaza's Report.[11] Plaza's report did not offer any constitutional arrangements for the composition of the judiciary but stated that the Constitutional Court would function to interpret the constitution and it cannot solve the *political differences of the parties,*[12] despite the fact that serious political differences would end up before the Court. For Plaza the composition of the judiciary under the 1960 Constitution was a result of concerns on maintaining a balance between the two communities.[13]

In 1967, the two community leaders agreed in principle on a new design for the judiciary under the supervision of the UN Mediator Tafall. The agreement was that the representation of the Turkish-Cypriot judges in the judiciary would be proportional to their population and this representation should be, as far as practicable, at all levels.[14] However, the implementation of the agreement was subject to agreement on all other matters. As there was no comprehensive agreement, these proposals were dropped as well. Subsequent proposals by UN mediator Perez de Cuellar offered the equal representation of Greek-Cypriot and Turkish- Cypriot judges in the Supreme Court.[15]

In 1977, the Turkish-Cypriot side proposed the equal representation of local judges in the composition of the constitutional court.[16] In return, Greek-Cypriots countered the proposal by stating that this would lead to deadlock in the judicial decision-making process. This offer was reiterated in 1978 with an addition of two alternate judges. Foreign judges were not envisaged by the Greek-Cypriot or by the Turkish-Cypriot side. However, another initiative, in November 1978, the *Framework for a Cyprus Settlement* which was prepared by the American, British and Canadian Governments, proposed a Federal

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[11] Report of the UN Mediator on Cyprus to the Secretary General, S/6253, 26 March 1965; Plaza's report rejected federalism as a new constitutional order as there was no territorial separation between the communities in 1965.

[12] Ibid, Para 30

[13] Ibid, Para 34

[14] C. G. Tornaritis, *Cyprus and its Constitutional and Other Legal problems,* 2nd ed. Nicosia, 1980

[15] M.S.Michael, *Resolving the Cyprus Conflict, negating history*, Palgrave, Macmillan, 2009;pp.118-119

[16] *Supra* fn. 14, C.G.Tornaritis

Supreme Court which would be composed of one Greek-Cypriot, one Turkish-Cypriot, and one non-Cypriot judge, jointly appointed by the President and the Vice-President.[17] According to this proposal, the Supreme Court would be responsible to interpret the constitution and act as the highest court of appeal where federal legislation would be required.[18] This Framework proposal was also not accepted. During the course of time, the proposed numbers of the local judges have changed there were no proposals for the inclusion of foreign judges. Therefore, in time, it became obvious that the presence of international judges was not desired by either side. Finally, in 1992, Butros Ghali, the then UN mediator, outlined his proposals in his *Set of Ideas* and reiterated the presence of an equal number of local judges, with a rotating presidency in the composition of the judiciary.[19] After the rejection of Ghali's Ideas, the intercommunal talks continued on and off until 2004 when the UN Secretary General Kofi Annan proposed *the Comprehensive Settlement for the Cyprus Problem* as a political solution to the people of Cyprus.

The Annan Plan was revised five times. When it reached its final version (Annan V, 31st of March 2004), it was a comprehensive Plan with nine Annexes.[20] The Plan proposed to establish the United Cyprus Republic (UCR) in the form of a federal state. The Plan was put to a referendum simultaneously on both sides of the island, on the 24th April 2004. It was accepted by 64.9% of the Turkish-Cypriots and was rejected by 75.8% of the Greek-Cypriots.[21] As the Plan required the approval of both sides to be implemented, the unification of the island through a federal constitution was not achieved. Nevertheless, the federal design is still relevant to Cyprus' future political settlement because the basic

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[17] Ibid

[18] Ibid

[19] Boutros Ghali Set of Ideas, Article 43

[20] These were: Constitution, Constitutional Laws, Federal Laws, Cooperation Agreements between Federal Government and Constituent States, List of International Treaties binding on the UCR, Territorial Arrangements, Treatment of Property Affected by Events since 1963, Reconciliation Commission and the Provisions regarding the Coming into being of the New State Affairs.

[21] The Greek-Cypriot eligible voter turnout was 88% and the Turkish-Cypriot eligible voter turnout was 87%; BBC News, 25 April 2004 accessed by: http://news.bbc.co.uk/1/hi/world/europe/3656753.stm on 29 May 2014; One week later, on the 1st May 2004, the RoC has become a member of the European Union but the Accession Treaty suspended application of the *acquis communautaire* in the areas that is controlled by Turkey

parameters of any settlement will not be too far from its constitutional accommodations. This is due to the need of providing a political balance between the two ethnic communities and also because the subsequent framework of convergences under the UN negotiations is based on the amendments to the Annan Plan.[22] Therefore, the Annan Plan's Constitution is in need of examination.

B. The Proposed Federal Constitution of the United Cyprus Republic (2004)

The Annan Plan proposed to establish the United Cyprus Republic (UCR) which would be based on a bi-zonal, bi-communal federal government.[23] The Federal government would be composed of two constituent states: the Greek-Cypriot State and the Turkish-Cypriot State and the constituent states would have equal status.[24] The executive power would be exercised by the Presidential Council which would be composed of six voting members[25], including President and the Vice-President.[26] The UCR would have a representative republican government[27] and there would be political equality of Greek-Cypriots and Turkish-Cypriots. In the Annan Plan Constitution, *"political equality"* was described as *"neither side may claim authority or jurisdiction over the other"*.[28] The Constitution would be the supreme law of the land and it would be binding on all federal authorities and the constituent states.[29] Article 3(2) stated that the federal government laws and the constituent states laws should not have any hierarchy between themselves. The powers of the federal government were listed in Article 14(1) and the constituent states, subject to the

[22] N.Trimikliniots Rethinking the Un-viability of the Constitutional Arrangement in A.Varnava and H.Faustmann, *Reunifying Cyprus, The Annan Plan and Beyond*, I.B.Tauris, 2009

[23] Main Articles

[24] Article 2 (1)

[25] Article Article 26(1)

[26] Article 27

[27] Basic Articles 1(4)

[28] Main Article iii

[29] Article 3(1)

limits of the Constitution, would be entrusted with the power to exercise all competences which were not entrusted to the federal government.[30]

In terms of legislature, there would be a federal Parliament, composed of two Chambers: the Senate and the Chamber of Deputies.[31] Each Chamber would have 48 members elected for 5 years through proportional representation.[32] Whereas the Senate would have 48 members, consisting of 24 Greek-Cypriots and 24 Turkish-Cypriots, the Chamber of Deputies would be composed proportionally but at least one-quarter of seats should be reserved to one constituent state.[33] The executive power would be exercised by the Head of State which would be the Presidential Council.[34] The Presidential Council would be composed of the members coming from the constituent states in proportion to the number of citizens of each internal constituent state.[35] It would have six voting members (four Greek-Cypriots and 2 Turkish-Cypriots). As for the federal administration, there were constitutional quotas reserved for the constituent states in federal institutions. For example, the public service would be composed proportionally to the population of the constituent states[36] but at every level of the administration, at least one-third of the public servants would come from one constituent state.[37]

The Annan Plan Constitution envisaged a federal judiciary, the Supreme Court of Cyprus, which would be composed of an equal number of judges from each constituent state and three non-Cypriots judges.[38] The Court was required to uphold the Constitution and guarantee its full respect[39] by other federal organs and the constituent states.[40] The

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[30] Article 15

[31] Article 22(1)

[32] Article 22(2)

[33] Article 5

[34] Article 26(1)

[35] Article 26(6)

[36] Article 30(2)

[37] Article 30(2)

[38] Article 6(1) and Article 36(1)

[39] Foundation Agreement, Article 6(1), Part II, General Provisions, Article 3(3)

Supreme Court would be responsible, *inter alia*, to resolve the disputes between the constituent states, between one or both of them and the federal government, and between the organs of the federal government.[41] The Court would also be responsible to resolve deadlocks on an interim basis within federal institutions if the deadlock could prevent the proper functioning of the federal government.[42] Moreover, the Supreme Court would also determine the validity of any federal or constituent state law under the Constitution or address any question that might arise from the precedence of constitutional laws.[43]

Another duty of the Supreme Court would be to sit as an appeal court in all other disputed matters, involving the interpretation or an alleged violation of the Foundation Agreement, the Constitution, federal laws (including federal administrative decisions), or treaties which would be binding upon the UCR.[44] The Supreme Court would also have authority over violations of federal law where provided by federal legislation.[45] Moreover, if there were a constitutional deadlock which might prevent the proper functioning of the federal government or its institutions and also prevent the UCR from fulfilling its obligations as a member of the EU, the Supreme Court, upon application of a member of the Presidential Council, might take an interim decision.[46]

The Supreme Court would also have the authority to prevent a person who does not hold its internal constituent state citizenship status from entering or residing in that constituent state by issuing an injunction.[47] At the same time, the Court ought to grant the injunction if the relevant person had been actively engaged in acts of violence or

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[40] Article 3(3)

[41] Article 36(2)

[42] Foundation Agreement, Article 6(3)

[43] Article36(3)

[44] Article 36(4)

[45] Article 36(5)

[46] Article 36(6)

[47] Foundation Agreement Annex II, Attachment 3, Constitutional Law on Internal Constituent State Citizenship Status and Constituent State Residency Rights, Article 6(1)

incitement to violence and the presence of that person in that constituent state would be a danger to public safety or public order.[48]

C. Assessment of the Federal Constitution and its Supreme Court

The Annan Plan has been regarded as the most comprehensive, *"elaborate and sophisticated proposal"*[49] and it had no precedent either in the history of Cyprus or in the history of UN mediations in ethnic conflicts.[50] Its federal constitution embedded all principles of federalism.[51] Federalism is significant and relevant for the political/constitutional solution in Cyprus because the root cause of the problem was both communities' demand for power, both on territory and in government institutions. Through the federal design, both constituent-states would share governmental power and thereby, the possible tyranny of the Greek-Cypriot majority and/or the risk of assimilation and secession of the Turkish-Cypriots would be prevented. Also when Cyprus' socio-political and historical facts are taken into account and compared to the other political aspirations of the two communities *(*such as, *Taksim v. Enosis),* federalism offers the only realistic solution which would unite, recognize and protect the diversity without eliminating cultural differences.[52]

Moreover, *unity in diversity*[53] is also relevant because the country needs to *unify* its *diverse* communities within one territory under the federal umbrella without assimilating the smaller ones and by respecting their differences. This principle should be the most important aim and probably the most difficult one to be reached.

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[48] Foundation Agreement Annex II, Attachment 3, Article 6(2); The roots of this aspect of the Constitution can be traced back in the Ghali-Set of Ideas, Article 51

[49] H. Anastasiou, *Broken Olive Branch,* Nationalism, Ethnic Conflict and the Quest for Peace in Cyprus, Vol.II, The Impasse of Ethnonationalism (Syracuse:Syracuse University Press, 2008;p.52

[50] Alvaro de Soto, "The Case of Cyprus" (paper, Third International Conference on Federalism, 3–5 March 2005, Brussels cited in Heracliades A., The Cyprus Gordian Knot: An Intractable Ethnic Conflict, Nationalism and Ethnic Politics, 17:2, 2011

[51] Chapter II, Part II.B.

[52] N.Kizilyurek&T. Erhurman, *Federalism in Cyprus: Politics in Search of its Subject*, Isik Kitabevi, Cyprus, 2009

[53] Chapter II, Part II.B.

Secondly, the autonomy principle manifested itself in the administration of the constituent states in which both constituent states would be the only authority in their own territory. Since the Ottoman time, both communities administered their internal affairs separately and autonomously under their religious organisations without territorial limitations. They continued to have their group autonomy in cultural matters in their short experience with the 1960 Constitution. Group autonomy was reinforced territorially after Turkey's invasion and occupation. Although *de facto* and an illegal act in itself, the present ethno-territorial dimension could only be solved by the application of the autonomy principle and by rendering respective constituent-states autonomous is their regions. Both constituent-states would have territorial autonomy to govern themselves in accordance with their respective constituent-state constitutions as long as they do not conflict with the central state. This was what the Annan Plan's federal constitution envisaged.

Moreover, the power and jurisdiction of the Greek-Cypriot and Turkish-Cypriot constituent states were defined by the subsidiary principle in order to prevent or at least to lessen the jurisdictional conflicts between themselves. Article 14/1 stated clearly the powers of central government in which the constituent-states cannot act upon and Article 15 stated the jurisdiction of the constituent-states. Both constituent-states would be required to function by their own constitutions, in which the limits of their power and authority would be explicitly stated in accordance with the federal constitution. Hence, it is important to define their jurisdictions clearly in the federal constitution in order to avoid a political conflict (on the powers of the constituent-states) that could escalate to violent conflict.

Finally, the representation of the members of the respective constituent-states would be enabled by the *participation* principle. As such, they would participate to the Senate on an equal basis and in the Chamber of Deputies on a proportional basis through quotas.[54] Also the equal participation of the respective constituent-states to the federal government institutions was proposed. Both communities would also participate in the composition of the public service and the Turkish-Cypriot constituent-state would have at least 1/3 of the

[54]The equal and/or proportional representation of the constituent states to the federal state are not specific to Cyprus's proposed federal design; but rather an essential part any federal design;McGarry J. and Loizides N., Power-Sharing in re-united Cyprus: Centripetal coalitions v.s. proportional sequential coalitions, I-CON (2015)13, 847

public posts. In order to facilitate the participation of the constituent-states in the government institutions, territorial quotas would be employed.

The Annan Plan's federal design overlaps with the 1960 Constitution's consociational design in many respects. For example, the consociational principle of grand coalition can be seen in the composition of the federal executive branch (Presidential Council) which would be composed of people from both constituent-states. The segmental autonomy of the 1960 Constitution which allowed the ethnic groups to administer their cultural affairs had a territorial dimension in the Annan Plan's federal constitution, and grant territorial autonomy to the constituent-states to govern themselves as long as their internal administration did not conflict with the powers of the federal government.[55] Moreover, the representation of the constituent-states in federal government institutions was constitutionally guaranteed with an increased representation of the numerical minority Turkish-Cypriots similar to the 1960 Constitution.[56] The only principle of consociationalism that was absent in the Annan Plan Constitution was the veto right to protect the vital interests of each community. However, considering the equal representation of the constituent-states in the Senate, both constituent-states were both enabled to block any decision by voting against it, if they regarded it as detrimental to their vital interests; this would provide them with additional protection, as the veto right would do. Therefore, the Annan's federal constitution was, in a way, a modification of the 1960's consociational constitution with territorial accommodations except for the veto right.

As it can be seen the federal design had/has the potential to solve the Cyprus problem. However, federalism, as a political choice, is regarded as the *lesser of evils* especially by the Greek-Cypriots people.[57] Due to the *de facto* creation of the territorial boundaries, the majority of Greek-Cypriots prefer a unitary state that is ruled by majoritarian democracy due to their numerical strength even before 1960.[58] Also, due to the Turkey's invasion and occupation, the territorial dimension, in which federalism is

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[55] Article 2

[56] Chapter IV,Part III.A.B.

[57] H. Brey, Kosovo and the Cyprus scenario:a nightmare and a missed opportunity, Südosteuropa Mitteilungen, Issue: 04/2007;p.45

[58] *Supra* fn.15, M.S.Michael

based, has always been regarded artificial and *de facto.* If majoritarian democracy cannot be achieved, a federal design with a strong, centralized government could be reluctantly accepted. On the other hand, Turkish-Cypriots initially demanded political and geographical partition of the island with a State of their own. However, despite their declaration of the so-called Turkish Republic of Cyprus in 1983, this entity has not been recognized internationally. Subsequently, they opt for a confederal solution and/or a loose, broadly decentralized federal system, which could function like a confederation. Therefore, until the Annan Plan, federalism had not received substantial attention from Cypriots although in the post-1974 era, federalism has remained as the central idea of the negotiations for a possible political solution.[59] Only left-wing politicians and scholars from both North and South accepted and argued for federalism to reunite the island. This is another irony of Cyprus' politics as the political leaders have been negotiating for a federal design for 40 years but the public still cannot understand that federalism is the *only game in town.*

III. The Federal Judiciary

In light of the above discussions and given the potential underlying federalism as a possible solution, the nature of the judiciary in a federal system is discussed next.

A. Federal Judiciary from a Theoretical Perspective

The federal system requires a supreme institution (a Supreme Court and/or a Constitutional Court) that will interpret the written federal constitution and resolve jurisdictional disputes between the government layers.[60] The jurisdictional disputes are generally the ones that concern the division of powers between the federal state and the member-states and/or between the member-states themselves.[61] The conflict on the division of powers is about *"whether a member-state has what power, to what extend it*

[59] *Supra* fn.2, Y.Papadakis, N.Peristianis and G.Welz

[60] J. McGarry, Federalism (Federation) as a Method of Ethnic Conflict Regulation, Forum of Federations in S.Noel, From Power-Sharing to Democracy, S. Noel, *From Power-Sharing to Democracy: Post Conflict Institutions in Ethnically Divided Societies,* Montreal, McGill Queen's University Press, 2005

[61] ibid

has the power and whether this power is in conflict with the federal state"; [62] the Court's decision in these cases would inevitably favour one power-holder over the other. The judiciary/Supreme Court is also entrusted to review the constitutionality of the State laws and the constitutionality of the member-states' law. Federal judges are empowered to invalidate federal government laws (in *horizontal* judicial review cases) and/or annul state and local government laws (in *vertical* judicial review cases); both cases have the risk of exacerbating disputes.[63]

In multi-state federal designs, the conflict usually involves *complex constitutional boundary agreements* because the member-states agree to join the federal state that will benefit them more, if they do not join.[64] Moreover, despite the fact that the member-states might break the conditions of the contract (federal constitution), they would like to see parties of the agreement comply with the rules.[65] That is why they support the establishment of a Supreme Court in order to control and/or prevent violations by the others.[66]

However, hints of irony are detected in the federal system. In the American experience, on the one hand, an arbitrator (as in the form of the Court) is necessary for the resolution of the conflicts between the member-states and the Congress and/or between two member-states.[67] On the other hand, for the resolution of disputes, member-states have entrusted power to the Supreme Court which is also a branch of the Central government; thereby, in a way, member-states ask the Court to be the arbitrator of its own case because the Court is a branch of the Central State. Moreover, the Supreme Court's power to

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[62] M. Shapiro, The Success of Judicial Review and Democracy in M. Shapiro and A.Stone-Sweet, *On Law, Politics, and Judialization*, Oxford University Press, 2002;p.23

[63] Friedman, Barry and E.F.Delaney, "Becoming Supreme: The Federal Foundation of Judicial Supremacy" 2011 *Columbia Law Review;* K.E.Whittington, the power of judicial review in Oxford Handbook of the US Constitution

[64] *Supra* fn.62, M. Shapiro

[65] Ibid;pp.2-3

[66] Ibid;p.18

[67] However, from this perspective, the constitutional court of a unitary state could face the same criticism as it is a government branch and still decides on the constitutionality of the government actions.

exercise jurisdiction both over the federal and member-state governments has also been criticized as it creates "*counter-majoritarian difficulty*" due to the Court's (as an unelected body) power in declaring the unconstitutionality of a legislative act or the executives' action (as an elected body) and thereby, frustrating the will of the majority (representatives of the people).[68]

The Federal Court's decisions might support the Federal States' or the member-states' actions; but it is evidenced that in multi-state federations, such as the USA, the Federal Court's decision usually supports the Federal State.[69] In any case, it is an important task of the Court to uphold and strengthen the federal system and prevent the dissolution of the State, especially in the initial years of the experience with federalism. This point is especially more relevant for the federal states which will come into being as a result of a long-time political conflict with an aim to resolve it and reconstruct peace. Needless to say, this work is done by the interpretation of the independent and impartial judges.

However, judges' independence and impartiality cannot be assumed from the beginning because their interpretation can be motivated by party politics and they might issue partisan decisions. Those judges who favour a more centralized federal system could support the actions and powers of the federal state and invalidate the member-states' actions more frequently, something which would give them more autonomy in their province; whereas the opposite will hold true for the judges who support a more decentralized federal system with more powerful member-states. For example, Posner argues that judges always decide according to their political preferences.[70] Similarly, Rosenberg states that independent judges sometimes might be carried away by their political preferences although they have the power to protect the discriminated groups and uphold their rights.[71] It is also stated that the judges' interpretation would depend on the subject matter, the time of the political debates and the pressure that comes through the Executive and/or Parliament. They might act as passive interpreters of the constitution by

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[68] A. M. Bickel, *The Least Dangerous Branch, Supreme Court at the Bar of Politics,* Indianapolis: Bobbs-Merrill, 1962;pp.16-23

[69] K.C. Wheare, *Federal Government*, London: Oxford University Press, 1953

[70] R.A.Posner, How Judges Think; Harvard University Press, Cambridge, London, 2008

[71] Rosenberg G.N., Judicial Independence and the Reality of Political Power, The Review of Politics, Vol.54, No.3, *Special Issue on Public Law*, 1992

applying self-restraint or they might resort to judicial activism,[72] though not every government-challenging decision is a result of judicial activism.[73] For example, in the cases on the *division of powers,* the continuous support of the Federal Constitutional Court to the central government or to the constituent-states might lead to dissatisfaction on the part of the unsupported one. When the Court supports the member-states or one member-state repeatedly, it might lose its legitimacy and/or reputation in the eyes of the Federal State. In response, the Federal State might take action, such as *court packing*[74], to show its dissatisfaction with the Court's decisions and to limit the Court's power. Therefore, for any court to be considered as successful, but especially the federal constitutional court, some degree of judicial independence and neutrality is essential.[75]

However, how this independence will be maintained is another thorny issue given the fact that judges who compose the Supreme Federal Court would hail from the member-states and they will highly likely sit to hear the cases that involve their member-states. Ferejohn argues that one way of ensuring judicial independence is the non-appointment of the confirming partisan judges by the politicians.[76] However, Hurwitz and Lanier's study has found that many Supreme Court judges have a good political network prior to their appointment and this political connection facilitates their appointment in the first place.[77] Therefore, it is argued that the political bias of judges is a reality when the federal court's judicial appointments are done by the member-states,[78] especially in dyadic federations. Partisan judges are influenced by their political/ideological bias which includes a will to

[72] Chapter III, Part II.A.

[73] *Supra* fn.62,M. Shapiro;p.21

[74] The term refers to the action of the government to either change the composition of the Court or number of the judges in the Court or limit the powers of the Court, including judicial review, or alter the size of the Court or dissolve/dismiss the Court completely. Reference; Larkins C.M., Judicial independence and Democratization: A Theoretical and Conceptual Analysis, *American Journal of Comparative Law,* Vol.44, 1996

[75] *Supra* fn.118, M.Shapiro, The Success of Judicial Review and Democracy

[76] Ibid

[77] Hurwitz M.S. and Lanier D.N., Judicial Diversity in Federal Courts: A Historical and Empirical Exploration, *Judicature*, 96, 2012

[78] Posner E.A., Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform The University of Chicago Law Review, Vol.75, No.2,2008

secure the outcome of the case, contrary to their judicial independence and impartiality.[79] In such instances, the judge aims to please a party and/or her member-state.[80] As such, they tend to pursue their political goals consistently and their decisions might affect the federal system significantly.[81] Importantly, it is argued that this is more likely to occur in dyadic federations.[82]

Due to the dangers of bias exposed in dyadic federations and also due to the important task of Court in protecting the federal system in constitutional review cases, the diverse composition of the Federal Constitutional Court is significant and relevant. For example, in the USA, one meaning of judicial diversity is ideological diversity; in other words, a judiciary which is composed of both Republicans and Democrats.[83] When the judiciary is composed of judges that are appointed from both political parties, judicial review is beneficial whether the legislature is Republican or Democrat.[84] Therefore, constitutional review makes more sense when the judiciary is diverse.

Following the analysis of Federal Judiciary from a theoretical perspective in which a diverse court composition has shown to be beneficial, the focus of examination next is the Supreme Court under the proposed Annan Plan Constitution and its potential advantages and disadvantages.

B. The Supreme Court under the Annan Plan Constitution

This section examines the proposed federal Supreme Court under the Annan Plan Constitution and discusses its advantages and disadvantages. It also compares the federal judiciary and the SCC under the 1960 Constitution aims to assess whether federal judiciary is a more elaborated version of the SCC.

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[79] Ibid

[80] Ibid

[81] Nagel R.F., Judicial Power and the Restoration of Federalism ANNALS, AAPSS, 574, 2001

[82] T.Bahcheli&S.Noel, The Quest for a Political Settlement in Cyprus: Is a Dyadic Federation Viable? *Publius:The Journal of Federalism*, Vol.44,No.4

[83] *Supra* fn.78, Posner E.A.

[84] Ibid

The importance of the Supreme Court's composition could only be understood by examining its role. As it was stated above, the proposed Supreme Court was deemed the ultimate authority in constitutional review cases and was required to mediate disputes between the constituent-states, between the federal organs and between the constituent-states and the federal government in order to supervise the constitutionality of their actions.[85] This power would require the Court to get involved in disputes which would be mainly political in nature because the constituent-states would be not only the administrative divisions but also the ethnic demarcation lines of the State, at least in the initial years in which the returns of the displaced people would be kept to minimum. Additionally, the Court's authority to prevent *potentially dangerous* people to enter the Constituent States showed that the Court was also deemed responsible to observe peace. Therefore, it is not wrong to state that the drafters of the Constitution expected the Court to build or at least protect peaceful conditions by *courting the peace*.[86]

Moreover, the constitutional provisions on the Court's role also demonstrated that the Court would have competence to deal with the *first-order* challenges which are directly related to the functioning and the power of the (federal) government.[87] This would deem the Court responsible for the democracy-building process as well. This aspect was the advantage of the Court because the Court would have the opportunity to build a *non-existent [pluralist] democracy from zero,* as Daly called it.[88] In an optimistic scenario, where the Court judges would not be under the political pressure of politics/politicians and act as independent and impartial arbiters, the Court could contribute to the democracy-building process positively. However, given that ethno-nationalist politicians from both sides would attempt to influence the local judges, there is a risk of the judges to vote with their ethnic prejudices and the Court's split into two ethnic camps. Nevertheless, the Court's decisions would, in any case, influence the political process either in positive or negative ways due to its composition and jurisdiction. Therefore, as the final arbiter of the

[85] Article 36(2)

[86] Chapter III, Part II.A.

[87] Chapter III, Part II.A.

[88] Daly T.G., The Alchemists: Courts as Democracy-Builders in Contemporary Thought, Edinburgh Centre for Constitutional, 2017

political controversies would be the Supreme Court, the Court's ethnically and internationally diverse composition is important due to the role it has to fulfil.

In order to ensure judicial diversity in practice, the constitutional quotas would be is employed[89] and the Court would be composed of an equal number of judges from each constituent-state and three non-Cypriots judges. The Court's diverse composition was also a result of the influence of the federal principle of *participation;*[90] this principle facilitated the participation of the diverse judges and the judicial power would be shared on an equal basis between the two constituent-states which would be organized along ethnic basis. The presence of international judges can be explained by the internationalization process of the Annan Plan Constitution and by the necessity of avoiding deadlock in judicial decision-making. Nevertheless, the Court's proposed diversity has been criticized by some and applauded by others.

The critiques on the jurisdiction and the composition of the judiciary are interwoven because they depend on each other. For example, Horowitz argued that the constitutional arrangements for the judiciary under the Annan Plan Constitution were problematic.[91] He speculated that the reasoning behind the diverse composition of the Supreme Court with foreign judges was to induce Turkish-Cypriots to accept the Annan Plan.[92] Besides, he claimed that as the Court would be entrusted with the power to resolve political deadlocks, the foreign judges would be required to take sides in important political disputes which would be initiated by Turkish-Cypriot politicians.[93] The idea that Turkish-Cypriots would deliberately act on this direction is, however, a prejudiced one. Horowitz also criticized the jurisdiction of the Court as it is not the Court's duty to resolve ethno-political deadlocks because this would undermine the constitutional adjudication: *"a constitutional court cannot be substitute for self-government"*.[94] However, he has not proposed any alternative

[89] Chapter III, Part III.B.

[90] Chapter II, Part II B.

[91] Horowitz D.L., Constitutional Courts: a primer for decision makers, *Journal of Democracy,* Vol.17,No.4, October 2006

[92] Ibid

[93] Ibid

[94] Ibid

constitutional accommodation for the composition of the constitutional court. Given that Horowitz is also against the use of constitutional quotas in other contexts, as he deems them illegitimate[95], most probably he would be a supporter of a non-representative court design, disregarding the dangers and the previous lesson of the unrepresentative court composition in *M. Ibrahim.*[96] Therefore, although Horowitz accepts that the design and the jurisdiction of the constitutional court influence political problems and democracy, he disapproves of such a composition and the role of the constitutional court as it would lead to the politicization of the judicial decision-making process.[97]

However, the risk of politicization of the decision-making was assumed from the beginning by the constitution-drafters. Being an ethnically and territorially divided post-conflict society, Cyprus still suffers from the *identity politics;* hence every action of the government branches is seen through the *lens of [ethnic] identity.*[98]Although the recent work on identity reveals that both ethnic groups have started to adopt more modernist view of identity and focus on their Cypriotness[99] rather than Turkishness and Greekness, society still has group divisions. The aim of the constitution-drafters was not to politicize the institutions further but to accommodate the differences and provide a balance between the different ethnic groups. Hence, it is not wrong to claim that it is the political nature of society that requires the Court to be composed in a representative way and sometimes function in this politicized manner.

For the prospective federal judiciary of a united Cyprus, judicial diversity is significant and relevant since one of the duties of the prospective federal constitutional court will be to make decisions within regards to the *ultra vires cases;* in other words, the usurpation of the authority of one of the constituent states' by the other or by the federal

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95 D.L.Horowitz, *Ethnic Groups in Conflict,* (2nded.) University of California Press, 2000

96 Chapter IV, Part IV.D

97 *Supra* fn.91, Horowitz

98 Choudhry S., *Bridging Comparative Politics and Comparative Constitutional Law* in Choudhry S.(ed.), Constitutional Design in Divided Societies,OUP,2008;p.5

99 In relation to Turkish-Cypriots, H.Erhürman,Articulations of memory in Northern Cyprus: between Turkishness, Europeanness and Cypriotness, PhD thesis awarded by the University of Westminster,2010; M.Hamit, Cypriotism in Between Turkish and Greek Nationalism, M.A., University of Athens, Department of Political Sciences, Economics and Law,2009

state. As such cases would have important political consequences, it is important to have an equal number of judges in the composition of the federal court from both constituent-states in order to provide legitimacy for both sides and create the perception that *justice is seen to be done.*[100] A diverse court is also a tool that could gather the public trust of all.[101] Of course, diversity would be more important for the smaller constituent-state who would fear the majority's *one-sided justice*. To cite one example is the resurrection of the aim of *Enosis* and *Taksim,* though it is a weak possibility. Would it not be necessary to have a diverse court composition for the purposes of decisions' legitimacy when/if the Turkish-Cypriot constituent-state declares its withdrawal from the common federal institutions and secession from the federal state with an aim to unite with Turkey or if the Greek-Cypriot constituent-state take action for *Enosis* or towards the disintegration of the federal system with an aim to replace it with a unitary system? These actions would be dealt before the Supreme Court. How would the Court resolve such political cases especially if there is no ethnic violence but it is predictable that violence is a matter of moment after the Court's decision? Should the Court allow secession and/or disintegration of federal system or should it protect it whatever the costs might be? The only way to attribute legitimacy to the Court decision and/or gather public trust in the impartially of the judiciary is to compose it in a diverse manner. Therefore, the Court's jurisdiction and composition are not independent from another.

The effective functioning of a federal system may be difficult especially when there are only two constituent-states[102] because there are many inter-governmental legal disputes which are in need of solution by the Supreme/Constitutional Court.[103] When a federation is composed of more than two member-states, its Constitutional Court is composed of judges from different member-states.[104] This creates a platform where diverse judges can be

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[100] Chapter III, Part I.

[101] Chapter III, Part II,B.C.

[102] I.D.Duchachek, Dyadic Federations and Confederations, Milne, R. S. 1981; Politics in ethnically bi-polar states: Guyana, Malaysia, Fiji. Vancouver, Canada: University of British Columbia Press; McGarry, John, and Brendan O'Leary. 2005. Must pluri-national federations fail? *Ethnopolitics,*8 (1):5–25

[103] *Supra* fn.82,T.Bahcheli & S.Noel

[104] Ibid

effective in decision-making and prevent other judges whose member-states are party to the case in question to dominate the decision-making.[105] However, in dyadic federations, judges have to deal with cases that involve their own member-states[106]; when the member-states are the ethnic units, the inevitable consequence is that they are involved in hearing cases that are on ethnic interests and divided along *us and them* lines. This, in return, creates an atmosphere in which their impartiality and interest (in the matter) are being questioned.[107] This, dyadic structure of the judiciary is also part of the problem that the federal judiciary of the united Cyprus would face. Therefore, the presence of international judges is more of a requirement for the purposes of avoiding deadlock in the Court.

As the Court was entrusted with the duty to resolve political disputes through the constitutional review mechanism, its decisions would have important political consequences on the constitutional order.[108] This is why it is designed in a diverse manner with three international judges. Due to the equal representation of the Greek-Cypriot and Turkish-Cypriot judges, in case of split voting, the decision of the international judges would prevail. Those who condemn constitutional accommodations on the judiciary have also argued that the UCR would be governed by international judges because the Constitution would substitute the will of the people with the will of foreign judges.[109] Critics have also argued that the introduction of foreign judges to the composition of the Supreme Court constitutes an unacceptable and undemocratic violation of national sovereignty because of the power of foreign judges[110] to determine the result of constitutional cases.[111] For example, Kentas argued that the composition of the Supreme

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[105] Ibid

[106] Ibid

[107] Ibid; as this interest is usually the interest of one's own ethnicity/nationality, the matter at hand is usually a very sensitive one.

[108] Chapter III,Part II.A.

[109] A.C.Emilianides, Constitutional Structure of the Annan Plan, in *Supra* fn.22, A.Varnava and H.Faustman

[110] This power would be the consequence of the disagreement between the national judges and it does not mean that this would be the case at all times.

[111] V.Coufoudakis and K.A.Kyriakides, *The Case Against the Annan Plan,* Published by Lobby for Cyprus, 2004

Court with the foreign judges would also constitute an imposition.[112] Similarly, Kyriakides argued that the presence of foreign judges and the excessive power[113] entrusted to them is far from ideal.[114]

Criticisms on the presence of international judges have valid points. Also, the problems associated with political appointments and partisan decision-making of the judges will remain controversial issues. However, this is a price to be paid if Cypriot judges cannot transcend their ethnic identity, and move to a more civil identity in order to maintain their judicial impartiality. Contrary to some Greek-Cypriot academics' arguments, the presence of international judges is not peculiar to Cyprus. Similar examples were observed in other politically problematic places,[115] such as South Tyrol[116] and Hong Kong[117], as well as in micro-states such as Liechtenstein, San Marino, Monaco, Andorra and Vatican City where self-determination, diversity and territorial integrity had been the important issues to be accommodated along with the interests of the larger neighbour States.[118]

While criticizing the presence of the international judges, the numerical strength (four) of the Cypriot judges is often missed in the context. Their vote would still outvote the international judges (three) as long as they agree on the decision. Despite the fact that previous experience proved that this is a weak possibility, still, Cypriot judges could have the voting power to determine the outcome of the cases. Seen in this perspective, the

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112 G.I.Kentas, A Realist Evaluation of Cyprus' Survival Dilemma as Result of the Annan Plan, accessed by: http://palio.antibaro.gr/national/kentas_cuprys.php

113 Chapter III.Part II.A.(judicialization)

114 K.A.Kyriakides, The Political Workability of the Annan Plan in *Supra* fn.28, *Supra* fn.22, A.Varnava and H.Faustman

115 Schneckener U., Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation, *Journal of Peace Research,* Vol.39, No.2, 2002

116 N. G. Loizides an appraisal of the Functionality of the Annan Plan V in *Supra* fn.22, A.Varnava and H.Faustman

117 Ibid

118 Thomas D. Grant, Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of the Micro-States: Self-Determination and State-Hood, AM.U.J.INT'L L.&POL'Y, Vol.12 Issue 4

international judges would not rule the country; rather, they would be able to serve for the rapprochement of the local judges to find common ground to interpret the Constitution and decide in the same manner. Thus, in a positive reading, international judges could help to *neutralize* the ethnic background of Cypriot judges in the decision-making process.

However, if international judges are excessively disliked, another constitutional solution should have been proposed. In reality, the previous proposals of the UN and the respective communities did not envisage any international judges. Hence, it is not clear how the international judges, once again, were given presence in the Annan Plan Constitution although it is understandable that they are needed for the purposes of breaking deadlocks. Besides, in the pre-Annan period, what both communities had in mind as a solution in case of deadlock in the decision-making is unknown, despite the fact that it is foreseen. Although it is vital to avoid any deadlock in the judiciary, anti-Annan Plan campaigners, mainly the right-wing Greek-Cypriot scholars, neither offered any other constitutional procedures and/or political arbitration procedure that could avoid the deadlock nor any other model for the composition of the Court that could function without a deadlock in case of ethnic voting.

Concerns on the deadlock in judicial decision-making that judges' interpretation might be influenced by their respective political interest and produce politically biased decisions which would have a political impact on the stable democracy are valid reasons to be considered. However, the Court provides an alternative, legal and non-violent premise for the resolution of disputes, especially to the political ones, if they cannot be resolved in the executive and/or in the legislature. In the absence of legal means and/or through *one-sided* justice, ethnic violence will always continue to be an option for the resolution of political disputes, especially in conflict-ridden societies such as Cyprus. Considering the possibility of violence and comparing the two possibilities, violence *versus* a politicized Court, the latter seems to be a more viable and less dangerous solution. A diverse composition of the Court is also required in order to perform this *conflict reducing* function. In any case, judges are in a better situation to decide on the constitutional/political conflicts because in theory they are not concerned with the short-term political interests as politicians might be. They are independent officers usually with life-time tenures and well equipped to deal with the daily pressures of political life. Therefore, if concerns on the political bias are high, either other means that could lessen the political influence on the court or other alternative conflict resolution mechanisms that

could lessen the Court's intervention on political life, such as political mediation, need to be searched for.

As a solution, most recently, Potier has argued that a Supreme Court can be established without international judges through the application of odd numbers in the Court's composition.[119] He proposed periodic renewals of the Court's composition in which the judgeships would be re-distributed every three years by a lot.[120] He maintained that this procedure would protect the politicization of the judicial appointments and the Court. However, he did not examine the consequences of such a composition in case of biased decision-making; instead he stated that he *hopes* that the judges would act impartially. It is not clear whether Potier's well-intentioned writing would work in the broader context of Cypriot politics as biased decision-making of local judges had already been assumed by the constitution-drafters even before 1960, observed in the 1960's and assumed again in the Annan Plan Constitution. That was the reason of the inclusion of the international judges in the first place as biased decision-making would lead to deadlock. Moreover, using lots, a procedure alien to the judiciary, could only lead to *justice by random.* The lot procedure most probably would depend on picking a name and the exclusion of one judge in case of ethnic voting, after the case was heard. However, if this is adopted, the justice system that would be required to solve important political cases would depend on the *chance* of a judge. This is a highly paradoxical procedure compared to the weight of the legal rules and procedures. What would be the consequences of, if, for example, a Greek-Cypriot judge is picked for thirty times in a row? Would the Court be able to obtain legitimacy in the eyes of the Greek-Cypriot people, when the Turkish-Cypriot judges' decision prevails for thirty consequent times? Therefore, it is difficult to support Potier's method on periodic renewals by lots as a constitutional proposal.

Another method for the composition of the Supreme Court was proposed by Loizides who argued that divided societies should be open to suggestions on the sovereignty question at the expense of bigger challenges.[121] He stated that even if peace agreements

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[119] Potier T., Making an Even Number Odd: Deadlock-Avoiding in a Reunified Cyprus Supreme Court, JEMIE 7, 2008

[120] Ibid

[121] N.G.Loizides an appraisal of the Functionality of the Annan Plan V in *Supra* fn.22, A.Varnava and H.Faustman

fail, when arbitration mechanisms such as the Supreme Court, are effective, they could maintain stability if parties reach a deadlock; but more importantly, the presence of the arbitration mechanism encourages parties to avoid costly deadlocks in the first place.[122] In relation to the composition of the Court, Loizides proposed the appointment of the Supreme Court judges by a poll of the "*most cross-voted politicians*".[123] The cross-voting system in the political elections would allow double voting of both communities; as such, Greek-Cypriots could vote in the Turkish-Cypriot constituent-state and *vice versa.*[124] In return, this system would contribute to the election of moderate politicians rather than hard-line nationalists. Subsequently, when the moderate politicians appoint the judges, they would consider the appointment of judges with moderate political views, rather than radical nationalists. Loizides' proposal seems to be a reasonable proposal for the Court's composition although it depends on the acceptance of the cross-voting system by the political leaders in the final settlement.[125] Although the Court would presumably still undergo the criticism of politicization (due to the appointment of judges by politicians), still, the political influence on appointments would be one of political moderation and *nationalisation/Cypriotisation* (in the sense of removing international judges), rather than the one of creating a more nationalistic and/or internationalized Court. Therefore, Loizides' proposal in appointing the judges by the most cross-voted politicians might be an important contribution to establish an independent and impartial, or at least the least biased, federal court.[126]

Besides, if the presence of foreign judges is such an undesirable constitutional accommodation for Greek-Cypriots, their presence could be fixed with a sunset clause for a transitional period of time and when their term terminates, no other international judge would be appointed to the Court. Of course, care is needed not to set a short time limit that

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[122] Ibid

[123] Ibid

[124] *Supra* fn.54,McGarry J. and Loizides N.

[125] The idea of cross-voting was something that was accepted in 2008 by the parties in the inter-communal talks. N. Trimikliniotis, *Beyond Secessionism in Cyprus: A Federal Remedial Reconstruction* in E.M.Belser et.all. *States Falling Apart? Secessionist ad Autonomy Movements in Europe,* Berne, Switzerland, 2015

[126] In order to do this, of course, elections need to be designed in a way to include cross-voting.

would not be adequate for the transformation of the ethnic identities to civil identities. Constitutional reservations should either set the time limits and/or define conditions, such as political stability and/or stable democracy, for such a change in the Court's composition, despite the fact that it is difficult to measure these conditions and/or agree on them. If time limits are set for the tenure of international judges, then, another constitutional tool should be present in case of judicial deadlock. Apart from sunset clause, another solution is from Schneckener who proposes political instruments and/or political procedures for conflict mediation and settlement across the whole range of political bodies, rather than judicial arbitration as it happened in Cyprus (1960) and BiH.[127] Therefore, the presence of international judges will also be needed as long as another [either legal or political] deadlock-breaking mechanism is found.

Another interesting point was that of those nationalist Greek-Cypriot commentators who criticized international judges, none of them attacked the equal representation of Turkish-Cypriot judges in the Court's composition. This can be either due to the pre-Annan proposals, which usually contained the equal representation of judges, or due to the excessive focus on international judges. Therefore, the reaction of Greek-Cypriots to the equal representation of Turkish-Cypriot judges in the judiciary without the presence of international judges remains unknown. The only case where the presence of Turkish-Cypriot judges was criticized was the property cases that could be dealt by the Supreme Court and the Relocation Board. In some cases, the Supreme Court and the Relocation Board would be a final decision-maker and recourse to the ECtHR was prevented constitutionally. These cases were the property cases of the Greek-Cypriots which were initiated against Turkey before the ECtHR as a result of Turkey's invasion and occupation.[128] Previously, similar cases were deemed successful before the ECtHR.[129] However, if the Annan Plan Constitution was accepted, the ECtHR would dismiss these cases before it and leave them to the Relocation Board to be solved.[130] This led the displaced Greek-Cypriots' complaints that the Annan Plan Constitution would restrict their

[127] Supra fn.115, Schneckener U.

[128] In 2008, there were 1,400 similar cases on property issues.

[129] The most important one was *Loizidou v. Turkey*, Application No.15318/89, 18 December 1996

[130] The Annan Plan, Part II: Regulation of Exercise of Property Rights, Article 5(2) called the ECtHR to strike out any proceedings before it and allow the domestic mechanism to solve these cases.

right to recourse to the ECtHR and also the right to peaceful enjoyment of possessions/property. They also disliked the idea that the Supreme Court and the Relocation Board that would be dealing with these cases would be partly composed of Turkish-Cypriot judges[131] because Turkish-Cypriot judges were considered as *a party* of the case who would not be able to adjudicate the cases impartially. If a Turkish-Cypriot judge is considered as someone who represents Turkey, this aspect of the Annan Plan Constitution was clearly against the established legal principle of *nemo judex in causa sua*[132], due to the threat it poses to fair trial rights. However, this conclusion cannot be definitively true or valid due to the growing discontent of Turkish-Cypriots towards Turkey and also due to the increasing sentiments about being *Cypriot*, rather than *Turkish*, after 1974. Nevertheless, these features of the Constitution were not very appealing to many Greek-Cypriots as these accommodations illustrate the exclusive jurisdiction of the (diverse) Court in such an important political matter, something which also came to be one of the reasons of the rejection of the Annan Plan by Greek-Cypriots.[133]

Finally, it needs to be noted that the composition of the senior judiciary remained the same in both power-sharing designs of the 1960 Constitution and the Annan Plan Constitution. In both Constitutions, the presence of international judges was envisaged with a view to prevent deadlock in judicial decision-making in case of ethnic voting. The only difference was the unalterable articles in the 1960 Constitution which blocked any change in the SCC's composition whereas the Supreme Court's composition could be changed by law (Article 6/2) in the Annan Plan Constitution. In that sense, the latter provided more flexibility when/if both communities would agree to change the Court's composition. This also could mean the possibility of abolishing the presence of international judges. Thereby, compared to the 1960 Constitution, changing the court composition through a legislation would be a more legitimate route rather than the course followed by Makarios in 1964: unilaterally enacted and imposed unconstitutional law (Law 33/64) by the majority against the wishes and in the absence of the minority.[134]

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131 A.Moulakis, Power-sharing and its discontents: Dysfunctional constitutional arrangements and the failure of the Annan plan for a reunified Cyprus, *Middle Eastern Studies*, 43:4, 2007

132 Noone should be a judge in his own cause

133 *Supra* fn. 111, V. Coufoudakis and K.A.Kyriakides

134 Chapter IV, Part IV.C

Another similarity of the two Constitutions is the absence of any constitutional provision that grants representation to the smaller minorities, namely Maronites, Latins and Armenians in government institutions. According to the 1960 Constitution, for example, no Armenian could be appointed as a judge to the High Court and the Supreme Constitutional Court qua representative of the Armenian community, as it was a constitutional requirement to belong to either the Turkish-Cypriot or the Greek-Cypriot community. Therefore, even if an Armenian were appointed to the Court, they would fulfill the quota of either a Turkish-Cypriot or a Greek-Cypriot, as a result of constitutional requirement. Although a different approach has been taken in the Annan Plan Constitution, by envisaging territorial quotas, it can be assumed that in practice, both constituent states would appoint someone from their own ethnic background. The representation, protection and the rights of these smaller groups were recognized in the Annan Plan Constitution[135] but their presence in the government institutions was not deemed necessary by the constitutional/territorial quotas.

The next part compares the Constitutional Court of BiH and the proposed Supreme Court of the Annan Plan Constitution with the aim to extrapolate relevant lessons from BiH's judiciary to Cyprus' prospective judiciary. To achieve this task the aspects where constitutional accommodations on judiciary converge and differentiate will be examined. However, due to the non-implementation of Annan Plan Constitution, it is pure speculation and cannot make wide-ranging comparisons. The reason of this brief comparison is also due to the uncertainty in the society as it is not known how both Greek and Turkish-Cypriot society would respond to the implementation of the Annan Plan Constitution.

IV. The Constitutional Court of Bosnia-Herzegovina vis a vis the proposed Supreme Court of the Annan Plan Constitution

It is possible to compare the two constitutional accommodations on judiciary but not their functioning in practice as the Annan Plan Constitution has not been implemented. However, both settings were a result of the internationalization of the State-building process which had consequences on their constitution, on the composition of the government institutions as well as on creating the Office of the High Representative with extensive powers in the domestic order in BiH. Although the Annan Plan Constitution did not propose such an Office, the presence of international members in Cyprus' federal

[135] Article 11(4)

institutions[136], including the proposed Supreme Court would create a similar effect and similar criticisms as in BiH that Cyprus is being led as an international *mandate* by the international community. It is not possible to predict to what extend the presence of foreign members in many federal institutions would affect the day-to-day work of the federal government. However, the adoption of such an internationalized constitutional model similar to Dayton requires a lot of effort to convince the political leadership in Cyprus,[137] as was seen in the Annan Plan referendum. Nevertheless, both Constitutions envisaged the presence of international judges.

The presence of international judges was highly criticized in both settings. In Bosnia, Serbs continuously protest them and in Cyprus, there was a great discomfort on the part of the Greek-Cypriots towards their presence. It is also claimed that one of the reasons of rejecting Annan was international judges.[138] Therefore, in a prospective constitutional court, the constitution-drafters need to consult not only with the political leaders but also with the public to understand their opinion as to the necessity of their presence. If the public do not approve such a constitutional court design, then, other solutions need to be sought.

As for the appointment of international judges whereas the President of the ECtHR made appointments to the BiH Constitutional Court, the UN Secretary General would be responsible in federal Cyprus. Their appointment process can only be assessed if/when a decision is made for their necessity. However, for the local judges' appointment, this researcher recommends the appointments of a federal constitutional court judges by a judicial appointments commission, which is composed of lay and legal persons as well as the most cross-voted politicians,[139] rather than a Presidential Council due to the highly politicized appointments process which was evidenced in BiH. Due to the Parliament being the responsible authority, political influence on appointments can only be abandoned by taking the appointment process away from the political institutions. Nevertheless, it needs

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[136] The Relocation Board, the Central Bank, the Monetary Policy Committee and the Property Board would also have international members.

[137] *Supra* fn.50, Heracliades A.

[138] Supra 114, Kyriakides K.

[139] Chapter III,Part III.A.

to be pointed out that the Annan Plan Constitution was silent in defining the criteria and/or qualifications necessary for the appointment of the Supreme Court judges.

Apart from this highly internationalized design, both the Dayton and the Annan Plan Constitutions aimed to accommodate ethnic communities through the power-sharing design which envisaged the distribution of group rights and representation. In doing so, both constitutions constitutionalized ethnic divisions through the recognition of ethnic groups in an ethnically allocated geography through constitutional territorial quotas in the government institutions, including the judiciary. Thus, both Constitutions did not require the presence of smaller groups in government branches due to this prioritization of ethnicity in the allocation of jobs. As the judges of the BiH Constitutional Court are appointed by the Parliaments of the two Entities, in practice, these territorial reservations serve for the appointment of the main ethnic groups and in practice, the appointment of smaller groups to the judiciary is prevented even if they hold the best qualifications. Just like BiH, the Annan Plan Constitution would also highly likely adopt a similar practice and reserve the judgeship posts to Turkish-Cypriots and Greek-Cypriots. If a prospective Federal Constitutional Court of Cyprus would be composed of solely Greek-Cypriots and Turkish-Cypriots (besides international judges), would it not be discriminatory to exclude an Armenian from the composition of the Court? As was stated before,[140] if these constitutional accommodations are challenged before the ECtHR as discriminatory, should the ECtHR rely on the necessities of peace? There should not be any reasonable justification and/or legitimate aim to treat Armenians differently except the necessities of a federal (or peace agreement) constitution which would possibly be dominated by group rights and representations. Still, it would be difficult to rely on the necessities of the peace and justify their differential treatment, as was observed in *Sejdic and Finci*.[141] These features of any power-sharing design need to be considered and the consociational and/or federal model should be modified according to the prevailing circumstances of a given country because while the aim is to achieve peace between the warring groups, the human rights of the smaller ones should not be neglected. As was documented in BiH, the discontent of the group called *Others,* as well as Roma and Jewish people was required to

[140] Chapter IV, IV.E.Aziz Case; Chapter V, art IV.F. Sejdic&Finci Case

[141] Part V,Part IV.F. Sejdic&Finci Case

be solved by the interference of the OHR and the ECtHR respectively.[142] Therefore, the Cypriot political leadership also needs to question the effects of any power-sharing model on the composition of the judiciary and be creative in designing the institution in order to protect the rights and representation of other smaller ethnic and/or religious groups as well.

A striking difference between the two settings was the restriction that Annan Plan Constitution put for the property cases of the displaced people to recourse to the ECtHR and the decision of the domestic courts, namely the Relocation Board and the Supreme Court, to be final and binding. However, there is no such restriction in the Dayton Constitution and the recourse to the ECtHR is open for the decisions of the Constitutional Court. In this aspect, the BiH Constitution seems to be more advanced than the Annan Plan Constitution. The only problematic aspect might be when/if there is a conflict with the OHR (which operates as if it is superior to the BiH Constitutional Court), it is not clear whether a dissatisfied applicant can recourse to the ECtHR because the OHR, arbitrarily, could issue an order to prevent this recourse.

In both Constitutions, the resolution of power conflicts among the constituent-entities was left to the Supreme/Constitutional Court and the Court is required to mediate disputes with its diverse composition; both courts had jurisdiction in constitutional review cases, in other words, in highly important political matters. Regarding property matters, for example, Stavrinides questions the consequences of a case when a Greek-Cypriot businessman would like to buy a plot of land that belongs to Turkish-Cypriots in the territory of the Turkish-Cypriot constituent-state with an aim to build hotels.[143] If the Turkish-Cypriots owners could agree to sell their land, the Turkish-Cypriot constituent-state could block the sale to the Greek-Cypriots by enacting a legislation citing "security concerns and public interest".[144] If the Greek-Cypriot businessmen recourse to the Federal Constitutional Court and again lose the case, would the Greek-Cypriot businessman believe that the Court issued an impartial decision or would they consider the Court as politically biased? On the contrary, if the businessman won the case, then, the Turkish-

[142] ibid

[143] Stavrinides Z., Is a Compromise Settlement in Cyprus Still Possible? Revisiting The Ghali Set of Ideas The Cyprus Review, *The Cyprus Review*,Vol.11,No.1,1999

[144] ibid

Cypriot constituent-state would create further problems to prevent the investment which would come to mean disrespecting to and/or not implementing the Court's decision. If the businessman sought recourse to the ECtHR and won the case, it would cause more animosity between Greek-Cypriot and Turkish-Cypriot constituent-states.

Considering all these above-mentioned examples, the necessity of judicial diversity in the constitutional court becomes obvious. Judicial diversity is not only relevant for the main ethnic groups but also the smaller ethnic/religious communities. It also becomes clearer that the main reason of this necessity is due to the role/duty of the court in protecting federal design by reviewing the constitutionality of the actions of the constituent-states and the Federal state. As for the lessons that can be drawn from the BiH experience is to seek ways to lessen the political influence both in judicial appointments and also in judicial decision-making process. It is argued that either a new judicial appointments procedure (that will not be under the discretion of the political branches) will be organized in order to prevent the appointment of partisan judges or other means, such as political arbitration mechanisms should be introduced to the system.

Table 1. The comparison of the three constitutional models

	Cyprus, 1960 Constitution	**BiH, 1995 Constitution**	**Cyprus, 2004 Annan Plan Constitution**
System of government	Consociational	Consociational / federal	Federal
Executive	President and Vice-President	Presidential Council	Presidential Council
Legislature	House of Representatives (Two Communal Chambers)	Parliament (Bicameral)	Two Chambers: the Senate and the Chamber of Deputies
Judiciary	Supreme C.C.	Constitutional Court	Supreme Court
Public Service	30/70	n/a	Proportional; at least 1/3 Turkish-Cypriots

V. Conclusion

This chapter provided an analysis of the proposed Annan Plan Constitution and its proposed Supreme Court, and then compared it to the BiH Constitutional Court in order to draw lessons from the latter. Overall, the case studies presented in this chapter confirm the importance of political, national, social and cultural variables to be included in the preparation of a future Constitution proposal.

Initially, after examining the socio-political events after the consociational break-down in 1960, it is shown that there were sufficient reasons to resort to another power-sharing design for reunifying Cyprus; the *de facto* partition of the island being the first one. This inevitably required the peace plan to be organized under federalism due to ethno-territorial division of the country. With this mentality, the United Nations' proposed federal constitution embedded all principles of federalism and aimed to accommodate the differences/diversities of the two ethnic communities territorially in order to achieve *unity in diversity* and peace. However, the federal design was criticized mainly by the Greek-Cypriot scholars and it was not accepted in the referenda. The proposed federal plan was the result of years of negotiations and has its roots in the High Level Agreements (1977 and 1979). Its Constitution might not be the perfect document to remedy all illnesses but as Brey rightfully stated: *No well-designed constitution can overcome entrenched antagonisms unless both parties are willing to compromise.*[145]Therefore, just like the 1960 Constitution, the federal system would also need goodwill of the parties in order to function.

As for the proposed Supreme Court, it was documented that the peace process until 2004, in which the Annan Plan was proposed, continuously envisaged the composition of the Supreme Court with judges from both ethnic communities and also international judges were given place. However, international judges were harshly criticized as they were considered as a violation of national sovereignty. Although no offer has been made to replace them by the critics, those scholars who were already supported the Annan Plan devoted effort to suggest new ways of composing the Court. This researcher considers Loizides' proposal as a viable option in composing the court by the appointment of the most cross-voted politicians with an aim of appointing the less partisan judge and lessening the political influence on judges. Alternative models also need to be sought and found

[145] *Supra* fn.57,H.Brey

because both the convergence documents (2008-2010) and the present socio-political divisions in Cyprus are clear evidence that the future constitutional proposals to unify the country will not be too different from the Annan Plan's Constitution.

In terms of its jurisdiction, the Supreme Court was also entrusted with important powers, such as, protecting the federal constitution and hence, involving peace jurisprudence through constitutional review cases. Considering the fact that Cyprus' federal judiciary would be required to build a federal system from zero and promote stable democracy, its composition cannot be left to one community. Diversity was also deemed necessary both for gathering public trust in the justice system as well as fostering the perception on the Court's legitimacy. The functioning of the federal judiciary has been examined both from a theoretical perspective and in relation to Cyprus. It is identified that there might be some problems in the functioning of the diverse court due to the dyadic structure of the federal constitution. As such, when local judges sit to hear the disputes in constitutional review cases, they will be required to make decisions about their constituent-states. In case of biased decision-making, deadlock would be inevitable. In that sense, due to the equal representation of Cypriot judges, the need of international judges, as a tie-breaking mechanism is highlighted. Of course, these scenarios are based on the pessimistic possibilities and it does not mean that judges would always act in a biased manner while interpreting the constitution. Nevertheless, besides the need of an ethnically diverse judiciary, the presence of international judges presents itself also as a necessity.

As for the comparisons with the BiH Constitutional Court, both Constitutions envisaged territorial criteria for the Court's composition. The BiH example showed that if the Annan Constitution was accepted the territorial criteria would most probably work on the basis of ethnicity and the participation/appointment of the smaller groups in the Court's composition would not be allowed. Therefore, the constitutional design should be modified in a way to embrace these smaller communities.

Moreover, in both countries, the presence of international judges was deemed controversial. What is learnt from the BiH experience is that if the Annan Constitution was implemented, Greek-Cypriots would protest their presence continuously, as this has been the case in BiH since the Serb leadership has voiced their discomfort. Another problematic area would be the role/influence of political and/or ethnic background of the local judges in their interpretation as this has been the case in BiH due to the existing ethnic divisions

within the society. Cypriot judges, unfortunately, might also be prone to have similar problems in maintaining their judicial independence and impartiality.

In terms of the jurisdiction of BiH Constitutional Court and proposed Supreme Court, both courts have important political functions. The most striking difference was the restrictions that the latter put to recourse to the ECtHR in property cases of the displaced persons. This aspect of the federal constitution was not acceptable to many Greek-Cypriots in the face of the illegal occupation and invasion of the north of the island by Turkey for more than 40 years.

In the light of the above, the path beyond the Annan Plan might be one towards a federal solution for Cyprus subject to a consensual political will on both sides of the ethnically divided country to do so. This supported by a Constitutional Court with a diverse judiciary is all the more important.

Chapter VII. Conclusion

This final chapter will provide a summary of the conclusions reached from the examination of the theoretical background and also from the analysis of the case-studies on the Constitutional Court of the Republic of Cyprus (1960), Bosnia-Herzegovina (1995) and the proposed Supreme Court of the United Republic of Cyprus (2004). It also aims to present the contribution of this thesis to the relevant literature and to suggest recommendations for further research.

I. Introduction

This thesis examined the reasons that necessitate the ethnically diverse composition of constitutional courts in divided societies which are governed by the principles of consociational democracy. It firstly demonstrated the application of the principles of consociational theory to the judiciary, and then examine why having a diverse judiciary in the senior judiciary is necessary in divided societies. For the purposes of this thesis, the Supreme Constitutional Court (1960-1964) under the Republic of Cyprus' 1960 Constitution and the Constitutional Court of BiH (1995-) under BiH's 1995 Dayton Constitution and the proposed Supreme Court under the Annan Plan Constitution (2004) were employed as case-studies. The composition, jurisdiction and functioning of the first two courts is analysed through constitutional review cases and the latter was investigated from a theoretical perspective. This comparative work has been done by taking into account the broader socio-political context in which the constitutional courts are situated.

This thesis aimed to answer the question of why judicial diversity is deemed necessary in divided societies with the support of four other questions.[1] To provide answers to the research questions, the thesis was split into five chapters. Chapter I, firstly, revisited the theoretical framework of the two power-sharing models, consociational democracy and federalism, and their relevance to conflict regulation and achieving stable democracy[2]. The inadequateness of the application of majoritarian democracy for divided societies was also referred to especially when there are permanent majorities and minorities.[3] Since power-sharing models propose political stability through their inclusive

[1] Chapter I,p.8

[2] Chapter II,Part II.A.B.

[3] Chapter II,Part II.C.

designs and consociational democracy has been used in the thesis' case-studies, the question of how the principles of consociational democracy influence the composition of the judiciary was examined.[4] While doing so, this research emphasized the importance of the consociational *principle of representation* in government branches, including the judiciary, which leads to the establishment of a diverse judiciary in divided societies.

In Chapter III, the reasons that necessitate judicial diversity were investigated thoroughly. The four main reasons were classified under four headings. Firstly, the constitutional courts' crucial work in constitutional review cases was examined to demonstrate the courts' power to determine the outcome of political disputes by interpreting the constitution and hence, influence political life.[5] As each judge is entrusted with the duty of the interpretation of a constitution (which is designed for stable democracy and peace) and provide their understanding of it, there was an illustration of why the court's composition has become more important. Then, it was shown why/how diverse judiciary reinforces public trust in the impartiality of the judiciary by including judges from different backgrounds and giving place to different perspectives.[6] As a third reason, the diverse judiciary's contribution to public trust in the court's legitimacy was provided.[7] It was discussed how judicial diversity creates the perception of local ownership that the judiciary serves the whole society and lead to the resolution of the disputes within legal boundaries, rather than resorting to violence. As a final reason, it was illustrated that there is a potential in improving the decision-making process in diverse courts due to the interaction and dialogue between judges from different backgrounds which could provide different insights on different life experiences especially where the case is about minorities.[8]

Against this theoretical background, subsequent chapters analysed how the theoretical framework of consociational democracy and the concept of judicial diversity

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[4] Chapter II,Part III

[5] Chapter III,Part II.A.

[6] Chapter III,Part II.B

[7] Chapter III,Part II.C

[8] Chapter III,Part II.D.

was applied and worked out in the 1960 Constitution of Cyprus[9] and 1995 Constitution of Bosnia-Herzegovina[10] and a brief comparison of the judiciaries of these countries was given a place. Also, the proposed federal design under the Annan Plan Constitution (2004) and its judiciary were examined as it has been offered by the United Nations as a political and constitutional solution to the Cyprus' problem; some lessons are drawn from the BiH Constitutional Court for the prospective federal judiciary of Cyprus(Chapter VI). The overall purpose was to identify the crucial role of judicial diversity in divided societies and the functioning of diverse constitutional courts.

Turning more specifically to the case-studies, the functioning of the Supreme Constitutional Court (SCC) under the 1960 Constitution of the RoC was analysed as the first case-study (Chapter IV). It firstly demonstrated the application of consociational theory into the constitutional design of the 1960 Constitution and the influence of consociationalism in establishing a diverse constitutional court. It analysed the Court's role through two landmark constitutional review cases. While examining these cases, it is explored whether the local judges were influenced by their ethnic background or whether they were impartial in interpreting the constitution. This has been done with a purpose to discuss whether the ethnic diversity of the SCC (and later the Supreme Court) was necessary and a positive contribution to political stability.[11] Another purpose was to explore the impact of the Court's decision on the political order.[12] Finally, a third case that was heard by the ECtHR on the constitutional order of the RoC which shed light on the human rights of the Turkish-Cypriots was examined.[13]

In Chapter V, the functioning of the Constitutional Court of BiH under 1995 Dayton Constitution was examined. Firstly, the application of the consociational theory with some federal features was demonstrated as it led to the design of a diverse Constitutional Court composition. The judicial appointments process that operated on the basis of territorial quotas was discussed, as the process determines the court's composition

[9] Chapter IV

[10] Chapter V

[11] Chapter IV,Part IV.B.Municipalities Case

[12] Chapter IV,Part IV.D, M.Ibrahim Case

[13] Chapter IV,Part IV.E, Aziz Case

with much political influence. Then, the selected constitutional review cases were analysed with an aim to assess the influence of the judge's ethnic background in the interpretation of the constitution. The impact of the Court's decisions on the constitutional and political order of BiH was also examined to reveal the power of the Court. After examining the Sejdic and Finci Case where BiH power-sharing accommodations on the composition of government branches were assessed by ECtHR,[14] in the last part, the SCC under 1960 Constitution and the BiH Constitutional Court were compared.[15] (Chapter V)

Finally, the proposed Supreme Court under the Annan Plan Constitution (2004) was explored in Chapter VI. The application and relevance of federal design in conflict resolution, the proposed judiciary therein, and its expected functions were analysed. The relevance of the federal principle of *participation* in composing diverse federal/supreme courts and also the Court's possible role in peace jurisprudence were demonstrated. In the last stage, due to the rejection and the non-implementation of the Annan Plan, this chapter drew lessons from the BiH Constitutional Court to the proposed Supreme Court to speculate on possible problems that the latter could be faced with.

II. Findings

While reviewing the relevance of power-sharing principles to divided societies (Chapter II), this research has identified that the important role and influence of the consociational principle of representation. This principle is influential in establishing diverse government branches, providing legitimacy to the political system and also demanding the establishment of representative courts in which judges from different backgrounds are given place. Therefore, one of the most important themes to emerge from this research was to recognise the principle of representation as the main pillar of both power-sharing democracy and judicial diversity due to the empowerment it provides and the inclusion of minorities to the government branches in divided societies. Besides the importance of the representation principle, the type/meaning of representation in which judges engage has been demonstrated as being of the symbolic and/or descriptive form (which do not require them to act on behalf of their background and secure an specific outcome of the cases); this is in harmony with established principles of judicial independence and impartiality. Therefore, it was shown how the representation principle

[14] Part V,Part IV.F.

[15] Part V,Part V.

has been utilized to provide inclusiveness for all constitutionally recognized groups and serve for the system's legitimacy and stable democracy. (Chapter II)

The examination of the theoretical framework of power-sharing designs also implied that a new theoretical framework of consociationalism and/or federalism needs to be formulated in order to respond the constitutional protection of smaller groups that are not constitutionally recognized.[16] This deficit on the part of the power-sharing designs is of utmost importance especially when one acknowledges the role of inclusiveness in providing political stability. The representation of smaller groups should be included and respected in the same constitutional level with other main groups in the power-sharing constitutions.

The main findings of this research were presented in Chapter III which examined four main reasons for the need of diversity in constitutional courts of divided societies. First of all, this research found out that this necessity comes as a result of the role that the constitutional court plays in constitutional review cases, and the role of the court is closely connected to its composition. Although the court's role in constitutional review cases has been examined in depth in the literature, this research has revealed the court's additional task in stabilizing democracy and peace jurisprudence.[17] It was also identified that while the court is resolving these disputes on the political order, it has to interpret the constitution in a way to uphold the peace as the most important constitutional value.[18] As there is a risk of violence in divided societies, it was argued that such an important work of the court cannot be left to the interpretation of the constitution to one ethnic group and/or to the majority group and the court's diversity is an important factor in supporting post-conflict stability. The unrepresentative court might issue detrimental decisions for other groups in society and the human and/or group rights of vulnerable groups might not warrant necessary protection, when/if violated by the government. The only way to counterbalance these risks and to contribute to peace jurisprudence is to compose a diverse constitutional court in which judges from different backgrounds are given the right to interpret the constitution and provide different perspectives as to how to resolve important political

[16] Chapter IV,Part IV.E, Aziz Case and Part V,Part IV.F.Finci Case

[17] Chapter III,Part II.A.

[18] Chapter III,Part II.A.

disputes that reach the court. Therefore, the most important finding of this thesis is to demonstrate the role of a diverse court in peace jurisprudence.

Secondly, this research identified that the diverse composition of the court contributes to the public trust of all groups in the impartiality of the judiciary. It was demonstrated that having a judge from one's own community creates the perception that justice is seen to be done and contributes to the public trust that everyone's' rights are protected. Thereby, a diverse judiciary is also a factor for gathering the public trust of all groups but especially minorities who demand to see that the courts and/or legal system are not being (mis)used as an instrument of oppression at the hands of one ethnic group.[19]

Thirdly, this thesis also demonstrated that judicial diversity contributes to the court's legitimacy; diversity reinforces the perception that the judiciary belongs to and serves the whole society.[20] It was found that the public's trust to the legitimacy of the court can only be maintained when judges from different social backgrounds are given place in the court composition and the perception that the courts are the prerogative of one group is abolished.[21] Also, it was emphasized that the constitutional court decisions, such as the ones which concern the implementation of the peace settlement, can be perceived as legitimate only if they are taken by a diverse rather than a non-representative court composition.[22] As diverse judges have different life experiences, this also indicates that previously non-represented viewpoints are worthy of consideration. Hence, while inclusion of different viewpoints through the presence of diverse judges provides legitimacy to the court, constant rejection of some values perpetuates the domination of a single viewpoint as the only correct way of thinking, and might lead sub-groups to violence for the resolution of disputes. Therefore, this study also found that the court's diversity contributes to its legitimacy and political stability by keeping different groups within the system.

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[19] Chapter III.Part II.B.

[20] Chapter III.Part II.C.

[21] Higginbotham A.L.,Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge, Duke Law Journal, Vol. 42, No. 5, March 1993

[22] A. Phillips, *The Politics of Presence, The Political Representation of Gender, Ethnicity, and Race,* Oxford University Press, 2014

Finally, the research submitted that diverse composition contributes to better decision-making by including diversity of life experiences.[23] Communication between diverse judges widens the topics discussed in judicial decision-making and leads to alternative ways of thinking. For example, during the deliberations, judges from minority groups, may moderate anti-minority views and lessen prejudices towards underrepresented and/or minority groups.[24] This could only happen through the interaction/dialogue between judges from different backgrounds in the decision-making process which also lowers bias and provides mutual understanding. That said, judicial diversity also enriches the decision-making process and contributes to the quality of judicial decision-making by the inclusion of different opinions. However, if only afore-mentioned three conditions exist, then improving the decision-making process could be thought of.

All these four reasons that are identified to justify judicial diversity in the constitutional court also serve for political stability as diversity is a tool to prevent violence in fragile democracies. In the absence of judicial diversity, it is very unlikely to recourse to the court in the first place as the court would neither contribute to the peace-building process positively nor be seen as an impartial arbitrator or a legitimate institution. Subsequently, the constitutional review process would also be ineffective at the hands of one group. Consequently, people would not recourse to the judiciary and might be prone to adopt violent means for dispute resolution. Therefore, a main finding of this research was to highlight the necessity of judicial diversity for the purpose of political stability.

However, this research also detected some challenges that diverse judiciary could face. Diverse judiciaries are generally established by the employment of constitutional quotas in power-sharing democracies; thus, judicial appointments operate on the basis of quotas. It was identified that the criticisms direct the quotas, as they contradict with the merit principle.[25] However, when the broader socio-political context of divided societies

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[23] Chapter III,Part II.D

[24] S. A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 Boston College Law Review, 95 (1998); S. R. Lazos Vargas, "Does a Diverse Bench Attain a Rule of Law that is Inclusive? The Empirical Data and Possibilities of a Process Theory Model of Judging" 10 *Michigan Journal of Race & Law* (2004); C.M.Cameron and C.P.Cummings, Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971-1999, Department of Political Science Columbia University, March 30, 2003

[25] Chapter III,Part III.A.B.

was taken into account, it was demonstrated that constitutional quotas which provide representation are also necessary tools for stable democracy by redressing previous discrimination and/or preventing prospective discrimination at the onset of the constitution-drafting process. As the exclusion of some groups led to ethnic conflict in the first place, quotas provide a sense of security for ethnic groups and stable democracy. In examining their alleged conflict with merit principle, it was demonstrated that their subjective constructions of the merit principle could easily serve to the appointment of candidates from majority groups at the expense of under-represented groups and/or to the appointment of someone who has previous political affiliations.[26] Therefore, this research, in a way, identified that the merit principle can be used for political purposes and lead to the politicization of judicial appointments as well. After all, the key finding in this context was to support the utilization of quotas as they serve higher purposes: stable democracy and peace. However, it was also identified that the implementation of quotas with time limits (or with a sunset clause) would be better in responding to the changing needs of society and they should not be implemented in an unrestricted manner, as an unalterable constitutional provision.

Although it was identified that judicial diversity is a factor that reinforces public trust in the impartiality of the judiciary, it was also criticized as it might lead to the loss of impartiality when/if judges (in diverse courts) would act to protect the interests of their background. In reply to this charge, judges' *symbolic* presence was emphasized and the impossibility of maintaining true impartiality and judges' awareness of their mental attitude and their right to recuse themselves from hearing the cases are pointed out.

After constructing these theoretical premises, this thesis has examined the application of power-sharing theories and the concept of judicial diversity into the case-studies with an aim to argue that judicial diversity is necessary in the divided societies of Cyprus and Bosnia-Herzegovina.

Chapter IV demonstrated firstly the application of consociational theory as a political/constitutional solution to the Cyprus problem and examined the relevance of the representation principle in creating a diverse SCC. The functioning of the diverse SCC is examined in two landmark cases. The key finding of the case-study of Cyprus was to identify the ethnic bias of the local judges. Local judges' biased decisions towards the

[26] Chapter III,Part III

applications of the *other side* were firstly identified in the *Municipalities case* in which all local judges interpreted the constitutional provisions according to the ambitions of their respective political leaders.[27] As the case was on the establishment of geographically separate Turkish-Cypriot municipalities and the territorial separation was one of the biggest problems between the two communities, the local judges could not escape from the influence of their politicized ethnic identity. Therefore, contrary to the literature that suggests that judicial diversity enforces public trust in the impartiality of judiciary,[28] the analysis of this case identified negative influence of (not diversity but) ethnic voting on the diverse courts' impartiality, in diverse courts. However, the case still demonstrated the necessity of a diverse judiciary because if the Court was composed of only one ethnicity (and without an international judge), the decision would serve to endorse the political goals of one ethnic group.

Apart from demonstrating the ethic voting of Greek-Cypriot judges once more in the M.Ibrahim Case[29], another important finding of this chapter was the power of a non-diverse Supreme Court in changing/abolishing the constitutional order of the RoC which was a consociational order in fact. The analysis of this case demonstrated how dangerous a non-diverse court composition can be in invoking extra-constitutional principles (such as the doctrine of necessity) or applying unconstitutional Laws (33/64) and be an instrument of oppression at the hands of one ethnic group. Therefore, although both cases revealed the local judges' ethnic bias in the judicial decision-making process, they also made it obvious that judicial diversity, together with the presence of an international judge, was still needed in order to balance opinions influenced by ethnic bias. As a final note, in the Aziz Case[30], it was demonstrated that the current constitutional system of the RoC operates on the basis of discrimination of the Turkish-Cypriots (in regards to voting rights), since the unrepresentative Supreme Court invoked doctrine of necessity in 1964 but did not apply it

[27] Chapter IV,Part IV.B.

[28] Malleson K., Diversity in the Judiciary: the Case for Positive Action, *Journal of Law and Society,* Vol.36,No.3,Sept.2009; Ifill S.A.,Racial Diversity on the Bench:Beyond Role Models and Public Confidence,*Wash.&LeeL.Rev.,*405, Vol.57,Issue 2, Article 5,2000

[29] Chapter IV,Part IV.D,

[30] Chapter IV,Part IV.E, Aziz Case

in this case. This case also revealed the necessity of modifying consociational arrangements in a way to protect the fundamental human rights of all groups.

The analysis of the BiH Constitutional Court, unfortunately, revealed similar tendencies. Apart from the Renaming Cities Case,[31] the examined cases revealed perceived ethnic bias of all judges in the interpretation of the constitution. Ethnic bias (in dissenting opinions) was exaggerated in some cases in which the human rights of some groups are disregarded at the expense of consociational bargains.[32] The main finding of this chapter was to illustrate that the Court (although diverse), it started to lose its perceived impartiality and legitimacy in time, thus, the public trust, and as a consequence of issuing ethnically biased decisions and dissenting opinions. Moreover, the main problematic aspect in the composition and functioning of the Court was identified as the presence of the international judges.[33] Therefore, although on one hand this Chapter also identified the necessity of judicial diversity in gathering impartiality and legitimacy in the initial establishment of the Court, a key finding was to show both the negative influence of ethnic background in the decision-making process[34] and the need of constitutional reform in composing the Court (either with or without international judges).[35]

In terms of the comparison between the SCC of Cyprus and BiH Constitutional Court, it has been identified that both Courts suffered/suffer from the ethnic bias of the local judges.[36] At the same time, it was demonstrated that both Courts were entrusted to resolve highly political disputes and the decision of these cases should not be left to the viewpoint of one group.

As for the Annan Plan Constitution, firstly, the relevance of the federal design in unifying the territorially and ethnically divided country and then secondly, the need of

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[31] Chapter V,Part IV.B.

[32] Chapter V,Part IV.A

[33] Chapter V,Part IV.E

[34] A.Schwartz and M.Murchison, Judicial Independence and Impartiality in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia- Herzegovina, June 2016

[35] S.Graziadei, Six models for Reforming the Selection of Judges to the BiH Constitutional Court, University of Graz and University of Antwerp, Working paper, No.14, January 2016

[36] Chapter V,Part V.

judicial diversity in the Supreme Court were demonstrated. While examining the proposed Supreme Court, it was identified that the Court was also entrusted with a power to deal with constitutional review cases that would have consequences on the political order, and this work would be done by a diverse composition, just like the SCC under the 1960 Constitution. When compared with BiH Constitutional Court, based on speculations, the main lesson that could be learnt is the need of clear constitutional and legal guidelines as to how to design the judicial appointments process, as political influence on the process together with the qualifications of judges was the main problem in BiH judicial appointments. Moreover, due to the highly disputed presence of international judges in BiH and the objection to their presence in the proposed Supreme Court, it was also identified that it is necessary to find ways to compose the Court without international judges; this could only be done by finding a solution to insulate the court from political appointments which would lead to the appointment of neutral local judges and avoiding the deadlock due to ethnic voting. Therefore, the BiH Constitutional Court taught a negative lesson to the prospective Constitutional Court of Cyprus.

Besides this concern and in light of the Sejdic and Finci Case,[37] it was also identified that the territorial criteria in appointing judges should be extended in a way to include other smaller groups and should not violate their human rights regarding the judgeship positions in the constitutional court composition. Therefore, an adapted version of consociational democracy and/or federalism needs to be re-designed and proposed for this purpose.[38]

III. Limitations of the study

While undertaking this research, a number of issues and problems have been brought to the surface. Firstly, this research can be criticized on the ground that it is primarily concerned with the constitutional devices of power-sharing design and the design of the judiciary it offers and it does not examine the possibility of composing a diverse constitutional court under a majoritarian democracy. This is due to previous research[39] that provided the inadequateness of majoritarian democracy in regulating divided societies and

[37] Chapter V,Part IV.F.

[38] Chapter IV.Part,Part IV.E;Chapter V,Part II.F.

[39] Chapter II,Part II.C

in providing stable democracy. Hence, in the absence of a third alternative method, the power-sharing design was (and still is) the only constitutional framework to be adopted and to work with for deeply divided societies. For the purposes of the case-studies of this research, numerically smaller groups have never considered themselves as "minority" and they were not considered as such. Thus, they have not argued for the minority protection, but rather sought the representation of their ethnic groups in government institutions and being empowered politically. Hence, this research was required to adopt power-sharing democracy as a basis to work with. Therefore, this approach has been due to limitations on the variety of available constitutional designs. As a consequence, the conclusions of this research are restricted to those countries that political problems arising from group divisions and are being solved by a power-sharing framework and it can hardly be valid for other countries that have different constitutional designs.

Another limitation of this study is that it did not examine methods that could contribute to judges' impartiality as this was the main problematic area of a diverse judiciary. The literature suggests that judges' tenure, financial interests, remuneration, [fixed] terms of appointments, as well as their promotion process are the factors that affect their independence and impartiality. As this research has not undertaken any work to examine these conditions, it cannot suggest whether judges' impartiality can be strengthened and ethnic bias can be lessened through the help of these factors. Also, this research did not involve the examination of various methods in detail that could lessen political influence on judicial appointments which in turn could lead to the appointment of less prejudiced judges, although it has found that the politicization of the judicial appointment process is the biggest issue to tackle in Bosnia-Herzegovina.

IV. Contribution to the Existing Literature

Apart from opening new discussion topics for future research, this study has made a significant contribution to the literature on consociational democracy by investigating the judicial diversity of constitutional courts in divided societies. The examination of the composition and functioning of diverse constitutional courts under consociational arrangements is relatively new and the related literature is limited, despite the vast literature on consociational democracy and also judicial diversity in western democracies.

The novelty of this thesis is its attempt to bridge political principles of consociationalism and legal principles derived from judicial diversity in the context of ethnically divided societies and as it incorporates politics and law to show the close

interplay between the political principles of consociationalism and judicial diversity. This examination of diverse constitutional courts under consociational democracy has not been undertaken in a comprehensive manner before. As such, this thesis can also be considered as an effort to direct the attention of consociationalists to the senior judiciary and also the attention of legal scholars on judicial diversity to examine the functioning of diverse constitutional courts in divided societies. Therefore, this research intended to contribute to the existing literature both on consociational democracy and judicial diversity.

The most substantial contribution of this research is to provide how diverse constitutional court decisions had an impact on the constitutional and political order of ethnically divided societies. This research is consistent with other authors' research that argues that constitutional courts are powerful actors in building democracy in divided societies,[40] contribute to the peace-building,[41] give spirit to the constitutional document[42] or, on the contrary, unwind the consociational system.[43] As the case-studies of this research were based on the examination of how diverse courts contribute to this process, this research contributes to the previous research by adding judicial diversity into the context.

Although this study gave place to the conflict between communal rights and human rights under consociational designs, it also differentiates from this previous work by exploring the concept of *representation* offered by the literature on consociationalism and demands the establishment of a diverse judiciary. Therefore, this research follows closely on from the work of McCrudden and O'Leary.[44]

This research also contributed to the understanding of how the concept of representation can take the form of substantive representation due to the local judges' biased interpretation in the judiciary of divided societies. Thereby, it shows that judicial

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[40] Issacharoff S., Constitutionalizing Democracy in Fractured Societies, 82 Texas Law Rev.1861,2003-2004

[41] Sapiano J., Courting Peace: Judicial Review and Peace Jurisprudence, University of Edinburgh, School of Law, Research Paper Series, No.2016/23

[42] Daly T.G.,The Alchemists: Courts as Democracy-Builders in Contemporary Thought, University of Edinburgh, School of Law, Research Paper Series, No.2016/23

[43] Pildes R,H., Ethnic Identity and Democratic Institutions: A Dynamic Perspective, November 2008 in S. Choudhry, *Constitutional Designs in Divided Societies*, Oxford University Press, 2008

[44] C. McCrudden and B. O'Leary, *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

diversity in divided societies is not understood in the same manner as in established democracies. Thus, this research also highlighted the differences in the operation of a diverse judiciary between the established/stable democracies and consociational democracies.

Another research that this thesis contributed is to the argument that quotas serve the broader purposes of stable democracy.[45] This was confirmed by the examination of the 1960 Constitution (Chapter IV) because soon after the ethnic representation in the government institutions was ended, ethnic conflict broke out. Therefore, this thesis also highlights the need of considering the broader perspective that the constitutional quotas serve; quotas do not only serve for the purpose of diversity/representation but also for providing legitimacy and governmental stability.

In relation to the case study of Cyprus, the originality of this thesis is its emphasis on the past, the proposed and the prospective functioning of the ethnically diverse constitutional court. The examination of the Cyprus problem has always been confined to the research in political science and even studies who claimed to be "legal" were political in essence.[46] This is valid for this study to some extend as the political context in which the constitutional courts operate needs to be provided for an understanding of why and how political problems influence the judiciary. However, the political power of the SCC and by 1964, the Supreme Court, has not received sufficient attention from scholars, despite the fact that the RoC owes its current constitutional/legal system to the Court's decision. Moreover, examination of the judiciary under the Annan Plan Constitution once more contribute to the understanding on the important role of the proposed Supreme Court in peace jurisprudence as well as the both necessary and problematic presence of international judges. The study on Cyprus differentiates from other works that investigate possible political solutions for Cyprus and considering the judiciary as part of the political settlement, by focusing especially on the judiciary, its diversity, and considering its impact on the pre- and post-political solution and stable democracy.

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[45] A. Jarstad, *Changing the Game: Consociational Theory and Ethnic Quotas in Cyprus and New Zealand,* Doctoral Dissertation, Department of Peace and Conflict Research, Uppsala University, Uppsala, 2001

[46] Evriviades M.L., The Legal Dimension of the Cyprus Conflict*, 10 Tex. Int'l L.J.*,1975;p.244

As for the contribution of this thesis to research on the Constitutional Court of BiH, it is the examination of international judges in (national) constitutional courts. During the initial years of this PhD, there was almost no publication explicitly on the necessity and/or problematic aspects of the presence or of international judges in domestic courts; this was an under-researched area of law. Only, in the last three years, Marko (an international judge himself), Schwartz and Grazidei have published on the topic.[47] This research also made an attempt to discuss the constitutional necessity of the presence of international judges. In that sense, this thesis contributes to the aforementioned author's work.

V. Recommendations for Policy-Makers and for Further Research

A range of possibilities for future research is opened up in this study, not only as regards Cyprus and Bosnia-Herzegovina, but also for the role and the composition of the constitutional courts in other divided societies. In the light of the findings of this thesis and the observations made in the preceding chapters the following recommendations could be put forward for academics and by policy makers.

A. Ensuring Judicial Impartiality in Diverse Judiciary

Judicial diversity is considered a contributing factor to the stability of democracy, thus, its establishment is of the highest importance. However, as shown in Chapter IV on Cyprus non-representative Supreme Court decision had disastrous consequences on the country's constitutional order and this was also a result of the ethnic bias of the local judges. As ethnic bias was also observed in the diverse court of SCC[48] and BiH Constitutional Court,[49] it presents itself as the biggest problematic area. Therefore, this thesis recommends the investigation of methods that could reduce the bias of local judges in such settings.

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[47] Schwartz A. and Murchison M., Judicial Independence and Impartiality in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia- Herzegovina, June 2016; S.Graziadei, Six models for Reforming the Selection of Judges to the BiH Constitutional Court, University of Graz and University of Antwerp, Working paper, No.14, January 2016; Grazidei S., Power-Sharing Courts, *Contemporary Southeastern Europe*, 2016(3)

[48] Chapter IV,Part IV.B.D.

[49] Chapter V,Part IV.A.D.

B. Thorough Examination and Investigation of Other Related Topics

However, any research on this point would require the examination of other related topics, such as the new judicial appointments process which could help the appointment of the least biased judge. As the examination of both the Cyprus and BiH judiciary under the 1960 Constitution supported Schwartz' argument that impartiality is a *myth* in divided societies because of the local judges' ethnic voting,[50] an avenue to discuss how to maintain local judges' impartiality in highly politicized contexts where identity politics are prevalent is opened. Hence, it requires more investigation to determine as to which procedures, such as, exams, interviews and/or judicial commissions can insulate appointments from political influence. Although appointing the judges of senior judiciary is usually within the discretion of Parliaments and/or Legislature, it can be researched whether entrusting power to independent Judicial Councils/Commissions could be one way to reduce political influence on the appointments process.[51] As such, detailed investigation ought to be carried out regarding whether independent appointments commissions, with equal members of legal persons and lay members can help to solve the problem of the politicization of appointments[52] and lead to the appointment of the most independent minded (so, the least biased) rather than the most politically active. For example, in New Zealand's guidelines, membership of or association with political organisations is deemed as inconsistent with judicial independence.[53] Also, in the UK, it is suggested that independent commissions with a diverse composition could lessen political influence in appointments.[54] Likewise, research can be carried out on the question of whether an examination system may be a better option than appointment by Parliament and can lead to the appointment of the most qualified candidate than a nationalistic and biased candidate. As the political influence has manifested itself as the main problem in BiH's judicial appointments, this option could be

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[50] *Supra* fn.34, A.Schwartz

[51] Thomas, Judicial Diversity in the United Kingdom and Other Jurisdictions, A review of Research, Policies and Practices, The Commission for Judicial Appointments, November 2005; The Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges in the Commonwealth, Bingham Centre for the Rule of Law, February 2016

[52] Ibid

[53] Guideline for Judicial Conduct, New Zealand, 1 June 2011

[54] C.Thomas, Judicial Diversity in the United Kingdom and Other Jurisdictions, A Review of Research Policies and Practices, The Commission For Judicial Appointments, November 2005

one way to solve the problem. The judicial appointments process is closely related to the need of an international judge as well because when/if the judicial appointment process ensures the appointment of neutral/impartial judge, then, the international judge, as a tie-breaker, would not be needed.

C. Reconsideration of the Role of an International Judge

The need of an international judge needs to be investigated and the research can be conducted on the question as to what extend the presence of international judges would be accepted by local communities and how to abolish the need for their presence in the court composition. As this research has highlighted the need of international judges as a deadlock breaking mechanism, the usefulness of other mechanisms, either political or constitutional, should be researched.[55] International judges' presence is also closely related to the question of how to maintain the local judges' impartiality because the former is envisaged as a result of concerns on ethnic voting. This means that procedures reducing the influence of ethnic background and help to increase impartiality need to be investigated. As such, the question of whether legal education and/or legal training could be helpful in reducing ethnic prejudices can be researched. The possible contribution of legal training before the appointment and/or during the post should be considered; such a measure can be examined as to whether it can be useful to remind the judges that their impartiality is needed for the broader purpose of stable democracy and how to avoid their ethnic prejudices in judicial decision-making.

D. The option of a New/Modified Form of Consociational Model

The consideration of whether a new/modified form of consociational theory could be proposed according to the needs of society is highly recommended. As such, as a first point, the investigation of the effectiveness of interim constitutions for a transitional period of time can be investigated due to the majority groups' disapproval of the power-sharing constitutions. Alternatively, the efficiency of power-sharing design constitution for a transitional period of time, either with a time limit or by setting targets such as stable democracy, could be investigated. The South African interim constitution (1993-1997)could be examined in order to draw lessons for the prospective constitutional experience of Cyprus. Likewise, the status of constitutional quotas under

[55] Schneckener U., Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation, *Journal of Peace Research,* Vol.39, No.2, 2002

consociationalism calls for a more in depth examination as to whether they could be adopted for an interim period until representation in government institutions is proportional to the ratio of the sub-groups in the total population, rather than an unalterable constitutional accommodation.[56] In relation to the judiciary, this would also mean the examination of time limits for the presence of international judges. Their disputed status must be debated with a view to be restricted with a time limit and not accepted as an unalterable constitutional provision. Also an alternative way for the construction of the quotas should be sought that would allow the presence of all smaller groups and not to discriminate them from the government branches, including the judiciary.

E. Consider the Influence of Dissenting Opinions Issuance

A further possibility for research could be to focus on the influence of issuing dissenting opinions and discuss the probability of prohibiting the publication of dissenting opinions for a transitional period of time until ethnic divisions do not dominate the judicial decision-making. Such an approach can be proposed after examining other jurisdictions which do not have the tradition of publishing dissenting opinions, such as the Belgium Constitutional Court.

F. Implementation of Constitutional Court Decisions

In relation to BiH, it is also recommended examining ways that would ensure the implementation of the court decisions, as this seems to be the third biggest problem of the Constitutional Court, after the perceived ethnic interpretation of judges and the appointment of nationalistic judges.

G. Conducting Interviews

It would be useful to conduct interviews with the public at large in these divided societies and maybe with their politicians and judges in order to have a better understanding about the expectations of society, the thoughts of politicians, and the mind-set of judges and try to reconcile the different viewpoints of these groups. Interviews could be undertaken with a view to propose how to maintain public trust to judicial impartiality and if there might be some avenues other than judicial diversity that could help to reinforce public trust in the constitutional court's legitimacy and impartiality. It should be of primary

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[56] C.McCrudden and B. O'Leary, *Courts and Consociations: Human rights versus Power-Sharing,* Oxford University Press, 2013

importance to be aware of what a divided society needs in order to achieve reconciliation at the grass root level and also in the highest organs of the government. However, due to the linguistic restrictions, this work could not be carried out as part of this research.

VI. Concluding Remarks

This research argued that judicial diversity is necessary due to the Court's role in constitutional review cases and it also provided arguments which showed that judicial diversity contributes to public trust in impartiality, legitimacy and improves the decision-making process in other settings. However, although the findings of this study support that diversity is necessary because of the Court's role, they do not support the argument that diversity contributes to public confidence in the impartiality of the judiciary, legitimacy and better decision-making. The analysis of the selected constitutional court cases showed that in both settings, Bosnia-Herzegovina and Cyprus, ethnic voting of the local judges is a reality in important cases which had a political tone and local judges did not adjudicate cases impartially. Thus, it is unnecessary to examine whether a biased court could be perceived as legitimate and/or improves decision-making. Of course, this research does not imply that all power-sharing designs have problems in maintaining individual judges' judicial impartiality; it also does not imply that these findings will be relevant to these case-studies in time given the chance that prominent identity concerns could be lessened. The empirical examination of these case studies can be used to disqualify the Constitutional Court's ethnic diversity due to the ethnic voting of the local judges. However, considering the important role of the Constitutional Courts in democracy and peace-building, the cases studies should be taken as evidence to entrench diversity to the senior judiciary in power-sharing constitutions of ethnically divided societies and should be taken as a qualifying factor for judicial diversity. After all, this research can be read as evidence that due to the constitutional court's role in peace-building process, its ethnic composition is necessary. To conclude, in ethnically divided societies where identity politics are prominent, law and politics are intertwined and thus, the diverse design of the judiciary is significant and relevant in preventing people from resorting to violence and promoting stable democracy.

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List of Appendices

Appendix A. Suggested Measure for Facilitating the Smooth Functioning of the State and for the Removal of Certain Causes of Inter-Communal Friction (1963)

Point 1.The right of veto of the President and the Vice-President of the Republic to be abandoned.

Point 2.The Vice-President of the Republic to deputise for the President of the Republic in case of his temporary absence or incapacity to perform his duties.

Point 3.The Greek President of the House of Representatives and the Turkish Vice-President to be elected by the House as a whole and not as at present the President by the Greek Members of the House and the Vice-President by the Turkish Members of the House.

Point 4.The Vice-President of the House of Representatives to deputise for the President of the House in case of his temporary absence or incapacity to perform his duties.

Point 5.The constitutional provisions regarding separate majorities for enactment of certain laws by the House of Representatives to be abolished.

Point 6.Unified Municipalities to be established.

Point 7.The administration of Justice to be unified.

Point 8.The division of the Security Forces into Police and Gendarmerie to be abolished

Point 9.The numerical strength of the Security Forces and of the Defence Forces to be determined by a Law.

Point 10.The proportion of the participation of Greek and Turkish Cypriots in the composition of the Public Service and the Forces of the Republic to be modified in proportion to the ratio of the population of Greek and Turkish Cypriots.

Point 11. The number of the Members of the Public Service Commission to be reduced from ten to five.

Point 12.All decisions of the Public Service Commission to be taken by simple majority.

Point 13.The Greek Communal Chamber to be abolished.

Appendix B. High-Level Agreement of 12 February 1977

The following is the text of the agreement between the then President of the Republic, Archbishop Makarios, and the Turkish Cypriot leader, Mr. Denktash, concluded on 12 February 1977 during a meeting under the auspices of the United Nations Secretary-General. The text of the agreed instructions (guidelines) reads as follows:

1. We are seeking an independent, non-aligned, bi-communal Federal Republic.

2. The territory under the administration of each community should be discussed in the light of economic viability or productivity and land ownership.

3. Questions of principles like freedom of movement, freedom of settlement, the right of property and other specific matters, are open for discussion, taking into consideration the fundamental basis of a bi-communal federal system and certain practical difficulties which may arise for the Turkish Cypriot Community.

4. The powers and functions of the central federal government will be such as to safeguard the unity of the country having regard to the bi-communal character of the State.

Appendix C. The 10-Point Agreement of 19 May 1979

Following is the text of the agreement between the then President of the Republic, Mr. Kyprianou, and the Turkish Cypriot leader, Mr. Denktash, concluded on 19 May during a meeting under the auspices of the U.N. Secretary-General, Dr. Waldheim: 1. It was agreed to resume the intercommunal talks on 15 June 1979.

2. The basis for the talks will be the Makarios-Denktash guidelines of 12 February 1977 and the U.N. resolutions relevant to the Cyprus question.

3. There should be respect for human rights and fundamental freedoms of all citizens of the Republic.

4. The talks will deal with all territorial and constitutional aspects.

5. Priority will be given to reaching agreement of the resettlement of Varosha under U.N. auspices simultaneously with the beginning of the consideration by the interlocutors of the constitutional and territorial aspects of a comprehensive settlement. After agreement on Varosha has been reached it will be implemented without awaiting the outcome of the discussion on other aspects of the Cyprus problem.

6. It was agreed to abstain from any action which might jeopardize the outcome of the talks, and special importance will be given to initial practical measures by both sides to promote goodwill, mutual confidence and the return to normal conditions.

7. The demilitarization of the Republic of Cyprus is envisaged, and matters relating thereto will be discussed.

8. The independence, sovereignty, territorial integrity and non-alignment of the Republic should be adequately guaranteed against union in whole or in part with any other country and against any form of partition or secession.

9. The intercommunal talks will be carried out in a continuing and sustained manner, avoiding any delay.

10. The intercommunal talks will take place in Nicosia.