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Six models for Reforming the Selection of Judges to the BiH Constitutional Court

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Summary

Following the decision on the unconstitutionality of the Day of the Republic (U-3/13) in late 2015, Bosnian Serbs and Croats vowed to terminate the mandate of international judges of the country's constitutional court. If the Bosnian parliament failed to act, political leaders from the Bosnian Serb entity would call a referendum on the Court and drop out of state institutions.

Against the backdrop of this political threat, Bosnians need to debate if they still need international judges or whether the Court's composition should be reformed. Comparatively, the presence of international judges in national apex courts remains an exception. This paper will not enter the debate on whether it is time to call time on international judges, but will show how the composition of the Court could be reformed. Politicians could draw inspiration from several models discussed in the paper: the domestic model, the German model, the Belgian model, the ECtHR model, and the D'Hondt model.

However, the possibility is not excluded that the very changes that Bosnian Serb politicians demand might require constitutional reform.

About the author

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1. Political Background

Following the decision of the Bosnian Constitutional Court on the unconstitutionality of the Day of the Republic (U-3/13),[1] all major political parties in the Republika Srpska entity vowed to terminate the mandate of international judges. Supported by Bosnian Croats,[2] Bosnian Serb political parties demand that the state parliament approves a Law on the Constitutional Court within the next 120 days.[3] According to the intention of RS politicians, the current model of judicial selection should be extended by analogy to replace international judges.[4] The RS will call a referendum on the Constitutional Court and drop out of state institutions,[5] should the Court not be reformed.

The aim of the following text is very much practical: to feed the discussion on reform of the selection of judges to Bosnia's Constitutional Court.

The text is organized as follows: (1) it provides a comparative introduction to the presence of international judges in domestic constitutional courts, (2) it gives an overview over the current composition and function of the BiH Constitutional Court, (3) it discusses whether the composition of the Court can be changed without constitutional reform, (4) it points out which models BiH politicians could consult for reforming judicial selection to the Court, and (5) it shows other ways to increase the legitimacy and independence of the Court.

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[1] Stefan Graziadei, 'The Unconstitutional Holiday: Bosnian Constitutional Court Annuls Serb Republic Day', Verfassungsblog, (2015) <http://verfassungsblog.de/en/11971/> [accessed 16 December 2015].

[2] Rodolfo Toe, 'Bosnian Croats, Serbs Unite Against Foreign Judges', Balkaninsight, 2 December 2015, http://www.balkaninsight.com/en/article/croat-and-serb-parties-call-for-reform-of-the-constitutional-court-of-bosnia-and-herzegovina-12-01-2015 [accessed 15 December].

[3] Daniel Kovacevic, 'Bosnian Serbs Plan Challenge to Constitutional Court', Balkaninsight, 30 November 2015, http://www.balkaninsight.com/en/article/bosnian-serb-leaders-pledge-to-change-bosnia-s-constitutional-court-11-30-2015-1 [accessed 15 December 2015].

[4] Interview with Milorad Dodik, 29 November 2015, FaceTv, http://www.facetv.ba/novost/11099/milorad-dodik-u-cd-u-odluku-mogu-okaciti-macku-o-rep [accessed 15 December 2015].

[5] Srecko Latal, 'Serb leader warns Bosnia could break up', Balkaninsight, 2 December 2015, http://www.balkaninsight.com/en/article/bosnian-serb-leader-warns-of-breakup-of-bosnia-12-02-2015 [accessed 15 December 2015].

2. International judges in domestic constitutional courts

The presence of international judges in national courts poses challenges to democratic theory. Even today, some European countries, such as the Netherlands and Switzerland,[6] forbid constitutional review of legislation. Even more at odds with national sovereignty is the idea that international judges may sit in national apex courts: "Because of the doctrine of state sovereignty, it sounds almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or a separate constitutional court of another country."[7] This is particularly true because such courts operate at the boundary between politics and law: they have the power to review legislation, which is based on the will of the people, for conformity with the national constitution.[8]

While the judgment of external courts on domestic situations requires a re-elaboration of democratic theory away from the national towards an international arena,[9] the primary allegiance of international judges remains somewhat ambiguous. For international courts in particular, it is not clear in whose name they speak.[10] For instance, an international group of legal experts wrote that foreign nationals would not be accountable to the people of a country: "Leaving the final decision in case of stalemate to foreign citizens in such critical organs as the Supreme Court and others is in stark contradiction to the principle of democracy."[11] But international judges in national courts are fully part of the domestic court, speak in their name and owe

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[6] Article 190 of the Swiss Constitution provides that federal statutes and international law shall be binding for the Supreme Court. The Netherlands allows for judicial review of statutes in light of international treaties but not the constitution. Maurice Adams and Gerhard van der Schyff, 'Constitutional Review by the Judiciary in the Netherlands a Matter of Politics, Democracy or Compensating Strategy? ', ZaörV, 66 (2006), 399-413.

[7] Joseph Marko, 'Foreign Judges: A European Perspective', in Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong, ed. by Simon Young and Yash Ghai (New York: CUP, 2014), pp. 637-65 (p. 637).

[8] Ibid. (Marko 2014)

[9] Armin Von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', European Journal of International Law, 23 (2012).

[10] Von Bogdany and Venzke, In whose name.

[11] International Expert Panel, A principled basis for a just and lasting Cyprus settlement in the light of International and European Law, para 18, http://agora-dialogue.com/2005/10/12/a-principled-basis-for-a-just-and-lasting-cyprus-settlement-in-the-light-of-international-and-european-law/ [accessed 16 December 2015].

their first allegiance to national law.[12] The situation becomes more complicated when there are strong tensions between national constitutional law and international law.[13] Still, because these judges are foreigners and often appointed by outside authorities, their relationship with external or international authorities remains blurred.[14]

There seem to be several drawbacks of having international judges serving in national courts. They are not trained in the domestic legal system, often do not understand the local language(s), and as citizens of another country they appear to be ill-equipped to uphold the supreme law of a country with which they share no bond of citizenship. These epistemic, cultural and linguistic challenges might considerably slow down the work of the Court. In addition, there are the severe democratic drawbacks mentioned earlier. Tim Potier argued that the internationalization of a national apex court prevents local ownership of the constitutional project.[15] It is not surprising that the examples of international judges in local courts are very rare, limited in time and to rather exceptional situations.

International courts and courts with a mixed composition (domestic-international) are generally created for a particular scope, namely the prosecution of very serious crimes as a measure of transitional justice. The hybridity domestic-international does not concern the composition only, but extends to the law that the tribunal applies and the law by which the tribunal was created.[16] The purest form of outside intervention is the establishment of an international tribunal under international law, with sitting international judges, competent to inflict sanctions for the most serious crimes that have been committed by a criminal regime. Such were the international criminal courts of Nuremberg and Tokyo as well as the Yugoslavia and Rwanda tribunals. The literature categorizes them respectively as international criminal courts

[12] David Feldman, ' The Independence of International Judges in National Courts: Lessons from Bosnia and Herzegovina', in The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges, ed. by Shimon Shetreet and Christopher Forsyth (Leiden: Martinus Nijhoff/Brill, 2012), pp. 215-29.
[13] Ibid. p. 215.
[14] Feldman, The Independence of International Judges.
[15] Tim Potier, 'Making an Even Number Odd: Deadlock-Avoiding in a Reunified Cyprus Supreme Court', JEMIE, 7 (2008), 1.
[16] Laura A. Dickinson, 'The Promise of Hybrid Courts', The American Journal of International Law, 97 (2003).

of the first and second generation.[17] A major innovation was the establishment of courts with a mixed composition. These third generation criminal tribunals may have a diverse institutional genesis: they can be either special courts set up jointly by national governments and the United Nations (Sierra Leone, Lebanon, Cambodia), or courts with international judges in countries under direct UN control (Kosovo, East Timor, Bosnia).[18] Hybrid courts are generally instituted for criminal matters of the most serious nature and are regarded as temporary bodies to help rebuild the national justice system.

Hybrid courts have the function of helping to ensure impartiality and to prevent 'ethnic justice'. They generally operate in contexts were the local justice system has either been completely destroyed (Kosovo, East Timor) or where there is the severe risk of ethnically biased judgements (Bosnia). Ensuring ethnic impartiality was also the reason for having international judges in the Bloody Sunday Tribunal, which was created by the British government to look into the killings that had occurred on that day in Northern Ireland.[19] The main aim of putting international judges into national courts is to educate their local peers in rule of law, doctrines of constitutional justice, and in particular international law and human rights law. In Bosnia, the presence of international judges in local courts has been credited with strengthening the independence and preparation of judges, the authority and quality of judicial decisions, and helping in the transition from socialist Yugoslav law to European constitutional standards.[20] The ontological reason for having international judges in local courts is to strengthen the impartiality, legitimacy, efficiency and quality of domestic judicial bodies.

The interest of the present paper lies in hybrid courts that have jurisdiction to hear a range of cases far broader than the ones in criminal nature only. From the vantage

[17] Etelle R Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform', Ariz. J. Int'l & Comp. L., 23 (2005).

[18] Aaron Fichelberg, Hybrid Tribunals – a Comparative Examination, (New York: Springer, 2015).

[19] Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, (Oxford University Press, 2008), p. 12.

[20] Altmut Schröder, 'Der Beitrag Internationaler Richter Zur Entwicklung Der Rechtsstaatlichkeit in Bosnien Und Herzegowina', ZIF, (2004) <http://reinhardmeyers.uni-muenster.de/docs/BH2.pdf> [accessed 15 December 2015].

point of national sovereignty, democracy and self-governance of the people, it is far more difficult to justify the presence of international judges in courts that have a general jurisdiction. By their very nature, these courts play a host of other roles. Constitutional courts not only act to uphold the rule of law, but often act as umpire between different founders and in transitional context even as founders of normative values.[21] Democratic theory requires a strong justification for having international judges in domestic courts, and the reasons need to be all the more compelling the broader the jurisdiction and functions of the Court.

International judges have been present in the constitutional courts of Kosovo, Bosnia-Herzegovina, Cyprus (1960-64) and the Final Appeals Court of Hong Kong. In Kosovo and Bosnia, there are three international judges in a nine member constitutional court. In Cyprus, the presence of international judges in the highest judicial organs was a feature of past-negotiated settlements but is likely to remain an element in any future reunification plan. The 1960 Cypriot Constitution, still in force today but suspended in part due to the doctrine of necessity,[22] awarded the presidency of the constitutional court and the high court to a 'neutral' judge.[23] That 'neutral' judge had to be a foreigner who is neither a Greek, Turkish or UK citizen.[24] The 'neutral judge' in the High Court had two votes.[25] In analogy to the Bosnian and Kosovo cases, the Annan Plan for a united Cyprus (2004) foresaw that one third of the judges of the Supreme Court would be internationals.[26] Hong Kong currently has one international judge in a five-member panel.[27] The Hong Kong Final Appeals Court is the highest court in Hong Kong, but the last word on constitutional matters rests with the Standing Committee of the National People's Congress of the People's

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[21] Christian Boulanger, Hüten, Richten, Gründen: Rollen Der Verfassungsgerichte in Der Demokratisierung Deutschlands Und Ungarns, (Berlin: epubli, 2013).

[22] Costas M Constantinou, 'On the Cypriot states of exception', International Political Sociology 2.2 (2008): 145-16

[23] Article 133(1)1 Constitution of Cyprus.

[24] Article 133(3) Constitution of Cyprus.

[25] Article 153(1)1 Constitution of Cyprus.

[26] Article 45 of the Constitution.

[27] Section 5(2-3) Hong Kong Court of Final Appeals Ordinance, http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/42B9DDC7225EDB8B482575EF000E160E/$FILE/CAP_484_e_b5.pdf [accessed 15 December 2015].

Republic of China.[28] There are only a few examples where international judges are part of a domestic apex court.

Together with hybrid criminal courts, the presence of international judges in domestic courts is generally part of a negotiated transition settlement. The provision on international judges in the Constitutional Court in Kosovo and Bosnia stem from international agreements determining the organization of the state, i.e. the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan)[29] and the General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement)[30]. The conferral of the presidency of the highest Cypriot courts to 'neutral' judges was a result of the Zürich-London Agreement for the Constitution of Cyprus.[31] The Comprehensive Settlement of the Cyprus Problem (Annan Plan) provided for three international judges in a nine-member Supreme Court.[32] The presence of foreign judges from other common law jurisdictions is provided for in the Joint Declaration of the UK and Chinese governments on the Hong Kong Question.[33] The presence of international judges in domestic courts with general jurisdiction is the result of international agreements negotiated to solve internal conflicts or that provide for the legal embedding of a negotiated transition.

International judges in national apex courts can never decide against the interest of all national judges acting jointly and often are invested with a supplementary role only. In Bosnia and Cyprus, international judges would intervene only when there is disagreement between the national judges. In Cyprus, international judges in the Supreme Court (under Annan III - 2003) would cast a vote only if the national judges were evenly split.[34] Ignoring difficulties that might arise in practice, Cypriot

[28] 158(1) of the Basic Law of Hong Kong.

[29] Article 6.1.3 of the Comprehensive Proposal.

[30] Article VI.1a Constitution of Bosnia-Herzegovina, which is Annex IV to an international treaty (Dayton Agreement).

[31] Article 6 and 16, Appendix I (Basic Structure of the Republic of Cyprus) to the London-Zürich Treaties of 1959.

[32] Article 6(2) of the Foundation Agreement.

[33] See Annex I ('Elaboration by the Government of the People's Republic of China of its basic policies regarding Hong Kong'), part III, of the above mentioned declaration.

[34] Frank Hoffmeister, Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession, (Martinus Nijhoff Publishers, 2006), p. 135.

law provides that all international judges shall "speak with one voice".[35] In Bosnia, cases would reach the Court in full composition only if there was some earlier disagreement in the Grand Chamber (composed solely of national judges): "If no decision is taken [in the Grand Chamber], the case shall be referred to the Constitutional Court sitting in the plenary session."[36] Kosovo is an exception. It has been a deliberate choice to have full time international judges participating in all affairs. The selecting authority gave priority to candidates committed to long-term residence in Kosovo.[37] The Hong Kong's Court of Final Appeal generally sits with one foreign judge as part of a five-judge panel.[38] In the countries surveyed, foreign judges make up between one-fifth and one-third of the Court and are decisive only if national judges are split.

The mixed courts are seen as a temporary instrument. The Cypriot Constitution provides that the position of the 'neutral' judge may be amended by law. Contrary to national judges, foreign judges would not be appointed for life.[39] Under the Annan Plan, the appointment and removal of international judges in Cyprus could be decided by law.[40] This means that it was up to domestic authorities to determine when it was time to move from an internationalized to a fully domestic court. In Hong Kong, there are increasing calls from most prominent Chinese legal scholars to end the mandate of international judges in a foreseeable time.[41] But for the former Chief Justice of the Court the presence of foreign judges should be made a

[35] Section 23(3) of the Federal Law on the Administration of Justice. Quoted in Potier, Making an Even Number Odd, p4.

[36] Article 10(4) of the Rules of Procedure of the Constitutional Court of Bosnia-Herzegovina.

[37] Nicolas Mansfield, 'Creating a Constitutional Court: Lessons from Kosovo.', East West Management Institute, (2013) <http://www.gjk-ks.org/repository/docs/EWMI_Report_on_Kosovo_Constitutional_Court.pdf> [accessed 15 December 2015] (p. 6).

[38] 'Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong', ed. by Simon Young and Yash Ghai (New York: CUP, 2014).

[39] Article 133(6) and (7) of the Cyprus Constitution.

[40] Hoffmeister, Legal Aspects of the Cyprus Problem, p. 135. This is based on Annex III, Attachment 26 [Federal Laws on the Administration of Justice] of the Comprehensive Settlement of the Cyprus Problem.

[41] Victor Fung Keung, Chinese-only judges in top court would hurt Hong Kong, South China Morning Post, 28 November 2012, *http://www.scmp.com/comment/insight-opinion/article/1092328/chinese-only-judges-top-court-would-hurt-hong-kong* [accessed 15 December 2015].

permanent arrangement.[42] The mandate of Kosovo Constitutional Court judges ended in 2014, but was extended for another two years after international pressure from the European Union.[43] Contrary to Bosnia and Cyprus, in Kosovo it was an outside authority (and not the local parliament) that had the competence to determine when international judges would leave the court.[44] East Timor recently ended the mandate of international judges in the country's courts after the outcome of judicial decisions upset the interests of the government.[45] The object of the present paper is reform of the Bosnian Court, whose unpopular decisions led Croat and Serb politicians to demand the removal of the Court's international judges.

3. Brief introduction to Bosnia and its Constitutional Court

The Dayton Agreement created a heavily decentralized country mirroring the features of a consociational democracy. Bosniaks,[46] Serbs and Croats received special constitutional status as "constitutive peoples" of Bosnia-Herzegovina (henceforth 'Bosnia' or 'BiH'). Constitutive peoples share power in the country's central government, enjoy wide autonomy in sub-state entities, are entitled to a minority veto in key levels of governance, and are proportionally represented in public

[42] Kris Cheng, Overseas judges at Court of Final Appeal should be permanent arrangement, former Chief Justice says, Hong Kong Free Press, 25 September 2015, https://www.hongkongfp.com/2015/09/25/overseas-judges-at-court-of-final-appeal-should-be-permanent-arrangement-former-chief-justice-says/ [accessed 16 December 2015].

[43] There was a debate, hosted by the LSE, on whether the prolongation of the mandate of international judges was in accordance with Kosovo's Constitution; http://blogs.lse.ac.uk/lsee/tag/kosovo-constitutional-court-debate [accessed 15 December 2015].

[44] Article 152(5) of the Constitution of Kosovo, vesting the authority to determine the end of the international judges' mandate in an international political organ, the Office, the International Civilian Representative.

[45] Freedom House, 2015 Report on East Timor, https://freedomhouse.org/report/freedom-world/2015/east-timor [accessed 15 December 2015].

[46] Bosniaks are an ethnic group situated on the territory of the Former Yugoslavia whose members speak the Bosnian/Serbian/Croatian language (BCS) and who are religiously, or at least culturally, affiliated to the Sunni Islamic faith. They constitute the relative majority of the population of Bosnia-Herzegovina and were elevated to the rank of nation by the Yugoslav League of Communists in 1968. Carsten Wieland, Nationalstaat Wider Willen: Politisierung Von Ethnien Und Ethnisierung Der Politik, (Frankfurt: Campus, 2000), pp. 227-30.

service.[47] According to O'Leary and McGarry, Bosnia is an example of a particularly conservative consociation with fixed, as opposed to self-chosen, group identities.[48]

Bosnia has been defined as one country with two entities and three peoples (or religions).[49] It is an example of a 'complex'[50] federal state composed of two entities, the Federation of Bosnia and Herzegovina (dominated by Bosnian Muslims and Bosnian Croats - FBiH) and the Republika Srpska (RS), now overwhelmingly populated by Serbs. Bosnia has a presidency with three presidents, two houses of parliaments at state level and two houses of parliaments in each entity as well as three constitutional courts (entity and state level).

The Dayton Constitution created only a few tie-breaking institutions that would be able to unblock a political system prone to gridlock. The most prominent is the High Representative for Bosnia-Herzegovina (OHR), an international governor with sweeping legislative and executive powers. Another is the Constitutional Court, which can take decisions by majority and is called upon to resolve disputes on veto rights. In view of majority voting, judges consider the Court as one of Bosnia-Herzegovina's most federal institutions.[51]

The Bosnian Constitutional Court is a hybrid institution with a majority of local and a minority of international judges. It is composed of nine judges. The six national judges are elected by the first chambers of the entities; four of which by the House of Representatives of the FBiH and two by the National Assembly of the RS.[52] The

[47] Florian Bieber, 'Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance', (Basingstoke: Palgrave MacMillan, 2007). Roberto Belloni, State Building and International Intervention in Bosnia., (London: Routledge, 2007).

[48] Brendan O'Leary, John McGarry, and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation', in Constitutional Design for Divided Societies: Integration or Accommodation, ed. by Sujit Choudhry (New York: OUP, 2008), pp. 41-90 pp. 61-2).

[49] Jaques Paul Klein, Stopping the Whirlwind. The World Today (lecture at Chatham House), 1999, p. 7.

[50] Christian Steiner and Nedim Ademović, 'Constitution of Bosnia-Herzegovina – Commentary', (Sarajevo: Konrad Adenauer Stiftung, 2010), pp. 112-3).

[51] Snezana Savić, 'Die Staatsorganisation von Bosnien-Herzegowina' [The state organization of Bosnia-Herzegovina], in Bosnien-Herzegowina im Horizont Europas. Demokratische und föderale Elemente der Staatswerdung in Südosteuropa [Bosnia-Herzegovina in Europe's horizon: democratic and federal elements of state formation in South Eastern Europe], edited by Graf Vitzthum, Wolfgang and Winkelmann, Ingo (Berlin: Duncker & Humblot, 2003), pp. 25-6.

[52] Article IV(5)a states that national judges are to be elected by entity parliaments.

three international judges are nominated by the President of the European Court of Human Rights upon consultation with the BiH Presidency.

Bosnia's Constitutional Court is the last judicial institution to have international judges. The Court remains the only hybrid court in the country, as the mandate of international judges and prosecutors in the state court of Bosnia and Herzegovina was left to expire in 2009 and 2012 respectively.[53] The difference between the international judges in other Bosnian courts and international judges in the Constitutional Court are more specific safeguards that the Constitution affords to the latter category of judges.[54]

As far as the jurisdiction of the Constitutional Court is concerned, the Court has both elements of the European and the American model of constitutional review. In line with the European model, the Court exercises the abstract review of constitutionality of law when called upon by authorized parties or when a case is referred to it by another court in Bosnia. Following the American model, the Court has some features of court of last resort in concrete disputes. However, it has considerably watered down the latter feature since its early jurisprudence.[55] The jurisdiction of the Court has been extensively described by supremely qualified scholars and practically illustrated with reference to the Court's foundational case law.[56] In light of that, there is no reason to dwell further on the Court's material jurisdiction.

There was debate whether the Court's judges should have veto rights, but this was rejected as incompatible with the nature of the judicial function. The Bosnian Constitutional Court asked the Venice Commission if judges could veto a decision of the Court out of the vital national interest of a constitutive people. The Commission

[53] Lara Nettelfield, Courting Democracy in Bosnia-Herzegovina (Cambridge: CUP, 2010), p. 267.

[54] This is particularly true if the position of international judges could be amended only by constitutional law. See point 3) of this contribution for a discussion of the legal contingencies underlying Court reform.

[55] Marko, Foreign Judge, in particular pp650-4; or Joseph Marko, 'Five Years of Constitutional Jurisprudence in Bosnia-Herzegovina – A First Balance', EDAP 7 (2004), pp. 21-3.

[56] Ibid. See Steiner and Ademovic, Commentary; as well as Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared', Max Planck UNYB, 15 (2011) <http://www.mpil.de/files/pdf3/mpunyb_01_Riegner_152.pdf> [accessed 15 December 2015].

responded negatively, affirming that vetoes would be "alien to the very nature of judicial decision making and the principles that flow from this nature".[57] In Belgium, the Law on the Constitutional Court foresaw that any majority in a seven-justice panel needed to include at least half of the judges of each community. The Belgian Council of State rejected the proposition for the same reasons as the Venice Commission, namely as being contrary to the nature of judicial decision-making.[58] The Constitutional Court is one of the few state institutions that decides by majority without consensus requirements.

The Constitutional Court of BiH was conceived as a key institution by the architects of the Dayton Peace Agreement. Daniel Serwer, US negotiator at Dayton, argued that the Constitutional Court was created to unwind the ethnic elements of the Bosnian Constitution through international human rights provisions.[59] According to the Office of the High Representative, [60] the Constitutional Court has been instrumental for the political evolution of the country. [61] In view of its broad jurisdiction and important functions, judicial selection has considerable influence on political developments in Bosnia-Herzegovina.

The role of the Court as unwinder of ethno-political bargains raises questions of democratic legitimacy. According to Judge Feldman, there is a popular perception that international judges are sympathetic to the Bosniak cause of making Bosnia a more functional (and more centralized) state.[62] Since the landmark decision on the

[57] Venice Commission, 'Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia-Herzegovina', (Strasbourg, 2005), para 4.

[58] Jan Velaers, Het Arbitragehof (Antwerp: Maklu, 1985), paras 211, 212. The opinions of the Council of State, section of legislation (a consultative body), remain largely unpublished. In this case, the negative opinion is based on the draft laws 435 and 704 of what became the law of 28 June 1983.

[59] Kathie Engelhart, 'Bosnia's Three-Headed Beast: Sejdić and Finci V. Bosnia and Herzegovina and the Case for "Reasonable" Discrimination', (2012) <https://production.sant.ox.ac.uk/sites/default/files/dahrendorf_k.engelhart.doc> [accessed 15 December 2015] (p. 19). Engelhart published a more elaborate version of the text, in the same year and with the same title, in Journal of Constitutional Law in Eastern and Central Europe 19(1), 23-59.

[60] The High Representative of Bosnia-Herzegovina is an institution that has oversight over the implementation of the civilian aspects of the Dayton Peace Agreement.

[61] Office of the High Representative (OHR). 1999. Comprehensive Judicial Reform Strategy for Bosnia and Herzegovina, http://www.esiweb.org/pdf/bridges/bosnia/OHR_JudicialReform.pdf, 11 (accessed 23 March 2015).

[62] Feldman, The Independence of International Judges in National Courts, pp219-20.

constituent status of Bosniaks, Serbs and Croats throughout the territory of BiH,[63] Bosnian Croat and Serb judges have been in the minority in some of the Court's major decisions.[64] Over the last few years, Bosnian Serbs have put the reform of the BiH judiciary, now including the constitutional court, at the top of the political agenda.

4. A Law on the Constitutional Court without constitutional reform?

While discussions on the issue of foreign judges in Bosnia's Constitutional Court have taken place for many years, recent controversial decisions by international judges have given new emphasis to those advocating a restructuring of the Court.[65] Bosnian Serb and Bosnian Croat politicians pushed for a Law passed by the BiH Parliamentary Assembly transforming the Constitutional Court from a hybrid internationalized court to a purely Bosnian Court. But it might not be that simple.

Following an interpretation of the Constitutional Court, judicial selection cannot be regulated by ordinary law. The Constitutional Court determined that nearly all of the changes relating to the election of constitutional court judges require a change in the Constitution: "The issues relating to the constitutional matter such as the election of judges of the Constitutional Court of Bosnia and Herzegovina cannot be regulated by any 'ordinary law' nor can they be regulated by other normative acts."[66] The Constitutional Court, as a guardian of the Constitution, determined that matters affecting the Court could only be regulated by constitutional law.

This stance of the Court was seen by political actors as blunt self-empowerment, but the Constitutional Court reiterated its position. Milorad Zivkovic, a high-ranking

[63] CC U-5/98, partial decisions of 29/30 January 2000, 18/19 February 2000, 1 July 2000 and 18/19 August 2000.
[64] Most notably the Constituent People decision (quoted above), the Komsic case on the unconstitutionality of the exclusion of others from the vice-presidency at entity level (U-14/12. 27 March 2015) and the recent Day of the RS Republic case (U-3/13 of 26 November 2015). " Bozo Ljubic, the president of the Croat National Council, argued in a press conference that Bosniak and international judges had united against a Croat TV channel. However, this is not true, as the Bosnian Serb judges had also voted against the Croat Channel (decision U-10/05 of 22 July 2005).
[65] Graziadei, 2015.
[66] Letter of the Constitutional Court of Bosnia and Herzegovina addressed to the BiH Justice Ministry No. K-I-45710, 24 June 2010.

politician from Dodik's SNSD, argued that the Court's internal rules violated the Constitution. He decided to ask the Court to declare its own rules unconstitutional. According to Zivkovic, who petitioned the Court in his role as deputy chairman of the BiH House of Representatives, the Court's interpretation excessively limited the power of the parliament to adopt a law on the Court. The Court rebutted that its independence and autonomy empowered the Court to organize itself without parliament interfering in the Court's internal affairs:

> Accordingly, the competence of the Constitutional Court to independently regulate the rules of the court ensues directly from the Constitution of Bosnia and Herzegovina with a clear goal to preserve the autonomy and independence of the Constitutional Court to the full extent. Precisely for that reason, the Rules of the Constitutional Court have the specific constitutional position and special constitutional nature. This also means that there is no manner in which that jurisdiction might be performed by any other Institution, including the Parliamentary Assembly of Bosnia and Herzegovina, since the Constitution of Bosnia and Herzegovina does not provide for something like that.[67]

Specifically on the replacement of international judges, the constitutional text reads as follows: "For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights."[68] Due to the divided nature of the polity, the international judges have remained in place even beyond the five years initially envisaged. The RS would be in favour of ending the mandate of international judges, while Bosniaks resist this demand.[69]

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[67] CC, U-7/13, para 9.

[68] Article 6(1)d of the Constitution of Bosnia-Herzegovina.

[69] Marija Tausan, 'Bosnia Calls Time on Foreign Judges', Balkan Insight, 26 March 2012, http://www.balkaninsight.com/en/article/bosnia-calls-time-on-foreign-judges [accessed 15 December 2015].

There are three positions one can take on the legal norm necessary for replacing international judges: replacement of international judges by ordinary law, by constitutional law, or only at the end of the mandate.

The first position requires a broad reading of the constitutional text. Parliament could argue that the framers intended the position of the international judges to be temporary. There are no preparatory works that could help in identifying the will of the framers. However, the Constitution reads that international judges should remain in place for the first five years. Any time thereafter, the parliamentary assembly would be free to replace international judges with immediate effect. As described above, according to the doctrine of national sovereignty judges at the highest court should be nationals of the country. This is the position that Bosnian Serbs and Croats take.

The second interpretation is based more on a textual reading of the Constitution. The Constitutional Court seems to have some preference for a literal reading of the text. According to the Constitutional Court, the above quoted provision must be interpreted restrictively:

> […] it clearly follows from the text of the above Article that the authority to adopt such law enables the Parliamentary Assembly to differently regulate exclusively the manner of appointment of judges of the Constitutional Court and solely in a restrictive manner – only in relation to the three judges selected by the President of the European Court of Human Rights. However, this, by no means, could be interpreted in a broader manner, as the applicant does, because the respective provision does not in any way bring to doubt the exclusive jurisdiction of the Constitutional Court under Article VI(2)(b) to completely independently issue the rules of court. (Italics added)

If read in this way, all judges, including the international judges, would remain in office for life. A specific time limit, i.e. a five year mandate, existed only for the judges first appointed. All other judges subsequently appointed "shall serve until the age of 70, unless they resign or are removed for cause by consensus of the other

judges."[70] This is further specified in the internal rules of the Court.[71] According to the Constitutional Court, the Court is the only authority which can remove a judge from office.[72] The Constitution allows the parliamentary majority only to change the selecting authority for international judges, but not to replace the institution of international judges in the Court as such. If read restrictively, only the mode of election of international judges can be changed by parliamentary statute.

In that case, the removal of international judges would need to take the form of constitutional amendment. Constitutional reform has proved elusive in Bosnia over the last twenty years. The only change to the Constitution was the inclusion of the Brcko district.[73] Requiring constitutional amendment for terminating the mandate of international judges would set the bar very high.

A third interpretation would be that even constitutional amendment is not sufficient to remove international judges immediately, but only on the natural termination of their mandate. The removal of sitting judges of a constitutional tribunal could amount to an unconstitutional amendment of the constitution. Article X of the Bosnian Constitution provides that no amendment to the Constitution may diminish any of the rights set forth in Article II (Human Rights and Fundamental Freedoms). This 'eternity clause' of the Bosnian Constitution is admittedly less extensive than that of the German Basic Law (Grundgesetz).[74] The latter not only covers human rights and freedoms, but also the basic structure of government (federalism, democracy) and basic constitutional principles (such as human dignity).

The early termination of a judicial mandate, in particular of a special court such as the constitutional court, seems problematic in light of the separation of powers and

[70] Article VI,1c of the BiH Constitution.
[71] In particular in Article 98 (Termination of Office) and Article 99 (Procedures for Elections of a New Judge) of the internal rules of the Court. The latest version of Constitutional Court rules is available at: http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/bih?fn=document-frame.htm$f=templates$3.0.
[72] Valerija Galić, 'Report on Bosnia-Herzegovina', in Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies, (Rio de Janeiro 2011), (p. 5).
[73] Amendment I to the BiH Constitution, http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20Amendment%20I%20to%20BH%20Constitution%2025-09.pdf [accessed 2 December 2015].
[74] Steiner and Ademovic, Commentary, pp980-1.

rule of law principles. In Baka v. Hungary, the Chamber of the European Court of Human Rights unanimously found that the early termination of the mandate of the president of the Hungarian Supreme Court violated the Convention.[75] The Strasbourg Court ascertained that the applicant's right of access to a Court (Art. 6 Convention) and his right to free speech (Art. 10 Convention) were violated. The Venice Commission and the Court spoke of a 'chilling effect' that the early termination of the mandate of Hungary's Supreme Court president had on the independence of the judiciary.[76]

Dodik's court packing plan would be an even more serious interference with the principle of an independent judiciary: the termination of the judicial mandate would not be due to an extrajudicial criticism that judges have voiced (such as in Baka), but taken as a political reprisal against their judicial decisions (with a chilling effect on the rest of the judiciary). There is some reason to think that a constitutional law abruptly terminating the mandate of international judges could be interpreted by the Court as an unconstitutional amendment of the Constitution.

However, the Court would need to establish jurisdiction to control such an amendment. The Court could either take the case out of its own impulse (though this would be difficult), or be called upon by an authorized party (for instance in the framework of a violation of vital national interest procedure launched by a constituent people in the state parliament). The Constitution forbids constitutional amendment that diminishes human rights and fundamental freedoms, but does not specify who should be the watchdog. As the Constitutional Court "shall uphold this Constitution" [77] , the Court seems the legitimate authority to review the constitutionality of constitutional amendment.

In the end it might very well fall to the Constitutional Court to decide which law is necessary to change the composition of the Court. This would bring the Court into a

[75] ECtHR, Baka v. Hungary. Case no. 20261/12, 27 May 2014. The case is currently being heard by the Strasbourg Court's Grand Chamber.
[76] Ibid, paras 52, 83, 101.
[77] Article VI.3 Constitution BiH.

conflict of interest (as ordinary law or constitutional amendment would regulate the composition of the Court), but past decisions show that the Court does not shy away from deciding such cases. [78]

While the unconstitutional amendment of the Constitution seems an extreme position, there are good arguments for requiring a qualified (constitutional) majority for terminating the mandate of international judges.

5. Six models for reforming selection to the Bosnian Constitutional Court

5.1. The domestic model

In Bosnia, the judicial selection is de jure neutral but de facto ethnic. On paper, the entity-based selection system is one of regional representation such as in Canada or, by constitutional convention, in the UK.[79] The Bosnian system is ethnically neutral,[80] but in practice the ethnic parity has never been put into question. In fact, the Constitutional Court has always had two Serb, two Croat and two Bosniak judges. There are two ways to imagine judicial selection following the domestic model: extending the current system by analogy or copying the model of sub-national constitutional courts in Bosnia.

Extension by analogy. The most straightforward option is to extend the current system by analogy. The 2:2:2 formula of ethnic parity could comfortably change into a 3:3:3. This option would require a change of the Constitution. It would be in line with the ethnic federalist BiH constitutional structure. This is also the proposal of

[78] The Court has quashed the decision of the BiH Parliamentary Assembly reducing the salary of Constitutional Court judges. It has reminded the legislator of the need to respect the independence of the constitutional court, the contours of which were laid out in the judgment. Decision U-6/06, from 29 March 2008.

[79] In Canada, three judges must come from Quebec. By constitutional convention, the other judges come from the following provinces: three from Ontario, two from the Western and one from the Atlantic provinces. In the UK custom equally has it that one high court judge comes from Northern Ireland (currently Lord Kerr) and two from Scotland (currently Lord Reed and Lord Hodge). Available at: https://www.supremecourt.uk/about/biographies-of-the-justices.html [accessed 15 December 2015] and http://www.parl.gc.ca/Parlinfo/compilations/SupremeCourt.aspx?Menu=SupremeCourt&Current=True [accessed 30 June 2015].

[80] Steiner and Ademović, Commentary, pp671-8.

Milorad Dodik for reform of the Bosnian Court: six judges to be elected from the Federation territory, and three from the Republika Srpska.[81] It is implied that all constituent peoples would have equal representation. Extending the current system seems one of the options most in line with ethnic power sharing in Bosnia.

However, this would shift the current balance of powers, as in Bosnia international judges are seen as sympathetic to the Bosniak cause of making Bosnia a more functional (and more centralized) state.[82] The Constitutional Court is the last bastion where Bosniaks succeeded in keeping international judges. Modifying the composition of the Constitutional Court could be a concession to Bosnian Serbs in light of a broader reform of the Bosnian state.

The entity model. The model of entity constitutional courts could also be interesting, insofar as the FBiH entity Constitutional Court has already managed the transition from a partly internationalized to a fully home-grown constitutional court. In the FBiH Constitutional Court, the nine seats are allocated as follows: two Bosniaks, two Serbs, two Croats and one "Other". The remaining two spots are not ethnically predefined.[83] Judges are selected by a majority of the upper chamber after being proposed by the entity's presidency. The Constitution of the RS remains silent about ethnic quotas, but requires two judges per constitutive group for the vital national interest panel within the Court.[84] Judges are pre-selected by the High Judicial and Prosecutorial Council, proposed by the RS president and confirmed by the National Assembly. [85] The entity constitutional court model allows for identitarian representation without becoming a fully blown system of group cleavages, such as in Belgium.

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[81] Interview with Milorad Dodik, 29 November 2015, FaceTv, available at http://www.facetv.ba/novost/11099/milorad-dodik-u-cd-u-odluku-mogu-okaciti-macku-o-rep [accessed 15 December 2015].
[82] Feldman, The Independence of International Judges, pp219-20.
[83] Article 9 of Part IVc of the FBiH Constitution.
[84] Article 116 RS Constitution - as supplemented with Item 2 of Amendment LXXXVIII.
[85] Selection of RS Constitutional Court judges. Available at: http://www.ustavnisud.org/Doc.aspx?subcat=24&cat=11&id=24&lang=bos [accessed 15 December 2015].

5.2. The Belgian model

Institutional design in the Belgian power sharing court was slightly easier than in Bosnia for several factors. Belgium is an example of dualist federalism; the accommodation between language groups is the result of an organic process and not of a war; and the absence of dissenting opinions, a life term for judges and astute institutional devices (such as the alternating majority vote) force the Court to compromise on decision-making. The lack of dissenting opinions and the life term weaken the argumentative and volitional representativeness[86] of the Court but strengthen its internal cohesion against political actors. The Belgian Court can be an interesting example, as it successfully managed the linguistic and ideological cleavages in the Court – both through the written text as well as by constitutional convention.

Belgium's Constitutional Court is composed of an equal number of Dutch and French speakers, and every language group has its own president.[87] The tie-breaking vote wanders each judicial year from one language group to another. Half of the Belgian Court's judges are former politicians.[88] The quota for politicians was created out of the fear that judges would handle politically sensitive questions without due care and install a gouvernement des juges. The Court is composed of a total of twelve judges who serve until the age of 70. Only a paritarian composition was seen as legitimate for an organ of arbitration between Dutch and French speakers.[89]

These core elements of the design of the Belgian Court have never been controversial. What can be interesting for Bosnia is the original draft Belgian model for judicial selection (which would strengthen group autonomy) as well as the more flexible current model of judicial selection.

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[86] Matthias Kumm, 'Representativeness and Independence of Courts', RSCAS Policy Paper, 7 (2012) <http://cadmus.eui.eu/bitstream/handle/1814/22562/RSCAS_PP_2012_07.pdf?sequence=1 > [accessed 15 December 2015] pp. 53-6).

[87] Article 33, Special Law on the Constitutional Court.

[88] Article 34§1.2 Special Law on the Constitutional Court.

[89] Francis Delpérée, ' Cour Suprême, Cour D'arbitrage Ou Cour Constitutionnelle ?', Les Cahiers de droit, 26 (1985).

The Belgian draft law on judicial selection. The original Belgian proposal was that a simple majority of each language group in the Senate would select constitutional court judges.[90] After the Council of State ruled that this would negatively affect judicial independence, the special legislator switched to a selection system requiring a two-thirds majority.[91] While the official appointment criteria appear neutral, constitutional convention has it that political parties select judges according to the D'Hondt system. The ideological representation, therefore, was excluded from the text but entered via the back door through mutual agreement between political parties. The aim of the original proposal was to make sure that judges would only need votes from their own language group to be elected.

If one aims to strengthen the autonomy of groups, one could envisage for Bosnia an option along the lines of the Belgian draft proposal for judicial selection. Depending on the model, the selector could be either the member of the presidency belonging to a certain constitutive people and the relative caucus in the House of Peoples, or the presidency and the House of Peoples by majority.

While it may not be necessary to strengthen group autonomy in selection at the central level, the discourse might be different at entity level. The selection of constitutional court judges in the RS does not require special majorities and is ostensibly more neutral. At the same time, it is more vulnerable to political capture. For instance, Bosniaks in the RS opposed in all ways the nomination of Džerard Selman to the entity constitutional court. Selman was regarded as Dodik's token Bosniak and not representative of Bosniaks in the RS.[92] Looming in the dark here is the bigger question of whether ethnic seats in the Court should be distributed only to candidates that have the support of their community.

[90] Velaers, Het Arbitragehof, para 184.
[91] Ibid.
[92] Gordana Katana, Dodikov privatni Bošnjak, Oslobodenje, 5 March 2012, http://www.oslobodjenje.ba/vijesti/bih/dodikov-privatni-bosnjak [accessed 30 June 2015].

The (actual) Belgian model is based on the parity of language groups, professional parity, and proportionality of political party representation.

Parity of language groups. As mentioned above, the parity between language groups in central institutions, including all apex courts, is a defining feature of the Belgian constitutional structure. But could such explicit parity work for Bosnia? Any direct quota runs counter to the current legal developments, in particular the Grand Chamber judgment in Sejdic and Finci v. Bosnia-Herzegovina[93] and case law of the Bosnian Constitutional Court.[94] However, parity seems more in tune with political realities in Bosnia. While the parity in the current composition of the Bosnian Court is not explicit, implicitly parity between constituent peoples has never been put into question.

Professional parity (lawyers-politicians). Paul Martens, former president of the Belgian Constitutional Court, argued that politicians in the Court are closer to the people and have a grasp of politically sensitive issues.[95] The parity requirement was introduced mainly to soften the passage from a political system based on the Rousseian tradition to one with judicial review of legislation.

But is there a point in having politician judges in Bosnia too? There are some upsides to having politicians as judges. The current imbalance in politician-judges between constitutive peoples is a problem. The Court's legitimacy suffers, as currently both Bosniak judges are high-level SDA politicians. In the RS, politicians argue that the Court is not objective but influenced by the SDA.[96]

On the technical level, the Law on the Constitutional Court could provide that one judge for every constitutive people has to be a former politician. Or, without

[93] ECtHR [GC], 22 December 2009, Case Nos. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia-Herzegovina.
[94] U-14/12 of 27 March 2015.
[95] Paul Martens, Les gens mécontents de la justice? Tant mieux, La Libre Belgique, 5 October 2010.
[96] Svjetlana Tadić, 'Tihomir Gligorić: O katastru nije presudio Ustavni sud BiH, već SDA' (interview) [It is not the Constitutional Court, but the SDA, which ruled on the question of state property], Glas Srpske, 28 November 2008, http://www.glassrpske.com/novosti/vijesti_dana/Tihomir-Gligoric-O-katastru-nije-presudio-Ustavni-sud-BiH-vec-SDA/lat/64061.html [accessed 23 March 2015].

resorting to the concept of constitutive peoples, the Constitution could provide that half of the judges elected in the Federation and half of the judges elected in the Republika Srpska have to be former members of parliament. Following the Belgian example, former politicians could be those who served at least five years in a parliament at entity or state level. This would create a level playing field between the different groups and clarify the role of the Court as a referee in political disputes on the Belgian example.

But the downsides might outweigh the upsides. The quota for politicians is at odds with the spirit of the times, raises questions in light of substantive judicial independence and might add little for Bosnia. The Rousseauian tradition of parliamentary sovereignty was strong and the presence of politicians seen as a necessary caveat against judge made law.[97] The presence of former politicians raises questions of judicial independence, including the right to a fair trial. A legally prescribed presence of politicians in the Constitutional Court remains generally an exception. As revealed by Patricia Popelier, politician judges in Belgium do not need to have any legal training.[98] It is of course odd that judges of the highest court would not have any education in law. Equally, it remains unclear how the presence of politicians influences key decisions of an apex court. Overall, the trend goes more in the other way of professionalizing the Constitutional Court by demanding higher legal qualifications to access it, a point to which I return later.

Proportionality of political party representation. The selection of Belgian Constitutional Court judges is based on an informal agreement between political parties to use the D'Hondt system of political representation in the state parliament. Every party knows which turn it is to select the next judge. As a general rule, the candidate is proposed by one party and accepted by other parties in parliament. If the proposal is controversial, the selecting party will have to propose a more moderate judge for securing parliamentary approval. With this somewhat "integrationist" system, even nationalist/separatist parties choose very reasonable

[97] Velaers, Het Arbitragehof, paras 174-180.
[98] Patricia Popelier, Procederen Voor Het Grondwettelijk Hof (Antwerpen: Intersentia, 2008), p. 21.

judges.[99] The main aim of the D'Hondt system is to ensure representation of the different political pillars of Belgian society (Catholics, Socialists and Liberals). According to the current president of the Belgian Constitutional Court, this constitutional convention strengthened the legitimacy and representativeness of the Court.[100]

The Belgian law on the selection of Constitutional Court judges was inspired by the German model (parliamentary election through 2/3 majority), but adapted to suit the needs of Belgium's divided society.[25]

5.3 The German model

Some scholars have argued that the selection of judges to the Bosnian Constitutional Court judges should be inspired by the German model.[101] German political parties informally agreed on a constitutional convention that ten of the twelve judges are nominated by the biggest parties (SPD and CDU each nominated five judges), and one judge each is nominated by the respective junior partners (Greens and Liberals).[102] The German system reflects the country's political diversity (with the exception, so far, of the left wing party Die Linke) and has remained stable over time. For Choudhry and Stacey, moving away from identitarian categories would similarly benefit Bosnia.[103] The German system, based on apparently neutral appointment rules, has resulted in a highly independent court and is regarded as a model all over the world.

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[99] In 2013, the New Flemish Alliance (N-VA) selected an esteemed female judge, Riet Leysen, after N-VA hardliner Matthias Storme had been de facto vetoed by French speaking political parties. Interview with a high-ranking member of the Belgian Senate, Brussels, 3 February 2014.

[100] Andre Alen, 'Toespraak van André ALEN, Voorzitter van het Grondwettelijk Hof, ter gelegenheid van de installatie op 19 maart 2014 van Mevr. Riet LEYSEN als rechter in het Grondwettelijk Hof' [Speech of Andre Alen for the installation of Riet Leysen as judge of the Constitutional Court], http://www.const-court.be/public/pbcp/n/%5B1%5DToespraak%20van%20Voorzitter%20Alen%20bij%20de%20plechtige%20installatie%20van%20Rechter%20Leysen.pdf [accessed 2 December 2015].

[101] Sujit Choudhry and Richard Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies', in Rights in Divided Societies, ed. by Colin Harvey and Alexander Schwartz (Oxford: Hart, 2012), pp. 89-123.

[102] Ibid.

[103] Ibid.

A counterargument would be that young and polarized democracies are not ripe enough for electing judges with supermajorities. In this light, it could be argued that supermajorities produce gridlock. For instance, in 2013 the SDA blocked the appointment of FBiH entity constitutional court judges in an effort to prevent change in the Federation government. As there were not enough judges to rule on the SDA's vital national interest veto, the whole political system was de facto blocked. But vetoes are not restricted to the selection of entity constitutional court judges. Even under the current system the selection of judges could be vetoed by a constitutive group for violation of their vital interests. If one is to eliminate blockage, an automatic system of election based on the D'Hondt rule could be envisaged. This would be not too dissimilar for other nominations in Belgium[104] or the German system, where half of the Constitutional Court judges are elected by an electoral council made up of only 12 parliamentarians ("Wahlausschuss"). The risk of blockage is present in the current system and cannot be ruled out altogether.

The more convincing argument against the German model is that Bosnian elites are not ready for it. The German model would certainly be desirable for strengthening the judicial independence of judges. But it is far from clear that the elite consensus between some of the oldest political parties in the world can be replicated in a more fragmented multi-ethnic post-war system such as the one in Bosnia. Ideological divisions in Germany have very much softened and might not be comparable to the 'hard' ethnic divisions that still drive Bosnia apart. The next model focuses on the election of international judges and ways to buttress their democratic legitimacy.

5.4 The ECtHR model

Currently, international judges are nominated by the president of the ECtHR after consultation with Bosnia's three presidents. In practice, the ECtHR president chooses international judges after a couple of phone calls without consulting Bosnia's

[104] See Flemish Law on the Creation of a Flemish Institute for Peace and Non-Violence, 7 May 2004 [in which parties in the Flemish parliament, according to the D'Hondt rule, choose members of the Council of Administration of the above mentioned institute].

presidency.[105] There are ways to give more legitimacy to international judges through local election.

For instance, why not have the Bosnian legislature propose a list of international judges to the ECHR Parliamentary Assembly for election, or vice versa? This could be done without changing the Constitution, as the parliamentary assembly may "provide by law for a different method of selection of the three [international] judges."[106] In any case, the change might be gradual as, according to a certain reading of the Constitution, even international judges would stay in office until 70. Modelling the election of international judges on the election of ECHR judges would strengthen the democratic legitimacy of international judges while minimizing the risk that entities pick international judges seen as sympathetic to their cause. This is the easiest and politically most acceptable option, as it would neither require constitutional changes nor shift the balance of powers. In short: parliaments, not presidents, would elect international judges.

A variant would be the Cyprus model. Under the Annan Plan, international judges would have been elected by the parliament.[107] Under the current Cyprus constitution, the 'neutral' judge of the Constitutional Court would be elected jointly by the President and Vice-President of the Republic.[108] Northern Ireland had a similar system, whereby the First Minister and the Deputy First Minister jointly proposed judges for appointment to the High Court.[109]

In political terms, it could also be acceptable for Bosnian Serbs if international judges were to be elected at entity level. For instance, the position of Judge Consance

[105] Phone interview with a high ranking expert. 4 February 2014. On file with the author. This information was confirmed by a Sarajevo based legal expert in a field interview on 4 April 2014.
[106] Article VI(1)d - Constitution of Bosnia-Herzegovina.
[107] Hoffmeister, Legal Aspects of the Cyprus Problem, p136.
[108] Article 133(1)2 Constitution of Cyprus.
[109] "Her Majesty may from time to time, on the recommendation of the First Minister and deputy First Minister acting jointly, appoint a qualified person as a judge of the High Court by letters patent under the Great Seal of Northern Ireland." Section 12A of the Judicature (Northern Ireland) Act 1978 (c.23). Reference to the First Minister and his deputy was removed in 2009. The First and deputy First Ministers found these arrangements providing ministerial oversight over judicial appointments and removals to be only transitory arrangements. They agreed to vest these powers with a judicial commission. The current applicable legislation can be consulted at: http://www.legislation.gov.uk/ukpga/1978/23/contents [accessed 16 December 2015].

Grewe will be vacant at the end of 2016, when she will turn 70. Grewe is certainly the most active international member of the Court. Her constitutional doctrine[110] (the Living Constitution) is most antithetic to the RS conception of a return to the original spirit and structure of the Dayton Agreement. The Parliamentary Assembly could decide that the RS is to fill the first vacant spot for the position of an international judge. The RS National Assembly could then nominate a sympathetic international judge (from Russia, for instance). This judge is likely to be the swing vote that the RS could control through this nomination. This model, or a variation thereof, would be politically acceptable, allow for a gradual change and would not require constitutional reform.

5.5 The D'Hondt model

Another interesting option could be to nominate judges either according to the force of parliamentary representation or through population figures.

D'Hondt (parliamentary representation). A court of ten judges, nominated by the parliamentary assembly according to the D'Hondt rule, is an interesting option. The candidate is proposed by a political party (according to the D'Hondt rule), but needs to be confirmed by a simple majority in the House of Representatives and in the House of Peoples. If not otherwise regulated, the caucuses of the House of Peoples would retain the possibility to invoke a vital national interest veto. In this way, the Court would well reflect the diversity of Bosnia's population as represented in the parliament.

The D'Hondt rule applied in the current situation would yield good results in terms of representation. Calculated on the election results of October 2014, the ten judges would be nominated by the following parties: SDA (Bosniak) - 2, SNSD (Serb) - 2, SDS (Serb) - 2, DF (no ethnic affiliation) – 1, Social Democrats (no ethnic affiliation) – 1, HDZ BiH (Croats) – 1, Union for a Better Future of BiH (Bosniak) – 1. There

[110] See separate dissenting opinions in U-13/05 (Tihic), 26 May 2006, U-13/05 (Tihic) and AP-2678/06 (Pilav).

would be three judges nominated by Bosniak parties, four by Serb parties, one by Croat parties, and two by non-ethnically affiliated parties. This diverse group of selectors could contribute to de-ethnifying the composition of Bosnia's Constitutional Court while ensuring broad representativeness.

As an alternative, the D'Hondt rule could be applied to population figures. This might be problematic in light of current human rights law, but Belgium has such a priori defined community quota. Here, one could envisage a Constitutional Court of ten judges approximately reflective of the Bosnian demographics with an overrepresentation of smaller groups: four Bosniaks, three Serbs, two Croats, and one representative of the group of non-affiliated ('Others'). The CIA estimates the following population figures: Bosniaks 48.4%, Serbs 32.7%, Croats 14.6%, Others 4.3%.[111]

There is a functional interest in such a design that works with the D'Hondt rule. A Constitutional Court without international judges, and with Croats and Serbs in the majority, bears the risk of being overtly passive and attached to formalistic reasoning. The judicial passivism of the Serbian Constitutional Court points in this direction.[112] More importantly, an ethically paritarian Court without international judges would be as gridlocked as any other state institution that works with the consensus requirement. The above mentioned reform would create a balance between those who favour decentralization (if not outright secession from) the state, and those who are paladins of a stronger Bosnian central state. Serbs and Croats would accept this system only with much difficulty. It would push Bosnia away from a state of peoples into a majoritarian direction - from parity to proportionality.

Every attempt to democratize the Court selection in a 'civic' direction will damage the position of Croats. This is the same issue that gave rise to the political problems

[111] Figures drawn from United States Intelligence Service, CIA World Fact Book: Bosnia and Herzegovina, 2014, https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html [accessed 15 December 2015].

[112] Violeta Beširevic, 'Governing without Judges": The Politics of the Constitutional Court in Serbia', Int. Jnl. of Constitutional Law, 12 (2014).

leading to the non-implementation of Sejdic-Finci.[113] Croats enjoy ethnic parity in key state institutions, although they figure below 15% of the total state population.[114] In Bosnia's lower chamber, Croat parties currently only have 5 out of 42 seats (12%). In Belgium, the third small constituent group has been excluded from constitutional selection altogether:[115] judges have to be Dutch or French speakers, and the only requirement is that one judge knows some German.[116] A Court appointed according to the D'Hondt rule is broadly representative of the population, but clashes with the constitutional spirit of Bosnia as an ethnic federation of three peoples with equal powers.

6. Other ways to increase the Court's legitimacy and representativeness

While the presence of international judges might be seen as problematic for national sovereignty and the legitimacy of the Court as a neutral arbiter of power sharing disputes, their presence adds to the argumentative representativeness of the Court. All international judges are high profile jurists with profound Convention knowledge: their work and dissenting opinions definitely add to the quality of the legal decision making in Bosnia. In addition, they add life to the largely formalist style of reasoning and opinion writing in South Eastern Europe. In a certain way, maintaining international judges contributes to the authority and legitimacy of the Court.

Raising the standards. If the aim is to increase the independence of the Court, then this can also be achieved through other ways. The most straightforward is to professionalize the Court by raising the legal qualifications required to access judgeship. For instance, the law could specify that only members of the highest legal professions or university professors can aspire to the position of constitutional court

[113] Florian Bieber, 'Ungovernable Bosnia – from the Ruling of the European Court of Human Rights on the Sejdic-Finci Case to the Government Crisis', IEMed Yearbook, (2014).
[114] CIA World Factbook: BiH.
[115] Marc Verdussen, 'Le Mode De Composition De La Cour Constitutionelle Est-Il Légitime? ', Revue belge de droit constitutionnel 1(2013).
[116] Article 34(4) of the Special Law on the Constitutional Court.

judge. Bosnian legal researchers have long unanimously advocated stricter criteria for the election of judges.[117]

In order to make the election system more meritocratic, the election system of constitutional court judges at entity level could, in principle, be taken as an example. The current selection system for judges at the federal level has the advantage of allowing a 'breadth of dialogue' but runs the risk of 'degrading' the legal quality.[118] For the constitutional courts of the entities, the High Judicial and Prosecutorial Council (HJPC) ranks the most suitable candidates on a meritocratic basis. While this did not eliminate the political elements in the election of judges, it can help public opinion to push politics to elect the most professionally suited judges. However, the Constitutional Court refuted any competence of the High Judicial and Prosecutorial Council over its affairs.[119]

In order to increase their volitional representativeness (i.e. the electoral link between the people and judges),[120] a time limit to the mandate of judges could be introduced. As seen by the Simic case, even a life mandate did not cut the web of connections between politics and the Court. Simic, a high ranking politician within Dodik's SNSD, was removed as a constitutional judge by an unanimous Court.[121] In the current situation, the next post for national judges will only be vacant in ten years' time. This seems a very long period; the system might benefit from being mixed up more frequently. One could look to Kosovo as an example. The Kosovo Constitution foresees that judges are appointed for nine years, without the possibility for reappointment. Many other countries, such as Italy, France and Spain, also have a nine-year term. A sufficiently long mandate without the possibility of re-election

[117] Centar za javno pravo [Center for Public Law), 'Conclusions and recommendations of the conference Election of Judges of the Constitutional Courts', Sarajevo, 2 November 2012, http://www.fcjp.ba [accessed 15 December 2015]. The conference papers have been gathered in the book: Edin Šarčević, Ko Bira Sudije Ustavnog Suda? [Who Selects the Constitutional Court's Judges], (Sarajevo: Center za javno pravo [Center for public law], 2012).
[118] Galic, Report on Bosnia-Herzegovina, p11.
[119] Letter of the Constitutional Court of Bosnia and Herzegovina addressed to the BiH Justice Ministry. No. K-I-45710, 24 June 2010.
[120] Kumm, Representativeness and Independence of Courts.
[121] CC, K-I-15/10 (dismissal of judge Simic), 8 May 2010. Available at http://www.ccbh.ba/public/down/Decision_on_Dismissal.pdf (consulted 2 December 2015).

would guarantee the independence of judges and better balance the need for change with that for stability.

Strengthening the vicarious representativeness (i.e. the possibility of democratically elected authorities countering judicial decisions) of constitutional courts in consociational democracies might be a lost cause. The strong cleavages in power-sharing systems make a unified government reaction against the Court unlikely. In Bosnia, the parliament is mostly not even able to give a unified response when asked by the Court during deliberations. In Belgium, the legislator equally does not retaliate against the Court. In one politically loaded case the government considered overruling the Court's decision, but quickly abandoned the idea.[122] Vicarious representativeness seems out of tune with the way politics is conducted in consociational democracies.

The cohesion and independence of the Court could be strengthened by moving its seat away from the capital. This would allow judges to build a stronger ésprit de corps that enhances their independence. The federal states of Germany, Switzerland[123] and the Czech Republic (formerly Czechoslovakia)[124] also intentionally put the seat of the Court far away from the capital. The same is the case with the constitutional court of the multi-national societies in Bolivia and South Africa. Bosnia's neighbour Serbia has considered moving its Constitutional Court out of Belgrade to a village of 9000 inhabitants in Vojvodina.[125] Bosnia's Constitutional Court should follow these examples and have its own seat in a place that is physically distant from Bosnia's three political capitals (Mostar, Banja Luka and

[122] Géraldine Rousoux, 'Leçons De L'éphémère. La Cour D'arbitrage Et Le "Renouveau' Électoral"', Revue Belge de Droit Constitutionnel, 1 (2003), 13.
[123] Switzerland does not have a constitutional court, so reference is made to the Federal Supreme Court of Switzerland, which has its seat in Lausanne. As French speakers were opposed to the total revision of the constitution in 1874, they were given the seat of the new permanent court as a compromise. Glendon Schubert, 'Political Culture and Judicial Ideology', Comparative Political Studies, 9 (1977).
[124] The Czechoslovak Constitutional Court, composed of six judges from the Czech and Slovak Republics respectively, was intentionally located away from Prague, capital of the state. Jiri Pehe, 'Constitutional Court To Be Established', Report on Eastern Europe, pp. 9-11, http://www.pehe.cz/clanky/1991/1991-15March1991RFERL.pdf [accessed 15 December 2015].
[125] Venice Commission, 'Opinion on the Draft Amendments and Additions to the Law on the Constitutional Court of Serbia', Opinion 647/2011 (2011).-23 [critical, because the village is considered too unattractive for Court judges and staff]. Venice, 16-7 December 2011.

Sarajevo). The Brčko district, as a neutral self-governing district under the direct sovereignty of Bosnia-Herzegovina, located at the crossroads between Bosnia, Serbia and Croatia, would represent an ideal choice. The change of seat might require a change in the Constitution, if the Constitutional Court insists that its internal rules cannot be modified by any ordinary law. Moving the Court to a neutral area would likely increase its independence and legitimacy, but might pose some logistical problems.

Including other diversities. In Belgium, where throughout the Court's history only 3 out of 45 judges have been female, the constitutional legislature has modified the special law on the Constitutional Court to guarantee gender representation. Since 2014, one-third of the judges should be women.[126] Equally, at least one of the politician judges and one of the jurist judges has to be a woman. In Bosnia this does not seem necessary at this point, as currently four out of nine judges are female (including two international judges), but it may be an option for the future.

Dissenting opinions could be banned (at least for all cases submitted by political actors). The Court already doubts the usefulness of dissenting opinions for the independence of judges, there being no indication "whether the separate opinions have reinforced the independence of the judges as well as of the Constitutional Court of Bosnia and Herzegovina as an institution".[127] The basic problem is that the Court divides on politically sensitive issues where the fault-lines between communities are obvious, rather than on individual rights cases. Dissenting opinions force judges to portray themselves as representatives of their community,[128] because the voting record will be available to everyone. Dissenting opinions keep the channels for argument and change open, but lay bare the divisions within the Court on sensitive issues (thereby harming the Court's legitimacy).

[126] The text was adopted on 20 March 2014. An identical version to the approved text can be consulted at: http://www.lachambre.be/FLWB/pdf/53/3346/53K3346004.pdf [accessed 15 December 2015].

[127] Galić, Report on Bosnia-Herzegovina, p20.

[128] Marko wrote that that the ethnic element emerged only in the more political cases: "In those cases relating to individual applications and complaints there was almost always a unanimous decision amongst the judges, as all judges generally took the effort to ensure from a procedural viewpoint that the individual will come as far as possible in their application. …In cases of judicial review of legislation on the other hand, the national judges appear to act as representatives of their constituent group of the population." Marko, Five Years, p31.

When reforming the Court, other Belgian devices conductive to decision making with moderation could be introduced. The rotation of the Court presidency could be shortened to a year, on the Belgian model. If the Court was to have an equal number of judges, the president would have the tie-breaking vote. In Belgium's Constitutional Court, the tie-breaking vote rotates between French and Dutch speaking presidents on a yearly basis. This leads to moderation, as judges from both groups, nominated for life, prefer to find compromises and work together rather than outvoting each other. The tie-breaking vote has never been used in cases that has bearing on the Belgian language conflict (so-called 'communitarian cases'),[129] as its sheer presence leads to more consensual decision-making. These institutional devices would strengthen the autonomy, independence and cohesion of the Bosnian Court vis-à-vis ethnic political actors.

7. Conclusion

With Dodik's gun metaphorically pointed against state institutions, Bosnian political parties must discuss whether to revise the composition of the Constitutional Court.

This paper presented six models for reform of the judicial selection process: the domestic model, the German model, the Belgian model, the ECtHR model, and the D'Hondt model. Judicial selection according to the D'Hondt system would strengthen the Court's judicial independence and representativeness while at the same time respecting its function as a power-sharing constitutional court. Other institutional fixes could include a term limit, a ban on dissenting opinions and a change of seat.

All models have advantages and disadvantages. Reforms in line with the D'Hondt system are ambitious, require constitutional overhaul and are oriented toward the long term. They are in line with the idea, recurrently expressed by international

[129] Alen, Andre. 2014. Toespraak van André Alen ter gelegenheid van zijn installatie tot Voorzitter van het Grondwettelijk Hof tijdens de plechtige zitting van dit Hof op woensdag 5 februari [Speech of Andre Alen on the occasion of his instalment as president of the Constitutional Court.] Brussels, 5 February 2014, http://www.const-court.be/public/pbcp/archive/f/Discours%20du%20Président%20Alen%20à%20l'occasion%20de%20son%20installation%20solennelle.pdf [accessed 15 December 2015].

constitutional advisory organs,[130] that Bosnia should slowly move from a consensus-based system to a more majoritarian direction. The ECtHR model, on the other hand, could provide a short-term democratic legitimacy fix without changing the Constitution. The model presented by Dodik, which would implicitly extend ethnic parity by analogy to the positions currently held by international judges, is the most in line with the constitutional structure of BiH as a state of three co-equal constituent peoples. However, his proposal may require constitutional reform that could be envisaged within an overall resetting of the Bosnian state.

[130] See opinions of the Venice Commission on Bosnia at http://www.venice.coe.int/webforms/documents/?country=50&year=all (in full) [accessed 15 December 2015]; http://www.mreza-mira.net/wp-content/uploads/Venice-Commission-Opinions-on-BiH-Nov-20131.pdf (short overview of all opinions) [accessed 15 December 2015].

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