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Independent or Dependent?
Constitutional Courts in Divided Societies

SUJIT CHOUDHRY AND RICHARD STACEY

1. INTRODUCTION: JUDICIAL INDEPENDENCE IN DIVIDED SOCIETIES

WHY IS A bill of rights now regarded as an indispensable feature of a liberal democratic constitutional order, especially in an ethnically divided society emerging from protracted and often violent conflict? There are two answers to this question. On one view, the function is to arm ethnic minorities with the legal means to check the abuse of public power. In post-conflict settings, the breakdown of the previous constitutional order may have been accompanied by widespread violations of human rights, especially with respect to ethnic minorities. Indeed, the failure of the previous regime to protect human rights may have been a reason for ethnic minorities to impugn the legitimacy of, and to withdraw support from, the previous constitutional order. A post-conflict constitutional settlement includes a bill of rights, both to acknowledge the precise character of past wrongs and to serve as a credible commitment to ensure such abuses do not occur in the future. A bill of rights provides incentives to parties to put aside violence and to settle their political disagreements peacefully through the institutions of the new constitutional order operating according to the rule of law. Call this the regulative conception of a bill of rights. But, on another view, the function of a bill of rights is to constitute the very demos that it constrains. A bill of rights calls upon citizens to abstract away from group markers, like race, religion, ethnicity and language, which previously served as the grounds for political identity and political division. Instead, a bill of rights encodes a vision of political community built around citizens who are equal bearers of constitutional rights – a constitutional patriotism or civic nationalism – whose political membership is unmediated by group identity. Thus, a bill of rights is an instrument of nation-building that is meant to transform the very self-understanding of citizens. It dissolves and privatises the
political salience of ethnic difference, and replaces it with a transcendent form of political identification. This is the constitutive function of bills of rights.

One of us has expressed scepticism on the capacity of bills of rights to do all the work that is expected of them in ethnically divided societies and we will not rehearse those arguments here. On this occasion, we explore a related but neglected theme – the design of the apex court charged with the ultimate responsibility of interpreting a constitutional rights-protecting instrument. In divided societies – particularly in post-conflicting settings – there are two constitutional agendas regarding the design of the apex court charged with interpreting the bill of rights. On the one hand, alongside the creation of a bill of rights, there are demands for judicial independence for all courts, up to and including the apex court itself. While judicial independence is open to many interpretations, a core meaning is the idea that courts must enjoy independence from the other branches of government that wield political power. Owen Fiss has usefully termed this 'political insularity'.

A central justification for judicial independence is that it flows from the very idea of a bill of rights. In ethnically divided societies, a bill of rights – to the extent that it is able to control the state – protects ethnic minorities from the tyranny of an ethnic majority. Independent courts that are free from the control of the ethnic majority are perceived as providing an important – perhaps indispensable – institutional mechanism for making a bill of rights a credible commitment to minorities. Indeed, if the breakdown of the previous constitutional order entailed not just the widespread abuse of human rights, but also the breakdown in the machinery of human rights enforcement, the demand for independent courts is that much stronger. The logic of a commitment to judicial independence manifests itself in a number of aspects of the design of the apex court – for example, in an appointments process that seeks to insulate the court from majoritarian capture. But in some divided societies there is an attempt to institutionalise ethnic divisions in the design of the apex court itself. In some post-conflict contexts there are measures to ensure that the major ethnic groups are institutionally empowered to choose a proportion of the justices, and consequently, that distinct ethnic communities are represented on apex judicial institutions.

Although they share the goal of protecting ethnic minorities, these two constitutional agendas are deeply in tension. The first seeks to render courts


In divided societies, the design of an apex court matters as a deliberate strategy to address diversity and pluralism. Courts are not neutral instruments; they reflect and shape the values and interests of the society to which they belong. In diverse societies, the role of courts is to evolve and adapt to the needs of the community. An apex court, which is the highest court in the land, must mediate the interests of different ethnic groups and ensure that all are represented fairly.

II. TWO KINDS OF JUDICIAL POLITICS

The politics of the design of apex courts in deeply divided societies is the product of the interaction of two kinds of judicial politics: the politics of judicial independence and the politics of constitutional interpretation.

Over the past decade, a large literature has addressed the emergence and persistence of judicial independence. As Matt Stephenson has usefully explained, the claim that courts are independent and check government power appears to imply "that the court is preventing the government from doing something that it would otherwise like to do", when even the most independent of courts are dependent on governments for financial support and the enforcement of their judgments. So the real question is "[w]hy . . . would the government accept the limits imposed by a truly independent court? Why would people with money and guns ever submit to people armed only with gavels?" For constitutional scholars, the answer has resided in the various constitutional safeguards associated with judicial independence, which has traditionally encompassed security.
of tenure, financial security and administrative independence, and now may extend to the design of the judicial appointments process. Indeed, this legalist premise underlies the whole practice of constitutional design and expert advice in post-conflict constitutional processes, as well as the framing of the international declarations that inform these processes.

However, even the most rigid constitutional guarantees of judicial independence cannot stand in the way of a government determined to capture the courts. Indeed, these guarantees may themselves be endogenous, products of the same political factors that give rise to judicial independence. The answer to the puzzle of judicial independence is not to be found, not in theories of judicial independence, but rather, in the notion of political competition. Where there are regular elections and party alternation, political parties that face the future risk of electoral loss will create independent courts to provide them with the institutional resources to check government power when they are in opposition. Parties are willing to fetter their decision-making while in office in exchange for the insurance provided by courts when they lose office. Conversely, if a party is politically dominant and does not fear electoral loss, it will likely prevent the rise of independent courts through its power of appointment. Moreover, similar assessment of the prospects of future electoral success also framed constitutional choices regarding the appointment mechanism, jurisdiction and composition of the court.

This line of analysis has not yet been extended to ethnically divided societies. This is surprising, it has long been recognised that in ethnically divided societies normal political competition is absent because of the character of political cleavages. In societies that are not ethnically divided, political and ethnic cleavages are cross-cutting, which promotes political moderation and blunts partisan divisions. In addition, this account of political cleavages is closely tied to the case for a competitive model of democratic politics. It assumes that politics is characterised by shifting coalitions and majorities, that political parties will compete for median voters at the centre of the spectrum and, hence, that political competition creates pressures toward moderation. In addition, there is no permanent exclusion of any segment of society from political power, encouraging political losers to accept their loss in the hopes that they will win another day. Not one of these assumptions holds for ethnically divided societies. In such cases, cleavages are mutually reinforcing, not cross-cutting, with ethnic division mapping onto political division and political competition not producing moderation, but inmoderation. The danger is of a majority dictatorship in democratic form that will not have the same incentives to check the abuse of public power produced by political losers with no prospect of a vote incentive to exit politics and tut

The implications of the abuse explored for a wide range of issues such as electoral system design executive and the legislature, courts (and bills of rights) has necessary implication that courts. Indeed, Lijphart's Ethnic Groups in Conflict — the courts.

How would the absence of such societies shape the constitution of constitutional democracy? Would such societies be mere subprospects or in the same way the prospect of losing power judicial independence or even face the prospect of losing power first place. But there is another minorities, who will be perpetually apex courts. The implicit assumption is that perpetual political minoritarian agenda on this issue. But dimensions of constitutional structure of politics may likewise affect courts.

There are two ideal-type sects emerging from prolonged, violexted democracy in which the post-conflict negotiation agenda. The threat of a return to violexted democracy in which the post-conflict negotiation agenda. The threat of a return to violexted democracy in which the post-conflict negotiation agenda. The threat of a return to violexted democracy in which the post-conflict negotiation agenda. The threat of a return to violexted democracy in which the post-conflict negotiation agenda.

power produced by political competition. Ethnic minorities, who are persistent losers with no prospect of wielding political power, would therefore have an incentive to exit politics and turn to violence.

The implications of the absence of normal political competition has been explored for a wide range of issues in constitutional design in divided societies such as electoral system design, the structure of and relationship between the executive and the legislature, federalism and legal pluralism. By contrast, courts (and bills of rights) have attracted no sustained analysis, despite the necessary implication that constitutional arrangements would be enforced by judicial review. Indeed, Lijphart's *Democracy in Plural Societies* and Horowitz's *Ethnic Groups in Conflict* – the two classic texts in the field – barely mention courts.¹¹

How would the absence of normal political competition in ethnically divided societies shape the constitutional politics of apex court design? Dominant ethnic majorities are merely a subset of the larger problem of political domination and the absence of political competition. Majority ethnic groups (who do not face the prospect of losing power) will attempt to capture courts and undermine judicial independence or prevent the establishment of independent courts in the first place. But there is another issue that has not been explored – how ethnic minorities, who will be perpetual political minorities, will address the issue of apex courts. The implicit assumption in the literature on judicial independence is that perpetual political minorities simply have no ability to set the constitutional agenda on this issue. But the fact that ethnic minorities can shape other dimensions of constitutional design in divided societies suggests that the structure of politics may likewise afford opportunities for them to do so with respect to courts.

There are two ideal-type scenarios here. First, in cases of divided societies emerging from prolonged, violent conflict, the design of the apex court charged with interpreting the post-conflict constitutional settlement could be an issue on the negotiation agenda. The leverage possessed by ethnic minorities would be the threat of a return to violence. Bosnia, Kosovo and Cyprus are examples of this scenario. The second scenario is that of a deeply divided but consolidated democracy in which there is no history of violent conflict or any realistic prospect of a descent into violence. Nonetheless, in at least one subset of these kinds of divided societies – plurinational places – national minorities have

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Where Lijphart does discuss judicial review in a chapter in *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, Yale University Press, 1999), he does so in order to investigate the relationship between constitutional rigidity (i.e. the ease of constitutional amendment) and the institutional nature of judicial review. He does not consider judicial review in the context of divided societies.
successfully mobilised through democratic polities to achieve the reconfiguration of these states from unitary monocultural entities to plurinational states whose institutions reflect the existence of multiple nations and nationalisms. Although the focus of the literature on constitutional design in plurinational places has been federalism and executive power-sharing, the design of the apex court could be part of this constitutional agenda. Examples include Canada, Spain and Belgium.

What would be the demand of minority ethnic groups be? One possible strategic objective would be to gain some control over the various features of the design of apex courts. An obvious mechanism for this end would be the appointments process, for example, through granting the authority to federal sub-units controlled by ethnic minorities to appoint a number of judges, through super-majority or concurrent majority requirements that empower minority legislators, or through minority control over nominations (e.g., the exclusive power to generate shortlists). A closely related, but distinct issue would be the composition of the court. Certain seats could be designated for judges drawn from ethnic minorities, or all seats could be designated for members of different ethnic groups. Yet another aspect of design would be the judges’ legal expertise. In biaural jurisdictions, such as Canada and the United Kingdom, a certain number of seats on the apex court may be set aside for judges trained in the component legal traditions where that tradition is tied to questions of minority ethnic identity. Finally, there are the decision-rules of the apex court. A court may constitute special panels of subsets of judges, to hear cases of special interest to ethnic minorities. These panels would contain a disproportionate number of judges appointed by minority ethnic communities, and/or ethnic minority judges. Alternatively, a court may require super-majority or concurrent majority to reach decisions, either on all issues or those of special concern to ethnic minorities.

Now this is not the only option on the table. The other would be for minorities to demand independent courts – for example, through the creation of a judicial services commission that buffers appointments from political influence. So what would determine an ethnic minority’s constitutional priorities on the design of the apex court? Demography and relative political power may rule out the institutionalisation of ethnic identity in the apex court. But even in cases where ethnic minorities had sufficient political resources to choose either approach, the very nature of constitutional interpretation in divided societies may drive them toward the institutionalisation of ethnic difference. To understand why, we need to turn to the second kind of judicial politics, the politics of constitutional interpretation.

Recent comparative research on constitutional adjudication has confirmed what scholars of judicial politics have long presupposed – that formal sources of law rarely dictate definitive outcomes to questions of constitutional interpretation. However, it does not follow that constitutional reasoning is unconstrained. As Jeff Goldsworthy has recently argued, courts across jurisdictions rely on a shared set of interpretive frames. These include textual (including contextual), interpretive (including draft-related provisions), prudential, and constitutional provisions. Each relative emphasis and interrelata methodological matrix of a normative space within which occur.

Within a given constitutional order, one may be ordered by the combination of the two kinds of constitutional tradition. The tradition of constitutional interpretation is the tradition that the right to equality are the political morality by reference, underlying theory of the right to implement that theory. Judges question the extent permitted interpretive stances on the core cluster together and be united, to an egalitarian or liberta and justifies judgments in particular.

In divided societies, the design of court is where judicial independence is ground. This is because these constitutions, and these constitutions may be of federalism, the electoral system. On the other hand, they almost which individuals hold rights. Many of these rights are hostile to equality and non-disclosure of rights and opportunities through rules governing preferential receipt of public services or in institutions and justly a range of ethnic character of specific regi
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resly on a shared set of interpretive methods in constitutional interpretation. These include textual (including intra-textual methods), originalist (both original intent and original meaning), teleological or purposive, doctrinal or precedent-based, structuralist (drawing inferences from a single provision or sets of related provisions), prudential, and ethical or moral approaches to constructing constitutional provisions. Each national constitutional tradition differs in the relative emphasis and interrelationship they accord to those methods. The methodological matrix of a national constitutional tradition defines an argumentative space within which acceptable forms of constitutional argument occur.

Within a given constitutional tradition, a particular constitutional outcome may be demanded by the combination of local sources and by the methodological distinctiveness of that tradition. But in most cases, those contingent features of a constitutional tradition merely rule out, and do not require, specific constitutional decisions. Rather, they create an argumentative space within which a tradition is open to elaboration, reinterpretation, contestation and change. These spaces provide openings for competing ideologies to shape and direct constitutional interpretation. For example, clauses entrenching specific rights (eg, the right to equality) are framed abstractly, and incorporate principles of political morality by reference. They therefore invite courts to articulate an underlying theory of the right in question and to craft constitutional doctrine to implement that theory. Judges may rely on competing theories of the right in question to the extent permitted by a national constitutional tradition. Interpretive stances on the correct interpretation of particular provisions may cluster together and be unitied by a shared ideological commitment — for example, to an egalitarian or libertarian political morality — that organises, unites and justifies judgments in particular cases.

In divided societies, the design of the constitution may create an additional set of issues where judicial ideology can shape constitutional interpretation. This is because these constitutions may contain competing logics. On the one hand, these constitutions may institutionalise ethnic identity in the very design of federalism, the electoral system, the legislature, the political executive, etc. On the other hand, they almost invariably contain a bill of rights according to which individuals hold rights irrespective of their ethnic identity. Moreover, many of these rights are hostile to the institutionalisation of ethnic difference. Rights to equality and non-discrimination presumptively prohibit the distribution of rights and opportunities on the basis of ethnic identity — for example, through rules governing preferential treatment in public sector employment, the receipt of public services or in land ownership. A right to mobility renders constitutionally suspect a range of government policies designed to maintain the ethnic character of specific regions by discouraging migration by members of

other ethnic groups. Moreover, the guarantee of rights on equal terms (eg, the right to vote and hold public office, the right to property) presumptively forbids the unequal enjoyment of the interests protected by those rights, including on the basis of ethnicity.

Now to be sure, almost every right in contemporary bills of rights is subject to reasonable limitations to be assessed on the basis of some test of proportionality. But as the well-known decision of the European Court of Human Rights in Mathieu-Mohin and Clerfayt v Belgium\(^13\) illustrates, all this does is reframe the problem. The case turned on whether limitations on European Convention voting rights, imposed by Belgian statute, could be justified by the objectives of political accommodation and linguistic power-sharing, and whether those limits were proportional to the objectives they were intended to achieve. Article 3 of Protocol 1 of the European Convention on Human Rights obliges states parties to hold regular and fair elections that ensure the ‘free expression of the opinion of the people in the choice of the legislature’. In considering the implications of this provision, the Court noted that it is not an absolute right and that ‘there is room for implied limitations’ in the wording of the Convention.\(^14\) A majority of the Court concluded that ‘any electoral system must be assessed in the light of the political evolution of the country concerned’.\(^15\) As the aim of the Belgian electoral legislation was to ‘defuse language disputes in the country’, the majority held that the limitation of voting rights was ‘not a disproportionate limitation such as would thwart “the free expression of the people”’.\(^16\)

The dissenting minority disagreed, arguing that the electoral system ‘should be assessed on its own merits’,\(^17\) and that the particular national circumstances which motivate the design of an electoral system should never be allowed to justify violations of rights. The broader lesson of Mathieu-Mohin is that proportionality analysis, in principle, provides the state with the legal opening to invoke the constitutionalisation of ethnic difference as the constitutional underpinning for specific measures that limit individual rights. At the end of the day, it falls to judges of the apex court to sort out this clash between conflicting constitutional logics, and to determine which one has priority.

Here is the link between the two kinds of judicial politics. These disputes over how to resolve the conflict between competing constitutional agendas will often divide ethnic groups within a divided society who may have different interests on the issue in question. Moreover, those differences in interest may be nested in deeper disputes over the very character and identity of the state. So the reason that ethnic minorities might seek to institutionalise ethnic difference on a court is not to transform judges into the ethnic minority politicians to bring to bear on constitutional genial to the protection of min between bills of rights and the state.

We explore these questions in two representing both of the \(k\) and Bosnia), and a third case apex-court design.

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\(^{11}\) NL Cigic, Genocide in Bosnia: Th (University Press, 1996); Laura Silver an 1993); and David Feldman, ‘Renaming Journal of Constitutional Law 649, 650.

\(^{12}\) See David Feldman’s contribution Agreement: Constitutionalism and Eth ‘The Continuing Relevance of the Spy Constitution’ (2011) 58 Problems of The Quest for a New Democratic Ori; Review 203, 2056; and EM Coues International Law Journal 789.
Courts in Divided Societies

III. THREE CASES

A. Post-transition Divided Societies: Bosnia and Herzegovina

The Republic of Bosnia and Herzegovina (hereafter Bosnia) emerged from the break-up of the Socialist Republic of Yugoslavia in the early 1990s. Three major ethnic groups – Muslim Bosniacs, Orthodox Christian Serbs and Roman Catholic Croats – inhabit the country. Between 1991 and 1995 the area was riven by civil war and ethnic cleansing of Bosniacs and Croats by Serbs in the entity now known as Republika Srpska and the reverse in the territory now known as the Federation of Bosnia and Herzegovina. The constitutional reconstruction of the country has been driven by two competing agendas. In the wake of a war fought to secure ethno-national self-determination, the protection and preservation of ethno-national identity and autonomy are important foundations of the new political arrangement. At the same time, this reconstruction attempts to protect individual rights of the kind enshrined in the European Convention on Human Rights.

The tension between these two agendas plays out in the very pages of the Bosnian Constitution, which commits the country both to collective rights and ethno-national autonomy within a federal state, as well as to individual civil and political rights. Article II(2) of the Constitution of Bosnia, for example, provides that the ‘rights and freedoms set forth in the European Convention for


the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina and shall have priority over all other laws. The Constitution includes a domestic bill of rights, with a list of individual rights enumerated in Articles II(3)(a) through to (m). At the same time, the political structure set up by the Constitution turns on ethnic and group identity and operationalises ethnic identity in the processes of government. While Bosnia's Constitutional Court has been influential in charting a course through these opposing currents, the limits of its ability to do so have become apparent, in part because ethnic difference has been constitutionalised in the appointments process to the court.

i. Bosnia's Consociational Peace Deal

The 1996 General Framework Agreement for Peace in Bosnia and Herzegovina, which ended conflict and restored political stability to the region, was negotiated and signed at Dayton, Ohio. The Dayton Accords constitute Bosnia as a confederation of two autonomous 'constituent entities', the Federation of Bosnia and Herzegovina and the Republika Srpska. The Federation of Bosnia and Herzegovina itself distributes responsibilities between cantons and the Federation's central government, making Bosnia a 'two-layer' federation. The Constitution establishes a three-member federal presidency representing each ethnic group and a bicameral legislature with representation guaranteed for each ethnic group. The Constitution requires that of the 42 members elected to the House of Representatives, Bosnia's lower chamber, two-thirds are elected from the Federation of Bosnia and Herzegovina and one third from the Republika Srpska. The Election Act sets up a complicated system of mixed proportional representation and compensatory mandates based on cantonal divisions, designed to ensure more or less equal representation of Bosniacs and Croats in the House. The 15 members of the upper chamber, the House of Peoples, include five representatives of each ethnic group selected by the subnational legislative caucuses of the respective constituent peoples. The formal distribution of power mirrors the partition along ethnic lines in ev

Against this ethno-political arrangement, elections are conducted by majority voting procedures and cannot be taken without the consent of each constituent entity. The participation of at least three out of ten people in the upper chamber is necessary for major changes to be adopted by the House of Representatives. The appointment procedure of this consociational logic, Article 6, members of the Court will be at the discretion of Bosnia and Herzegovina's Federal Assembly of the Republika Srpska by the European Court of Human Rights and cannot be citizens of judges selected by the constitutional ethnic background. In practice, since its inception, the Court has had three Bosniac and two Croat judges.

ii. Impact and Performance of the Constitution

Two decisions of the Bosnian Constitutional Court have to date the European Court of Human Rights' decision that the Court's power for the use of force to explain the perceived imports of the Constituent Peoples' constitutions to be

The Constituent Peoples' constitutions and the European Court of Human Rights


40 Articles V and IV of the Constitution of Bosnia and Herzegovina, 1995.

41 Election Act, 2001, Official Gazette of Bosnia and Herzegovina, 23/01, 07/02, 09/02, 20/02.
distribution of power mirrors the political reality that has produced a tripartite partition along ethnic lines in every election since 1910.34

Against this ethnopolitical background, Bosnia’s consociational power arrangements establish a system of checks and balances weighted according to ethnicity. All federal legislation must be approved by both chambers, and special majority voting procedures and quorum requirements ensure that decisions cannot be taken without the support of at least one-third of each of the representatives of each constituent people in the lower chamber, or without the participation of at least three out of five of the representatives of each constituent people in the upper chamber.35 Further, the Constitution creates express veto points for members of the presidency and ethnic communities in the federal House of Representatives in respect of measures ‘destructive of a vital interest of the Bosniacs, Croats or Serbs.’36

The appointment procedure for the Bosnian Constitutional Court follows this consociational logic. Article VI (1) of the Constitution provides that four members of the Court will be appointed by the House of Representatives of the Federation of Bosnia and Herzegovina, and two members by the National Assembly of the Republika Srpska. The remaining three members are appointed by the European Court of Human Rights on the advice of the federal presidency and cannot be citizens of Bosnia or of any neighbouring state. The six judges selected by the constituent entities are not required to be of any particular ethnic background. In practice, however, these six positions on the Court have, since its inception, been filled by two Serbian judges, two Bosniac judges and two Croat judges.37

ii. Impact and Performance of the Court and its Judges

Two decisions of the Bosnian Constitutional Court, along with one that reached the European Court of Human Rights, stand out for exemplifying the implications of the Court’s power for ethnic nationalism. In turn, these decisions help to explain the perceived importance of ethnic representation on the Court.

a) The Constituent Peoples Decision

The Constituent Peoples decision of 2000 declared provisions of both constituent entities’ constitutions to be incompatible with the Constitution of Bosnia

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35 These requirements are set out in the Constitution at art 14(3)(c) and (d). See also Hayden, ‘The Continuing Reinvention’ (n 19) 7.

36 Articles V(2)(d) and V(3)(6).

37 Feldman, ‘Renaming Cities’ (n 8) 655.
for identifying certain ethnic groups as the ‘constituent people’ of those particular entities. The Constitution designates Bosniacs, Croats and Serbs as constituent peoples throughout the entire territory of Bosnia. Thus, a majority of the Court held that Bosnia’s territorial delimitation cannot be allowed to justify ‘ethnic domination, national homogenisation, or a right to uphold the effects of ethnic cleansing’.

The tension between the commitments to individual rights and the imperatives of an ethnic consociational peace deal are apparent in the judgments of the Court, which divided on ethnic lines. The majority of the Court—the international judges and the two Bosniac judges—held that provisions seeking to designate or emphasise each of the entities as ‘the state of’ one or other particular people indicate a ‘purposeful discriminatory practice . . . with the effect of upholding the results of past ethnic cleansing’. The discriminatory effect of these provisions in turn denuded rights of free movement and return to homes and residences from which people had fled or been removed during the war and periods of ethnic cleansing. The Court then turned to the question of whether discrimination and violations of individual rights could be justified by the imperatives of ethnic power-sharing and consociationalism under the principle of proportionality. On this question, the majority concluded that ‘ethnic segregation can never be a “legitimate aim” with respect to the principles of “democratic societies” as required by the European Convention on Human Rights and the Constitution’. Moreover, the majority went further and rejected the argument that individual rights undermine the peaceful co-existence of ethnic groups. On the contrary, they reasoned that individual rights are as important to peaceful co-existence between ethnic groups as the collective rights of the constituent entities themselves. Indeed, as the consociational institutions of government are meant to encourage the peaceful co-existence of ethnic groups, individual rights that promote ethnic intermingling must be protected.


28 U 5/98 (above n 29) para 52.

29 Ibid para 61.

30 Ibid para 95.

31 Ibid para 95. The rights in question are entrenched in art II(3) of the Constitution:

Refugees and Displaced Persons

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

32 Ibid para 79.

33 Ibid para 96. See also para 113.

The four judges in the minority opinion over individual rights appointed judges concluded that the International Convention on the European Framework Minorities, as well as the provisions of the Convention on Human Rights, apply to the entities. But for the entities to saw the majority’s conclusion a.

b) T1

In February 2004, the Constituent Assembly passed the Republic of Srpska, privileged Serb and member of the Republika Srpska, and violation. The Court also held that the Republika Srpska discourages the right to move to or settle homes in the Republika Srpska. Constitutional Court of Bosnia, U 44/01 (available online at www.cecbh.ba/eng/odluko/povuc.pdf.php?id=22214). See the Dissenting Judgment of Judge Zvočić, Dissenting judgment of Judge Svoboda, and Dissenting judgment of Judge Srečko, ‘Constitutionalizing Democracy in Fractured Societies’ (2003-04) 82 Texas Law Review 1861.

34 Constitutional Court of Bosnia, U 5/98 (above n 29) para 95. See also Feldman, ‘Elimination of all Forms of Racial, Religious and Political Rights Protection of National Minorities’.
The four judges in the minority, by contrast, privileged the logic of ethnic consociation over individual rights. A dissenting opinion by one of the Croat-appointed judges concluded that the various international agreements such as the International Convention on the Elimination on all forms of Discrimination and the European Framework Convention for the Protection of National Minorities, as well as the provisions of the Bosnian Constitution enshrining individual rights to movement and property, were "totally beside the point" and of no application to the dispute. A minority opinion by a Serb-appointed judge similarly argued that were constitutional equality rights to alter the ethnic power-sharing arrangements in the various constituent entities, the raison d'etre for the entities would cease to exist. The other two dissenting opinions also saw the majority's conclusion as posing a threat to the ethnic character of the entities.

b) The Place Names Case

In February 2004, the Constitutional Court declared unconstitutional parts of two statutes passed by the Republika Srpska, pursuant to which a number of cities and towns had been renamed to suggest their Serbian ethnic character.

The objection to these name changes parallels the concerns raised in the Constituent Peoples case: the emphasis on the Serbian character of places in the Republika Srpska privileged Serbian identity over Bosnian and Croat identity in the Republika Srpska, and violated rights to freedom from ethnic discrimination. The Court also held that emphasising the Serbian character of places in the Republika Srpska discouraged members of the Bosniac and Croat communities from moving to or settling in the Republika Srpska or from returning to homes in the Republika Srpska from which they had fled during the war, and infringed rights of return and free travel within Bosnia. In contrast to its earlier decision in the Constituent Peoples case, the Court was unanimous.

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26 Dissenting judgment of Judge Zvonko Miljko, Partial Decision in case U 398 (n 29) at 48-49.
27 Dissenting judgment of Judge Snjezana Savic, Partial Decision in case U 398 (n 29) at 63.
28 See the Dissenting Judgment of Judge Vitomir Popovic (Serb-appointed), Partial Decision in case U 398 (n 29) at 82-81 and Mirko Zivkovic (Croat-appointed), Partial Decision in case U 398 (n 29) at 93-94.
31 See arts III(5) and II(3)(m) of the Constitution of Bosnia and art 2 of Protocol 4 to the European Convention on Human Rights.
The Court considered and rejected various justifications for the limitation of these rights. One possible justification was that name changes intended to emphasise the Serbian ethnic identity of towns within the Republika Srpska are consistent with the very designation of a Serbian constituent entity. The Court rejected this justification, saying that it would be illegitimate to emphasise the ethnic character of a town when that ethnic character was the result of ethnic cleansing and forced removal. Another possible justification was that the name changes would distinguish towns in the Republika Srpska from towns in the Federation with similar names. To rename the towns to emphasise the Serbian nature of those towns, the Court reasoned, was disproportionate to that objective. The same purpose could be achieved, the Court went on, by choosing names less invasive of rights to movement and rights of return.

The *Places Names* case very clearly pits the ability of constituent entities to emphasise their ethnic identity against individual rights to move around and settle anywhere in Bosnia. Both the Constituent Peoples and Place Names decisions demonstrate that ethnic nation-building will be subjected to the constraints of classic civil and political individual rights enshrined in familiar documents like the European Convention.

c) Limits to Individual Rights: the Finci and Sejdic case

There have been limits to the Court’s ability to marry the two competing agendas of Bosnia’s constitutional project. The *Finci and Sejdic* case is an example of where the Bosnian Constitutional Court, at least in the view of the European Court of Human Rights, did not do enough to ensure that individual rights were insulated against the demands of ethnic power-sharing government structures. Two Bosnian citizens, one being a member of the Jewish community and the other being a member of the Roma community, argued before the European Court that the provisions of the Constitution restricting membership of the presidency to Bosniacs, Serbs and Croats were inconsistent with the European Convention on Human Rights. The Bosnian Constitutional Court rejected three previous challenges to the consistency of these electoral provisions with the Convention. One of these judgments – which went only to the admissibility of the issue – was unanimous. The other two judgments were split, with an international judge from Germany and the Court’s president in dissent on both occasions. In late 2009, the European Court handed down judgment in *Finci and Sejdic* declaring the restriction incompatible with Convention rights to equality and anti-discrimination. The difference in approach between the two courts highlights the tension between rights and an explicitly ethnic constitutional Court, individual the demands of ethnic consociational infringements were justifiable in In one decision, the Court relies in *Mathieu-Mohin* on the presidency were both in logue between opposing parties of that aim. The Bosnian Court reconciled its judgments in sions — which established a strong that the elections cases concern public offices, which the *Constitution* Confronted with the tension between for and consociationalism, the Court choose between these two con Feldman, sitting as a judge of the

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The European Court of Human repugnant in all its forms and u the presidency’s ethnic exclusivity the issue, however, with one disinsensitivity to the fragility and ean ethnic groups in Bosnia.

iii. Applying the Bosnian Const

In the *Constituent Peoples* case, decision, with the two Serbian at

* Mathieu-Mohin and Clarfay v Bel 
  * Case No AP-2678/06, majority judge: www.echr.court僚.com/en/pdf/op/nr_op.pdf
  * Case No AP-2678/06, Feldman J’s ba/eng/iduke/pdf/065/065789.pdf
  * See the note by Marko Milanić 636, 638.
Courts highlights the tension that exists between commitments to individual rights and an explicitly ethnic distribution of political power. For the Bosnian Constitutional Court, individual rights against non-discrimination gave way to the demands of ethnic consociationalism because, in the Court's view, those infringements were justifiable in the broader context of Bosnian ethnic politics. In one decision, the Court relied on the European Court of Human Rights' decision in Mathieu-Mohin to hold that the ethnic restrictions on membership of the presidency were both in service of the legitimate aim of 'peace and dialogue between opposing parties' and not disproportionate to the achievement of that aim. The Bosnian Constitutional Court's decisions on this issue can be reconciled with its judgments in the Constituent Peoples and Place Names decisions - which established a strong norm of non-discrimination - on the basis that the elections cases concerned ethnic power-sharing and the distribution of public offices, which the Constituent Peoples and Place Names cases did not. Confronted with the tension between the rights against ethnic discrimination and consociationalism, the Constitutional Court has had no choice but to choose between these two constitutionally mandated imperatives. As David Feldman, sitting as a judge of the Bosnian Constitutional Court, explained:

> I accept that ... different parts of the Constitution appear to have conflicting values and objectives, but constitutions are never entirely coherent. They are always shaped by, and are a compromise between, conflicting values and objectives. The task of the Constitutional Court under Article VI is to give effect to the Constitution, with all its inconsistencies, and make it as effective as possible in all the circumstances.

The European Court of Human Rights, holding that racial discrimination is repugnant in all its forms and under any circumstances, was unable to uphold the presidency's ethnic exclusivity. The European Court was itself divided on the issue, however, with one dissenting opinion criticising the majority for its insensitivity to the fragility and delicacy of the peaceful relations between dominant ethnic groups in Bosnia.

### iii. Applying the Bosnian Constitutional Court Model to Other Jurisdictions

In the Constituent Peoples case, a bare majority of five votes to four carried the decision, with the two Serbian and the two Croat judges in the minority and the

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43 Mathieu-Mohin and Clerfayt v Belgium (n 13).
46 See the case note by Marčo Milanović in (2010) 104 American Journal of International Law 636, 638.
two Bosniac judges and the three international judges in the majority. David Feldman points out that during the first five years of the Court’s operation — before he served on it — the judges of the Court tended to vote according to the interests of their ethnic affiliations, and many of the cases involved bare majorities of two ethnic judges and the three international judges. The addition of three international judges was intended to neutralise the effects of ethnic polarisation on the Court. Since the Court is entrusted with adjudicating disputes between explicitly ethnic political organs, there is a strong justification for ensuring that the Court remains insulated from ethnic bias. But since the three international judges and two judges from any one constituent people constitute a majority, the presence of international judges may have had the perverse effect of facilitating the Court’s ethnic polarisation. More recently, however, the Court has shown a greater propensity for unanimity (e.g., the Place Names case). Moreover, this trend towards unanimity has been accompanied by a privileging of the integrative values of the Bill of Rights over the logic of consociational power-sharing. It is not clear what shifted within the Court. One possibility is that the presence of the international judges on the Court had its intended effect and promoted the convergence of the domestic judges from a variety of ethnic backgrounds on a constitutional patriotism embodied in the rights-protecting provisions of the Bosnian Constitution. Furthermore, the Court has been a driver of moves towards greater integration in Bosnia and the decline of the consociational power-sharing arrangements often seen as indispensable to forging peace in a massively divided society. It has been widely recognised that post-war Bosnia’s consociational arrangements were unworkable and that the Bosnian state was dysfunctional. A fascinating consequence of the Constituent Peoples’ judgment was the extent to which the Sarajevo Agreement on the implementation of the judgment, concluded in March 2002, limited the ability-building projects. The agreement the two constituent entities’ legis that each constituent people has population distribution. Further on ethnic domination in go ‘proportionate representation’ it reflects population distributions ment occurred.

The Sarajevo Agreement also the protection of vital ethnic impossibility of “pretextual ethnic” route for the judicial review of d Peoples’ decision refined the mod “a restrained form of consociative a platform for governance than i ration is based on ethnically mix dependent on the ‘facially neutrality various ethnic groups’. The shif lisp of the Ljiphar, mould et al. by Ljiphart’s interlocutor, Don now. What is important for us divisions in the country has cont

The Bosnian experience may I questions of constitutional design

11 Feldman, ‘Renaming Cities’ (n 18) 660.
12 Mansfield, ‘Ethnic but Equal’ (n 19) 2060
14 Feldman, ‘Renaming Cities’ (n 18); H Stokke, ‘Human Rights as a Mechanism for Integration in Bosnia-Herzegovina’ (2006) 13 International Journal on Minority and Group Rights 263, 264; and Mansfield, ‘Ethnic but Equal’ (n 19) 2089. In Germany, this shift in loyalty from nation to legal principles has been called ‘constitutional patriotism’; see D Kommer, ‘The Federal Constitutional Court in the German Political System’ (1994) 26 Comparative Political Studies 470, 488.
16 Hayden, ‘The Continuing Re-invention’ (n 19); 4; Mansfield, ‘Ethnic but Equal’ (n 19) 2055. In 1997, in the face of political stalemate to which Dayton’s consociational arrangements frequently led, the parties to the Dayton Accords agreed at a meeting in Bonn, Germany, to imbue the Office of the High Representative with almost dictatorial powers to govern the country. These have become known as the Bonn Powers of the Office of the High representative.

17 Sarajevo Agreement available online id=7274.
18 ibid pt I art 3.
19 Partial Decision (above n 29) para 24.
20 Sarajevo Agreement (n 57) pt IV. Integration in Bosnia-Herzegovina’ (n 54).
21 Sarajevo Agreement, (n 57) pt I art constituent peoples to be adequately refig of one constituent people constitute rights of constituent peoples in the pro motion of culture, tradition and culture and any other interest as claimed by Peoples or the Republika Srpska Cow.
22 Mansfield, ‘Ethnic but Equal’ (n 19).
23 Sarajevo Agreement (n 57), pt I art Constituent Peoples’ decision has had or sh.
25 Mansfield, ‘Ethnic but Equal’ (n 19).
26 See generally, Nina Czapar, ‘C Conflict Regulation Strategies in Postco Ethnically Grouped in Conflict (n 10); Divided Society (Berkeley, University Societies’ (1993) 4 Journal of Democracy.
March 2002, limited the ability of the entities to pursue aggressive nation-building projects. The agreement requires that the upper chambers of each of the two constituent entities’ legislatures be constituted on the basis of parity, so that each constituent people has the same number of delegates regardless of population distribution. Further, in order to give effect to the Court’s prohibition on ethnic domination in government structures, the agreement insists on ‘proportionate representation’ in government based on the 1991 census, which reflects population distributions before ethnic cleansing and internal displacement occurred.

The Sarajevo Agreement also makes significant changes to the procedures for the protection of vital ethnic interests. It defines vital interests, avoiding the possibility of ‘pretextual ethnic vetoes’, and, more importantly, creates a route for the judicial review of declarations of vital interest. The Constituent Peoples’ decision refined the model established by the Dayton Constitution into a restrained form of consociationalism in which the vital interest veto is more a platform for governance than a trapdoor to deadlock, proportional representation is based on ethnically mixed pre-war demographics, and power-sharing is dependent on the ‘facially neutral process of geographic concentration of the various ethnic groups’. The shifting balance in Bosnia between consociationalism of the Lijphart-mould and a more integrative political arrangement favoured by Lijphart’s interlocutor, Donald Horowitz, has been documented before now. What is important for us here is how a court designed to mirror ethnic divisions in the country has contributed to this integrative process.

The Bosnian experience may be instructive for other divided societies facing questions of constitutional design, such as Kosovo and Cyprus. The Constitution

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Sarajevo Agreement available online from the OHR website at www.oahr.net/print/content_id=7274.

Ibid. pt 1 art.3.

Partial Decision (above n 29) Reasons, para 60.

Sarajevo Agreement (n 57) pt IV. See also Stokke, ‘Human Rights as a Mechanism for Integration in Bosnia-Herzegovina’ (n 24) 277.

Sarajevo Agreement, (n 57) pt I art. 4. Vital interests are listed as the exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial bodies; identity of one constituent people; constitutional amendments; organisation of public authorities; equal rights of constituent peoples in the process of decision-making; education, religion, language, promotion of culture, tradition and cultural heritage; territorial organisation; public information system; and any other interest as claimed by two-thirds of one of the caucuses of the Federation House of Peoples or the Republica Serbica Council of Peoples.

Mansfield, ‘Ethnic but Equal’ (n 19) 2074.

Sarajevo Agreement (n 57), pt I art 5. Other commentators have noted the softening effect the Constituent Peoples’ decision has had on the consociational nature of the Bosnian political settlement. See Richard H Pilger, ‘Ethnic Identity and Democratic Institutions: A Dynamic Perspective’ in Choudhry (ed), Constitutional Design for Divided Societies (n 7) 173, 197.

Mansfield, ‘Ethnic but Equal’ (n 19) 2085.

of Kosovo provides for consociational power-sharing arrangements similar to Bosnia’s. Seven of the nine seats on the Constitutional Court of Kosovo are designated for filling by a two-thirds majority of the unicameral legislature. The remaining two seats are designated for filling by a simple majority of the legislature with the consent of a majority of the legislative representatives of ethnic minorities, whose representation in the legislature is itself guaranteed. The recently rejected Annan Plan for Cyprus included an apex court staffed by an equal number of Cypriot and Turkish judges alongside three international, non-Cypriot judges. It seems from the Bosnian experience that an ethnically diverse and representative apex court is important to developing the legitimacy of the court, just as consociational mechanisms are necessary for political compromise. At least in Bosnia, however, the apex court has been able to overcome the ethnic divisions reproduced on the court and hand down ethnically non-partisan judgments that privilege the rights-protecting parts of the Bosnian Constitution. The international, neutral, presence on the Court may have ensured the independence and impartiality of the apex court and prevented its capture by sectional ethnic interests.

B. Divided Democracies: Canada

In 1980, and again in 1993, Quebeckers voted in referenda on whether the province of Quebec should remain part of Canada or secede to form a sovereign independent nation. French-speakers are a majority in Quebec, but a minority in Canada as a whole. Throughout Canada’s history the French-speaking minority has tried to protect its distinct linguistic and cultural identity. Linguistic nationalism in Canada has been central to three sets of constitutional questions – about provincial autonomy, about Quebec’s unique civil law tradition, and about the effect of the 1982 Canadian Charter of Rights and Freedoms on Quebec’s policies linguistic nation-building.

The Supreme Court of Canada has addressed these questions, and in doing so has confronted directly the question of how pan-Canadian individual rights enshrined in Canada’s bill of rights, the Canadian Charter of Rights and Freedoms, limit or constrain Quebec’s ability to forge a distinct cultural and political identity. Its record in this regard can be assessed through three sets of cases, all centred on language rights. On the matter of language in the private sector, the Court has at times been generous to Quebec. With respect to the language of education, the Court’s judgments have been more restrictive of Quebec’s autonomy. Regarding that, firm in upholding constitutional

i. Quebec Nationalism and the I

Two significant changes to Canada’s institutional questions of Quebec nation from Canada to imperial courts: the Charter of Rights and Freedoms. The starting point is the British nation state of Canada as a core force today. The Act was textual elements of federalism, including jurisdiction, the relationship and the relationship between the Quebec and the federal government. Between Confederation. It fell over the nature of Canada. At the Judicial Committee of the Privy Council – rather than the Senate, set out by the Phe weak federal government, a conc over major aspects of social and equity to the Privy Council in 1949, the ap of appeal. Quebeckers were eroded by a Supreme Court of Canad.

As it became clear in the 1949 Canada’s apex court, Quebec was An early proposal included a nisting of five judges appointed

46 Constitution of the Republic of Kosovo, 2008, art 114(2) and (3). The representation of ethnic minorities is set out in art 64.
47 See the draft Constitution for Cyprus, Annex I to the Annan Plan, available online from the UN website at www.un.org/docs/annan/Annan_Plan_April2004.pdf, art 36.
Quebec's autonomy. Regarding the language of government, the Court has been firm in upholding constitutionally mandated requirements of bilingualism.

i. Quebec Nationalism and the Design of the Court

Two significant changes to Canada's constitutional landscape brought together the issue of the institutional design of the apex court and the three constitutional questions of Quebec nationalism. The first was the abolition of appeals from Canada to imperial courts in 1949, and the second was the introduction of the Charter of Rights and Freedoms.

The starting point is the British North America Act,69 which established the nation state of Canada as a federation of several provinces and is still in force today. The Act was textually ambiguous on a number of important elements of federalism, including the respective scope of provincial and federal jurisdiction, the relationship between the federal and provincial governments and the relationship between the provincial executive and legislative power. Quebec and the federal government consequently developed very different conceptions of Confederation. It fell to the courts to resolve basic disagreements over the nature of Canada. At first, Canada's court of final appeal was the Judicial Committee of the Privy Council – the British appellate body for colonial courts – rather than the Supreme Court of Canada. The conception of Confederation set out by the Privy Council favoured strong provinces and a weak federal government, a conception in which the provinces had jurisdiction over major aspects of social and economic policy.70 With the abolition of appeals to the Privy Council in 1949,71 the Supreme Court became Canada's final court of appeal. Quebecers were concerned that Quebec's autonomy would be eroded by a Supreme Court of Canada biased in favour of the federal government.72

As it became clear in the 1940s that the Privy Council would no longer be Canada's apex court, Quebec began to make proposals for a new apex court. An early proposal included a nine-member specialist Constitutional Court, consisting of five judges appointed by the federal government, and one judge

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69 Constitution Act, 1867 (UK), 30 & 31 Vict, c. 3.
71 Act to Amend the Supreme Court Act, S.C. 1949 (2nd sess), c.37, s.3.
appointed by each of the executives of each region of Canada (Quebec, Ontario, Atlantic Canada and Western Canada). Another proposal empowered provincial executives to appoint two-thirds of the Constitutional Court with one-third of the judges appointed by Quebec, and another one-third appointed by the other provinces. The federal government was concerned that such a court would become a representative tribunal for the negotiation of regional interests rather than an independent judicial body.

Quebec shifted its focus from the creation of a specialist constitutional court to the reform of the Supreme Court of Canada. The 1971 Victoria Charter proposed that appointments require the agreement of the federal and provincial executives, and that every case involving Quebec's civil code be heard by a panel of five judges, including three from Quebec. Another variation reduced the federal executive role to nomination with legislative confirmation, and linked this to reforms to the composition of the federal upper chamber such that it would consist of members appointed by the federal House of Commons and provincial legislatures. Proposals included in the Meech Lake Accord in 1987 (an abortive attempt to generate Quebec's support for the 1982 Constitution Act) were for federal appointment of a guaranteed number of judges from Quebec to the Court, from a list of candidates prepared by Quebec. Appointments to the non-Quebec seats would be made from lists provided by the other provinces. A final set of proposals involved expanding the Court and increasing the number of sitting judges from Quebec, as well as ensuring that constitutional cases be heard by a smaller panel on which all the Quebec judges would sit.

Limited concessions were made to Quebec in 1985, in the aftermath of the breakdown of negotiations between the federal government and the provinces over the adoption of the Charter of Rights and Freedoms in 1980. The Supreme Court Act of 1985 formulates a convention that judges from Quebec serve on the Court, by setting the number of judges on the Court at nine and designating three of those seats for judges from Quebec. However, Quebec has no say in who the three judges from Quebec will be; the judges are appointed by the federal government with no input from Quebec. Canada's Constitution Act of 1982, which includes the Charter, entrenches Quebec's privileged position on the Court by requiring that changes to the 'composition of the Supreme Court' require unanimous federal and remaining seats – three from British Columbia and one for constitutional political conveniency.

The above reforms occurred in the Canadian Charter of Rights response to centrifugal pressures institutional claims had been defen jurisdiction. In the 1960s Quebec building and an expansion of its The basic political objective of both by regulating ethno-linguis ing a pan-Canadian political co

In regenerative terms, the Court building through rights to inter-education. A flashpoint of conflict Canadian citizens who received Canadian English to have their called 'Canada Clause'). Quebec because the province legitimate enhance its integrity as a cultu Rights and Freedoms was declared unconstitutional. The federal protect minority language rights it protected language rights for

In constitutive terms, the Ch, function as the germ of a pan-C state such as Canada, since it province of residence, a bill of ri
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of a specialist constitutional court nada. The 1971 Victoria Charter pro- ment of the federal and provincial Quebec's civil code be heard by a Quebec. Another variation reduced with legislative confirmation, and the federal upper chamber such by the federal House of Commons said in the Meech Lake Accord in f's support for the 1982 Constitution guaranteed number of judges from candidates prepared by Quebec. should be made from lists provided by involved expanding the Court and a Quebec, as well as ensuring that which all the Quebec judges were in 1985, in the aftermath of the federal government and the provinces and Freedoms in 1980. The Supreme that judges from Quebec serve on the Court at nine and designating. However, Quebec has no say in the judges are appointed by the fed-
Canada's Constitution Act of 1982 gives Quebec's privileged position on composition of the Supreme Court.
require unanimous federal and provincial consent. The distribution of the remaining seats – three from Ontario, one from Atlantic Canada, one from British Columbia and one from the Prairie provinces – is a matter of subconstitutional political convention rather than statute.

The above reforms occurred against the background of the introduction of the Canadian Charter of Rights and Freedoms – itself the federal government's response to centrifugal pressures from Quebec. Until the 1960s, Quebec's constitutional claims had been defensive, aimed at safeguarding its existing areas of jurisdiction. In the 1960s Quebec's goals shifted to ethno-linguistic nation-building and an expansion of its jurisdiction over social and economic policy. The basic political objective of the Charter was to combat Quebec nationalism both by regulating ethno-linguistic nation-building in Quebec and by constituting a pan-Canadian political community throughout Canada.

In regulatory terms, the Charter imposes legal restraints on minority nation-building through rights to inter-provincial mobility and to minority language education. A flashpoint of controversy within Quebec has been the right of Canadian citizens who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec (the so-called 'Canada Clause'). Quebec objected to the entrenchment of these rights because the province 'legitimately discriminates in its legislation to preserve and enhance its integrity as a culturally differend [sic] society'. The Charter of Rights and Freedoms was drafted specifically to render objections like this unconstitutional. The federal government, through the Charter, was able to protect minority language rights for Francophones in Quebec at the same time as it protected language rights for francophones across Canada.

In constitutive terms, the Charter of Rights and Freedoms was intended to function as the germ of a pan-Canadian constitutional patriotism. In a federal state such as Canada, since citizens share rights irrespective of language or province of residence, a bill of rights is meant to serve as a transcendent form of

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81 Constitution Act 1982, s.41(d).
82 See P. Hogg, Constitutional Law of Canada 5th edn (Searsborough, Thomson Carswell, 2007) ch. 8.3.
84 See generally K. McRoberts, Quebec: Social Change and Political Crisis (Toronto, McClelland and Stewart, 1988).
86 Charter, s 6(2).
87 Ibid. s 23.
89 The Supreme Court upheld the Charter against Quebec's language policy in one of its earliest Charter cases, Quebec (AG) v Quebec Protestant School Boards [1984] 2 SCR 66.
90 See Federalism for the Future (n 83) 4.
political identification. In this light, the minority language education rights communicate a conception of linguistic identity that is subsumed by a Canadian constitutional identity.

ii. Assessing the Court

The Court has had a large role in defining the constitutional relationship of Quebec to Canada. In three sets of language rights cases the Court has addressed the tensions between the logics of plurinational accommodation and individual rights.

First, in a pre-Charter case dealing with the language of government, the Court struck down provisions of the 1977 Quebec Charter of the French Language\(^{31}\) purporting to make French the exclusive language of Quebec’s legislature and courts.\(^{32}\) These provisions were held to be in direct contravention of section 133 of the British North America Act, which requires that all Acts of Parliament and the Quebec legislature be published in both English and French.\(^{33}\)

Second, with respect to the language of commerce and the private sector, the Court’s influence on Quebec’s fortunes has been mixed. The Court struck down requirements in the Charter of the French Language that commercial signage be exclusively French, on the grounds that the law imposed unreasonable limitations on the Canadian Charter right to freedom of expression.\(^{34}\) However, the Court accepted the legitimacy of Quebec’s stated objective for the provision, to ensure that “the visage linguistique” of Quebec would reflect the predominance of the French language.\(^{35}\) The provision was struck down because it was disproportionate to that objective; a measure requiring that French be predominant would have sufficed. Moreover, in a companion case, the Court accepted that Quebec has the constitutional authority to regulate the language of commerce and business, and that doing so in a way that promotes the use of French in commerce and business falls within provincial jurisdiction.\(^{36}\) The Charter of the French Language obliges employers to provide written communications to their staff in French, prohibits employers from making employment conditional on the knowledge of a language other than French unless necessary, and authorises the provincial government to require larger businesses (50 employees or more) to engage in a process of francisation, whereby the use of French is generalised throughout the firm. The Court’s view is that these rules are matters of

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32 AG Quebec v Blakie (1979) 2 SCR 1016.
33 The portions of the Charter of the French Language that establish French as the exclusive language of work within the civil service, however, have never been constitutionally challenged and remain in force. These provisions have cemented the place of French as the dominant language of work in Quebec, by creating strong economic incentives for individuals who desire to secure public sector employment or contract with the state to master French.
34 Ford v Quebec (AG) [1988] 2 SCR 712.
36 Devine v Quebec (AG) [1988] 2 SCR 790, paras 16-20.

intraprovincial commerce and though they have an obvious imp which are matters of federal cor istion of Canadian federalism th ery driver of Quebec's push f have not been subject to Charter

Finally, on matters of French: has upheld English minority lan, promote French as the dominan grants citizens educated in Eng right to have their children edit Protestant School Board decisio Charter of the French Language proportionality analysis, held th it attempted to completely neg to merely limiting it).\(^{38}\) The Ch received schooling in English an schooling in English in Quebec, Language attempted to limit.\(^{39}\) However, rather than holding th that the violation was not just Board), the Court narrowly inte tional terrain. It therefore did Quebec had acted for a constitu

While the outcome for Quebec noteworthy: First, in all five ca down a judgment of 'The Co auth by an individual judge The Court's practice seems to ti diverse issues, it is important emphasise the fact that what d judge authoring the opinion, be elements of the Canadian cons also reflects an agreement amon Joint authorship signals a stru more concurrence.

Second, the Court has appl nation-building policies, but a issue these policies. While the Co rights and commercial advertis
intraprovincial commerce and thus are within provincial jurisdiction, even though they have an obvious impact on interprovincial and international trade, which are matters of federal competence. This approach reflects an interpretation of Canadian federalism that protects provincial autonomy — long a primary driver of Quebec’s push for judicial reform. Moreover, these provisions have not been subject to Charter challenge.

Finally, on matters of French as the language of public education, the Court has upheld English minority language rights in the face of Quebec’s attempt to promote French as the dominant language of education. The ‘Canada Clause’ grants citizens educated in English at primary level anywhere in Canada the right to have their children educated in English in Quebec.7 In the Quebec Protestant School Board decision, the Court struck down the provision of the Charter of the French Language that completely denied this right and, in its proportionality analysis, held that Quebec’s purpose was impermissible because it attempted to completely negate the effect of the Canada Clause (as opposed to merely limiting it).94 The Charter also grants the right to children who have received schooling in English anywhere else in the country the right to continue schooling in English in Quebec, another right the Quebec Charter on the French Language attempted to limit.95 The Court blocked this measure in Solski.96 However, rather than holding that there had been a violation of the Charter and that the violation was not justified (as it had in Quebec Protestant School Board), the Court narrowly interpreted the provision to keep it on safe constitutional terrain. It therefore did not have to address the question of whether Quebec had acted for a constitutionally permissible purpose.

While the outcome for Quebec in these cases has been mixed, two points are noteworthy. First, in all five cases, the Court has been unanimous, handing down a judgment of ‘The Court’ as an institution rather than a judgment authored by an individual judge in which the rest of the Court has concurred. The Court’s practice seems to indicate its awareness that, with respect to these divisive issues, it is important for it to present a collective front in order to emphasise the fact that what drives the judgments is not the identity of the judge authoring the opinion, but the Court’s understanding of the constituent elements of the Canadian constitutional order and their interrelationship. It also reflects an agreement among judges from across Canada’s linguistic divide.

Joint authorship signals a stronger degree of agreement on the Court than a mere concurrence.

Second, the Court has applied the Charter to check Quebec’s linguistic nation-building policies, but at the same time has left space for Quebec to pursue these policies. While the Court’s decisions on minority language education rights and commercial advertising appear to limit Quebec’s ability to recognise,

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7 Charter, s 23(1)(b).
8 Quebec Protestant School Boards (n 89) at 87-88.
9 Ibid s 23(2).
94 Solski (Tutor of) v Quebec (AG) 2005 SCC 14; [2005] 1 SCR 201.
protect and enhance the status of French in education and commerce, over time it has come to accept Quebec's objectives as constitutionally legitimate, either explicitly or implicitly. The early post-Charter decision, Quebec Protestant School Board, can be read either to imply ide that the objective of preserving and enhancing the status of French as Quebec's common language was per se illegitimate, or that the means chosen were disproportionate. But in Ford the court accepted the legitimacy of this objective and struck down the law for not using a less intrusive means. This raised the question of whether it would be legitimate to pursue this objective with respect to access to English language education. Solski stayed clear of this issue because it interpreted the challenged measure to comply with the minority language education rights in the Charter and did not have to consider the question of proportionality. But the Court went out of its way to say that the measure as interpreted would still meet Quebec's objectives, implicitly accepting that such an objective is constitutionally legitimate.

What the Court has not done is to expressly root the legitimacy of this objective elsewhere in Canada's constitutional structure. The answer is federalism, which in large part was designed to accommodate Quebec's distinctive linguistic and cultural identity. Federalism has therefore conditioned the interpretation of the Charter, while at the same time, the Charter constrains the extent of provincial diversity under federalism.

iii. Applying the Model

The Canadian experience may offer some insight to divided democracies going through similar constitutional reforms, such as the United Kingdom and Spain. Two sets of changes have recently been made in the United Kingdom: first, greater power has been devolved to Scotland, Northern Ireland and Wales, and second, in 2009 the Supreme Court of the United Kingdom replaced the Appellate Committee of the House of Lords as the apex court in the UK. By statute, the composition of the Supreme Court must reflect 'knowledge of, and experience of practice in, the law of each part of the United Kingdom'. The Supreme Court itself interprets this to impose a substantive requirement that judges from both Scotland and Northern Ireland serve on the Court. In practice, this continues the informal convention of designating at least one seat each for Law Lords from Scotland and Northern Ireland.

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105 ibid s 27(6).
106 'Procedure for appointing a Justice of the Supreme Court of the United Kingdom', available on the Supreme Court of the United Kingdom website at www.supremecourt.benl.uk/docs/appointments-of-justices_V2.pdf. It should be noted that a single legal system governs both England and Wales. To the extent that they are sub-national units within a federated legal system, they form a single jurisdictional entity within that system.

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A justification for diversity on Home Unions grow into their sorts of tensions as arose between Stephen Tierney's contribution to the rights in the European Court between jurisdictions, as long as reason why this margin of appre are different legal systems within the House of Lords held, conside Human Rights Act of 1998 which of Scots law different from English this 'homogenisation' of law is a multiplicity of otherwise valid co-evolved state. The guaranteed Supreme Court may prove impo arise. However, while the two s guarantee that judges in this po national interests in their judicia

In Spain, too, tensions between communities have led to at least Court decision on the place of 1 Statute of Autonomy of Catal Catalonia, provides that Catalan Amendments to the Statute prov guage of government, but the Catalan as a preferred language the status of Spanish in Cataloni time that the autonomous com composition of the Constituent appointed four-spice by the up by a three-fifths majority, and pendent General Council of the

107 Indeed, Stephen Tierney makes it devolution can be seen as an 'accommod involving which, as in Quebec's case, hat Scotland and undermining efforts to re S Tierney, 'Giving with one hand: Scots Journal of Constitutional Law 730.
108 Attorney General's Reference (No. 109 Organic Law on the reform of the S 6(1) and (2).
110 The Court did, on the other hand language of education. See the Decision Autonomy for Catalonia, Judgment 31 English, commissioned by the govern drep/binasr/Informe%20STC_eng.pdf
111 Spanish Constitution 1978, art 159
A justification for diversity on the Court is expertise. It is possible that as the Home Unions grow into their devolved powers they will encounter the same sorts of tensions as arose between Quebec and the Canadian government. As Stephen Tierney’s contribution to this volume points out, the approach taken to the rights in the European Convention on Human Rights may acceptably differ between jurisdictions, as long as they meet minimal standards. There seems no reason why this margin of appreciation would not apply in the UK, where there are different legal systems within a single state. Yet the Appellate Committee of the House of Lords held, considering fair trial rights in the Convention and the Human Rights Act of 1998 which gives effect to the Convention, that provisions of Scots law different from English law were bad law. The concern then is that this ‘homogenisation’ of law is a form of legal imperialism that undermines the multiplicity of otherwise valid constitutional visions in the different parts of a devolved state. The guaranteed representation of the Home Unions on the Supreme Court may prove important if and when these tensions continue to arise. However, while the two Scots judges dissented in this case, there is no guarantee that judges in this position will emphatically pursue ethnic or subnational interests in their judicial roles.

In Spain, too, tensions between the federal government and the autonomous communities have led to at least one controversial and divisive Constitutional Court decision on the place of language in the autonomous communities. The Statute of Autonomy of Catalonia, which functions as a constitution for Catalonia, provides that Catalan and Spanish are official languages in Catalonia. Amendments to the Statute provided further that Catalan is the ‘preferred’ language of government, but the Constitutional Court held that entrenching Catalan as a preferred language was unconstitutional because it undermined the status of Spanish in Catalonia. Tensions like these have arisen at the same time that the autonomous communities have expanded their influence on the composition of the Constitutional Court. The 12 judges of the Court are appointed four apiece by the upper and lower houses of the Federal Parliament by a three-fifths majority, and two apiece by the government and the independent General Council of the Judiciary. Changes to the organic law of the

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102 Indeed, Stephen Tierney makes just this kind of argument in noting that while the Scottish devolution can be seen as an ‘accommodationsist’ move, there are undeniable integrative tendencies involved which, as in Quebec’s case, have the effect of restricting sub-national nation-building in Scotland and undermining efforts to reorient the United Kingdom in a plurinational direction. See S Tierney, ‘Giving with one hand: Scottish devolution within a unitary state’ (2007) 5 International Journal of Constitutional Law 730.
105 The Court did, on the other hand, uphold provisions establishing Catalan as the ‘normal’ language of education. See the Decision on the constitutionality of amendments to the Statute of Autonomy for Catalonia, Judgment 11/2010, 28 June 2010. See the report of the judgment, in English, commissioned by the government of Catalonia, available online at www10.gsc.cat/drep/binaries/Informe%20STC_112-13021.pdf.
106 Spanish Constitution 1978, art 159(1).
judiciary now require that the Senate appoint its four judges from a list of nominees provided by the legislative assemblies of the autonomous communities.\textsuperscript{110} The autonomous communities are thus assured of some procedural input into the composition of the Court. This could prove to be influential if clashes between the federal government and the communities continue to appear before the Constitutional Court.

C. Facially Neutral Institutional Rules: Germany

Our final case study is Germany. Germany is not a divided society in the way that Bosnia and Canada are. Germany's apex court in constitutional matters – the Federal Constitutional Court (FCC) – does, however, face a similar tension between the impetus for independence and the impetus for the representation of political interests on the FCC. In Germany's case, the political interests are ideological and organised around political parties rather than ethno-cultural or linguistic groups. The design of the FCC reflects these conflicting political interests, but it does not institutionalise them in the same way as in Bosnia and Canada. The political rules governing appointments, which require broad political consensus, are facially neutral and can adapt to changing patterns of political mobilisation. They do not freeze the current pattern of political identity into place. Moreover, the FCC has adjudicated constitutional disputes in which the competing legal positions track these ideological divisions.

1. The Politics of Judicial Appointments in Germany

The FCC is a product of the constitutional document drafted for the new West German state in the wake of the Second World War. Section IX of the German Basic Law establishes the Court, but leaves institutional details such as the Court's jurisdiction, the number of judges, their terms of service and their selection, to be determined by legislation. The Federal Constitutional Court Act (FCCA) was eventually passed in February 1951 and the first judges were appointed to the Court in September 1951 after months of deadlock and fierce competition between political parties.\textsuperscript{111}

Of the three cases presented here, Germany is the most faithful to the 'insurance model' theories of judicial independence presented by Tom Ginsburg and others.\textsuperscript{112} The political parties represented in the structures of government and


\textsuperscript{112} Ginsburg, Judicial Review in New Democracies (n 6); Stephenson, "'When the Devil Turns ...'" (n 3); Ramseyer, The Puzzling (In)Dependence of Courts' (n 3); and J Ferejohn, "Judicializing Politics, Politicizing Law" (2002) 63 Law and Contemporary Problems 41. See also the contribution of Alex Schwartz and Colin Harvey to this volume.
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n 6); Stephenson, "When the Devil Turns
Courts" (n 5); and J Forejohn, 'Judicializing
ary Problems' 41. See also the contribution

responsible for appointments to the FCC were concerned to prevent partisan domination of the Court in order to ensure as much as possible the independence of the Court down the road. The outcome has been a highly politicised appointment process and an apex court apparently strongly committed to unanimity in its judgments.

a. Structure of the FCC and Appointment of Judges

The FCC has 16 judges. It is a 'twin court' composed of two senates with distinct and mutually exclusive jurisdiction. Eight judges sit in each senate and are appointed for a non-renewable term of 12 years. The president of the FCC heads one senate and the vice-president heads the other. Although the federal president formally appoints the judges elected by the chambers, the power of appointment rests with the two chambers of the legislature, the Bundestag and the Bundesrat. Each chamber appoints a total of eight judges, four to each senare. In the Bundestag, judges are chosen indirectly through a 12-member committee, the membership of which reflects party representation in the Bundestag. Election as a judge requires a supporting vote of eight of the 12 members of the electoral committee (reduced from nine in 1956).

In the Bundesrat, election of judges is by a two-thirds majority of the votes of the Länder. The Länder represented in the Bundesrat have on occasion formed an ad hoc commission to make recommendations to the full chamber on candidates for the FCC, but such a commission is not required by law and is not always constituted.

In contrast to Bosnia and Canada, the rules for the appointment of judges are neutral with respect to political or social groups. The super-majority requirements for the election of judges in both the upper and lower chambers, however, have ensured that the main parties on the German electoral landscape, the alliance between the Christian Democratic Union (CDU) and the Christian Social Union (CSU), and the Social Democrats (SPD), each enjoy a practical veto over appointments. The result has been the development of a sub-constitutional practice by which partisan political interests represented in the legislature play a decisive role in the election of judges, through three primary mechanisms.

FCCA, arts 2 and 4. The number of judges in each senate has been gradually reduced by legislation from 12 to 10 in 1956, and finally to eight in 1962. Also, when the FCC was established in 1951, judges were appointed either for life; or for a renewable term of eight or four years. This arrangement was abolished in 1970 and the present system introduced. See GN Schram, 'The Recruitment of Judges for the West German Federal Courts' (1973) 31 American Journal of Comparative Law 691, 693; and Vanberg, The Politics of Constitutional Review (n 111) 85.

This aspect of the appointment procedures is required by art 94(1) of the German Basic Law. The specific procedures for the appointment of judges are set out in arts 6-10 of the FCCA.


Vanberg, Politics of Constitutional Review (n 111) 83.
First, when vacancies on the FCC have meant that both the Bundestag and the Bundesrat have had to elect judges, negotiations between representatives of the two houses have occurred, providing an opportunity for horse-trading between the parties represented in the legislature, with the interests of the Länder represented by negotiating teams from the Bundesrat. In 1971, for example, four new judges were to be appointed by the Bundesrat and two by the Bundestag. The negotiating teams were formed by the two major parties at the time, the CDU and the SPD, and the manifest purpose of the negotiation was the realignment of the membership of the Court to reflect party sympathies.197

Second, the Länder themselves occasionally seek representation on the FCC and bring pressure to bear accordingly. The election of a Hessian civil servant to the FCC in 1963 has been explained as a result of the influence of a Hesse minister on the ad hoc Bundesrat commission,198 while Bavaria and the north-German element were successful in having representative judges appointed in 1975.199 Disputes and disagreements between Länder and between Länder and the federal government often take on a party political character,200 with the result that Land pressure for one candidate or another is taken up by politically sympathetic parties.

Third, and most significantly, the dominant parties in the legislature have allocated seats on the FCC among them, and indeed are thought to own them.211 The practice arose in order to avoid the partisan deadlock that delayed the appointment of judges in 1951. Now, half of the judges are appointed by the CDU/CSU, while the other half are appointed by the SPD. When either of the smaller parties, the Greens or Liberal Free Democrats (FDP), have been part of a governing coalition, they have usually been able to secure control over the appointment of one seat. When a judge retires, the party to which the seat belongs chooses the replacement with no opposition in the legislature – provided the candidates are moderate enough to be acceptable to the other party. The president of the FCC has always been appointed by the CDU/CSU, while the vice-president has always been appointed by the SPD. In Germany, seats on the apex court are ‘double-designated’, according to which chamber of the legislature fills them and again according to which party fills them. The result is an FCC fairly evenly representative of the large parties in Germany, with little drastic ideological shift over time.220

197 Clark, ‘Selection and Accountability of Judges’ (n 115) 1828, fn 157; Schram, ‘The Recruitment of Judges’ (n 113) 696.
198 Schram, ‘The Recruitment of Judges’ (n 113) 696.
202 Vanberg, Politics of Constitutional Review (n 111) 85.

b. Assessing the FCC in the Co

In Canada and Bosnia ethnicity hision of the apex courts, which has disputes arising out of ethnic Germany, the primary factor in and many of the most significant with disputes of party politics national commitment to multiparty between the FCC and the government Konrad Adenauer's CDU government. Germany's accession to the Europ of tension that we are more sp between Germany's commitment participate in the political process provides that political parties 'may organisation must conform to dot in the democratic process through constraints of democracy. The doc:

d. federal law (Article 21(3)).

Three sorts of cases in the FCC this tension between rights and d had on the political vitality of pol participation of political parties in tion to decide on the constitution petitions to ban the Neo-Nazi Soci. The FCC reasoned that 'in a free d iation and freedom of association a rights' and that, by implication, 'tivities must not be restrained'.226 Nev had felt it necessary to limit the a rights in order to safeguard democ ties, limiting political individual rij system was, in the FCC's view, just in cementing the importance of p because their direct result was to e them altogether, but also in highli:

200 Article 15(2) of the FCCA, read with: 201 The Socialist Reich Party case, 2 BVerfG 85 (1956).
202 Socialist Reich Party case, ibid.
meant that both the Bundesrat and the Bundestag might be considered to be representatives of the interests of the provinces as a whole. In 1971, for example, the Bundesrat supported the proposal of the Bundestag that the court should be expanded to include judges from theerrer part of the negotiation was "to reflect party sympathies," and to seek representation on the FCC on behalf of the Hessische Landesverband. Bavaria also sought representation on the FCC on behalf of the Hessische Landesverband; however, the other Länder and the other political parties have not taken up the same role in the legislature.

b. Assessing the FCC in the Context of Germany's Multiparty Democracy

In Canada and Bosnia, ethnicity has emerged as a primary factor in the composition of the apex courts, which have had an important influence in adjudicating disputes arising out of ethnic federalism and ethnicity more broadly. In Germany, the primary factor in the composition of the FCC is party politics, and many of the most significant cases the FCC has decided have dealt with disputes of party politics and matters arising out of Germany's constitutional commitment to multiparty democracy. Generally, tensions have arisen between the FCC and the government, such as during the early face-off between Konrad Adenauer's CDU government and an SPD-dominated second senate on Germany's accession to the European Defence Community treaties. The kind of tension that we are more specifically interested in here, however, arises between Germany's commitment to a conception of democracy and rights to participate in the political process. Article 21(1) of the Basic Law, for example, provides that political parties "may be freely established," but that their "internal organisation must conform to democratic principles." The right to participate in the democratic process through political parties is immediately limited by the constraints of democracy. The details of those constraints are themselves left to federal law (Article 21(3)).

Three sorts of cases in the FCC's 60-year history stand out as focal points of this tension between rights and democracy and for the direct effect they have had on the political vitality of political parties. The first set involves the participation of political parties in the legislative system. The FCC has jurisdiction to decide on the constitutionality of political parties, and has upheld petitions to ban the Neo-Nazi Socialist Reich Party and the Communist Party. The FCC reasoned that "in a free democratic state ... freedom of political opinion and freedom of association are guaranteed to individual citizens as basic rights" and that, by implication, "the formation of activity of political parties must not be restrained." Nevertheless, since the framers of the Basic Law had felt it necessary to limit the absolute freedom conferred by basic political rights in order to safeguard democratic institutions from undemocratic activities, limiting political individual rights in the service of the democratic political system was, in the FCC's view, justifiable. The decisions were hugely influential in cementing the importance of party-based democracy in Germany, not only because their direct result was to exclude extremist parties from the party system altogether, but also in highlighting the power the FCC holds to protect the

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115) 1828, fn 157; Schram, 'The Recruitment

116) 83–85, Schram, 'The Recruitment of

117) 85.

118) See Vanberg, 'Establishing Judicial Independence' (n 120), and Vanberg, Politics of Constitutional Review (n 111), 67–77.

119) Article 13(2) of the FCCA, read with art 21(2) of the German Basic Law.

120) The Socialist Reich Party case, 2 BVerfGE 1 (1952) and the Communist Party case, 5 BVerfGE 85 (1956).

121) Socialist Reich Party case, ibid.
ideology of ‘militant democracy’. The FCC has extended its guardianship over the ‘party state’ in other ways too. It has developed a rich jurisprudence on the role of parties, relying on the statement in the Basic Law that ‘political parties shall participate in the formation of the political will of the people’ to hold that when the state is engaged in the process of will formation, political parties are ‘integral units of the constitutional state’. In seeking to ensure the character of German democracy, the FCC has handed down decisions ordering higher salaries for legislative representatives, invalidating laws unduly restricting political parties from gaining access to the ballot, forbidding political parties from changing the order in which candidates appear on party lists, and limiting the conditions under which a minor parliamentary party can be excluded from representation on a legislative committee, barring Parliament from excluding a representative from a legislative committee merely because he or she is not a member of a political party, and vindicating the rights of parliamentary minorities to establish investigative committees to hear evidence of illegal or improper conduct by a ruling governmental majority.

An important decision on multiparty democracy involves the expansion of the system by abolishing electoral thresholds for representation in the legislature. German electoral law requires a party to win at least five per cent of the vote in order to take PR seats in the legislature. The adoption of thresholds has been explained as an attempt to negate the instability that splinter parties bring to a PR system. In the National Unity Elections case, however, the FCC held that the rule would not apply to the first post-unification elections in Germany in 1990. This was to ensure that the parties of the former East German republic, now minority parties in the unified Germany, ‘would have a fighting chance to enter the new, all German Parliament’. In a subsequent decision related to the 1994 election, the FCC upheld the waiver of the five per cent rule for a minority party from the former East Germany, allowing it to take seats in the legislature even though it won less than five per cent of the vote. In these cases, the FCC upheld rights of political parties to strengthen the party-political system’s role and, in the case of the Land elections, the importance of the case lies in the policy that the court did not simply adopt a case-by-case approach.

The third category of cases involves important partisan concerns. The FCC has jurisdiction in the Land court and Länder. Relating to the Länder in Germany, however, has raised issues. In the 1961 Television case, television service because it infringes on the freedom of information, and the FCC rebuked the government for having consulted only with the SPD. Thus, the Länder differently on the basis of Adenauer’s plan to create a new opposition party. The SPD and a number of CDU in abortion law passed by an SPD-FPDI joint committee. This was whether the Basic Law’s party had to submit to ‘certain norms’ on the norms contained in Article 6 on constitutional protection of marriage and the review proceeding. Such cases have been because the Basic Law contemplates the protection of the Bundesregierung and no

107 Kommer, ‘The Federal Constitutional Court’ (in 120) 474. The phrase ‘militant democracy’ was introduced by the FCC in the Communist party case (n 125) at 139. The FCC has rejected three other applications for declarations that a political party is unconstitutional. See D. Kommer, Constitutional Jurisprudence of the Federal Republic of Germany 2nd edn (Darmstadt, Universitätsverlag, 1997) 11-12.

108 German Basic Law, art 21(1).


111 Federal Electoral Law, art 6(6).

112 See K. Bawn, ‘The logic of Institutional Preferences: German Electoral Law as Social Choice Outcome’ (1993) 37 American Journal of Political Science 595, 598. Despite objections, the FCC has upheld the principle of the 5% threshold (Bavarian party case, 8 BVerfGE 84 (1987)).

113 82 BVerfGE 322 (1990).

114 Kommer, ‘The Federal Constitutional Court’ (n 130) 117.

115 Basic Mandate Clause case, 95 BVerfGE 408 (1997). See also M. Kommer, ‘The Federal Constitutional Court’ (n 130) 118.

116 103 BVerfGE 111 (2001), Kommer, n 107.

117 Kommer, ‘The Federal Constitutional Court’ (n 130) 117.

118 Kommer, ‘The Federal Constitutional Court’ (n 120) 474-75.

119 Kommer, Constitutional Jurisprudence
'CC has extended its guardianship by developing a rich jurisprudence on the Basic Law that 'political parties political will of the people' to process of will formation, political stability'. In seeking to ensure the integrity of the ballot, it has taken into account the possibility of plural party systems and has given limiting treatment to any single party, which can be excluded from representation from a representative capacity or whether the court will not be a member of a parliamentary minority to establish legal or improper conduct by a ruling party. The new constitutional representation of the electorate involves the expansion of the representation in the legislature. At least 15 per cent of the vote in the adoption of thresholds has been a matter of concern to the parties of the FCC since it has rejected the majority system unconstitutionally. See D Kommer, c of Germany 2nd edn (Durham, Duke 2002) 205.

The phrase 'militant democracy' (n 125) at 139. The FCC has rejected three key arguments unconstitutionally. See D Kommer, c of Germany 2nd edn (Durham, Duke 2002) 205.

'Guardian of German Democracy' (2006) 603 at 111, 116 (emphasis and citations omitted).

German Electoral Law as Social Choice at 96, 98. Despite objections, the FCC has rejected the majority system unconstitutionally. See also BVerfGE 84 (1987).

30. 117. (1997). See also Kommer, 'The Federal Court in Divided Societies' 117

upheld rights of political participation ahead of mechanisms intended to strengthen the party-political system against the threats that splinter parties might pose to a parliamentary system.

Second, the FCC has been called on to adjudicate directly in electoral disputes between the two very parties who select its judges. In what has been called Germany's 'Bush v Gore', the Hessian Election Review case, the FCC was asked to decide whether the CDU's electoral victory in the largely SPD-dominated Hesse Land, on the back of illegal campaign financing, was void. While the FCC held that the CDU's actions did not violate the statutory standard of public morality by which the validity of the election was to be assessed, the importance of the case lies not in its outcome but in the direct role that the party-politically appointed FCC played in partisan electoral politics.

The third category of cases shows that partisan concerns arise in cases that are at least on the surface not about party politics, a demonstration of just how important partisan concerns are to constitutional adjudication in Germany. The FCC has jurisdiction in disputes involving public law between the federal government and the Länder. Relations between the federal government and the Länder in Germany, however, have often been shaped by partisan considerations. In the 1961 'Television case', nullifying a decree establishing a national television service because it infringed Land competence in respect of cultural matters, the FCC rebuked the government, not only for the content of its action, but for having consulted only with Länder controlled by the CDU and not those controlled by the SPD. Thus, the government had unconstitutionally treated the Länder differently on the basis of party orientation. Indeed, Chancellor Adenauer's plan to create the national television service had been strongly opposed by states under SPD control. In another case, five CDU-controlled Länder and a number of CDU members of the Bundestag challenged a liberal abortion law passed by an SPD-FDP coalition. The rights conflict in this case was whether the Basic Law's protection of an 'inner core of personal freedom' had to submit to 'certain norms governing the whole of society' - in this case the norms contained in Article 6 of the Basic Law articulating the state's 'special protection' of marriage and the family. The case was an abstract judicial review proceeding. Such cases frequently take on partisan overtones simply because the Basic Law contemplates abstract review only where a third of the members of the Bundestag, a state government, or the federal government...
request it. Abstract review is usually initiated by opposition parties and the proceedings often result in a reiteration of party positions in court. The FCC divided on the judgment, but not on the interpretation of the rights at issue. Rather, the court divided on the question of how the political system should approach the objective values at the heart of the Basic Law. The two dissenting judges argued that the implementation of the Basic Law's objective values is a task for the legislature, not the courts. A wide range of options for the translation of values into law and policy exists, and the decision on how to do so is one that 'rests with the legislature upon which the people directly confer legitimacy.' The majority, in engaging the legislature's decision, entered into the political fray while the minority chose to defer to the legislative majority; the minority aligned with SPD politics while the majority favoured the more conservative CDU opposition.

ii. Applying the Model

Canada is often looked to as a model of institutional design for divided societies. Increasingly, Bosnia is coming to be seen in a similar light, at least in post-conflict states. However, the German model, with its facially neutral rules, might offer a better solution for the design of apex courts in divided societies. In Peru, for example, a similar sub-constitutional power-sharing arrangement has arisen between the four dominant political parties against the background of facially neutral rules for the appointment of judges to the apex court. Judges are appointed by a super-majority in the legislature, but an agreement now exists in terms of which the seats on the court are designated for parties represented in the legislature.

The benefit of facially neutral rules of this kind is that they accommodate shifting electoral dominance. The rules are flexible enough to allow for the kind of sub-constitutional arrangements that ensure all the major political parties are involved in the political process of selecting judges to the apex court. In Germany's case this has resulted in an effective and independent apex court. In addition, the FCC does not reveal the names of dissenting judges unless they write separate, dissenting opinions. Dissenting opinions have only been allowed since 1971, and since then have been Analysis of the voting patterns of the link between a judge's perfot with the designation on his or her

Why have the judges on the FCC writing dissenting opinions? Perhaps prevent the party-political analyses like the United States. While native say on the appointment of makes it very difficult to assess perhaps to preserve its own inde pendency. While party policies ent staffed and in the cases that com politics influence the way the j judges' behaviour is itself explicit politics. The idea here is that dise majority in future cases. In those the institutional legitimacy the FC for political analysis of its judge

The disadvantage of the Canad ethnic concerns are explicitly and institutional foundations of neutral there is no room for respo over time or realign in any num neutral rules in Germany and Per outcomes have been central in s judges. These rules allow for a co dominance of electoral processes, not be able to accommodate or re outcomes in the same way.

The difference between the G diversity of interests on the aj approaches is similar to the dil corporate consociational approa government. A liberal consensus identity, and rewards whatever g process. These identities could be also be purely political or ideologi

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144 Will Kymlicka, eg, describes Canada as a 'world leader... now seen as a model by many other countries' for the management of ethno-cultural relations (Finding our Way: Rethinking Ethnocultural relations in Canada (Oxford, Oxford University Press, 1993) 2–3. See also S Choudhry, 'Does the World need more Canada? The Politics of the Canadian model in constitutional politics and political theory' (2007) 5 International Journal of Constitutional Law 606, 607–08).
145 Katherine Nobbs takes a largely positive view of the Bosnian Court's performance in bettering ethno-cultural relations in Bosnia. See Nobbs, 'A review of minority participation in the judiciary' (n 33).
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yty positions in court. The FCC interpretation of the rights at issue, of how the political system should be the Basic Law. The two dissenting the Basic Law’s objective values is a lution for the translation of the decision as only is one possibility. The minority favoured the more conservative

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seen in a similar light, at least in a model, with its facially neutral design of apex courts in divided sub-constitutional power-sharing dominant political parties against the appointment of judges to the apex majority in the legislature, but an agree
ments on the court are designated for his kind is that they accommodate flexible enough to allow for the kind sure all the major political parties acting judges to the apex court. In live and independent apex court. In es of dissenting judges unless they ng opinions have only been allowed since 1971, and since then have been prepared in only six per cent of decisions. Analysis of the voting patterns of judges is difficult as a result, and investigating the link between a judge’s performance and the partisan interests associated with the designation on his or her seat is all but impossible.

Why have the judges on the FCC generally chosen not to reveal their votes by writing dissenting opinions? Perhaps the judges on the FCC are concerned to prevent the party-political analyses of its members that are common in jurisdictions like the United States. While it is clear that political parties have a determinative say on the appointment of judges, the FCC has taken an approach that makes it very difficult to assess whether judges favour their appointing party, perhaps to preserve its own independence or at least the appearance of independence. While party politics enters the FCC both in the process by which it is staffed and in the cases that come before it, it cannot be said whether those politics influence the way the judges decide. Another possibility is that the judges’ behaviour is itself explicable in terms of the insurance model of judicial politics. The idea here is that dissenting judges anticipate that they will be in the majority in future cases. In those future cases, the same judges will benefit from the institutional legitimacy the FCC derives from minimising the opportunities for political analysis of its judges’ decisions.

The disadvantage of the Canadian or the Bosnian model is the very fact that ethnic concerns are explicitly and concretely integrated into the appointment and institutional foundations of the courts. Because the rules are not facially neutral there is no room for responsive adjustment should ethnic concerns fade over time or reappear in any number of ways we cannot predict. The facially neutral rules in Germany and Peru have resulted in a situation where electoral outcomes have been central in shaping the process for the appointment of judges. These rules allow for a creative and flexible response to the contingent dominance of electoral processes. There is no reason that rules like these should not be able to accommodate or respond to ethnicity-based electoral or political outcomes in the same way.

The difference between the German approach to the representation of a diversity of interests on the apex court and the Bosnian and Canadian approaches is similar to the difference between liberal consociational and corporate consociational approaches to representation in the elected branches of government. A liberal consociation allows groups to ‘self-determine’ their identity, and rewards whatever group identities emerge from the democratic process. These identities could be ethnic or religious or linguistic, but they could also be purely political or ideological or policy-centric. Corporate consociation,


ted ... now seen as a model by many other relations (Finding our Ways: Rethinking versity Press, 1995) 2-3. See also S Choudhry, at Canadian model in constitutional politics Constitutional Law 606, 607-08). he Bosnian Court’s performance in bettering # of minority participation in the judiciary’ independence: Lessons from three “Cases” of Journal of Latin American Studies 251.

117 Vanberg, The Politics of Constitutional Review (n 111) 91. See also at 55, pointing out that the FCC is broadly representative of established political interests, ‘including the interests of the states as corporate entities within the German system’. 118 This point is taken from the discussion in J McGarry, B O’Leary and R Simeon, ‘Integration or Accommodation? The Enduring Debate in Conflict Regulation’ in Choudhry (ed), Constitutional Design for Divided Societies (n 7) 61-62.
in contrast, predetermines the identities that groups carry. Group identity is assigned according to ascriptive characteristics like ethnicity or mother tongue, and those identities in turn become politically salient as the mechanism or marker by which seats in parliament or portfolios in cabinet are allocated. The rules for consociation in liberal consociational systems are thus facially neutral just as are Germany’s rules for the composition of the FCP. It seems, then, that differences in approach to broader questions of constitutional design reappear in these debates about apex courts. Thus, the politics of representation in these broader political areas may prove to be relevant to the investigation of the politics of representation in apex courts.

IV. CONCLUSION

In this chapter, we have argued that the politics of the design of apex courts in deeply divided societies is the product of the interaction of two kinds of judicial politics, the politics of judicial independence and the politics of constitutional interpretation. We suggested that in divided societies ethnic minorities that were likely to be perpetual political minorities have an interest in shaping the appointment procedures, composition, expertise and decision-rules of the apex court charged with ultimate responsibility for constitutional interpretation. We also suggested that in such societies the interrelationship between bills of rights that guarantee universal human rights for all citizens irrespective of ethnic identity, and elements of the constitutional order that institutionalise ethnic difference, would be at the heart of important constitutional cases and would yield interpretive disagreement. These constitutionally divisive issues would divide a divided court.

But what we have witnessed in the Bosnian and Canadian cases is how courts can arrive at a consensus and speak in a single voice on precisely these difficult questions. So the question for future research is how judges on a multi-member court reason across these divides. We cannot fully explore that issue here, but offer the following preliminary observations. In contemporary debates on representative democracy in diverse societies, one of the central questions has been whether legislatures should be designed to ensure the representation of historically excluded groups. Anne Phillips has argued in favour of these policies under the rubric of a politics of presence.10 For Phillips, the value of guaranteeing representation of historically excluded groups is the increased likelihood that they will be particularly alert to the interests of their communities, of how they are affected by public policies, and will advance arguments and adduce evidence that would be neglected by members of the majority. But it does not follow that members of other groups are incapable of understanding these arguments, and hence, that absent vetoes or super-majority rules, members of excluded groups are doomed to lose in politics. On of legislative deliberation, these are majority, who will be persuaded if offered.

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are doomed to lose in politics. On the contrary, the claim is that in the process
of legislative deliberation, these arguments may resonate with members of the
majority, who will be persuaded by the strength of the reasons and evidence
offered.

Phillips’s institutional focus is the legislature. In a highly suggestive passage,
she explores the extension of her argument to the judiciary:

(C)ertain decisions are legitimated only by the representativeness of those who take
them, while others stand independently of this. When this is so, the precise composi-
tion of the judiciary may not be such a salient concern. This conclusion, however,
would follow only if we believed in impartiality as that ‘view from nowhere’,
untouched by the experiences of where we have come. If, on the contrary, we see
the pursuit of impartiality as depending on gathering the views from everywhere, then
securing the diversity of the judiciary becomes as important as securing the diversity
of the legislative assembly. In both cases, experience will affect our judgment, and a
body that draws overwhelmingly on one set of experiences will be limited in its range
of concerns. The difference is that, while members of the legislature can legitimately
engage in special pleading..., members of the judiciary cannot so legitimately regard
themselves as ‘representing’ particular concerns. This is an important distinction...
and it makes it harder to argue for strict guarantees along the lines of equal or propor-
tionate presence. But the composition of the judiciary is an additional and significant
concern, and particularly so where the judiciary adjudicates constitutional con-
cerns.109

Phillips helps to frame the problem of adjudication on a divided court in a
divided society. Judges are not simply delegates of the ethnic politicians who
appointed them. But on constitutional questions that go to the very nature of
citizenship and identity in a multi-ethnic state, judges from excluded groups
bring to bear arguments and evidence that draw upon their experience in order
to persuade their fellow judges from outside the community. The details of how
that process takes place, and how the institutional factors that establish,
empower, shape and constrain courts can promote this kind of deliberative
engagement, we leave for another day.

109 ibid 197, quoting IM Young, Justice and the Politics of Difference (Princeton, Princeton
University Press, 1990) for the phrase ‘view from nowhere’.