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The Principle of Reflective Judiciary in Divided Societies: Challenges and Opportunities in the Western Balkans[*] [**]

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1. Introduction

The evolution of constitutional law and – more in general – of constitutionalism in Europe in the 20th century has left a rich legacy of unsettled issues that are hopefully expected to find some proper and stable answers in the current 21st century cycle.

Among them, two of such issues that deserve to be emphasised here are, first, a new systematic, contemporary and realistic revisiting of traditional definitions of the judicial function, at large, and, more in particular, of judicial constitutional review; and, secondly, a recognition of

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the conceptual boundaries of the constitutional space to be acknowledged to the factor currently referred to as "identity" – individual and collective – and its impact on governance in a context of multiculturalism.

In fact, the two issues are mutually interactive, as will be explained more in detail. Their interaction may be indicated as a new constitutional issue by itself, namely the issue of "*diversity in the judiciary*". Thus framed, such issue is, in part, consistent with traditional settings – such as separation of powers and checks and balances -, and, in part, thoroughly innovative: in fact, it entails a non-conformist consideration of the meaning of the "nation" within the concept of nation-state as the exclusive frame of reference for the organisation of public power.

Each one of the two issues deserves some further preliminary elements of explanation that will make their mutual interaction clearer: in fact, the more the judicial function is called to play a vital role for the governance of the system, the more such governance requires to deal with questions of identity and diversities in society, the more the judiciary itself is directly involved in dealing with questions of identity and diversities that affect its very composition and organisation.

1.1 New perspectives on the judiciary

In the first place, our synthetic survey is to recall how the original ideology of Western constitutionalism was strongly oriented toward recognising a fairly weak and specific role for the judiciary, a role limited to deciding individual controversies by applying the law and without any more general governmental task: routine descriptions such as the judiciary as «*the*

least dangerous branch»[1], or such as «*le juge est la bouche de la loi*»[2] are quite representative – although mainly symbolically – of that ideology, both in the common law and in continental European legal theory.

The sense of such descriptions needs being revisited in the light of contemporary developments. Although the adjudicatory function is still bound by the law, its context requires to be adjusted to the constant expansion of public intervention in most – if not all – of the matters of economic and social life since the end of the 19th and throughout the 20th century. The growth of public policies – that reach ethical issues concerning life and death of individuals – has caused a conspicuous enactment of legislation – primary and secondary – that inevitably and correspondingly raises litigation and carries with it the involvement of the judiciary.

Furthermore, the amount of legislation is often characterised also by quite a loose and generic regulatory impact, that allows a wide share of interpretive discretion not only to the benefit of public administration but also of courts: the judiciary is, in fact, called to deal with a larger amount of contentious issues that require written regulatory provisions to be interpreted, applied to the case and transformed (from provisions) into law.

Enforcement of the law must be the outcome of interpretation, *per se* and also in order to check its formal and substantive consistency with higher laws, such higher laws being the entrenched provisions of a written constitution (since Marbury v. Madison, 1803); or, in continental Europe since the 20th century, also with sources of international and supranational law[3].

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[1] See the well-known words from *The Federalist Papers*, No. 78, (Alexander Hamilton): «Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them […] The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments» (emphasis original),

[2] As stated in C. de Secondat de Montesquieu, *De l'esprit des lois*, Livre XI, Chapitre VI, 1748: «*Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle*» and «*les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*».

[3] On the impact of the growing complexity of the system(s) of sources of law on judicial interpretation and consequently on the systemic role of the judiciary, see R.

The relevant contemporary phenomenon and process is well known and the physiological tension between the political and the judicial method of law-making does at times appear quite pathological. It is to be recalled that such trend has been critically and significantly qualified as *juristocracy*[4].

The concept of juristocracy makes reference to the attribution of larger shares of public power to the judiciary (ordinary and constitutional) that ends up being able to adopt judicial decisions that are in fact intrinsically of an evaluative and political nature and ultimately express a policy founded on constitutional values. Thus the judiciary becomes to some extent a

Toniatti, *Le interazioni della giurisdizione ordinaria con la giurisdizione costituzionale e con le giurisdizioni europee comunitaria e convenzionale*, in G. Di Federico (a cura di), *Manuale di ordinamento giudiziario*, Padova, 2004, p. 191; and Id., *L'impatto sistemico della protezione europea e interamericana dei diritti fondamentali: la Corte di Giustizia dell'Unione Europea quale fattore di asimmetria fra la Corte Europea e la Corte Interamericana dei diritti dell'uomo*, in https://cocoaproject.eu/images/CocoaWP_Toniatti_Impacto.pdf (2017).

The phenomenon somehow affects the United Kingdom as well: it is to be stressed that - in spite of Brexit - a reference still needs being made to the Human Rights Act (1994) and to the judicial "declaration of incompatibility" of domestic rules of law with regard to the European Convention of Human Rights and to the case-law of the ECtHR: indeed, not judicial review with its typical effects impacting the formal validity of sources of law, obviously, but nevertheless a cause for courts to evaluate the consistency of the law with regard to higher sources, although the final decision on such (in)consistency is ultimately up to Parliament to examine and cope with.

[4] See R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge (MA), 2004 & 2007: «Courts have become crucial fora for dealing with the most fundamental questions a democratic polity can contemplate. This global trend towards juristocracy is arguably one of the most significant developments in late-twentieth and early-twenty-first century government. Armed with judicial review procedures, constitutional courts in most leading democracies have been frequently called upon to determine a range of matters, from the scope of expression and religious freedoms, privacy and reproductive rights, to public policies pertaining to education, immigration, criminal justice, property, commerce, consumer protection, and environmental regulation. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues such as same sex marriage, limits on campaign finance, or affirmative action have become a common phenomenon. This is true in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary, and where courts have long played a significant role in policy-making and also in younger constitutional democracies that have established active judicial review mechanisms only in the past few decades». On juristocracy see C. Closa, *Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* in *International Journal of Constitutional Law*, 2006, p. 581.

policy-making institution, competing with the thoroughly political branches of government[5].

A different qualification of the current evolved judicial role – in fact not necessarily in opposition to the previous one – is best caught by a distinct reasoning[6]. According to this reading, it is essential to acknowledge that «*the introduction of constitutional jurisdiction in Europe has not been the product of an evolution, but rather of a revolution*»; and that what is most needed is «*a theory of jurisdiction more descriptive of its true nature than the theory of the "automaton judge", a theory that would accentuate the creative moment*».

A new adequate and contemporary theory of jurisdiction needs being founded upon an assessment of its authentic nature – as distinct from the one traditionally linked to it –, a meaning of its nature that ought to distance itself from the reductive orthodox view and include a creative moment. Eventually, this theory – to be developed as yet – promises to be consistent with the innovative idea of a living judiciary appropriately acting within the current non-traditional complex legal context[7].

1.2 New perspectives on diversity in the judiciary

Thus sketched the need of a new perspective on the judiciary, it is time now to approach the second main issue, namely, "identity" and "diversities" and their mutual interaction with the judicial system. The issue must be critically taken into account on the background of the traditional constitutional theory that has shaped the role of the judiciary – both as to its functions and to the organisation - as part of the ideological construction of the nation-state.

The main feature of the nation-state – indeed, its very historical *raison d'être* – is the emphasis on unity and uniformity: one nation, one language, one law, (originally even) one religion (*cujus regio ejus et religio)*, since the peace

[5] Of course, when the political branches are seen as acting against the constitution, a proactive intervention by the judiciary in support of mainstream constitutionalism is to be qualified correspondingly, as suggested in R. Toniatti, *Non-Deferential Judicial Checks and Balances and Presidential Policies*, in *DPCE online*, 2021, p. 989.

[6] These are the words of F. Rubio LLorente, in A. Pizzorusso (ed.), *Law in the Making. A Comparative Survey*, Berlin-Heidelberg, 1988, p. 165.

[7] See R. Toniatti, *A Living Judiciary for a Living Law: Constitutional Transitions and Governmental Checks and Balances*, 2016 (International Conference on "Judicial Power in the Countries in Transition", Moscow, May 2016) in http://cocoaproject.eu/index.php/co-co-a-publications?id=7

of Augsburg (1555), whereby individuals were expected to share the same religion of the prince (either Roman Catholic or Protestant) in the in Germany.

Since then, and in particular in the second half of the 20th century, the pluralist paradigm has deeply evolved into being itself a typical competing character of (nation)-states in Europe, certainly with regard to religion and – to some extent - to language as well[8]. The normative framework is still one of legal monism, although some relevant exceptions to it are accepted by national governments in order to accommodate some space for legal pluralism (especially inclusive of religious law in family matters)[9].

The (nation)-state continues being the main theoretical reference of organisation of all polities in Europe, although many relevant functions are either transferred to or exercised within the supra-state setting of the European Union. Furthermore, while the "nation" also holds on as the main reference of political organisation, its compatibility with the pluralist paradigm is confirmed by all those countries that have adopted a sophisticated domestic order open to the protection of national and language minorities or communities: this is the case of Austria, Belgium, Finland, Italy, Spain, Switzerland, of Norway, Sweden and Finland with regard to the Sami, and of *all* the countries of Central, Eastern, and South-Eastern Europe.

On the ground provided by their own respective legal system, I would argue that protection of national minorities and the pluralist principle itself have become a component of the "constitutional traditions common to the member states" elaborated by the Court of Justice of the EU and formalised in art. 6 of the treaty on the EU as a source of EU law[10].

The consolidation of the plural paradigm allowing a new way of being and conceiving of the nation as a founding concept is suggested also by the symptomatic conclusion, in 1995, of the Framework Convention for the Protection of National Minorities (FC) promoted by the Council of Europe:

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[8] See F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 3rd ed., Milan, 2021; R. Toniatti, *La tutela delle minoranze linguistiche nello spazio costituzionale europeo*, in A. Sperti - R Tarchi (a cura di), *Minoranze e maggioranze nella democrazia pluralista*, Pisa, 2020.

[9] R. Toniatti, *Consensual Legal Pluralism: Assessing the Method and the Merits in Agreements between State and Church(es) in Italy and Spain*, in C. Piciocchi - D. Strazzari - R. Toniatti (eds.), *State and Religion: Agreements, Conventions and Statutes*, Naples, 2021.

[10] R. Toniatti, *Los derechos del pluralismo cultural en la nueva Europa*, in *Revista Vasca de Administración Pública*, 2000, p. 17.

the very choice of the denomination of "*national* minorities" clearly implies some separation between *citizenship* of one state and sharing the condition of being the *member of a different nation*[11].

In fact, most European (nation)-states are suitable to be regarded as "culturally compound systems", just as federal (nation)-states are territorially compound systems. Although basically the general setting is one of *equal undifferentiated citizenship*, new forms of *cultural citizenship* are to be perceived in constitutional rules and legislative implementation concerning the status of minorities, cultural citizenship referring to the content of rules that combine the value of equality with the pluralist principles affecting diversity.

The law of diversity itself is a consistent development of equality and proves to be able to be compatible with both the idea of the nation (equal citizenship) as well as the principle of pluralism (cultural citizenship).

[11] Reference to the text of a few general provisions does help to emphasise the significant impact of the FC on those features of unity and uniformity indicated as characterising the traditional understanding of the concept of "nation": art. 1 «The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation»; art. 4 «1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. 2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. 3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination«; art. 5 «1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. 2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation»; art. 6 «1. The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media. 2. The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity».

1.3 A new constitutional space for identities in the judiciary.

One of the consequences to be drawn from these introductory remarks is that policies of normative accommodation of diversities do contribute to the efficient and shared governance of divided societies. Diversities are not (any longer) repressed, nor are they (any longer) denied[12].

It is essential, nevertheless, to avoid any over-simplification and acknowledge that societies may be divided along several lines (national/ethnic, linguistic, religious, ideological, etc.) and that each polity invariably selects those diversities of theirs that need being accommodated.

Furthermore, one has to bear in mind that the qualification of "divided societies" does not necessarily mean "conflictual societies". In the context of this paper, diversities we are concerned with are established and autochthonous diversities (national/ethnic, linguistic, to a much lesser extent religious). The specification is needed in order to avoid an automatic and uncritical application of the same rules and their rationale to all the minorities - other than those indicated above – who live in the same polity. What matters is not the question of citizenship as it is the historical circumstance of "belonging to the land" and of sharing the territory as their own, just as it happens with other communities[13]. It is this circumstance that not only allows but makes it necessary to deal with diversities within the frame of the nation-state and its original incomplete and insufficient construction of to the relevance of diversities to the institutional organisation of the state.

This is the premise for considering the impact of diversities and plurality of identities on the judiciary and arguing in support of the idea of a "reflective judiciary" that rules out discrimination directed to keeping those diversities out of the judiciary and that, at the same time, is structured in order to be aware and inclusive of them. The more the judicial function is crucial to the extent of being qualified as "juristocracy", the more the crucial issues connected to diversities require a normative guaranty for pluralism within the judiciary itself.

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[12] See R. Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in T. Bonazzi and M. Dunne (eds.), *Citizenship and Rights in Multicultural Societie*s, London, 1996.

[13] See R. Toniatti (a cura di), *Minoranze autoctone e altre minoranze*, Milan, 2022, available in http://www.liatn.eu/; see also R. Medda-Windischer, C. Boulter - T. H. Malloy (eds), *Extending Protection to Migrant Populations in Europe. Old and New Minorities*, London, 2019.

A judiciary organised in conformity with the paradigm of cultural pluralism marks a synthesis between uniformity and equality, on the one hand, and diversity and differentiation, on the other[14].

Of course, the task of reflecting diversities within the judiciary does not – and is not meant to - transform the judiciary itself into a "representative" institution. The focus here is on sociological representation and not on representation bearing any legal or political significance; it is on mirroring somehow the outer society within the judicial institution and not on carrying on any political will or substantive interests – if not the one not to be discriminated – into judicial proceedings[15].

The phenomena we are dealing with are inevitably divisive *within* scholarship and involve innovative choices that may be at odds with established legal and constitutional theory[16].

Ultimately, the main question that we may end up debating is whether «*constitutional law is to adapt itself to the living political reality of the jurisdiction it is meant to rule* or whether *it is the exclusive role of constitutional law to establish a binding normative frame irrespective of the peculiarities of the political reality*». In other words, the choice is between «*adaptive constitutional law*», or «*transformative constitutional law*».

[14] The phenomenon has been defined as «the projection of institutional, cultural, linguistic, religious and ethnic pluralism on the judiciary», in M. Caielli and A. Mastromarino, *Jurisdiction and Pluralisms: The Temptations of a Reflective Judiciary*, in *Federalismi.it*, 2018, 5; more in particular, the same Authors approach the topic by noting that «some composite and fragmented legal systems have decided to preserve the institutional unity of the judiciary, incorporating social pluralism in the composition of judicial organs by imposing criteria for the selection of both constitutional and ordinary judges related to, for example, gender, ethnicity, territorial origin, religious or linguistic affiliation, thus exposing the myth of neutral and impersonal adjudication and constitutional decision-making».

[15] The rationale of the reflective judiciary has been described as oriented to a plurality of aims: «the search for or achievement of a certain degree of judicial diversity seeks to meet multiple needs. For example, measures adopted to increase the presence of women in the judiciary have been traditionally conceived as a means of alleviating female exclusion from decision-making positions. But, at the same time, they can be also considered as a way to raise gender awareness in the courts and therefore counter act gender stereotyping and promote gender justice. Both these results are, in turn, a way to reduce the sense of isolation of courts from the community they serve and enhance the acceptability of judicial decisions», in M. Caielli and A. Mastromarino, *Jurisdiction and Pluralisms: The Temptations of a Reflective Judiciary*, in *Federalismi.it*, 2018, p. 6.

[16] See M. Comba, *Reflective Judiciary: more an illusion than a temptation*, in *Federalismi.it*, 2018, p. 173.

2. The reflective judiciary: the impact of diversities on the judiciary

Features of a reflective judiciary are already a reality – as we shall see – that is based on positive law as well as on practice. Hypothetically, such existing experiences and possible future developments may be framed within the wide perspectives of the fundamental multifaceted "right to a fair trial" and to the "right to a natural judge"[17].

2.1 The reflective judiciary and judicial independence

Independence, neutrality and impartiality of the judiciary as a whole as well as of individual judges are structural features of the Western constitutional legal tradition although they are differently ensured. Professional qualification and personal integrity of candidates are essential components of selection, in conformity with the respective civil law and common law systemic standards and procedures of recruitment.

In the common law tradition, recruitment takes place according to the so-called *meritocratic method*, which focuses on the personal individual record of candidates (*intuitus personae*).

In the UK, the method of selection and royal appointment from within the legal profession is rather opaque[18]. In the US, the method is very transparent, and it operates through a three-stage procedure which includes, first, a presidential nomination, later, a confirmation by the Senate and, eventually, the appointment by the President. Each one of the three stages happens to be administered by political institutions, whose political discretion is limited only by (constitutional or legislative) requirements, dealing with personal character, ethical standards and professional qualification of the appointees. Occasionally, in some 25-30 USA member

[17] See L. Montanari, *Le droit au juge dans le «droit constitutionnel global»*, in CoCoA Working Papers, 2019, available at https://cocoaproject.eu/images/MONTANARI_droit_au_juge_finale.pdf.

[18] Historically, in 1701 «the Act of Settlement removed the power of the King to appoint judges at pleasure and introduced new protections: tenure during good behavior and fixed judicial salaries.10 These safeguards protecting judges' impartiality were developed in parallel with the doctrine of parliamentary sovereignty, 11 so that an "independent judiciary" was understood as comprising independent individual judges, rather than seen as a separate and independent branch», in E. Delaney *Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom*, in *I•CON*, 2016, p. 752.

states, recruitment of state judges takes place through popular elections, that normally are regulated by their own rules, distinct from the ones that regulate competitive political elections. Again, the personal record of candidates does matter for achieving the eventual appointment.

On the contrary, in the civil law legal tradition, recruitment is of a *bureaucratic nature*, in the sense that modalities of admission into the judiciary are not different from the ones established for achieving a position in any department of public administration: a competitive exam, meant to check the possession of an appropriate professional education and of technical skills that are the outcome of higher training in the field, any assessment of the personal character of the appointees – other than moral integrity - being ruled out because it might serve as a screen for an improper selection on non-admissible ground (philosophical, ideological or religious worldview, political affiliation, social origin, gender, else). Each judge, therefore, is at least theoretically fungible with any other.

Nevertheless, also countries with a civil law tradition resort to the *meritocratic method* of recruitment for members of constitutional courts as well as for members of the two European Courts, namely the European Court of Human Rights and the Court of Justice of the European Union[19]. The same happens – although with a variety of nuances that are to be explained by the specificity of the respective context – with regard to other international courts[20].

[19] On the case-law of the European Court of Human Rights on judicial independence see G. Raimondi, *L'indipendenza delle corti nel diritto costituzionale, comparato ed europeo: la prospettiva della Corte europea dei diritti dell'uomo*, in *Rivista di Diritti Comparati*, 2018, p. 3; R. Toniatti, *L'indipendenza dei giudici sovranazionali e internazionali*, in *Diritto pubblico comparato ed europeo,* 2010, p. 1763; L. López Guerra, *The national judge and judicial independence,* in A. Torres Pérez (ed.), *The independence of the international judiciary: Concept, methods, and current challenges*, in special issue, *Maastricht Journal of European and Comparative Law*, 2017, p. 459.

[20] For example, the Rome Statute of the International Criminal Court makes explicit reference to the principle of the reflective judiciary: «Composition and administration of the Court. See art.36: 3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. (b) Every candidate for election to the Court shall: (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court; (c) Every candidate for election to the

In such cases, the shared underlying rationale for the adoption of the meritocratic method is the consequence of the need of *some sort of compensation* between, on the one hand, the loss of full political and legislative discretion (either by national Parliaments, domestically, or by sovereign member states as such in the international and supranational contexts) and, on the other hand, the attribution of powers of adjudication to a judicial institution.

Such attribution produces an impact on the outcome of the legislative function (to the extent of preventing the applicability or of invalidating legislation) and is therefore to some extent compensated by the power of selecting and appointing the members of such courts: in fact, they are meant to perform a role quite in contrast with the traditional and mechanistically interpreted principle of separation of powers, not sufficiently integrated by an anticipation of what in the United States is referred to as the "judicial philosophy" of candidates[21]. It is this specific element of the appointment process that contributes to qualifying the method of judicial recruitment as functional to the strengthening of the principle of checks and balances.

One could (over)simplify the understanding of the evolutionary dynamics by saying that innovative and non-traditional courts - as, in particular, constitutional, international and supranational courts - require just as innovative and non-traditional methods of recruitment, selection and appointment.

Furthermore, beyond the compensation theory, the substantial expansion of judicial adjudication (both constitutionally and supra/internationally) has raised equivalent challenges as to the legitimacy of the substantive and ultimately political role plaid by such courts: hence the "need" or the "temptation" to compensate the gap of political legitimacy with some connections with main structural components of the plural fabric of society.

Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court […] 8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges. (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children».

[21] See R. Toniatti, *Appointing Power e indirizzo politico: le nomine del Presidente Reagan alla Corte Suprema*, in *Quaderni Costituzionali*, 1987.

Once again, one could (over)simplify the understanding of the evolutionary dynamics by saying that the quest for legitimacy of juristocracy requires an approach towards a reflective judiciary, a "reflective juristocracy" being the source of inspiration of the current trend.

2.2 The reflective judiciary: rules and practices in Western constitutional democracies

The phenomenon of the reflective judiciary is likely to have its historical roots in territorially compound polities (federal systems: Austria, Germany), and has its developments in culturally (language-wise) compound federal polities (Belgium, Switzerland) and has experienced further developments in polities where societal pluralism is acknowledged as a structural reality[22].

It is important to notice that such practice takes on a plurality of forms, and is either regulated by the law – in particular, as a matter of constitutional design – or implemented on a conventional and political ground.

In the first group, the Constitution of South Africa (1996) plays an important role as it has been the first to formalise the principle of the reflective judiciary, in conformity with its inspiration open to pluralism and inclusiveness: art. 174, 2nd paragraph ("appointment of judicial officers") – after taking due care of gender representation («any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen») – states that «the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed».

An assessment of the effects of implementation of this regulation suggests that «seeking to give effect to the transformative vision embodied in the Constitution, the past decade of constitutional democracy in South Africa has seen the racial and gender makeup of the judiciary almost completely altered»[23].

[22] See J. Woelk (ed.), *Jurisdiction and Pluralisms: Judicial Functions and Organisation*, in Special Symposium, *Perspectives on Federalism*, 2020, I.

[23] According to statistical data, «in 1994, South Africa's judiciary was overwhelmingly white, male, drawn from the ranks of the middle and upper classes, and

The same format has been adopted also by the Constitution of Zimbabwe (2013), whose art. 184 («Judicial appointments to reflect society») says that «appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe».

Although the precedent of constitutions of African countries may be questioned in this context that admittedly focuses on the Western legal tradition, the two examples provided here are still quite interesting and meaningful, certainly with regard to the cultural environment and the international consultancies that supported the drafting of the Constitution of South Africa[24].

The Western legal tradition is not in doubt when, next, we recall the Canadian experience.

The Constitution Act, 1982 (formerly, before the process of patriation, the British North America Constitution Act, 1867), sets the general rule (Chapter VII, Judicature) in Section 98 ("Selection in Quebec") which establishes that «the Judges of the Courts of Quebec shall be selected from the Bar of that Province». The rule is manifestly in conformity with the need to protect the French-speaking community, its civil law legal system and the French language that expresses it. The rule thus appears quite in line with the need to provide a fair "reflection" in the Canadian national judicial organisation of the cultural, linguistic and legal context of Quebec.

Furthermore, sec. 6 of the Supreme Court Act (1985) mandates that «at least three of the judges shall be appointed from among the judges of

Afrikaans speaking. In 1994, there were two black judges and one female judge amongst the two hundred or so judges that made up the judiciary. By 2005, the number of black judges had increased exponentially, and so had the number of women appointed, although not to the same extent. The Constitutional Court is an interesting case in point. At the Constitutional Court's founding in 1994, it was composed of only three black and two female judges. Today, the Constitutional Court is made up of two white males and six black males, including the chief justice, and three females. However, women make up less than 10 per cent of the overall South African judiciary», in P. E. Andrews, *The South African Judicial Appointments Process*, in *Osgoode Hall Law Journal*, 2006, 565.

[24] See N. Steytler and Z. Ayele, *The Judiciary in Federal Systems in Africa*, in *Perspectives on Federalism*, 2020, p. 102, where, in spite of the acknowledgement of the importance of language and ethnic diversity to the purpose of adopting a federal arrangement, only the use of different languages is dealt with.

the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province»[25].

The rationale of such regulation has been clearly construed by the Supreme Court itself in *Reference Re Supreme Court* (*Supreme Court Reference*), 2014: the Court stated that «the purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights». Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada[26].

It is interesting also to recall that, by a convention of the constitution, the same number of (three) members out of the nine justices of the Supreme Court are selected from the Bar of Ontario.

It is clear that the Canadian model combines the kind of "institutional" reflection that is typical of federal systems – as indicated above – with the "cultural" reflection of a minority that is part of the national community[27].

The same sort of combination, framed as a consequence of the linguistic ground supporting the federal arrangement, is present in Belgium[28].

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[25] See also sec. 6.1 of the Supreme Court Act that confirms and qualifies the link («For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province»).

[26] The Court added that «this broader purpose was succinctly described by Professor Russell in terms that are well supported by the historical record: […] the antipathy to having the Civil Code of Lower Canada interpreted by judges from an alien legal tradition was not based merely on a concern for legal purity or accuracy. It stemmed more often from the more fundamental premise that Quebec's civil-law system was an essential ingredient of its distinctive culture and therefore it required, as a matter of *right*, judicial custodians imbued with the methods of jurisprudence and social values integral to that culture». (at 49, emphasis in original).

[27] On the Canadian judiciary and pluralism – but with no reference to the reflective judiciary - see F. Bérard - J.F. Gaudreault-DesBiens, *The Challenge of Diversity in a Multinational Federation: the Impact of the Judiciary on Pluralism in Canada*, in *Perspectives on Federalism*, 2020, p. 55. An insightful presentation of the issue is provided in E. Ceccherini, *In Judiciary We Trust. The Reflective Judiciary in Canada*, in *Federalismi.it*, 2018.

[28] See P. Popelier, *Judicial Functions and Organisation in Belgium*, in *Perspectives on Federalism*, 2020, 78; on linguistic separatism in Belgium and for a critical assessment of the

In the Constitution there is no provision concerning such features of the Constitutional Court, that is to be found in the (organic law) Special Act on the Constitutional Court (1989). The composition of the Court is regulated by art. 31: «The Constitutional Court shall be composed of twelve judges: six Dutch-speaking judges, who form the Dutch language group of the Court, and six French-speaking judges, who form the French language group of the Court»[29].

Furthermore, art. 33 mandates that «the Dutch-speaking and French-speaking judges of the Constitutional Court shall elect a Dutch-speaking and French-speaking president from their respective language groups». The linguistically divided presidency is definitely a significant symbol of the reflective judiciary in Belgium.

That the composition is determined mainly by the format of the federal structure rather than by the multi-language fabric of society is evidenced by the absence of a requirement including German-speaking members of the Court.

The principle of linguistic parity inspires the organisation of the whole judiciary (civil, criminal and administrative courts), that the Constitution attributes to the federal state.

The same pattern of division is adopted also for the organisation of the High Council of Justice for all Belgium: art. 151 establishes that «the High Council of Justice is composed of a Dutch-speaking college and of a French-speaking college. Each college comprises an equal number of members and is constituted with equal representation, on the one hand, of judges and officers of the public prosecutor's office elected directly by their peers under the conditions and in the manner determined by the law and, on the other hand, of other members appointed by the Senate by a two-thirds majority of the votes cast, under conditions established by the law».

Yet another federal polity - Switzerland – is modelled according to the twofold need to reflect pluralism in society and, indirectly, the cultural and linguistic identity of the Cantons. Nevertheless, the 1999 Constitution

complex identification of a *régime* of *communautarisme juridictionnel* and of features of an authentic reflective judiciary see A. Mastromarino, *Linguistic separation or jurisdictional communitarianism? Reflective judiciary in Belgium*, in *Federalismi.it*, 2018.

[29] The same provision also clarifies the criteria for referring judges to one or another of the two language groups: «the title of Dutch-speaking judge or of French-speaking judge of the Constitutional Court shall, for the judges referred to in Article 34, § 1, 1°, be determined by the language of their degree, and for the judges referred to in Article 34, § 1, 2°, by the parliamentary language group to which they last belonged».

is silent in this regard. And yet, while a total of 38 judges sit on the bench of the Federal Supreme Court, the gender balance is based on 11 women and 26 men serve as federal judges. Furthermore, of the federal judges currently serving on the bench**,** 3 have Italian, 11 French and 23 German as their native language[30].

The same rationale - combining, on the one hand, territorial self-government by a linguistic minority in a regional system such as Italy and, on the other, adopting a perspective of reflecting distinct cultural identities within the judicial organisation - is regulated by sources of law.

In fact, the constitutional protection of language minorities in South Tyrol establishes a reservation and a proportional distribution between the Italian, German and Ladin language groups of the existing posts in the province of Bolzano extended to the personnel of the judging and prosecutorial courts. The stability of assignment in the same province is guaranteed for magistrates belonging to the German linguistic group and to the Ladin linguistic group, without prejudice to the rules of the judicial system on incompatibilities. The criteria for assigning positions reserved for German-speaking and Ladin-speaking citizens, also apply to judicial personnel in the province of Bolzano.

Furthermore, it is required that a member of the Council of State (the national highest administrative court) being a member the German-speaking or of the Ladin-speaking group must be part of «the sections of the Council of State invested with the appeal judgments on the decisions of the autonomous Bolzano section of the regional court of administrative justice».

The European polity that, without any reference to a decentralised system of territorial government – which has its own formal relevance in the formal separated judicial organisation – has focused on societal diversities exclusively in order to achieve a fair representation of it on the judiciary is most likely to be the United Kingdom[31]. In fact, a policy of favour and support for a reflective judiciary has been adopted and implemented for several years: in England and Wales, a new attention on issues of fair gender representation and the growth of multiculturalism have

[30] The Federal Supreme Court numbers 19 deputy judges, who are also elected by the Federal Assembly. Of the deputy judges currently sitting on the bench**,** four have Italian, six French and eight German as their native language. Six of the deputy judges are women.

[31] For a well-known criticism of the system of judicial selection see J.A.G. Griffith, *The Politics of the Judiciary*, 5th ed., 1997.

produced a specific policy in judicial recruitment, with the aim of increasing judicial diversity in the judiciary, with regard to the presence of women and lawyers of Oriental, African or West Indies origin.

The formal ground for this policy is the Constitutional Reform Act (2005) that has established the Judicial Appointments Commission (JAC). Provided that, according to section 63.2, «selection must be solely on merit», the provision states that «the Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments» (sec. 64.1)[32].

Preparatory work of the Constitutional Reform Act gave evidence to «a shared perception that the lack of diversity threatened the legitimacy of the judicial system» and emphasised how «the calls for reflective representation bundled together two distinct concepts: descriptive representation, in which "one person represents another by being sufficiently like him" and substantive representation, in which the representative and the represented share substantive values»[33].

At the end of this short survey, it is clear that the principle of the reflective judiciary is not incompatible with the Western legal tradition and, in fact, is written in constitutional and legislative sources, or practiced on conventional ground: once again, it is fundamental to stress that "reflection" cannot be read as synonymous of "representation" and, consequently, that a reflective judiciary is not to be misinterpreted as a representative judiciary.

This character holds true irrespectively when applied to international courts such as the European Court of Human Rights[34], to higher courts in

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[32] See K. Malleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?,* in K. Malleson and P. H. Russell (eds.), *Appointing Judges in an Age of Judicial Power. Critical Perspectives from Around the World*, Toronto, 2006; C. Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions. A review of research, policies and practices*, Commission for Judicial Appointments, 2005; K. Malleson, *Justifyng Gender Equality on the Bench: Why Difference Won't Do*, in *Feminist Legal Studies*, 2003, p. 1; L. Barmes and K. Malleson, *Lifting the Judicial Identity Blackout* , in *Oxford Journal of Legal Studies*, 2018, p. 357.

[33] The quotations are from E. Delaney *Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom*, in *I•CON*, 2016, p. 763 and 765. For the debate on judicial diversity in the United States see J. A. Wynn, Jr. and E. P. Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, in *Albany Law Review*, 2004, p. 775.

[34] Let us recall that, on the one hand, «the Court shall consist of a number of judges equal to that of the High Contracting Parties» (art. 20 ECHR) and yet that "the

federal polities (even when selected by a parliamentary chamber that are representative of member states), and also when politically suggested and legally required by societal conditions of pluralism.

3. The phenomenon in the Western Balkans: (i) divided societies and protection of minorities

In the Western Balkans – in some countries more than in others - societal conditions of pluralism require a structural incorporation of the principle of the reflective judiciary.

The focus here is on Kosovo, Montenegro, and North Macedonia, although traces are to be found elsewhere as well (e.g., in Bosnia and Herzegovina). We are suggesting a comparison by difference between, on the one hand, Kosovo and North Macedonia and, on the other, Montenegro.

In the first two cases, divided societies are also pathologically conflictual and in due time needed the intervention of the international community. Apparently, the effects of constitutional equal citizenship *per se* are not able to overcome a deeply felt divisiveness and establish a sufficient level of awareness of a shared sense of "national" aggregation. In the case of Montenegro, on the contrary – although the context is not non-conflictual – there is a constitutional setting providing for quite a strong protection of minorities that, however, does not reach the composition of the judiciary.

As an outcome of this comparison, one may say that the principle of the judicial reflection of societal diversities is obviously an instrument for managing conflictual relations among the distinct groups by establishing a consociational regime; and that the purpose of "power sharing" is achieved through negotiations and with the support of the international community.

The same comparison may also suggest that the arrangement inspired by that same principle may be temporary and be eventually replaced by a composition of the judiciary indifferent to diversities.

judges shall sit on the Court in their individual capacity" (art. 21 ECHR). See R. Toniatti, *L'indipendenza dei giudici sovranazionali e internazionali*, in *Diritto pubblico comparato ed europeo*, 2010, p. 1763.

However, the Canadian and European experiences mentioned above allow to doubt that the solution may be provisional, as long as diversities and widely felt awareness about them are themselves permanent.

The comparative analysis will focus the text of their respective constitutional sources, assuming that the constituent choice is adequately representative of the political will to establish an appropriate balance between safeguard of pluralism and protection of the national state unitary judicial function.

The indicators of the status of societal divisions are found in the text of the preamble and of provisions of the constitution, in conformity with an approach of "descriptive comparative law" as a preliminary stage for further critical analysis, giving due account to the fact that, at the same time, those textual sources provide also indicators supporting equal citizenship and non-discrimination, showing the acknowledgement of the need of a balanced approach[35].

3.1 Constitutional provisions framing a divided society and protecting minorities in North Macedonia

The ethnic conflicts in North Macedonia requested an intervention by the international community that led to the conclusion of the fundamental 2001 Ohrid Framework Agreement (FA). The FA was signed by the different ethnic factions directly involved and endorsed by the European Union and the United States. It had the purpose of promoting «the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens».

One of the basic principles of the FA (1.3) reads that «the multi-ethnic character of Macedonia's society must be preserved and reflected in public life».

The core content of the FA is centred on "Non-Discrimination and Equitable Representation": «The principle of non-discrimination and equal treatment of all under the law will be respected completely. This principle will be applied in particular with respect to employment in public

[35] See J. Frosini, *Mere dichiarazioni o fonti costituzionali? Uno studio comparato dei preamboli alle Costituzioni dei Paesi dell'ex Jugoslavia*, p. 123; and L. Montanari, *Le nuove Costituzioni: un'introduzione* in L. Montanari (a cura di), *L'allargamento dell'Unione europea e le transizioni costituzionali nei Balcani occidentali Una raccolta di lezioni*, Naples, 2022, p. 77.

administration and public enterprises, and access to public financing for business development» (art. 4.1).

The provision continues by stating that «Laws regulating employment in public administration will include measures to assure equitable representation of communities in all central and local public bodies and at all levels of employment within such bodies, while respecting the rules concerning competence and integrity that govern public administration. The authorities will take action to correct present imbalances in the composition of the public administration, in particular through the recruitment of members of under-represented communities. Particular attention will be given to ensuring as rapidly as possible that the police services will generally reflect the composition and distribution of the population of Macedonia, as specified in Annex C» (art. 4.2).

Furthermore, it is stated that «for the Constitutional Court, one-third of the judges will be chosen by the Assembly by a majority of the total number of Representatives that includes a majority of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia. This procedure also will apply to the election of the Ombudsman (Public Attorney) and the election of three of the members of the Judicial Council» (art. 4.3).

The FA includes the text of several amendments to the Constitution that provide a rigid system of reflective judiciary, as we'll see later on.

The new Post Ohrid text of the preamble reads: «The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romany people, the Bosniak people *and others* taking responsibility for the present and future of their fatherland, aware of and grateful to their predecessors for their sacrifice and dedication in their endeavours and struggle to create an independent and sovereign state of Macedonia, and responsible to future generations to preserve and develop everything that is valuable from the rich cultural inheritance and coexistence within Macedonia, equal in rights and obligations towards the common good—the Republic of Macedonia— […] have decided to establish the Republic of Macedonia as an independent, sovereign state, with the intention of establishing and consolidating the rule of law, guaranteeing human rights and civil liberties, providing peace and coexistence, social justice, economic well-being and prosperity in the life of the individual and the community […]».

The text of the Constitution offers several provisions dealing with protection of minorities within a framework inspired by the principle of pluralism.

As to languages, art. 7 establishes that «(1) The Macedonian language, written using its Cyrillic alphabet, is *the* official language throughout the Republic of Macedonia and in the international relations of the Republic of Macedonia. (2) Any other language spoken by at least 20 percent of the population is also an official language, written using its alphabet, as specified below. (3) Any official personal documents of citizens speaking an official language other than Macedonian shall also be issued in that language, in addition to the Macedonian language, in accordance with the law […] (5) In the organs of the Republic of Macedonia, any official language other than Macedonian may be used in accordance with the law».

The regulation takes into consideration also the use of minority languages in local government: art. 7.(4) establishes that «any person living in a unit of local self-government in which at least 20 percent of the population speaks an official language other than Macedonian may use any official language to communicate with the regional office of the central government with responsibility for that municipality; such an office shall reply in that language in addition to Macedonian. Any person may use any official language to communicate with a main office of the central government, which shall reply in that language in addition to Macedonian».

The same provision (art. 7) further states that «(6) In the units of local self-government where at least 20 percent of the population speaks a particular language, that language and its alphabet shall be used as an official language in addition to the Macedonian language and the Cyrillic alphabet. With respect to languages spoken by less than 20 percent of the population of a unit of local self-government, the local authorities shall decide on their use in public bodies».

Another basic constitutional safeguard of a balanced system is formalised in the principle of "equitable representation": «The fundamental values of the constitutional order of the Republic of Macedonia are: the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution; the free expression of national identity. Equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life» (art. 8).

The approach to religious pluralism is regulated by art. 19: «1. The Macedonian Orthodox Church, as well as the Islamic Religious Community

in Macedonia, the Catholic Church, Evangelical Methodist Church, the Jewish Community and other Religious communities and groups are separate from the state and equal before the law. 2. The Macedonian Orthodox Church, as well as the Islamic Religious Community in Macedonia, the Catholic Church, Evangelical Methodist Church, the Jewish Community and other Religious communities and groups are free to establish schools and other social and charitable institutions, by way of a procedure regulated by law».

Ethnic, racial or religious hatred or intolerance are criminalised by the Constitution itself and are established as well as limitations to freedom of association, in general, and to political parties in particular[36].

The Constitution introduces an entrenched procedural requirement in the decision-making process on issues affecting the protection of minorities and establishes a specific institution for advising the Assembly on issues affecting the minorities.

Firstly, reference is to art. 69.2: «For laws that directly affect culture, use of language, education, personal documentation, and use of symbols, the Assembly makes decisions by a majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who claim to belong to the communities not in the majority in the population of Macedonia. In the event of a dispute within the Assembly regarding the application of this provision, the Committee on Inter-Community Relations shall resolve the dispute».

From the second point of view, Article 78 provides for the institution of a Committee for Inter-Community Relations: in detail, «(2) The Committee consists of seven members each from the ranks of the Macedonians and Albanians within the Assembly, and five members from among the Turks, Vlachs, Romanies and two other communities. The five members each shall be from a different community; if fewer than five other communities are represented in the Assembly, the Public Attorney, after consultation with relevant community leaders, shall propose the remaining

[36] See the text of art. 20: «Citizens are guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions. Citizens may freely establish associations of citizens and political parties, join them or resign from them. The programmes and activities of political parties and other associations of citizens may not be directed at the violent destruction of the constitutional order of the Republic, or at encouragement or incitement to military aggression or ethnic, racial or religious hatred or intolerance».

members from outside the Assembly. (3) The Assembly elects the members of the Committee».

The functions of the Committee are indicated as follow: art. 78.(4) says that «the Committee considers issues of inter-community relations in the Republic and makes appraisals and proposals for their solution. (5) The Assembly is obliged to take into consideration the appraisals and proposals of the Committee and to make decisions regarding them. (6) In the event of a dispute among members of the Assembly regarding the application of the voting procedure specified in Article 69(2), the Committee shall decide by majority vote whether the procedure applies».

Although we are not specifically dealing here with substantive regulation of minorities, it is interesting to underline how the Constitution refers to the same phenomenon with a variety of styles: instead of using the word "minorities", the text mentions "persons belonging to all communities", or "communities", or "members of under-represented communities", or "communities not in the majority in the population of Macedonia" or, lastly – as in art. 78 –, uses directly the denomination of the groups themselves (Macedonians, Albanians, Turks, Vlachs, Romanies).

3.2 Constitutional provisions framing a divided society and protecting minorities in Kosovo

The Constitution of Kosovo brilliantly states, under the heading "Equality Before the Law" (art. 3), that «1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities». Since the outset, it is to be noticed how the very word "minority" is avoided and is normally replaced by "community".

The principle of pluralism is acknowledged and is the source of inspiration of the provisions protecting minorities, with regard to qualification and use of languages[37] and even state (we dare not say "national") symbols: art. 6 states that «1. The flag, the seal and the anthem are the state symbols of the Republic of Kosovo all of which reflect its multi-ethnic character».

[37] See art. 5: «1. The official languages in the Republic of Kosovo are Albanian and Serbian. 2. Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law».

The Constitution of Kosovo has general rules on collective rights of communities as such, as well as on individual rights of their members and on the specific duties of the state.

The long list of such collective and individual rights of minorities and their members reproduces and adapts the regulation contained in the Framework Convention for the Protection of National Minorities of the Council of Europe. It is noteworthy that the Kosovo Serb Community – for obvious contextual reasons – is expressly mentioned and addressed with specific provisions.

In this perspective, see the whole of Chapter III (Rights of Communities and Their Members), starting with art 57 (General Principles): «1. Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in chapter II of this Constitution. 2. Every member of a community shall have the right to freely choose to be treated or not to be treated as such and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice. 3. Members of Communities shall have the right to freely express, foster and develop their identity and community attributes. 4. The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the law of the Republic of Kosovo and shall not violate the rights of others».

The responsibilities of the state are listed in art. 58: «1. The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities. The Government shall particularly support cultural initiatives from communities and their members, including through financial assistance. 2. The Republic of Kosovo shall promote a spirit of tolerance, dialogue and support reconciliation among communities and respect the standards set forth. 3. The Republic of Kosovo shall take all necessary measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, cultural, linguistic or religious identity. 4. The Republic of Kosovo shall adopt adequate measures as may be necessary to promote full and effective equality in all areas of economic, social, political and cultural life, among members of communities and the effective participation of communities and their members in public life and decision making. Such measures shall not be considered to be an act of discrimination».

The same provision includes specific regulations on culture and the religious dimension of identities: «5. The Republic of Kosovo shall promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo. The Republic of Kosovo shall have a special duty to ensure an effective protection of the entirety of sites and monuments of cultural and religious significance to the communities».

A proactive orientation of the state is the object of a specific obligation, reinforced by the prohibition of policies of assimilation of minorities, once again echoing the Framework Convention: «6. The Republic of Kosovo shall take effective actions against all those undermining the enjoyment of the rights of members of Communities. The Republic of Kosovo shall refrain from policies or practices aimed at assimilation of persons belonging to Communities against their will, and shall protect these persons from any action aimed at such assimilation. 7. The Republic of Kosovo ensures, on a non-discriminatory basis, that all communities and their members may exercise their rights specified in this Constitution».

More in detail, rights of Communities and their Members are considered in art. 59: «Members of communities shall have the right, individually or in community, to: 1. express, maintain and develop their culture and preserve the essential elements of their identity, namely their religion, language, traditions and culture; 2. receive public education in one of the official languages of the Republic of Kosovo of their choice at all levels».

The same provision continues by establishing that «Members of communities shall have the right, individually or in community to 3. receive pre-school, primary and secondary public education, in their own language to the extent prescribed by law, with the thresholds for establishing specific classes or schools for this purpose being lower than normally stipulated for educational institutions; 4. establish and manage their own private educational and training establishments for which public financial assistance may be granted, in accordance with the law and international standards; 5. use their language and alphabet freely in private and in public; 6. Use their language and alphabet in their relations with the municipal authorities or local offices of central authorities in areas where they represent a sufficient share of the population in accordance with the law. The costs incurred by the use of an interpreter or a translator shall be borne by the competent authorities; 7. use and display community symbols, in accordance with the law and international standards; 8. have personal names registered in their

original form and in the script of their language as well as revert to original names that have been changed by force; 9. have local names, street names and other topographical indications which reflect and are sensitive to the multi-ethnic and multi-linguistic character of the area at issue».

The field of media and communication is specifically addressed: «[Members of communities shall have the right, individually or in community, to] 10. have guaranteed access to, and special representation in, public broadcast media as well as programming in their language, in accordance with the law and international standards; 11. to create and use their own media, including to provide information in their language through, among others, daily newspapers and wire services and the use of a reserved number of frequencies for electronic media in accordance with the law and international standards. The Republic of Kosovo shall take all measures necessary to secure an international frequency plan to allow the Kosovo Serb Community access to a licensed Kosovo-wide independent Serbian language television channel».

Protection of minorities expands to the safeguard of freedom of association open to international contacts: «[Members of communities shall have the right, individually or in community, to] 12. enjoy unhindered contacts among themselves within the Republic of Kosovo and establish and maintain free and peaceful contacts with persons in any State, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage, in accordance with the law and international standards; 13. enjoy unhindered contacts with, and participate without discrimination in the activities of local, regional and international non-governmental organizations; 14. establish associations for culture, art, science and education as well as scholarly and other associations for the expression, fostering and development of their identity».

The regulation of recognition and protection of minorities is integrated by the establishment of an *ad hoc* Consultative Council for Communities (art. 60) which «acts under the authority of the President of the Republic of Kosovo» and «in which all Communities shall be represented» and whose composition includes «among others, [..] representatives of associations of Communities».

The mandate of the Consultative Council for Communities shall «1. provide a mechanism for regular exchange between the Communities and the Government of Kosovo. 2. afford to the Communities the opportunity to comment at an early stage on legislative or policy initiatives that may be prepared by the Government, to suggest such initiatives, and to seek to have

their views incorporated in the relevant projects and programs. 3. have any other responsibilities and functions as provided in accordance with law».

The Constitution (art. 61) also establishes an entitlement to representation in public institutions employment: «Communities and their members shall be entitled to equitable representation in employment in public bodies and publicly owned enterprises at all levels, including in particular in the police service in areas inhabited by the respective Community, while respecting the rules concerning competence and integrity that govern public administration».

3.3 Constitutional provisions framing a divided society and protecting minorities in Montenegro

The text of the preamble of the Constitution expresses a somehow sort of a balanced setting, combining references to a unitary frame – "citizens of Montenegro" – and to the distinctiveness of collective identities.

The relevant statements in such perspective are as follows: «The decision of the citizens of Montenegro to live in an independent and sovereign state of Montenegro, made in the referendum held on May 21, 2006. The commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law. The determination that we, as free and equal citizens, members of peoples and national minorities who live in Montenegro: Montenegrins, Serbs, Bosniacs, Albanians, Muslims, Croats and the others, are committed to democratic and civic Montenegro».

The same orientation is incorporated by the provision (art. 2) on sovereignty («Bearer of sovereignty is the citizen with Montenegrin citizenship. The citizen shall exercise power directly and through the freely elected representatives».

Significantly, the focus is on undifferentiated "Montenegrin citizenship" (art. 12): «In Montenegro there shall be a Montenegrin citizenship. Montenegro shall protect the rights and interests of the Montenegrin citizens. Montenegrin citizen shall not be expelled or extradited to other state, except in accordance with the international

obligations of Montenegro»; on prohibition of infliction of hatred[38] and of discrimination[39].

Equality is also proclaimed in very general terms (art. 17): «Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements. All shall be deemed equal before the law, regardless of any particularity or personal feature».

A special protection is safeguarded in situations of temporary limitation of rights and liberties (art. 25): «During the proclaimed state of war or emergency, the exercise of certain human rights and freedoms may be limited, to the necessary extent. The limitations shall not be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal feature […]»[40]. Furthermore «there shall be no abolishment of the prohibition of: inflicting or encouraging hatred or intolerance; discrimination; trial and conviction twice for one and the same criminal offence (*ne bis in idem*); forced assimilation».

The relevance of the factor of distinct identities is expressly regulated also with regard to the right of asylum (art. 44)[41], to prohibition of

[38] See art. 7: «Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited».

[39] See art. 8: «Direct or indirect discrimination on any grounds shall be prohibited. Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination. Special measures may only be applied until the achievement of the aims for which they were undertaken».

[40] The provisions continues: «There shall be no limitations imposed on the rights to: life, legal remedy and legal aid; dignity and respect of a person; fair and public trail and the principle of legality; presumption of innocence; defense; compensation of damage for illegal or ungrounded deprivation of liberty and ungrounded conviction; freedom of thought, conscience and religion; entry into marriage».

[41] See the text of art. 44: «A foreign national reasonably fearing from persecution on the grounds of his/her race, language, religion or association with a nation or a group or due to own political beliefs may request asylum in Montenegro. A foreign national shall not be expelled from Montenegro to where due to his race, religion, language or association with a nation he/she is threatened with death sentence, torture, inhuman degradation, persecution or serious violation of rights guaranteed by this Constitution. A foreign national may be expelled from Montenegro solely on the basis of a court decision and in a procedure provided for by the law».

censorship (art. 50)[42], to the limitation of freedom of association and of political parties (art. 55)[43].

The protection of minorities is specifically addressed by a procedural safeguard, and by a whole set of substantive provisions.

The Constitution qualifies the regulation of «the manner of exercise of the special minority rights» as a matter that – among others – requires a source of parliamentary legislation (art. 16.2).

Minority rights – reinforced by the constitutional prohibition of assimilation[44] – are specifically mentioned under the heading of "protection of identities" (art. 79). The list is long, wide and detailed and the reference is mainly to the notion of "minority nations" or "minority national communities" and the use of the noun "nation" and of the adjective "national" is indeed quite frequent: «Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they can exercise individually or collectively with others» as listed in the text.[45]

[42] See the text of art. 50: «There shall be no censorship in Montenegro. The competent court may prevent dissemination of information and ideas via the public media if required so to: prevent invitation to forcible destruction of the order defined by the Constitution; preservation of territorial integrity of Montenegro; prevention of propagating war or incitement to violence or performance of criminal offences; prevention of propagating racial, national and religious hatred or discrimination».

[43] See the text of art. 55: «The operation of political and other organizations directed towards forceful destruction of the constitutional order, infringement of the territorial integrity of Montenegro, violation of guaranteed freedoms and rights or instigating national, racial, and religious and other hatred and intolerance shall be prohibited. The establishment of secret subversive organizations and irregular armies shall be prohibited».

[44] As declared by art. 80: «Forceful assimilation of the persons belonging to minority nations and other minority national communities shall be prohibited. The state shall protect the persons belonging to minority nations and other minority national communities from all forms of forceful assimilation».

[45] On the use of terminology in the field see Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro of the Venice Commission, 2004, p. 5.

Rights and liberties may be grouped according to the object and refer to minority national identity[46], use of respective national language[47], education[48], toponymy[49], information[50], self-promotion of their own rights[51].

A special mention deserves the right to an "authentic" political representation[52] and the right to a "proportionate" representation in public employment[53].

[46] See the text of art. 79: «1. the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities; 2. the right to choose, use and publicly post national symbols and to celebrate national holidays». The rule involves also crossborder relations: «12. the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs».

[47] See the text of art. 79: «3. the right to use their own language and alphabet in private, public and official use […] 5. the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in the language of minority nations and other minority national communities […] 7. the right to write and use their own name and surname also in their own language and alphabet in the official documents».

[48] See the text of art. 79: «4. the right to education in their own language and alphabet in public institutions and the right to have included in the curricula the history and culture of the persons belonging to minority nations and other minority national communities […] 6. the right to establish educational, cultural and religious associations, with the material support of the state».

[49] See the text of art. 79: «8. the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in the language of minority nations and other minority national communities».

[50] See the text of art. 79: «11. the right to information in their own language».

[51] See the text of art. 79: «13. the right to establish councils for the protection and improvement of special rights».

[52] See the text of art. 79: «9. the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action».

[53] See the text of art. 79: «10. the right to proportionate representation in public services, state authorities and local self-government bodies». For critical remarks on representation of minorities see the Opinion on the Draft Law on Amendments of the Law on Minority Rights and Freedoms on Montenegro, 2015, p. 7.

4. The phenomenon in the Western Balkans: (ii) the reflective judiciary

The Venice Commission has recently expressed a negative opinion not on the arrangement inspired by the principles of the reflective judiciary *per se* but on its implementation through a quota system.

The Opinion on the draft law on Courts of Bosnia and Herzegovina (March 2023) states, among other comments, that «article 5 (2) of the Draft Law envisages that the composition of the Courts should reflect proportional national representation according to the 1991 census. In this regard, the Venice Commission recalls its previous findings that while the ethnic representation quotas may be legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. The judiciary is not a representative institution. Here, the principle of the independence and impartiality of individual judges should prevail over other considerations. Moreover, organising courts along ethnic lines would be damaging to the credibility of the judicial institutions**.** Such an approach may also counter Protocol no. 12 to the European Convention on Human Rights (the ECHR) on the prohibition of discrimination and should therefore be approached with extreme caution. Hence the Venice Commission would recommend to revise the mentioned provision – for example by providing that the composition of the State judicial institution should reflect the diversity of the society of Bosnia and Herzegovina in terms of ethnic, gender composition and otherwise and the judiciary, as required by the Constitution, shall be generally representative of the peoples of Bosnia and Herzegovina» (at 29).

The reasoning underlying this part of the Opinion assumes that the concept of "reflection" be necessarily synonymous of the one of "representation", a circumstance that should not be taken for granted, as confirmed, for example, by international courts (the judge of the ECtHR elected with respect to each High Contracting Party (art. 22 ECHR)[54] – does not "represent" his/her High Contracting Party. It is necessary to stress once again that a "reflective" judiciary cannot be made to mean in any way to be a "representative" judiciary. And in North Macedonia and Kosovo, where the principle has found strong roots, and in Montenegro as well, where the principle is somehow pale and indirect and yet it is not thoroughly

[54] See also the French official text: «*Les juges […] élus au titre de chaque Haute Partie contractante*».

unknown, the projection of societal diversities on the judicial organisation does not entail any form of representation.

The principle is present in the constitutional text with regard to the judiciary at large, to the prosecutorial institution, to the Judicial Council - the institution safeguarding judicial independence and self-administration-, and to the Constitutional Court.

4.1 The principle of the reflective judiciary in North Macedonia

The Constitution of North Macedonia regulated the plural and reflective character of the whole judicial sphere and of the Constitutional Court through the procedural mechanism of the respective parliamentary election. Technically, it is the way electoral majorities are built that allows for ensuring the election of members "reflecting" the minorities.

This is the case of the election of the Public Attorney[55], and of the Public Prosecutor[56], whose reflective nature is also ensured[57].

The same applies also to the case concerning the Judicial Council[58]: the institution «is composed of fifteen members. The President of the Supreme Court of the Republic of Macedonia and the Minister of Justice

[55] See the text of art. 77.(1): «The Assembly elects the Public Attorney by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia»; and art. 77.(2): «The Public Attorney protects the constitutional rights and legal rights of citizens when violated by bodies of state administration and by other bodies and organizations with public mandates. The Public Attorney shall give particular attention to safeguarding *the principles of non-discrimination and equitable representation of communities in public bodies at all levels and in other areas of public life* […]» (emphasis added).

[56] See the text of art. 106: «The Public Prosecutor's Office performs his/her duties on the basis of the Constitution and law and the international agreements ratified in accordance with the Constitution. The function of the Public Prosecutor's Office is performed by the Public Prosecutor of the Republic of Macedonia and by the public prosecutors […]».

[57] See the text of art. 106: «The public prosecutors are elected by the Council of Public Prosecutors and their term of office shall have no restrictions. *In the election of public prosecutors, equitable representation of citizens belonging to all communities shall be observed*» (emphasis added).

[58] See the text of art- 104: «1. The Judicial Council of the Republic of Macedonia is an independent and autonomous institution of the judiciary. The Council shall ensure and guarantee the independence and the autonomy of the judiciary».

are ex officio members of the Judicial Council. Eight members of the Council are elected by the judges from their own ranks. *Three of them shall belong to the communities that are not majority in the Republic of Macedonia, insuring that equitable representation of citizens belonging to all communities shall be observed.* Three members of the Council are elected by the Assembly of the Republic of Macedonia with majority votes of the total number of MP's, and *with majority votes from the total number of MP's who belong to the communities that are not majority in the Republic of Macedonia.* Two members of the Council 1. are proposed by the President of the Republic of Macedonia and are elected by the Assembly of the Republic of Macedonia, and *one of them shall belong to the communities that are not majority in the Republic of Macedonia* […]»[59].

One of the main functions of the Judicial Council, namely recruitment of members of the judiciary, is consistent with the principle[60]: according to the relevant provision, in fact, «*on the election of judges, lay judges and court presidents, equitable representation of citizens belonging to all communities shall be observed*»[61].

Eventually, as anticipated, the principle concerns the Constitutional Court as well, according to art. 109: «(1) The Constitutional Court of Macedonia is composed of nine judges. (2) The Assembly elects six of the judges to the Constitutional Court by a majority vote of the total number of Representatives. *The Assembly elects three of the judges by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia*»[62].

4.2 The principle of the reflective judiciary in Kosovo

The Constitution of Kosovo is perhaps the fundamental law in the area that – for evident historical reasons – is particularly accurate in framing

[59] Emphasis added.

[60] See the text of art. 105: «1. The Judicial Council of the Republic of Macedonia elects and dismisses judges and lay judges; determines the termination of a judge's office; elects and dismisses Presidents of Courts; monitors and assesses the work of the judges decides on the disciplinary accountability of judges; has the right to revoke the immunity of judges; proposes two judges for the Constitutional Court of the Republic of Macedonia from among the judges; and performs other duties stipulated by law».

[61] Emphasis added.

[62] Emphasis added.

the regulation on the issue. In fact, the organisation of the whole judiciary is entirely framed in order to ensure the reflection of societal diversity within the judicial sphere.

The principle of the reflective judiciary inspires the composition of the judiciary[63], that «shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality» (art. 104.2); and «the composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court (art. 104.3)»[64]. Furthermore, «at least fifteen percent (15%) of the judges from any other court established with appeal jurisdiction, but not fewer than two (2) judges, shall be from Communities that are not in the majority in Kosovo» (art. 104.6).

The principle expressly affects the composition of the Supreme Court («the highest judicial authority», according to art. 103.2) as stated by art. 103.3 («at least fifteen percent (15%) of the judges of the Supreme Court, but not fewer than three (3) judges, shall be from Communities that are not in the majority in Kosovo»).

The same approach regulates the organisation and the exercise of the functions of the Judicial Council[65]. In the first perspective, the principle is implemented – introducing a distinction between the Kosovo Serb community, the only one that is specifically mentioned, and reserved or guaranteed seats for other Communities - through the regulation of the electoral process and a combination of a quota system and a reserved parliamentary vote[66].

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[63] See the text of art. 104.1 ("Appointment and Removal of Judges"): «The President of the Republic of Kosovo shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council».

[64] The relevance of the territorial context makes the same provision add that «before making a proposal for appointment or reappointment, the Kosovo Judicial Council consults with the respective court».

[65] «The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system» (art. 108.1); and «The Kosovo Judicial Council is a fully independent institution in the performance of its functions» (art. 108.2).

[66] See the text of art. 108: «The Kosovo Judicial Council shall be composed of thirteen (13) members, all of whom shall possess relevant professional qualifications and expertise. Members shall be elected for a term of five (5) years and shall be chosen in the following manner: 1. Seven (7) members shall be judges elected by the members of the judiciary. 2. Two (2) members shall be elected by the deputies of the Assembly, holding seats attributed during the general distribution of seats and at least one of these two must be a judge. 3. two (2) members shall be *elected by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community and at least one of the two must be a judge*; 4. two (2)

From the point of view of the exercise of its functions, the Constitution states that «the Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. *The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law*» (art. 108.2).[67]

More in detail, «proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and *the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court*» (art. 108.4)[68].

Furthermore, the Constitution establishes a connection between the reserved parliamentary seats and the function of proposing candidates for judicial positions, marking once again a distinction between the Kosovo Serb community[69] and other unnamed minorities[70], although in neither of the two cases the respective community is given a veto power.

members shall be elected *by the deputies of the Assembly holding reserved or guaranteed seats for other Communities* and at least one of the two must be a judge» (emphasis added).

[67] Emphasis added.

[68] Emphasis added.

[69] See the text of art. 108.9: «Candidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that position» (emphasis added).

[70] See the text of art. 108.10: «Candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position» (emphasis added).

The same principle applies to the State Prosecutor[71] and the State Prosecutor Council[72]: the latter, in the exercise of is function of recruiting, proposing, promoting, transferring, reappointing and disciplining prosecutors, «shall give preference for appointment as prosecutors to *members of underrepresented Communities* as provided by law» (art. 110.2).[73] The provision also reinforces the connection between prosecutors to be appointed and the specific cultural diversity of the relative territorial competence[74].

Lastly, the Constitution also provides for the establishment of a reflective Constitutional Court: according to art. 114.1, «principles of gender equality shall be respected».

Furthermore, the Court shall be composed of nine members: «The decision to propose seven (7) judges requires a two thirds (2/3) majority of the deputies of the Assembly present and voting. The decision on the proposals of the other two (2) judges shall require the majority vote of the deputies of the Assembly present and voting, but *only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the Communities not in the majority in Kosovo*» (art. 114.3)[75].

4.3 The principle of the reflective judiciary in Montenegro

The principle of the reflective judiciary is not specifically formalised as a mandatory rule in the text of the Constitution in Montenegro. Therefore, in this area, the comparison between the three countries in the

[71] See the text of art. 109.4: «The State Prosecutor shall *reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality*» (emphasis added).

[72] See the text of art. 110: «1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and *reflects the multi-ethnic nature of Kosovo and the principles of gender equality*» (emphasis added).

[73] Emphasis added.

[74] See the text of art. 110.3: «Proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall *reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction*» (emphasis added).

[75] Emphasis added.

Western Balkans considered here shows a specific difference between Montenegro on one side and North Macedonia and Kosovo on the other.

In spite of the open recognition of society's cultural pluralism and of a detailed regulation of minorities' rights that goes even beyond the standards set by the Framework Convention of the Council of Europe, diversity in the composition of the judiciary at large, of the Judicial Council and of the Constitutional Court has not been included in normative texts as a binding rule.[76]

However, the Law on the Constitutional Court (2015) does provide for the incorporation of the principle of fair reflection of societal pluralism as a binding recommendation to be taken into account in the process of selection of candidates for appointment: in fact, beyond the possession of a professional qualification and of a suitable personal character (art. 9)[77], the law states (art. 10.6) that «in nominating the candidates, proposers shall take into account the proportionate representation of members of minorities and other minority ethnic communities, as well as a balanced gender representation».

In other words, instead of a mandatory rule directly affecting the composition of the Court, the law produces binding effects on the procedure of selection and, more in particular, on the President of Montenegro and on the responsible working body of the Parliament of Montenegro, namely the "proposers", according to the legislative definition

[76] According to the Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro of the Venice Commission (2004), «the population of Montenegro is extremely heterogeneous. According to the preliminary results of the latest census (November 2003), of the people living in Montenegro 40.64 % declared themselves as Montenegrins and 30.01% as Serbs (in 1991 the respective figures were 69% and 9%). Of the remaining, 9.41% stated that they were Bosniaks, 4.27% Muslims, 7.09% Albanians, 1,05% Croats, 0.43% Roma, and 1.25% "others". 4.29% did not indicate a national/ethnic determination (answering was not compulsory), and for 1.57% no data were available».

[77] As established by art. 9: «Candidates eligible to apply to the public call shall be prominent lawyers who, in addition to constitutionally defined conditions for a Constitutional Court judge, also meet the general conditions for employment in state authorities. Prominent lawyers, within the meaning of paragraph 1 of this Article, shall refer to legal science professors, judges, public prosecutors, attornies, notaries, lawyers who work in state authorities, public administration bodies and local self-government or local government bodies, as well as lawyers who work in companies and legal entities, who enjoy a professional and personal reputation».

(art. 7)[78]. The effects, however, are limited to "taking into account" and do not, as such, affect the actual proposals.

The provision is quite specific Inasmuch as it indicates the criteria of a «proportionate representation of members of minorities and other minority ethnic communities» and of a «balanced gender representation«, that from a requirement of the proposal of candidates is expected to be transferred as an indirect requirement for the composition of the Court.

The procedure of parliamentary election of constitutional judges requires a qualified majority of members of Parliament[79]: in the context of a culturally compound polity as Montenegro, the rationale of this safeguard is likely to be related not only to the need of a political consensus above the governmental majority-minority relationship but also to the «proportionate representation of members of minorities and other minority ethnic communities» and to a «balanced gender representation».

In the recent institutional practice, however, the requirement of a qualified majority has been used in order to prevent the election of a candidate to the Court on the ground of his national background[80]. In other words, the absence of specific normative safeguards rooted in positive law *may* be have to rely on political safeguards only. In the course of time, a conventional practice may be developed in order to allow the proper implementation of the policy presently regulating the proposal of candidates.

[78] See the text of art. 7: «President of Montenegro and responsible working body of the Parliament of Montenegro (hereinafter: the proposers) shall conduct the procedure of nominating the judges of the Constitutional Court […]».

[79] See the text of art. 91.3: «The Parliament shall elect and release from duty the judges of the Constitutional Court, the Supreme State Prosecutor and four members of the Judicial Council from among reputable lawyers by two-third majority vote in the first voting and by three-fifth majority in the second voting of all the Members of the Parliament no sooner than a month».

[80] The facts have been reported in A. Kajosevic, *Montenegro Starts Unblocking Constitutional Court, Electing New Judges*, in *BalkanInsight***,** February 27, 2023: «The opposition Democratic Party of Socialists, DPS, Social Democrats and Bosniak Party did not support Resulbegovic, a national minority candidate. On February 7, Albanian coalitions and the country's Bosniak party failed to agree on a joint minority candidate because Resulbegovic, a prosecutor from Ulcinj, was Albanian. Bosniaks wanted a Bosniak judge from Bijelo Polje, Alija Beganovic».

5. The rationale of the reflective judiciary

The organisation of the judiciary as a way of reflecting societal diversities in court is not the recognised established rule in the Western legal tradition and yet the implementation of its inspiring principles are more frequent than one might anticipate without a specific research.

The rationale of the reflective judiciary is to be identified with the twofold principle of *non-discrimination against any* and *inclusiveness of all identities*.

It is important to emphasise that one of the "diversities" that kept one category out of the judiciary for centuries is represented by women, not a numerical minority and yet a marginalised and heavily discriminated against group[81]. A judiciary that precludes women's presence in its composition could not pretend being "reflective" of society[82].

The main reason for neglecting the perspectives of the reflective judiciary is, in my opinion, that while classic and orthodox features concerning the judiciary were built around contingent theoretical concepts and immediate political needs for nation-state-building in the 19th century, the evolution of contemporary 20th century polities and the process of strengthening of constitutional democracies have allowed the formalisation of a good deal of flexibility in going beyond those dogmatic concepts and political needs.

Historical evidence shows that – with due attention to centrifugal tendencies and secessionist temptations – constitutional protection of cultural diversities (starting from religious diversities inclusive of freedom from religion) and of national, ethnic and language minorities is (or at least may be) in conformity with the safeguard of the fundamental unity of (nation)-states.

In fact, problems of that sort are part of the experience of the process of international cooperation and of supranational integration in Europe, whereby constitutional law is confronted with problems of balancing national identities with regard, specifically, to a common judicial frame. In spite of obvious differences, the same rationale of domestic reflective *judiciary – no discrimination against any and inclusiveness of all identities* - is to be

[81] On the issue see M. Caielli, *Why do women in the judiciary matter? The struggle for gender diversity in European courts*, in *Federalismi.it*, 2018, p. 157.

[82] A constant brilliant reference of the statement has been the professional life of Ruth Bader Ginsburg, Justice of the Supreme Court of the United States. On her figure, see T. Groppi - I. Spigno - L.E. Ríos Vega (eds.), *Rust Bader Ginsburg. La voce della giustizia*, Bologna, 2023.

considered as being at the foundation of the legitimacy of the European international and supranational judicial architectures.

Some rules of soft law allow us to go deeper into a better and deeper understanding of such rationale.

The first reference is to the "Bangalore Principles of Judicial Conduct", adopted in July 2006 by the United Nations Economic and Social Council (ECOSOC) through a resolution recognising the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary.

The document is divided into various chapters rooted in distinct values and their respective application. Value 5 on Equality deals with ensuring equality of treatment to all before the courts as essential to the due performance of the judicial office.

Application 5.1 of Equality reads that «A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds")».

The qualification of societal diversities as "irrelevant grounds" is crucial to other areas of application of Equality in the sphere of jurisdiction: so, Application 5.2 states that «a judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds». And, according to Application 5.3, «A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties».

Further areas concern Application 5.4 («A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground») and Application 5.5 («A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy»).

Such rules are not really qualifying the judiciary as directly reflective of diversities. Diversities remain out of the composition of courts itself and yet they do enter the courtroom: awareness of diversities in society is

functional to dealing with discrimination as well as to the employment of *ad hoc* mechanisms such as "cultural defence", such as "cultural expertise" as a means for cultural and not only linguistic translation, or the identification of "culturally motivated crimes", all of them mechanisms that are to be discretionally evaluated by the judge.

Another set of rules of soft law is offered by the Mt. Scopus Approved Revised International Standards of Judicial Independence, first adopted in 2008 by an influential international academic and professional group that met at the Hebrew University in Jerusalem.

One principle (2.15) is that «The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects».

A second principle (2.15.1) is that «Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements».

According to the Mt. Scopus International Standards, diversity does fully enter the courtroom and in fact it affects the very composition of judgeship, both from the point of view of positive recruitment of judges as well as of non-discrimination for admission into the judiciary of individuals connected to minority groups.

Divided societies have advanced the reach of the principle of equality and non-discrimination as needed precisely because of the structural condition of pluralism that is one of the main features of contemporary society, even without considering the impact of the waves of migration.

The principles of the reflective judiciary in the Western Balkans have had an opportunity of enforcing the same rationale based on awareness of diversities while in the exercise of the judicial function, based also on non-discrimination and inclusion of diversities within the very judicial body.

As noticed above, the reflective judiciary is particularly instrumental to managing not only diversities but especially *highly conflictual divided societies*, as in North Macedonia and Kosovo; and its absence may have its consequences in Montenegro as well – not a less conflictual divides society -, which does not directly rely on that same principle. In such contexts, the reflective judiciary may be able to carry on with it more tolerance on the

side of the majority, and more confidence in the fairness of the judicial process on the side of minorities[83].

The principle of the reflective judiciary in divided societies, in my opinion, is both an opportunity and a challenge for the countries concerned to manage and eventually overcome their conflictual situations and to gradually experience the effects of mainstream Western and European constitutional democracy[84]. Eventually, the present stage of an *adaptive constitutionalism* may turn out to be a leverage for approaching a further stage of *transformative constitutionalism*.

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[83] A very special setting is the one provided for in the problematic Constitution of Bosnia and Herzegovina with regard to the composition of the Constitutional Court: in fact, according to art VI, «The Constitutional Court of Bosnia and Herzegovina shall have nine members.
(a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency. (b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighbouring state». In other words, the international community as a stakeholder in stability in the Balkans has found a way for being "reflected" within the Constitutional Court. In this sense, the reflective judiciary appears to have a role in the phenomenon known as "cosmopolitan constitutionalism" (see M. Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, in *International Journal of Constitutional Law*, 2016, p. 697.

[84] See J. Woelk, *From Enlargement Perspective to "Waiting for Godot"? Has the EU Lost its Transformative Power in the Balkans?*, in L. Antoniolli - L. Bonatti - C. Ruzza (eds.), *Highs and Lows of European Integration. Sixty Years After the Treaty of Rome*, Cham, p. 27.

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ABSTRACT: Recent evolutions of constitutionalism show, among others, two interactive phenomena: first, a well notable new role plaid by the judiciary, in particular through constitutional adjudication as well as by international and supranational jurisdictions; and, second, a development of «identity» as a key factor increasingly characterising contemporary polities. Hence the dynamics of organising the judiciary in a way that allows a fair representation of societal pluralism, without any reference to representation of cultural communities. The practice of setting up reflective judiciaries is practiced by some territorial and culturally compound polities of the Western legal tradition and, more recently, by some countries in the Balkans – such as Kosovo and North Macedonia but not by Montenegro – as a means of managing cultural identities in divided societies.

KEYWORDS: Innovative paradigms and the evolution of constitutionalism – Reflective judiciary and cultural pluralism – Reflective judiciary in the Western legal tradition – Reflective judiciary in Kosovo and North Macedonia – The rationale of a reflective non-representative judiciary

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