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Checkmate? Corporate Power-Sharing, Liberal Voting Rights and the Kosovo Supreme Court

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ABSTRACT After the 2021 parliamentary elections, the Kosovo Supreme Court annulled some 5800 votes expressed for three minority lists running for guaranteed seats of the Bosniak and the Roma minorities. The court considered it impossible that they were cast by members of the respective ethnic communities. This court ruling has wider implications for consociational theory, as it makes novel normative prescriptions about group representation in divided societies. The debate in Kosovo closely mirrors similar controversies elsewhere, such as the ‘Sejdić-Finci’ case in the elections of the state presidency of Bosnia and Herzegovina, or the reserved parliamentary seats in Lebanon.

1. Introduction

Checkmate for the consociational design of Kosovo’s constitution? In a new ruling, the Supreme Court of Kosovo points to contradictions in the constitutional design of the political institutions, objecting to a scenario where a political party has run for seats reserved for an ethnic minority group, but has gained its votes cross-ethnically. Thereby, the court addresses an unresolved tension in many power-sharing democracies: rigid quotas in parliament and government, which link representation to specific groups, are not matched with corresponding provisions in voting rights and citizenship rights. Instead, as in the case of Kosovo, all voters are equal, regardless of their identity, and make their choice from a universal ballot, leading to a potential mismatch between the constituency that an MP should represent, i.e. the group quota, and the voters who elect them. Similar constitutional designs are often used in power-sharing democracies, including several countries in the region (Bieber, 2004; McCulloch, 2014), and the legitimacy of such institutional designs has previously been questioned (Haddad, 2010). Therefore, the court ruling might have implications beyond borders.

Kosovo’s constitution is in large parts a textbook example of a ‘consociational democracy’, a system ensuring that each politically recognised identity group is adequately

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represented by its own representatives in parliament and in government. Such consociational institutions are often introduced in ethnically divided societies to avoid minorities being subject to rule by (ethnic) majorities; frequently, such rules are introduced as a political solution to settle civil wars (Jarstad, 2008). The constitution of Kosovo, a clear-cut type of a consociational democracy, provides for reserved positions in office, in particular for guaranteed parliamentary seats for the ethnic Serbs and four smaller minority groups. The constitution was born of the UN-drafted constitutional framework for Kosovo, and it aims to allow for compromise between the ethnic Albanian majority and the Serbs, and to guarantee that this ethnically diverse population is adequately mirrored in parliament.

However, the election of minority representatives in consociational democracies is subject to a prominent scholarly debate. In consociational democracies, most voters cast a vote for a party representing their own group, even though they might not necessarily be hostile to parties of other groups. A possible side effect of ethnically segmented party systems is ‘ethnic outbidding’, or the mutual radicalisation of party positions on ethnic issues. Eminent scholars and policy makers alike are primarily preoccupied with the question of how to avoid segmented representation along ethnic lines (Deschouwer & Van Parijs, 2009; Reilly, 2001; Stojanović & Strijbis, 2019). They recommend complementing consociational democracies with incentives for parties to seek votes from outside their own ethnic community (called ‘centripetal institutions’), and therefore to engage in inter-ethnic campaigns (Bogaards, 2019; Murtagh, 2020). In line with this goal, in order for presidential candidates to be elected, Nigeria and Indonesia require them to gain votes across the country, and therefore from different ethnic groups (Bogaards, 2003; Reilly, 2021; Tan, 2013). Other countries ban political parties that are aligned with ethnic groups, or regional parties (Bogaards, 2010; Moroff, 2010). Cross-ethnic voting is not only a normative target, but also a regular empirical phenomenon: candidates and parties try to maximise their electorate, employing strategies of appealing to voters across ethnic boundaries (Stojanović, 2006; Zuber, 2015).

The Supreme Court of Kosovo moves diametrically against this liberal ‘zeitgeist’, against the developments in other ethnically heterogeneous countries, and diametrically opposed to scholarly recommendations, introducing a de-facto prohibition of cross-ethnic votes. The court does so ex-post, rendering thousands of votes that were cast in a regular fashion for minority parties in the national parliamentary elections 2021 invalid, on the grounds that they were cast cross-ethnically. While this ex-post annulment of votes is remarkable from a legal perspective (see section 3), the court ruling also constitutes a new, unprecedented move, with the potential to become important not only in the region, but also for the academic debates in consociational theory and minority representation. The court argues that representatives elected on reserved seats for identity-based groups can only represent their groups if they are elected by votes from those groups, an argument with wider implications for the theory of political representation in divided societies. According to this rule, countries with corporate consociational designs would need to segment their elections, either by separating voters according to their identity in different vote registers, and letting them vote on different ballots, or by reaching the same goal indirectly through an (ethno-)territorialisation of electoral politics.

This article highlights the implications of this court ruling for three research questions. First, the article addresses the multiple implications of the ruling for Kosovo. On the one hand, it points to the contradictions between the system of reserved seats for ethnic parties and the principle of universal voting rights, and on the other hand it discusses the

impossibility of resolving this contradiction without violating important principles of Kosovo's constitutional order (Krasniqi, 2015). Second, it offers a comparative analysis of the rules concerning the ethnic segmentation of elections and cross-ethnic vote pooling. Third, it highlights the importance of this unique decision for the literature on consociational democracies, and in particular, the apparently unresolvable dilemma of 'corporate' electoral designs in combination with universal ('liberal') voting rights (McCulloch, 2014; McGarry & O'Leary, 2007).

In the subsequent sections, I discuss how consociational democracy can be combined with specific rules addressing the voting rights of citizens. Sections 3 and 4 introduce the Kosovo Supreme Court ruling, and discuss possible solutions in a comparative manner. The conclusions point to implementation problems surrounding the court ruling, and the implications for the consociational model.

2. Theory and Literature Review

Consociational democracies are built on the representation of identity-based groups through elections, where each politically relevant group elects its own representatives. Election rules in consociational democracies are designed to offer minority groups guarantees of proportional representation. However, elections in consociational democracies are often criticised because they segment the political sphere into groups. Thus, 'in divided societies [, ... power-sharing] freezes the conflict lines, and the parties do not need to compete for votes among their former foes' (Jarstad, 2008). This leads to a hardening of ethnic differences, and to radicalisation (Sisk, 2010).

Some consociational democracies—such as Switzerland, Northern Ireland or North Macedonia—leave it open as to whom is being represented, and rely on the principle of proportionality. This family of consociational democracy, with no pre-determined groups, has been labelled the 'liberal type'. In contrast, the 'corporate type' links representation to ethnic categories (McCulloch, 2014). In this latter type, the constitution or equivalent legislation determine a set of ethnic groups that are guaranteed group representation in the political institutions of that country. Each of these groups is assigned reserved seats or ethnic quotas. The representatives from each these group reflect the group's (homogeneous or plural) views, and what they frame as the group's interests (Lončar, 2021; Pitkin, 1967).

This distinction focuses on the type of collective right to representation and collective veto right in the decision-making process. However, it leaves out the discussion about the voters: who is entitled to partake in the election of the group representatives?

2.1. An Extended Typology

I complement the liberal and the corporate type of consociational democracy (referring to collective group rights in representation) with three different types of voting rights.¹

- In a liberal model, voting rights are universal, and all voters vote on the same ballot, regardless of their group identity.
- In segmented elections, voters are separated into different vote registers and different ballots, and each group elects their representatives based on their group identity, with no possibility to cast a cross-ethnic vote. This can be implemented directly (separate

vote registers for different groups), or indirectly, by tying the voting rights to indirect markers of ethnicity.

- In vote-pooling models, ballots and electoral districts are designed such that voters cast votes—or one of several votes—for candidates or parties with a group identity other than their own. Either the ballot strictly prescribes votes for different groups (vote-pooling by default), or it provides mild incentives for voters, e.g. allowing them to issue multiple ordered preferences (centripetal model).

Table 1 intersects the three types of voting rights with the two types of consociational democracies.

The *universal ballot (liberal model)* is the standard in democracies, and can be found both in combination with the liberal and in the corporate consociational model. In the liberal type, the universal ballot is consistent with the principle that there are no predetermined groups. The politically salient groups are subject to change, and they constitute themselves in the electoral process.

In the corporate type, universal ballots allow members associated with one group to cast their vote for candidates running for seats of another group, which may lead to the paradoxical outcome that group representatives are elected primarily by voters from a different group. If group representation simply implies that a salient (or constitutionally determined) identity group is present in a representative institution, then it does not matter by whom these representatives are elected. If however, group representatives are expected to voice the concerns of specific groups, represent their preferences, and be electorally accountable, then such cross-ethnic voting might undermine the quality of representation (Hodžić & Mraović, 2015; Jensenius, 2017). Specific ballot formats allow this problem to be avoided by segmenting the electorate (Kroeber, 2017), or alternatively, they make cross-ethnic vote-pooling the default, so that group representatives are accountable to society at large.

Segmented voting rights can be found in elections with reserved seats for ethnic minorities, or separate districts for minority groups. In Croatia, citizens belonging to minority groups are registered on special electoral rolls according to their identity, and can vote for the reserved seats of their minority group on a special ballot. However, they also have the choice to vote instead for a party of the ethnic majority or non-ethnic parties on the general ballot. In local and regional elections, they even have both votes: in municipalities or provinces with a significant number of minorities, they get to choose a minority deputy mayor and/or governor on a minority ballot, as well as the mayors and the governors on the general ballot. Similar rules apply in Slovenia, where members of two small minorities have two votes in national parliamentary elections, one for the minority deputy, and a second one on the general ballot. In New Zealand, Maori voters are registered on a separate roll. In the two-vote electoral system, there are separate Maori districts in one of the two tiers, and one of the two ballots is ethnically segmented. None of these cases is considered a consociational democracy (due to a lack of group-related rights in the government formation and law-making process).²

A segmentation of the electorate can also be achieved *indirectly*, without separate ballots, namely through the creation of territorial electoral districts that correspond to ethnic geography. In Belgium for example, the electoral districts serve to separate the country between the federal regions and the capital. This territorialisation also separates the electorate by linguistic communities, to the extent that the linguistic boundaries correspond to those of the federal regions. Until 2011, Montenegro singled out a territorial district for the election of Albanian minority representatives. In Bosnia and Herzegovina, the

Table 1. Minority representation rights and voting rights—types and cases of application

Type	Corresponds to consociational type	with universal ballots	combined with vote pooling		combined with ethnically segmented voting rights	
			direct	indirect	direct	indirect
<i>Seats reserved for candidates of specific groups/quotas</i>	<i>Corporate: mandates are tied to groups</i>	Seats for multiple groups elected in the same district (Bosnia and Herzegovina [presidency: Bosniak and Croat seat], Colombia, Venezuela) Seats for ethnic party lists (Kosovo)	Bloc vote or PR in heterogeneous districts, with ethnic quotas, and multiple votes for each ethnic slot (bloc vote or multiple independent votes) (Singapore, Burundi, Lebanon [heterogeneous districts], etc.) _ ^b	Seats reserved for ethnic groups are assigned a territorial district with a heterogeneous electorate (India)	Separate ethnic vote registers (Croatia; New Zealand, Slovenia, Taiwan)	Territorial segregation (Belgium; Bosnia and Herzegovina [presidency: Serbian seat]; Bolivia ^a ; Lebanon [homogeneous districts])
<i>Proportional representation</i>	<i>Liberal: no group-specific mandates</i>	List PR or open-list PR Threshold exemption (Serbia, Germany; Montenegro); guaranteed seats/ bonus seats (Romania, Serbia)	_ ^b	Single-Transferable Vote (Northern Ireland) Special tier for underrepresented communities, elected from second (universal) vote (Philippines)	_ ^b	_ ^b

^aBolivia: underrepresented indigenous minorities may opt to vote on a separate indigenous ballot in a limited number of regions (where their groups are concentrated).

^bConfiguration theoretically implausible.

Source: Reilly (2021); Kroeber (2017); Bogaards (2019), and sources referred to in the text.

Serbian member of the three-headed presidency is elected from the federal entity that has a dominant Serbian population. Similarly, the two bilingual Swiss cantons of Berne and Valais rely on territorial districts for the election of the cantonal governments, thereby indirectly giving the linguistic minority special rights for the election of their own government representatives. Such indirect territorial solutions exclude citizens from group representation, if they do not live in a part of the territory where they are a local majority. For example, the Swiss canton of Berne has a special territorial district for the French-speaking minority for the election of a reserved seat in the cantonal executive, but this district does not include the bilingual town of Bienne, which although it has a German-majority, is also the municipality with the largest number of French-speakers in the canton. Even though the ECHR has highlighted the problems of such solutions in the case of Bosnia and Herzegovina, none of these territorial solutions have been undone by the court (see Section 4).

I am not aware of any liberal consociational democracy (or any other country with proportional elections) with segmented voting rights—such a combination would not make much sense.

Vote-pooling ballots can be found in countries combining fixed ethnic quotas with a mixed-ethnic ballot, where voters cast votes for candidates of different groups (Burundi, Cameroon, Chad, Djibouti, Singapore, see section 4). Electoral districts are mixed, with a fixed ethnic key, and parties present mixed-ethnic list of candidates. Voters cast a block vote or a proportional list vote for one of these lists (Bogaards, 2019; Tan, 2013). Differently, India reserves seats for scheduled castes, but elects them from general territorial single-member constituencies, by voters from all caste groups, so that some of the voters cast an inter-ethnic ballot by default (Jensenius, 2017, p. 3). Lebanon, a consociational democracy of the corporate type, allocates seats to its ethnic communities. The degree to which this leads to inter-ethnic vote pooling depends on the ethnic composition of the electorate in the districts, and the ethnic allocation of the district seats. In the past, there were both homogeneous and heterogeneous districts, including districts where a large part of the electorate by default voted for the representatives from another group.

When reserved seats are combined with vote-pooling ballots, this fundamentally alters the character of corporate consociational rules: by default, quotas or reserved seats guarantee the descriptive representation of specific groups in political office, but the ballot design prevents these representatives from being able to only speak for their groups: instead, they are electorally accountable to society at large (Templeman, 2018). This raises discussions as to whom these representatives are accountable, and whether they can be considered group representatives at all (Jensenius, 2017).

A family of voting systems exists that does not constrain voters to cast a cross-ethnic vote, but offers them the opportunity to split several votes—ideally on an ordered preferential ballot—between candidates of different identities, also addressed as ‘centripetal institutions’. Scholars expect that voters will cast lower-preference votes inter-ethnically (Reilly, 2001). The Single-Transferable Vote (STV), one of these rules, leads to a proportional allocation of seats to parties, and can therefore also be associated with liberal electoral rights.³

2.2. *Courts and Corporate Consociational Rules*

The segregation of voting rights along predetermined ethnic identities—either by separate voting rolls, or through indirect means (territorial solutions)—has implications both for the

active and passive voting rights of citizens. This has been subject to prominent rulings by the European Court of Human Rights (ECHR), among others, on Belgium, Cyprus and Bosnia and Herzegovina. In Belgium, regional representation and the representation of the linguistic communities are linked. This implies, first, that only citizens living in specific territorial entities can elect the representative bodies of the linguistic communities. Further, citizens who are local minorities in territories where the ‘other’ group primarily resides do not have the possibility to elect representatives from their linguistic community into the regional institutions or the Senate. The ECHR has ruled that this is in the interest of the stability of the political arrangement (McCrudden & O’Leary, 2013, pp. 60–63).⁴ In Cyprus, the same court ruled that the segmentation of voters into two electoral lists, and two separate parts of parliament, a Greek and a Turkish one, was untenable, although this was only because Turkish participation in parliament had been temporarily suspended following the de-facto split of the island. In this context, the separation of voters into two ethnic electoral rolls deprived members of the Turkish community of their active voting rights.⁵

In contrast, in the ‘Sejdić and Finci’ case of Bosnia and Herzegovina,⁶ the ECHR ruled in a way that questions the corporate segmentation of voting rights. The ECHR assessed the eligibility of smaller minorities to the three headed presidency of Bosnia and Herzegovina, and other related cases (Bochsler, 2012; Hodžić & Stojanović, 2011; McCrudden & O’Leary, 2013). The court objected to the deprivation of citizens of their (passive) voting rights.

In light of the discussion in the literature, and in light of previous court cases, the annulment of cross-ethnic votes in the parliamentary elections of Kosovo constitutes a novel element. The subsequent sections describe the court ruling, and its motivation, and discuss how other countries have resolved the tension between liberal voting rights and quotas/reserved seats.

3. The Case of Kosovo

The parliamentary elections of 2021 in Kosovo constitute one of many cases where ethnic quotas for minority groups and liberal voting rights have led to controversial outcomes.

3.1. The Constitutional Framework

In line with the model of consociational democracy, Kosovo’s political system guarantees the inclusion of non-majority groups in parliament and in government through reserved seats. These minority seats were part of the UN Interim Administrations’ Constitutional Framework for the temporary self-government of Kosovo of 2001 (Stahn, 2001, p. 556), and they were carried over into the Ahtisaari plan, a constitutional plan to establish political institutions in Kosovo that reflect the multi-ethnic nature of the polity. The constitutional framework foresees strong collective passive rights, i.e. guarantees for group representatives to be represented in parliament.

In parliamentary elections, a universal (not ethnically segmented) ballot, and proportional representation in a countrywide 100-seat district is combined with the election of ethnic representatives, where several recognised minority groups have their own guaranteed seats in parliament. 20 seats are set aside for the ethnic parties of five minorities. The historically largest Serbian community receives 10 seats, whereas the smallest of

the recognised minority groups, the Gorani, are allocated one seat. This system follows the corporate type of consociational democracy. The allocation of the guaranteed seats is not strictly proportional to group sizes, so that for some of the groups the ‘representation ratio’ (seat-to-vote ratio) is higher than for others. Unequal turnout further inflates inequalities in representation, as Serbs—especially in the North—have repeatedly (partly) boycotted elections (Wise & Agarin, 2017). Parties may declare their electoral lists as affiliated with one of these five minorities, and then run for these set-aside seats.

However, the active voting rights applied here are individual and universal, and there is no ethnic segmentation of the electorate: neither of individual voters, nor through territorial electoral districts. This is also reflected in the voting process: the ethnic identity of those who vote for the parties that run for these minority seats is unknown. Kosovo not only practices fully liberal voting rights, but also none of the citizens’ rights are exerted according to the citizens’ ethnic identities (Krasniqi, 2015). These election rules offer an ideal typical demonstration of the possible tensions between a collective passive ‘right to representation’ (corporate rules) and universal (liberal) active voting rights at the individual level.

3.2. *The 2021 Parliamentary Elections*

In the parliamentary elections of 2021, a dominant list appeared among Kosovo Serbs, resulting in competition for their 10 seats dropping to a historical low. Observers see this as linked to the suppression of votes for rivaling Serbian parties (Westminster Foundation for Democracy [WFD], 2021, pp. 17–18; see also Fort, 2018). Eventually, the Serbian list received 99% of the 45,000 Serbian votes, and all 10 reserved seats.

In the same elections, two previously not active electoral lists were nominated on behalf of the Bosniak, and of the Roma and Ashkali groups. Candidates on these lists were characterised as political allies to the Serbian minority. They won one seat each on behalf of their respective minority groups, though the largest part of their votes came from Serbian-dominated municipalities or villages (WFD, 2021, pp. 19–20).

This result was not only seen as controversial by the leaderships of rival minority parties, but also by international observers. In light of the available population estimates for territorial units, the widespread conclusion that many of these votes were cast by citizens who self-identify as Serbs seems plausible. Witness reports point to an orchestrated campaign by the ‘Serbian List’, which is hegemonic in the North, to organise the votes in favour of their political allies (WFD, 2021, pp. 19–20). However, some of the contested votes (including votes that were cancelled) originated in municipalities in the South, where the Serbian List has little political influence. Still, in the public discourse, the picture of a takeover of Bosniak and Roma/Ashkali seats by the Serbs prevailed.⁷ Research shows that representatives of ethnic minorities in the parliament of Kosovo interpret the interests of the respective minorities that they represent largely along the lines of the political platforms that their parties stand for (Lončar, 2021), and therefore, the party identity of the elected MPs might be equal to, if not more important than their Bosniak and Roma/Ashkali identities.

3.3. *The Supreme Court Rulings*

Rival Bosniak parties contested the regularity of the result. Eventually, after a first ruling by the Electoral Complaints and Appeals Panel, which was appealed against, the

Supreme Court cast a final ruling. The Court's decision appears to be based on a strictly corporate model of representation, and an essentialist understanding of identities. By relying on this corporate and essentialist view, the Court denies constitutionally prescribed liberal voting rights, and it appears unaware of the possible wider implications of its decision.

The Supreme Court issued two rulings, one related to the parties representing Bosniaks, and one for Roma/Ashkali parties.⁸ In both rulings it largely reaches the same conclusions, using similar arguments, though with slightly different wordings. The court objects that

for a first time in parliamentary elections in Kosovo, some subjects, here the United Community Adrijana Hodžić and the VAKAT coalition [Bosniak parties] gained most of their votes from the Serbian community. This violates the will of the voters belonging to the Bosniak community, and is essentially an abuse of the electoral process, violating the integrity of the elections.⁹

To rectify the result, the court identifies a number of municipalities and/or voting precincts where the votes cast for specific minority parties largely surpass the estimated local population of the respective groups. It then lists a number of municipalities and voting precincts where it annuls votes cast for Bosniak or Roma/Ashkali minority lists.¹⁰ In said municipalities and precincts, votes for all Bosniak and Roma/Ashkali parties were annulled, i.e. for those suspected of being proxies of the Serb List, as well as for the established minority parties that accused these new lists of capturing minority seats on behalf of the Serbs. However, the number of votes that were annulled differed greatly between the two sets of parties. For the latter (supposedly 'genuine' minority parties), between 9 and 583 votes per list were annulled, while the supposedly 'fake' parties or 'proxies' lost 5042 through the court ruling, resulting in a net shift of vote shares, and the proxy parties losing all their seats to the 'genuine' minority parties.

The Court's interpretation of what happened (largely identical to the experts' interpretation) is expressed in a hypothetical strategic scenario: 'communities with more voters compared to others [Serbs] could make use of this mode of voting, and thereby control the representatives of other communities [Bosniak, Roma]'. The central argument of the judgement is that the practice of cross-ethnic voting, when organised in large numbers, 'would put in question the representation of minorities'.¹¹

The Court's understanding of ethnicity, its interpretation of statistical figures, and its view of the voting process make the verdict vulnerable to four sets of critique. First, the court argued that representatives of non-majority groups should be elected by the respective group members, and in consequence of this rule cancelled all votes that were cast for specific electoral lists in some municipalities and voting precincts. However, ballots in Kosovo's elections are universal, every voter has the same choice of electoral lists. The court, ex-post, decided that only votes for ethnic minority parties were to be taken into account if they were cast by voters of the respective groups. It explained that the decision to eliminate cross-ethnic votes cast for Bosniak lists respects those votes that were 'expressed [...] by the Bosniak community'.¹² This annulment is ad-hoc, and not based on an established rule or procedure. Neither the constitution, nor the electoral code delimit the electorate of ethnic parties. Instead, individual voters have the right to vote for any party that they encounter on their ballot. Apart from strategic reasons, there are also non-strategic individual reasons to cast a cross-ethnic vote, such as preference

votes for individual candidates, or a party programme that appeals across ethnic boundaries. It is not the task of a court to establish the motives for a (free) electoral choice.

Second, to distinguish ethnic voters from inter-ethnic voters, the court needs some direct or indirect identification of voters by ethnic group. However, in Kosovo, citizenship or (individual) political rights are not attached or segmented by ethnic identities (see Section 4). The only official register of ethnic identities is the population census of 2011. The census was conducted only in the South, meaning that the state lacks population numbers by ethnicity for the North (Visoka & Gjevori, 2013, p. 489). The Court relied instead on informal estimates by the OSCE and ‘based on the final electoral register, and a verification of the names [i.e. the identities] of all potential voters’¹³ (no further details given). Thereby, it identified a number of municipalities and precincts where the number of votes for minority lists was superior to the population number of this group, and cancelled these votes. While there are no concerns about the validity of the OSCE estimates, and they might well serve for planning purposes, they are, however, clearly not suitable as a basis for determining political rights. The name-by-name analysis is based on an essentialist understanding of identities, and does not leave individuals the right to identify with a group of their choice.

Third, as an implication of the group right to representation, the court identifies groups of voters, and a maximum number of voters by precinct and by municipality that have the right to cast an ethnic minority vote, and others with no such rights. This de-facto cap on the number of ethnic votes is based on aggregated estimates and census figures about the ethnic population by municipalities and precincts. The court states that ‘it is undemocratic that votes from one community are the basis for the representation of another community, and these votes do constitute an objective link between voters and the community’.¹⁴ Thus, the court projects fixed and unidimensional identities onto citizens, and ties them to their given names and their residence. Inter alia, this rules out mixed-ethnic families or any migration within Kosovo or across borders which might alter the ethnic composition of the affected places.

Fourth, the court assumes that representation needs to be based on ethnic links.

These votes are not valid because it is undemocratic when the representatives from one community gain their mandate based on votes that they obtained from another community, so that there is no objective link between the voters and their representatives.¹⁵

Thereby it denies voters the right to select their preferred political representatives when they do not belong to the same community, on the grounds that they lack an ‘objective link’.

The Supreme Court takes possible strategic repercussions of its rule into consideration, though it does so only for the short-term, and in light of potential further innovations in electoral strategies. The court recognises that the strategies employed by supposed Serbian-sponsored satellite parties ‘could in the future be used by the majority, and render impossible the substantive representation of other communities [i.e. Serbs]’.¹⁶ It thereby does not take into account possible more far-reaching consequences of its move for the constitutional order of Kosovo and other countries in the region (see Section 5). The post-electoral annulment of cross-ethnic votes through the Supreme court calls for revisions of the electoral law that rule out cross-ethnic voting in future elections. This,

however, requires either an identification of citizens by their ethnic identity, or an indirect territorial solution to separate voters of different groups.

In light of the existence of similar constitutional designs in other countries in the region, the next section discusses how changes to the political order of Kosovo might lead to claims for similar reforms, and fuel ongoing crises abroad.

4. Regional Comparison, Possible and Impossible Solutions

The case of parliamentary elections in Kosovo prompts questions about configurations of corporate group-related electoral rules (ethnic quotas or reserved ethnic seats) rights to representation (consociational electoral rules) and voting rights (see also Section 2, Table 1).

First, a direct implementation would require a reform which would segment the electorate along ethnic lines, so that citizens would be associated with ‘their’ ethnic group, and vote for their respective group representatives. There are two possible ways how this could be implemented. Either, all voters would vote by ethnic identity. Or, in an asymmetric solution, only members of the respective communities would be allowed to elect minority representatives of their groups, but members of these communities could also decide to vote for general (non-minority) representatives instead. Second, an indirect territorial solution would divide the territory of Kosovo along ethnic lines into electoral districts, and associate the guaranteed group mandates to the districts where the respective groups live in large numbers. Third, voting rights and group representation rights might be harmonised by moving to an entirely liberal solution, e.g. electing the parliament under proportional rules with a low threshold, but with no reserved ethnic seats (e.g. Bosnia and Herzegovina, lower house), or with measures of affirmative action for any party that declares itself as representing a non-majority group (e.g. Serbia, Romania).

For Kosovo, a reform of the electoral rules relying on any of these solutions would have implications beyond the electoral process. The ‘direct’ segmentation of the electorate attaches political rights to ethnic identities, and thereby introduces a fundamental change to Kosovo’s model of citizenship, moving from a universal to an ethnicised understanding of citizenship, where citizens exert their political rights as members of a group, intermediated by group representatives, rather than as individuals. Even if this ethnicisation of citizenship should be relevant for one domain of citizenship rights, voting, all citizens of Kosovo would need to be registered based on their ethnic identity. This comes with a string of challenges, for instance for citizens who do not fall into a single category, or those from groups with multiple (linguistic and religious) identities, for those born from mixed marriages, or for citizens with civic identities. Furthermore, a significant part of the ethnic Serbian population of Kosovo does not hold citizenship (Krasniqi, 2019). In this context, and with further unresolved issues of displacement, ethnic citizenship or even ethnic voting rolls would produce yet new challenges.

Under the second (indirect) solution, the introduction of ethno-territorial electoral districts, citizens are only able to vote in their place of residence for parties running in that area. In particular, they can only vote for ethnic minority seats if they live in an area if a substantial share of the population belongs to that minority. This eliminates most cross-ethnic votes, because minority parties can no longer seek the votes of citizens living in parts of Kosovo other than the ethnically designated districts. However, non-minority voters living in the electoral district assigned to a minority group can still vote cross-

ethnically.¹⁷ The division of Kosovo into areas where certain minorities may exert their political rights as minorities, and others where they may not, opens a Pandora's box regarding territorial organisation of Kosovo. For many displaced members of minority communities (e.g. Roma/Ashkali displaced from the North, but also possibly in the future Serbs from the South), the court ruling implies that their possible return to the place from which they were evicted will exclude them from the right to elect their group representatives.¹⁸ A territorial solution to avoid inter-ethnic voting thus leads to the perpetuation of the current territorial distribution of identities, resulting in a 'political ethnic cleansing' of minority voters from some or all parts of Kosovo. For the 2021 elections, this is exactly the consequence of the court's post-hoc measure. The Supreme Court does not address the implications of its ruling for the segmentation of citizenship rights along ethnic lines or for the territorial/political order of Kosovo (see Section 5), nor does its ruling mandate the lawmakers to find a solution that would avoid the same impasse in future elections.

The third remaining solution is to abolish the reserved seats altogether and move to liberal consociational election rules. This would produce a major constitutional and international crisis: Kosovo's consociational democracy, which is built on the principle of strong group representation, with a considerable over-representation of Kosovo's Serbs, would be at stake. The collective rights of the non-majority communities in Kosovo are also the centrepiece of all diplomatic efforts to seek a political agreement between Pristina and Belgrade, and removing group representation rights would undermine past agreements.

4.1. Regional Debates

The Kosovo court ruling and/or a change of the electoral rules following from the ruling might have signalling effects in the region, or even beyond. Similar problems are already being debated in several democracies in the region with either consociational institutions or ethnic seat guarantees. In Bosnia and Herzegovina, the election and composition of the state presidency is one of the elements of the ongoing political crisis (Keil & Perry, 2015, p. 87). A change in the election rules was requested by the European Court for Human Rights (ECHR) due to the exclusion of small minorities from passive voting rights (see Section 2). One of the contentious political issues of possible reforms is their implication for the election of the Croat and the Bosniak seats. Under current rules, both are elected on the same ballot, so that Croat voters may cast their vote for Bosniak candidates, and Bosniaks for Croat candidates. The change requested by the leadership of Croat nationalist parties would abolish the possibility of cross-ethnic voting. In a presidential election that is clearly segmented along ethnic lines, ethnic moderate candidates risk to be eroded between the two nationalist poles. The Croat nationalists' arguments espouse a view (identical to the Supreme Court of Kosovo) in which only ethnic Croat voters can determine the Croat representative.

In the 2000 elections in Romania, one out of the 18 minority seats in parliament was won by an electoral list registered on behalf of a previously unknown minority group. The list was run by a political entrepreneur and trade union leader who identified this opportunity to win a seat in parliament (Alionescu, 2004).¹⁹ In Croatia, the legitimacy of set-aside minority seats in parliament is being questioned, because ethnic minority citizens, in particular Serbs, who are the largest minority group, only voted for their group representatives in small numbers in national parliamentary elections. Most either abstained or voted for general (non-reserved) seats.

4.2. *Global Comparison*

From 1992 until 2017, Lebanon relied on a system of territorial districts to balance the representation of different communities in parliament, combining elements of the block vote with mixed ethnic districts and quotas, and elements of indirect ethnic segmentation (Salloukh, 2006, p. 640). However, democratic shifts and uneven mobilisation can alter the political choice in mixed Christian–Muslim constituencies, with the result that candidates elected on Christian, and especially Maronite seats depended on non-Christian votes for their election (Haddad, 2010, p. 62,77; Salloukh, 2006, p. 640,644). This has led to calls for a stricter segmentation of the vote, moving from indirectly assigned seats (ethno-territorial districts) to directly assigned ethnic seats, and separate ethnic voter registers and ballots. This proposal is also known as the ‘Orthodox Proposal’ (el Machnouk, 2018, p. 8).

Possible reforms in Kosovo might thus lead to calls for imitation in other countries in the region, or even beyond.

5. **Conclusions**

A new ruling by the Supreme Court of Kosovo opens a unresolved question about consociational democracies: are guaranteed seats for ethnic minorities compatible with cross-ethnic voting? And if not, how may out-of-community voting in divided societies be prevented or prohibited?

From a theoretical perspective, the Kosovo Supreme Court ruling is both exceptional and noteworthy. First, it opens a debate about the design of electoral rules to guarantee the representation of identity-based groups. The court makes a novel argument that group representation should be linked to voting rights that segment the electorate into identity-based groups. This contrasts with the concern of scholars and policy-makers that the ethnicisation of elections leads to a segmentation of politics and to polarisation, and the consequent interest in voting rules that require or incentivise cross-ethnic vote pooling (Bogaards, 2019; Reilly, 2021). Second, Kosovo’s Supreme Court puts its finger on the problem of consociational democracies. If group representatives are to be linked exclusively to the votes that members of said groups express in elections, this means that the corporate type of consociational democracy has been incompletely conceptualised. The emphasis on the ethnically exclusive electoral link between voters and representatives requires that consociational democracies of the corporate type have specifically designed voting rights which distinguish voters by their ethnic identity. And third, the court converts a body of research, addressing the question of whether minority representatives elected by non-minority votes are credible in voicing minority issues, into strong normative claims, which could serve as policy recommendations.

However, the policy prescriptions for the case of Kosovo—but also beyond—should be taken with a grain of salt. Even disregarding all the other damage (ex-post annulment of votes, ethnic identification of voters based on names), the court ruling open a number of legal challenges. Their implementation could lead to many more political problems than it resolves, both within the legal and political context of Kosovo, but also in other countries if the exemplary case of Kosovo raises the pressure for similar solutions. A direct implementation of the court ruling onto the election rules would require group-specific election registers and ballots, and require Kosovo to amend its liberal-universal citizenship

laws, and attach ethnic identities to citizenship. In a context of contested statehood and unresolved citizenship issues for displaced persons (Krasniqi, 2019), this is a hardly achievable endeavour. Alternatively, an indirect territorial implementation would require constitution-makers to divide the territory of Kosovo into ethno-territorial electoral districts. This would have undesirable side-effects for group representation: a territorial district would deprive Serbs living in enclaves, or as dispersed minorities, of their right to elect representatives Serbian representative, and it would reinforce the logic of strict political divisions along ethnic lines. Serbs in Kosovo are politically split between a more radical, territorially concentrated group in the North, and a politically better integrated and moderate minority in the ‘enclaves’ in the South (Jenne, 2009)—a pattern that plausibly is not unique for Kosovo. Beyond group representation, the codification of a territorial division between minority- and majority areas is inherently related to other sensitive issues, ranging from the residency and voting rights of displaced persons,²⁰ to the territorial order (e.g. the status of Serbian-majority municipalities in the North, to possible border changes (Landau, 2017, pp. 453–454; Rossi, 2014)), to issues about minority rights in enclaves and in municipalities with dispersed minorities. The court does not discuss whether there is any policy solution at hand to avoid a similar scenario occurring in future elections, without major politically and legally undesirable implications. According to my judgement, with no acceptable solution in sight, it actively pursues a battle which it can only lose, and which might cause damage to the legitimacy of the constitutional order of Kosovo. Or in brief, it has manoeuvred itself into a ‘checkmate’.

The question raised by Kosovo’s Supreme Court is also highly salient beyond the country’s borders. Group-specific reserved seats, in many forms, exist around the world—from Bolivia, to New Zealand, to Romania—though always with some degree of liberty for cross-ethnic voting.²¹ This may be unproblematic in consociational democracies where the constituent groups are not pre-determined, but emerge as a result of elections (liberal type). The court ruling, however, points to the limits of centripetal institutional engineering in consociational democracies of the corporate type: while incentives for cross-ethnic voting are reported—in some contexts—to lead to political cooperation and integration, they are detrimental to group representation when group representation is not understood as being only about descriptive representation (presence), but also in terms of the political preferences of group members (substantial representation), and in terms of electoral accountability. This tension between the centripetal and the corporate types of the consociational model is particularly salient when the centripetal institutions incentivise voters of the majority group to vote for minority representatives. This might create the impression that these minority seats are captured by representatives who are loyal to the majority, or in the same vein, that representatives are elected by a larger group on behalf of a smaller group. As group representation is the centrepiece of consociational democracies, massive cross-ethnic voting might also put the legitimacy of consociational democracies at risk.

Political elites are in the challenging position of needing to find a solution to Kosovo’s electoral Gordian knot before it leads to further escalation. So long as the contradiction between a universal ballot and reserved seats in the constitution remains, the electoral strategy of nominating a list on behalf of a minority, and encouraging voters to vote inter-ethnically (or related strategies) could be put in place at any time. The court’s solution in the form of the annulment of votes is easy to challenge because it changes the rules *ex-post*, after the voters had cast their votes already, with the obvious infringements of political

rights (ballots with invalid options). A permanent resolution should best be addressed by political actors in the legislative arena, where it belongs, and not by courts.

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Notes

1. I.e. the type of votes that voters can express and the ballot format. By election rules, I refer to the regulations determining who wins mandates in parliament or government.
2. Kroeber (2017) highlights that in Croatia, Slovenia and New Zealand, minority representatives are not legally required to be identified with the group whose seat they occupy, e.g. a Non-Maori candidate could run for a Maori seat and be elected by Maori votes. I classify these three cases as corporate, because minorities vote in separate, ethnically defined electoral districts. The election of non-minority members on minority seats has occurred in elections where reserved seats were not assigned to a pre-determined groups—which I classify as liberal—and with a non-segmented electorate (Alionescu, 2004).
3. There are other incentives for candidates or parties to seek cross-ethnic votes, which are built into the rules about the seat allocation (the designation of the winner), but combined with a liberal ballot, discussed as ‘territorial vote requirements’. For instance, to be elected president of Nigeria in the first round, candidates need 25% of the votes from 24 out of 36 provinces, de-facto implying cross-ethnic votes. The mechanism is not consociational, because it is not associated with group representation, although elites in Nigeria complement it with an informal (consociational) rule requiring the rotation of the presidency between the North and the South.
4. European Court of Human Rights, Mathieu-Mohin and Clerfayt v. Belgium of 2 March 1987, case no. 9267/8.
5. European Court of Human Rights, *Aziz v. Cyprus* of 22 June 2004, case no. 69949/01.
6. European Court of Human Rights on the case of *Sejdić and Finci v. Bosnia and Herzegovina* of 22 December 2009 (nos. 27996/06 and 34836/06), see also (Bochsler, 2012; Hodžić & Stojanović, 2011; McCrudden & O’Leary, 2013).
7. <https://balkaninsight.com/2021/02/22/kosovo-serbs-accused-of-fixing-bosniak-roma-election-results/>.
8. For Roma/Ashkali: Supreme Court of Kosovo, 29/2021; for Bosniaks: 30/2021.
9. Supreme Court of Kosovo, 30/2021, p. 4.
10. No criteria were provided that would allow for a reassessment of the procedure, e.g. how the court dealt with non-identified citizens in the population estimates, what margin of difference between population estimates and voting patterns was allowed, and whether this difference was absolute, based on the number of citizens/voters, or relative, related to vote shares and local population shares.
11. Supreme Court of Kosovo, 30/2021, p. 10.
12. Supreme Court of Kosovo, 30/2021, p. 11.
13. Supreme Court of Kosovo, 29/2021, p. 6.
14. Supreme Court of Kosovo, 29/2021, p. 6.
15. Supreme Court of Kosovo, 30/2021, p. 4; similar: 29/2021, p. 6.

16. Supreme Court of Kosovo, 29/2021, p. 8; identical in 30/2021, p. 5.
17. The division of the territory into ethno-territorial units therefore occurs as part of the difficult trade-off between the exclusion of group members from group representation (those living in places where they are not part of a local majority) versus the (undesirable) inclusion of non-group-members in the potential electorate for group seats.
18. In several contexts, displaced persons are more willing to agree to solutions to conflicts (Psaltis et al., 2020).
19. Similarly, in Bosnia and Herzegovina, in a pragmatic approach, multi-ethnic parties have managed to tailor their nominations to the reserved seats available (Murtagh, 2020, p. 80).
20. This affects to a large degree the Serbs who fled Kosovo after 1999, as well as Roma who were displaced in the course of the conflict and who are often not registered as residents where they live (Sardelić, 2015).
21. Some countries (e.g. Croatia and New Zealand) allow only minority members to vote cross-ethnically, but not members of the majority, or they partially limit cross-ethnic voting by restricting the right to vote for special seats to a specific part of the territory (e.g. Bolivia).

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