

 *federalismi.it*
RIVISTA DI DIRITTO PUBBLICO ITALIANO, COMPARATO, EUROPEO

NUMERO SPECIALE 5/2018

Jurisdiction and Pluralisms:
The Temptations of a Reflective
Judiciary

Edited by Mia Caielli, Mario E. Comba,
Domenico Francavilla e Anna Mastromarino



ISSN 1826-3534

Numero speciale / Special Issue 5/2018

Tutti i contributi del presente volume sono stati sottoposti a referaggio
All contributions are peer reviewed



Table of contents

PREFACE

- Preface. Jurisdiction and Pluralisms: The Temptations of a Reflective Judiciary, by *Mia Caielli e Anna Mastromarino*..... 4

CONTRIBUTIONS

- Linguistic separation or jurisdictional communitarianism? Reflective judiciary in Belgium, by *Anna Mastromarino*..... 6
- In Judiciary We Trust. The Reflective Judiciary in Canada, by *Eleonora Ceccherini* 26
- Foreign judges on Pacific Courts: Implications for a Reflective Judiciary, by *Anna Dziejczyk* 63
- Unequal Opportunities: Education Pathways to the U.S. Judiciary, by *Alfred C. Aman, jr.* 88
- Diversity and the Judiciary in India: Supreme Court judges in Indian society, by *Domenico Francavilla* 106
- Why do women in the judiciary matter? The struggle for gender diversity in European courts, by *Mia Caielli* 124

CONCLUSIVE REMARKS

- Reflective Judiciary: more an illusion than a temptation, by *Mario E. Comba*..... 140

ABOUT THE AUTHORS 154



Preface

Jurisdiction and Pluralisms: The Temptations of a Reflective Judiciary

by **Mia Caielli e Anna Mastromarino**

The projection of institutional, cultural, linguistic, religious and ethnic pluralism on the judiciary seems to be leading to two different phenomena, both aimed at protecting diversity and recognizing community interests. On the one hand, some countries have been establishing special religious or/and ethnic special courts. On the other, 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. This latter phenomenon needs to be investigated in the light of its impact on judicial decision making and its ability to reduce ethnic, religious, linguistic or cultural conflict.

This area has been investigated by the research unit of Torino within the P.R.I.N. Research Project “*Jurisdiction and Pluralisms* (JPs)” which has been exploring the impact of the plurality of pluralisms on basic features of judicial organization and function since 2013.

This issue, in particular, brings together some contributions based upon researches presented during sessions focused on the phenomenon of particular manifestations of diversity in the exercise of the judicial function, at the International Conference “*Diversity and the Courts: Judicial Pluralism in India*” hosted by the University of Torino on 18 and 19 September 2014, and the International Workshop “*The Judiciary in Territorially and Culturally Compound Systems: Organisation and Functions*” at the University of Trento (7 and 8 May 2015). The other contributions present the results of independent research aiming at a more complete comparative picture of the various ways of achieving a certain degree of judicial representativeness in countries characterized by considerable legal and ethnic pluralism, and of diversity

in the courts and judicial activism in terms of the representation of interests and needs of different segments of certain societies.

Particular attention is paid to analysis of the instruments that are used in order to increase judicial representativeness since such instruments vary considerably according to the multiple needs that the search for a more diverse judiciary aims to satisfy. The different examples and cases of achieved or desired judicial diversity are therefore analysed from the perspective of the main purpose that courts' representativeness seeks to pursue. Three main purposes have been identified. First of all, a reflective judiciary aims to strengthen public confidence in the administration of justice; secondly, it aims to guarantee more informed judicial decisions and have a positive impact on the reasoning and style of judgments; finally, it is seen as an instrument to promote equal opportunities for women and members of ethnic, religious, and linguistic minorities in access to judicial careers.

It is difficult to identify one single and exclusive aim pursued by each experience of reflective judiciary. Rather, it emerges from the case-studies that 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 counteract 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.

This special issue provides an opportunity to explore the different models of reflective judiciaries all around the world, since they are related to European, American and Asian contexts: all the papers published here illustrate and analyse a variety of recent rules and practices aimed at offering a new interpretation of the idea of justice delivered "in the name of the people". But they also inevitably leave many questions open and address areas that need to be further examined in future research that most contributors are already involved in.

Linguistic separation or jurisdictional communitarianism? *Reflective judiciary* in Belgium

by Anna Mastromarino

Table of contents: 1. Introduction 2. Federalism in Belgium. 3. The justice system in Belgium. 4. Linguistic separatism in the Belgian judicial system. 5. Shades of *Reflective Judiciary* in Belgium. 6. “No” to *communautarisme juridictionnel* . 7. Linguistic separatism and *belgitude*. 8. Conclusions: Beyond linguistic separatism: When communication breaks down

1. Introduction

Belgium’s institutional, legal, sociological and cultural context reflects a fracture that tangibly splits the country in two, with every decision concerning the country’s organisation responding to the need to preserve the existence of the two major linguistic communities: Flemish and French.

The aim of this paper is to assess whether, as regards the judiciary, the typically Belgian linguistic division does not reflect a simple issue of representation of different national groups within Institutions, or whether this division reflects a general ideological approach strongly embedded in the federal structure: regardless of their impact, whether demographic, political or economic, the Flemish and Francophone communities must be balanced. All state powers, including the judiciary, must engage in maintaining this difficult balance. Below, we will seek to demonstrate this argument.

2. Federalism in Belgium

Belgium arrived at federalism in 1994. As already mentioned, this was not a drastic choice, but more of a slow and gradual process that led to the progressive territorial decentralisation of central power.

Born to contain the secessionist claims of certain political forces, where weaker forms of dissociation had failed, the Belgian constitutional model represents an *unicum*. At the same time, it is a *fédéralisme de dissociation* (because it stems from the process of dissociation of an initially unitary State), a *fédéralisme de superposition* (which creates different types of collectiveness, such as regions and communities that overlap

from a territorial point of view), and a *fédéralisme de confrontation* (to meet the cohabitation needs of a multidimensional society)¹.

The Belgian federation is made up of six different organisations: three communities, French-speaking, Flemish and German-speaking, and three regions, Wallonia, Flanders and the Region of Brussels-Capital. Therefore, every citizen is subject to three different levels of authority in Belgium: regional, communitarian and federal.

In offering a juridical response to the conflict affecting the social body, the Belgian constitutional model is based on two different realities in an attempt to make two different and theoretically incompatible types of federalism coexist: on the one hand, with the strengthening of the three linguistic communities, it introduces a personal system revolving around cultural distinctions; and on the other, according to the more classical federal theory, with the redefinition of the regions, it unites the territorial element with the subjective data. The result is an articulate system that breaks down spaces and jurisdictions, overlapping the subjective component of belonging to the group with the objective one of the territory, and which makes belonging and territoriality the mainstays of the organisation and operation of the federal system, despite its more simplified form than the original constitutional project².

There has been a progressive “territorialisation” of the communitarian system over the years, partially concerning matters of a cultural nature initially assigned to the jurisdiction of the communities, tied to the linguistic affiliation of the citizens and not to their residence, to the point where the voluntary nature of membership in a linguistic group has been replaced by an objective concept of belonging determined by the place where they live.

Furthermore, the system has gradually succeeded in generating a political model that more closely reflects the sensitivities of each linguistic group. When the reform was first implemented, a reduction of the federation was favoured, at least in practical terms, because the jurisdictions and departments of the Flemish region were gradually absorbed by the Flemish Community, while the institutions of the French Community, despite continuing to exist, devolved part of their jurisdiction to the Wallonia region.

Then there is the fact that, unlike the more classic examples of federalism by aggregation, Belgium is founded on the traditional principle of equality among the federated departments, that is not revealed in the facts, however: re-proposing what is essentially the social fracture running through the entire national territory, over the years the Belgian system has become bipolarised, ending up revolving around the historic divide between French-speaking and Flemish communities.

¹ See F. Delpérée, *Le droit constitutionnel de la Belgique*, Brussels, Bruylant, 2000, 388 et seq.

² For further details on the matter, refer to A. Mastromarino, *Belgio*, Bologna, il Mulino, 2012, 28 set seq.

Every single aspect of political and institutional life in Belgium reflects this dichotomy: the party system is split; the electoral system is organised on the basis of a rigid system of linguistic districts; in Parliament, the more traditional parliamentary groups are flanked by linguistic groups, to which every elected member must adhere; the social services, healthcare and education systems are based on the principle of linguistic territoriality and respond to the rule of mono-linguicism that has been consolidated over the years, with amendments and additions that have never involved a substantial rethinking of the linguistic separatism that exists in Belgium³.

It is on this separation that the Belgian *paix communautaire* has been built⁴. This separation and the constant use of compromise often leads to stalemates that are overcome through apparently surreal solutions (worthy of a Magritte painting), which are actually effective in maintaining that unstable balance sustaining the kingdom of Belgium. An excellent explanation is given by jurist Paul Martens, identifying an element transversal to every other division, shared by all Belgians: “Au Nord comme au Sud, nous

³ The Belgian linguistic regime is outlined via a step-by-step procedure, the start of which can definitely be seen as coinciding with the approval of a law on the use of language in administration on 28 June 1932, and the adoption of a specific regulation for the use of languages in the legal system on 15 June 1935. Since then, the division of the national territory into mono-lingual regions (with the exception of Brussels-Capital) has been subject to no further doubt. On the contrary, in the early Sixties it was confirmed and made even more restrictive, with laws passed on 8 November 1962 and on 30 July and 2 August 1963, proceeding with what was commonly known as the “freezing” of the linguistic boundaries.

⁴ The term *paix communautaire* is borrowed from the name commonly given to the law passed on 9 August 1988. It was approved by Parliament following a long period of tensions fed by the rigid application of linguistic separatism in the municipalities in which the special system was applied (*à facilités linguistiques*). These were situated on the border with the linguistic regions in which the language spoken by the majority of the inhabitants is different from the official language. The law’s passage in 1988 introduced an eloquent example of Belgian pragmatism and its vocation for compromise, with an unusual and insuperable presumption of knowledge of the official language by those who elected to municipal office. The need to guarantee linguistic uniformity and to verify that knowledge of the official language by public administrators is required by regulations is not derogated, but bypassed by means of a legal presumption “qui pourrait permettre de vivre en paix linguistique et de vaquer à d’autres préoccupations plus urgentes: l’objectif de pacification valait bien qu’on malmenât quelque peu la raison”. Cf. P. Martens, *Les cours constitutionnelles: des oligarchies illégitimes?*, in *La république des Juges*, Actes du colloque organisé par la Conférence libre du Jeune Barreau de Liège, Liège, Edition du Jeune Barreau de Liège, 1997, 63 (53-72). Referring to the case of the creation of the district of Bruxelles-Hal-Vilvorde, Paul Martens insists on Belgian pragmatism, which sometimes approaches surrealism and often implicates a *vulnus* of the system of separatism to the benefit of what he himself calls *pax belgica*, meaning a compromise representing the achievement of a difficult balance between the interests of the various communities and between the communities and the Federal State (again P. Martens, *Le communautarisme, le multiculturalisme, le nationalisme et l’universalisme en Belgique à la lumière de la jurisprudence de sa Cour Constitutionnelle*, in J. Ringelheim, *Le droit et la diversité culturelle*, Bruylant, Brussels, 2011, 205 et seq. Constitutional justice seems to have taken this perspective to heart when, in decision no. 73/2003, referring specifically to the need to defend *paix communautaire* at all costs, it recalls how Belgium represents a space for the neutralisation of passions, permanently using compromise; and in the case regarding the inspection of Francophone schools under the special system, located in Flemish territory, resolved with decisions 95/2010 and 124/2010, defined by the author as a “prototype des décisions de pacification par lesquels la Cour, tout en reconnaissant l’homogénéité de principe de la Communauté flamande, tempère son application en solidifiant les accords qui ont été conclus et les dérogations qui doivent être accordées”.

avons, prétend-on, une aversion pour les questions simples: il suffit qu'un problème soit soluble pour qu'il cesse de nous intéresser. Par contre, nous raffolons des questions qui nous divisent et qui nous permettent de disputer sans fin. Nous en avons un stock inépuisable: question royale, question scolaire, question linguistique. Nous ne leur donnons jamais une solution tranchée. Nous laissons les positions antagonistes sur un point d'équilibre et nous en faisons un compromis. Nous avons une inaptitude à la raison syllogistique : nous faisons de la dialectique mais en laissant le syllogisme inabouti. Souvent, nous nous opposons sur des points mineurs : nous avons la capacité de prendre l'anodin au tragique. Et les solutions que nous imaginons finissent par contenter chaque partie parce que chacune d'elles est convaincue qu'elle l'a emporté, grâce à la polysémie du texte finalement adopté. Nous avons le talent de bien nous entendre sur des malentendus. Nous sommes modérément cartésiens. Le surréalisme belge existe aussi dans notre droit"⁵.

3. The justice system in Belgium

The organisation of justice does not escape the logic of separation in a system that is completely divided by language, in which there is no public space that is immune to the linguistic factor, no public space in which people can declare themselves to be “lay” from a linguistic point of view. This proves that “language” is not a matter that can be assigned to the centre or the periphery in the Belgian system: it is more of a code that can help decipher the entire system.

The Belgian legal system belongs to the tradition of *civil law*. Competence over the organisation of judicial power (the independence and autonomy of which are sanctioned by the Constitution) and of constitutional justice is held by the federation.

Alongside ordinary jurisdiction, Belgium has two more jurisdictions that perform mainly a controlling function; these are the *Conseil d'Etat*⁶ and the Constitutional Court.

Like the *Cour the Cassation*, these two Courts hold jurisdiction over the entire national territory. However, for the purposes of our work, it is worth remembering that the other courts and tribunals are organised

⁵ P. Martens, *Théories du droit et pensée juridique contemporaine*, Brussels, Lancier, 2003, 249. Elsewhere, in *LeLibre.be*, dated 5 October 2010, the same author speaks of a “réalisme fantastique” typical of the Belgian system, also with regard to its jurisprudence, capable of “mettre dans la même décision les concessions des uns et des autres, permettant à chacun d'estimer que les concessions qu'on leur fait sont au moins aussi satisfaisantes que celles qu'ils font”. An admirable example of jurisprudential fantastic realism refers to the decision no. 124 passed by the Constitutional Court in October 2010, which, while confirming the exclusive jurisdiction of the Flemish government to monitor and inspect schools situated in Flanders, also adds that the Flemish Community is obliged to agree to an exception with regard to French-speaking schools active in municipalities *à facilités linguistiques*.

⁶ The *Conseil d'Etat* is the highest department in the judgement and control of Belgian administration. In some spheres, due to the wishes of the federation or intervention of a sub-state department, there is also a territorial organisation of administrative justice. In this case, the *Conseil d'Etat* operates in the second degree.

into five “judicial areas” corresponding to the five districts of the Appeals Court: Brussels, Liège, Mons, Gent and Antwerp.

Each district is divided into twelve counties, all under a court of first instance, with the exception of the county of Brussels, where there are two courts, one operating in French and the other in Flemish. There are also nine labour tribunals and nine commercial tribunals.

Each county is divided into cantons, totalling 187, with 187 *juges de paix*. Lastly, each province can rely on its own Court of Assizes. This is not a permanent jurisdiction, but a specialised department, set up, if necessary, by judges who are members of the Appeals Court. The decisions of the Belgian Court of Assizes can be overruled only by the *Cour de Cassation*.

Access to the Bench (as a *juge de paix* or member of the *tribunal de police, du travail, du commerce or de première instance*) is by royal appointment.

In 1991, law makers intervened to make the selection process more difficult. Today, intervention by an appointment commission is envisaged. The commission is set up within the Higher Council of Justice (department for the self-governance of judicial power), choosing from candidates having passed a national exam and then presented to the reigning monarch in the form of a proposal. The selection criteria include language, which is unquestionably determined by the possession of a university degree, according to the location in one or the other linguistic region of the university that issued the degree.

The potential candidate’s profile is undoubtedly influenced by two factors: his/her education language and the geographical location of the vacant position. This is because, since 1935, justice has also adapted to the system of mono-linguism in force in every other area of civil service in Belgium.

Consequently, in observance of the principles regulating the establishment of a judgment at one court or another on the basis of jurisdiction by territory and subject, even the judicial system is based on a system of linguistic separatism, in compliance with the principles assumed and never abandoned by law makers, with the law passed in June 1935 on the use of language in judicial administration. Consequently, the entire procedure is conducted in the official language of the region where the court appointed to pass judgement is located, notwithstanding the parties’ rights to defence.

Additionally, even when only one department holds jurisdiction over the entire national territory, as is the case of the *Cour de Cassation*, the *Conseil d’Etat* or, as regards constitutional justice, the Constitutional Court, the linguistic element is preserved in terms of the organisation and composition of the court, guaranteeing equal participation by the members of one or the other linguistic group and/or the creation of uniform sections along linguist lines.

4. Linguistic separatism in the Belgian judicial system

It is undeniable that, in Belgium, the linguistic communities' focus on linguistic separation in judicial services has grown over time, not only with regard to the use of one language or the other, but also with regard to the recruitment of judicial staff, particularly judges.

This does not, however, seem to depend on a progressive acknowledgement to the individual of a communitarian right to be judged by a subject sharing the same ethnic-linguistic affiliation, in order to guarantee full entitlement to defence. Rather, this increasingly clear separation seems to depend more on the strict application of the principle of linguistic territoriality and the adoption of preferential monolingualism implying a systemic choice made as the basis of the Belgian state structure.

This perspective seems to be confirmed by an analysis of the linguistic rights acknowledged to the parties in judgement. If proceedings are held in a region where the official language is not that spoken by one of the parties, their right to use their mother-tongue is limited, although we also need to distinguish between the criminal and civil spheres.

The system appears complex, making it difficult to summarise here.

It is also worth remembering that, in civil matters, territoriality is a priority in defining the language of the judging body: if both parties present a claim, the procedure can be transferred to a court or tribunal of the same level in another linguistic region. As regards the Region of Brussels-Capital, taking into account the bilingual nature of the department, the procedure is held in the language of the region in which the defendant is domiciled. If he/she is domiciled in the Region of Brussels-Capital or abroad, the choice of language for the proceedings depends on the plaintiff. The defendant may present a claim, *in limine litis*, to have the lawsuit held in the language of the region where he/she is domiciled. In any case, the judge may reject the claim if he considers that the defendant has the necessary knowledge to understand the proceedings in the language in which it has been set-up, i.e. that of the plaintiff.

Territoriality prevails in the criminal sphere as well. In the Region of Brussels-Capital, the accused's domicile determines the language of the proceedings. When the accused knows only one language, different from the one in which the proceedings are to take place, or if his/her knowledge of the language of the proceedings is insufficient to fully guarantee his/her rights to defence, he/she may ask to be heard by a department operating in his/her language. The judge will be responsible for assessing claims on a case-by-case basis, and either accepting or rejecting them. Should they be rejected, the accused will be entitled to receive a translation of all legal files.

The adoption of the law passed on 19 July 2012 appears to respond to the Belgian system's vocation for linguistic separation.

The law is part of a larger package of regulatory interventions, also of constitutional ranking, forming the basis of the political agreement for what is known as the sixth reform of the Belgian State⁷.

In particular, this reform changed the judicial district of Brussels-Hal-Vilvorde (BHV), duplicating the judicial seats, splitting the offices of the public prosecutor's department along linguistic lines (with the creation of the XII *arrondissement* of Brussels), and redefining the rules for the use of language in legal matters in the territories concerned in the division of the constituency.

As concerns the electoral plan, the bilingual nature of the dissolved BHV district had contributed to generating unsustainable political tension which also ended up involving Parliament and the Constitutional Court on several occasions⁸: the search for a solution involving the division of the district seemed inevitable, unlike the judicial sphere, where the existence of the bilingual district BHV had generated a less heated debate in juridical terms.

The reasons for the reform that led to the juridical district being included in the split have to be sought elsewhere. First and foremost, the split would seem to depend on the opportunity to impose on the district an all-round division involving every sphere possible; but also on strictly political reasons⁹. It effectively highlights the centrality assumed by the principle of territoriality in the Belgian system and the system's consequent inexorable tendency to minimise (when truly necessary or impossible to do otherwise) the existence of bilingual spheres that generate socio-institutional tensions and overshadow the application of the law.

The law passed in 2012 (a detailed analysis of which is outside the scope of this article¹⁰) does not actually focus on disputing or changing the legislative framework of the law passed in 1935. Rather, it tends to impose a simplification that moves directly in the sense of application of the regimen of linguistic separatism in the use of languages in the districts of Hal-Vilvorde and the bilingual district of Brussels, extending to it the application of the rules already usually applied in the other *arrondissements* we briefly mentioned earlier.

⁷ Cf. A. Mastromarino, *Modificaciones constitucionales en Bélgica. La sexta reforma de l'État: un proceso en marcha*, in *Revista d'Estudis Autònoms i Federals*, n. 22, 2015, 64-91.

⁸ For a reconstruction of the matter of the BHV electoral district, before its split, historically and institutionally, see B. Blero, *Bruxelles-Hal-Vilvorde, couronne d'épines de l'État fédéral belge?*, in *Pouvoirs*, 136, 2010, 97-123.

⁹ It is worth remembering that, with decision no. 96 passed on 30 June 2014, the Belgian Constitutional Court ruled on the constitutionality of the law in the division of the BHV.

¹⁰ To this end, see F. Gosselin, *La réforme de la loi du 15 juin 1935 concernant l'emploi des langues en matière judiciaire*, in F. Gosselin (dir.), *La réforme de l'arrondissement judiciaire de Bruxelles. Première approche pratique*, Brussels, Larcier, 2012, 69-104; by the same author, see also *La loi du 19 juillet 2012 portant réforme de l'arrondissement judiciaire de Bruxelles*, in *Journal des tribunaux*, 16 February 2013, 113-119.

There does not seem to be any impellent reason of public system on the basis of the division of the BHV judicial district (as happens on the electoral front), but more of a desire to guarantee and confirm the institutional political foundations of the defence and consolidation of the previously mentioned *paix communautaire*, which finds a stronghold in the regimen of mono-linguicism and linguistic separation.

This appears to be the direction taken by the review of the constitutional text accompanying the law that led to the introduction of art. 157bis in the Constitution, prescribing the use of the special law for defining or amending essential elements concerning the use of the language in the judicial sphere. In the words of constitutional law makers, the provision was made necessary because “la réforme touche au cœur des grands équilibres qui sous-tendent la paix communautaire, par analogie avec ce que prévoient d’autres dispositions de la Constitution qui touchent également à ces grands équilibres”¹¹.

5. Shades of *Reflective Judiciary* in Belgium

The justice system’s tendency to try to consolidate the legitimisation of its judges by selecting members capable of representing the social body is not new. Think of the unwritten rules that determine the composition of the United States Supreme Court; the practices implicated in the application of rules on the presence of the Quebec component of the Canadian Supreme Court; the constitutional or legislative provisions of those countries that, especially in recent years, have encoded the selection of judges, initially at the constitutional level, but sometimes ordinary judges as well, so that the representation of diversity (gender, linguistic, ethnic and religious) within the social body can also be taken into consideration by the judicial system. The matter is quite delicate if one considers that, with reference to the act of representation, it is common to trace the difference between the tasks of legislating and judging.

There can be many reasons for this aspiration and, from a theoretical point of view, the matter (as a whole) seems to have been the focus little study in order to draw final conclusions.

In this sense, the volume containing this piece intends to contribute to the reflection, proposing an attempt at organising and theoretically classifying tangible cases.

What is certain is that the matter relating to the legitimisation of judiciary power tends to become quite a touchy subject and to take on particular characteristics in correspondence with systems marked by ethnically and nationally fragmented social bodies. In this case, tensions between the different *cleavages* tend to monopolise institutional life, especially where minorities complain of a deficit in visibility and defence. The reaction to this is often the breaking down of power into segments in order to reflect and provide a response to the divisions of society.

¹¹ *Ann. Parl.*, Ch., 2011-2012, discussion générale, 20 juin 2012.

This phenomenon ends up having particular effects in the judiciary sphere with regard to the legitimisation of the judging body. Methods of legitimisation different from those of the circuit of representation (the same authority, for example, or a high level of skill), can, in fact, lose value if used in a climate of diffidence and mistrust towards those who, operating on behalf of the State, are thought to act in the interests of the majority only, without being able to identify with and understand the juridical culture in which the minority moves¹².

We are well beyond the matters that the protection of rights to defence can raise in the presence of a linguistic minority.

Here, we face a perspective involving the judging body's very reasoning, marking a cultural confine between "us" and "them", and which ends up investing the unity of jurisdiction, raising the matter of the possible conditioning of those who decide in relation to their autonomy, but not in the sense of guaranteeing the impartiality of the ruling with respect to the judge's social and cultural background¹³. On the contrary, it seeks to assure the parties that the decision has been taken in a specific sense (which is that to which they belong and which the judging body knows, being a member of it), in order to guarantee its equity.

Certain legal systems seem to willingly accept the risk of a loss of autonomy by the judging body or of dismembering the legend of the unity of jurisdiction in order to ensure the tangible application of another principle: that of the natural judge "by affiliation", capable of better understanding the position of those who are part of the judgement, since he or she is "one of us". This is not a matter of expecting preferential treatment, which would find its *raison d'être* in belonging to the same group. Rather, it is more a question of cultivating the certainty, from which legitimisation and trust are promulgated, that those called upon to pass judgement have the cultural tools to fully understand the reasons of the parties or the accused, and, consequently, to judge fairly. The difference is slight but requires a shift from a merely procedural level (predetermination of the judge by law) to a level on which sociological – if not psychological – factors intervene to enrich the reflection.

Now, considering all of the above, can Belgium be included among the paradigmatic cases best representing the theoretic plan to which we have referred, well defined by the phrase "*Reflective Judiciary*", and which is timidly beginning to gain ground in doctrine?

¹² For a reflection on the legitimisation of judiciary power in constitutional democracy, refer to A. Di Giovine, A. Mastromarino, *Il potere giudiziario nella democrazia costituzionale*, in R. Toniatti, M. Magrassi, *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e confronti europei e comparati*, Padua, Cedam, 2011, 17-41.

¹³ ...through that process that P. Martens, *Le métier de juge constitutionnel*, in F. Delpérée, P. Foucher (dir.), *La saisine du juge constitutionnel. Aspects de droit comparé*, Brussels, Bruylant, 1988, 25-42, 29, plastically defined as a 'miracle de transfiguration'.

Answering this question seems complex, although, anticipating the conclusions, it should be said that the outcome is largely negative, despite the existence of certain factors that could lead to different considerations. These factors, first of all, lead to a social-juridical analysis and invite us to reflect on the possible existence of different juridical cultures within the two majority linguistic communities. These factors, as described in the previous paragraphs, in turn, have an immediate influence on the clear organisation of the judicial system from a linguistic point of view, but also on the emergence of a *Judiciary Federalism*. This highlights a certain gap in as far as the tangible expression of the jurisdictional function in the different regions of the country is concerned, despite the exclusive competence being formally assigned to the federation by the Constitution. We will have the opportunity to look at this in more detail in the last paragraph.

On order to understand *Belgique juridique* (and any connections with the phenomenon of *Reflective Judiciary*) we must first look at *Belgique sociologique* and reiterate the centrality of two social groups which, in a desire to simplify matters, are usually defined on a linguistic basis.

In fact, language, in both the Flemish and the French-speaking communities alike, represents the beating heart of a larger identity that finds its vehicle of expression and point of strength in language, though not representing the only *fait différent* between the two communities. The fracture between the two communities is not purely linguistic, but cultural and ideological, and economic and social as well. It appears to interest the idea of community and of State cultivated by the French-speaking and Flemish communities; and to regard the juridical tradition referred to by the two groups in the application and interpretation of the texts¹⁴. It would seem to stem from a different concept of nationalism (with everything that ensues in terms of national symbolism) conceived within the two groups¹⁵.

¹⁴ P. Martens, *Théories du droit et pensée juridique contemporaine*, cit., 248-249, insists on this point, stating that “juristes néerlandophones et francophones ne se présentent pas avec un patrimoine culturel identique lorsqu’ils abordent l’interprétation d’un texte. Les francophones ont, pour l’essentiel, un fonds de culture cartésienne et positivisme qui les conduit à chercher le sens de la loi, indépendamment des contingences historiques ou politiques de son élaboration. Les néerlandophones sont imprégnés d’une culture d’affirmation et de revanche qui éclaire les textes d’un sens qui n’est pas lisible par le lecteur d’une autre culture”.

¹⁵ It is known that the original nationalism referred to by the Flemish community is one that bases its idea of social cohesion on pre-juridical, irrational and romantic data, while the concept of nation to which the Francophones refer is the result of an act of intellect, which invites a converging of the differences within a common project of life. This nationalism is more defensive and cyclical than anything else. Although diluted time after time, this distinction found a plastic representation at the time of creation of the federate departments and in the definition of the autonomy granted to them. Over time, two different conceptions of the country have found space in Belgium (including at the institutional level). One – that closest to the “feelings” of Flanders, founded on the subjective membership in a group and linked, more than anything else, to the Germanic concept of population – has focused rights from the start on the acknowledgement of three separate communities: French-speaking, German-speaking and Flemish; the other – rooted in the territorial conception of region and aimed at re-proposing

Above all, it appears that it has already been taken into account by Belgian jurisprudence for some time, at least since the Sixties, about thirty years before the federal transformation of the Belgian State and before the beginning of the process of territorial decentralisation launched constitutionally with the reform of 1970. Consider, in this sense, the conclusions reached by the Conseil d'Etat in decision no. 11,749 of 1966, better known as *arrêt Molulin et de Coninck*.

In this case, in formulating his decision, the judge seems to allow himself to be guided not so much—or not only—by the provisions in force (primarily art. 42 of the Constitution), but by other infra or para-legal documents¹⁶. The ruling refers specifically to the division of the Belgian State into linguistic regions, and this division can be considered, according to the Council, a division suited to conditioning the exercise of a public service (including radio and television broadcasting, in the case in hand), having confirmed the existence of a “*partie flamande du pays*” which evidently requires the existence of an opposing French-speaking part. Despite the fact that, at the time (1961), the division into institutional linguistic regions had not been formalised in any text in force, the Council seems to want to enhance certain social and cultural values, assuming that the two linguistic communities, which it is taken for granted exist in Belgium, can have different needs which, as such, must be met by public administration¹⁷.

The Conseil d'Etat's type of reasoning and the perplexities aroused in doctrine, then and now, by the decision, allow us to go even further, assuming the existence of a difference that can be glimpsed between the lines of the judgement, between the *modus decidendi* of the French-speaking judge, with his Latin education, and that of the judges whose *reasoning* prioritises the method of the Anglo-Saxon or Germanic school as in the case of the Flemish magistrates; this method is much less linked to the letter of the law

a French idea of State, prioritising a voluntary view of the definition of community – has always required the institutionalisation of three different regions, Wallonia, Flanders and Brussels-Capital.

¹⁶ The reference is to the conceptual impact proposed by Hughes Dumont, *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, vol. 1, Brussels, Bruyellant, 1996, used to analyse the case of Moulin-de Coninck by P. Martens, *Théories du droit et pensée juridique contemporaine*, cit., 244.

¹⁷ Messrs Moulin and De Coninck, secretaries of the Belgian Communist Party, had contacted the *Conseil d'Etat*, contesting the legitimacy of the regulations adopted in 1961 by the administrative council of the Flemish section of the Belgian broadcasting company, by force of which access to the spaces of the political tribune was reserved exclusively to the political forces represented by at least one seat “dans la partie flamande du pays”. Being able to rely on the presence of those elected in the Brussels-Capital region and the region of Wallonia, but not in Flanders, they complained of their unfounded exclusion from the broadcasting circuit in this part of the country. At the time of the complaint, the reference to the existence of an alleged “Flemish part” had no foundation in the positive law that made no mention of either the notion of region or of community. Despite the fact that the dictates of art. 42 of the then Constitutional text, which declared that those elected represented the nation and not only the province in which they were elected, could, on the contrary, be mentioned in support of the position of plaintiffs, in 1966, the Conseil d'Etat rejected the complaint, grounding the legitimacy of the overruled regulations directly on geopolitical and sociological factors, before those of a regulatory nature. Among others, see P. Martens, *Le Droit peut-il se passer de Dieu : six leçons sur le désenchantement du droit*, Namur, Presses Universitaires de Namur, 2007, 114 et seq.; H. Dumont, *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, cit., 286 et seq.

and oriented much more towards a teleological interpretation of the provision¹⁸. Having said this, and having reached this point, we have to stop: otherwise, if we continuing along our line of reasoning, it is unlikely that we will be able to escape the syllogism, which, when certain conditions are met, leads us to consider the organisation of the Belgian judicial system as completely irreconcilable with the legitimate aspiration of being able to rely on a same, shared interpretation of the regulations common to all citizens.

6. “No” to *communautarisme juridictionnel*

There is no lack of elements that could lead to the temptation to include Belgium among the systems to be taken pragmatically into consideration for a systematic study of the phenomena of *Reflective Judiciary*: composition of the courts on a linguistic basis; geographic differentiation; consideration of the sociological differentiation of ethnic-linguistic membership among factors sustaining decisions; the assumption that there can be a certain distance between the legal culture in which Flemish and French-speaking judges have been educated and operate.

Then there is an analysis that is not restricted to photographing the present, tending towards the reasons that have led to the choices progressively made in acknowledging and representing the different identities within the judicial sphere, that could shed new light on the reflection, leading more to a reading of the figures from the viewpoint of the more general Belgian federal context and its particularities than from the point of view of territorial organisation of the powers of the State.

Notwithstanding certain long-term considerations that will be made when we draw our conclusions, we can, in fact, exclude that the decisions made with regard to the organisation and operation of judicial power in Belgium were adopted primarily to meet needs to “represent” diversity in the jurisdictional sphere.

In this sense, the Constitutional Court, in decision no. 195 of 2009, excluded that Belgian justice can, in some way, be inspired by velleitiés of *communautarisme juridictionnel*, meaning that only judges belonging to the same community as the parties or the accused could be legitimated to pass judgement¹⁹.

Such features of the judiciary (and of the constitutional justice itself) seem to be a response to “structural pressure” affecting either the institutions and the people, and influencing their expectations towards the system, from the viewpoint of its organisation. They can be traced back to an institutional need linked to the tension experienced by the system with respect to seeking and maintaining an institutional balance

¹⁸ Remember P. Martens, *Théories du droit et pensée juridique contemporaine*, cit., 244, the “problème d’une telle méthode porte sur l’identification de la finalité à satisfaire : peut-on interpréter des textes belges à la lumière des fins que poursuit une partie de la population de l’État belge ?”.

¹⁹ P. Martens, *Le communautarisme, le multiculturalisme, le nationalisme et l’universalisme en Belgique*, cit., 208.

that would preserve the State's integrity, enabling political instances of an otherwise opposed ethnical nature to coexist.

There are two communities in Belgium speaking two different languages. Belgian federalism was created on the basis of this differentiation. Belgian institutions are based on this differentiation and the unique Belgian federal system is based on maintaining an unstable balance between this differentiation and State unity.

The search for balance (obviously an unstable one...) is the key to reading the Belgian system, directly related to the constant use of compromise as the preferential political dynamic to prevent the prevalence of one political force over the other, or of the interests of one community over the other.

It is hard to say whether the distance between the two communities still feeds this institutional separation or whether institutional separation maintains the social and cultural gap between the two communities. What is certain is that this separation/division has become physiological and characterises the system, guaranteeing its survival. It also represents the horizon of sense on which every Belgian builds his/her identity as a citizen from birth. The citizen is included *ab origine* in a dichotomist public context, in which everything is linguistically defined: how could the judicial system not be? How could it not be like this, taking into account that "not being like this" would manifest an original element unknown to the system, capable of generating mistrust in the public and endangering that balance that is at the basis of Belgian cohabitation. In a world where everyone, from shop owners to high-level officials, speaks his/her own language how could someone have faith in an allophone institution?

As a consequence, as regards the judicial system and its linguistic organisation defined in compliance with the rigid application of the territorial principle, apart from in the bilingual areas obviously, the question appears not so much to be "why is it like this?" as "how could it be otherwise?". The Belgian judiciary has to be divided because the entire institutional system is divided; because through the demarcation of spaces of exclusive autonomy, the entire system tends towards a balance guaranteeing cohabitation and peaceful coexistence between two otherwise opposing communities.

When possible, this balance has been pursued and protected by applying the principle of territoriality and a preference for mono-lingual regimens. In other cases, the balance is pursued by guaranteeing equal participation by the Flemish and French-speaking components.

So, in the case of the Constitutional Court, "la règle de la parité ne peut être assimilée à une disposition sur l'usage des langues au sein de l'institution de justice. Elle doit être comprise dans une perspective plus institutionnelle. Elle est révélatrice de la structure dualiste de la société politique. Elle entend apaiser les craintes de l'une et de l'autre des Communautés les plus importantes qui sont organisés en son sein. Elle

met surtout la cour à l'abri des critiques de partialité que pourrait lui valoir une composition déséquilibrée²⁰.

The Court's composition (from a linguistic point of view), the selection of its members (chosen from linguistically determined lists, drawn up by the Lower House and the Senate), and its internal organisation (with two presidents, one from each of the two linguistic communities, and on the assistance of referendaries, who are also divided into linguistic groups) meet the need to place the Court in a position to be able to fulfil its office as guarantor of the institutional balance, envisaging an equal structure in linguistic terms, since it is impossible to organise mono-lingual work sections as in other courts of final instance²¹.

It is a shared opinion that the Constitutional Court in Belgium “contribue à un fonctionnement ordonné et pacifié de l'entreprise fédérale”²². In this sense, it ends up representing that vocation for unity in diversity on which Belgium is represented better than any other body.

It is no coincidence that the Constitutional Court has been assigned to oversee the respect of so-called *loyauté fédérale*²³, “ingrédient essentiel de la cohésion de l'État belge”²⁴ which “rappelle aux différents

²⁰ Cf. F. Delpérée, *La Cour d'Arbitrage et le fédéralisme belge*, in E. Orban (coord.), *Fédéralisme et cours suprêmes*, Brussels, Bruylant, 1991, 167-198, 174.

²¹ ...being convinced that the “règle de la parité linguistique de la Cour constitutionnelle est une illustration particulière d'un constat général : la composition d'une juridiction constitutionnelle doit être adaptée aux spécificités des attributions qui lui sont confiées”: M. Verdussen, *Le mode de composition de la Cour constitutionnelle est-il légitime*, in *Revue de Droit constitutionnel belge*, no. 1, 2103, 67-86, 74. A more general reflection on *La legittimazione della giustizia costituzionale. Una prospettiva comparata*, is made by Tania Groppi, in R. Toniatti, M. Magrassi, *Magistratura, giurisdizione ed equilibri istituzionali*, cit., 297-312. On this point, see the volume edited by Marina Calamo Specchia, *Le Corti Costituzionali. Composizione, Indipendenza, Legittimazione*, Turin, Giappichelli, 2011.

²² Cf. M. Verdussen, *Les douze juges. La légitimité de la Cour constitutionnelle*, Brussels, Labor, 2004, 27-28.

²³ Inspired by German law, federal loyalty finds citizenship in the Belgian constitutional text (art. 143) with the federal reform of 1993. Considered by many to be a *soft law*, a “norme de conduite politique ayant une signification pédagogique et socio-psychologique importante” (as stated during the constitutional review: Révision du Titre III, Chapitre III bis de la Constitution en vue d'y ajouter des dispositions relatives à la prévention et au règlement des conflits d'intérêts, Rapport Benker, *Doc. parl.*, Sénat, s. e. 1991-1992, no. 100- 27/8, p. 11) it was, for a long time, subject to an ambiguous application by constitutional judges who generally preferred to resort to other principles, such as proportionality or, in the more strictly juridical sense, to the rules of the division of jurisdiction. In reality, the concept of *loyauté fédérale* does not end in the centre-periphery division of jurisdiction, as it connects rather to the “nécessité de rechercher avec constance, au sein de la fédération, un équilibre viable entre l'autonomie des entités fédérées et l'intégrité de la communauté de destins que représente l'ensemble fédérale” (P. Dermine, *La loyauté fédérale et la Sixième réforme de l'État - Essai d'interprétation*, in *Administration publique: Revue du droit public et des sciences administratives*, no. 2, 2015, 212, 211-225. Among other things, the sixth State reform sought to overcome this ambiguity, including art. 143 in the so-called block of constitutionality reforming the special law on the matter of the Constitutional Court (L.S. 6 January 1989). The obligation of federal loyalty now takes on the role of independent parameter of constitutionality, to which the Court must refer whenever the federation of the federate bodies fail to perform their duty in respecting and defending the balance of the overall system in the exercise of their jurisdiction.

²⁴ See M.-F. Rigaux, *La loyauté fédérale ou la polysémie d'une norme*, in *La loyauté. Mélanges offerts à Etienne Cerexhe*, Brussels, Larcier, 1996, 312, 311-319.

acteurs politiques qu’au-delà du respect formel de compétences, il faut assurer la finalité du projet politique”²⁵ and which doctrine does not hesitate to place in connection with another unwritten principle, while forming one of the founding pillars of the system, that of *vivre ensemble*²⁶, united with the concept of *paix communautaire* to which reference has been made. With this in mind, an indissoluble link is formed between the Constitutional Court, linguistic separation and federal loyalty²⁷, amplifying the Court’s role as keeper of the federal system and guarantor of the reliability of the system with respect to the claims of the people²⁸.

7. Linguistic separatism and *belgitude*.

It is, therefore, possible to state that linguistic separation and the strict rules dominating the organisation of judiciary power in Belgium respond, firstly, to an institutional need. They are the expression of the Belgian federal system and not, as would seem to emerge in other experiences of *Reflective Judiciary*, the manifestation of a claim of representation of personal identity at the jurisdictional level, in order to establish a good level of empathy with the judge who in this way is expected to better understand the reasons of the parties, and identify with their cultural context.

Being an institutional claim, separation and organisation along linguistic lines of judicial offices and bodies is only one aspect of the country’s political dynamics. It represents just one of the many components hanging in the balance, registering the degree of socio-political differentiation and disaggregation of the social body, offset on the scales by the thrust towards unity. This thrust exists, despite the rooting of the

²⁵ See: E. Cerexhe, *La loyauté, concept moral ou juridique*, in *Liber amicorum Henri-D. Bosly*, Brussels, La Chartre, 2009, 75, 71-76.

²⁶ In this sense: A.-C. Rassin, *Le principe du “vivre ensemble belge” une épopée constitutionnelle. Réflexions autour de la loyauté fédérale et de son intégration dans la jurisprudence de la Cour constitutionnelle*, in *C.D.P.K.*, 1, 2012, 25-75.

²⁷ In this context, an invitation to reflect is extended by the reconstruction proposed by B. Dejemeppe, *La loi du 18 juillet 2002 relative à l’emploi des langues en matière judiciaire : un nouveau pari pour le bilinguisme des magistrats*, in *Journal des tribunaux*, dated 25 January 2003, 61-65. He claims that “loyauté fédérale passe, dans ce pays par la connaissance et la reconnaissance linguistiques” (65), thus proposing not only to focus, as already happens, on a regimen of indefectible linguistic separation, but also on the study of knowledge of the other’s language. The idea seems to be confirmed by a larger project called Plan Marnix, which focuses on a rethinking of the social value of language. Via the forecasting of a plan for immersion which envisages the compulsory and simultaneous use of French, Flemish and English in the school system in the bilingual region of the capital, the idea is to progressively change the way of understanding language, from being a vehicle of identity to a tool for communication. Cf. P. VAN PARIJS, *Le multilinguisme n’est pas nocif*, in *Le Soir*, dated 27 September 2013. By the same author, on *Plan Marnix*, see *Altérité et diversité: le défi de l’autre en Europe*, in *France Forum*, n. 53, 2014, 27-29.; *Multilingual Brussels: past, present and future*, in E. Corijn, J. Van der Ven (eds.), Brussels, VUB Press, 2012, 269-289.

²⁸ P. Popelier, *The Belgian Constitutional Court: Guardian of consensus democracy or venue for deliberation?*, in *Liberæ cogitationes liber amicorum Marc Bossuyt*, Cambridge, Intersentia, 2013, 499-514, especially 503, where he states that the Court “serves as a watchdog over the federal consensus democracy in several ways”.

forces of independentism in the Belgian political system²⁹, and is well-represented by the consolidation of a heritage of characteristics shared by the entire Belgian population, regardless of communitarian membership.

There has long been discussion in Belgium about *belgitude*, referring to the emergence of a shared identity created in opposition to the historical division between the Flemish and French-speaking communities, and which highlights some shared characteristics.

The expression was coined by Claude Javeau for the first time in 1976³⁰ and has contributed in recent years to highlighting a certain standardisation of the country, including in terms of the values, expectations and habits cultivated by Belgian citizens regardless of their linguistic affiliation. This is reflected in research conducted in recent years that seems to show that, aside from some obvious differences between the two large regions of the country, “c’est leur proximité qui frappe. Ainsi en matière religieuse, la différence autrefois sensible entre les deux a presque complètement disparu. On ne note que très peu de différence entre elles en ce qui concerne la libre disposition du corps et de la permissivité sociale, si ce n’est que les néerlandophones se montrent quelque peu plus tolérant à l’égard des nouvelles formes de vie commune”³¹.

And it is of *belgitude juridictionnelle* that we also speak in a jurisdictional sphere³², referring to the Constitutional Court’s action, proving its activity in terms of cohesion of the system, of neutralisation of conflict, in a unifying function that is so strong as to represent an obstacle for the prospects of the “evaporation” of Belgium cherished by the Flemish independence movement³³. Indeed, the movement did not hesitate, including through direct attacks, to try to damage the Court’s credibility in public opinion, and its reputation as a *super partes* body, raising issues in relation to its excessive politicisation, provocatively and with a lack of coherence. At the end of the day, the aim of these concerns was to

²⁹ In the federal elections held on 25 May 2014, the Flemish independence party, N-VA, won 20.3% of the vote, confirming its position as the country’s leading party. In Flanders, for the renewal of the European and regional bodies, it garnered about 33% of the consensus.

³⁰ See the contribution by C. Javeau, *Y a-t-il une belgitude ?*, to be published in the dossier “L’autre Belgique”, directed by Paul Martens for *Nouvelles Littéraires* magazine.

³¹ L. Voyé, *Les Belges et leurs valeurs*, in *Outre-terre*, no. 40, 2014, 191-205, 205.

³² Again, P. Maddens in the interview published for LeLibre.be, dated 5 October

³³ To back its claims, the Flemish independence movement recently prefers to use expressions that are decidedly “outside the juridical language, but evocative nevertheless. There has often been talk of “evaporation” of the Belgian State, plastically referring to the idea that the independence of Flanders will not be achieved through a violent or sudden act of separation from the rest of the kingdom, but rather at the end of a process, the duration of which cannot be established beforehand, characterised by the progressive emptying of the federation’s prerogatives in favour of the federate departments, until the complete dissolution of the State level” (917): I focused on the matter in my *Evaporazione vs solidificazione: la sfida belga*, in *le Istituzioni del Federalismo*, no. 4, 2014, 909-937.

favour the appointment of pro-independence judges to the Court, transforming the linguistic criteria of composition of the body from institutional criteria to those with a nationalist tendency with a strong emotional undercurrent³⁴. Their intention seems to be to attack the country's unity, striking one of the institutions that, more than any other, has managed to remain separate from nationalist tensions, while adopting the philosophy of Belgian linguistic separatism.

8. Conclusions: Beyond linguistic separatism: When communication breaks down

For some time now, the Flemish secessionist debate seems to have adopted a language all of its own in order to advance the Belgian political agenda. This language is in line with the country's institutionalist dynamic, moulded on the characteristics of disaggregating federalism³⁵, incessantly animated by centrifugal thrusts with the progressive allocation of jurisdiction to federate departments and the consequent impoverishment of the federal legislative function.

In this perspective, independence supporters rarely speak of separating Flanders from the rest of Belgium. In these terms, the secessionist theory no longer even seems to appear in the New Flemish Alliance's electoral programme, perhaps because secession would have devastating effects on the country, leading to its substantial dissolution.

Instead, Flemish independents seem to focus on a confederative arrangement of the system, one in which several substantially independent institutional organisations can coexist in the same State, though linked by a common constitutional project: nothing like the historical confederal experience of the United States, Germany or Switzerland... but more like an extreme evolution of the disaggregating project adopted by Belgium in 1994, capable of adapting to changes in the social and political body while avoiding visceral disputes that would be devastating for the system (as recently shown by events in Spain)³⁶.

The judicial system does not seem to escape this centrifugal tendency: on the contrary, it is becoming a case study for analysing the phenomenon and for highlighting certain risks that, if not avoided, could seriously threaten Belgium's (con)federal project.

³⁴ By way of example, see the comments of B. Maddens, *Het machtigste parlement van België*, in De Redactie.be dated 8 June 2015, which solicited an immediate, dry response from certain jurists, some Flemish: P. Popelier, J. De Jaegere, *Het Grondwettelijke Hof: Belgische restauratie noch Vlaams voorrechterschap*, in *De juristenkrant een actuele kijk op net recht*, dated 24 June 2015.

³⁵ Reference attributed to A. Mastromarino, *Federalismo disaggregativo. Un percorso costituzionale negli Stati multinazionali*, Milano, Giuffrè, 2010.

³⁶ Again, A. Mastromarino, *Evaporazione vs solidificazione: la sfida belga*, cit., 923 et seq.

It has been recalled that competence over the judicial system is held exclusively by the State. This means that the federation is responsible for regulating the organisation of the judicial system, the recruitment of its staff and the rules of its operation.

It has also been recalled that organisation, recruitment and operation, responding to a need for pacification and balance that is part of federal institutions as a whole, were conceived to guarantee the respect of an essential principle of the Belgian system—linguistic separatism—using it to adapt the jurisdictional function to a pre-judicial element, geopolitical if you like, meaning the existence of two separate and territorially rooted ethnic-linguistic communities in Belgium.

What still has to be highlighted are the effects that that preference, gradually tacked onto the legislative power of the federate departments with respect to the federation in the centrifugal sense, will end up having on the arrangement of the judicial system described so far. Also, in the medium to long term, what effects can it have with respect to the balancing of institutional factors and identity-related factors mentioned earlier, which animates the judicial system and still sees a prevalence of the former over the latter, thanks in part to the Court's clear refusal to accept any shift of *communautarisme juridictionnel*.

To this end, we must simply mention two phenomena.

Firstly, the matter relating to the creation by federate entities of new jurisdictions, albeit of a decidedly specialised nature.

While it is true that the Belgian system is based on a rigid split in the attribution of competence between centre and periphery with no space for the rival power, it is also true that, on more than one occasion, resorting to the so-called theory of implicit competences has allowed territorial groups to intervene in the competence of the Federal State within the limits of their territory, when necessary to ensure the exercise of a competence constitutionally attributed to it³⁷.

Not only federate identities have often resorted to the theory of limits implicit in the judiciary sphere; indeed, the Court itself has approved its application. And a certain consolidation of the practice, as well as an increase in the incidence of inferences over time can be observed: in 2001, with decision no. 19, the Constitutional Court constitutionally declared legitimate the, although limited, exceptions approved by the Flemish Community to the Belgian Judiciary Code in relation to the Appeals Court; in 2003, with decision no. 49, the constitutional judge considered legitimate the creation of an appeal commission in Wallonia, appointed to audit appeals against decisions made by the Walloon administration with regard to aid for the disabled; with decision no. 8/2011, the Court acknowledged the legitimacy of the Flemish

³⁷ This requisite is joined by two more legitimising the use of implicit jurisdictions; that legislative intervention does not have definitive effects and weighs on the jurisdiction of the federation and that the matter in hand can be subject to differentiated regulation.

Region's decision to create an administrative jurisdiction specialised in urban planning law. The practical consequences of the ruling are considerable, when one considers that, prior to the adoption of the Flemish decree on urban planning jurisdiction, the State Council itself had been called upon to pass judgment in the first instance, and which, outlined in a framework of *Judicial Federalism*, now shows an evident difference in the organisation of Flemish administrative justice compared to that of Wallonia and of the Region of Brussels-Capital, where the State Council continues to be judge of sole instance.

The progressive establishment of a divide between the two communities is even better conveyed by a second set of arguments, also from the point of view of jurisdictional organisation, regardless of the attribution of an exclusive jurisdiction by the federation, and well beyond the application in terms of a merely institutional instrument of the principle of linguistic separation. Here, we are referring to the use of the translation of judiciary documents and decisions.

The linguistic separatism in force in Belgium imposes procedural mono-linguism and does not envisage the translation of documents and decisions.

This situation could have generated two different scenarios: a judiciary in which there is a sort of communitarian self-referential aspect, in which, in the absence of translation and knowledge of the other language, the characteristics in terms of juridical culture that we have already said belong to one or the other linguistic group, become increasingly evident, increasing distances in terms of interpretation, since there is no longer any possibility for exchange; or, a second hypothesis, in which the desire and functional need to confront someone else working in the same order, establishes a virtuous circle encouraging legal operators to learn the jurisprudence of the other community, learning the language or using translations. Reality has offered proof, as it often does, inevitably revealing itself to be a little more complicated than theory. In Belgium, elements of both scenarios are observed, depending on the subject. There are, in fact, sectors of law, such as administrative law, especially linked to the territory, as we have said, where the use of translations is becoming increasingly rare and jurisprudence increasingly "communitarian". This is because, while recognising a jurisdiction that concerns the general principles managed by the federation, administrative law is now a sector that is mostly attributed to the jurisdiction of the federate departments. These deeply influence administrative judges' interest in learning the jurisprudence of the other linguistic community. Interest is minimal because the possibility of having to apply the other law, which is like that of a foreign country, is also minimal. And where there is no interest, there is no market: this means there are fewer private translations and few official ones (the weight of translations on public spending is well known!), to the point where the State Council publishes its decisions only in the language in which the suit was discussed, with some exceptions.

This would be confirmed *a contrario* by the experience of the Court of Cassation, the decisions of which are translated and distributed throughout the country, by virtue of the weight that they still carry over the entire nation, helping to consolidate case law shared by the two communities.

Thus, it is obvious that the principle of linguistic separatism, a bastion of communitarian pacification in the judiciary sphere as well, can, if considered as part of a combined provision with the rules regulating the division of jurisdiction between centre and periphery, represent an institutional short circuit, accelerating the process of distancing the two communities, as it seeks to favour their coexistence in the same constitutional arrangement.

The risk is that separation could degenerate into incommunicability, and that incommunicability could trigger a process of pure nationalization of the judiciary, instead of a bare “judicial communitarism” at the constitutional level as well, as mentioned earlier.

That said, no process in Belgium is ever one-way. The thrust towards separation regularly corresponds to a counterthrust towards unification. It is sometimes latent, but never absent.

We could assume that, alongside confirmation of the strict separatism trend present today, the idea of the practical (before ideological) need to know the other language is gaining ground as is the consolidation of the conviction that it is necessary to be able to communicate with those who share the same constitutional project which, while often subject to maintenance, does not seem to have been revoked. This is part of the conviction that “apprendre la langue de l’autre ce n’est pas trahir sa communauté”³⁸. It means implementing strategies of inter-culturalism and of communication, perhaps starting from the judicial system itself, conceiving a process of shared education for those working in law that does not replace the linguistically characterised one envisaged today, but that can be added at a later time to create a shared platform in terms of interpretation of the texts, starting from the letter of the provision, and in terms of the juridical culture that influences, as a precognitive factor, the very act of interpreting.

As always, because we are dealing with Belgium, the conclusions are “inconclusive”. Or perhaps it would be more appropriate to say that they are suspended, awaiting a new evolution of the system, which generally isn’t long in coming, one way or another.

³⁸ So P. VAN PARIJS, *Le multilinguisme n’est pas nocif*, in *Le Soir*, dated 27 September 2013

In Judiciary We Trust. The Reflective Judiciary in Canada

by Eleonora Ceccherini

Table of contents: 1. Territorial organization of Canada between territorial and multinational federalism. 2. The multifaceted composition of Canada population. 3. The judicial power organization in Canada: is there room for a judiciary power? 4. Provincial and legal cultures representation in the Supreme Court. 5. The judicial power as reflection of pluralism of Canadian society. 6. To be judged by their Peers. 7. Conclusion.

1. Territorial organization of Canada between territorial and multinational federalism

The study of the Canadian legal system has always awakened legal scholars' interests, both in the field of public and private law, for its significant peculiarities which appear at the institutional, political, social and economic level. Canada has a federal organisation and two legal systems coexist in its institutional framework: civil law, and common law; likewise, there are two official languages: French and English. Despite being an independent state with its own flag and its own constitutional system, the British monarch continues to be the Head of the State and the Queen is portrayed on Canadian dollars. From an economic perspective, there is a strong divergence between the Western Provinces, strongly exploiting natural resources, and the Eastern ones – specifically Ontario and Quebec – with a strong industrial vocation¹. It is necessary to add some further remarks, symptomatic of the Canadian “duality”: first, Aboriginal communities, occupying the territory before the arrival of European colonists, were recognized the status of Founding Peoples; second, the population is conspicuously composed of people who migrated in Canada more recently.

The choice of a federal asset is linked to the idea of keeping the Provinces autonomous, in order to limit the trend of decentralization resulting in the problematic coexistence of former French colonies and the Anglophone Dominion. The former French colonies are characterized by a civil law system, French as a

¹ P. Foucher, *La double dualité du Canada et ses conséquences juridiques*, in P. Thibault, B. Pelletier, L. Perret (eds.), *Les melanges Gérard –A. Beaudoin. Les défis du constitutionalisme*, Yvon Blais, Cowansville, 2002, 163 ff.; G. Martinico, *La genesi “mista” dell’asimmetria canadese*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa University Press, Pisa, 2017, 15 ff.

common language and catholic religion, often invoked for nationalist purposes²; whereas the Anglophone Dominion is characterized by a system of common law, English as a common language, and Protestant origins. The causes of this coexistence depend on historical reasons: a part of the Canadian territory which was colonized by the French, has been surrendered to the British Crown with the Treaty of Paris in 1763. The attempt to anglicise those territories (i.e. The Provinces of Quebec and New Brunswick) immediately failed. Consequently the British Crown accepted and recognised the civil law system through the Quebec Act of 1774. This Act provided that the former could regulate civil and property rights according to civil law, while they had to conform to, the common law system for criminal law and all other matters³. Keeping the former civil law system implies using the language related to that system. With the approval of 1774 Act, a process of biculturalism and bijuralism was triggered. Such dualism would strongly influence the Canadian legal asset. Accepting two Founding Peoples and being aware of the impossibility to reduce to a one-single-reality the dualistic legal nature Canadian political establishment to allow Provinces to regulate relationships between individual, as well as to let Quebec to adopt civil law. This was officialised by the British North America Act (BNA) of 1867, which would give birth to the Dominion⁴.

² In the territories occupied by the French Crown, the civil law system is adopted: *la Compagnie des cents associés* – founded in Quebec – officially imported Paris custom in 1627, and from 1667 onwards – when the *Compagnie* is dissolved – local right gets directly borrowed as French law main source. In 1710, the British conquered the French colony of Acadia and deported the French, starting a process of Anglicization of this area. In this situation, apart from the French *enclave*, common law got imposed in the rest of Canada. The two colonizing processes are very different: the French had settled with commercial interests, and for this reason they had climbed up Saint Lawrence river with fur smugglers and missionaries, looking for new routes of communication; the British, instead, wanted to occupy lands for agricultural purposes and this is the reason why they were in a continuous spread. The Seven Years War (1756-1763) – whose core events took place in Europe – sees France and United Kingdom at odds, fighting for their colonial possessions. The results of the conflict were not favorable for France, which, with the Treaty of Paris of 1763, was forced to surrender the territory that, nowadays, corresponds to New France. Firstly, the United Kingdom tried to start a process of Anglicization, through Royal Proclamation, in 1763. Although this act recognized the self-government of colonies, it imposed the British law to all former French territories. However, this project was not carried out and French or Natives parties were allowed, through an act, to apply French law. In cases of legal controversies, a mixed composition of juries was required, depending on the linguistic affiliation of the involved parties. L. Bruti Liberati, L. Codignola, *Storia del Canada. Dal primo contatto fra Europei e indiani alle nuove influenze nel pensiero politico mondiale*, Bompiani, Milano-Firenze, 2018, *passim*; F. Toriello, *La circolazione del modello inglese in Canada e il rapporto con la tradizione di civil law. Un contributo alla ricostruzione*, in G. Rolla (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Giuffrè, Milano 2008, 81 ff., M. Morin, *Les Débats concernant le droit français et le droit anglais antérieurement à l'adoption de l'Acte de Québec de 1774*, in *R.S.U.S.*, 44, 2014, 259 ff.

³ The same Act allowed the use of French language, the right to practice Catholicism and the equal right to get access to public charges both for Anglophone and Francophone. A. Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Éditions de l'Université d'Ottawa, Ottawa, 1967, 27 ff.

⁴ In 1841, the Act of Union came into effect: the two Provinces, the Lower Canada (Quebec) and the Upper Canada (Ontario) were merged to form a single Province; nonetheless, this Act did not achieve political stability and paved the way for the approval of British North America Act. Thereafter, in 1869, the Bay Hudson Company

However this is not the end of frictions between Quebec and the Rest of Canada. Rather, they were even sharpened because the Provinces wanted to establish a federal system based on the equality among Provinces on one side, and on the other side, on the recognition of the status of distinct society to the French community. This dualism played a key role in shaping the history of Canada, as on the one hand the organization of public powers is justified by a *foedus*, which gathers all the territories for a question of efficiency of the system, and on the other hand such structure aims to maintain and guarantee the recognition of national identities⁵. Therefore, the Francophone nationalism is a recurring element in the political debate, and it cyclically reemerges in different occasions throughout Canadian history, fostering a divide from an ethnic and linguistic (and no longer religious) point of view.

A crucial milestone, which turns the tension between the Francophone and Anglophone souls of Canada into a permanent feature of the system, is the so-called “Quiet Revolution”. This term refers to a series of events that took place in the period between the ‘60s and ‘70s, which is also characterised by some political, institutional and social reforms promoted by the Liberal Party of Quebec⁶. The renewed feeling of community spreading among the Francophone part of the population contributed to the federal government’s decision to establish the Royal Commission on Bilingualism and Biculturalism in 1963 with the task: «to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races⁷, taking into account the contribution made by the other ethnic groups to the Cultural enrichment of Canada and the measures that should be taken to safeguard that contribution»⁸.

surrendered all the administrated territories (which would form, in the future, the Provinces of Manitoba, 1870, Alberta and Saskatchewan, 1905) to Dominion; in 1871, British Columbia joined Canada and in 1873, Prince Edward Island; in 1949, the Province of Newfoundland and Labrador joined the Federation. In 1975, Yukon and North-West Territories joined too; the third Territory, Nunavut, was founded in 1999.

⁵ Ph. Resnick, *Towards a Multinational Federalism: Asymmetrical and Confederal Alternatives*, in F. Leslie Seidle (ed.), *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, Institute for Research on Public Policy, Montréal, 1994. About this topic, under a comparative point of view: E. Fossas, *National Plurality and Equality*, in F. Requejo (ed.), *Democracy and National Pluralism*, Routledge, London, New York, 2001, 63; G. La Forest, *What Canadian Federalism Means in Québec*, in *Rev. const. st.*, 15, 2010, 1 ff.

⁶ M. Rubboli, *Un federalismo imperfetto*, Giunti, Firenze, 1992, 103; J. Woehrling, *La constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours*, in *Rev. fran. dr. const.*, 1992, 195 ff.; F. Rocher, *The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism*, in A.-G. Gagnon (ed.), *Contemporary Canadian Federalism*, University of Toronto Press, Toronto, 2006, 81 s.; R. Louvin, *Legami federativi e declino della sovranità*, Giappichelli, Torino, 2001, 45 ff.

⁷ General Introduction to “Report of the Royal Commission on Bilingualism and Biculturalism”, 1967---1970, xxi.

⁸ Another consequence of the report of the Commission was the increased importance and visibility to Francophone in the Federal Government, goals achieved by Pearson government which, in 1965 included three prominent figures: Jean Marchand, Gérard Pelletier and Pierre Elliott Trudeau.

In this context, the figure of Pierre Elliot Trudeau emerged on the political horizon. Trudeau promoted the political project to integrate all the identities which made up the country, which at this point were no longer limited to the traditional Francophone and Anglophone components.

To pursue the goal of integration, the Premier adopted the Multiculturalism Policy of Canada (1971) aimed at recognizing the cultural pluralism of the country; nonetheless the approval of the Charter of Rights and Freedoms in 1982 put a full stop to the “duopoly” held by the Francophone and Anglophone components. The political goal of the Charter of Rights and Freedoms was to foster the unity of Canada and build a national identity. The cultural pluralism of the Canadian society induced to codify rights into a written constitutional text, since many citizens, who did not share the same cultural origins of the Founding Peoples, did not feel safeguarded enough by a legal system of European origin. In their vision, the equal protection of everyone’s rights should have been the fundamental feature of the Canadian citizenship. Trudeau’s vision entailing a pan-Canadian federal nationalism was opposed to the Francophone’s one, which in turn had been exacerbated after the Quiet Revolution. Under an electoral point of view, the pan-Canadian nationalism was regarded positively by one third of the citizens who did not have British or French origins. However, the Canadian Premier’s politics did not meet the favour of Quebec, which showed its distance from the political project by calling the direct democracy in 1980. On 20th May 1980, during the last stages of the approval of the Constitution Act, a popular consultation was called in order to legitimize the francophone Province government to negotiate its full sovereignty with the possibility to maintain economic and commercial relations with the Federation⁹. Quebec voters (representing 59.6% of the votes) were able to reject this hypothesis but there was no chance to concretely stop the Prime Minister’s project, since he wanted to proceed unilaterally to the enactment of the Constitution Act, without the consent of the Provinces. Three of these, Quebec, Manitoba and New Foundland, first referred the issue to their Courts of Appeal for an advisory opinion and then to the Supreme Court. The latter expressed the existence of a constitutional convention, implying the duty to negotiate and obtain a substantial degree of provincial consent without the obligation to reach a unanimous decision. After this opinion, Premier Trudeau started again the negotiation process for Patriation. The consensus on his project grew with the exception of Quebec, which asked once again an advisory opinion to the Supreme Court on whether a unanimity decision was needed for any law affecting the responsibilities of Provinces and the right to veto by the Francophone party. The reference was only delivered after the definitive approval of the Constitution Act and held that, according to constitutional

⁹ As known, the results was not favorable to the secessionist claims but the francophone political élite called a another referendum in 1995 with the same purpose.

conventions Quebec was not empowered to block the process amending the British North America Act¹⁰.

In 1982, the Patriation resulted in a significant political success for Premier Trudeau and represented one of the most relevant achievements for Canadian constitutional law. Unfortunately, the constitutional process was not able to incorporate the francophone community, whose attempts to be recognized as a distinct society were frustrated¹¹. Then, two further proposals of constitutional reform were issued: the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992. They were meant to introduce some clauses recognising the *québécoise* speciality, but they were not finalised¹².

These further failures ended up reinforcing the nationalist ambitions of Quebec and in 1995, once again, the Provincial Government called a referendum for the secession of the Province. Votes in favour of keeping part of the Federation slightly prevailed (49.42% yes, 50.58% no); hence the central government asked the Supreme Court for an advisory opinion concerning the legitimacy of a possible unilateral secession of Quebec. The court answered that firstly, the territorial and political separation would only be legitimate through an agreement between the Federation and Province (in other words, a unilaterally decision was not admissible), and, secondly, supreme principles of the Canadian system had to be respected. Such principles consisted of the rule of law, constitutionalism, federalism, democracy and protection of minorities¹³.

The legislative follow-up to the advisory opinion was set forth in the Clarity Act, 2000: “An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference”. The Federal Act requires that Parliament preliminary states if the requires that the Parliament preliminary states if the question that people are asked to answer through the

¹⁰ Renvoi: opposition à une résolution pour modifier la Constitution (1982) 2 RCS, 793. J. Robillard, *Constitutional Conventions: The Canadian Supreme Court's Views Reviewed*, in *Public Law*, 1981, 183 f.; J.F. Gaudreault-Des Biens, *The “Principle of Federalism” and the Legacy of the Patriation and Quebec Veto References*, in *Supreme Court L. Rev.*, 54, 2011, 77 ff. More generally, see: N. Olivetti Rason, *Manutenzione costituzionale: l'esperienza canadese*, in S. Gambino, G. D'Ignazio (eds.), *La revisione costituzionale e i suoi limiti*, Giuffrè, Milano, 2007, 339 ff.; G. Gerbasì, *Il Canada e l'Unione europea: esperienze giuridiche a confronto tra procedure emendative e la peculiare nozione di rigidità dei rispettivi atti normativi fondamentali*, *ibidem*, 651 ff.; A. Scerbo, *La costituzione canadese tra principio federale, potere di revisione e spinte alla disgregazione*, *ibidem*, 851 ff.

¹¹ F. Lanchester, *La «Patriation» della Costituzione canadese: verso un nuovo federalismo?*, in *Riv. trim. dir. pubbl.*, 1, 83, 337 ff.; T. Groppi, *Federalismo e Costituzione*. Giuffrè, Milano, 2001, 187 ff.; F. Astengo, *Il Quebec: storia di una specialità negata*, in G. Rolla (ed.), *Regimi giuridici speciali di autonomia delle comunità territoriali*, Giuffrè, Milano, 2013, 143 ff.

¹² M. Bastarache, *L'Accord constitutionnel de 1987 et la protection des minorités francophones hors Québec*, in *McGill L. J.*, 34, 1, 1988-1989, 119 ff.

¹³ G. Rolla, *Il referendum sulla sovranità del Quebec ed il futuro del Canada. Alcuni paradossi costituzionali*, in *Giur. cost.*, 5, 1996, 3269 ff.

referendum is clear enough. After the referendum, the Parliament also has to assess whether the popular consultation resulted in a clear manifestation of will and whether there is an evident majority.

In the same year, in response to the Federal Act, the National Assembly of Quebec passed another act named: “An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State”. This law states that Quebec can exercise its right to choose its political regime, including sovereignty, and that in a referendum the option obtaining is whichever obtains 50% + 1 of the votes must prevail¹⁴.

However, the francophone speciality has never received any formal recognition, apart from a small exception, i.e. a Parliamentary resolution of 22 November 2006 on proposal of Harper government stating that: «(...) que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d’un Canada uni»¹⁵.

The brief analysis presented above shows how Canada is a system seeking the balance between two cultures: specifically the one considered as a minority aims at having a specific identity recognition at constitutional level within the Federation, and this could undermine reciprocal ties. Indeed, two additional cleavages emerge: the former depends on the presence of First Nations, the latter is related to the numerous communities of immigrants.

2. The multifaceted composition of Canada population

As highlighted above, the institutional history of Canada is defined through the Francophone and Anglophone dichotomy. However, restricting the debate solely to this dualism would be a superficial simplification and would not take into account the social pluralism that characterise the country. First the census of 2011 showed that in Canada there are 1,400,685 individuals belonging to the autochthonous communities; they are 4.3% of the entire population¹⁶ and their ancestors used to live in those lands before the arrival of the colonizers. First Nations suffered a massive colonization, both by the French and by the British, and for a long time they have had an inferior *status civitatis*, compared to that of white

¹⁴ P. Passaglia, *La Corte suprema del Canada definisce le regole mediante cui procedure alla secessione*, in *Foro it.*, 1999, 271 ff.

¹⁵ Resolution of November 27th, 2017 2006 par 265 Debats de la Chambre des communes, 39° parl, 1 re sess, vol. 141, n° 84 on November 22nd, 2006 5197. About the relationship between the Premier Harper and Quebec, please see: G. Laforest, *Trust and Mistrust Between Harper and Québec*, in A. López-Basaguren, L. Escajedo San Epifanio(eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. II, Springer-Verlag, Berlin-Heidelberg, 2013, 341 ff.

¹⁶ <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>. This figure points out an increment of this component in recent years. There was an increase from 2,8% in 1996 to 3,3% in 2001, and 3,8% in 2006, confirming an increment of 20,1% from 2006 to 2011, compared to 5,2% of the aboriginal population.

settlers; moreover, they suffered from the implications of a sort of tutelage¹⁷ and of aggressive policies oriented towards cultural assimilation¹⁸. In 1876, the *Indian Act* was passed, implementing sec. 91(24) of BNA, which granted to the Federation the competence on «Indians and Lands Reserved for the Indians». The purpose of this legislative act was to sterilize and remove Indian cultures through a corpus of regulations which legitimized discriminatory practices, sometimes openly oppressive¹⁹.

The condition of First Nations radically changed when the Charter of Rights and Freedoms was enacted in 1982. The Charter contains some express provisions about the condition of the Natives. In fact, the text article 25 of the Charter clearly states that «The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired».

Sec. 35 (1) of the Constitution Act, 1982 reads as follows «The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed»; while Sec. 35 (2) includes Indians, Inuit and Métis as aboriginal peoples of Canada²⁰.

¹⁷ For this expression please see: N. Dyck, *What is the Indian Problem?*, Institute for Social & Economic research, St John's, 1991, 24 ff., stating: «a forms of restraint or care exercised by one party over another as well as the condition of being subjected such protection or guardianship...The tutelage that Canadian Indians have experienced has been based (...) upon the power of one side to regulate the behavior of the other in accordance with a set of unilaterally selected purposes». R. Motta, *Mâitres chez eux. Sovranità domestica e diritti ancestrali delle prime nazioni in Nuova Francia e Canada*, in *Materiali per una storia della cultura giuridica*, 1, 2001, 211 f.

¹⁸ By way of example, it's important to remember that the right to vote has been recognized to them only in 1960 and for a long- time politics of subjugation had took place, which consisted in the obligation of living in the reserves, in the prohibition of celebrating their rituals, and culminated in the realization of residential schools, where the indigenous' children used to be imprisoned, in order to be educated according to the "civil" lifestyle. These schools became places of sexual and physical abuses, so that the government finally recognized huge compensations to the survivors and publicly apologized on behalf of Canada, on June 11, 2008, for all the vexations. N. Funk-Unran, *The Canadian Apology to Indigenous Residential School Survivors: A Case Study of Renegotiation of Social Relations*, in M. Mihai, M. Thaler (eds.), *On the Uses and Abuses of Political Apologies*, Palgrave Macmillan, Basingstoke, 2014, 138 ff.; K. Roach, *Blaming Victim: Canadian Law, Constitution and Residential Schools*, in *University of Toronto L. J.*, 41, 2014, 566 ff.; A. Pelletier, M. Morden, *Exploring the Social Elite Accommodation: Recognition and Civil Society Integration in Divided Societies*, in A. López-Basaguren, L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. II, Springer-Verlag, Berlin-Heidelberg, 2013, 630 ff.

¹⁹ The Indian Act is still in force even though it has been amended throughout history. Such amendments have depleted the act from its contents that were detrimental to the equality principle. J. F. Leslie, *The Indian Act: An Historical Perspective*, in *Canadian Parl. Rev.*, 2002, 23 ff.; S. Imai, *The 2016 Annotated Indian Act and Aboriginal Constitutional Provisions*, Carswell, Scarborough, Ont., 2016; K. Coates, *The Indian Act and the Future of Aboriginal Governance in Canada*, Research Paper for the National Centre for First Nations Governance, May 2008.

²⁰ P. W. Hogg, *Constitutional Law of Canada*, Carswell, Scarborough, 1992, s. 3.5; L. Mandell, L. Hall Pinder, *Tracking Justice: The Constitution Express to s. 35 and Beyond*, in L. Harder, S. Patten (eds.), *Patriation and Its Consequences*, University of British Columbia Press, Vancouver-Toronto, 2015, 180 f.; G. Otis, *Constitutional Recognition of*

The recognition of the aboriginal communities' rights is particularly relevant, because the autochthonous component is extended to the framers. This gives birth to a new *pactum societatis* that unlike the one which dated back to the British North America Act of 1867, aimed at overcoming the historical dualism between the Francophone and Anglophone communities.

After the constitutionalization of First Nations' rights, a series of claims from the communities, wishing to administer territories where they had historically settled, took place²¹. They claimed the recognition of aboriginal self-government, which was considered an inherent right, protected by the Constitutional text²². The consequences led to the approval of a series of agreements between federal and provincial governments on the one side and aboriginal representatives, on the other side. Once that the agreements are ratified as laws, the institutions of autochthonous self-government are responsible for the regulation of important matters related to the tutelage and exploitation of the territory, over education and social

Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada, in J. *Legal Pluralism and Unofficial Law*, 2014, 320 ff.; C. Alcantara, *To Treaty or not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada*, in *Publius*, 38, 2, 2008, 343 ff.; D. Newman, *Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory*, in M. Graeme et al (eds.), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, Toronto, LexisNexis, 2007, 527 ff.; M. Aparicio Wilhelmi, *Breve Aproximación al reconocimiento constitucional de los derechos de los pueblos autóctonos*, in E. Mitjans, J. M^a Castellà Andreu (eds.), *Derechos y libertades en Canadá*, Atelier, Barcelona, 2005, 227 ff.

²¹ P. Macklem, D. Sanderson (eds.), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, University of Toronto Press, Toronto, 2016; J. Borrows, *Freedom and Indigenous Constitutionalism*, University of Toronto Press, Toronto, 2016; M. Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and respect for Difference*, University of British Columbia Press, Vancouver, 1997.

²² It's necessary to remember that the Charlottetown Accord related to a constitutional reform project which tried to introduce the right of self-government of aborigines. In particular, there were plans to add an additional subsection to art. 35 which would have read as follows: «It's provided that the enjoyment of the right identified at c. 1, would cause the power, for the legislative bodies constituted by the autochthone peoples, each in their field of responsibility: a) to preserve and develop their languages, cultures, economies, identities, institutions and traditions; b) to develop, maintain and enforce the relationship with their lands, their waters and their environment, so that these Peoples may manage and rule their development as a People, in base of their principles and their priorities, and ensure the integrity of their society». Moreover, the accord contained a provision in which the judiciary power was asked to interpret the Constitution Act according to the fact the autochthone communities should be allowed to preserve their cultures and to constitute one of three levels of government. Moreover, it empowered the aborigine institutions to adopt provisions protecting and promoting the autochthone languages and cultures. Basically, the Charter of Rights and Freedom had not to be interpreted so as to prevent the enactment of provisions aimed at safeguarding and promoting the autochthone cultures. However, as well-known, the Accord of Charlottetown were not approved and so the codification about the aborigine populations has remained unvaried. J. Morin, J. Woehrling, *Les Constitutions du Canada et du Québec du régime français à nos jours*, Editions Thémis, Montréal, 1994, 441 ff.; O. Mercredi, M. E. Turpel, *In the Rapids: Navigating the Future of First Nations*, Viking, Toronto, 1993; M. E. Turpel, *The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change*, in K. McRoberts, P. J. Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada*, University of Toronto Press, Toronto, 1993, 117 ff.; P. T. Hall, *What are we? Chopped Liver? Aboriginal Affairs in the Constitutional Politics of Canada in the 1980's*, in M. Behiels (ed.), *The Meech Lake Primer: Conflicting Views*, University of Ottawa Press, Ottawa, 1990; P.J. Monahan, *Meech Lake: The Inside Story*, University of Toronto, Toronto, 1991.

services²³. The Treaties have a variety of contents, depending on the signing tribe, but as far as we are concerned, some acts provide either the application of customary rules by provincial courts or the establishment of aboriginal courts.

The Canadian social stratification has not only been enriched by the autochthonous component, but by a plurality of communities too, constituted by new comers, who participate to the definition of the Canadian mosaic²⁴. According to the 2011 census data, there are 6,775,800 foreigners living in the country, which is the 20.6% of the population and the highest percentage among G8 Countries²⁵. Between 2006 and 2011, around 1,162,900 people have immigrated to Canada and they make up the 3.5% of the population; according to government data 19,932,300 of Canadian citizens descend from foreign forefathers. An increment of the visible minorities has been recorded: in 1981, 68.5% of immigrants came from extra-European countries, in 1991 the percentage increased to 78.3% and 2006 the census pointed out that 83.9% of immigrants who arrived in Canada between 2001 and 2006 did not come from Europe. The territorial area of origin is mostly Asia (58.3% of immigrants), while only 16% comes from Europe²⁶.

According to 2006 data, for the first time one fifth of the population is allophone (20,1%), which means that the mother tongue of these people is neither French nor English; 200 different mother tongues have been recognized among the Canadian population²⁷. According to the 2011 census data, 57% of the population is English mother tongue, while 22% is French; 19.8% instead speak another vehicular language²⁸.

Under a constitutional point of view, this demographical phenomenon has been made visible by the formulation of sec. 27 of the Charter of Rights and Freedoms which states: «This Charter shall be interpreted in manner consistent with the preservation and enhancement of the multicultural heritage of Canadians». This clause imposes judges to interpret the catalogue of rights in a manner consistent with

²³ M. Papillon, *Adapting Federalism: Indigenous Multilevel Governance in Canada and in the United States*, in *Publius*, 42, 2, 2012, 289 ff.; C. Alcantara, J. Nelles, *Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance*, *ivi*, 44,1, 2014, 183 ff.

²⁴ All data reported are available at <http://www.statcan.gc.ca/daily-quotidien/071204/dq071204a-eng.htm>

²⁵ <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a6>

²⁶ The inversion of trend took place in 1971 when European immigrants amounted to 61,6%.

²⁷ Chinese is the third most common mother tongue – immediately behind English and French – it follows Italian, German, Punjabi, Spanish, Arabian, Tagalog and Portuguese. About the linguistic pluralism, please see: P.L. Petrillo, *Multiculturalismo e diritti linguistici in Canada*, in E. Ceccherini (ed.), *I diritti al tempo delle crisi. Nuove tecniche di ponderazione*, Editoriale scientifica, Napoli, 2018, forthcoming.

²⁸ <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/index-eng.cfm>

the Canadian cultural heritage, which is not ascribable only to francophone or Anglophone citizens, but is polysemous and equally founding of the Canadian society²⁹.

The choice to introduce a provision *ad hoc* related to the matter of multiculturalism confirms the will to implement a policy of integration and sharing of the new constituent accord of 1982 for the immigrants' communities who, perhaps, have been resident for more generations in the country but did not want to abandon their original culture³⁰. This is an innovative and characterizing provision of the Canadian catalogue of rights from a comparative point of view. Unlike the other provisions, whose text has been edited many times – both by parliamentary committees and constitutional conventions – the content of sec. 27 constitutes a sort of *coup de théâtre* within the joint parliamentary committee in charge of the auditions that took place between November 7 1980 and February 2 1981. The establishment of the Ministry of Multiculturalism in 1971 showed that the issue of multiculturalism was not something new in the Canadian legal system. Nonetheless, during the constituent debate this profile had not been analyzed thoroughly. There had been only a slight indirect reference during the Federal–Provincial Conference of First Ministers on the Constitution, which took place in Toronto from 14 to 18 July 1980. In this context, the final report on the contents of the Charter's Preamble suggested to put the following formulation: «we, the diverse people of Canada» in the *incipit*, and to explicitly refer to the diversity of the country, of its people and its cultures. However, the focus of the debate was mostly on the anglo-francophone dualism, and not about the heterogeneity of the Canadian society components.

It was only during the Joint Committee hearings that the need to highlight cultural diversity as a fundamental and characterizing element of the Canadian social structure emerged. Many associations kept lobbying in favour of including that reference in the Preamble, however, both the Government and the commissioners were convinced that the multicultural perspective should have been introduced in the Founding Act in order not to limit to the French and English Canadians. It is for this reason that it was

²⁹ About the relevance of Art. 27 of the Charter, T. Modood, *Multiculturalism. A Civic Idea*, Polity, Cambridge, 2007; D. Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*, Hart Publishing, Oxford, 2011; G. Rolla, *The Two Souls of the Canadian Charter of Rights and Freedoms*, in *Int'l J. Canadian St.*, 36, 2007, 317 ff.; N. Olivetti Rason, *Il patrimonio culturale dei canadesi. Profili costituzionali*, in G. Rolla (ed.), *L'apporto della Corte suprema*, cit., 119 ff.; T. Groppi, *Il multiculturalismo come strumento per la costruzione dell'identità nazionale: l'esperienza del Canada*, in D. Amirante, V. Pepe (eds.), *Stato democratico e società multiculturali. Dalla tutela delle minoranze al riconoscimento delle diversità culturali*, Giappichelli, Torino, 2011, 17 ff.; V. Uberoi, *Multiculturalism and the Canadian Charter of Rights and Freedoms*, in *Pol. St.*, 57, 2009, 805 ff.; J. E. Magnet, *Interpreting Multiculturalism*, in Canadian Human Rights Foundation (ed.), *Multiculturalism and the Charter*, Carswell, Scarbrough, Ont., 1987, 145 ff.; K. Swinton, *Multiculturalism and the Canadian Diversity*, in H. P. Glenn, M. Ouellette (eds.), *La culture, la justice et le droit*, Thémis, Montréal, 1994, 76 ff.; F. Raimondo *Il multiculturalismo canadese e il "caneidoscopio" della diversità religiosa*, G. Delledonne, G. Martinico, L. Pierdominici (a cura di), *Il costituzionalismo canadese a 150 anni dalla Confederazione*, cit., 179 ff.

³⁰ A. Cairns, *The Constitutional World We Have Lost*, in D.E. Williams (ed.) *Reconfigurations: Canadian Citizenship and Constitutional Change*, McClelland & Stewart, Toronto, 1995, 97.

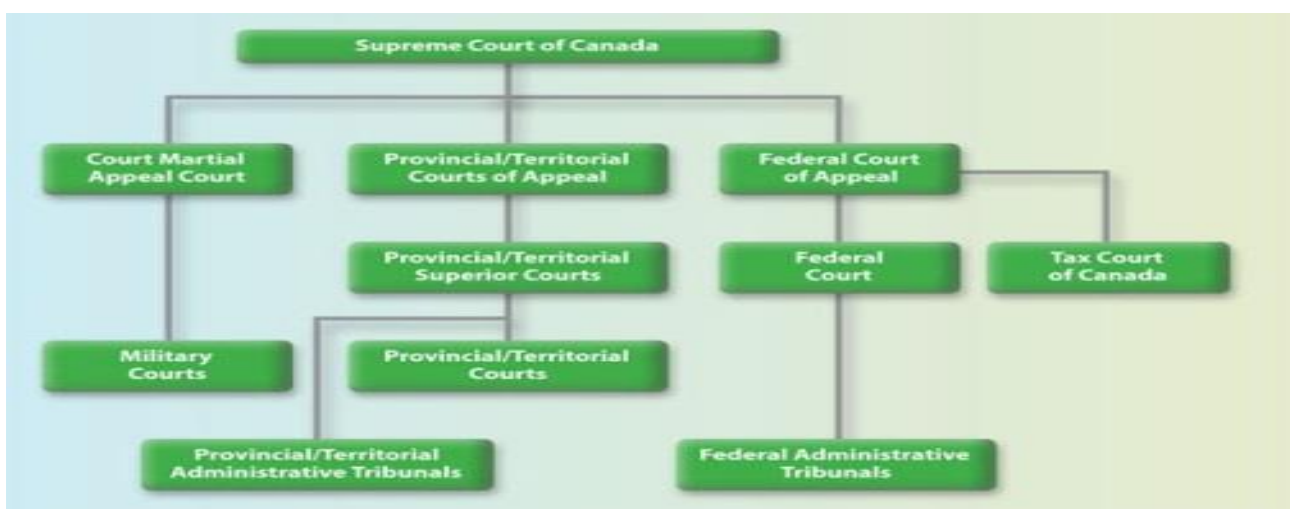
introduced as an additional provision which states: «This Charter shall be interpreted in manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.». The proposal was accepted and the version voted on the Committee was the one eventually enacted (62).

3. The judiciary organization in Canada: is there room for a reflective judiciary?

In order to examine whether or not the exercise The matter regarding whether the exercise of the judicial function in Canada may reflect the socio-cultural composition of the people, a brief inquiry on the judiciary and on the access to the judicial function³¹.

Despite being a Federal State, Canada did not choose a two-tier jurisdiction. The judiciary is national but it is organized at a provincial level. The unitary choice is the result of a precise orientation carried out at the moment of the adoption of the BNA, because the Founding Fathers explicitly refused the United States two-tier model, considering it detrimental to correct and impartial application of justice. At the highest Canadian jurisdiction there is the Supreme Court, which, besides being a court of last instance, in 1982 also became a body carrying out judicial review of legislation.

The Canadian judiciary is structured at a Provincial and Territorial level. Jurisdiction, both civil and criminal, is divided into three areas: Provincial or Territorial Court, Superior Court and Court of Appeal. Provincial/Territorial Courts have limited jurisdictional functions, they rely on the Provinces or on the Territories both for the organization and for the appointments, and can be functionally divided into Youth Courts, Family Courts and small claims Courts; the other two courts (Superior Courts and Courts of appeals) are federal, albeit they are located in provincial territories.



³¹ P.H. Russell, *The Judiciary in Canada: The Third Branch of Government*, McGraw-Hill Ryerson, Toronto, 1987.

Pursuant to sec. 101 of the BNA, the Federal Parliament could establish additional Federal Courts and Federal Courts of Appeal, in order to ensure a correct application of the law. The Federal Courts hear cases involving intellectual property proceedings, immigrants and refugees matters, maritime law, interprovincial and federal-provincial disputes, and civil claims against the Federal Government. The Federal Courts of Appeal hear appeals from the Federal Courts, Tax Courts, and judicial review of several federal tribunals listed in the Federal Courts Act. Finally, there is a dedicated military jurisdiction consisting of Military Courts and Court Martial Appeal Court. Also administrative tribunals are part of this framework. They deal with disputes over the application of laws and regulations regarding human rights, refugee claims, disability benefits, and employment insurance claims. Their decisions may be appealed before ordinary courts of provincial and federal level respectively.

According to sec. 101 of the Constitution Act of 1867, judges of the Supreme Court, Federal courts and Tax Courts are appointed by the General Governor, after being proposed by the Government; sec. 96 points out the same procedure of appointment for judges of the provincial superior courts, even though their establishment and organization is up to each Province. Impartiality of the function is ensured by a mandatory limit of retirement fixed at the age of 75 for federal judges (sec. 99 c. 2, Constitution Act, 1867) whilst for the other judges the retirement age is fixed by statute at either 70 or 75 depending on the court and by the substantial immovability granted to the judge, who can be removed only by the General Governor on address of both the Houses and only if the judge didn't hold office with good behaviour (sec. 99 c.1, Constitution Act, 1867)³². By request of the Minister of Justice, inquiries on the behaviour of the judges are made by the Canadian Judicial Council, which is chaired by the Chief Justice of Canada and composed of the chief justices and associate chief justices of Canada's superior courts, the senior judges of the territorial courts, and the Chief Justice of the Court Martial Appeal Court³³.

The requirements to access the Superior and Appeal Courts both provincial and federal, are generally defined by sec. 97 of the Constitution Act, 1867, which states the requirement for judges to belong to the Provincial bars, and more specifically, by the Judges Act, 1985, which requires the candidates to have been barristers or advocates for at least ten years standing at the bar of any province. Alternatively, they should have exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a Province. The conditions for accessing the judiciary of provincial courts are defined, instead, by single provincial or territorial statutes.

³² This part replicates the Act of Settlement, 1701.

³³ Judges Act and Interpretation Act, R.S.C. 1985.

Although the Canadian judiciary is a unitary national *corpus*, it is a matter of fact that traditionally governmental appointments are not put forth unilaterally by the executive branch. Actually the *iter* is only accomplished after the consultation with the provincial judicial councils. More specifically in 1988, thanks to the reform achieved by the Minister of Justice Ray Hnatyshyn of Government Mulroney, Judicial Advisory Committees were established in every Territory and Province. They are made up of five representatives of the practice law, the judiciary and the civil society, and they comment on the eligibility of the candidates³⁴. In 1991 two additional components, chosen by the Minister of Justice³⁵, in order to create committees that better reflected the diversity of the society were added. An additional reform in 1999³⁶ empowered the Independent Judicial Advisory Committee of a Province or Territory to perform a preliminary screening of the applications submitted by the candidates³⁷.

Nowadays, each committee is composed of seven members including: a nominee from provincial or territorial law society, a nominee from provincial or territorial branch of the Canadian Bar Association, a judge appointed by the Chief Justice of the Province or by the senior judge of territory; a nominee of the Provincial Attorney General or territorial Minister of Justice; three nominees of the Government representing the “general public”³⁸. The body at issue is also integrated by the Commissioner for Federal Judicial Affairs of the Federal Government, which does not have a right to vote and carries out secretarial functions, i.e. giving data and documents useful for the application screening.

This pre-selective stage may be integrated by interviews with the candidates and ends up with the evaluation of each of them as “highly recommended”, “recommended” or “unable to be recommended”³⁹. The list is then sent to the Government which has to make its definitive choice. If the

³⁴ P.H. Russell, J. Ziegel, *Federal Judicial Appointment: An Appraisal of the First Mulroney Government's Appointment and the New Judicial Advisory Committees*, in *University of Toronto L. J.*, 41, 1991, 33 ff.; S. Lawrence, *Reflections: On Judicial Diversity and Judicial Independence*, Articles & Book Chapters, Paper 369, 2010, in http://digitalcommons.osgoode.yorku.ca/scholarly_works/369; M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, Ottawa, 1995.

³⁵ M.L. Friedland, *Appointment, Discipline and Removal of Judges in Canada*, in H.P. Lee (ed.), *Judiciaries in Comparative Perspective*, Cambridge University Press, Cambridge, 2011, 53; P.H. Russell, *Constitutional Reform of the Judicial Branch*, in *Canadian J. Pol. Sc.*, 1984, 227 f.

³⁶ The reform was approved in 1998 but entered in force in 1999.

³⁷ Every Province and Territory has its own committee with the exception of Ontario which has three and Quebec which has two.

³⁸ In 2007, the Harper Government integrated committees with another member from the law enforcement community. R. Knopff, *The Politics of Reforming Judicial Appointments*, in *UNB L. J.*, 58, 2008, 45 ff.

³⁹ A. S. Millar, *The "New" Federal Judicial Appointments Process: The First Ten Years*, in *Alta. L. Rev.*, 2000, 38, 616 ff.; F. Gélinas, *Judicial Independence in Canada. A Critical Overview*, in A. Seibr-Fohr (ed.), *Judicial Independence in Transition*, Springer, Heidelberg 2012, 575.

list of names does not satisfy the Government, a second evaluation is requested⁴⁰. Once the appointment is fulfilled, the judges have to follow vocational training organized at a federal level by the National Judicial Institute, the Canadian Institute for the Administration of Justice, the Canadian Judiciary Council and the Office of the Commissioner for Federal Judicial Affairs⁴¹.

The appointment of judges of the Provincial Courts is up to the Provincial Government, which is supported by the collaboration of provincial judicial councils, established by the provincial law, which act along the same lines as federal committees⁴².

The choice of the selection process of judges, whose appointment is up to the executive, is the consequence of the British motherland's will considering it as an eligible mechanism to remove the judicial function from the influences of social communities in which the judicial bodies were located. During the debate on the BNA, no criticisms related to this option emerged, in the word of Sir Hector-Louis Langevin, who said in 1865: «by leaving these appointments to the Central Government, we are satisfied that the selection will be made from men of the highest order of qualifications, that the external and local pressure will not be so great, and the Government will be in a position to act more freely»⁴³.

However, the evolution of the system with the implementation of Federal Judicial Advisory Committees mitigated this option, going towards a stronger connection between the judicial activity and the territory where it would take place, because a pre-selection was carried out at the Provincial level, which selects its own jurisdictional body. On the other side, it must be considered that the advisory provincial step reduces the exclusive power of appointment of the Government, adding elements aimed at ensuring a certain balance of powers. Needless to say, there are still perplexities about the real independence of the function, in particular, because because judges, before taking their office, often held political offices; hence, their

⁴⁰ This system, introduced in 1988 had already been adopted in Quebec since 1979, when a selection committee was established. They were in charge of receiving applications and making proposal to the federal government. Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges, R. Q. c T-16 r. 5, § 15.

⁴¹ For additional information, see www.nji.ca/njii/index.

⁴² Since 1979, in Quebec, the Government has benefited from the help of a selection committee Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges, R. Q. c T-16 r. 5, § 15. Since 1988 Ontario has provided for the Ontario Judicial Appointments Advisory Committee, which, on 28 February 1995, through the Courts of Justices Act (1994), joined the Ontario judiciary. In order to know more about the appointment procedures on a provincial level: R. Devlin, A. W. MacKay, N. Kim, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple" P Judiciary*, in *Alta. L. Rev.*, 38, 2000, 754 ff.; L. Sossin, *Judicial Appointment Democratic Aspiration and the Culture of Accountability*, in *UNB L. J.*, 58, 2008, 11.

⁴³ Sir Hector-Louis Langevin, in Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 8th Prov. Parl. Of Canada, 3d Seff. (16 February 1865) 387, quoted by C. Forcese, A. Freeman, *The Laws of Government. The Legal Foundation of Canadian Democracy*, Irwin Law, Toronto, 2011, 249.

appointment is very likely to be influenced by their political belonging⁴⁴. Therefore, some amending bills have been proposed, regarding the composition of the Advisory Committees and their functions⁴⁵

4. Provincial and Legal Cultures Representation in the Supreme Court

A different analysis must be carried out in relation to the Supreme Court, a judicial body that underwent considerable transformation during the years.

In fact, looking at the legislative history of the British North America Act (BNA), it is possible to notice that the Founding Fathers were inclined to assign to a judicial body the task to solve the conflicts of competence between Federation and Provinces. On the one side, the U.S. model of the Supreme Court was very influential, on the other side Canadian Provinces, and especially Quebec, were reluctant to establish the Supreme Court given the representatives assemblies' loss of influence in respect of the judicial branch⁴⁶.

At the beginning, the BNA stated that conflict between Federation and Provinces would have been solved through the power of disallowance. However this choice made the central government the real hub of the system. For this reason Provinces pushed in order to pass an act introducing a court of appeal pursuant to sec. 101 BNA⁴⁷. The Parliament was favourable to this solution, otherwise only the provincial judicial branch would have been the arbiter of the allocation of competences between Federation and Provinces. In this way the introduction of the court was interpreted like a pro-federation choice.

Therefore, the Supreme and Exchequer Act, 1875 was passed. It gave birth to the court of last resort in Canada⁴⁸. The Bill was the result of a political bargain oriented to maintain the unity of the country and at the same time to recognize the differences between the two prevailing cultures. The body was made up of six judges, (five puisne judges and one chief justice) of whom two judges coming from Quebec. According to a custom three of them must come from Ontario and two from Maritimes Provinces. Thanks to the Act to Amend the Supreme Court Act, 1949, the court became the judge of last instance for Canada and acquired the current configuration. Its members are nine judges, including the chief

⁴⁴ P.H. Russell, *The Judiciary in Canada*, cit., 114; T. Morton (ed.), *Law, Politics and the Judicial Process in Canada*, Calgary University Press, Calgary, 2002, 121 ff.; C. Forcese, A. Freeman, *The Laws of Government. The Legal Foundation of Canadian Democracy*, Irwin Law, Toronto 2011, 251; F.C. DeCoste, *Political Corruption, Judicial Selection, and the Rule of Law*, in *Alta L. Rev.*, 38, 2000, 654 ff.

⁴⁵ For an overview of the proposals: C. Forcese, A. Freeman, *The Laws of Government*, cit., 271.

⁴⁶ J. Smith, *The Origins of Judicial Review in Canada*, in T. Morton (ed.), *Law, Politics, and the Judicial Process*, cit., 433 ff.

⁴⁷ Sec. 101 BNA: «The Parliament of Canada may, notwithstanding in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada (...).»

⁴⁸ I. Bushnell, *Captive Court*, McGill University Press, Montréal, 1992, 4 ff. Until 1949, Privy Council will be the last judicial instance for the Canadian Dominion, P.W. Hogg, *Canada: From Privy Council to Supreme Court*, in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, New York, 2006, 55 ff.

justice, three of whom are entitled to Quebec; whilst a customary source provides that three of them have to come from Ontario, the other two judges from Atlantic Provinces and eventually two from Western Provinces. The appointments are made by the Governor General on behalf of the Minister of Justice, while the Chief Justice is appointed by the Prime Minister and according to the same custom he or she must be alternatively Anglophone or Francophone.

Differently from the appointment of members of other judicial bodies, the system of appointment to the Supreme Court still raises some criticism in relation to its effective capacity to help the government to select the most suitable candidates to this remarkable function. In fact, this method was criticized by legal scholars and politicians who claimed that also other state authorities should be vested with the power to appoint the Supreme Court judges⁴⁹.

The ongoing practice did not give birth to a common custom. Indeed, several solutions were followed. There have been not only unilateral appointments, but also designations that involved *ad hoc* parliamentary committees which included members of opposition parties who heard the candidate selected by the Government or who enlisted proper candidates presented to the Minister of Justice after consultation of judicial branch and of advocates of the interested Province⁵⁰.

According to several pressure groups it would be advantageous to pass a bill which provides the popular election rather than governmental appointment⁵¹. For this purpose, a Standing Committee on Justice to Study the Process by which the Judges are appointed to courts of appeal and the Supreme Court of Canada was established in 2003. In the Committee's report, the majoritarian Liberal Party excluded the

⁴⁹ A. M. Dodeck, *Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit*, in *Supreme Court L. Rev.*, 2014, 112 ff.

⁵⁰ M.A. Simonelli, *Does judicial appointment process matter? Il caso della Corte suprema canadese*, in *federalismi.it*, 5, 2016; R. Cairns Way, *Deliberate Disregard: Judicial Appointments under the Harper Government*, in *Supreme Court L. Rev.*, 67, 2014, 43 ff.; N. Vizioli, *Le nomine dei giudici della Corte suprema del Canada*, in M. Calamo Specchia (ed.), *Le Corti costituzionali: composizione, indipendenza, legittimazione*, Giappichelli, Torino, 2011, 155 ff.; J. Ziegel, *Sélection au mérite et démocratisation des nominations à la Cour Suprême du Canada*, in *Choix*, 5, 2, 1999, 6; D. Songer, *The Transformation of the Supreme Court of Canada*, University of Toronto Press, Toronto, 2008, 14 f.; D. White, *Political Accountability in Appointments to the Supreme Court of Canada*, in *Constitutional Forum Const.*, 25, 3, 2016, 109 ff.; G. Delledonne, *La designazione dei giudici della Corte suprema: osservazioni comparatistiche*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione*, cit., 125 ff. On July 14 2017, in order to substitute the Chief Justice Beverly MacLachlin, the Premier Trudeau announced the constitution of an independent and non-partisan Advisory Board, which will have the task of identifying suitable candidates, submitting a short list of three to five individuals for consideration by the Prime Minister. This special system of appointment is based on openness, transparency and accountability. On December 18, 2017, the Prime Minister announced the appointment of the Honourable Sheilah Martin to the Supreme Court of Canada.

⁵¹ In 2002, Environics poll reported two-thirds of Canadians favour the popular election of the Supreme Court Justices: F. L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in K. Maleson, P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power*, University of Toronto Press Incorporated, Toronto- Buffalo-London, 2006, 56.

hypothesis of parliamentary hearings like in the U.S.A. or public interviews like in South Africa or parliamentary elections. It showed a certain favour for the obligation of the Minister of Justice to present himself to the Houses in order to justify and to defend his appointments and for the creation of a committee with the task to select a list made up of three to five candidates among whom the Minister would have had to choose one. After the selection, the Minister and the committee must be heard in the House of Commons. The committee had to represent as many interests as possible and to include federal and provincial government ministers, members of the judicial branch, advocates and people from civil society.

In contrast, the Bloc Québécois aspired to the provincial appointment. On the contrary, the Conservative Party opted for a parliamentary election whilst the New Democrats were favourable to parliamentary hearing of the Minister of Justice but before the final appointment.

The aim was to reduce the overwhelming power of government in the appointment process in order to avoid the danger of appointments made on the basis of political affinity with the government in charge rather than due to professional skills, thus impinging on autonomy and impartiality of judges⁵².

In order to reduce the relationship between governmental majority and judicial branch – as noted above – proposals are oriented to a greater involvement of the elective bodies. However, it is clear that a counter-majoritarian role can be assured only if the vote regarding the individual designation, either *ante* or *post*, is assumed through qualified majority so as to involve the opposition parties. Otherwise an absolute or relative majority could propose again the political orientation of the majority, without increasing the legitimacy of the Supreme Court.

Shifting the appointment process within the parliamentary context could be a reply to the critiques about the lack of legitimization, which sometimes are raised against the Supreme Court. Moreover, such a choice could better safeguard the principle of sovereignty of Parliament which constitutes a fundamental principle of the Canadian legal system. This issue became very relevant after the enactment of sec. 52 of the Constitution Act, 1982 that poses the Act at the top of the system of sources of law, while converting the Supreme Court into a constitutional judge. As noted above, legal scholars and politicians were sceptical about the prospect of creating an authority deprived of democratic legitimization which could strike down act of Parliaments, so to give rise to an era of judicial activism rather far from traditional Canadian history⁵³.

⁵² The prejudice was fired by the fact that before 1949, more than 50% of judges had served as member of legislative assemblies.

⁵³ F.L. Morton, R. Knopff, *Charter Politics*, Nelson Canada, Scarborough, 1992; Id., *The Charter Revolution and the Court Party*, Broadview Press, Peterborough, 2000, 149; C.P. Manfredi, *Judicial Power and the Charter: Canada and the*

That is a very debated topic among Canadian legal scholars who believe that the judicial function can limit the autonomy of elected bodies. At the time of the enactment of the Charter of Rights and Freedoms, especially the Provinces argued that the codification of rights in a constitutional document and consequently its configuration as a parameter of constitutional review were inconsistent with the parliamentary system⁵⁴. The proceedings of the Joint Parliamentary Committee, which have taken place before the final enactment of the Charter of Rights and Freedoms, shed light on the risk that the function of Parliament and so of the supremacy of its acts, that is to say of statutory law, could be eroded by the judicial power.

The words of Sterling Lyon – Manitoba Prime Minister are a very good and striking example in this sense. He underlined that the guarantee of rights could be achieved more successfully through the elected assemblies rather than by «men albeit learned in the law, who are not necessary aware of everyday concerns of Canadians»⁵⁵. In sum, the introduction of judicial review was perceived as undemocratic⁵⁶, apart from the fact that the adoption of the Charter of Rights and Freedoms was an advancement in the protection of minorities, that wouldn't have reached easily the majority in the elected assemblies⁵⁷.

A scholar underlined that «all of these victories for underprivileged individuals and groups enhance, rather than undermine, the democratic character of our society. The fact that they were won in the courts rather than in the legislative arena does not make them less democratic»⁵⁸.

Paradox of Liberal Constitutionalism, 2d edition, Oxford University Press, Toronto, 2001; N. Olivetti Rason, *La giurisprudenza della Corte suprema del Canada*, in *Giur. cost.*, 2003, 3238 ff.; J.B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, University of British Columbia, Vancouver, 2005; B.L. Strayer, *The Canadian Constitution and the Courts*, Butterworths, Toronto, 1983, 35 ff.

⁵⁴ I. Cotler, *Can the Center Hold? Federalism and Rights in Canada*, in E. Katz, G.A. Tarr (eds.), *Federalism and Rights*, Rothman and Littlefield Publishers Inc., Lanham, 1996, 174; F.L. Morton, R. Knopff, *The Charter Revolution*, cit., 149.

⁵⁵ Several Provincial Premiers showed their hostility towards the proposal of change of the Supreme Court in a judicial review court: A. Blakeney, the Premier of Saskatchewan and member of the New Democratic Party was worried about the possibility that social laws enacted could be quashed by the Supreme Court. E. McWhinney, *Dilemmas of Judicial Law-Making*, in P. Thibault, B. Pelletier, L. Perret (eds.), *Essays in Honour of Gérald A. Beaudoin*, cit., 326, ft. 47.

⁵⁶ F. L. Morton, R. Knopff, *The Charter Revolution*, cit., 150; Id. (ed.), *Law, Politics and the Judicial Process*, cit., 571 f.; S. Gambino, *Federalismo, diritti, corti. Riflessioni introduttive a partire dall'esperienza canadese*, in S. Gambino, C. Amirante (eds.), *Il Canada. Un laboratorio costituzionale*, Cedam, Padova, 2000, 33 ff.; R. Sharpe, *Judicial Activism: The Debate in Canada*, in C. Casonato (ed.), *The Protection of Fundamental Rights in Europe: Lessons from Canada*, Università di Trento, Trento, 2004, 11 ff.; C. Casonato, *Judges and Rights: Activism, Restraints, and Legitimacy*, in Id. (ed.), *The Protection of Fundamental Rights*, cit., 27 ff.

⁵⁷ P.W. Hogg, *The Charter Revolution: Is It Undemocratic?*, in *Constitutional Forum*, 12, 2001-2002, 2.

⁵⁸ R. Sigurdson, *Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics*, in C. Leuprecht, P.H. Russell (eds.), *Essential Readings in Canadian Constitutional Politics*, University of Toronto Press, Toronto, 2011, 402.

Concerns seem to be diminished – albeit not disappeared – for several reasons. Firstly, prominent authors have introduced the idea of a dialogue between courts and legislature⁵⁹, by building a collaborative relationship rather than a conflicting one. Secondly the Supreme Court have showed deference to the Legislative power, acting with self-restraint and modulating the retroactivity of decision invalidating laws concerning very delicate matters⁶⁰. Lastly the judicial body has acquired legitimization from the public opinion⁶¹.

6. The judicial power as reflection of pluralism of Canadian society

The reflective judiciary does not necessarily imply a proportional representation of the ethnic, religious, racial and social groups of the Canadian community but it is aimed at promoting their participation to the judicial activity.

This aspiration to manifest the diversity in judicial bodies is spreading. We can notice that sec. 2.13 of the Universal Declaration on the independence of judiciary power of Montréal in 1983 provides that: «the process and standards of judicial selection shall give due consideration to ensuring a fair reflection of the judiciary of the society in all its aspects»⁶². In the same wake, the International Bar Association Code on Minimum Standards of Judicial Independence states that «The process and standards of judicial selection must insure fair representation of all social classes, ethnic and religious groups, ideological inclinations and where appropriate, geographical regions. The representation should be fit and not numerically or accurately proportional⁶³».

⁵⁹ The reference is to: P.W. Hogg, A.A. Bushell, *The Charter Dialogue between Court and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, in *Osgoode Hall L. J.*, 35, 1997, 75 ff.; P.W. Hogg, A.A. Bushell, W.K. Wright, *Charter Dialogue Revisited – or “Much Ado About Metaphors”*, *ivi*, 45, 1, 2007, 1 ff.

⁶⁰ A case in point can be the decision *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5 about the prohibition against physician-assisted dying, where the Court suspended its ruling for 12 months. See U. Adamo, *Costituzione e fine vita*, Cedam, Padova, 181 ff.; E. Stefanelli, *La Corte suprema del Canada, il suicidio assistito, l'uso dei precedenti. Brevi note a margine del caso Carter v. Canada (Attorney General)*, 2015 SCC, in *federalismi.it*, 3 luglio 2015; C. Casonato, M. Tomasi, *Constitutional Dialogues in Canada. Corte Suprema e parlamento sulle questioni di fine vita*, in C. Murgia (ed.), *Scritti in onore di Sara Volterra*, Giappichelli, Torino, 2017, 191 ff.; S. Rodriguez, *Tecniche di bilanciamento tra diritto alla vita e libertà personale: l'attivismo della Corte canadese e il dialogo con i giudici di Strasburgo*, in E. Ceccherini (ed.), *I diritti al tempo delle crisi*, cit.

⁶¹ The data of Angus Reid Institute show that 74% of Canadians declares their satisfaction for the decisions of the Supreme Court and that 61% of Canadians trust in the Supreme Court in parallel only 28% of the citizens trusts in the Parliament, see www.angusreid.org (15 August 2015).

⁶² S. Shetreet, *The Doctrinal Reasoning for More Women Judges: The Principle of Reflective Judiciary*, in Id (ed.), *Women in Law*, Kluwer, London, Cambridge, 1998, 190; Id., *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in S. Shetreet, J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff Publishers, Dordrecht, 1985, 393 ff. The statement was strongly supported by African delegation where the topic of ethnic and tribal belonging is very relevant.

⁶³ S. Shetreet, *The Doctrinal Reasoning*, cit., 189.

In the framework of the OCSE either the Declaration of Copenhagen (1990) or of Lund (1992) put the attention to the issue of participation of minorities in the administration of justice. Sec. 30 of the first one rules that: «The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary». At the same time the latter points out, in the chapter related to the participation in decision-making (point six), that: «States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements as necessary. These may include, depending upon the circumstances: special representation of national minorities, for example, (...) formal or informal understandings for allocating to members of national minorities (...) seats on the supreme or constitutional court or lower courts».

From this perspective, Canada has been a forerunner legal system. In fact, from the entry into force of the Supreme Court Act, 1875 onwards a legal quota for francophone judges has been reserved, leaving to the customary law the indication of the other seats which are reserved to the Provinces.

However, a greater attention towards the diversity in the judicial branch has moved to the lower courts, becoming a meaningful issue at political level. In 2016, the Minister of Justice declared that: «We know that our country is stronger, and our judicial system more effective, when our judges reflect Canada's diversity. As promised, we have filled the urgent judicial vacancies by drawing on a list of recommended candidates who are of the highest calibre and who are as diverse as Canada»⁶⁴.

It's obvious that the purpose of creating the judiciary as a mirror of the socio-cultural diversity is one of the most relevant aim of the Government, since pluralism existing in the society has considered as a *quid pluris* to be enhanced, even in a field in which the function is exercised in the general interest of the community and not in accordance with a specific group interest. The extension of the mirror representation to all level of judiciary power is encompassed also in the guidelines of the Provincial Judicial Advisory Committees for the proposals of the judicial appointments⁶⁵.

⁶⁴ The Honourable Jody Wilson-Raybould Minister of Justice and Attorney General of Canada <http://news.gc.ca/web/article-en.do?nid=1086309> 22th of July 2016.

⁶⁵ «Along with this assessment of professional competence and overall merit, Committees must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority. In doing so, Committees should give due consideration to all legal experience, including that outside of mainstream legal practice. Broad consultations by the Committees, and community involvement through these consultations are essential elements of the process». <http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html>

The attention to this debate has increased in the last years and from a chronological point of view has involved the gender matter. It is worth to remember that only a strong pressure held by the National Action Committee on the Status of Women brought to the result of the appointment of Bertha Wilson, in 1982, as the first woman in the Supreme Court, after having been appointed as the first woman of the Court of Appeal of Ontario in 1975.

In relation to the gender issue, an increase of female appointments in the federal courts can be seen as well: in the '80s, only 3% of judges were women, in 1990 the percentage increased to 10% and became 25% in 2002. The Premier Brian Mulroney, in his first mandate between 1984 and 1988, appointed 17% of women. Among all, the appointments in the Supreme Court of Claire L'Hereux Dubé in 1987 and Beverly McLachlin 1988 (who were appointed Chief Justice by Jean Chretien in 2000) must be included. Jean Chretien has appointed the first justice in the Supreme Court of Ukrainian origins, John Sopinka and the first of Italian descent, Frank Iacobucci too⁶⁶.

At the Supreme Court level, it seems that a customary norm exists, providing that there have to be three women among its members, while on the contrary the representation of the other social components is weaker. However several signals show a shift. Indeed, Justice Larry La Forme was appointed as the first aboriginal people to the Court of Appeal of Ontario in 2004. Justice Maurice Charles has been the first black judge called to the Provincial Court of Ontario in 1969 and Justice Michael Tulloch was appointed to the Court of Appeal of Ontario in 2012.

At the Provincial level, the Ontario Judicial Appointments Advisory Committee, which was established in 1989, has promoted the appointments of women in its first six years of function, thus increasing the amount from 3% to 22% and selecting three justices belonging to First Nations, ten to visible minorities and even eight to French Canadians; Ontario was the first Province to appoint the first aboriginal, the first Eastern Asian and the first black woman judge⁶⁷.

Therefore, we can conclude that there is an increasing trend towards the incorporation, in the judiciary power of members identified on the basis of socio-cultural and ethnic origins. This is a trend that is confirmed at the comparative level⁶⁸. Nevertheless it is necessary to give the right weight to the specific groups in the Canadian mosaic. Furthermore, it seems important to understand whether *ad hoc* judges carry out their function of legitimacy of the judicial body or if they influence the body.

⁶⁶ L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 59 f.

⁶⁷ L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 70.

⁶⁸ K. Nobbs, *International Benchmarks a Review of Minority Participation in the Judiciary*, in M. Weller (ed.), *Political Participation of Minorities*, OUP, Oxford, 2010, 589 ff.

Starting from the first point, it is undisputable that the Canadian legal system relies upon a historic diarchy composed of Anglophone and Francophone communities. We have already explained the underlying reason of this union, given that, from the one side the Quebeckers claimed the recognition of the status of distinct society and, from the other side, the Anglophones made efforts to incorporate them into the institutional structure. The position of French origin citizens can not be assimilated to the condition of an ordinary linguistic minority, because Canadian history and law recognize to Quebeckers the *status* of Founding People to the same extent as the Anglophone community. Quebec constitutes the core of the Canadian Federation. This is an undeniable element from the ancient time of its foundation. The debate for the approval of the British North America Act showed this point clearly.

We could mention the words of Hector Langevin who stated in Parliament that French Canadians were “separate people” and was afraid of the withdraw of French customs, uses and law. He was not the only deputy who even if favourable to the federation project expressed his concern about the possible assimilation of French Canadians to the predominant Anglophone culture.

The strong integrational compact explains the reasons for the creation of a unique and united Federation, which characterizes the institutional architecture of Canada, and has been reiterated throughout times by the Supreme Court. Very often the latter behaves as a guarantor of the francophone peculiarity in the Federation both in Quebec and outside of its borders.

In an important leading case which dates back to the ‘30s, the Court ruled: «Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies»⁶⁹.

The guarantee of francophone culture in Canada has been recently restated in the reference for the Senate⁷⁰ where about the question concerning the removal of the real property requirement according to

⁶⁹ *re The Regulation and Control of Aeronautics* (1932) A. C. 54 at 70. On this point, M. D. Behiels, *Canada’s Francophone Minority Communities. Constitutional Renewal and the Winning of School Governance*, McGill-Queen’s Press, Montréal, 2004, X.

⁷⁰ Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704. On this reference see: P. E. Mendes, *Constitutional Options after the Supreme Court’s Decision in Reference Re Senate Reform: Restoring Trust and Credibility through Senate Reform*, in *NJCL*, 35, 1, 2015, 85 ff.; J. I. Colón-Ríos, A. C. Hutchinson, *Constitutionalizing the Senate: A Modest Democratic Proposal*, in *McGill L. J.*, 60, 4, 2014, 599 ff.; A. Dodeck, *The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism*, *ibidem*, 623 ff.; R. Albert, *Constitutional Amendment by Stealth*, *ibidem*, 673 ff.; Y. Danwood,

which Senators should own land worth at least \$ 4000 in the Province for which they are appointed. This requirement would violate sec. 23(3) Constitution Act, 1987 which allows Quebec senators not to reside in the electoral divisions for which they have been appointed. This provision constitutes an exception to the general rule applied to Quebec senators exclusively, who must have property in Quebec, albeit without being compelled to have their residence in the Province. On this issue, the Court pointed out the special arrangement reserved to Quebecers and ruled that the full repeal of the property requirement embodied in sec. 23(3) requires the consent of legislative assembly of Quebec, under the special arrangements procedure. This amending formula recognizes Quebec's veto power of and the privileged position of the Province in the constitutional framework.

The relevance of the Quebec position in the constitutional compact which gave the birth to the Federation was addressed in another reference of 2014 concerning the eligibility requirements for Quebec appointments⁷¹. The reference is subdivided into two questions: the first one affects the fact whether a person who was at any time an advocate of at least ten years standing at the Barreau du Quebec was qualified for appointment under sec. 6 of the Supreme Court Act, 1985 given that the selection should be made «from among the advocates of that Province»; the second one refers to the possibility for the Parliament to enact ordinary statutes in order to interpret the requirement of sec. 6 of the Supreme Court Act, 1875.

The Court's majority opinion excluded that the general requirements encompassed in sec. 5 - which reserved the appointment to current judges of a superior court of a province, including the court of appeal, to former judges of such a court, to current barristers or advocates standing at the bar of the Province for at least 10 years - and to former barristers or advocates standing at least 10 years can be extended to the judges coming from Quebec.

The Senate Reference. Constitutional Change and Democracy, ibidem, 737 ff.; C. Mathieu, P. Taillon, Le fédéralisme comme principe matriciel dans l'interprétation de la procédure de modification constitutionnelle, ibidem, 763 ff.; N. Karazivan, De la structure constitutionnelle dans le Renvoi relative au Sénat: vers une gestalt constitutionnelle?, ibidem, 793 ff.; K. Glover, The Supreme Court in a Pluralistic World: Four Readings of a Reference, ibidem, 839 ff.; E. Macfarlane, Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada, ibidem, 883 ff.; C. Cornell, "Reference re Senate Reform and the Supreme Court of Canada's Clarification of the Constitutional Procedure for Reforming the Canadian Parliament's Upper House, in Law & Bus. Rev. Am., 20, 2014, 451; E. Arban, Current trends in Canadian federalism. Centripetal and centrifugal forces in Canadian division of powers, in <http://www.amministrazioneincammino.luiff.it/app/uploads/2010/08/Current-trends-in-Canadian-federalism1.pdf>

⁷¹ Reference re Supreme Court Act, ff. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433. The reference was motivated by the appointment of Justice Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more ten years standings. His appointment was challenged before the Federal Court of Canada.

The reason is included in sec. 6 of the same Act, which in its English version provided that at least three of the judges must be appointed among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or among the advocates of that Province. Sec. 6 narrows the array from four kinds of people who are eligible under sec. 5 to two groups who are eligible under sec. 6. The explanation of this differentiation is based on the need to assure to the Court the presence of civil law experts and to represent legal tradition and social values from Quebec in order to maintain Quebec's confidence in the supreme judicial body.

A distinct regulation is the result of the historic bargain which gave birth to the Act regulating the institution of the Supreme Court⁷². It enshrines a symbolic significance and not only a technical one; it assures the permanent linkage between the judges and the French-Canadian society.

In the reference, the legislative history of the Act demonstrates that the provision of *ad hoc* seats for judges coming from Quebec was aimed at implementing the trust in the new judicial body by Quebeckers. The analysis of the Act helps understand that Quebec representation is not only linked to the necessity to have civil law skills but also constitutes a fundamental milestone of the constituent compromise that has led to the adoption of the British North America Act, which reshaped the Canadian dominion, so to turning it into a federal state.

The conclusions of the majority opinion were reached by adopting a literal and purposive analysis. The literal meaning was taken into account because the text of sec. 6 expressly requires the current membership of the Barreau du Quebec or of the Court of Appeal or of the Superior Court of Quebec while derogating from sec. 5 of the Act. The purpose of the provision was considered as well, because this piece of legislation represents the historic compromise that *brought* to Federation. It provides a French-Canadian quota of justices so as the court could have civil law training and could be trusted from by Quebec citizens, while recognizing the special status of their Province. The enactment of an *ad hoc* provision for Quebeckers permitted to overcome all the criticism coming from provincial representatives and to increase the confidence in the new body.

In respect of the second question affecting the possibility for an ordinary statute to extend the general requirements embodied in sec. 5 and in sec. 6 of the Act, the court deemed that issues related to the Supreme Court, after the Patriation, have been attracted in the domain of constitutional sources of law specifically in Part V of the Constitution Act, 1982. Therefore any law amending the Supreme Court Act, 1875 must have constitutional rank although the Act regulating the composition and function of the

⁷² P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Information Canada, Ottawa, 1969.

Supreme Court was an ordinary statute. At the moment the judicial authority is a constitutional body and it said that its regulation was upgraded to constitutional level.

Even in this case, the genesis and context of the Act explains the characteristic of the accommodation between the two founding peoples who want to maintain the bijuralism of the Federation. This goal was present also in previous agreements reached before the enactment of the Constitution Act, 1982. For instance, in the April Accord, 1981, in which there is a confirmation of the intention to limit Parliament's unilateral authority to reform the Supreme Court so as to make it more difficult to modify the court's composition. Indeed, the amending formula for this part requires the unanimity and so the Quebec's representation was given special constitutional protection.

The reference of the court *de facto* renders unalterable the constituent covenant that has institutionalized the diarchy between Anglophones and Francophones. Such agreement implies the duty to allocate *ad hoc* seats for Quebec in order to strengthen the link between *societas* of the Province and the federal institution. In fact, the primary goal does not seem to be the need to defend the interests of Quebec through the Francophone representation but rather to legitimate the judgments of the court from Quebec, due to its specific representation. In other words, the outcomes of decisions less characterized by a pro-provincial approach (*rectius* pro-Quebec) would be legitimated because the judicial body incorporates a francophone representation and for this reason these decisions can be more easily endorsed⁷³.

Moreover, indicating the current professional activity - as a requirement for the appointment to the Supreme Court - guarantees the presence of skills in civil law, which is a fundamental feature of the Quebec identity. In this regard, the Honourable Justice Piere-Basile Mignault said: «for the people of Quebec, our civil law is our most precious asset after our religion and language. It is a legacy we have received from our fathers, to be maintained and passed on to future generations. It is our duty and responsibility to honour and preserve our civil law, to ensure the purity of its doctrine and keep it safe from any influence that would prevent it from being what it should be»⁷⁴.

This framework downscales the strength of the view according to which the francophone representation carries out its function of adjudication in a partial way and uncritically pro-Quebec. This conclusion could

⁷³ R. Schertzer, *Quebec Justices as Quebec Representatives: National Minority Representation and the Supreme Court*, in *Publius*, 46, 4, 2016, 539 ff.; P. Patenaude, *Le Québec et la Cour suprême*, in *Alta L. Rev.*, 14, 1976, 138 ff.

⁷⁴ P.-B. Mignault, *L'avenir de notre droit civil*, in *Revue de droit*, 56, 1922, 116, the quotation comes from S. Morin, *Quebec: First Impressions Can Be Misleading*, in S. Farranm, E. Özücü, S.P. Donlan (eds.), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended*, Ashgate, Dorchester, 2014, 169 always concerning the same topic: S. Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil*, in *McGill L. J.*, 32, 1987, 559 ff.; Id., *Le code civil et l'identité*, in S. Lorie, N. Kasirer, J.-G. Belley (eds.), *Du Code Civil du Québec: contribution à l'histoire immédiate d'une recodification réussie*, Editions Themis, Montréal, 2005, 619 ff.; W. Tettley, *Mixed Jurisdictions. Common Law vs. Civil Law (codified and Uncodified)*, in *Louisiana Law Review*, 60, 2000, 677 ff.

affect all of the other components of the court who, in any case, represent other provinces. In other terms, a francophone “faction” is not present in the Supreme Court and few dissenting opinions were delivered by the three French Canadian Justices in juxtaposition with the Anglophone majority.

Three exceptions to this general statement can be mentioned concerning cases that involve relevant matters: *Public Service Board v. Dionne*⁷⁵ and *Capital Cities Communications Inc. v. Canadian Radio Television Commission*⁷⁶ relating culture and communication and *Quebec A.G. v. Canada*⁷⁷. The first two decisions were delivered by the Supreme Court in 1978 and reaffirmed the full federal competence in the matter of television broadcasting either cable or wireless, leaving apart the legislative intervention of Provincial Legislatures.

These decisions are meaningful due to all of the three French Canadians justices, whose opinions were strongly contrary to the majority opinion, stating that the cable tv matter was reserved to the Provinces. The dissenting judges did not agree with the idea according to which since wireless broadcasting is a competence of the Federation, then, due to some attractive *vis* even the cable communication should be regulated by federal level. In the dissenting opinions, this interpretation was deemed to be in contrast with the sec. 92 of BNA⁷⁸, which would cover this kind of communication because it involves the landline telephone communication. The access of the Province to this competence - beyond the economic interest - would have a strategic importance to build and maintain the distinctive values of francophone culture in a perspective of cultural protectionism⁷⁹. In consideration of the relevance of the issue, harsh comments were addressed against the opinion of the court, which was blamed of ignoring claims and requests made by Provinces. This event compelled Chief Justice Bora Laskin to say that: «Judges are completely independent of any influences in their decisions (...) the source of our appointment in no way qualifies our independence. We have no duty to governments, no duty to litigants, except to apply the law according to our ability. I do not represent the federal government nor do I represent Ontario which is my home province I represent no one but myself. (...) I know of no better way to subvert our

⁷⁵ *Public Service Board et al. v. Dionne et al.*, [1978] 2 S.C.R. 191.

⁷⁶ *Capital Cities Communications Inc. v. Canadian Radio Television Commission* [1978] 2 S.C.R. 141.

⁷⁷ *Quebec A.G. v. Canada*, [2015] 1 S.C.R. 693, 2015 SCC 14.

⁷⁸ Sec. 92 (10) Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Roads, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

⁷⁹ On the topic of building a national identity through medias, see P.K. Kresl, *Come formare una cultura nazionale in un mondo senza confini*, in G. Rolla (ed.), *Lo sviluppo dei diritti fondamentali in Canada*, Giuffrè, Milano, 2000, 277 ff.; K. Ross, P. Playdon (eds.), *Black Marks: Ethnic Minority and Media*, Ashgate, London, 2001, 33 ff.; B. Larsen, T. Tufte, *Is There a Ritual Going On? Exploring the Social Uses of the Media*, in I. Bandebjerg, H.K. Hastrup (eds.), *Sejvens, Yearbook 1999: Intertextuality and Visual Media*, University of Copenhagen, Copenhagen, 1999, 181 f.

judicial system, no better way to destroy it than to give currency to the view that the Judiciary must be a representative agency»⁸⁰.

Nevertheless, friction factors relying upon provincial claims have decreased within the Supreme Court especially after the enactment of the Charter of Rights and Freedoms in 1982. Many commentators agree that the shift of function of the Supreme Court has changed its approach to legal reasoning too, in the sense that it aims at enhancing a cooperative federalism, rather than a conflicting one⁸¹. In addition, data show that a centripetal movement of Canadian federalism is taking place⁸² and that there is a reinforcement of collegial decision held at the unanimity⁸³. This statement is supported by an element: in cases in which matters that are very relevant to Quebec are debated, French Canadian justices did not adopt francophone sectarianism or embrace positions very close to separatist attitudes. On the contrary, opinions were delivered at unanimity and they witnessed that the judicial body generally showed unitary opinions lacking of nationalistic or partisan shades. Given this, bijuralism and territorial cleavages of the court do not hinder the creation of the κοινή which has been sometimes challenged by political institutions and civil society.

⁸⁰ The Ottawa journal 23 1978 in https://www.newspapers.com/title_1188/the_ottawa_journal/

⁸¹ E. Brouillet, *The Supreme Court of Canada: The Concept of Cooperative Federalism and its Effects on the Balance of Power*, in N. Ayrones, J. Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists*, University of Toronto Press, Toronto, 2017; C. Mathieu, P. Taillon, *Le fédéralisme comme principe matriciel*, cit., 763 ff.; J. Leclair, *The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity*, in J.-F. Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États. Gouvernance, identité et méthodologie*, Bruylant-Éditions Yvon Blais, Bruxelles-Cowansville, 2005, 383 f.; G.-A. Beaudoin, *La Cour suprême et le fédéralisme canadien*, in E. Orban (ed.), *Fédéralisme et cours suprêmes*, Bruylant-Presses de l'Université de Montréal, Bruxelles-Montréal, 1991, 81 ff.; G. Delledonne, *L'omogeneità costituzionale negli ordinamenti composti*, Editoriale scientifica, Napoli, 2017, 152 ff. The web site of the Supreme Court regarding 2006-2016 data proves this statement.

⁸¹ J.B. Kelly, *Judging the Judges: The Decline of Dissent in the Supreme Court's Charter Decisions*, in F.L. Morton (ed.), *Law, Politics*, cit., 560 ff.; D. Songer, *The Transformation of the Supreme Court*, cit., 203 f.; C. L'Hereux-Dubé, *The Dissenting Opinion: Voice of the Future*, in *Osgoode Hall L. J.*, 2000, 496 ff.

⁸² F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, in *Can. J. Pol. Sc.*, 20, 1987, 44; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Wall and Thompson, Toronto, 1989, 36; E. Richez, *Losing Relevance: Quebec and the Constitutional Politics of Language*, in *Osgoode Hall L. J.*, 52, 1, 2014, 191 ff.; E. Brouillet, *The Supreme Court of Canada*, cit., 142; J. Woehrling, *The Canadian Charter of Rights and Freedoms and Its Consequences for Political and Democratic Life and the Federal System*, in A.-G. Gagnon (ed.), *Contemporary Federalism*, University of Toronto Press, Toronto, 2009, 235; A. Lajoie, *Garantir l'intégration des valeurs minoritaires dans le droit: une entreprise irréalisable par la voie structurelle*, in J.-F. Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États*, cit., 377 f.; B. Pelletier, *El impacto de la Carta canadiense de derechos y libertades sobre la particularidad quebequesa*, in E. Mitjans, J. M^a Castellà Andreu (eds.), *Derechos y libertades en Canadá*, Atelier, Barcelona, 2005, 69 ff.

⁸³ E. Mac Farlane, *Consensus and Unanimity at the Supreme Court of Canada*, in *Supreme Court L. Rev.*, 52, 2010, 379 ff.; D. Songer, J. Siripurapu, *The Unanimous Cases of the Supreme Court of Canada as Test of Attitudinal Model*, in *Can. J. Pol. Sc.*, 42, 2009, 87 ff.; McCormick, *Bias, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada*, in *Osgoode Hall L. J.*, 42, 2004, 107 ff.; Id., *The Choral Court: Separate Concurrence and the McLachlin Court 2000-2004*, in *Ottawa L. Rev.*, 37, 1, 2005, 37; C. L'Hereux-Dubé, *The Length and Plurality of Supreme Court of Canada Decisions*, in *Alta L. Rev.*, 28, 3, 1990, 586 ff.

In recent years, it has not been possible to single out a francophone block which counterposes against the rest of Canada representatives with the exception of the case above-mentioned: *Quebec A. G. v. Canada*. In fact, some reflections arise from a recent case where three justices from Quebec delivered a dissenting opinion, jointly with Justice Abella. The Province of Quebec challenged the constitutionality of sec. 29 of the *Ending Long Gun Register*, which imposed the destruction of all records hosted in a data base, which contained all the certificates for every arm acquired, transferred or possessed in Canada. Such database had been created by all Provinces effort. The Federal Act had been enacted by relying on the Federation's competence on criminal jurisdiction but Quebec objected it had the right to obtain the data regarding the territory of Quebec. The Attorney General of Quebec pointed out that the evolution of Canadian federalism is favorable to a flexible approach on the division of competences and the case should be solved through the principle of cooperative federalism. In addition, the federal act can affect a specific provincial matter, which is property and civil rights. Therefore a joint decision about this matter would be preferable⁸⁴.

It is not easy to determine if this case will be able to open a new phase in the relationship between Quebec and the rest of Canada, but, anyway, this judgment alone cannot frustrate the initial hypothesis about the impartiality and autonomy of the bench in a context of reflective judiciary at least in Canada. This statement is based on the analysis of the dissenting opinions. When they were delivered by three Québécois justices, they would reveal a strong disagreement with the rest of the Anglophone-oriented judicial body, giving credit to the hypothesis of the existence of a "Francophone Justice party"; on the contrary the inexistence of a shared vision among the three French-Canadian Justices can be detected. It does not emerge, in fact, any "functional" and cultural bond of the Francophone Justices to the referring Province, rather a professional contribute to *ius dicere* of the court. Therefore their territorial provenience has the prevailing purpose to legitimize the jurisdictional activity of the whole court. In this context, pluralism of the Supreme Court reflects the heterogeneity of the Canadian society, but does not foster conflicts. The court is a neutral body that promotes a cooperative federalism. In fact, inspired by several cases related to meaningful topics such as the cultural and linguistic ones, the court did not hesitate to deliver solutions that were "not Quebec-oriented". An interesting case that may be mentioned is *Ford v. Quebec*⁸⁵, which is relevant not only for issues related to language but also for the applicability of the

⁸⁴ P. Daly, *Dismantling Regulatory Structures: Canada's Long-Gun Registry as Case Study*, in *NJCL*, 33, 2, 2014, 169 ff.

⁸⁵ *Ford v. Quebec* [1988] 2 S.C.R. 712. On this topic, see also the case *The King v. Dubois* [1935] S.C.R. 378.

notwithstanding clause of sec. 33 of Charter of Rights and Freedoms, that is the means by which Premier Pierre Elliot Trudeau achieved the consent to the Patriation process⁸⁶.

Firstly, the decision in the Ford case was delivered at unanimity and so no ethnic-linguistic rift was arisen, although the matter was crucial for Quebec people. Secondly, the judgment is very important with respect to the applicability of sec. 33. The application of the clause to the Bill 101, which avoids the judicial review of legislation, is consistent with the purpose of the Charter. However, the court struck down sec. 58 and 69 of the Charter of French Language, which banned commercial signs written in language other than French, because these provisions were not consistent with the limitation clause of sec. 1 of the Charter of Rights and Freedoms. The evidences produced in the court about material facts did not justify the limitation to freedom of expression imposed by ss. 58 and 69 of the Charter of the French Language. Despite the fact that the Quebec Government had the purpose to enhance the status of French language, the legislative intervention was not necessary or proportional. Yet the motivation of Quebec Government of Bill 101 made reference to the need of protecting the “*visage linguistique*”. Therefore the override clause represented the tool aimed at recognizing Quebec speciality.

The idea that francophone justices in the court do not “represent” Quebec claims has emerged also in other significant cases. The 1998 Secession Reference was a case of high political relevance and the outcomes could be very detrimental for the federal pattern. The court unanimously that the secession of a portion of territory is legal, in theory, but must not be carried out unilaterally; a secession can happen only at the end of a negotiated path with the Federation and the other Provinces and after a popular consultation with a strong majority in favour of the project. Unilateral secession can be justified only in

⁸⁶ Section 33: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4). P. Kaye, *The Notwithstanding Clause (Sec. 33 of the Charter of Rights and Freedoms)*, Ontario Legislative Library, Legislative Research, Toronto, 1992, 31 f.; M.R. Radiciotti, *Protezione dei diritti fondamentali, judicial review e notwithstanding clause in Canada*, in G. Rolla (ed.), *L'apporto della Corte suprema*, cit., 195 ff.; P.H. Russell, *Standing Up for Notwithstanding*, in *Alta L. Rev.*, 29, 1991, 293 ff.; T. Kahana, *What Makes for a Good Use of the Notwithstanding Mechanism*, in *Supreme Court L. Rev.*, 23, 2004, 191 ff.; L. Weinrib, *Learning to live with the override*, in *McGill L. J.*, 35, 1990, 542 ff.; K. Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, in *Int'l J. Const. L.*, 4, 2, 2006, 347-370; J. Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?*, in *Supreme Court L. Rev.*, 23, 2004, 135 ff.; J. L. Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?*, *ibidem*, 169 ff.; F. De Montalvo Jääskeläinen, *Las cláusula notwithstanding y override del constitucionalismo canadiense*, in *Teoría y realidad constitucional*, 30, 2012, 387 ff.; S. Gardbaum *The New Commonwealth Model of Constitutionalism*, Cambridge University Press, Cambridge, 2013, 97 ff.; R. Albert, *The Desuetude of the Notwithstanding Clause - and How to Revive It*, in *Boston College Law School Research paper* 425, 2016.

case of infringement of citizens' rights and if democratic rules are violated. The court took a firm stance on this point, behaving again as a federal institution oriented towards the unity of the state. Judges stated that the federation is the most suitable institution to safeguard the cultural and ethnic minorities which form the majority within a specific province. In this way, the Supreme Court enhanced the protection of cultural diversity in a federal form of state⁸⁷.

In the examined cases, the Supreme Court acts as the protector of Federation and of the competence of the Provinces, including Quebec, whose historic and cultural diversity is considered but not overexposed. The francophone justices deliver opinions in which the *Quebécois* peculiarity is highlighted and stressed but it is not used instrumentally against the Federation. In other words, Quebec is not recognised a special position. The Province does not have a veto power as argued in the Quebec veto Reference, where the all members of the court stated that Quebec can not enjoy a special treatment because the Federation is based on the equality of all its components. The Supreme Court reveals a neutral, or pan-canadian approach and data show the same attitude: looking at the judgments from 1982 to 2002 concerning the conflict between Federation and Provinces, 58.6% of its decisions have been in favour of Government of Ottawa and among these 75% involved Quebec.

Summing up the representation of Quebec in the court does not perform in favour of the Province. Its attitude seems to be aimed at building a connection between Federation and Quebec. They do not feel constrained by a constituent community and do not represent a particular part in the judicial decision-making process. They seem to have inclusive, and not adversarial, purposes.

This approach is not exempt from critics, especially by legal scholars who would be more favourable to a judicial activism pro-Quebec, promoting a more decentralized system of government⁸⁸.

⁸⁷ D. Haljan, *Constitutionalising Secession*, Hart Publishing, Portland (Or), 2014, 325 ff.; S. Alvstad, *The Québec Secession Issue, with an Emphasis on the "Cultural" Side of Equation*, in *Temple ICLJ*, 18, 2004, 89 ff.; M. Dawson, *Reflections on the Opinion of the Supreme Court of Canada in the Québec Secession Reference*, in *NJCL*, 11, 1999, 5; P. Monahan, *The Public Policy Role of the Supreme Court of Canada in Secession Reference*, *ibidem*, 65 ff.; C. Ford, *In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Québec Secession Reference*, in *Alta L. Rev.*, 2001, 511 f.; J. Leclair, *The Secession Reference. A Ruling in Search of a Nation*, in *RJT*, 34, 2000, 885; A. Bayefsky (ed.), *Self-determination in International Law: Québec and Lessons Learned*, Kluwer, Deventer, 2000; P. Dumberry, *The Secession Question in Quebec*, in *DPCE*, 2, 2015, 357 ff.; K. Basta, *The State between Minority and Majority Nationalism: Decentralization, Symbolic Recognition and Secessionist Crises in Spain and in Canada*, in *Publius*, 48, 1, 2017 51 ff.; J.-F. Gaudreault-Des Biens, *Secession Blues: Some Legal and Political Challenges Facing the Independence Movement in Quebec*, in *Percorsi costituzionali*, 2014, 765 ff.

⁸⁸ S. Ishiyama Smithy, *The Effect of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada*, in *Publius*, 26, 2, 1996, 83 ff.; J.B. Kelly, M. Murphy, *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor*, *ivi*, 35, 2, 2005, 217 f.

6. “To be judged by their peers”

The social, cultural and linguistic pluralism of Canada is particularly salient and as noted before, the administration of justice tries to reflect this diversity. From a constitutional point of view, the representation of Quebec in the Supreme Court is casted in the stone of the Constitution and the presence of members of the other Provinces is based on conventional sources. In the lower courts, sources of soft law orientate the appointments in order to foster the pluralism even though the trend *currently* seems to be weak.

As far as this issue is concerned, it is noteworthy to single out a specific feature of the administration of justice, which affects the opportunity of incorporating part of the social and ethnic pluralism in the jury trials. The procedural history of Canada has been characterized by explicit exclusions of several groups such as women, religious, ethnic and racial minorities from enrolment in the juries⁸⁹ but in current times serving on juries is banned only for specific professional categories (see below).

However, the rule according to which every person can be eligible for jury service only formally. Indeed, from a substantive point of view, there are sections of the society whose exclusion is a matter of fact. This is not the consequence of a specific bias, but of a series of circumstances. A specific case deals with the representation of First Nations in the juries. A renewed importance has been given to this topic especially after a recent judgment of the Supreme Court: *R. v. Kokopenace*⁹⁰, where the court was called upon to decide whether a jury was supposed to be representative of the community.

Albeit this decision, according to previous judgments, reaffirmed that the State does not have a specific duty to include specific subset of the population, it is worth considering some aspects of the case, especially by analysing the dissenting opinion.

The appeal was brought by Ontario Court of Appeal against the respondent, Mr Kokopenace, an Aboriginal man from Grassy Narrows reserve in Kenora (Ontario) charged with second degree murder for stabbing his friend to death during a fight. Before the Court of Appeal, Mr Kokopenace alleged that his jury had been selected from a jury roll which did not include an adequate representation of aboriginal

⁸⁹« No person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex» [(Criminal Code, R.S.C. 1985, c. C-46, s. 626(2)]. This section was introduced by the Criminal Law Amendment Act, 1972, S.C. 1972, c. 13, s. 46; C. Petersen, *Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process*, in *McGill L. J.*, 38, 1993, 147 ff.; D.M. Tanovich, D.M. Paciocco, S. Skurka, *Jury Selection in Criminal Trials: Skills, Science and the Law*, Irwin, Toronto, 1997; E. Morton *Two Conceptions of Representativeness*, in *University of Toronto Faculty of Law Rev.*, 61, 2003, 105 f.; M. Comiskey, *A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge*, in *Chi-Kent L. Rev.*, 90, 2015, 1001 ff.

⁹⁰ *R. v. Kokopenace*, 2015 SCC 28 [2015] 2 S.C.R. 398.

on-reserve residents. Given this fact, he argued that this circumstance violated sec. 11(d) and (f)⁹¹ and 15⁹² of the Charter of Rights and Freedoms.

The appeal focused on the significance of the statement «independent and impartial tribunal», which should have reflected the pluralism of the society. The shortage of representativeness would have constituted a *vulnus* to fair trial which would have been caused by the incapability of the public powers to compile the jury roll in an adequate way. In other words, the infringement of sec. 11 of the Charter would stem from failing all the efforts aimed at creating a jury roll that fully represents the numerous characteristics existing in modern societies.

In order to understand the features of the judgment adequately, first of all it is worth mentioning the stages of jury selection. The Juries Act of Ontario states that in order to be eligible to serve as a juror, individuals must be Canadian citizens, reside in Ontario and to be at least 18 years of age. Moreover, some specific professions or prior criminal records can be reason of exclusion⁹³. The selection process is divided into three parts: the preparation of the jury roll; the selection of names from it to make up the jury panels for court sittings; the selection, from the jury panel, of the trial jury that will serve on a criminal trial. The first two stages are provided by a provincial law: the Juries Act, whilst the third stage is governed by the federal criminal code.

Mr. Kokopenace challenged the constitutionality of the administrative practice in execution of the Provincial Law: the jury roll must be prepared by provincial officials each year and the candidates are chosen randomly from the Municipal Property Assessment Corporation but for aboriginal peoples the

⁹¹ Sec. 11: «Any person charged with an offence has the right (...) (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.»

⁹² Sec. 15(1): « Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.»

⁹³ **Juries Act, R.S.O. 1990, c. J3, s. 3: Ineligible occupations****3. (1) The following persons are ineligible to serve as jurors:****1. Every member of the Privy Council of Canada or the Executive Council of Ontario.****2. Every member of the Senate, the House of Commons of Canada or the Assembly.****3. Every judge and every justice of the peace.****4. Every barrister and solicitor and every student-at-law.****5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.****6. Every person engaged in the enforcement of law including, without restricting the generality of the foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the Fire Protection and Prevention Act, 1997, and officers of a court of justice. R.S.O. 1990, c. J.3, s. 3 (1); 1994, c. 27, s. 48 (1); 1997, c. 4, s. 82.**

names of inhabitants of reserves are obtained from any record available. Following this selection, the sheriff is requested to send questionnaires to the recipients. When the forms are filled, and sent back, the sheriff is able to compile the jury roll. The accused maintained that there is an underrepresentation of Aboriginal on-reserve residents in the jury system because the jury roll includes a limited number of First Nations representatives. This happens because the public officers encounter many difficulties in finding the names of inhabitants of reserves and indeed there is a low rate of responses to questionnaires.

The Supreme Court delivered three different opinions: a majority opinion, a partially concurring reason and a dissenting opinion. The majority opinion held that the sec. 11 of the Charter doesn't imply a protected right to be judged by a jury which represents all the diverse groups of the society; the jury must not reflect a cross-section of the community, or its different characteristics. The low representation of Aboriginal peoples does not depend on the process of selection of jurors, who are selected from a random sample of eligible people in the district. The underrepresentation is determined by the difficulty to source the names of Aboriginal on-reserve residents and by the low return rate of notices for on-reserve residents: in 2007 the percentage of response was 10.72% compared to an off-reserve response rate of 56%. Given this fact, it is undisputable that there is not any or discrimination towards First Nations members by public officials rather than disaffection of these latter with the criminal justice system. In this case the State did not act intentionally to exclude a set of population; public powers provide a fair opportunity for a broad cross-section of society to participate in the jury process and so unintentional exclusion of a segment of population does not amount to a constitutional defect. In absence of an explicit *voluntas excludendi*, there is not invalidity of the administrative acts and Mr. Kokopenace does not have the right to have a new trial. The reason why Aboriginal People are not encompassed in the jury roll, albeit having reference to the historical and systematic subordination and marginalization perpetrated by white settlers, does not authorize an active and promotional action of the public authorities oriented to increase the number of Aboriginal jurors. The representativeness of the jury is guaranteed by using a fair and random selection process which is not aimed at excluding specific categories of people. In this respect, the legislative and administrative applications of sec. 11(d) and (f) are fair and the Province of Ontario has made all the reasonable efforts at each step, in order to include Aboriginal People in the jury roll. Thus, the focus of the opinion is based on the process of selection and not on its effect.

Moreover there is no infringement of sec. 15 of the Charter (principle of equality) and no indirect discrimination has taken place since Mr Kokopenace could not prove to have suffered a disadvantage due to the low numbers of aboriginal jurors from reserve; on the contrary he could have had potentially conflicting interests from those potential jurors.

Of course, the reason of the dissenting opinion ruled by Justice Cromwell, concurring the Chief Justice McLachlin, is totally different. Firstly, much more attention is paid to empirical and factual data. In fact, 46 First Nations live in the district of Kenora and the adult on-reserve inhabitants are estimated between 21% and 32% of the population. In 1993, the rate of response of notices sent by the sheriff amounted to 33% for aboriginal peoples and between 60% and 70% for the rest of population; in 2002, the percentage of notices coming from reserves fell down to 15.8% and, in 2008, even to 10%. For these reasons, the presence of autochthonous people in the jury trial suffers from an underestimation of 30%. This situation draws to the conclusion that there is a permanent and ongoing exclusion of a significant segment of the First Nations in the jury roll based on the ground of race. Although sec. 11(f) does not authorize affirmative actions in this extent or reserved quotas, this cannot justify the retention of a *status quo* which *de facto* pushes Aboriginal people away from the administration of justice. The fact that public powers do not intentionally act in order to exclude on-reserve inhabitants, and these latter do not show interest in being involved due to socio-cultural causes, is not sufficient to declare legitimate the administrative procedure. Indeed, the dissenting justices single out the defective process which shows how its stages are unfair and unsuitable to reach the goal to involve the Natives in a conspicuous way.⁹⁴ According to the dissenting justices, the Ontario authorities have not been active in seeking the most adequate means to involve First Nations not considering the peculiarity of the district of Kenora, where the most part of Natives live in very distant, hard-to-reach reserves. Moreover the postal service was not able to check the effective deliveries of the questionnaires and indeed the sheriff was not capable of updating the registers of residents. These shortcomings provoked the absence of representativeness in the jury trial of Mr. Kokopenace.

The majority opinion pointed out that the Aboriginal people were responsible for their delimited presence in the jury trial due to their negligence. This explanation is not satisfactory for dissenting justices. These latter shed light on the same aspect but with a different approach: the disaffection constitutes the result of the process of domination occurred by white settlers, that caused a high rate of Aborigines in prisons and their distrust in the criminal justice system. The aim of the dissenting justices is not to introduce quotas for Native jurors, but to increase the numbers of Aboriginal Peoples in the array from which pinpointing the jurors through specific and targeted actions.

⁹⁴ In the judgment, the justices expressed doubts about how the sheriff had sent the notices to the inhabitants of the reserve which are often located in isolated areas and about the outdate of the records for Natives.

It is noteworthy that Justices pay attention to the role and meaning of the jury trial in the common law system: among them it stands out one - which would contribute to strengthen the supporters of reflective judiciary - to increase the public confidence in justice⁹⁵.

Anglophone scholars have demonstrated the relevance and the sensitivity of the issue concerning the jury selection, since biases and prejudices can drive verdicts in one sense or the other. The heterogeneous composition can help the jury to be permeated by different perceptions which can be fruitful in order to achieve a fair verdict.

In the end, we cannot forget to give the right importance to the debate occurred in other legal systems such as the U.S.'one, where the representation of the different set of population in the jury trial has contributed to improve and legitimize the criminal justice system, which otherwise would have been overlapped with the predominantly white, male, middle-aged and middle-class group⁹⁶. In this framework, many studies trace the performing outcomes of juries which involve a certain level of diversity in composition⁹⁷. The lack of representativeness can promote the mistrust of Aboriginal People in the justice especially because the jury trial is considered a standard of freedom and a means to contain the powers of government. In fact, Tocqueville stated that the jury lays the foundations for the legitimization of the authority of the people who appoint themselves as judges and so the author underlines the democratic function of the jury⁹⁸.

⁹⁵ E. Morton, *Two Conceptions of Representativeness in the Canadian Jury Selection Process: A Case Comment on R. v. Gayle*, in *Univ. Toronto Fac. Law Rev.*, 61, 2003, 105 ff.

⁹⁶ Concerning the topic of composition of juries in the United States but with conclusions applicable to the Canadian system, see S. Volterra, *Gruppi minoritari ed emarginati davanti alla Corte suprema tra il 1874 e il 1910*, in Ead.(ed.), *Corte suprema e assetti sociali negli Stati Uniti d'America (1874-1910)*, Giappichelli, Torino, 2003, 44 f.; B.A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, in *U. Cin. L. Rev.*, 61, 1993, 1129; R.M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, in *Yale L. J.*, 116, 2007, 1568; B. D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, in *Colum. L. Rev.*, 92, 1992, 725 ff.; R. Schuller, N. Vidmar, *The Canadian Criminal Jury*, in *Chi.-Kent L. Rev.*, 86, 2011, 497 ff.; J. Elster, *Securities Against Misrule: Juries, Assemblies, in Elections*, 2013, 136-37.

⁹⁷ S.R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, in *Soc. Issues & Pol'y Rev.* 2, 2008, 65; Id., *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, in *J. Personality & Soc. Psychol.* 90, 2006, 597 ff.; S.R. Sommers, P. C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, in *Chi-Kent L. Rev.*, 78, 2003, 997 ff.; A. W. Alschuler, *Racial Quotas and the Jury*, in *Duke L. J.*, 44, 1995, 704 ff.; D. Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, in *U. Chi. Leg. F.*, 1998, 161 ff.; (suggesting that parties be given a fixed number of affirmative choices as to who is included on the final jury), W.J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, in *U. Pa. J. Const. L.*, 3, 2001, 171; W. J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, in *DePaul L. Rev.*, 53, 2004, 1497 ff.

⁹⁸ A. Tocqueville, *La Democrazia in America*, Rizzoli, Milano, 2002, 274 f.

Lastly, another aspect was faced the case, which had strongly emerged in the report, whose name is First Nations Representations on Ontario Juries, held by the former puisne justice, Frank Iacobucci, in February 2013⁹⁹. The outcomes of the report showed how the lack of interest - or even - the open hostility to criminal justice system were linked on the one side, to the high rates of aboriginal inmates in the correctional system and, on the other side, to the different approach to the administration of justice between First Nations and Western legal tradition¹⁰⁰. First Nations have a different view about the substantive content of justice and the process of achieving it, which is more oriented to restorative justice rather than retributive justice.

However, a greater involvement of First Nations in the jury trials could be a useful tool in order to reconcile and to hail past discrimination and as consequence to improve the trust in justice. “Reflective jury” could be a suitable instrument to implement the process of reconciliation to which the Canadian Government has committed itself in the last years.

7. Conclusion

In this chapter, we discussed the attempt of the Canadian constitutional system to incorporate the cultural and linguistic diversities in the judiciary power.

Our primary aim has been to describe the issue. The starting point was the role of French Canadian justices in the Supreme Court. After exploring the jurisprudence of the court, we can affirm that the Francophone Justices perform their task with commitment and loyalty to the *ius dicere* rather than to their cultural and linguistic belonging. Nevertheless, their presence in the body has doubtless contributed to the nation-building process which sometimes is put to the test by political challenges.

The entrenchment of Justices coming from the Provinces in the Supreme Court has not hindered the capacity of the judicial body to deliver impartial and reasonable decisions. As a consequence, the trust and the credibility in the Supreme Court have increased, producing an undeniable benefit for the whole legal system.

Diversity can increase judicial legitimization and reduce criticism about the lack of non-democratic origin of the judges. Cases involving delicate issue can be met with more public approval, and divisiveness can reach more easily an accommodation.

⁹⁹https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_On_tario_Juries.html

¹⁰⁰ S. Zimmerman, “*The Revolving Door of Despair*”: *Aboriginal Involvement in the Criminal Justice System*, in *U.B.C. L. Rev.*, 1992, 367 ff.

For this reason, both the 1987 Meech Lake Accord and the 1992 Charlottetown Accord advocated a reform in respect to appointments to the Supreme Court in the direction of reinforcing the Provincial and aboriginal representation within the body.

One more relevant point seems to be that there is an increasing interest in promoting the diversity in the judicial recruitment, and in this sense, we may remind the guidelines of the Provincial Advisory Committees.

The survey showed that there is a perception of the existence of a *quid pluris* in the multifaceted composition of the judiciary. Firstly, there is a strengthen of the social cohesion and indirectly of democracy, which is distinguished rather by a project of inclusion than for one of alienation. By the way, how could the different groups trust in a judicial system which is not able to include the diversity of the population?¹⁰¹

After all, if it is true that we are living in “judgeocracy” era, a realistic counterweight can be the full and active participation of minorities in the judicial function.

The admission to judicial career of members of communities who have been excluded in the past may only make the function of judging more plausible, which might enshrine distinct perspectives, and not solely those of prevalent class.

This feature is particularly relevant in the case of jury trials. We mentioned the issue, underlining how some justices assessed that the plural composition of the array of jury panel could be helpful to achieve a fair and impartial trial.

Moreover, it is indisputable that the inclusion of members of underrepresented groups in the jury could help overcome past and present discrimination. In fact, if seen in light of this mutual relations, affirmative actions or special measures could strengthen the participation of minorities in judging-decisions and the sense of inclusiveness.

We cannot deny that the issue of reflective judiciary is controversial because it may collide with a milestone of democratic system which connects itself to the constitutional traditions of judicial impartiality and independence. These outlines seem to be barriers to the implementation of diversities in the judiciary, but they can not be an excuse for a failure to implement measures to enhance diversity, or at least, to prevent practises that reduce representativeness.

In conclusion, the goal should be: making the difference without distinctions¹⁰².

¹⁰¹ J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971.

¹⁰² These words are inspired by J. Brockman, *A Difference without a Distinction*, in *Can. J. L. & Soc.*, 8, 1993, 149 ff.

Foreign judges on Pacific Courts: Implications for a Reflective Judiciary^{*}

by Anna Dziedzic

Table of contents: 1. Introduction. 2. Foreign judges in the Pacific. 2.1. The Pacific region. 2.2. Foreign judges in the Pacific. 3. Two understandings of reflectiveness. 3.1. Reflective judicial activities. 3.2. Judicial resemblance. 4. Foreign judges and reflective judicial decision-making. 4.1. The role of the judge. 4.2. The role of the judiciary. 4.3. Alternative sources of knowledge. 4.4. Diversity. 4.5. Concluding comments. 5. Foreign judges and judicial resemblance. 5.1. Public confidence in the judiciary. 5.2. Legal pluralism. 6. Conclusion

1. Introduction

The appointment of foreign judges to a state's domestic courts stands in tension with the idea of a reflective judiciary. In most judiciaries around the world judges are citizens of the state on whose courts they serve. The use of foreign judges on domestic courts in states in the Pacific, as well as parts of Africa, Asia, the Caribbean and Europe, represents a numerically small but globally widespread exception to this norm. The practice is particularly prevalent in the Pacific region, which serves as the case study for this article. A foreign judge is a person who is a citizen or permanent resident of a foreign country and who, prior to his or her appointment as a judge, was a member of a national legal community other than that which he or she now serves as a judge. The appointment of foreign judges to domestic courts serves as an example of an 'unreflective' judiciary, in the sense that the judiciary is composed, at least in part, of judges of a different nationality and generally also of a different ethnic and cultural identity to the community.

This article considers how the use of foreign judges affects the reflective nature of judiciaries in the Pacific. Paragraph 2 provides a brief overview of the nature and extent of the use of foreign judges in the Pacific region, focusing on the nine independent states of Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. While these states have distinctive histories,

^{*} The research for this article was conducted as part of my doctoral studies at Melbourne Law School, supported by the Human Rights Scholarship awarded by the University of Melbourne. I would like to thank Cheryl Saunders, Adrienne Stone and the participants at the 'Masterclass on Indigenous Peoples and the Law' at Melbourne Law School on 6 April 2017 for their comments on earlier drafts.

experiences and constitutional systems, characteristics such as the small size of the states, geographic isolation, colonial heritage and legal pluralism are broadly shared and provide the conditions for the use of foreign judges. This Part also outlines the legal frameworks for the appointment of foreign judges and the number of foreign judges serving in the region, drawing on a survey of the composition of superior courts in each state from 2000 to 2015.

Paragraph 3 sets out two relevant ways in which a judiciary might be said to reflect the community that it serves. The first concerns the extent to which the judiciary reflects, in the sense of representing or speaking for, the community in its judicial decision-making. The second concerns the extent to which the composition of the judiciary reflects, in the sense of resembling, the community. Paragraphs 4 and 5 then examine how the use of foreign judges in the Pacific affects each of these senses of judicial reflectiveness. Paragraph 4 argues that foreign judges are unlikely to have the same knowledge and experience of the community as local judges and so are less likely to be able to bring relevant community values to bear on judicial decision-making. Foreign judges in the Pacific might instead be characterised as technical experts who provide an impartial, strictly legal form of judicial decision-making. This part also considers the value of judicial diversity, which is sometimes regarded as a positive feature of a reflective judiciary. The use of foreign judges, however, demonstrates that diversity cannot be conflated with reflectiveness. Rather, the practice provides a particular kind of diversity that privileges legal knowledge and experience over the capacity to reflect or represent the community's views.

Paragraph 5 is concerned with the community's perception of judiciaries that comprise foreign judges. While there is a risk that the use of foreign judges might undermine public confidence in the judiciary, this does not seem to be the case in the Pacific. Paragraph 5 canvasses some possible reasons for this and suggests that in the circumstances of legal pluralism that pertain in Pacific states, the use of foreign judges serves to symbolise the distinction between the formal western legal system and customary legal systems. The 'unreflective' judiciaries of the Pacific convey a particular understanding of judicial decision-making and the role of the judiciary, which suggests that the value placed on the idea of a reflective judiciary and the ways in which that reflectiveness is realised are likely to vary across different legal contexts.

2. Foreign judges in the Pacific

2.1. The Pacific region

The Pacific region comprises the island states and territories situated in the South Pacific Ocean. It includes independent sovereign states as well as self-governing territories and dependencies. This article focuses on nine independent Commonwealth states in the region: Fiji, Kiribati, Nauru, Papua New

Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. All have small populations, in some cases dispersed across islands in large ocean areas.¹ All are small island developing states and face similar challenges in relation to the economic activity, governance and resilience of their peoples.² Small populations, geographic isolation, distance from overseas markets, and dependence on subsistence agriculture are often considered constraints on economic development in small island states.³

The region contains great diversity of peoples and cultures, which is reflected in different legal systems, laws and languages. The states in the region are typically divided into three broad cultural groups according to the ethnicity and culture of their Indigenous peoples. Fiji, Papua New Guinea, Solomon Islands and Vanuatu are predominately Melanesian; Samoa, Tonga and Tuvalu are predominantly Polynesian; Kiribati and Nauru are predominantly Micronesian. These classifications are not firm boundaries: for example, there are Polynesian peoples in parts of Fiji and Micronesian peoples in Tuvalu. The three groups are not themselves homogenous, but rather encompass many different peoples and cultures. There is greater diversity within Melanesian states (for example, Papua New Guinea contains over 800 language groups), while the communities within Polynesian and Micronesian states are more homogenous, and some, such as Tonga, are highly centralised.⁴

The extent and significance of societal cleavages varies across the region. Melanesian states, which comprise significantly diverse cultural and ethnic groups with their own territories, peoples and customary laws, have been more vulnerable to societal conflict.⁵ Recent conflicts in Solomon Islands and Papua New Guinea arose from disputes about access by ethnic groups to land and resources and renewed secessionist movements.⁶ Societal cleavages in Fiji take a different form and lie between Indigenous Fijians and Indian Fijian people descended from indentured labourers brought to Fiji during British

¹ Tuvalu and Nauru have populations of approximately 10,000; Tonga 106,000; Kiribati 112,000; Samoa 193,000; Vanuatu 265,000; Solomon Islands 584,000; Fiji 892,000 and Papua New Guinea 7,619,000: United Nations, Department of Economic and Social Affairs Population Division, *World Population Prospects* (United Nations 2015) <<http://esa.um.org/unpd/wpp>>.

² *About the Small Island Developing States* (2015) United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States <<http://unohrrls.org/about-sids/>>.

³ Francis X Hezel, 'Pacific Island Nations: How Viable Are Their Economies?' (Pacific Islands Policy No 7, East-West Center, 2012) 3.

⁴ IC Campbell, *Worlds Apart: A History of the Pacific Islands* (Canterbury University Press, 2003) ch 1.

⁵ Sinclair Dinnen, Caroline Sage and Doug Porter, 'Conflict in Melanesia: Themes and Lessons' (World Bank, 2010).

⁶ Albert Palmer, 'The Ethnic Conflict in Solomon Islands' in Ustina Dolgopol and Judith Gail Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers, 2006) 49; Dinnen, Sage and Porter, above n 5, 5–6.

colonial rule. Fiji's coups and constitutional instability are attributed, at least in part, to tensions arising from the ways in which political power is shared between these two communities.⁷

The nine states included in this study are members of the Commonwealth of Nations, reflecting their former status as colonies, protectorates or trust territories of Australia, New Zealand and the United Kingdom.⁸ With the exception of Tonga, all states became independent during a period of decolonisation in the 1960s to 1980s. Tonga was never formally colonised and its constitution dates from 1875. However, as a protectorate from 1900 to 1970, Great Britain took responsibility for defence, foreign affairs and judicial proceedings against non-Tongan peoples. The constitutions made at independence have continued, with some amendment, in all states except Fiji and Tuvalu.⁹ All states adopted a common law legal system and Westminster form of government. Colonial courts were staffed by judges drawn from and appointed by the imperial power and the use of foreign judges into independence, while different in significant ways, echoes this former colonial practice. Into independence, the newly established legal and political systems were often designed and administered with the support of foreign experts, including foreign judges, sourced mainly from Australia, New Zealand and the United Kingdom. While there are variations across the region, the judiciaries in each state generally comprise a lower court (District or Magistrates Court) with civil and criminal jurisdiction, a higher court (High or Supreme Court) to deal with serious civil and criminal cases and appeals, and an appellate court (Court of Appeal).¹⁰ Foreign and local judges are appointed to sit on courts at all levels in all nine states. Until 2018, Nauru had a distinctive arrangement with Australia under which the High Court of Australia is designated the final court of appeal for most Nauruan civil and criminal matters, but not constitutional matters.¹¹

⁷ Nicholas Aroney and Jennifer Corrin, 'Endemic Revolution: HLA Hart, Custom and the Constitution of the Fiji Islands' (2013) 45(3) *The Journal of Legal Pluralism and Unofficial Law* 314, 317; Brij V Lal, 'Making History, Becoming History: Reflections on Fijian Coups and Constitutions' (2002) 14(1) *The Contemporary Pacific* 148.

⁸ Vanuatu was an Anglo-French condominium from 1906 until independence in 1980.

⁹ *Constitution of Kiribati 1979* (schedule to the *Kiribati Independence Order 1979* (Imp)); *Constitution of Nauru 1968*; *Constitution of the Independent State of Papua New Guinea 1975*; *Constitution of the Independent State of Samoa 1960*; *Constitution of the Solomon Islands 1978* (schedule to the *Solomon Islands Independence Order 1978* (Imp)); *Constitution of the Republic of Vanuatu 1980*. New constitutions were made for Fiji in 1990, 1997 and 2013 and Tuvalu in 1986.

¹⁰ Jennifer Corrin Care and Don Paterson, *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd ed, 2008) ch 11.

¹¹ *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru*, 6 September 1976; *Nauru (High Court Appeals) Act 1976* (Cth); *Appeals (Amendment) Act 1974* (Nauru). Nauru withdrew from this arrangement early in 2018 and committed to establish its own national Court of Appeal.

The superior courts (Supreme Courts and Courts of Appeal) have jurisdiction to determine questions arising under the state's constitution or involving its interpretation.¹² They also have powers of strong judicial review and may overrule legislation that is inconsistent with the constitution. Several Pacific courts also have an advisory jurisdiction in constitutional matters, which permits them to provide opinions on questions referred to the court by the Cabinet, parliament or head of the executive.¹³ There are no specialised constitutional courts.

Prior to colonisation, the people of the Pacific were governed according to customary law. In all states, customary law is formally recognised and continues to operate, both as an alternative to the formal legal system and as an influence upon the content of common and statutory law.¹⁴ In several states, there are specialised courts to deal with customary matters such as land and titles, which may be integrated with other courts or operate independently.¹⁵ At the local village level, customary institutions may have jurisdiction to adjudicate disputes according to custom.¹⁶ The resulting legal pluralism presents a range of challenges, including managing choice of courts, how decision-makers identify and apply customary laws in particular cases, and how courts might interpret and develop common law, statutory law and constitutional laws in light of custom.¹⁷

2.2. Foreign judges in the Pacific

Foreign judges in the Pacific sit on courts that exercise common law, statutory and constitutional jurisdiction. It is rare for a foreign judge to sit on a customary court exercising customary jurisdiction, although in some jurisdictions the courts on which foreign judges sit have jurisdiction to hear appeals from such courts.

Constitutions and legislative frameworks of the states in the region enable the appointment of foreign judges. To be eligible for appointment, a person must have held judicial office or have practiced as a legal

¹² *Constitution of Fiji* 2013 ss 99(4), 100; *Constitution of Kiribati* 1979 s 88; *Constitution of Nauru* 1968 s 54(1); *Constitution of Papua New Guinea* 1975 s 162; *Constitution of Samoa* 1960 ss 73(2), 80; *Constitution of Solomon Islands* 1978 s 83; *Constitution of Tonga* 1875 s 90; *Constitution of Tuvalu* 1978 ss 130, 131, 135; *Constitution of Vanuatu* 1980 s 53.

¹³ *Constitution of Fiji* 2013 s 91(5); *Constitution of Kiribati* 1979 s 66(5); *Constitution of Nauru* 1968 s 55; *Constitution of Papua New Guinea* 1975 s 19; *Constitution of Samoa* 1960 s 73(3); *Constitution of Vanuatu* 1980 s 39(3).

¹⁴ Corrin Care and Paterson, above n 10, ch 3; Jennifer Corrin, 'Getting Down to Business: Developing the Underlying Law in Papua New Guinea' (2014) 46(2) *The Journal of Legal Pluralism and Unofficial Law* 155.

¹⁵ Eg *Native Lands Act* s 133 (Fiji); *Magistrates Court Ordinance* c 52 (Kiribati) Pt VI; *Lands and Titles Act 1981* (Samoa) pt 6; *Customary Land Tribunal Act 2001* (Vanuatu).

¹⁶ Eg *Village Courts Act 1989* (PNG); *Village Fono Act 1990* (Samoa); *Island Courts Act* c 167 (Vanuatu).

¹⁷ Jennifer Corrin, 'Moving beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 59 *Journal of Legal Pluralism and Unofficial Law* 29.

practitioner for a minimum period of time, in the state itself or another country.¹⁸ Such ‘other countries’ may be limited to Commonwealth countries,¹⁹ those with a similar legal system,²⁰ and/or those specified in a law.²¹ Kiribati permits legal experience in any country.²² Between 2000 and 2015, 187 foreign judges sat on the higher courts of the nine Pacific states.²³ Of these, approximately 32% were from New Zealand, 30% from Australia and 8% from the United Kingdom, reflecting continuing connections between these former colonial administrative powers and the states in the region. Ten judges were recruited from within the Pacific region and four from African states, reflecting regional and Commonwealth ties. During this period, 22% of foreign judges were from Sri Lanka. All Sri Lankan judges served in Fiji and were appointed after April 2009 when the interim military government abrogated the constitution and dismissed all serving judges.

In some states, the terms and conditions for judicial appointment expressly distinguish between citizen and non-citizen judges. The Constitutions of Fiji and Samoa exempt non-citizen judges from the constitutional guarantee of tenure until retirement age that applies to citizen judges.²⁴ Legislation in Papua New Guinea provides that non-citizen judges may be appointed for a term not exceeding three years, while citizen judges are appointed for ten-year terms.²⁵ Even where there are no mandatory requirements, foreign judges in the region are usually appointed on contract for short fixed terms.²⁶

The ratio of foreign to local judges varies across the Pacific. In Nauru and Tuvalu all of the judges on the relevant courts between 2000 and 2015 were foreign. Between 71% and 95% of the judges serving in Fiji, Kiribati, Solomon Islands, Tonga and Vanuatu were foreign judges. Papua New Guinea had the lowest proportion of foreign judges with just 21%. Care should be taken when interpreting these figures. A foreign judge might be a resident full-time judge appointed for a term of years and so hear many cases. Some foreign judges visit the country a few times a year to sit on courts of appeal. Occasionally, a foreign

¹⁸ *Constitution of Fiji* s 105; *Constitution of Kiribati* ss 81(3); 91(1)(b); *Constitution of Samoa* s 65(5); *Constitution of Solomon Islands* s 78(3); *Constitution of Tonga* s 85; *Constitution of Tuvalu* s 124; *Constitution of Vanuatu* s 49(2) with *Legal Practitioners (Qualifications) Regulations Act 1996* (Vanuatu) s 2.

¹⁹ *Constitution of Tonga* s 85(b)(i); *Constitution of Solomon Islands* s 78(3)(a).

²⁰ *Constitution of Samoa* s 65(5); *Constitution of Tuvalu* s 124(a); *National Court Act 1975* (PNG) s 2(a)(ii).

²¹ *Constitution of Solomon Islands* s 78(3); *Constitution of Nauru* s 49(3) read with *Legal Practitioners Act 1973* s 5.

²² *Constitution of Kiribati* ss 81(3); 91(1)(b).

²³ For the purposes of this study, a higher court is a court that exercises constitutional jurisdiction.

²⁴ *Constitution of Fiji* s 110(1); *Constitution of Samoa* s 68. This was also the case in Solomon Islands until the distinction was removed by constitutional amendment in 2009: *Constitution (Amendment) Act 2009* ss 6, 8.

²⁵ *Organic Law on the Terms and Conditions of Employment of Judges* (PNG) s 2.

²⁶ Carl B Ingram, ‘The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence’ in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law, 2011) 375; Corrin Care and Paterson, above n 10, 100.

judge is appointed to hear a specific matter. Such variations affect the actual proportion of cases that are heard by foreign judges vis-à-vis local judges.

The principal reason that Pacific states use foreign judges is because the small size of local populations and legal professions mean it is not possible to appoint sufficient numbers of local judges. In some cases, smallness also means that states struggle to cover the costs of maintaining a judiciary and so rely on donor countries or organisations to provide, and pay for, foreign judges.²⁷ Sometimes, it is argued that in a small community, foreign judges are, or are perceived to be, impartial because they are more distant from local politics and the community.²⁸ This view, however, has been strongly contested, on the grounds that local judges in the Pacific are in fact highly respected for their impartiality and integrity.²⁹ Other reasons for the use of foreign judges include cost savings where demand cannot support a permanent resident judge or full time court of appeal³⁰ and to provide expertise in specialist areas of law. While some states have taken steps towards greater localisation of their judiciaries, progress is slow and foreign judges are likely to continue to sit on Pacific courts for the foreseeable future.

3. Two understandings of reflectiveness

While there are different ways in which judiciaries might be said to be reflective, the predominant understanding is a judiciary whose *composition* reflects that of the community.³¹ A reflective judiciary requires ‘a membership of individuals with a wide variety of backgrounds, cultures, opinions, styles and perspectives and that the judiciary should not be restricted to or dominated by a single group’.³² In most cases, a reflective judiciary requires that diverse identity groups within the citizenry, in terms of gender, ethnicity, territorial origin, religion or linguistic affiliation, are included in the composition of the judiciary. In some contexts, a reflective judiciary might also indicate a balance of ideological views and political affiliations.

²⁷ Eg the Commonwealth Fund for Technical Cooperation administered by the Commonwealth Secretariat provides foreign judges to several Pacific states.

²⁸ Susan Boyd, ‘Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development’ (2003) 77 *Australian Law Journal* 303, 306.

²⁹ Peter MacFarlane, ‘Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States’ (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103, 106.

³⁰ Natalie Baird, ‘Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific’ (2013) 19 *Canterbury Law Review* 80, 82.

³¹ Other ways in which judiciaries demonstrate reflectiveness include community participation in judicial decision-making and public access to judicial reasons: Sophie Turenne, ‘Fair Reflection of Society in Judicial Systems’ in *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer, 2015) 1.

³² Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 24.

The idea of a reflective judiciary is not uncontroversial. One objection rests on the link between reflectiveness and representation. Because a judge is impartial, he or she cannot be said to represent any particular group within the community and as such it is inappropriate to understand judges as representing diverse identity or other groups within the community. For this reason, some scholars prefer the term ‘reflective’ rather than ‘representative’ when referring to the composition of the judiciary.³³ However, this shift in terminology does not resolve the complexity inherent in the concept of judicial reflectiveness. Indeed, literature on the concept of representation³⁴ can assist in drawing out the relevant ways in which the concept of reflectiveness may be understood and applied to the judiciary.

Scholars have distinguished two broad categories of representation that are relevant here. The first understands representation as an activity, in which the representative *acts for* someone or something else; while the second understands representation descriptively, in which the representative *stands for* or resembles someone or something else.³⁵ Applying the first understanding to a reflective judiciary, it might be said that the judiciary, in its activities (specifically adjudication and law making) represents or acts for specific values, such as law or justice, or, for reasons I explain below, for the community. On the second understanding, a judiciary is reflective in the sense that resembles or mirrors the community.

These two understandings of reflectiveness map onto two different kinds of argument as to why a reflective judiciary is desirable. The first, which I call ‘reflective judicial decision making’, argues that reflectiveness improves the way in which courts perform their adjudicative and lawmaking functions. This argument goes to the reflective nature of the judiciary’s *activities*: it is about what the judiciary does, rather than what it looks like. The second, which I call ‘judicial resemblance’ relates to how the judiciary is perceived by the community and argues that a reflective judiciary in this sense is more likely to hold the public’s confidence. This argument goes to the reflective nature of the judiciary’s appearance: it is primarily about what the judiciary looks like, rather than what it does, although, as discussed below, the distinction is not absolute. The remainder of this section explains each of these two kinds of reflectiveness in more detail by placing arguments for a reflective judiciary within this theoretical framework. The following Parts III and IV examine how the use of foreign judges in the Pacific impacts on the reflectiveness of the judiciary’s activities and appearance in turn.

³³ Ibid; Rachel J Cahill-O’Callaghan, ‘Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity’ (2015) 35(1) *Legal Studies* 1, 4.

³⁴ Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967); Philip Pettit, ‘Varieties of Public Representation’ in Ian Shapiro et al (ed), *Political Representation* (Cambridge University Press, 2009) 61.

³⁵ Pitkin, above n 34, ch 4, 6.

3.1. Reflective judicial activities

Representation can be understood as an activity, in which the representative *acts for* someone or something else. One understanding of representation involves a relationship where the representative acts or speaks for *someone* else.³⁶ For example, a member of the legislature might represent his or her constituency or political party by speaking for their views in the legislature. In an agent/principal relationship, the agent represents the principal by acting as the principal directs. Petit characterises this as ‘responsive representation’, because the agent or elected representative must track and respond to the wishes of those he or she represents.³⁷ The judiciary, on the other hand, is not understood as a representative in this sense of acting or speaking for another person or group, because to do so would compromise impartiality. Judicial reflectiveness therefore does not encompass this particular sense of responsive representation.

However, a representative might be understood as representing *something*, rather than *someone*, else. When representation is understood as an activity, a person might be said to represent what guides his or her actions.³⁸ A judge will not be guided by the wishes of a particular person or group, but will be guided by the values of law or by justice, for example. On this understanding, a judge might be said to represent law or justice.³⁹ If this is the case, it does not necessarily follow that the composition of the judiciary must therefore reflect the diversity of the community. Such claims depend on the understanding of the nature of judicial decision making. One view of judicial decision-making characterises it as a technical task in which a judge identifies fixed legal rules and applies them to the case before the court. On this view of judging, the personality, values or background of the individual judge do not matter, because the application of rules to facts should lead to the same outcomes regardless of the identity of the judge.⁴⁰ In contrast, some understandings of judicial decision making acknowledge the judge’s role in *determining and making* law. Particularly where the law or its application is not clear, or would appear to lead to an unjust outcome, or has wide social and political ramifications, judges must make decisions based on their own sense of the values embodied in law and their understanding of the judicial role.⁴¹ The common law tradition has long understood law as an expression of the shared values, practices and institutions of the

³⁶ Ibid 113.

³⁷ Pettit, above n 34, 65.

³⁸ Pitkin, above n 34, 117–118.

³⁹ Ibid; Susan Kiefel and Cheryl Saunders, ‘Concepts of Representation in Their Application to the Judiciary in Australia’ in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer International Publishing, 2015) 41, 42.

⁴⁰ Rackley, above n 32, 131.

⁴¹ Ibid 28, 131; Terence Etherton, ‘Liberty, the Archetype and Diversity: A Philosophy of Judging’ [2010] *Public Law* 727, 740.

community, capable of development and change in light of those values. Etherton suggests that this understanding of common law shares much with Dworkin's theory of judging according to the principle of integrity, which requires judges to interpret the law as a coherent scheme of justice within the particular community.⁴² If law is understood to be a 'reflection of the community's values', capable of 'evolving as the values, aspirations and political morality and institutions of the community evolve',⁴³ then judges might be said to, at least on occasion, *represent* the concerns, values and aspirations of the community. A judiciary composed of judges whose identities and backgrounds reflect the diversity within the community is valuable because it ensures that judges, collectively, will have greater and wider knowledge of the community they serve; and that in turn, judicial decisions will be responsive to community values. Between these two understandings lie many different views about the nature of judicial decision making. For the purposes of this article, it is not necessary to determine which is correct. The point is rather to show two things. First, that judging may be understood as an activity that entails representation, in the sense that it is guided by concepts or values such as law or justice. Secondly, it suggests that different understandings of the role of the judge will bear on the value that is placed on a reflective judiciary. In Part III, I suggest that the use of foreign judges in the Pacific demonstrates a particular understanding of the role of the judge, which affects the value accorded to judicial reflectiveness.

3.2. Judicial resemblance

The second relevant category of representation is the idea that the representative person or institution stands for or resembles that which it represents. Pitkin calls this 'descriptive representation'.⁴⁴ A common expression of this sense of representation is the idea that a democratically elected legislature represents the people or the nation and so ought to mirror the diversity of the people proportionately.⁴⁵ A second example is the jury, which is intended to stand for the community as a whole and so ought to reflect a cross section of the community.⁴⁶ These examples, however, do not easily transpose onto the judiciary. The judiciary, as an important public institution integral to the governing of the state, might be said to represent the state. Does it follow that the judiciary ought then to resemble the people of the state?⁴⁷

In the literature on reflective judiciaries, arguments about the appearance of the judiciary are generally framed in terms of public confidence: a judiciary that does not reflect society will not have the people's

⁴² Ronald Dworkin, *Law's Empire* (Fontana, 1986) esp ch 7.

⁴³ Etherton, above n 41, 733.

⁴⁴ Pitkin, above n 34, ch 4.

⁴⁵ *Ibid* 62.

⁴⁶ Pettit, above n 34, 67.

⁴⁷ Pitkin, above n 34, 116–17.

confidence.⁴⁸ However, because this concern focuses on public perceptions of the judiciary, it takes different forms in different contexts. In the United Kingdom, for example, it is claimed that public confidence is undermined when people see judges as distant, elite or ‘other’.⁴⁹ In countries where certain identity groups have historically been excluded from the judiciary and legal profession, the representation of persons from those groups on the courts signals equal rights and inclusion.⁵⁰ In post-colonial circumstances, the use of foreign judges, particularly when they are recruited from the former colonial power, reflects the continuing legacies of colonisation, and localisation might be an important statement of sovereignty and independence.⁵¹ In such circumstances, the resemblance of the judiciary to the community is valuable because it expresses strongly held public values such as egalitarianism, equality or sovereignty.

The context-specific nature of public confidence suggests two things. First, resemblance is not valued for the sake of appearance, but because the way the judiciary looks is expected to reflect the way in which the judiciary acts, for example by bringing the values of egalitarianism, equality or sovereignty to bear on its functions. Secondly, while a judiciary that resembles the community might increase public confidence in some circumstances, in other contexts it may not because, for example, other kinds of values that are not expressed through resemblance, such as expertise or impartiality, might be considered more important.

Parts III and IV of this article assess the use of foreign judges in the Pacific against each of these two kinds of reflectiveness. Judiciaries comprising foreign judges are not reflective of the communities they serve in either of the two senses of reflectiveness outlined here. While there are exceptions, foreign judges serving in the Pacific are generally of a different nationality and cultural background to the local communities. The examinations in Parts III and IV suggest some ways in which this unreflectiveness is understood, justified and compensated for in the Pacific region.

4. Foreign judges and reflective judicial decision-making

Foreign judges are generally not members of the community and are unable to claim personal experience of living within that community. As outsiders to the community, foreign judges face challenges in

⁴⁸ Rackley, above n 32, 23–4; Paige Hoster, ‘Understanding the Value of Judicial Diversity through the Native American Lens’ (2011) 36 *American Indian Law Review* 457, 459–61.

⁴⁹ Rackley, above n 32, 25; Etherton, above n 41, 744; Cahill-O’Callaghan, above n 33, 4.

⁵⁰ Eg in United States Edward M Chen, ‘The Judiciary, Diversity, and Justice For All’ (2003) 91(4) *California Law Review* 1109, 1117; in South Africa Francois Du Bois, ‘Judicial Selection in Post-Apartheid South Africa’ in Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 280, 283–4.

⁵¹ MacFarlane, above n 29, 105, 107.

understanding and reflecting community values in the adjudication of disputes and the development of the law, particularly when the value systems of the community differ in fundamental ways to the foreign judge's home community. Pacific cultures are often cast as obligation-based or 'other-orientated', in which the individual is understood, in complex ways, within the context of community.⁵² This can be contrasted to western understandings of communities as comprising autonomous, rights-bearing individuals.⁵³ These different community values may be brought to bear on many legal questions that come before Pacific courts. For example, how offensive is it to use certain swear words in a particular island community?⁵⁴ What constitutes 'active participation in activities of the indigenous community' for the purposes of registration as an elector?⁵⁵ To what extent do customary codes of behaviour qualify the exercise of freedom of speech?⁵⁶ In small jurisdictions where a limited number of cases come before the courts, foreign judges will not find much guidance in past decisions and so are left to determine these questions based on their own understanding of community values, an understanding informed by their own outside experience.

In the Pacific, the issue is particularly sharp when the judiciary is called upon to interpret and develop statutory or common law in light of customary law. Customary law is constitutionally recognised as a source of law or aid for interpretation in most Pacific states.⁵⁷ Customary laws and practices might be particularly relevant in criminal,⁵⁸ family,⁵⁹ and constitutional⁶⁰ cases. There are concerns that foreign judges might ignore or fail to properly understand customary law and that this has inhibited the integration of customary and western laws and legal systems.⁶¹ There are also concerns that judges have developed the common law without a detailed appreciation and understanding of local customs,

⁵² Iutisone Salevao, *Rule of Law, Legitimate Governance and Development in the Pacific* (ANU E Press, 2005) 122–5.

⁵³ Susan Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009) 102–3.

⁵⁴ *R v Kamimakica* [2012] TVHC 4.

⁵⁵ *Sopoaga v Attorney-General* [2007] TVHC 2.

⁵⁶ *Taione v Kingdom of Tonga* [2004] TOSC 47.

⁵⁷ Corrin Care and Paterson, above n 10, ch 3.

⁵⁸ Eg, to what extent should the customary practices of seeking forgiveness be taken in to account in criminal sentencing? In Samoa, see *Attorney General v Matalavea* [2007] WSCA 8; Papua New Guinea see Bernard Narokobi, 'How Independent Are the Courts in Papua New Guinea? The Somare/Rooney Affair' (1980) 9(2) *Pacific Perspective* 12, 18.

⁵⁹ Jean Zorn, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003) 95.

⁶⁰ Eg are restrictions that confine the franchise and eligibility for election to Samoan *matai* (chiefs) consistent with constitutional rights? *Attorney-General v Olomalu* [1982] WSCA 1.

⁶¹ Lalotoa Mulitalo, *The Consequences of Legal Pluralism for Law Reform in the South Pacific* (PhD Thesis, University of Queensland 2013) 114–18; Jennifer Corrin, 'Breaking the Mould: Constitutional Review in Solomon Islands' (2007) 13 *Revue Juridique Polynésienne* 143, 149; Zorn, above n 59, 97.

compromising the development of an indigenous jurisprudence.⁶² It is a particularly difficult task for a foreign judge to understand, and then represent or speak for, a community in which customary law informs both the institutions of government and the daily lives of the people.⁶³ The use of foreign judges thus limits a core value of a reflective judiciary, that of reflective judicial decision making.

There are several different ways in which Pacific judiciaries might seek to ameliorate or compensate for ‘unreflective’ judicial decision making that may arise as a consequence of the use of foreign judges. I discuss four here: a technical understanding of judging; deference to local decision-makers; alternative sources of knowledge; and the value of diversity. Some of these methods go to understandings of the judicial role, others to institutional and procedural aspects of the court’s functions. Not all apply across all Pacific states in equal measure and not all are as persuasive as others. I use them here as examples to show how judiciaries comprising foreign judges might justify and compensate for shortcomings in reflective judicial decision making.

4.1. The role of the judge

As discussed in Part II, the value of reflective decision making depends on a particular view of judging, which acknowledges that judges bring their own values to bear on judicial decision making. An alternative view of the nature of judging characterises it as a technical task, in which judges take the text of the law as they find it and apply it to the case at hand, and develop the law in a similarly technical way, drawing on legal expertise and skills in argument and analysis. On this view, the identity and background of the judge becomes less relevant than his or her technical expertise.

One illustration of this technical understanding of the role of foreign judges is the judgment in the Tongan case of *Attorney-General v Namoa*.⁶⁴ In that case, a member of the Tongan parliament and an academic publicly criticised a decision of the Tongan Supreme Court that held that provisions of Tonga’s land legislation unconstitutional. They noted that the judges of the courts were foreign and said that the decision should have been heard in the Land Court, where an assessor could have ‘clarified matters to the Chief Justice pertaining to how we live as Tongans, our culture and our connection to the land’. One discussant went further and noted that the judges had since left Tonga and suggested that the King should intervene because ‘this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country’. Chief Justice Ward of the Supreme Court ruled that

⁶² Falefatu M Sapolu, ‘Adjudicators in Western Samoa’ in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific, 1988) 60, 61–2; MacFarlane, above n 29, 108.

⁶³ David Baragwanath, ‘Judging: A Butterfly View’ (2010) 16 *Canterbury Law Review* 243, 246.

⁶⁴ *Attorney-General v Namoa* [2000] TOSC 13.

this second comment amounted to a contempt of court, because there was a real risk that it would diminish the authority of the court. In doing so, the Chief Justice emphasised a particular view of the role of the judge, stating that:

The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.⁶⁵

This statement is an example of the understanding of the foreign judge as a technical legal expert, whose role is to interpret the legal text alone. While this view is rarely regarded as an accurate description of judicial decision making,⁶⁶ this understanding of the judicial role resonates with claims commonly made about foreign judges in the Pacific. The idea that judges decide cases on law alone is consistent with the emphasis placed on foreign judges' impartiality and distance from the community. It is also reflected in the qualifications for judicial office, which emphasise shared legal heritage rather than shared social experience.

4.2. The role of the judiciary

An alternative way in which foreign judges might reconcile non-reflectiveness with the value of reflective judicial decision-making is to defer to local bodies, such as the legislature, which have the constitutional role of making laws and the representative credentials to do so in a way that takes account of the community's values and concerns. Baird's study of the reasoning of foreign judges in contentious cases suggests that where judges acknowledge that local culture is relevant to the legal decision, they might then defer to local decision-makers.⁶⁷ She gives as an example the approach of the foreign judges on the Samoan Court of Appeal in the *Samoa Party* Case, in which the Court upheld the validity of legislation which restricted who was eligible to bring a petition to challenge an election result. In Samoa, only *matai* (chiefs) may stand for election. The challenged legislation permitted only *matai* who had received a significant number of votes to challenge an election result. The foreign judges on the court expressly stated that the court's role is not to 'impose its own ideas', but rather to determine whether the Constitution has been infringed.⁶⁸ In contrast, Parliament had 'double legitimacy' as representative of the people and as composed of *matai* versed in both Christian principles and Samoan tradition.⁶⁹

⁶⁵ Ibid.

⁶⁶ M H McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 38–9.

⁶⁷ Baird, above n 30, 86–88.

⁶⁸ *Samoa Party v Attorney-General* [2010] WSCA 4, [45].

⁶⁹ Ibid [10]; Baird, above n 30, 89–90. See also AH Angelo, "'Steady as She Goes": The Constitution and Court of Appeal of Samoa' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 145.

While the Samoan Court demonstrated deference to parliament in this case, other courts in the region have taken a different approach. Baird discusses the Tuvaluan case of *Teonea v Pule of Kaupule of Nanumaga*, which concerned a decision by the local *falekaupule* (council) to prohibit a new church in its village.⁷⁰ The case required the foreign judges on the Court of Appeal of Tuvalu to balance the constitutional right to freedom of religion and the constitutional protections of Tuvaluan values and culture. Tompkins JA in dissent stated that ‘it would not be appropriate for an appellate court with no prior knowledge of Tuvalu or its culture’ to overrule factual findings by bodies more familiar with Tuvaluan culture.⁷¹ The two judges in the majority, however, held that the Court’s duty was to determine whether the *falekaupule’s* decision was inconsistent with the Constitution and found that in this case it was. The judgments in the case show how difficult it is for a court to find the line between appropriate deference to local bodies and fulfilling its constitutional function of determining whether a law infringes the Constitution.

4.3. Alternative sources of knowledge

One way in which a court comprising foreign judges might ensure that judicial decisions are reflective of the community is to rely on knowledge about the community from sources other than the judge’s own experience. Procedures for gathering information about the community and its values may be built into the judicial process. A court will hear submissions and argument from the parties and may permit others with an interest in the case to present relevant non-legal material.⁷² The use of lay assessors is another means by which Pacific courts might inform themselves of community views.⁷³ Judges may also inform themselves through research and training, at their own initiative or through formal means such as the use of law clerks and judicial training institutions.⁷⁴ These alternative sources of information can, however, only take a foreign judge so far. Ultimately, the judge must weigh the arguments and evidence before the court for him or herself. The nature of foreign judging in the Pacific – where many judges sit on a part time, non-residential basis – and the scarcity of legal resources, limit opportunities for judges to request further information from the parties or conduct their own research.

Another source of knowledge about community values is local judges. Judiciaries comprising foreign judges might seek to ensure that when panels of judges sit, as occurs in appeal matters, the panel include both local and foreign judges. In this, practice across the Pacific varies. In Vanuatu, for example, foreign

⁷⁰ *Teonea v Pule of Kaupule of Nanumaga* [2005] TV HC 2; [2009] TVCA 2; Baird, above n 30, 91–3.

⁷¹ *Teonea v Pule of Kaupule of Nanumaga* [2009] TVCA 2, [34].

⁷² David Pannick, *Judges* (Oxford University Press, 1987) 73.

⁷³ Eric Colvin, ‘Criminal Procedure in the South Pacific’ (2004) 8(1) *Journal of South Pacific Law* 18–19.

⁷⁴ Turenne, above n 31, 10.

and local judges regularly sit together on appeal court panels. It is a recent practice in Samoa to include a local judge in Court of Appeal sittings. However, in states where there are few or no local judges, it may not be possible to compose panels that include a local judge. For these reasons, while it is theoretically possible for foreign judges to gain relevant knowledge of the community through other sources, the practical realities of foreign judging in the Pacific limit their ability to do so.

4.4. Diversity

While the use of foreign judges limits the extent to which judicial decisions are reflective of the local community, the practice might nonetheless fulfil one of the advantages of a reflective judiciary, that of diversity. Justice Hale explains the value of diversity in the following way:

in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view.⁷⁵

In the context of judiciaries comprising only local judges, the argument for diversity is sometimes put in terms of reflectiveness on the basis that judges with diverse backgrounds and life experiences will bring diverse perspectives to the task of judging.⁷⁶ The use of foreign judges, however, suggests that the value of diversity cannot be conflated with reflectiveness, because a court comprising foreign judges can provide diversity without being reflective.

The nature of the diversity provided by foreign judges, however, is of a distinctive kind. Recruiting foreign judges has the potential to increase the diversity of judges' backgrounds and experiences. For example, in some Pacific states there have been efforts to increase the number of women judges by recruiting both foreign and local women judges.⁷⁷ However, it is not surprising that the cohort of foreign judges working in the Pacific tends to reflect the gender, class and racial demographics of the judiciaries and legal professions of their home country. So, for example, the vast majority of foreign judges serving in the

⁷⁵ House of Lords Select Committee on the Constitution, 'Judicial Appointments' (HL Paper 272 25th Report of Session 2010-2012) 31.

⁷⁶ Although scholars are careful to note that judicial diversity of this kind need not be overtly tied to identity characteristics or demographic reflectiveness, rejecting both the implication that judges 'represent' a particular identity group and the essentialist implication that all persons of a particular identity group share the same experience and speak with one voice: Etherton, above n 41, 745; Cahill-O'Callaghan, above n 33, 10.

⁷⁷ Eg since 2013 two local and two foreign women have been appointed to the Supreme Court of Samoa.

region are male,⁷⁸ reflecting the gender imbalance in the judiciary and legal professions of Australia, New Zealand and Sri Lanka.⁷⁹

While foreign judges might potentially provide greater diversity in terms of identity characteristics such as gender, the most obvious criterion of diversity is nationality. Some international practice suggests that the representation of nationalities or subnational groups on particular courts is important. For example, there is a convention that, of the twelve members of the United Kingdom Supreme Court, two judges are Scottish and one is from Northern Ireland.⁸⁰ Canadian legislation requires that at least three of the nine judges of the Supreme Court of Canada are appointed from among the judges or advocates of the Province of Quebec.⁸¹ In both cases, this is to ensure that the Court has specific expertise in the distinctive legal systems of these sub-national jurisdictions. The presence of such judges might also be said to enhance the representativeness of the highest Court and symbolise the inclusion of different groups within the state. These cases, however, stand in contrast to the circumstances in the Pacific, where judges of different nationalities are experts in a *foreign* legal system and not a law within the court's jurisdiction. A closer analogy might be found with the use of foreign judges on Hong Kong's Court of Final Appeal, where one foreign judge generally sits on a panel with four local judges.⁸² In the circumstances of the transfer of sovereignty over Hong Kong from the United Kingdom to China in 1997, the use of foreign judges from common law jurisdictions was regarded as a way to maintain Hong Kong's common law legal system.⁸³ Foreign judges working in the Pacific might be understood to similarly provide common law expertise. All foreign judges who served in the Pacific during the case study period were from common law countries. In addition to a shared common law heritage, many statutory laws in Pacific jurisdictions are inherited or derived from Australian, New Zealand or United Kingdom statutes⁸⁴ and so

⁷⁸ Thirteen of the 187 foreign judges who served in the nine Pacific states from 2000-2015 were women.

⁷⁹ While the number of men and women entering the legal profession is roughly equal in Australia, New Zealand and Sri Lanka, women are underrepresented at senior levels and on the judiciary: Susan Glazebrook, 'Looking through the Glass: Gender Inequality at the Senior Levels of New Zealand's Legal Profession' (Paper presented at the Chapman Tripp Women in Law event, 16 September 2010); Urbis, *National Attrition and Re-engagement Study* (Law Council of Australia, 2013); Ruwani Dantanarayana, 'Discrimination at the Sri Lankan Legal Workplace' (paper presented at the 28th LAWASIA Conference, Sydney 6-9 November 2015).

⁸⁰ James Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform' in Emmanuel Guinchard and Marie-Pierre Granger (eds), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer, 2018) 77, [4.03A].

⁸¹ *Supreme Court Act 1985* (Canada) s 6.

⁸² Simon NM Young and Antonio Da Roza, 'The Judges' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 253, 259.

⁸³ *Ibid* 263.

⁸⁴ Jennifer Corrin Care, 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) 6 *Journal of South Pacific Law*.

share similarities with foreign judges' home jurisdictions. These legal ties mean that foreign judges can bring relevant expertise to bear on the interpretation and development of Pacific law.

However, while there are similarities in the common law and statutory laws of Pacific states and those of judicial donor states of Australia, New Zealand, Sri Lanka and the United Kingdom, the same cannot be said for other areas of law and constitutional law in particular. All nine Pacific states have written constitutions that include a bill of rights. Courts have powers of constitutional review and may declare legislation and executive actions invalid on the ground that they are inconsistent with the Constitution. In contrast, New Zealand and the United Kingdom do not have a single written constitution, and the courts there have weak powers of judicial review.⁸⁵ Australia has a written constitution and strong judicial review, but no bill of rights. In such cases, the diverse national experience and legal expertise within panels of judges can become important, as judges with experience in different jurisdictions draw on the legal knowledge of judges of other nationalities represented on the Pacific court.⁸⁶

Foreign judges might also contribute a transnational legal perspective, by providing comparative insights on shared legal concepts, provisions and issues.⁸⁷ Transnational values may be particularly relevant in common law countries, which share a common legal foundation and style of judicial reasoning based on incremental development and drawing analogies, including citing laws from other jurisdictions for this purpose.⁸⁸ A transnational perspective might also be valued where the domestic court interprets and applies laws which have a foundation in international law, such as human rights, or where the court draws upon shared global values such as constitutionalism or democracy.⁸⁹ National diversity can also signal a regional or international view of a matter and so encourage compliance. There are examples of politically sensitive cases where special effort has been made to appoint a diverse panel of judges in order to bolster the credibility of the decision.⁹⁰

⁸⁵ Maurice Casey, 'New Zealand Judges in Overseas Courts' in Ian Barker and Graham Wear (eds), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis NZ, 2003) 89, 91.

⁸⁶ Robert French, 'Cooperation and Convergence: Judiciaries and the Profession' (Paper presented at Commonwealth Lawyers Association Regional Conference, Sydney, 21 April 2012).

⁸⁷ Rosalind Dixon and Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48(1) *Wake Forest Law Review* 149, 166.

⁸⁸ Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 37, 62–4.

⁸⁹ Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010) ch 3.

⁹⁰ Eg *Republic of Fiji Islands v Prasad* [2001] FJCA 2, concerning the legality of the purported abrogation of the constitution during the 2000 coup, was heard by a panel of five judges from Australia, New Zealand, Papua New Guinea and the United Kingdom; *In re the Constitution, Reference by HE the President* [2002] FJSC 1, concerning the allocation of seats in the Fiji Senate, was heard by a panel of five judges from Fiji, New Zealand, Papua New Guinea and Samoa.

The value of diversity is limited where courts routinely recruit foreign judges from the same donor country and where panels of judges sitting on appeal cases are from the same donor country.⁹¹ In this, experience across the Pacific differs. The Vanuatu Court of Appeal in 2015 was highly diverse, comprising local judges as well as judges from Australia, Fiji, the Gambia, New Zealand and the United Kingdom. In contrast, the Courts of Appeal of Samoa and Tuvalu were predominantly constituted by judges from New Zealand during the case study period.

While Pacific courts comprising foreign judges may not reflect diverse identity groups within the community, they do reflect diversity of a different kind. This diversity arises not as a result of different experiences of living under one shared legal system, but rather from the experience of living and working with different legal systems. Because it is framed around *legal* knowledge and experience, this kind of diversity cannot fully compensate for the shortcomings in reflective judicial decision-making in the sense of reflecting the community's values and needs. It is, however, consistent with the focus on the expert technical, institutional and procedural aspects of judicial decision-making.

4.5. Concluding comments

Generalisation about judicial decision making across the Pacific, and even across single courts over time, is difficult. Individual judges bring different philosophies and understandings of the judicial role to the task of judging in general and to the specific task of judging in a foreign jurisdiction. However, the use of foreign judges clearly limits the extent to which Pacific judiciaries reflect the communities they serve. Foreign judges generally will not have the depth of knowledge of the national law, and community in which it operates, that local judges have. There is then a risk that the law will be developed, interpreted and applied in a way that does not fully appreciate the distinctive, deeply ingrained community values and custom in Pacific states.

The analysis in this section suggests that the significance of reflectiveness depends to some extent on the understanding of the nature of judicial decision-making. Some of these understandings camouflage, but do not address, the concern. The technical view of judicial decision-making, in which the judge's own values are thought never to intrude on the task of judicial decision-making, is no longer regarded as an accurate description of the judge's task, if it ever was.⁹² The practice of deference to local decision makers itself expresses a particular view of the role of the judge and the judiciary that not be consistent with the community's expectations of the constitutional role of the judge.⁹³ While it might be possible for foreign

⁹¹ On diversity within panels of judges see Rackley, above n 32, 171; Etherton, above n 41, 744–46.

⁹² M H McHugh, above n 66, 38–9.

⁹³ Baird, above n 30, 94–5.

judges to gain knowledge of the community's values and needs through alternative sources, such as the judicial process or by sitting with local judges, the practicalities of foreign judging make this difficult. The diversity offered by the use of foreign judges might potentially ameliorate some concerns about the court's capacity for reflective judicial decision making, but only where local judges regularly sit with foreign judges, as is the case in Papua New Guinea and Vanuatu. Diversity in the nationalities of foreign judges on the bench can be valuable, in that different but relevant legal expertise and perspectives can be brought to bear on the development of Pacific law. This diversity, however, does not support reflective judicial decision making, in the sense of reflecting community values. Instead, it gestures towards a reflectiveness of a different kind, in which judicial decision making might be said to reflect international or transnational legal values. Whether the comparative transnational perspectives offered by foreign judges are regarded as a positive depends to a large degree on views about the extent to which legal systems should, and do in fact, differ or converge.⁹⁴ This in turn echoes wider debates about the possibility and effectiveness of legal transplants to and from different legal contexts.⁹⁵ The use of foreign judges might suggest a preference for global values, or the transnational values of the common law legal family, rather than local values. In this, however, it does not seem to suit the Pacific, where local customary laws and values continue to have a strong influence. In Part IV below, I offer a tentative explanation of one way in which this tension might be understood in the context of claims about judicial resemblance and public confidence.

5. Foreign judges and judicial resemblance

Part III considered how the presence of foreign judges affected the activities of Pacific judiciaries, and in particular the extent to which judicial decision-making reflects or represents the community. This Part considers the second sense of reflectiveness, that is, whether the judiciary resembles or mirrors the community it serves. Clearly, a court comprising foreign judges does not resemble the community in this sense.

As discussed in Part II, scholars have argued that a judiciary that resembles the community it serves is more likely to hold the public's confidence, because it is seen as closer to the people, inclusive and non-discriminatory. While the use of foreign judges might be thought to undermine public confidence in the judiciary, this has not been the case in the Pacific. This Part suggests some reasons why the use of foreign judges is instead a generally accepted practice in most Pacific judiciaries.

⁹⁴ Jackson, above n 89.

⁹⁵ Vlad Perju, 'Constitutional Transplants, Borrowing and Migrations' in Michel Rosenfeld and Sajo, Andras (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304, 1309–11.

5.1. Public confidence in the judiciary

Public confidence in the judiciary largely depends on how the judiciary is perceived by the community. As such, a range of factors may contribute to, or undermine, public confidence in different circumstances. A lack of judicial resemblance might be seen to undermine public confidence in the judiciary where it serves to distance the courts from the people, or maps onto historic patterns of discrimination against, for example, women or racial minorities. In post-colonial circumstances, the use of foreign judges, particularly when they are recruited from the former colonial power, might be regarded as undermining state sovereignty.⁹⁶ Some of these arguments potentially apply to the use of foreign judges in the Pacific. Most foreign judges serving in the region are recruited from Australia, New Zealand, and the UK, while the majority of foreign judges serving in Fiji are Sri Lankan. Many are not residents, but rather visit occasionally for court sittings. Judges from these countries generally have a different cultural background and ethnic identity to the Pacific communities they serve. Australia, New Zealand and the United Kingdom were all former colonial powers in the region, and judges from these countries also carry with them the histories and legacies of colonisation.

The post-colonial circumstances of the Pacific might be compared to that of Africa. In contrast to the Pacific, several African states undertook to ‘Africanise’ their judiciaries after independence by recruiting judges from other African countries and the Caribbean until local legal professions developed to the point that qualified citizens were available to serve as judges.⁹⁷ Although there is a large Pacific diaspora, especially in New Zealand, only one foreign judge recruited from outside the region has a Pacific Islander background.⁹⁸ There are, however, increasing instances of intra-regional judicial exchanges, in which a judge from a Pacific country sits as a foreign judge in another Pacific country.⁹⁹ Some states have placed greater emphasis on recruiting from within the region, most notably in Nauru and Kiribati, where Fijian, Samoan and Solomon Islander judges have served. Intra-regional recruiting is limited, however, and the majority of foreign judges in the region remain ethnically and culturally distinct from the community.

While there is no comprehensive study, the courts in most of the nine Pacific states are generally respected by the public and hold a high degree of public confidence.¹⁰⁰ Two exceptions are Nauru and

⁹⁶ MacFarlane, above n 29, 105, 107.

⁹⁷ Rachel L Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge, 2013) 53, 56.

⁹⁸ Justice Ida Malosi of the District Court of New Zealand served as a Judge of the Supreme Court of Samoa in 2013-14.

⁹⁹ Ten of the 187 foreign judges who served in the nine Pacific states in 2000-2015 were from other Pacific Island states.

¹⁰⁰ Sean Dorney, *The Embarrassed Colonialist* (Penguin Group Australia, 2016) 40; Miranda Forsyth, ‘Understanding Judicial Independence in Vanuatu’ (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia,

Fiji, where serious concerns have been raised about interference by the executive or military government with judicial independence. In these cases, however, the concern is not so much that the judges are foreign, but rather that foreign judges are particularly susceptible to influence by a powerful executive that determines their appointment and tenure.¹⁰¹ As is the case elsewhere, the decisions of Pacific courts are occasionally subject to criticism. Sometimes the criticism focuses on the fact that the judges sitting were foreign, claiming, for example, that the judges did not fully understand the context¹⁰² or had a conflict of interests.¹⁰³ Such cases appear rare, and are counterbalanced by many instances of compliance with court decisions even in contentious political cases. Indeed, it is sometimes claimed that the community prefers foreign judges, on the basis that they are distant from the local community and therefore impartial.¹⁰⁴ This brief overview suggests that reflectiveness, in the sense of resemblance, is not critical to public confidence in the judiciary. Judicial independence and impartiality, the quality of judges' decision making, and the fairness of court procedures are also relevant. While the use of foreign judges *risks* compromising public confidence in the courts, it is not possible on the available evidence to say that, in the Pacific, it has actually done so.

5.2. Legal pluralism

This is not to say that the use of foreign judges does not affect the public perception of courts in the Pacific. It may be that the continued use of foreign judges on Pacific courts serves to symbolise the distance between the plural legal systems of Pacific states, signalling the distinction between these courts and the law they dispense, and co-existing customary legal systems.

Legal pluralism in Pacific states entails the coexistence of transplanted western legal systems and indigenous customary legal systems. The interaction between these legal systems differs across states, areas of law, and institutions, giving rise to a great deal of complexity. Sometimes the systems mix, in that

2015); Transparency International Australia, 'National Integrity Systems: Transparency International Country Study Report, Solomon Islands' (2004) 19–20; Thuy Mellor and Jak Jabes, *Governance in the Pacific: Focus for Action, 2005-2009* (Asian Development Bank, 2004) 37.

¹⁰¹ Geoffrey Eames, 'The Rule of Law in Nauru: An Evolving Concept?' (Paper presented at Law Society of South Australia Criminal Law Conference, McLaren Vale, 24 October 2014); Graham Leung, 'Some Challenges to the Rule of Law in Fiji' (Paper presented at 36th Australian Legal Convention, Perth, 18 September 2009).

¹⁰² Eg for criticisms about the use of foreign judges 'unfamiliar with Samoan ways' to decide cases concerning *matai* voting and universal suffrage: Casey, above n 85, 100. See also *Attorney-General v Namoa* [2000] TOSC 13 discussed above.

¹⁰³ Eg Evan Wasuka, 'Solomons MP Doesn't want case heard by Australian judge', *ABC Radio Australia*, 4 January 2012 <<http://www.radioaustralia.net.au/international/2011-02-10/solomons-mp-doesnt-want-case-heard-by-australian-judge/225564>>.

¹⁰⁴ Boyd, above n 28; Mellor and Jabes, above n 100.

statutory or common laws might recognise or incorporate customary law; or customary law might operate within a statutory framework.¹⁰⁵ Sometimes, the interaction is at the point of legal or constitutional values, in that the values of customary law are used to inform the interpretation of statutory or constitutional law and institutions.¹⁰⁶ Other times, the legal systems are regarded as separate and exclusive spheres of jurisdiction, as a result of either law or practice.

One hypothesis deserving further investigation is that transplanted western law sits lightly over the customary legal systems of the wider Pacific region. It may be that although laws, structures and institutions have been successfully transplanted, the theories and presumptions that animate these forms of government in their originating context do not necessarily accompany them, leaving a gap that is filled by local understandings and meanings. Writing in the context of Fiji, Kaplan argues that coup leaders and chiefs have understood their actions as justified by values of Fijian society that are more fundamental than constitutions and courts.¹⁰⁷ Nanau suggests that Solomon Islanders see government mechanisms and structures as alien and turn instead to cultural structures and allegiances.¹⁰⁸ Tamanaha argues that ‘Micronesians exhibit a discernible pride in the fact that they have constitutions and law’ but ‘little, if any of this pride about their constitutions and law is based on a considered evaluation of the claims that the ideology of law makes about consensual social order, or the match between these claims and reality... They feel pride because they know it is good and right to have law and constitutions.’¹⁰⁹ The idea that transplanted constitutions and law have a signalling, rather than substantive, function finds some support in the history of constitution making in the Pacific, where, prior to colonisation, indigenous leaders adopted western constitutional systems in an effort to demonstrate sovereignty and self-government and so ward off colonisation.¹¹⁰

These studies suggest that transplanted laws, institutions and values on the one hand, and customary laws, institutions and values on the other, are understood and owned by the people in a different way. If

¹⁰⁵ Corrin, ‘Moving beyond the Hierarchical Approach to Legal Pluralism in the South Pacific’, above n 17.

¹⁰⁶ Eg Tuvalu: Stephen Levine, ‘Constitutional Change in Tuvalu’ (1992) 27(3) *Australian Journal of Political Science* 492.

¹⁰⁷ Martha Kaplan, ‘Promised Lands: From Colonial Lawgiving to Postcolonial Takeovers in Fiji’ in Sally Engle Merry and Donald Lawrence Brenneis (eds), *Law and Empire in the Pacific: Fiji and Hawaii* (School of American Research Press, 2004) 153, 182. See also Aroney and Corrin, above n 7.

¹⁰⁸ Gordon Leua Nanau, ‘Solomon Islands’ in Stephen I Levine (ed), *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, Second edition, 2016) 291, 297.

¹⁰⁹ Brian Z Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (EJ Brill, 1993) 198.

¹¹⁰ Sione Lātūkefu, ‘Constitution-Making in the Pacific Islands in the Nineteenth Century’ in Peter G Sack (ed), *Pacific Constitutions: Proceedings of the Canberra Law Workshop VI* (Research School of Social Sciences, Australian National University, 1982) 21.

this is the case, it might provide a partial explanation as to why the use of foreign judges on domestic courts is accepted practice in the Pacific region. The use of imported technical experts to administer the imported laws seems appropriate or even necessary,¹¹¹ whereas interference by foreign judges in customary law matters would not be tolerated. Because the two legal systems are not completely separate, problems are most likely to arise when formal courts are required to determine matters that affect custom. This is reflected in the concerns, noted in Part III above, that foreign judges might not fully understand customary law, or fail to give it due weight, in judicial decision making.

One possible implication of legal pluralism, then, is that the value of judicial resemblance in pursuit of public confidence differs according to the different understandings of the underlying purpose and values that animate the co-existing legal systems. It may be that reflectiveness matters more where adjudicators decide matters according to customary law and values; and less where the judiciary applies laws that seem to be at a greater remove from the daily lives of the people. This is not to suggest that laws and institutions in the latter category are irrelevant, but rather that they serve different purposes and interests that are supported by the technical expertise and impartiality that foreign judges are understood to provide.

6. Conclusion

Scholarship on the nature and value of a reflective judiciary has largely developed in jurisdictions where the judiciary is comprised of judges who are members of the community. The debate has concerned which groups within this community are represented in the composition of the judiciary and consequently reflected in judicial decisions. While local judges might have diverse backgrounds and experiences, all have in common membership of the community. The use of foreign judges removes this point of commonality and so provides a specific kind of example of a non-reflective judiciary.

The use of foreign judges means that the judiciaries of the Pacific are not reflective of the communities they serve, although variations in the extent and nature of the use of foreign judges vis-à-vis local judges throughout the region makes this more prominent in some states than others. This article has drawn out two relevant senses in which such judiciaries are not reflective. First, it is particularly difficult for Pacific judiciaries comprising foreign judges to reflect or ‘speak for’ distinctive Pacific community values and customary norms in judicial decision-making. Second, courts comprising foreign judges do not resemble the communities they serve, such that the courts appear distant and removed to the lives of people in Pacific communities. Part III of this article explored a number of ways in which the unreflectiveness of Pacific judiciaries may be justified by alternative theoretical understandings of judicial decision-making

¹¹¹ Sally Engle Merry, *Colonizing Hawaii'i: The Cultural Power of Law* (Princeton University Press, 2000) 89.

or ameliorated by practical steps to increase the court's knowledge of the community. However, none of these fully address the concern that the use of foreign judges limits the capacity of Pacific courts to develop and apply the law in a way that is reflective of Pacific communities and their values. It is, however, important to emphasise that reflectiveness is not the only criteria by which a judiciary is assessed. While this article has shown that the use of foreign judges limits judicial reflectiveness, further work is required to assess the use of foreign judges against other benchmarks, such as judicial independence and impartiality, accountability, and legitimacy.

The institutional organisation of the judiciary conveys a particular view of the judicial function and the role of the court in the constitutional system and community.¹¹² What then does the use of foreign judges express about the nature of the judicial function and the role of courts in Pacific contexts? In this article, I suggest that it conveys a particular view of first, the nature of judicial decision-making; and secondly, the role of the formal or transplanted western legal system. As to the first, the widespread and accepted use of foreign judges in the Pacific reflects an understanding of the judge as a technician, expert in common law adjudication and decision-making, who decides cases impartially according only to the law. As such, foreign judges are valued for their expertise and impartiality, and are not required or encouraged to account for wider community values. As to the second, the accepted use of foreign judges in the Pacific reflects an understanding of the transplanted common law and constitutional legal system as separate and distinct from customary laws and institutions, with a particular, and perhaps confined, function and role within the context of legal pluralism. Both findings show that the value placed on a reflective judiciary and manifestations of judicial reflectiveness are likely to differ across constitutional systems depending on specific contextual factors including, but not limited to, different theoretical understandings of the role of the judge generally and in the particular circumstances of legal pluralism.

¹¹² Turenne, above n 31, 6.

Unequal Opportunities: Education Pathways to the U.S. Judiciary^{*}

by **Alfred C. Aman, Jr.**

Table of contents: **1.** Introduction. **2.** Diversity and education. **2.1.** Higher Education and Judicial Diversity: Pathways and Bottlenecks. **2.2.** High school to college: Dropouts and Wealth Disparities. **2.3.** Other Diversity Factors and Bottlenecks—Gender. **2.4.** Diversity on State Courts. **3.** The human face of law. **3.1.** Elbert Parr Tuttle. **3.2.** Constance Baker Motley. **3.3.** Sonia Sotomayor

1. Introduction

This paper is about diversity in federal and state courts in the United States. My main argument is that we should promote a judiciary that is reflective of the society of which it is a part for three reasons: first, because in doing so, we gain critical awareness of barriers to judicial service; second, because in doing so, we are also promoting access to resources, education and opportunities in the legal profession; and third, because it is possible (although not automatic) that a reflective judiciary will broaden the range of experience and perspective on the matters involved in the cases themselves. I will focus primarily on the first and second of these points, with some attention to individual judges in the paper's closing section. In the U. S., members of the bar become judges usually after a distinguished career in practice or the academy. There are no civil service exams to enter the judiciary. Under the U.S. Constitution, federal (i.e., Article III) judges reach the federal bench via presidential nomination and senatorial confirmation. States systems are separate. State judges attain their positions in various ways. The formal routes include election (partisan or nonpartisan), gubernatorial appointment, legislative appointment, or nomination by commission, otherwise known as the merit system. The customary understanding of merit selection includes a nonpartisan or bipartisan commission that nominates a limited number of individuals to the executive when a judicial vacancy occurs, for executive appointment, with continuing tenure on the bench dependent upon a subsequent retention election. In such elections, the judge is unopposed on the ballot;

^{*} I wish to thank Professors Carol Greenhouse and Dan Conkle for their very helpful comments and suggestions on various drafts of this article. I also wish to thank Kimberly Mattioli, Assistant Librarian, and Evan Stahr, IU 2017, for their superb research assistance throughout this project.

voters decide whether or not to retain the judge. Some state judges are elected directly by the public, like any other candidate for public office in a partisan election.¹

Diversity of the bench is directly related to how judges are appointed and, especially, the candidate pools from which they are appointed. Therefore, the consequences of a broadly conceived sense of diversity will not only foster judicial legitimacy, but also the most fundamental values inherent in our society—democracy, fairness and, as I will especially argue below, access to education at all levels (primary, secondary, college and law school).

For the judiciary to be truly reflective of society, candidate pools must also be reflective. For this to occur with regularity, access to education is necessary at all levels of society. Education is the primary pathway to the bar and ultimately, the judiciary. A reflective judiciary is, therefore, like the canary in the mine—an indicator of access to education and to professional opportunity within the legal profession. When barriers exist to education, barriers exist to the judiciary as well. I could not, therefore, disagree more with Chief Justice Roberts than when he sought to bar the use of race to determine which public schools certain children may attend. He stated: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."² I disagree, because the evidence shows that various creative policy initiatives are necessary if we are to attain a non-discriminatory society through educational opportunity. In part one of this paper, I will discuss various pathways to the federal and state judiciaries—gateways and impasses (“bottlenecks”). I will emphasize access to education and the role education plays as a gateway. As we shall see, progress has been made in the United States in the decades since the Civil Rights Act of 1964, but barriers persist. This is evident in the patterns of minority and female participation on the federal and state appellate bench: appointment favors men over women, and whites over minorities. We will look within those patterns to identify further gateways and bottlenecks. In part II, we then look to the human side of the law—namely judges—and discuss, briefly, illustrious judicial careers whose existence is owed to diversity in the federal judiciary.

2. Diversity and education

Diversity matters at all judicial levels because, as published data will show, the judiciary is a bellwether for a democratic society - a yardstick to tell us how we're doing in terms of maintaining a democratic culture at all levels. A value on diversity throughout the judiciary but especially at the top exerts positive

¹ See Mark S. Hurwitz and Drew Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 50 (2008). See also *Republican Party v. White*, 536 U.S. 765 (2002) (holding that preventing judicial candidates in partisan elections from commenting on political issues violates the First Amendment).

² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).



pressure all the way down. Moreover systematic exclusion isn't healthy for society in general or the legitimacy of the judiciary in particular.

The importance of diversity to education was forcefully recognized by Justice Sandra Day O'Connor, writing for the majority in *Grutter v. Bollinger* in 2003³, upholding the use of race as a factor in decisions admitting students into law school:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society.⁴

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our nation's leaders. Individuals with law degrees occupy roughly half the state governorships,⁵ more than half the seats in the United States Senate,⁶ and more than a third of the seats in the United States House of Representatives.⁷ In 2003, the Supreme Court said: "[t]he pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges."⁸ In fact, all eight Justices currently sitting on the Supreme Court as of this writing attended either Harvard or Yale.⁹

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.¹⁰

2.1. Higher Education and Judicial Diversity: Pathways and Bottlenecks

Race, ethnicity, gender and income structure and often block access to education, and thus to law school, law practice and the judiciary. An examination of the demographics of education and law practice, tell a

³ 539 U. S. 306 (2003).

⁴ *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

⁵ *Fast Facts about American Governors*, RUTGERS UNIV. CTR. ON THE AM. GOVERNOR, <http://governors.rutgers.edu/on-governors/us-governors/fast-facts-about-american-governors/>.

⁶ JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP OF THE 114TH CONGRESS: A PROFILE 5 (2016).

⁷ *Id.* at 5.

⁸ *Grutter*, 539 U.S. at 332.

⁹ Note that Justice Ginsburg attended Harvard Law School but graduated from the Columbia Law School, another highly selective institution. Biographies of Current Justices of the Supreme Court, U.S. SUPREME COURT, <https://www.supremecourt.gov/about/biographies.aspx>. The recently deceased Justice Antonin Scalia also attended Harvard Law School. Adam Liptak, *Antonin Scalia, Justice of the Supreme Court, Dies at 79*, N.Y. TIMES, Feb. 13, 2016, <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

¹⁰ *Grutter*, 539 U.S. at 332.

story of career mobility into the judiciary with education as the driver. The effects of education are stronger at each level up the judiciary and are strongest, perhaps, at the federal level.

High school education varies widely by race and ethnicity – children of poor families of any race, and non-whites drop out at higher rates than children of wealthier or white families.¹¹ Urban and minority-heavy public primary school systems like Chicago Public Schools are often drastically underfunded compared to their suburban counterparts.¹² The effects of poor high school education are compounded throughout a person's life. Someone who drops out of high school is likely to earn less and less likely to be employed than someone who graduates high school.¹³ A high school diploma is all but a necessity for admittance to an undergraduate institution, much less a law school.

The lack of people of color in law schools is especially noteworthy since undergraduate admissions of people of color at some top schools are higher (e.g., 12.1 percent at Harvard, 16.8 percent at Williams).¹⁴ Overall, the distribution of whites and minorities in higher education has tended to improve since the beginning of the 21st century. In 2009-10, African Americans represented 12.5 percent of all bachelors' degrees; Hispanics 8.8 percent, Asian Americans 7.3 percent, American Indians and Alaska Natives 0.6 percent; whites 72.9 percent – the only racial group for whom conferred degrees declined over the previous decade.¹⁵ Of course, talented undergraduates may choose careers outside of law, but these differences can serve as rough benchmarks.

In 2015, the US Census Bureau estimated that African Americans comprised 13.9 percent of the total American population of 321.4 million.¹⁶ None of the top law schools regularly admits a student cohort

¹¹ INST. OF EDUC. SCI., NAT'L CENT. FOR EDUC. STATISTICS, DROPOUT RATES, <https://nces.ed.gov/fastfacts/display.asp?id=16>.

¹² See BRUCE D. BAKER, CENTER FOR AM. PROGRESS, AMERICA'S MOST FINANCIALLY DISADVANTAGED SCHOOL DISTRICTS AND HOW THEY GOT THAT WAY 9–13 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/07/BakerSchoolDistricts.pdf>.

¹³ Matthew Lynch, *Cause and Effect: The High Cost of High School Dropouts*, HUFFINGTON POST (Nov. 30, 2014, 7:31 PM), http://www.huffingtonpost.com/matthew-lynch-edd/cause-and-effect-the-high_b_6245304.html.

¹⁴ Many of the nation's highest-rated colleges and universities have recently released data on the makeup of those students accepted for admission into the Class of 2019, indicating the racial and ethnic breakdown of accepted students. 12.1 percent of accepted students at Harvard are African-Americans. Black/African American students account for 11.6 percent of all admitted students at Pomona College. *Black Students Admitted to a Select Group of Colleges and Universities*, JOURNAL OF BLACKS IN HIGHER EDUC., <http://www.jbhe.com/2015/04/black-students-admitted-to-a-select-group-of-colleges-and-universities/>.

¹⁵ INST. OF EDUC. SCI., NAT'L CENT. FOR EDUC. STATISTICS, DEGREES CONFERRED BY SEX AND RACE, <http://nces.ed.gov/fastfacts/display.asp?id=72>.

¹⁶ U.S. CENSUS BUREAU, COMPARATIVE DEMOGRAPHIC ESTIMATES 2015, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_CP05&prodType=table.

reflective of the diversity of the population at large¹⁷; Harvard comes closest, with 8.7 percent of its recent admission offers going to African Americans.¹⁸ About 12 percent of active district court judges are African-American, with 10.1 and 3.0 percent being Hispanic or Asian-American, respectively.¹⁹ Black judges also account for 13 percent of active circuit court of appeals judges, and only 5.3 percent of senior judges.²⁰ This number has improved significantly due to a targeted effort by President Obama in nominating more non-white judges.²¹ Women are also significantly underrepresented on the federal bench: about 32 percent of both the active district and court of appeals judges are women.²²

The breakthroughs made by some elite schools at the undergraduate level have not transferred to elite law schools. In a recent survey of the top 15 law schools, Harvard, as I mentioned above, led the way. Others were well below that—Cornell, for example, was 6.4 percent.²³ The law schools with the two lowest percentage of Black students among the 15 highest-ranked schools are the University of California Berkeley (4.4) and the University of Michigan (3.6).²⁴

The latter figures may show the impact of recent bans on “affirmative action.” In both California and Michigan, among other states, public law schools are prohibited by state law from considering race in admissions decisions.²⁵ These state law bans have dropped minority enrollment in higher education precipitously.²⁶

Grutter’s viability as a precedent was watered down considerably by a differently constituted Supreme Court in 2013 in *Fisher v. University of Texas*.²⁷ This case is now referred to as *Fisher I*. The Court explained that a university’s use of race must meet strict scrutiny, even if it is intended to promote diversity.²⁸ This higher standard makes it significantly more difficult for a university to justify affirmative action programs.

¹⁷ *Ranking the Top Law Schools by Their Percentage of Black Students*, JOURNAL OF BLACKS IN HIGHER EDUC., <http://www.jbhe.com/2014/12/ranking-the-top-law-schools-by-their-percentage-of-black-students/>.

¹⁸ *Id.*

¹⁹ BARRY J. MCMILLION, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS (2014) 22, <https://www.fas.org/sgp/crs/misc/R43426.pdf>.

²⁰ *Id.* at 14.

²¹ *Id.* at 14, n.56; see also Phillip Rucker, *Obama Pushing to Diversify Federal Judiciary Amid GOP Delays*, WASH. POST, Mar. 3, 2013, https://www.washingtonpost.com/politics/obama-pushing-to-diversify-federal-judiciary-amid-gop-delays/2013/03/03/16f7d206-7aab-11e2-9a75-dab0201670da_story.html.

²² MCMILLION, *supra* note 23 at 13; 21.

²³ JOURNAL OF BLACKS IN HIGHER EDUC., *supra* note 20.

²⁴ JOURNAL OF BLACKS IN HIGHER EDUC., *supra* note 20.

²⁵ See *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. TIMES, Dec. 9, 2015, http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html?_r=0.

²⁶ *Id.*

²⁷ 570 U. S. ___, 133 S.Ct. 2411 (2013).

²⁸ *Id.* at 2418.

Justices Scalia²⁹ and Thomas³⁰ concurred in the opinion and reaffirmed their belief that *Grutter* should be altogether overturned.

In the 2016 sequel to *Fisher I*, a seven-member³¹ Supreme Court upheld the University of Texas's admissions program that considered race as part of a set of holistic criteria³² – a “factor of a factor of a factor.”³³ This case is now generally called *Fisher II*. The result was a surprise to many commentators, who feared that the case could be a death knell for *Grutter*.³⁴ The majority opinion is a repudiation of the white racial privilege and grievance that can be seen as the true impetus behind Abigail Fisher's decision to sue the university – it seems to be asking why Fisher concentrated so heavily on one tiny factor when other admissions policies played a larger role in keeping her out of UT.³⁵ The decision admitted that race-neutral practices were insufficient to create “sufficient racial diversity”³⁶ to ensure the “cross-racial understanding”³⁷ and “increasingly diverse workforce and society”³⁸ that stem from diversity in education. Justice Kennedy ends the majority opinion by stating: “it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”³⁹ Perhaps most strikingly, all of the dissenting Justices (save Justice Thomas) confine their dissent to the majority's application of *Fisher I*'s strict scrutiny standard.⁴⁰ None except Thomas urge the majority to overturn *Grutter*.

The majority's opinion can also be read to repudiate the “mismatch theory” infamously asserted by the late Justice Scalia in *Fisher I*'s oral arguments.⁴¹ It is clear that law students of color do not need to be slow-tracked into lesser law schools. They can keep up with their white colleagues, even at elite schools

²⁹ *Id.* at 2242 (Scalia, J., concurring).

³⁰ *Id.* at 2242 (Thomas, J., concurring).

³¹ Justice Scalia had passed away between argument and decision, see Liptak, *supra* note 9, and Justice Kagan recused herself due to her work on the case as Solicitor General. Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES, June 23, 2016.

³² *Fisher v. University of Texas at Austin*, ___ U.S. ___, 136 S.Ct. 2198, 2206–7 (2016).

³³ *Id.* at 2207 (quoting 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

³⁴ See, e.g., Kimberly West-Falcon, “Symposium: Surprisingly, Facts Rule the Day in *Fisher II*,” SCOTUSBLOG (June 24, 2016), <http://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/>.

³⁵ For example, Fisher did not fall within the top 10 percent of her high school class. Those who fall within that range receive automatic admission to the university and account for about 75 percent of admitted students each year. *Fisher II*, 136 S.Ct. at 2208–9. For a recent article emphasizing the fragility of the precedent set forth in *Fisher I* and *II*, see Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 UC Davis Law Review 1105 (2018).

³⁶ *Id.* at 2211.

³⁷ *Grutter*, 539 U.S. at 328.

³⁸ *Id.* at 330.

³⁹ *Fisher II*, 136 S.Ct. at 2214.

⁴⁰ *Id.* at 2215–16 (Alito, J., dissenting).

⁴¹ Richard O. Lempert, Opinion, *The Supreme Court has Upheld Affirmative Action. So Let's Dump Mismatch Theory*, N.Y. Times, June 23, 2016.



(if they manage to get in).⁴² The root of the judiciary's diversity problem lies partially with admission rates, rather than individual performance.

The fact is that public universities have now developed significant "enrollment gaps" in states where affirmative action is banned in college admissions: California, Florida, Michigan, and Washington.⁴³ This finding helps account, in part, for the bottleneck mentioned earlier, in the transition from college to law school, and shows the relevance of public policy and legal supports for maintaining the conditions that support a reflective judiciary.

Turning from law schools to the bar, we note that only 3.95 percent of the lawyers at large law firms are African American, and even fewer become partners.⁴⁴ The American Lawyer magazine refers to this as the "leaky pipeline" between law schools and practice.⁴⁵ This bottleneck is significant since judges tend to be drawn from large firms. In 2010, 71.5 percent of all law students were white, but 88.1 percent of all practicing lawyers were white.⁴⁶ This appears to indicate a significant professional gap between law school and participation in the legal profession.

On the federal level, however, at least some progress seems to have been made with respect to male minorities. Of the active U.S. circuit court judges, 51.2 percent are white men, 25.3 percent are white women, 16.7 percent are non-white men, and 6.8 percent are non-white women.⁴⁷ Altogether, 48.8 percent of active circuit court judges are women or minorities). In contrast, of senior circuit court judges, appointed much earlier, 80.7 percent are white men, 9.6 percent are white women, 8.8 percent are non-white men, and less than 1.0 percent are non-white women.⁴⁸ Of active U.S. district court judges, 52.7 percent are white men, 22.1 percent are white women, 15.4 percent are non-white men, and 9.8 percent are non-white women.⁴⁹ Altogether, 47.3 percent of active district court judges are women or minorities.⁵⁰ As we will see, however, there is significant variation by state and by region. For example, the 11th U.S. Circuit Court of Appeals represents Alabama, Florida, and Georgia. Its territory comprises the highest

⁴² See Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through the Law School*, 25 L. & SOC. INQUIRY 395, 401–2 (2000).

⁴³ *How Minorities Fare*, *supra* note 29.

⁴⁴ M.P. McQueen, *Diversity Scorecard: Minorities Make Small Gains in Big Law*, AM. LAWYER, May 23, 2016.

⁴⁵ *Id.*

⁴⁶ LAWYER DEMOGRAPHICS, AM. BAR ASS'N (2014), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf.

⁴⁷ MCMILLION, *supra* note 23.

⁴⁸ MCMILLION, *supra* note 23.

⁴⁹ MCMILLION, *supra* note 23.

⁵⁰ MCMILLION, *supra* note 23.

percentage of black Americans—approximately 25 percent⁵¹—of any federal judicial circuit in the country. Today, there are eleven judges on "active" status on the bench there and eight more on "senior" status.⁵² Of these nineteen jurists, only one is black—Judge Charles Wilson, who was appointed by President Bill Clinton in 1999.⁵³ Judge Wilson, in turn, replaced Judge Joseph Hatchett, the first black judge ever to serve in the 11th Circuit since its creation in 1981.⁵⁴ There have been six vacancies on the 11th Circuit since President Obama took office in January 2009. He has only nominated one African-American to fill these gaps – Abdul Kallon in 2016.⁵⁵ The Senate has confirmed two of Obama’s 11th Circuit nominees—Adalberto Jordan and Beverly Martin, a Hispanic man and a white woman.⁵⁶ Here we are most likely witnessing *political* bottlenecks as the Republican dominated senate delegations of these states have vigorously resisted most Obama nominees.

Looking to the future, the nation is becoming more diverse in ways that should favor increasing diversity of our institutions at all levels if education and the professions are reflective of the population at large.⁵⁷ But that is a big “if”. The demographic shifts in the United States are just as likely to make more visible the obstacles to equal access and participation.

2.2. High school to college: Dropouts and Wealth Disparities

These future demographic changes place an even greater premium on access to quality education at the primary and secondary levels of education as well as the affordability of college and law school beyond that. Who can qualify as candidates for college even as our demographics change? Obviously, high school drop outs cannot.

⁵¹ U.S. CENSUS BUREAU, *supra* note 19.

⁵² *Eleventh Circuit Judges*, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov/eleventh-circuit-judges>.

⁵³ *Diversity in the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nDsearch?race=African+American>.

⁵⁴ William Peacock, *Does the 11th Circuit Bench Have a Diversity Problem?*, FINDLAW (Oct. 30, 2013 3:25 PM), http://blogs.findlaw.com/eleventh_circuit/2013/10/does-the-11th-circuit-bench-have-a-diversity-problem.html.

⁵⁵ Kent Faulk, *Obama Nominates Judge Abdul Kallon for the U.S. 11th Circuit Court of Appeals*, AL.COM, Feb. 11, 2016, http://www.al.com/news/birmingham/index.ssf/2016/02/obama_nominates_judge_abdul_ka.html.

⁵⁶ Peacock, *supra* note 60.

⁵⁷ *U.S. Census Bureau Projections Show a slower Growing, Older, More Diverse Nation a Half Century from Now*, U.S. Census Bureau (2014), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

The United States is facing a dropout crisis – over 3 percent of high school students drop out each year,⁵⁸ and over 6 percent of young adults are of high school age but lack a high school degree.⁵⁹ That totals to over a million students per year either leaving high school early or lacking the credentials needed to move up to the next level of education.

Poverty and dropouts are inextricably connected. In 2009, poor (bottom 20 percent of all family incomes) students were about four times more likely to drop out of high school than high-income students.⁶⁰ Child poverty is rampant in the U.S., with 22 percent of school-age children living in poor families.⁶¹ And poverty rates for Black and Hispanic families are three times the rates for white families.⁶² Students struggling financially have many reasons to miss school. Many of them have to take care of another relative at home.⁶³ Some have to walk through violent streets on their way to school.⁶⁴ Wide disparities in race and socioeconomic status continue to plague high school attendance.

In this context, it is important to note that many of what once were reliable gateways to higher education for poor and middle class students are changing significantly, as many public primary schools⁶⁵ and universities⁶⁶ essentially have become privatized as state funding recedes and costs and tuitions escalate. The Supreme Court has not been very supportive when it comes to advancing affirmative action with regard to high school students. In *Parents Involved in Community Schools v. Seattle School District*,⁶⁷ the court considered student assignment plans that school districts voluntarily adopted that relied on race to determine which schools certain children may attend. The Seattle district had never historically operated segregated schools or been ordered to desegregate.⁶⁸ The district classified children as white or nonwhite, and used the racial classifications as a “tiebreaker” to allocate slots in particular high schools in an attempt

⁵⁸ PATRICK STARK, ET AL., NAT’L CTR. FOR EDUC. STATISTICS, TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 1972-2012 A-1 (2015).

⁵⁹ *Id.* at A-1.

⁶⁰ *Id.* at 27.

⁶¹ THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2012 54 (2015), <http://nces.ed.gov/pubs2014/2014015.pdf>.

⁶² *Id.* at 54.

⁶³ *Id.*

⁶⁴ Rachel Purl and Randi Belisomo, *Safe Passage Workers Celebrated as Schools Face an Uncertain Future*, WGN NEWS, June 7, 2016, <http://wgntv.com/2016/06/07/chicago-safe-passage-workers-honored-with-rally/>.

⁶⁵ See, e.g., Sandra Chapman, *Nearly Half of Indiana’s Charter Schools Doing Poorly or Failing*, WTHR, Nov. 11, 2014, <http://www.wthr.com/article/nearly-half-of-indianas-charter-schools-doing-poorly-or-failing>.

⁶⁶ See, e.g., Steven Salzberg, *Wisconsin Gov. Scott Walker’s Dual Attacks on the University of Wisconsin*, FORBES, Jun. 12, 2015, <http://www.forbes.com/sites/stevensalzberg/2015/06/12/wisconsin-gov-scott-walkers-dual-attacks-on-the-university-of-wisconsin/#1a0e566d7400>.

⁶⁷ 551 U.S. 701 (2007).

⁶⁸ *Id.* at 712.

to keep them racially diverse.⁶⁹ The Supreme Court held this use of race unconstitutional. The school districts had not carried their heavy burden of showing that the interest they seek to achieve justifies the means they had chosen—assigning students based in part on race in the name of equality.⁷⁰

In an eloquent dissent, Justice Breyer took issue with this ruling, noting that in his mind the context in which racial criteria were used here justified the school district’s policy. Among other arguments, he invoked democracy:

[T]here is a democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.⁷¹

He went on to state that the majority should acknowledge the compelling nature of this interest in light of *Grutter*, and emphasized that the seminal *Brown* case concerned primary schools.⁷² “Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.”⁷³

2.3. Other Diversity Factors and Bottlenecks—Gender

Nationally, women are entering higher education and post-graduate education at higher rates than men.⁷⁴ This is true for all racial and ethnic groups; women’s greater participation in education is especially marked in more rural communities.⁷⁵ This suggests that efforts to sustain a reflective judiciary in terms of race/ethnicity should automatically increase the percentage of women.⁷⁶ Recent American Bar Association data show that women make up 36 percent of the licensed bar, but only 18 percent of partners at large firms.⁷⁷ Women also make up only 27 percent of the state and federal judiciaries.⁷⁸

⁶⁹ *Id.* at 712.

⁷⁰ *Id.* at 730.

⁷¹ *Id.* at 840 (Breyer, J., dissenting).

⁷² *Id.* at 841 (Breyer, J., dissenting).

⁷³ *Id.* at 841 (Breyer, J., dissenting).

⁷⁴ COUNCIL OF ECON. ADVISERS, ELEVEN FACTS ABOUT AMERICAN FAMILIES AND WORK 10 (2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1350164/11familyworkfacts.pdf>.

⁷⁵ NAT’L CTR. FOR EDUC. STATISTICS, URBAN EDUCATION IN AMERICA Table B.3.b.-1 (2012), <http://nces.ed.gov/surveys/ruraled/tables/b.3.b.-1.asp?refer=urban>.

⁷⁶ *Id.*

⁷⁷ AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2016), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf.

⁷⁸ *Id.* at 5.

Women of color have it even worse than white women; for example, women of color make up only 3.41 percent of Fortune 500 general counsels⁷⁹ and less than 2 percent of partners in major firms.⁸⁰ They are much more likely to experience workplace discrimination and friction with their peers.⁸¹ These intersection points between race and gender highlight the double discrimination that women of color face in the legal profession. It seems that women suffer a similar “leaky pipeline” as African-Americans – increasing numbers of women in law school or in the bar do not necessarily lead to increasing numbers of women in prestigious positions.

Given the importance of a successful legal career as a pathway to the bench, the numbers of minorities in major law firms and minority women in particular are of great importance. Their experiences point to another bottleneck along the way to the judiciary.

2.4. Diversity on State Courts

The Brennan Justice Center published a report indicating that diversity on state courts was far worse than one might expect. “Today, white males are overrepresented on state appellate benches by a margin of nearly two-to-one. Almost every other demographic group is underrepresented when compared to their share of the nation’s population.”⁸²

The report points implicit bias in the formation of the candidate pools, as well as the profession’s failure to engage in direct and effective outreach for minority and women applicants. In addition, these pools of applicants, although statistically larger than before, are more fragile than the consistently large and deep pools of white males available. Inequalities in state judiciaries contribute to inequalities in the federal judiciary.

3. The human face of law

We have been reviewing rationales for a reflective judiciary based on the ladder of educational and professional opportunity. But those are not the only rationales for a reflective judiciary. Judges are the human face of the law, and international, as well as domestic, observers look to the courts’ composition

⁷⁹ AM. BAR ASS’N, VISIBLE INVISIBILITY V (2015), http://www.americanbar.org/content/dam/aba/marketing/women/visible_invisibility_fortune500_executive_summary.authcheckdam.pdf.

⁸⁰ *Minorities & Women*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, <http://www.nalp.org/minoritieswomen>

⁸¹ VISIBLE INVISIBILITY, *supra* note 88 at XII.

⁸² CIARA TORRES-SPELLISY, ET AL., BRENNAN CENTER FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 1 (2010), https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf. For racial and ethnic distributions by state, see *National Database on Judicial Diversity in State Courts*, AM. BAR ASS’N, <http://apps.americanbar.org/abanet/jd/display/national.cfm>.

as a measure of how well the law represents and is accessible to a diverse population. In a memo last month to the Georgia governor advocating for diverse judicial nominees, retiring Georgia Supreme Court Judge John Allen explained, “Unquestionably, judges are influenced in their notion of justice by their unique life experiences. It would be a travesty to the population served if their justice is reflected only in terms of the 'white male' experience.”⁸³ Experience matters, both in informing the court’s opinions and in ensuring that the population feels “part of the process and not an outsider looking in,” as Justice Sonia Sotomayor described an unrepresented community’s possible relationship to the courts.⁸⁴

I will conclude with three brief vignettes of the appointment of three judges. Each of their appointments seemed unlikely from a statistical standpoint, but each was groundbreaking in its own way. More importantly, they all had two things in common: a great education and a commitment to justice through law.

3.1. Elbert Parr Tuttle⁸⁵

On my office wall hangs a picture of the Fifth Circuit Court of Appeals, circa 1970.⁸⁶ At that time the court consisted of 19 judges (active and senior)—all white males. Yet there were other kinds of diversity on that court—political and geographical—hidden from view. Elbert Parr Tuttle was born in California but grew up in Hawaii—a highly unlikely location for someone appointed to a judgeship in a Deep South state like Georgia. His family was not wealthy, but did place great weight on high-quality education. He went to the Punahoa Academy in Hawaii—an excellent secondary school, the same one attended by President Obama. He then broke into the Ivy League, first at Cornell University and then on to the Cornell Law School. He made the most of his opportunities, graduating from college and law school with high honors. He moved to the Deep South after he met his wife, Sara Sutherland, and opened a law firm in Atlanta, Georgia with her brother, William Sutherland. The firm of Sutherland and Tuttle thrived and became one of the region’s and nation’s first and leading firm specializing in Tax Law.

Judge Tuttle’s parents had been lifelong Republicans when the party was truly the party of Abraham Lincoln. It supported integration and had many blacks as members. The Republican Party was founded in 1854 mainly to end slavery, and for two decades it honorably promoted African-American equality. Its

⁸³ Katherine Munyan, *Judicial Diversity Matters—At Home and Abroad*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/blog/judicial-diversity-matters%E2%80%94at-home-and-abroad>.

⁸⁴ Kevin Uhrich, *The World According to Sonia*, PASADENA WEEKLY, Jan. 30, 2013, http://www.pasadenaweekly.com/cms/story/detail/the_world_according_to_sonia/11851/.

⁸⁵ For this section, see generally ANNE EMMANUEL, *ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION* (2011).

⁸⁶ The Fifth Circuit had not yet split into the Fifth and Eleventh Circuits, which occurred in 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

first presidential nominee, pioneer James C. Frémont, took a staunch anti-slavery stand in 1856⁸⁷ and ran well, paving the way for Abraham Lincoln's election four years later.⁸⁸ In fact, Judge Tuttle's mother's father had died in Andersonville, Georgia at a confederate prisoner-of-war camp during the American Civil War. When Judge Tuttle explored the politics of a state like Georgia in the 1920's, he found nothing but the white, consciously racist, Democratic Party. He once described the Democratic Party of Georgia as "paternalistic at best, and autocratic at worst [n]othing 'democratic' about it at all except the name." He remained nominally a Republican, and when Eisenhower sought the nomination and eventually won the Presidency as a Republican in 1952, Tuttle had already come to the attention of the new administration. At the Republican Convention he had skillfully enabled the Eisenhower delegation to be seated as the delegates from Georgia, rather than the rival Taft delegation. This bit of convention maneuvering put Eisenhower over the top in delegates and clinched the Republican nomination. When the Republican Party won the Presidency in 1952 and looked to Georgia to determine whom they might appoint to an open seat on the Fifth Circuit Court of Appeals, there were not many Republicans to choose from. Most of the party of Lincoln in the Deep South was black, uneducated, and greatly discouraged or prevented from voting. There were few educated Republicans in the Deep South then, much less lawyers. Tuttle was an obvious choice.

He came to that Court not only as an accomplished, highly regarded tax lawyer, but someone who fought against the racism in the South long before he became a judge. He had, for example, argued, on a pro bono basis, several high profile cases seeking to protect the human rights of African-Americans. But perhaps more important was the perspective on race he brought, in large part due to his upbringing in Hawaii—a multi-cultural, multi-racial society. He once told the story of being stopped by the police in Atlanta because he was driving with a black man in the front seat of the car. He had to explain to the policeman that all was fine—he was just giving the man a ride home. He often reflected on how easy it was for him to understand the fact that race should not be a factor, causing suspicion like this, in the course of going about everyday life like this.

Elbert P. Tuttle was appointed to the Fifth Circuit in 1954 shortly after the landmark case of *Brown v. Board of Education*⁸⁹ was decided. That case made the exclusion from educational institutions of persons solely on the basis of their race unconstitutional, but its implementation was truly undertaken "with all

⁸⁷ See *Republican Party Platform of 1856*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29619>.

⁸⁸ Frémont received 114 of 296 electoral votes and 1,342,345 popular votes. *Electoral College Box Scores 1789–1996*, NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/scores.html#1856>.

⁸⁹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

deliberate speed.”⁹⁰ Much of the litigation it spawned took place in the Fifth Circuit which then included the states of Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. (It has now been divided into the 5th and the 11th Circuits). *Brown* was eventually extended and applied to many areas beyond education.⁹¹ What was effectively a system of apartheid established throughout the South by the use of state laws mandating *de jure* racial discrimination finally began to fall. The eradication of *de jure* segregation did not, however, occur without enormous resistance. Judge Tuttle was the Chief Judge of the Fifth Circuit throughout the Civil Rights struggle.

His leadership on the Court was bolstered by other Republican appointees who shared a similar integrationist philosophy —John Minor Wisdom in Louisiana and John R. Brown in Texas for example. Wisdom was native to Louisiana but Brown came from Nebraska. These three, along with Judge Rives from Alabama, helped transform the South and abolished what was in fact a system of state imposed apartheid.

Judge Tuttle was white, from a marginal state, and appointed by a political party whose views compared to the majority party in the South at that time were highly progressive. His education and success as a major lawyer in the region made him an obvious appointment. He shaped the law for generations to come.

3.2. Constance Baker Motley⁹²

Constance Baker Motley was the first black woman to become a judge on a federal court in the United States, having been appointed to the Federal District Court in New York in 1966 by President Lyndon Johnson.⁹³ She rose to prominence as an attorney with the NAACP, a job she held since the early 1940’s,⁹⁴ and in that capacity she was recognized as one of the most courageous, creative and effective advocates for racial equality in her day. She argued innumerable cases in the Supreme Court and throughout the Deep South—almost all of them successfully—challenging what was then truly a system of apartheid. Attorney Motley played a key role, but the fact she was able to play this important role and ultimately become a Judge herself occurred, in retrospect, more by chance than design.

⁹⁰ *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955). This case is commonly known as *Brown II*.

⁹¹ See, e.g., *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (extending *Brown*’s reasoning to desegregation of public busing), *aff’d per curiam* 352 U.S. 903 (1956).

⁹² For background on Judge Motley’s life and career, see generally CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER THE LAW (1998).

⁹³ Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES, Sept. 29, 2005, <http://www.nytimes.com/2005/09/29/nyregion/constance-baker-motley-civil-rights-trailblazer-dies-at-84.html>.

⁹⁴ *Id.*

Constance Baker was born in New Haven, Connecticut in 1921, the ninth of twelve children of parents from the Caribbean island of Nevis.⁹⁵ “Her father worked as a chef for various Yale University student organizations, including Skull and Bones, and her mother was a domestic worker.”⁹⁶ Constance Baker was an excellent high school student who never expected to go to college, much less law school. Her family simply could not afford it. In a feature story about her published in the *New Yorker* magazine in 1994, (shortly, by the way, after Judge Motley visited our Law School) the author of that profile, Marie Brenner, recounted a speech Motley gave upon her induction into the Women’s Hall of Fame in Seneca Falls, New York. While the other honorees talked about politics, Motley talked about education and the impact one man in particular had had on her career.

“There was no money for me to go to college,” she said. “I went to work at the National Youth Administration, and one day I gave a speech at a black community house. Clarence Blakeslee had built the community house. He was a contractor who had done a lot of work at Yale. He had made millions of dollars, and what he did with those millions was to help educate black Americans.”⁹⁷ Blakeslee had been impressed by the teenager’s speech and had asked her where she would attend college. When Baker told him that her parents could not afford to send her, he offered to pay for her education.⁹⁸

She chose to attend Fisk University in Nashville; she did not think that the segregation of the South would bother her. Her frightened parents refused to cross the Mason-Dixon Line.⁹⁹ “On her first trip home, she brought them back a ‘Colored Only’ sign.”¹⁰⁰ After two years at Fisk, she transferred to NYU and graduated in 1943.¹⁰¹ When Blakeslee asked her what she wanted to do next, she said she had always wanted to go to law school. As she put it, “When I was 15, I decided I wanted to be a lawyer. No one thought this was a good idea.”¹⁰² Luckily, Blakeslee did and he financed her legal education as well. She became one of the foremost civil rights attorneys of her day.

Her career and accomplishments were made possible through the generosity of a single individual. As we will see below, the educational access challenges she faced as a child from a poor New Haven family, unable to finance her own education, persist today. Moreover, changes in the constitutionality of affirmative action programs at the university and law school levels also adversely affect the racial diversity

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Marie Brenner, *Judge Motley’s Verdict*, *NEW YORKER*, May 16, 1994.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Martin, *supra* note 97.

¹⁰² Brenner, *supra* note 101.



of the pools from which judges may now be chosen. She prevailed due to the generosity of one individual who financed her excellent education—NYU and the Columbia Law School.

3.3. Sonia Sotomayor

Justice Sonia Sotomayor is the third of only four women to ever sit on the Supreme Court, its first Latina justice,¹⁰³ and its twelfth Roman Catholic justice.¹⁰⁴ She is one of the youngest justices on the court, but brings a wealth of experience with her.¹⁰⁵ Sotomayor was born in the South Bronx to Puerto Rican-born parents.¹⁰⁶ Her father died when she was nine, and she was subsequently raised by her mother.¹⁰⁷ Education was truly her pathway to success. Sotomayor graduated summa cum laude from Princeton University, where she was fortunate enough to receive a full scholarship.¹⁰⁸ She made her way to Harvard Law, where she was an editor at the Harvard Law Review.¹⁰⁹ Sotomayor credits her admission to Harvard to affirmative action.¹¹⁰ She worked in both private practice and as an assistant district attorney in New York City.¹¹¹ She broke all the rules—not only with her education but her high level legal jobs as well. Sotomayor reached the Supreme Court having served on the two lower federal courts below. She was appointed to the United States District Court for the Southern District of New York in 1991, and to the Second Circuit in 1998.¹¹² She worked her way up the judicial ladder. Her nomination to the district court was slowed by Republican politicking.¹¹³ Following the retirement of liberal Justice David Souter,

¹⁰³ See, e.g., Joan Biskupic, *First Hispanic Supreme Court Justice Takes Prominent Role*, REUTERS, Apr. 25, 2012, <http://www.reuters.com/article/us-usa-immigration-arizona-sotomayor-idUSBRE83O1IO20120425>. There is some debate whether Justice Sotomayor is the first Hispanic justice of any gender; some retroactively regard Justice Benjamin Cardozo as Hispanic, a racial signifier that was not common in the 1930s. See Neil A. Lewis, *Was a Hispanic Justice on the Court in the '30s?*, N.Y. TIMES, May 26, 2009, <http://www.nytimes.com/2009/05/27/us/27hispanic.html>. Regardless, Justice Sotomayor is certainly the first Latina on the Court.

¹⁰⁴ Laurie Goodstein, *Sotomayor Would Be the Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES, May 30, 2009, <http://www.nytimes.com/2009/05/31/us/politics/31catholics.html>.

¹⁰⁵ See Biographies, *supra* note 9.

¹⁰⁶ SONIA SOTOMAYOR, MY BELOVED WORLD 11–12 (2013).

¹⁰⁷ Scott Shane & Manny Fernandez, *A Judge's Own Story Highlights Her Mother's*, N.Y. TIMES, May 27, 2009, <http://www.nytimes.com/2009/05/28/us/politics/28mother.html>.

¹⁰⁸ SOTOMAYOR, *supra* note 109, at 123.

¹⁰⁹ Biographies, *supra* note 9.

¹¹⁰ Bill Mears, *Sotomayor Says She was 'Perfect Affirmative Action Baby'*, CNN, June 11, 2009, <http://www.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/index.html>.

¹¹¹ Biographies, *supra* note 9.

¹¹² Biographies, *supra* note 9.

¹¹³ Tom Brune, *Sotomayor No Stranger to Senate Confirmation Process*, NEWSDAY, May 27, 2009 (archived from original), <https://web.archive.org/web/20090531063012/http://www.newsday.com/news/printedition/nation/ny-usconf2812810389may27,0,5438462.story>.

President Obama nominated Sotomayor in May 2009.¹¹⁴ The President praised her diverse background and noted that with her confirmation, “America will have taken another important step towards realizing the ideal that is etched above its entrance: Equal justice under the law.”¹¹⁵

Sotomayor’s three-day Senate confirmation hearing centered in part around her 2001 comments at a University of California, Berkeley lecture: “I would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹¹⁶ These comments, though perhaps inartful, hint at the profound way that having diverse experiences on the Court can change its jurisprudence by simply opening justices’ eyes to more issues.¹¹⁷ Her nomination was confirmed by the Senate in August 2009 by a vote of 68–31, with all voting Democrats voting in favor and nine Republicans crossing the aisle to vote for her confirmation.¹¹⁸

Here I think we can take away a different use of diversity that emerged in these hearings. As Carol Greenhouse has written:

Race featured prominently in the hearings – never as a basis for exclusion, but consistently as a basis for doubt and delegitimation. Exclusion may be a consequence of delegitimation, but this is not automatically so. Similarly, exclusion may be a motive for delegitimation, but this is not automatically the case either. While any nominee may be challenged from the right or the left on the basis of the form and content of his or her speech, only an individual who has affirmatively embraced a minority self-identity and a professional identity may be challenged in precisely the way Sotomayor was. The construction of race deployed by Sotomayor’s opponents was strategic in the hearings as a broad appeal to constituents – against Sotomayor, in turn cast explicitly as a surrogate for the Obama administration. That construction of race projects political opposition into the judicial sphere by narrowing the ordinary language meanings of judicial neutrality to the (constructed) condition of racial whiteness.¹¹⁹

¹¹⁴ Peter Baker & Jeff Zeleny, *Obama Hails Judge as ‘Inspiring,’* N.Y. TIMES, May 26, 2009, <http://www.nytimes.com/2009/05/27/us/politics/27court.html>.

¹¹⁵ *Id.*

¹¹⁶ *‘Latina Woman’ Remark May Dominate Sotomayor Hearings,* CNN, May 28, 2009, <http://www.cnn.com/2009/POLITICS/05/28/sotomayor.latina.remark.reax/?iref=mpstoryview>.

¹¹⁷ See, e.g., Dahlia Lithwick, *The Women Take Over,* SLATE, Mar. 2, 2016, http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/03/in_oral_arguments_for_the_texas_abortion_case_the_three_female_justices.html. In this article, Lithwick posits that having “four smoking hot feminists” on the Court (including Justice Breyer) changed the likely outcome of the recent *Whole Women’s Health* abortion decision.

¹¹⁸ *Senate Roll Call on Sotomayor Vote,* WASH. POST, Aug. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080603919.html>.

¹¹⁹ See Carol J. Greenhouse, *Judgment and the Justice: An Ethnographic Reading of the Sotomayor Confirmation Hearings,* 8 LAW, CULTURE, AND THE HUMAN. 409, 412 (2012).



All three of these Judges broke barriers to get their appointments—barriers that continue to persist but can and must be overcome to achieve a democratic, inclusive society.

Diversity and the Judiciary in India: Supreme Court judges in Indian society

by **Domenico Francavilla**

Table of contents: **1.** Introduction. **2.** Indian pluralism and the judiciary: constitutional provisions and interpretation on the appointment of judges. **3.** Informal practices of diversity in the appointment of judges. **3.1.** Geographical diversity. **3.2.** Religion, class and gender. **4.** Merit and diversity in constitutional perspective

1. Introduction

The Supreme Court of India sees itself as the guardian of fundamental rights and constitutional principles, and many consider it as one of the most powerful Supreme Courts in the world. Its jurisdiction is very wide and it has strong powers over other state organs¹. The higher judiciary as a whole, including the Supreme Court and twenty-four high courts, played a prominent role in the evolution of Indian law after Independence. Judicial activism is a well-known feature of the Indian legal system; the development of public interest litigation, promoting access to justice for the protection of fundamental rights, has further enlarged the Supreme Court's prerogatives². The higher judiciary has in many cases built from scratch or entirely changed parts of Indian law, virtually writing new legislation in judgement shape³. The Supreme Court and the high courts have been called to judge on a number of difficult issues spanning ever more intricate and significant questions concerning Indian society and institutions – conflicts with the legislative and executive powers have arisen around specific issues and in more systemic terms when the limits of the power to amend the Constitution were involved or the independence of the judiciary was at risk⁴.

¹ On the Supreme Court's powers see, for instance, M.P. Jain, *Indian Constitutional Law*, Gurgaon, LexisNexis, 2018.

² See S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi, Oxford University Press, 2002 and S. Ahuja, People, *Law and Justice: Casebook on Public Interest Litigation*, Vols. 1 and 2, London, Sangam Books, 1997.

³ Among the many examples, one can consider the Vishaka case (Vishaka v. State of Rajasthan, Supp. 1997, 3 S.C.R. 404); see A. Mehta Sood, "Gender Justice through Public Interest Litigation: Case Studies from India", *Vanderbilt Journal of Transnational Law*, 41, 2008, pp. 833-906.

⁴ See M.P. Singh, "Securing the Independence of the Judiciary: The Indian Experience", *Indiana International and Comparative Law Review*, 10(2), 2000, pp. 245-292.

Even though the work of the Supreme Court of India, and generally of the higher judiciary, has been criticised⁵, according to most scholars these courts have consistently moved towards the realisation of constitutional values and norms, following the “revolutionary” inspiration of the Indian Constitution, and have been successful in assuring a functioning rule of law⁶. In addition, in a country where the judiciary as a whole is often slow and ineffective⁷, citizens’ trust with regard to the Supreme Court is high, notwithstanding the fact that many important decisions inevitably raised discontent in some parts of Indian society⁸.

Who are these judges? Do they reflect the vast diversity of Indian society? This article deals with the issue of reflective judiciary in the Indian context focusing on the higher judiciary and, particularly, on the Supreme Court. It aims to provide a description of the role diversity plays in the appointment of judges, and of the broader Indian debate about a reflective judiciary – an issue of increasing prominence both in India and other parts of the world⁹.

The Constitution regulates the composition and the appointment of judges of the Supreme Court and high courts. The numeric composition of the Supreme Court has been amended several times to keep pace with the increasingly large number of cases the Court has to deal with¹⁰. Although constitutional norms regarding the procedure for the appointment of judges have not been amended, important changes have been introduced by way of interpretation and convention. Particularly important is a group of judgments collectively known as the *Judges Cases*. As we will see, these were principally three judgments that led the judiciary to take the main responsibility for nominating new members of the higher judiciary

⁵ See B. N. Kirpal, et al. (eds), *Supreme but not Infallible: Essays in honour of the Indian Supreme Court*, New Delhi, Oxford University Press, 2000.

⁶ M.P Singh (“Securing the Independence of the Judiciary: The Indian Experience”, cit, p. 291): writes: “Among all the troubles and tribulations India has faced since the commencement of the constitution, the judiciary has performed its role fairly well. In its times of trouble with the executive, the judiciary has received the spontaneous and sustained support of a powerful legal community and of the people in general. Therefore, the judiciary has generally been able to maintain its independence and perform its role along the expected lines. I often wonder whether the largest democracy on earth, among all its adversities, has been able to sustain and effectively operate its constitution because of the constitution makers’ vision of an independent judiciary and the sustenance of their vision by the people of India. In spite of many failings, it is no mean achievement for the people of India and their institutions that they have been able to sustain a democratic constitution where all others in similar or even more favorable circumstances have either not attempted or failed. The independence of the judiciary appears to be one of the most prominent factors in the occurrence of this phenomenon. Let us therefore, preserve, protect, and promote it”.

⁷ See, for instance, J.K. Krishnan, et al., “Grappling at the Grassroots: Access to Justice in India’s Lower Tier”, *Harvard Human Rights Journal*, 27, 2014, pp. 151-189.

⁸ See B. N. Kirpal, et al. (eds), *Supreme but not Infallible*, cit.

⁹ On this global debate see, among the many works on the topic, K. Malleon and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, Toronto, University of Toronto Press, 2006.

¹⁰ From the original eight judges, the *Supreme Court (Number of Judges) Amendment Act*, 2008 fixed the maximum number at thirty-one and they are currently twenty-five.

– a significant shift from the past. A fourth Judges Case was added in 2015, when the Supreme Court declared unconstitutional the 99th Constitutional Amendment Act 2014, which aimed to establish the National Judicial Appointments Commission, and the related National Judicial Appointments Commission Act 2014, regulating the working of this new body. These Acts would have resulted in limiting the dominant if not exclusive role of the judiciary, and particularly of the Chief Justice, in appointing judges of the higher courts. Both Acts came into force in 2015 but the Supreme Court declared them unconstitutional in the same year, raising much criticism from politicians and legal scholars¹¹.

The Judges Cases regard the relationship between the judiciary and the executive in appointing judges rather than the problem of diversity as such, but they contain some reference to diversity and are clearly helpful to frame the issue and its implications. Diversity is not an explicit criterion for the appointment of judges neither in the Constitution nor in later interpretive developments. However, informal practices exist in order to promote a judiciary that is reflective of Indian society by taking into account the vast range of diversity in India with regard to states, religions, social background, and gender. In fact, new research shows that diversity is already an important, albeit informal, criterion guiding the selection of judges. As we will see, this is particularly important with regard to federalism and geographical representation, much less so in relation to inclusiveness in terms of religion, social background and gender.

Diversity thus emerges in informal conventions in the appointment of judges. During debates in the Constituent Assembly, merit alone was the paramount criterion in appointing judges, which led to many critical voices raising attention to the under-representation of lower social classes and women, and increased the profile of the issue as a whole.

The relation between merit and diversity is a complex one. The principle of diversity may entail one judge being appointed in preference to another, setting aside seniority and prior experience. Even though in this example a conflict with merit may seem evident, the concept of merit itself is vague. Many senior judges have considerable merit if one assesses their individual expertise and legal skills; therefore, a sort of ranking of judges is a difficult and probably unsound exercise. Diversity, then, can be a factor in defining merit, taken in a broad and contextual sense, rather than the opposite of merit. To assess the merit of a judge to become a member of the Supreme Court means identifying the best possible judge for that specific position at a particular moment. From this perspective, the assessment of merit should

¹¹ See C. Chandrachud, “Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India”, [in R. Albert & B. E. Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies*, Springer, Forthcoming], (September 2, 2017), available at SSRN: <https://ssrn.com/abstract=3031280>

include not only legal expertise but also diversity, considering the overall context. However, in the realm of law, values and opinions need to be demonstrated as legitimate in the normative framework. In this regard, as we will see, according to Singh, diversity in the judiciary is an implicit principle that is coherent with the spirit of the Indian Constitution¹².

On the other hand, is diversity a value to be pursued on a symbolic level or as a substantive value having an effect on the quality of the decisions of the court? Even though diversity is a criterion actually used in the appointment of judges, it is difficult to draw any established conclusion about the consistency and effects of these informal practices of reflection in the composition of the Supreme Court of India and to assess if diversity improves the quality of a decision. A critical point highlighted by Chandrachud is that benches, normally including from two to five judges, are the “units” that decide cases, and it is unlikely that these benches reflect the diversity of the Court as a whole¹³.

After a brief introduction to pluralism in Indian society and to the organisation of the higher judiciary, this article will analyse formal norms concerning the appointment of judges as provided for in the Constitution and case law. Secondly, it will analyse the informal practices that, in fact, influence the appointment of judges according to the principle of diversity. Thirdly, the article will consider the coherence of this principle with the Indian constitutional framework, the debate about the need to introduce explicitly and formally a reflective judiciary in India, and the issue of its symbolic and substantive value in the Indian experience.

The importance of the Supreme Court of India and the pluralism of Indian society make the Indian experience a significant one in the debate about the appointment of judges and reflective judiciary. As a country taking part in the Common Law tradition, speaking broadly, the UK and US models are certainly prominent models for India, but they are not the sole models and the Indian legal system is slowly but consistently finding its own way to balance the complex issues raised by diversity in the courts.

2. Indian pluralism and the judiciary: constitutional provisions and interpretation on the appointment of judges

The issue of judicial diversity is all the more important if a society is composite and pluralistic. In this respect, India presents characteristics of great plurality on many levels. In fact, Indian culture and society

¹² See M.P. Singh, “Merit in the Appointment of Judges”, *Supreme Court Cases*, 8, 1999.

¹³ See A. Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court*, New Delhi, Oxford University Press, 2014.

are very complex due to the many overlaps and interactions that have taken place historically in an extremely large territory¹⁴.

A first aspect to emphasise is religious pluralism. India is predominantly Hindu, but many other important religions are present. The Indian Muslim community, although representing only about 15% of the Indian population, is in absolute terms one of the largest in the world. Numerically smaller on a national scale but important in some areas of India, and more generally on a cultural level, are also the Buddhist, Jain, Sikh, Christian, Parsi and Jewish communities. It is also worth remembering that Hinduism itself is not a unitary phenomenon and, within it, there are religious traditions that can be very different from one another¹⁵.

On the social level, there is the controversial issue of the social organisation of castes and of divisions following a high castes/low castes logic, including for the sake of simplicity among the latter the Untouchables (*Dalit*), who are lower than low caste Hindus in the social hierarchy. In the Indian context, social hierarchies of this kind affect also those belonging to non-Hindu communities; in addition, India has many large indigenous communities (*Adivasi*), which are marginalised by other groups. Social divisions do not follow only caste lines but also those of wealth and economic status, and the two aspects are often connected. This is particularly important, given the poverty of large parts of the Indian population¹⁶. Perhaps even more important is the condition of women, which in many respects remains far from satisfactory¹⁷.

India also has a large geographical diversity and strong national identities. This includes Indian languages – India is multilingual, and linguistic diversity has had an important role in defining the character of Indian federalism¹⁸. At a very general level, it is also important to highlight the interweaving of different cultures and the constant interaction of indigenous and western cultural elements¹⁹.

This extreme plurality has always represented an unavoidable question on the institutional level. The Indian Constitution is the output of a very difficult exercise in balancing the interests and needs of

¹⁴ For a short introduction to the epochs of Indian law and its pluralistic features, see W.F. Menski, *Comparative Law in a Global Context: The Legal Systems Of Asia And Africa*, 2nd edn., Cambridge, Cambridge University Press, 2006.

¹⁵ On this aspect, see for instance G. Flood, *An Introduction to Hinduism*, New Delhi, Cambridge University Press, 2004.

¹⁶ Among the vast literature on caste, *dalit* and *adivasi*, see M. Galanter, *Competing Equalities: Law and the Backward Classes in India*, Berkeley, University of California Press, 1984.

¹⁷ See, for instance, F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, New Delhi, Oxford University Press, 2001.

¹⁸ See S. Choudhry, "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia", *International Journal of Constitutional Law*, 7(4), 2009, pp. 577–618.

¹⁹ For interaction of law with Indian culture, see W.F. Menski, *Comparative Law in a Global Context*, cit.

different parts of the composite Indian society²⁰. The most obvious aspect of this plurality on the institutional level is the federal character of India, which is a Union of States²¹. Another systemic aspect is the coexistence of a territorial law, which applies to all Indian citizens, and of different personal laws, which apply on the basis of religious affiliation, even though only in matters of family and succession²². The acknowledgment of this plurality, and of the pluralistic structure of Indian democracy, was necessary. The constitutional order aims to rationalise and protect diversity. Whether plurality is territorial, linguistic, religious, social, or economic, in all cases the Indian legal system has tried to establish institutional mechanisms to pursue unity in diversity, and the judiciary has been at the forefront of dealing with the complex issues arising in a pluralistic society. The Indian Constitution includes several norms and principles to help overcome traditional social divisions based on caste and gender and, more generally, to promote an inclusive society²³.

More specifically, these aspects of Indian pluralism have had an impact on the organisation of the courts. Indian federalism has consciously chosen the path of a unitary judiciary. There are no parallel judiciaries at the state and federal levels, but a single system. The high courts are at the top of the states and the Supreme Court, which, in a limited sense, is the sole federal court, is at the apex of the whole judiciary²⁴. Personal laws, differentiated on a religious basis in family and succession matters, are applied by ordinary courts where the religious affiliation of judges may be known, but is not relevant from a legal point of view²⁵. This is a further illustration of how the principle of a unitary judiciary has been pursued without distinction between Union and states, and without distinctions based on religion. The Constitution found

²⁰ See G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford, Clarendon Press, 1966.

²¹ For an introduction to the features of Indian federalism, see M.P. Jain, *Indian Constitutional Law*, cit. and S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, Oxford, Oxford University Press, 2016.

²² See F. Agnes, “Personal laws”, in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, cit., pp. 904-920; W.F. Menski, *Comparative Law in a Global Context*, cit. and Id., *Hindu Law: Beyond Tradition and Modernity*, New Delhi, Oxford University Press, 2003.

²³ See D. Amirante, *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell’Unione indiana*, Bologna, Bononia University Press, 2014; on specific aspects, see, for instance, M. Galanter, “Who Are the Other Backward Classes? An Introduction to a Constitutional Puzzle”, *Economic and Political Weekly*, 13(43/44), 1978, pp. 1812–28; A. Mehta Sood, “Gender Justice through Public Interest Litigation: Case Studies from India”, cit.; M.P. Singh, “Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice”, *Delhi Law Review*, 10-11, 1981-82, p. 39 ff.

²⁴ For an introduction see N. Robinson, “Judicial Architecture and Capacity”, in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, cit., 2016, pp. 331-348. Indian High Courts’ jurisdiction may extend to more than one State or Union Territory and the Union has crucial powers as regards high courts, beginning with the appointment of judges.

²⁵ This basic aspect does not prevent the operation at an informal or parallel level of *shari’a* courts and other kinds of religious and traditional dispute settlement bodies.

a balance between the various components of Indian society providing institutional forms in order to assure a unitary framework for the new Indian democracy.

In this framework, however, the Constituent Assembly did not provide for any form of diversity in the rules concerning the appointment of judges. The relevant article is art. 124(2), according to which “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years”; the same article states that “in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted”²⁶.

The main problem with this rule is the relationship between the executive power and the judiciary, and the primacy of one over the other when a consensus is difficult to achieve. Clearly, this is a crucial matter for the independence of the judiciary.

Summarising the long and complex history of judicial developments embodied in the so-called Judges Cases, the following points are worth remembering:²⁷ in the first case (1982)²⁸, the Supreme Court held the principle of consultation and collaboration between all parties involved in the appointment process. However, the majority of judges established the primacy of the executive, which could appoint any judge to the Supreme Court or to a high court even in conflict with the Chief Justice of India or other judges taking part in the decision. This decision raised severe criticism and was overruled in the second Judges Case in 1994²⁹. The Supreme Court reversed the previous position by establishing the primacy of the judiciary and namely of the Chief Justice, not as an individual but as a representative of the judiciary. The third Judges Case (1999) is peculiar, because the President of India called the Supreme Court to make a decision in order to solve a conflict between the executive and the judiciary, caused by the executive’s refusal to appoint judges indicated by the Chief Justice³⁰. In this case, the Supreme Court confirmed the principle of the second Judges Case and provided further guidelines to regulate the procedure for the appointment of judges. In particular, the Court stated that, considering the majority judgement in the

²⁶ As regards High Courts, art. 217(1) states that: “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the Chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years”.

²⁷ See for details M.P. Singh, “Securing the Independence of the Judiciary: The Indian Experience”, cit., and A. Chandrachud, *The Informal Constitution*, cit.

²⁸ S. P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

²⁹ Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268

³⁰ In re Presidential Reference, A.I.R. 1999 S.C. 1.

second Judges Case and the precedent set by the then Chief Justice, it is “desirable that the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court”³¹. The Court also identified in detail other judges that could be included in the collegium. A further important point is the outstanding role of the Chief Justice. In fact, if consensus cannot be reached, “it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India”³².

It is worth remembering that by convention and following a position supported by the Law Commission of India, the Chief Justice of India is appointed on the mere basis of seniority³³. Secondly, the vast majority of judges of the Supreme Court were previously high court judges³⁴. The result of the first three Judges Cases was that the collegium composed by the Chief Justice of India and the four senior judges of the Supreme Court, or other senior judges depending on the specific case, had the power to appoint the judges of the Supreme Court and of the high courts. The role of the executive was diminished and that of the senior judiciary exalted. The fourth Judges Case confirmed this position as essential to the independence of the judiciary, which is part of the basic structure of the Constitution.

Merit is confirmed as the principle to be followed. The debate on diversity is not central in these cases, but some references may be found. For instance, the third Judges Case states: “When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench”. Even more significantly, in the second Judges Case, Justice Pandian stated: “Though appointment of Judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society”. This issue was not a matter of decision but it is significant that a tacit agreement seems to appear in the Supreme Court on this point³⁵.

Even if the Indian Constitution contains no rule requiring judges be appointed taking into account elements of diversity, there are informal norms and practices that must be taken into consideration.

³¹ *Ibidem*, paragraph 16.

³² *Ibidem*, paragraph 25.

³³ See for details M.P. Singh, “Securing the Independence of the Judiciary: The Indian Experience”, cit.

³⁴ Art. 124(3) of the Constitution states that: “A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or (c) is, in the opinion of the President, a distinguished jurist”. Nonetheless, very few judges who were not high court judges have been appointed as Supreme Court judges.

³⁵ See M.P. Singh, “Securing the Independence of the Judiciary: The Indian Experience”, cit.

Actual practice and non-formalised rules are no less important than the formal rules established in the Constitution and later judgments.

3. Informal practices of diversity in the appointment of judges

In a recent book, Abhinav Chandrachud showed that diversity is indeed a criterion for the appointment of judges of the Supreme Court³⁶. This is a non-explicit fact that Chandrachud has ascertained through a series of elements collected in the field. The analysis of the appointments of Supreme Court judges in the period 1950-2009 in order to identify patterns that can be interpreted in terms of judicial diversity is accompanied by data taken through interviews conducted with Supreme Court judges, including some chief justices and senior judges taking part in the collegium for the appointment of new judges. The existence of an informal but consistent practice emerges, thus projecting the issue into the normative and institutional dimension.

In particular, Chandrachud's research provides evidence that four types of diversity are taken into consideration in the process of appointing the judges of the Supreme Court. The criteria are the geographical origin of the judges, belonging to religious minorities, belonging to lower castes, and their gender. These aspects may integrate the fundamental criterion of merit, defined as seniority, previous experience, and recognised personal competence. Their influence is therefore not binding and their weight in actual appointment decisions can be variable. Nonetheless, it turns out that the issue of diversity consistently appears in the decision-making process. Not all four criteria are on the same level. The criterion of geographical origin emerges as more firm and institutionalised. The judges seem to consider this as more important than the other three, particularly gender, which only recently acquired significant importance.

3.1. Geographical diversity

The first criterion is that of representation of the different geographical areas of India. How is the territorial provenance of the judges defined? An important point is that this provenance is not given an identity value. For the purposes of the appointment of a Supreme Court judge, a judge is considered "to belong" to the state that falls under the jurisdiction of a particular high court. This means that the relevant data is not the region or state of birth, with its cultural and linguistic identity, nor even the one where the judge has lived most of his life, but the high court where he or she served³⁷. Whatever the criterion of

³⁶ See A. Chandrachud, *The Informal Constitution*, cit., and the review by T. Deo in the *Indian Journal of Law and Society*, vol. 5, 2014, pp. 263-270.

³⁷ See A. Chandrachud, *The Informal Constitution*, cit., p. 258 ff.

definition of geographical belonging, the principle clearly aims at guaranteeing fair representation in the Supreme Court of judges coming from different areas of the country.

The quantitative analysis of Chandrachud is based on the classification of states and Indian macro-regions according to demographic and other criteria³⁸. The demographic criterion is the main one and Chandrachud analyses the correspondence between the number of Supreme Court judges and the populations of the states. This datum has a connection with parliamentary representation and Chandrachud defines it as a criterion of political significance. Is there a correlation between population and parliamentary representation of a given state and the number of Supreme Court judges coming from that state?

To this end, we must consider that the number of states has changed several times throughout the history of independent India: from the original fourteen states and six Union Territories, today we have twenty-nine states and seven Union Territories. As anticipated, each state has its own high court and some high courts have jurisdiction over a plurality of states and Union Territories. The territory of Delhi has its own high court; in this respect, it is worth remembering that this territory has a greater population than some Indian states. A very important fact reported by Chandrachud is that as many as seventy per cent of the Indian population live in less than a third of the states. The majority of the Indian population is concentrated in only six states: Uttar Pradesh, Maharashtra, Bihar, West Bengal, Andhra Pradesh, and Tamil Nadu. The most populous state is Uttar Pradesh.

From the analysis of the composition of the Supreme Court during the period considered, an effective relevance of the criterion of geographical origin emerges. In the 1950s, when there were only fourteen states, seven dominated the Supreme Court, always having at least one judge: Madras, West Bengal, Bombay, Bihar, Punjab, Uttar Pradesh, and Madhya Pradesh. In the following decades, with the increase in the number of states of the Indian Union, and also in the number of judges of the Supreme Court, a relationship of general equilibrium between states was maintained. In fact, no state has come to have more than ten per cent of Supreme Court judges. In 2012, all states had a judge from their high court in the Supreme Court except Sikkim and the new states established in 2000. Chandrachud notes that this inclusiveness of the Court was not set aside as a result of the Judges Cases; this was not granted because the setting aside of political influence could have led to decisions involving less diversity in geographical terms. No state generally has more than two judges at the same time and therefore no state monopolises the Court. Another significant fact is that historically four states have dominated the Supreme Court: West Bengal in the East, Maharashtra in the West, Tamil Nadu in the South, Uttar Pradesh in the North.

³⁸ For methodological details, see A. Chandrachud, *The Informal Constitution*, cit., p. 237 ff.

Depending on the decades considered, there may have been the prevalence of an Indian macro-region, but, overall, a balance has been guaranteed. No Indian macro-region has ever had more than forty per cent of judges and no state more than two or three judges simultaneously in the Court³⁹.

The data should also be read considering the age of appointment of judges to the Supreme Court and the number of years of previous service as high court judges. Another aspect considered by Chandrachud is the size of a high court and therefore of the maximum number of judges, which is variable for each court. The size of the high court tends to be linked to the number of cases to be decided and, according to Chandrachud, the number of cases decided by a particular high court has an effect on the evaluation of the experience of the judges of that court. This indicator is not necessarily proportional to the population indicator. For example, the Delhi High Court has a very high maximum number of judges and decides on more cases than those of high courts of more populous states. A correlation seems to exist whereby Supreme Court judges most often appointed served in the most important high courts, irrespective of the population living in the area under their jurisdiction.

In this regard, Chandrachud also notes a significant change in the last two decades he considers, which concerns the judges of the High Court of Delhi, whose number has significantly grown. In fact, there have always been two judges, if not three, from this high court. This could be a result of the major role of the judiciary in appointments following the Judges Cases and, according to Chandrachud, an explanation may be found in the reputation of the High Court of Delhi – for the quality of decisions, the importance of Delhi on the political and economic level, and the high number of important decided cases. According to the sceptics, the truth is that the Supreme Court is located in Delhi and therefore personal relationships between judges play a significant role in the appointment.

In conclusion, according to Chandrachud there is a significant correspondence between the number of Supreme Court judges and the population of the states, their representation in Parliament, and the size of their high court. The most accurate indicator seems to be the size of the high court. The judges of the courts with more members and more cases seem to be more likely to be selected for the Supreme Court. The data collected through the interviews is also very significant. According to judges interviewed by Chandrachud, geographical diversity is regularly taken into consideration as a criterion, if not in all cases. The nuances, however, can differ. According to some, the emphasis is on trying to appoint judges who come from different Indian macro-regions; to others it is a practice for which a fairly institutionalised proportional representation system exists, according to which larger states have two judges.

³⁹ On geographical representation, see also G.H. Gadbois, Jr., *Judges of the Supreme Court of India: 1950-1989*, New Delhi, Oxford University Press, 2011.

On the evaluative level, the majority of judges consider it a valid system – even if they justify it from a plurality of perspectives – while even its critics believe it must be followed because there are no better alternatives. One of the judges interviewed by Chandrachud said the practice is justified by the federal character of India and is necessary for the legitimisation of the Supreme Court. According to other judges, the appointment of judges from different geographical proveniences has an important practical function, which is to assure the Supreme Court is competent about the various state laws. This observation leans in the direction of merging the criterion of diversity with merit.

When a judge retires, the tendency is to replace him or her with a judge belonging to the same state. For example, Chandrachud reports one striking case: when Balakrishnan was Chief Justice, judges from Tamil Nadu, West Bengal, Uttar Pradesh, Punjab and Haryana, Madhya Pradesh, Odisha, Assam (including Nagaland, Meghalaya, Manipur, Tripura, Mizoram, and Arunachal Pradesh), and Delhi retired and all were replaced with a judge from the same place. The criterion of geographical diversity therefore clearly exists and can favour some judges, over-riding seniority and legal reputation. One of the interviewed judges reports a case when a relatively obscure judge was appointed because of geographical diversity but, in order to be sure of his qualities, the appointing judges were obliged to study some of his judgments with great care. However, the fact that geographical origin is not understood in terms of cultural, linguistic or national identity is of fundamental importance to understand the working of this criterion in practice. The point seems to be to assure that judges sit in the Court who have a certain degree of knowledge of the contexts and problems of the different areas of India. In other words – observes Chandrachud – the criterion is not based on their national background but derives from their state expertise.

3.2. Religion, class and gender

According to the analysis of Chandrachud, belonging to a religious minority, as well as social belonging (particularly in terms of caste and gender) are considered informally when appointing judges of the Supreme Court. However, they are considerably less relevant than geographical criterion⁴⁰.

With regard to religious minorities, Chandrachud notes that in the years considered in his analysis, judges belonging to the three most numerous religious minority communities, namely the Muslim, Christian and Sikh, were represented at the Supreme Court. The question of the presence of Muslim judges is particularly relevant in the Indian context. At the beginning of the history of the Supreme Court in independent India, the presence of Muslim judges at the Court was proportional to the number of the Indian Muslim community (about sixteen per cent). With the progressive increase in the number of judges

⁴⁰ For an extensive analysis, see A. Chandrachud, *The Informal Constitution*, cit. p. 254 ff.

of the Supreme Court there has not been a corresponding increase in the number of Muslim judges and so, observes Chandrachud, in the period 2000-2009 only four per cent of the appointed judges of the Supreme Court was Muslim. In any case, from 1975 onwards two Muslim judges were usually present. As for the judges of Christian affiliation, if in the Sixties no Christian judge was part of the Court, in the preceding and following decades there was at least one. For the Sikhs, representation was even more sporadic. However, we must consider that the Christian community and the Sikh community in India, although culturally important, are numerically very small. Therefore, it is only with reference to the Muslim community that one observes a significant lack of proportionality between the composition of Indian society and the composition of the Supreme Court.

According to Chandrachud's interviews, it appears that the Indian Government pursues the representation of religious minorities more than the judiciary. Some judges point out that they have received precise guidance, both for the appointment of Supreme and high court judges. According to one of the interviewed judges, one could even speak of an "unofficial reservation" system for Muslims, Christians and Sikhs at the Supreme Court. Other judges deny there is a kind of quota system, but acknowledge religious affiliation is considered.

The criterion of social belonging defined in terms of caste is very complex. Chandrachud uses a simplified scheme by dividing judges belonging to backward castes, including all the disadvantaged categories identified by the Constitution (scheduled castes, scheduled tribes and other backward classes) and judges belonging to forward castes. This scheme lacks the nuance necessary to draw clear conclusions, but the macro-analysis still allows us to highlight some important issues. For example, in the first two decades of the Court's existence no one belonging to a backward caste was appointed as a Supreme Court judge. Now, in general, between one and three judges belong to backward castes.

From the interviews it appears that with caste, in contrast to religious minorities, there is no pressure from the government, nor is the issue explicitly discussed in the collegium. However, there is a widespread awareness of the importance of the presence of judges belonging to lower castes in the Court and this criterion is considered in the appointment process⁴¹.

For women the question becomes even more complex⁴². The first woman appointed as a judge of the Indian Supreme Court was Fathima Beevi in 1989. Thereafter there was an appointment every decade and in 2011 for the first time there were two women. The appointment of two women in 2018 has raised

⁴¹ Greater importance is given to this aspect for the appointments of the judges of high courts, and here we find in some cases government pressure and an informal system of quotas. The question is important because Supreme Court judges are normally first high court judges. The issue of quotas in universities is also relevant.

⁴² See A. Chandrachud, *The Informal Constitution*, cit. p. 219 ff.

the number to three women contemporaneously serving as judges of the Supreme Court. Considering the progressive increase in the number of Supreme Court judges, the proportion remains low. Chandrachud notes that in the case of women, especially in the early years of the Supreme Court, there may indeed have been the absence of a sufficient number of qualified candidates, but nowadays this argument is weaker.

According to the interviewed judges, in the appointment process there is awareness of the issue and the gender criterion can overcome that of seniority. In other words, a female high court judge may be preferred to a male high court chief justice. The same can happen for judges belonging to lower castes; in some cases these “backward” judges were preferred to “forward” judges who were serving as high court chief justices and thus took precedence over older and more experienced judges.

In conclusion, if the criterion of territorial provenance seems to be well established and legitimised, the other criteria are certainly taken into consideration in the appointment process, but in a less cogent and coherent way. The criterion of seniority and prior experience seems here to prevail over other factors, and examples to the contrary are not sufficient to amount to a rule.

4. Merit and diversity in constitutional perspective

The debate on reflective judiciary is becoming increasingly important in India. At the institutional level, one may refer to a seeming controversy between the President of the Union and the Chief Justice of the Supreme Court of India in 1999⁴³. In a period when there were issues in appointing new judges, the President stated: “I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle.”

The Chief Justice replied: “I would like to assert that merit alone has been the criterion for selection of Judges and no discrimination has been done while making appointments. All eligible candidates, including those belonging to the Scheduled Castes and Tribes, are considered by us while recommending names for appointment as Supreme Court Judges. Our Constitution envisages that merit alone is the criterion

⁴³ This debate is analysed by M.P. Singh, “Merit in the Appointment of Judges”, cit., who makes reference to the statements of the President and the Chief Justice of India (reported in *India Today*, 25 January 1999) quoted below.

for all appointments to the Supreme Court and High Courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy.”

According to Singh, the two positions are not in conflict: both merit and diversity are important and neither could be ignored. Analysing the developments of the Judges Cases, one could argue that if the Court had had to decide directly on the question it would have agreed on the principle of a fair representation or reflection of society. In fact, the Indian Constitution promotes an inclusive society and favours the representation of the weaker sections of society in government, understood in its widest meaning. The Constitution does not specifically refer to the diversity of the judiciary, but this could be explained by considering the high qualification level required and the limited number of places. Once the requirement of competence is satisfied, there are no arguments to deny the representation to the weaker sections of society. In constitutional terms, at the core of the Constitution’s vision is social justice and the transformation of society through the emancipation of the weaker sections. From Singh’s perspective, diversity is justified, if not compulsory, in terms of constitutional interpretation⁴⁴. The factual analysis of Chandrachud showed that diversity in the judiciary is already pursued through informal practices. Singh argues that these practices are coherent with the constitutional framework and increasingly legitimised in public discourse.

As Chandrachud highlights, those who support diversity believe that it increases the legitimacy of the Court, builds public trust, and improves the quality of decisions by bringing a variety of perspectives into its opinions. A court that "fairly reflects" the diversity of a given society indicates that it is “open to all”⁴⁵. From a theoretical point of view, diversity in the courts may have a symbolic or a substantive value. At the symbolic level, a judge can become an symbol of inclusiveness, even if he does not necessarily share the point of view of the members of the community he belongs to. At the substantive level, the mere presence in the court of a judge having a different background can eliminate the prejudices that colleagues may have, and can bring additional perspectives and attitudes. On the other hand, as Chandrachud observes: “it is arguable that diversity on the Supreme Court of India is more symbolic than substantive. Each case, after all, only reflects the diversity of the few judges who decide it, and no case embraces the diversity of the entire Court”, and, as a result, “the diversity of the Court does not make its way into the Court’s opinions. This is significant if one believes that diversity in a court is substantive, and not merely symbolic—that the diverse background of a judge is not merely a token which attempts to enhance the

⁴⁴ See M.P. Singh, “Merit in the Appointment of Judges”, cit.

⁴⁵ See A. Chandrachud, *The Informal Constitution*, cit. p. 220; see also B.L. Graham, “Toward an Understanding of Judicial Diversity in American Courts”, *Michigan Journal of Race and Law*, 10(1), 2004, pp. 153–94.

court's legitimacy, but a tool which gives the court access to different points of view, to diverse ways of thinking, and makes the opinions of the court themselves more reflective"⁴⁶.

Chandrachud also addresses another key element of the debate, that is the meritocratic principle in the selection of judges, and the so-called "merit/diversity paradox", that is to say, the conflict that would exist between selecting the best judges or the judges who best reflect the composition of the society in which the court operates. Chandrachud observes that there are at least three reasons why the principle of diversity does not conflict with that of merit. First, merit is not necessarily compromised by considering diversity. The experience of the Supreme Court of India and other Supreme Courts shows that the judges still respond to certain merit requirements. Secondly, one cannot make sense of merit in a social or contextual void, and, in this light, the diversity of a judge can well be considered an element of individual merit. Third, the same idea of merit "can be "self-reflective", "self-selecting", or "self-cloning", which means that "the definition of merit varies with the persons who judge merit – a judge of merit, consciously or unconsciously, may seek a replication of his or her own credentials in the candidate he or she seeks out. The judge of merit may seek out a candidate who is least likely to challenge the establishment. Some scholars have suggested that it is a 'myth' that merit is a neutral standard"⁴⁷.

The conflict between merit and diversity can also be considered a conflict between those who believe that the judges find and apply the law in a neutral and impartial manner and those who recognise the political role of the judges, in the sense that judging is a political process by its nature. From this perspective, diversity undermines impartiality. On the other hand, the advantage of diversity is that the presence of judges having different backgrounds ensures that there is not a sort of elite that dominates the values of the court, excluding other parts of society. The discourse here is reversed: diversity increases the "structural impartiality" of the court⁴⁸.

On the negative side, one could argue that diversity opens the door to political influence in the appointment of judges, or that geographical representation can give rise to distortions, such as "circuit effects"⁴⁹. In fact, the Supreme Court has appellate jurisdiction and could be better disposed towards the

⁴⁶ See A. Chandrachud, *The Informal Constitution*, cit. p. 263.

⁴⁷ See A. Chandrachud, *The Informal Constitution*, cit. p. 223. In his analysis, Chandrachud makes reference to several works, including Lady Hale, "Making a Difference? Why We Need a More Diverse Judiciary", *Northern Ireland Legal Quarterly*, 56(32), 2005, pp. 281-292; G.H. Gadbois, Jr., "Judicial Appointments in India: The Perils of Non-contextual Analysis", *Asian Thought and Society*, 7, 1982, pp. 124-143; and M.P. Singh, "Merit in the Appointment of Judges", cit.

⁴⁸ See A. Chandrachud, *The Informal Constitution*, cit. p. 223, and S.A. Ifill, "Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts", *Boston College Law Review*, 39(1), 1997, pp. 95-149.

⁴⁹ See A. Chandrachud, *The Informal Constitution*, cit. p. 260, and, in general, L. Epstein et al., "Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court", *University of Pennsylvania Law Review*, 157(3), 2009, pp. 833-80

judgments of high courts in which a good number of Supreme Court judges have worked. Even more critically, reflection is not representation, and diversity cannot be assured in a consistent way. This could be seen as crucial to preserve the independent role of the judges but, on the other hand, the lack of formalisation can allow non-transparent practices or, at best, result in a Court's composition that cannot fully satisfy the expectations of society.

Today the Indian debate more explicitly deals with the issue of diversity. The 99th Constitutional Amendment Act 2014, which aimed to establish the National Judicial Appointments Commission, and the related National Judicial Appointments Commission Act 2014, did not include diversity formally in the procedure for the appointment of judges. However, those Acts were declared unconstitutional irrespective of the issue of diversity. They were deemed to affect the independence of judiciary, which is part of the basic structure of the Constitution. This fourth Judges Case was criticised because it denied that the independence of judiciary can be reached in several ways, including via the executive, in the appointment of judges, as in other constitutional experiences⁵⁰. However, it is worth remarking that during the parliamentary debates, many voices were critical against these Acts because of insufficient attention to the representation in the judiciary of women and backward classes.

The aspect of structural impartiality seems particularly important if we consider the Shah Bano case or the recent Shayara Bano case, where the Supreme Court had to decide on important issues concerning the application of Muslim law in India. The first concerned maintenance rights, and the second one the admissibility of instant and irrevocable repudiation through triple *talaq*⁵¹.

In the Shah Bano case the bench was Hindu and this element shook the confidence of the minority Muslim community. In the Shayara Bano case, the five-judge bench was composed of a Sikh Chief Justice, and a Muslim, Christian, Hindu, and Parsi. From the point of view of the quality of the decisions, the presence of a Muslim judge on the bench can be considered from different perspectives. One aspect could be a better knowledge of Muslim law, but this argument is weak in reality, because all Indian judges must know Muslim family law as a component of Indian official law and, in many cases, Muslim judges actually do not prove to have a better understanding of Muslim law than other judges.

A different aspect is the intricacy of the issue of representation/reflection. In the Shah Bano and the Shayara Bano cases, it is impossible to assume a single Muslim view. Even though more traditional parts of Indian Muslim communities opposed both judgements, it is worth remembering that the applicants

⁵⁰ See C. Chandrachud, "Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India", cit.

⁵¹ Mohd. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945; Shayara Bano v. Union of India and Ors., Supreme Court of India, SCC OnLine 2017 S.C. 963.

were Muslim women and a number of Muslim associations. In the Shayara Bano case, triple *talaq* was declared contrary to the Constitution by a 3:2 majority. The Sikh chief justice and the Muslim judge wrote the minority opinion. It can be argued that, if the bench was composed by five Hindu judges, the situation would have been much worse from the point of view of perception on the part of the Islamic community. However, where is the relevance of the presence of a Muslim judge? If one considers that the Muslim judge is somehow a representative of the Muslim position, the result is that the judgement highlights the fact that the Muslim opinion is that of the minority. However, one can see the question differently. The real guarantee of diversity is to assure that judges with different backgrounds decide on a dispute, whether as a majority or a minority. Here diversity shows its strength in the Indian context, where inclusiveness remains a guiding principle from the birth of the Constitution to the present day, as powerful in principle as fragile in practice.

Why do women in the judiciary matter? The struggle for gender diversity in European courts

by Mia Caielli

Table of contents: 1. Introduction: Women and judgeship. 2. Gender diversity in the ECtHR and in the CJEU: A more reflective and representative judiciary? 3. Engendering courts as a means of achieving equal opportunities between women and men. Anything else? 4. Gender and judging: Some concluding remarks

1. Introduction: Women and judgeship

The exclusion of women from the legal world was one of the last gender inequalities to be outlawed in most Western democracies. Yet, it persisted in many countries despite the explicit constitutional prohibition of sex discrimination and the achievement of female suffrage.

In the UK, the *1919 Sex Disqualification (Removal) Act* followed the 1918 recognition of women's right to vote and paved the way for the admission of women to the legal profession: although women joined the Law Society in 1922, the first female judge was not appointed until 1962, one year before the enactment in Italy of Law no. 66 of 1963 laying down rules for the admission of women to public offices and professions, including the judiciary¹. A few years earlier, in decision no. 56 of 1958, the Italian Constitutional Court upheld Law no. 1441 of 1956 limiting the number of women magistrates in juries, implicitly arguing that the performance of judiciary duties is better suited to the male than the female intellect². Even in the US, where the first female federal judge was appointed in 1928³, the exclusion of women from juries was one of the last sex-based classifications to be declared unconstitutional. In 1994,

¹ Until then, Article 7 of Law No. 1176 of 1919 on the access of women to public offices expressly excluded them from roles implying jurisdictional powers.

² The Court explains how the constitutional principle of equality between women and men is not infringed upon by the legislator "taking into account, in the interest of the public service, the different attitudes of the members of each of the sexes" and that limiting the presence of women in popular juries meets "the need for a more appropriate functioning of such benches" (Decision no. 58 of 1956, available at www.cortecostituzionale.it).

³ Beverly B. Cook (1984), "Women judges: A Preface to their History", in *Golden Gate University Law Review*, 573, 604.

with its decision *J.E.B. v. Alabama ex re*, the Supreme Court held that peremptory challenges based on sex violate the equal protection rights of prospective jurors⁴. The participation of women as equals on juries has remained problematic in many other common law judicial systems where sex exemptions were not outlawed until the end of the last century⁵.

These are just a few emblematic examples of the traditional exclusion of women from judgeship and they appear sufficient to explain why it has been argued that “the exercise of judicial power is enmeshed in powerful cultural norms of masculinity”⁶.

A parallel can easily be drawn between female political representation and women judgeship. Many decades after the achievement of both women’s suffrage and the right to enter a judicial career, only two countries in the world have 50 percent or more female representatives in their single or lower houses⁷, and women are still a minority in top-ranking judicial positions like supreme, constitutional and European courts⁸. Electoral gender quotas (and, in a few Asian and African countries, reserved parliamentary seats) have been a partial response to the continuing under-representation of women in politics for many years⁹. More recently, given the fact that “the torrent of women's entry into the legal profession has not produced a pipeline to power for women in the judicial branch of government”¹⁰, some efforts have been made to include more women in the judiciary as well, with special attention to constitutional and apex courts. Some countries have adopted specific positive action policies in favour of women in the judiciary¹¹, while

⁴ Joanna L. Grossman (1994), “Women's Jury Service: Right of Citizenship or Privilege of Difference?”, in *Stanford Law Review*, 1115.

⁵ Jocelyne A. Scutt (2016), *Women and The Magna Carta: A Treaty for Control or Freedom?*, Basingstoke: Palgrave MacMillan, 40-54.

⁶ Sally J. Kenney (2012), “Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go”, in *Michigan State Law Review*, 1499.

⁷ Inter-Parliamentary Union (IPU), *Women in national parliaments. Situation as at 1st July 2017*, available at www.ipu.org.

⁸ See table on the female share of professional judges by level of court in *CEPEJ (2016), European judicial systems Efficiency and quality of justice (2014 data)*, *CEPEJ Studies No. 23, 101, Table no. 3.14* (available at www.coe.int/cepej). *With regard to non-CoE countries, see among other data, UN Women (2011), 2011- 2012 Progress of the World's Women: In Pursuit of Justice*, UN Women, New York, Figures 2.5 and 2.6, pp. 60-61, available at www.unwomen.org, and, with specific regard to Latin America and the Caribbean, UN ECLAC – Gender Equality Observatory, <http://oig.cepal.org/en/indicators/judicial-power-percentage-women-judges-highest-court-or-supreme-court> (website accessed 6 August 2017).

⁹ See, *inter alia*, Susan Franceschet, Drude Dahlerup (eds.) (2012), *The Impact of Gender Quotas*, New York: OUP.

¹⁰ Sally J. Kenney (2012), *supra* note 6, 1499.

¹¹ With regard to constitutional courts, it’s worth mentioning the Belgian case: on 4 April 2014 the Parliament adopted the *Loi spéciale portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle*, whose art. 12 and 38 require the Constitutional Court to be composed of at least a third of judges of each sex. Similar rules exist in other European countries but are related to ordinary courts: Austria set a gender quota for the selection of high court judges at 30%; the Norwegian Judicial Appointment Board, on the basis of the *Work Environment Act*, exerts the principle of gender allocation per quota in courts with gender imbalance (*CEPEJ (2016), European judicial systems Efficiency and quality of justice, supra* note 8, 84-85), while, in the UK, the Lord Chancellor and Lord Chief Justice have a statutory responsibility to ensure such parity (Kate Malleson (2013), “Gender Quotas for the Judiciary in England

in most cases, the appointment of female judges can be considered a sort of ‘implicit quota’. In the US, following President Jimmy Carter’s commitment to the principle of a gender diverse bench¹², the appointment of a certain percentage of female judges to federal courts has never been called into question. With regard to the Supreme Court, women make up one-third of the members since the confirmation of Associate Justice Elena Kagan in 2010; similarly, appointments to the Supreme Court of Canada obey a customary rule requiring the presence of three women among the nine justices. More recently, gender balance in the judiciary has become an explicit aim pursued by judicial appointment commissions and other bodies involved in national and supranational judicial selection processes. The latest are emblematic of the struggle for an increased female presence in the judiciary: at the European level, judicial appointments to the European Court of Human Rights (ECtHR) and to the Court of Justice of the European Union (CJEU) have just begun to take gender into account with a view of redressing the persistent under-presence of women on both benches.

Analysis of the set of rules governing the complex procedures for the composition of the two European courts represents a starting point for addressing the main *question underpinning this chapter: what is the purpose of a judicial body reflecting the gender composition of society? In other words: is gender balance in the courts a matter of equal opportunity between women and men in access to the legal profession or should it be achieved in order to increase the representativeness of the judiciary and the quality of judicial decisions?*

Clearly, such a question *implies other more general, subtle and delicate issues* that have divided generations of feminists. To mention just a few: Do women represent women? Do women judge differently? While the first of these two questions has been widely addressed by the literature on women and politics since the Seventies, the second is strictly related to the more recent battle for greater judicial gender diversity.

2. Gender diversity in the ECtHR and in the CJEU: A more reflective and representative judiciary?

Following the EU’s active participation in the 1995 *Fourth World Conference on Women* in Beijing, balanced participation of women and men in decision-making appeared on the agenda of its political institutions and was codified in the *Fourth Action Programme for Equal Opportunities* (1996–2000)¹³. During this period,

and Wales” in Ulrike Schultz, Gisela Shaw (eds.), *Gender and Judging*, Hart Publishing, 481-499).

¹² Sally J. Kenney (2013), *Gender and Justice: Why Women in the Judiciary Really Matter*, New York and London: Routledge, 65-86. President Carter also stated that quotas in the judiciary were desirable: “If I didn’t have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of all my judicial appointments would be black and three percent would be Spanish speaking and 40 percent would be women” (quoted by Nancy Scherer (2011), “Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?”, in *Northwestern University Law Review*, 587, 596).

¹³ On the EU decision to adopt gender mainstreaming and its implications, see, among others, Mark A. Pollack &

the European Commission considered that the balanced participation of women and men in decision-making was essential for the legitimacy of representative and advisory bodies, but also acknowledged for the first time that “the judiciary influences society at all levels and it is therefore crucial that women form a significant presence within it”¹⁴.

The year 1999 is considered a turning point for gender diversity in the European Union judiciary¹⁵, since a woman was appointed judge of the Court of Justice for the first time¹⁶ and European research was undertaken on the under-presence of women in the judiciary. In its *Report* on “Women and decision-making in the judiciary of the European Union”¹⁷, the EU Commission analyses the judicial power structure in both Member States and the Court of Justice. The *Report* focuses on equal opportunities between women and men in the decision-making process, with the aim of applying the concept of gender mainstreaming to judicial selection. Thus, gender balance in the courts is considered an application of the general principle of equality between the sexes: it does not appear to be a matter of legitimacy of the Court of Justice which could derive from it reflecting the society it serves, a matter that is indeed gaining more and more relevance in contemporary democratic judiciaries.

The French appointment of Simone Rozès to the Court of Justice as Advocate General in 1981 was saluted by the President of the Court as an important implementation of the EU principle of equal treatment between women and men¹⁸, without any mention of the potential impact of more female judges on the bench or, more generally, any claim for a more representative judiciary. Very recently, Lady Brenda Hale was appointed President of the UK Supreme Court. Her commitment to diversity in the judiciary is very well known¹⁹ and formed the core of her speech criticising “the inbuilt bias in choosing judges,

Emilie Hafner-Burton (2000), “Mainstreaming gender in the European Union”, in *Journal of European Public Policy*, 432.

¹⁴ Council Recommendation 96/694/EEC of 2 December 1996 on balanced participation by women and men in the decision-making process.

¹⁵ Sally J. Kenney (2013), *Gender and Justice: Why Women in the Judiciary Really Matter*, New York and London: Routledge, 120.

¹⁶ The 1999 Irish appointment of Judge Fidelma Macken followed the French designation of Simone Rozès as Advocate General in 1981.

¹⁷ Miriam Anasagatsi, Nathalie Wuyame (1999), *Women and decision-making in the judiciary in the European Union*, Brussels: European Commission, available at <https://publications.europa.eu/en/publication-detail/-/publication/04eafd0f-7ca1-403f-9abd-db05bf7b988a/language-en>.

¹⁸ Sally J. Kenney (2002), “Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice”, in *Feminist Legal Studies*, 260: the author also argues that France’s designation of Simone Rozès “had nothing to do with feminism; no evidence suggests that France appointed Rozès because of gender nor had feminists in France or the EU organised on her behalf” (261).

¹⁹ Brenda Hale (2001), “Equality and the Judiciary: Why Should We Want More Women Judges?”, in *Public Law*, 489. More recently, she recalled the importance of a diverse judiciary in her “Equality in the Judiciary” speech at the Kuttan Menon Memorial Lecture (21 February 2013, available at <https://www.supremecourt.uk/docs/speech-130221.pdf>).

and the dependence on ‘soundings’ from judges, as producing a judiciary that is not only mainly male, overwhelmingly white, but also largely the product of a limited range of educational institutions and social backgrounds”²⁰. Commenting on her appointment, the Bar Council stressed that it will “serve as encouragement to all for greater diversity in law”²¹.

How can this difference of meaning given to a woman making it to the highest judicial position in UK and to a woman entering the highest European court be explained?

First, the time factor cannot be undervalued. Diversity is not one of the traditional requirements judiciaries are supposed to meet: it has become an important factor influencing courts’ accountability only quite recently, beginning at the end of the past century, when the political role of supreme, constitutional and human rights courts began to be acknowledged. It is worth recalling how US Supreme Court decisions eliminating legal barriers to jury service for women, and for African Americans a few years earlier²², were based more on the rights of citizens to serve on juries than on the right of defendants to be tried by a representative jury, considering jury service an essential duty of citizenship, “carrying an independent right not to be excluded on the basis of group membership”²³.

Secondly, the contemporary UK context is quite peculiar. Under the *Constitutional Reform Act 2005*, a Judicial Appointments Commission was set up with the mandate to operate a transparent system based on applications and appointment on merit, and to increase the diversity of those applying for judicial office: furthermore, an Advisory Panel on Judicial Diversity was established in 2009 with one of its main focuses being gender balance²⁴, which might require the use of positive action measures²⁵.

Diversity of the judiciary does not appear to be an issue for EU lawmakers even today. In fact, it is explicitly addressed only through the principle of nationality: art. 19 (2) TEU states that both the Court of Justice and the General Court must consist of one judge from each of the Member States. The exact role of such a provision is not yet entirely clear: in the first place, its wording does not seem to require a candidate to be a citizen of his or her appointing State (although some countries do explicitly require that

²⁰ Haaron Siddique, “Brenda Hale appointed as UK Supreme Court's first female President”, in *The Guardian*, 21 July 2017.

²¹ Clive Coleman, “Baroness Hale: The Supreme Court trailblazer”, in “BBC News”, 21 July 2017, available at <http://www.bbc.com/news/uk>.

²² With *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court ruled that a prosecutor's use of peremptory challenge in a criminal case may not be used to exclude jurors based solely on their race. A series of cases later extended the *Batson* doctrine to the use of race-based peremptory challenges in civil as well as criminal cases and regardless of whether the parties and the excluded jurors share the same race.

²³ Joanna L. Grossman (1994), *supra* note 4, 1116.

²⁴ On the new judicial appointment procedure with regard to gender balance see E. Rackley (2013), *Women, Judging and the Judiciary: From Difference to Diversity*, New York and London: Routledge, 69-106.

²⁵ Kate Malleon (2013), *supra* note 11.

any candidate it considers for appointment should have its nationality); additionally, panels can decide cases without the presence of the judge of the Member State involved and judges are required to exercise their mandate in full independence of their Member States. Still, the ‘one State-one judge’ convention cannot be considered only ‘internally’ beneficial aiming at the Court’s knowledge of all EU legal systems (thus underestimating the fact that some countries have more than one legal system): it is a common belief that it may also generate external legitimacy through representation since “each Member State feels that ‘our’ judge was present, even though he/she will not generally be present when a case originating from their Member State is being decided”²⁶. This is a peculiar understanding of ‘representation’, introducing the concept of ‘descriptive representation’ that will be explored later in this chapter²⁷.

The Court of Justice is composed of 28 judges and 11 Advocates General²⁸, while the General Court now consists of 45 judges²⁹.

Judges have always been appointed by common accord of the governments of the Member States for a renewable term of office of six years. They are chosen from among individuals whose independence is above suspicion and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are of recognised competence. After the 2006 Lisbon Treaty, in force since 2009, appointments are still made by State governments (art. 253 of the TFEU), but are preceded by consultation of a panel responsible for issuing an opinion on the candidates’ suitability to perform their duties. The panel was established under art. 255 of the TFEU, which states that it “shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament”. It appears evident that both the composition and the operating rules of the Panel are of great importance for the judicial selection procedure and, according to the same Treaty provision, such competence lies with the Council, which adopted two decisions setting up the new body in 2010³⁰.

²⁶ Michal Bobeck (2014), “The Court of Justice of the European Union”, in *European Legal Studies - Research Papers in Law* no. 2, 10.

²⁷ *Infra*, § 3.

²⁸ According to art. 252 TFEU, the Court is assisted by eight advocates-general, whose number may be increased by the Council if the Court so requests. Council decision 2013/336/EU increased the number of advocates general to eleven with effect from 7 October 2015.

²⁹ In 2019, this number will increase to 56 (two judges from each Member State). The Civil Service Tribunal, established on 2 December 2005, ceased to exist on 1 September 2016: its latest composition comprised seven judges.

³⁰ Council Decisions of 25 February 2010 (2010/125/EU) and (2010/124/EU).

If, as has been pointed out in the past, judicial appointments to the Luxembourg Court during the first years of its functioning were characterized by a high degree of secrecy in the national nomination processes as well as in the poor scrutiny at the EU level prior to appointment³¹, nothing seems to have changed as a result of the partially renewed procedure. First, information on selections of candidates is not publicly accessible in most countries. Second, the Panel hears the proposed candidate in private, its deliberations are held *in camera* and, although it is required to give a reasoned opinion on each candidate, such opinion is forwarded only to the Representatives of the Governments of Member States in order to protect the privacy of the candidates, especially of those who do not receive a favourable opinion³². Additionally, the criteria adopted during the candidate's evaluation have been criticized, since the Panel lacks any form of democratic control and has considerable discretion in interpreting the Treaty provisions concerning the requirement for holding judicial office³³.

All the aforementioned recommendations for a greater gender balance coming from the EU Commission have not yet been transposed into enforceable rules.

The only reference to female judgeship in the rules concerning the composition and functioning of the CJEU is recent, confined to a “whereas” of a regulation, and merely concerns the composition of the former Court of First Instance. Indeed, the EU legislature recently decided on the reform of the General Court through Regulation 2015/2422 which explains: “It is of high importance to ensure gender balance within the General Court. In order to achieve that objective, partial replacements in the Court should be organised in such a way that the governments of Member States gradually begin to nominate two judges for the same partial replacement with the aim therefore of choosing one woman and one man, provided that the conditions and procedures laid down by the Treaties are respected”³⁴.

Although political pressure for an increased gender balance in the judiciary has been kept up, consideration of the candidate's sex is not yet a formal requirement, nor has the Panel adopted any explicit criterion aimed at promoting sex equality³⁵. The most recent Fourth Activity Report of the Panel lacks

³¹ Among the scholars exploring the issue of judicial diversity, see Iyiola Solanke (2009), “Independence and Diversity in the European Court of Justice”, in *Columbia Journal of European Law*, 89, 120, stressing how the opacity in ECJ nominations was likely to undermine the Court's independence and credibility.

³² Jean-Marc Sauvé (2015), “Selecting the European Union's Judges: The Practice of art. 255 Panel”, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford: OUP, 78.

³³ Tomas Dumbrovský, Bilyana Petkova and Marijn Van der Sluis (2014), “Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States”, in *Common Market Law Review*, 455, 457.

³⁴ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, Whereas No. 11.

³⁵ Bilyana Petkova (2015), “Spillovers in Selecting Europe's Judges. Will the Criterion of Gender Equality Make it to Luxembourg?”, in Michal Bobek (ed.), *supra* note 27, 221.

any reference to gender equality in judicial appointments³⁶, while a clear commitment to judicial gender diversity has instead been made by the Strasbourg counterpart, i.e. the Parliamentary Committee on the election of judges.

According to Article 22 of the European Convention of Human Rights (ECHR), judges of the ECtHR “shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party”. The Assembly proceeds to vote on the candidates in a secret ballot, following the recommendations of its Committee on the Election of Judges. An absolute majority of votes cast is required in the first round and if this is not achieved, a second round is held: the candidate with the most votes is elected to serve on the Court for a single term of nine years.

Immediately following the adoption of Protocol no. 11 introducing a single European Court of Human Rights on a permanent basis to replace the existing Commission and Court, with Resolution 1082 (1996), the Parliamentary Assembly began taking steps to improve the procedure for examining candidatures for the election of judges. This Resolution was immediately followed by Order No. 519 (1996) instructing its Committee on Legal Affairs and Human Rights to examine the question of the qualifications and manner of appointment of judges with a view to achieving a balanced representation of the sexes. A few years later, through Recommendation No. 1429 (1999), the Parliamentary Assembly recommended that the Committee of Ministers invite the governments of the Member States to apply different criteria when drawing up lists of candidates for the office of judge and to “select candidates of both sexes in every case”³⁷. A new Order was then adopted to address the previous instruction serving the purpose of a greater gender balance in the ECtHR to the Sub-Committee on the election of judges³⁸, which recently recalled all previous orders and recommendations on the importance of considering gender in national submissions of candidates³⁹.

Therefore, States are now asked to put forward at least one candidate from ‘the under-represented sex’ unless exceptional circumstances exist which permit them to not do so.

Convergence of the two European judicial appointment panels today appears not only desirable, but likely to happen soon, given the fact that the ECtHR’s Advisory Panel has followed the path traced by

³⁶ Report published on 10 February 2017, available at <http://www.consilium.europa.eu/it/press/press-releases/2017/04/19-fourth-report-article-255/>

³⁷ § 6.3 of the Recommendation.

³⁸ Order No. 558 (1999) instructing the Committee “to make sure that in future elections to the Court member states apply the criteria which it has drawn up for the establishment of lists of candidates, and in particular the presence of candidates of both sexes”.

³⁹ Information Document AS/Cdh/Inf (2017) 01 rev 4, 27 April 2017, § 7.

art. 255 in many regards. While the evolution of gender equality protection under the ECHR system owes much to EU primary and secondary legal provisions and to the huge body of Court of Justice judgments, the case of judicial gender diversity shows “a potential future spillover regarding sex equality [flowing] in the opposite direction: from Strasbourg to Luxembourg”⁴⁰.

3. Engendering courts as a means of achieving equal opportunities between women and men.

Anything else?

Regarding the slow process of increasing the number of female judges in the Court of Justice, it has been considered that “the important point is not that there should be a more equal gender balance, the important point is the benefits a more equal gender balance can bring”⁴¹. I could not agree less. Increasing the female presence in the judiciary and, in particular, in apex and European courts is an aim in itself that must be pursued independently of its positive side effects. The very first argument of this chapter is that engendering courts is essential for the implementation of the basic principle of equality between women and men enshrined in EU primary law as well as in the ECHR.

Still, the connection between gender balance in the courts and judicial diversity should not be neglected despite it being neither clear nor obvious.

Interestingly, after having explained that among all aspects of diversity the focus had been on “gender, ethnic origin, disability, sexual orientation, geographical location, socio-economic background”⁴², the *2010 Report* of the previously mentioned Advisory Panel on Judicial Diversity 2010, Judiciary of England and Wales, underlined how “failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power”⁴³. Two questions then arise. First: does achieving a greater gender balance in the courts mean meeting the requirement of a diverse judiciary? Secondly: regarding the wording of this *Report*, can female judges be considered judges of ‘diverse backgrounds’?

Very similarly, one of the multiple activities aimed at supporting democracy worldwide of the *International Institute for Democracy and Electoral Assistance* (IDEA) has been the compilation of a primer covering the systems used for the selection of judges in constitutional democracies, recommending different

⁴⁰ Bilyana Petkova (2015), *supra* note 36, 233.

⁴¹ Jessica Guth, “Law as the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its decisions and their impact”, in Gabriele Abels, Heather MacRae (eds.), *Gendering European Integration Theory. Engaging new Dialogues*, Barbara Budrich Publishers, 2016, 175.

⁴² Sect. 1, § 17 of the *Report*.

⁴³ Sect. 1, § 25 of the *Report*, available at <https://www.judiciary.gov.uk/publications/advisory-panel-recommendations/>.

appointment criteria deemed necessary to meet the requirements of an independent, politically impartial, honest and competent judiciary. Such criteria include “ensuring the representativeness and inclusiveness of the judiciary, especially with regard to gender, status, ethnicity or origin”⁴⁴. Gender balance is therefore expressly considered a factor contributing to the necessary representativeness of the judiciary, implicitly assuming that women represent women.

The debate is old and far from being closed. Much of the scholarship on the topic has emerged during past decades when legal feminists addressed the highly controversial issue of gender electoral quotas and female political representation. One of the arguments for the redressal of female under-presence in legislative bodies through positive action measures was the need for women’s political presence in order to advance policies favourable to women. However, harsh criticism arose, given the simple and irrefutable fact that women are not a group of interest, nor a specific diversity to be represented.

Anne Phillips pointed out that “the presumption of a clearly demarcated woman’s interest which holds true for all women in all classes and all countries, has been one of the casualties of recent feminist critique, and the exposure of multiple differences between women has undermined more global understandings of women’s interests and concerns”⁴⁵. Despite this, she remains one of the major theoretical supporters of electoral quotas for women, her gender justice argument being based precisely on the difficulty of recognizing a clear and agreed women’s interest, thus requiring an increased female presence in political assemblies⁴⁶.

Exploring the different meanings of representation, Hanna Pitkin criticized the concept of ‘descriptive representation’, dismissing “the idea of correspondence and likeness and the importance of resembling one’s constituents”⁴⁷. But this peculiar definition of representation, otherwise known as ‘standing for’⁴⁸, was soon adapted to female presence in elected assemblies⁴⁹ and, more recently, to women judgeship. The concept of descriptive representation shares certain features with symbolic representation and the importance of female role models in politics, which has always constituted a good (yet controversial and sometimes dismissed⁵⁰) argument for gender electoral quotas: female presence in parliaments would

⁴⁴ IDEA, *Judicial Appointments*, August 2014 (available at <http://www.constitutionnet.org>).

⁴⁵ Anne Phillips (1998), *Feminism and Politics*, New York: OUP, 234.

⁴⁶ *Ibidem*, 234-238.

⁴⁷ Hanna F. Pitkin (1967), *The Concept of Representation*, Berkeley: University of California Press, 111. She warned: “Think of the legislature as a pictorial representation or a sample of the nation, and you will almost certainly concentrate on its composition rather than its activities” (226).

⁴⁸ *Ibidem*, 60-93.

⁴⁹ Cindy S. Rosenthal (1995), “The Role of Gender in Descriptive Representation”, in *Political Research Quarterly*, 599; Jane Mansbridge (1999) “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes,’” in *Journal of Politics* 628.

⁵⁰ Anne Phillips (1998), *supra* note 45, 228.

encourage other political participation by women and foster a discrimination- and stereotype-free environment. Similarly, increasing gender balance in the European judiciary might have effects that extend beyond the mere possibility of accessing (legal) decision-making positions. It could help alter deep-seated attitudes toward gender roles in public life, a process that, in some European countries especially, has proven particularly slow and difficult. It could also help create an environment in which it is expected that women occupy higher judicial positions. However, referencing Jane Mansbridge's analysis of gender electoral quotas⁵¹, and applying her critical mass theory, we might argue that women's descriptive (or symbolic) representation does improve women's substantive representation, in the sense that it helps reach the threshold number of women that can impact judicial decision making.

Therefore, the risk of 'essentialism'⁵² should not prevent us from taking a further step towards holding that judicial gender balance makes a difference in the delivery of justice. Without underestimating the dangers of assuming the existence of a female perspective, I believe there is some justification for holding that female presence in the legal profession and, above all, in the judiciary, can play a fundamental role in the necessary activity of unveiling the myth of gender neutrality of law. Legal feminists have devoted much attention to how law constructs gender (and vice-versa), showing how "law does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities"⁵³. Moreover, the focus of feminist legal studies has long (and has not ceased to be) been on law as an instrument of male supremacy⁵⁴. It does not seem to be crucial to decide whether the law was designed by male elites for the purpose of disadvantaging and dominating women⁵⁵; rather, what really matters is that "policies designed for men have fit badly with women's lives"⁵⁶. Therefore, female judges might make a difference in the

⁵¹ Jane Mansbridge (2005), "Quota Problems", in *Politics & Gender*, 622.

⁵² Essentialism is the multifaceted criticism moved to the possibility of isolating a unitary woman's experience which originated in the Nineties with special regard to the need of taking into consideration the different experiences of black women: Angela Harris (1990), "Race and Essentialism in Feminist Legal Theory", in *Stanford Law Review*, 581.

⁵³ Rosemary Hunter, Clare McGlynn and Erika Rackley (2010), *Feminist Judgements: An Introduction*, in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.), *Feminist Judgements: From Theory to Practice*, Hart Publishing, 6, referencing Carol Smart (1989), *Feminism and Power of Law*, New York: Routledge. The topic has been largely discussed in postmodern feminist theory: Mary Joe Frug (1992), *Postmodern Legal Feminism*, New York-London: Routledge. Among Italian scholarship, see Tamar Pitch (1998), *Un diritto per due. La costruzione giuridica di genere, sesso e sessualità*, Milano: Il Saggiatore, and Barbara Pezzini (2012), "Costruzione del genere e Costituzione", in Barbara Pezzini (ed.), *La costruzione del genere. Norme e regole*, Bergamo: Sestante Edizioni, 15-73.

⁵⁴ On the origin and development of this assumption, tracing it back to the early feminist movement of the 19th Century, see Judith A. Baer (2011), "Feminist Theory and the Law", in Robert E. Goodin (ed.), *The Oxford Handbook of Political Science*, New York: OUP, 305-306.

⁵⁵ This assumption inspired the first national meeting of American feminists at Seneca Falls in 1848, and is still shared by contemporary radical feminists like Catherine MacKinnon.

⁵⁶ Judith A. Baer (2011), *supra* note 54, 307.

judiciary in the sense that their task in contemporary democracies has a great deal to do with the process of eradicating the persisting effects of “conventional legal doctrines, developed by men in a society dominated by men, [that] have a fundamental male bias even when they are ostensibly gender-neutral”⁵⁷. This might entail bringing gendered realities into gender-neutral law, continuing the activity of “uncover[ing] how law was moulded by male life experiences and values and aim[ing] to change it by writing women’s life experiences and values into such legal principles as justice and freedom”⁵⁸.

Assuming this is the desired and expected outcome of increased judicial gender diversity, do women judges really make a difference in delivering justice? This is the question any talk on reflective judiciary inevitably raises: is the presence of members of certain groups or minorities merely symbolic or does it have a real and effective impact on the delivery of justice?

Regarding female judgeship, the answer is far from simple. First, ‘female’ cannot be used as a proxy for ‘feminist’ and gender awareness is not the automatic result of an achieved gender balance in courts. One need only remember a fundamental consideration at the basis of any feminist discourse and research: “a feminist consciousness is a political achievement, not an inevitable result of being female or living life as a woman”⁵⁹. Things get even more complicated when one deepens the analysis of what ‘feminist consciousness’ means in general and what it might imply in judicial decision-making. A very convincing explanation of what judging like a feminist means was provided by Catherine Bartlett in 1990 in her ground-breaking work on feminist legal methods. Doing law as a feminist entails ‘asking the woman question’, which “is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups”⁶⁰. Still, doubts may arise regarding the existence of different feminisms and their multifaceted character. This specific aspect was taken into great consideration in the Feminist Judgments Projects, aimed at analysing the potentials of a more gender diverse judiciary. Rosemary Hunter, Clare McGlynn and Erika Rackley, who coordinated the group of feminist legal scholars set out to write alternative feminist judgments in significant UK legal cases, were concerned with the issue and therefore claimed that “much broader representation not only of women, but of feminisms among the judiciary is required before anything approaching true judicial diversity could be said to be achieved”⁶¹.

⁵⁷ *Ibidem*, 306.

⁵⁸ Tove Stang Dahl (1987), *Women’s Law: An Introduction to Feminist Jurisprudence*, Oslo: Norwegian University Press, 55.

⁵⁹ Sally J. Kenney (2012), *supra* note 6, 1526.

⁶⁰ Katharine T. Bartlett (1990), “Feminist Legal Methods”, in *Harvard Law Review*, 829, 836, 837-849.

⁶¹ Rosemary Hunter, Clare McGlynn and Erika Rackley (2010), *Feminist Judgments: An Introduction*, in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.), *Feminist Judgments: From Theory to Practice*, Hart Publishing, 13.

Similar practical exercises have been also conducted in Canada through the Women's Court of Canada that engaged in writing shadow opinions of some landmark decisions on the equality clause of the Canadian Charter of Rights and Freedoms⁶², and in the US, where a group of feminist lawyers rewrote certain Supreme Court's key judgments on issues of gender justice⁶³.

No analogous study exists with regard to the case law of the European courts, and the impact of a more gender diverse judiciary cannot be merely hypothetical.

When it comes to the Court of Justice, it has been stressed how difficult it is to study the impact of diversity including gender because judgments are given by the panels of the Court without dissenting or separate judgments and advocates general might help, but only in comparison with the judgment.

Another, easy, objection to the effective role of female judges can play concerns an incontrovertible fact: the vast majority of ECJ decisions significantly advancing women's rights were made by all-male judges. Many studies on the tribute gender equality must pay to the judiciary have pointed out the well-known fact that the development of the principle of equality between the sexes at the EU level has been a sort of 'side effect' of other policy initiatives aimed at achieving the common market and therefore functional to the free movement of goods, services and people⁶⁴. In other words, all-male panels of judges of the Court of Justice during the 1970s and 1980s made an excellent contribution to the improved situation of female workers while focusing on necessary equal labour market participation. However, until the late 1990s, "equal opportunities were acceptable so long as they did not interfere significantly with the operation of the Single Market"⁶⁵, whereas after the Amsterdam Treaty and the new mandate given to European institutions in the fight against discrimination, different forms of interventions began to be required for the advancement of women. The previously mentioned Treaty provisions in force since 1999 as well as the EU Charter of Fundamental Rights insist on the substantive dimension of the sex equality principle pervading every area of life, demanding new efforts to eliminate gender-based stereotypes, equalize care burdens between the sexes, combat gender-based violence and so on⁶⁶.

⁶² Partial results are published in the *Canadian Journal of Women and the Law* (2006), vol. 18, issue 1.

⁶³ Kathryn M. Stanchi, Linda L. Berger and Bridget J. Crawford (eds.) (2016), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, CUP.

⁶⁴ Heather MacRae (2010), "The EU as a Gender Equal Polity: Myths and Realities", in *Journal of Common Market Studies*, 155.

⁶⁵ Catherine Barnard (2012), *EU Employment Law*, IV ed., OUP, 255.

⁶⁶ See the *Strategic engagement for gender equality 2016-2019* setting the framework for the EU Commission's future work towards improving gender equality (available at <http://ec.europa.eu/justice/gender-equality/>)

4. Gender and judging: Some concluding remarks

This chapter has suggested that the gender composition of European courts matters. Increasing the presence of women judges is first and foremost an end in itself: women should have access to the judicial branch of government regardless of what they do with this tool of influence⁶⁷. Having said that, gender awareness in European courts seems to be more important than ever and the demand for women judges is not only a matter of equality between the sexes in the judicial decision-making process, but is intrinsically linked to the need to consider all public policies under a gender lens⁶⁸.

One of the reasons behind the recent debate concerning an increased presence of women judges in the CJEU is related to the peculiar task performed by the EU judiciary through its preliminary ruling function which is essential for the uniform application and implementation of EU law in all Member States. The integration of a gender perspective by the Luxembourg court will filter through to domestic jurisdictions in preliminary rulings with a ripple effect on national judicial behaviours: the interpretation and enforcement of EU law overtly or implicitly involving gender issues has an obvious impact on State sex equality policies and on the referral of cases that may have unintended gendered consequences. As Jessica Guth observed, the work of understanding the preliminary reference procedure from a gendered standpoint appears crucial, since “much is dependent on the judiciary in the home state as to the extent to which [...] gender questions are seen as important and worthy of referral”⁶⁹.

While judicial gender awareness might lead to different understandings and outcomes of the issues as the above-mentioned projects on feminist judgments are able to prove, the presence of female judges in the ECtHR is equally crucial. In my opinion, special attention should be devoted to the interplay between different contemporary feminisms and their impact on recent highly controversial gender-sensitive issues on which human rights courts are increasingly being asked to rule.

The most blatant example is religious dress: cases concerning Islamic veils involve many feminist issues, and decisions by both of the European courts do not show adequate judicial awareness of all of the issues contemporary feminisms argue about. The landmark Strasbourg decision *S.A.S. v. France* ruled that the French ban on face covering did not violate the ECHR’s provisions on sex equality, the right to privacy

⁶⁷ This is simply the “justice argument” much used in the debate over electoral gender quotas: equal representation is intended as an end in itself, and “women are freed from all the expectations of making - or on the contrary not making - a difference in politics” (D. Dahlerup, “The Dilemma of Quotas. Comment to Anne Phillip’s arguments for quotas”, in Anne Phillips (2000), *Democracy and the Representation of Difference and The Politics of Presence: Problems and Developments*, Aalborg: Aalborg Universitet, 27).

⁶⁸ Sally J. Kenney (2002), *supra* note 18, 257.

⁶⁹ Jessica Guth (2014), *Gendering the Court of Justice of the European Union*, paper available at paperroom.ipso.org/papers/paper_32600.pdf

and freedom of religion⁷⁰. One very interesting aspect of this decision is that gender lenses were applied, but the only feminist approach to the issue taken into consideration was the theory that Islamic religious clothing is oppressive to women, without any consideration of other theories explaining how gender inequality cannot be explained cross-culturally⁷¹. The veil issue was also addressed by the ECJ in two recent judgments ruling that an internal rule of an undertaking prohibiting the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination⁷². It is quite surprising that the Court—but first of all the national referring judges—concentrated only on interpreting the concepts of direct and indirect discrimination based on religion or belief within the meaning of Directive 78/2000/EC, with no incursion into the realm of problems that an intersectional approach to discrimination creates, including the impact religious neutrality might have on women.

Feminist legal methods might prove essential given that one of the aims and effects of ‘asking the woman question’, together with the adoption of the so-called ‘feminist practical reasoning’⁷³, is to challenge not only gender but also cultural and religious biases.

These are new challenges showing how gender equality is not fixed nor irreversible and how reality is gendered. But, if attention to gender implications in judicial decision-making is to avoid losing importance, is the achievement of a perfect gender balance in the courts likely to remain essential? Among the criteria for judicial appointments recently adopted in New Zealand, ‘reflection of society’ is explicitly mentioned and intended as the “awareness and sensitivity to the diversity of the community; knowledge of cultural and gender issues”⁷⁴. The biological sex of judges is not mentioned, perhaps because gender awareness is no longer supposed to be just a women’s issue.

Still, Sally Kenney makes a good point when, referencing Anne Phillips, she points out that “the idea that men should speak and act for women is patronising and [...] including women on the bench indicates the belief that women are capable of judging and symbolises the consideration of their experiences and perspectives”⁷⁵.

Now, given the fact that there is still little relationship between the proportion of female lawyers and the percentage of women accessing higher judicial positions in domestic and European courts, efforts for

⁷⁰ ECtHR, *S.A.S v France*, Application No. 43835/11, 1 July 2014.

⁷¹ On the feminist critique to the ban on Islamic veils see the recent Sital Kalantry (2017), “The French Veil Ban: A Transnational Legal Feminist Approach”, in *University of Baltimore Law Review*, 200.

⁷² ECJ, Case C-157/15, *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* and Case C-188/15 *Bouagnaoui and Association de défense des droits de l’homme (ADDH) v Micropole Univers*, both delivered on 14 March 2017.

⁷³ Katharine T. Bartlett (1990), *supra* note, 849-863.

⁷⁴ *Judicial Appointment Protocol 2013*, § 4, Crown Law Office, New Zealand.

⁷⁵ Sally J. Kenney (2002), *supra* note 18, 269.

increasing gender balance on the bench cannot stop. Only five of the 28 judges of the Court of Justice and ten of the 45 judges now sitting in the General Court are women, with a slightly higher presence of female Advocates General (three out of 11)⁷⁶. It appears that female presence in the European judiciary has only recently begun to shift from ‘tokenism’⁷⁷ to minority, while the move from minority towards parity seems neither automatic nor granted. It requires continuing efforts aimed at removing barriers to female lawyers’ access to judicial positions, which might include the revision of the traditional principles underlying the access and promotion procedure; the identification of criteria that might indirectly result in discrimination against women such as seniority, since the large number of years of professional experience required for some high-profile appointments works against women⁷⁸, and gender diversity in judicial appointment advisory panels⁷⁹. Moreover, domestic methods of judicial appointment and selection play a fundamental role: higher courts’ judges represent the so-called ‘qualified labour pool’⁸⁰ that needs to be expanded, since vertical segregation of women within the judiciary is still the reality in most EU Member States⁸¹. Furthermore, the high degree of politicization of the national processes of selecting candidates for both the ECtHR and the ECJ⁸² makes women breaking into the inner circles of power from which candidates are often chosen anything but irrelevant.

⁷⁶ Data available on the CJEU website (<https://curia.europa.eu/>). The Civil Service Tribunal, established on 2 December 2005, ceased to exist on 1 September 2016: its latest composition comprised two female judges out of the seven.

⁷⁷ Tokenism is intended as the isolated appointment of one or a small percentage of women in decision-making positions with the sole aim of showing that the position is formally open to women. Kenney is illuminating when she explains that “a token woman does not threaten the coding of a job—judge, or law professor—as male; instead, the token woman is exceptional, the honorary male” (Sally J. Kenney (2012), *supra* note 6, 1508). Tokenism is frequently used in the analysis of female judicial appointments: with regard to the US judiciary, Beverly B. Cook (1978), “Women Judges: The End of Tokenism”, in Winifred L. Hepperle, Laura Crites (eds.), *Women in the Courts*, Williamsburg, VA: National Center for State Courts, 84-105.

⁷⁸ These are some of the actions recommended to national jurisdictions and European institutions by the aforementioned *Report* on “Women and decision-making in the judiciary of the European Union” (*supra* note 15, at 53).

⁷⁹ It is worth noticing that the recently set up art. 255 Panel is an all-male body.

⁸⁰ This concept derives from US sex employment discrimination which is much used in the contemporary analysis of the gender underbalance in the judiciary: see for instance Sally J. Kenney (2012), *supra* note, 1506).

⁸¹ It is apparent that judicial appointments to the ECtHR and the CJEU depend to a great extent on the percentage of their presence in domestic higher judicial bodies, which varies significantly across countries but, with few exceptions, does not reach significant levels (Melody E. Valdini, Christopher Shortell (2016), “Women’s Representation in the Highest Court. A Comparative Analysis of the Appointment of Female Justices”, in *Political Research Quarterly*, 865).

⁸² Michal Bobek provided some signals of the de-politicization of the judicial selections to the European courts (Michal Bobek (2016), “The Changing Nature of Selection Procedures to the European Courts”, in Michal Bobek (2016), *supra* note 32, 10). However, non-merit criteria must not to cease to be important where judges are not career judges, recruited by public competition, but are appointed based on democratic ideas justifying the involvement of political parties and/or legislative assemblies. This is the case of most common law judges, constitutional, international and European courts.

Reflective Judiciary: more an illusion than a temptation

by **Mario E. Comba**

Professore ordinario di Diritto pubblico comparato
Università degli Studi di Torino

Table of contents: 1. The right to be judged by Peers. 2. The two models of the Judiciary. 3. Federalism. 4. Reflective judiciary. 4.1. Reflective Judiciary as descriptive representation 4.2. Reflective Judiciary as a way to “judge differently”

1. The right to be judged by Peers.

Any discourse about the Judiciary and its role in the contemporary comparative constitutional debate cannot do without a reference to the Separation of Powers Theory, where the idea itself of a Judiciary as an autonomous function, separated from the Administration or the Executive, was elaborated for the first time. According to medieval political theory, the two activities traditionally performed by the King were *Gubernaculum* and *Juridictio*¹: the latter – consisting in the definition of a legal right - was a mixture between what we now conceive as the two separate regulatory and judicial functions, collectively considered, as opposed to the *Gubernaculum* or *Imperium*. The main difference between the two is that *Juridictio* was limited by principles of reason, while *Gubernaculum* or *Imperium* was not, since it was up to the discretion of the King².

It was Montesquieu who conceived the distinction between administrative and judicial activities and thus fostered the need to entrust two different bodies with those two different activities, consequently overcoming the unity of the *Juridictio* within the King’s powers. It is interesting to note that in Book XI, Chapter VI of the *Esprit des Lois*, where how Constitutions can establish political liberty and the principle of separation of powers are described, Montesquieu suggests how to render the Judiciary an “invisible

¹ C.H.McIlwain, *Constitutionalism: Ancient and Modern*, Cornell University Press, 1940, *passim*.

² L. Mannori, B. Sordi, *Storia del diritto amministrativo*, Roma-Bari, Laterza, 2001, p. 36-71, describe what they call the Jurisdictional State, where jurisdictional and administrative function are mixed.

power”. In order to obtain such invisibility, judicial decisions must be taken by lay-men and not by professional judges:

«The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people, at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.

By this method, the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.³ »

Not only this, but Montesquieu seems even to envisage something similar to a Reflective Judiciary, when he states that judges must be peers of the accused to avoid the idea of having fallen into the hands of persons inclined to excessively rigorous judgements.

Judges ought likewise to be of the same rank as the accused, or, in other words, his peers; to avoid imagining to have fallen into the hands of persons inclined towards rigorous treatment⁴ »

This must not be surprising, if we consider that one of the typical features of medieval law – still alive in the *Ancien Régime* period when Montesquieu was writing - was personality, as opposed to the territoriality of law. Far from being subject to a uniform law throughout the entire territory of the Kingdom, every person could claim to be judged according to the law – and sometimes also by judges – pertaining to the same community or guild, or corporation. The two most evident cases were special laws and special tribunals for churchmen (*ius ecclesiae*) and for merchants (*lex mercatoria*), but every single community had its own privileges, among which the right to be judged by peers and according to specific laws or customs were not uncommon. The medieval legal pluralism was in fact characterized by several *iura propria*, each for any community, changing according to different lands, coexisting with an *ius commune*, derived from Roman law and as such pretending to be universal but applicable only when *iura propria* were lacking a specific solution⁵.

In order to understand this situation better, one has to realize that the medieval legal pluralism was grounded in a plurality of sources of law, which was possible because the political power did not have a monopoly regarding the creation of laws, but was indifferent to the production of law so that any group, any “*ordo*”, could legitimately create its own law and have it applied by its own judges⁶. And, in turn, this pluralist production of the law required a communitarian society, where the single person did not have

³ Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1. Pp. 200-201 (available on oli.libertyfund.org).

⁴ Montesquieu, cit., p. 202.

⁵ P. Grossi, *L'ordine giuridico medioevale*, Bari, Laterza, 1995, p. 52 – 56.

⁶ P. Grossi, cit., p. 50-51.

any legal relevance as an individual but only as part of a community – an “*ordo*” - so that each person was subject to the law produced by their own community⁷.

Medieval legal pluralism declined at the beginning of the Modern Age, when a process towards the consolidation of National States began: the trend from legal pluralism to legal monism led eventually to the enactment of civil codes to be intended as the strongest expression of a uniform law, in a system of hierarchy of the sources of law where law could only be approved by the political power and by no means by single communities.. The process towards legal monism spanned several centuries, was multifaceted and followed different paths in different parts of Europe. It can, however, be traced along one of its main cultural assumptions in the “fabrication” of sovereignty performed in France at the end of XVI century.

When J. Bodin published *Les six livres de la République* in 1576, there was still no country in Europe in which his idea of sovereignty had really been implemented⁸: he did not describe the existing situation, but suggested the possible evolution of a political situation that only in France and England already reflected some essential elements of his idea of sovereignty, but without being aware of it⁹. When Bodin’s ideas spread to other European countries¹⁰ they were adapted to local traditions and political situations, but everywhere the common feature was the overcoming of legal personalism and of the recognition of *iura propria*, in favour of the unification of the law under one only political authority entitled with the power to create it. A mixed government in England (the King and the Parliament), as well as federalism in Switzerland and in the US and later in Germany, were the main exceptions to the theory of indivisible sovereignty, but they cannot be traced back to the medieval fragmentation of powers on a personal basis because they do not consist in the concrete attribution of different powers to different independent holders. In fact, they still imply the existence of an abstract power, a unique power rather than a sum of the parts¹¹; even if this power is divided (between the King and the Parliament, or between the Federation and a number of States) –signifying a divergence from the Bodin’s model – what is divided is, however, a power that was originally united and only subsequently divided, for the sake of historically established political and constitutional compromises.

Legislative monism implied jurisdictional monism: if the law is only one throughout all the territory of the Kingdom and has been created by a sole political power there is no reason to differentiate judges nor

⁷ P. Grossi, cit., p. 75 – 82.

⁸ D. Grimm, *Sovereignty*, Columbia University Press, New York, 2015, p. 23.

⁹ D. Grimm, cit., p. 15

¹⁰ According to Grimm, cit., p. 24, *Les six Livres de la République* were very soon translated in Latin and were published in Italian in 1588, in Spanish in 1590, in German in 1592 and in English in 1606.

¹¹ D. Grimm, cited, p.32.

to be judged by peers, as every judge will apply the law in the same way, whatever his cultural background and personal ideas. A good example, showing how far in space and time Bodin's influence expanded, can be found in the words of Chief Justice Ward of the Supreme Court of Tonga:

*«The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation».*¹²

Again, the process of jurisdictional unification was long and multifaceted (e.g., in the Kingdom of Sardinia, special Tribunals for Churchmen were abolished only in 1850), although eventually the principle of jurisdictional monism was applied both in common law and civil law legal traditions. The “double jurisdiction” model current in some euro-continental countries – implying the existence of Administrative Tribunals which have jurisdiction on administrative acts - is only apparently an exception, since it is not based on the personality of the parties, but on the nature of the object of the judgment (administrative act or, in Italy, an act deriving from the exercise of a public power)¹³.

A greater difference can, however, be noted between common law and civil law judiciary models, which is relevant for the purpose of this research and explored in the following paragraph.

2. The two models of the Judiciary

The separation of powers Theory was applied differently on the two sides of the Atlantic¹⁴. The American Constitution of 1787 is the more strictly adherent to Montesquieu, particularly where the role of Judiciary is concerned: the judge has to be independent, but since he can only “declare” the content of the law, and is therefore invisible for Montesquieu and is “*the least dangerous branch*” for Hamilton¹⁵. In the USA the King was substituted by the elected President, who kept a supremacy position also in relation to the Judiciary through the power to appoint Federal Judges (albeit with the advice and consent of the Senate), but very soon the Supreme Court self-empowered itself with the jurisdiction to annul laws of the

¹² Attorney-General v Namoā [2000] TOSC 13. Cited in A. Diedzic, *Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary*, in this Issue.

¹³ For the implementation in Italy, see A. Poggi, *Il sistema giurisdizionale tra attuazione e adeguamento della Costituzione*, Napoli, Jovene, 1995.

¹⁴ M. Comba, *The Evolving Concept of Separation of Powers and Independent Administrative Agencies*, in R. Caranta, M. Andenas, D. Fairgrieve (eds.), *Independent Administrative Authorities*, BIICL, London, 2005, p. 225.

¹⁵ Madison, Hamilton and Jay, *The Federalist Papers*, (London, Penguin Books, 1987 – 1st edition New York 1788), paper 78 (attributed to Hamilton), according to whom: “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 of the political rights of the Constitution, because it will be the least in a capacity to annoy or injure them”. Needless to say this assessment was soon contradicted by the following evolution of the American constitutional system: A. Bickel, *The Least Dangerous Branch*, Indianapolis, the Bobb-Merrill company, 1962.

Congress and of the several States, thus invading one of the first prerogatives of the Legislative power and beginning the long march to become the “*most extraordinarily powerful court of law the world has ever known*”¹⁶.

In France, art. 16 of the *Déclaration des Droits de l’Homme et du Citoyen* of 1789 contains what can be considered a formal constitutionalising of the Separation of Powers: “*Toute Société dans la quelle la garantie des Droits n’est pas assurée ni la Séparation des Pouvoirs déterminé, n’a point de Constitution*”. However, it was only a formula because the Revolution – following Rousseau much more than Montesquieu - wiped out any concern about checks and balances, introducing an almighty Legislative Assembly entrusted virtually with any power, and leaving to the Judiciary only the ancillary position of *bouche de la loi*, forced to go back to the Legislative Assembly and ask for a *référé législatif* whenever a new question arose which was not explicitly regulated by the law in order to avoid “creative” interpretation. This is another important difference with the common law judge who can have a creative role in the formulation (or discovering) of the common law, when a statute of the Parliament does not regulate a specific case and, moreover, can bind other judges to the new rule that has been implemented, through *stare decisis*.

In this institutional environment, evolution similar to the US Supreme Court is clearly unthinkable as it because it would be unthinkable, for a French judge, to stand against the law and even declare it null. This kind of Judge – also known as the “post-Jacobin Judge”¹⁷

– has only the power to interpret the law using the hermeneutical tools at his disposal and therefore perform a task similar to that of all other public officers, with just some extra guarantees of independence, but without the special position awarded in the common law model to the Judiciary who can to some extent become quasi-political, as, for example, in the US Supreme Court.

When it comes to the legitimation of the Judiciary, selection procedures, among others, are the relevant issue¹⁸. The first model (Anglo-American) suggests a “political” origin, due to the politically triggered procedure of appointment, strengthened by the professional and social selection of the candidate judges, who are chosen among law experts already at the apex of their legal careers. Moreover, the Anglo-American model shows an additional quest for legitimation through the widespread recourse to juries, which implies the introduction of layman’s judgment in the process as opposed to the non-elected (but

¹⁶ As it is defined by Bickel, cit., p. 1.

¹⁷ G. Lombardi, *Premesse al corso di diritto pubblico comparato*, Torino, Giuffrè, 1986, p. 44.

¹⁸ For a comparative analysis of judges selection procedures in Europe, see: G. Oberto, *Recrutement et formation des magistrats en Europe, Etude comparative*, Strasbourg, Editions du Conseil d’Europe, 2003. At the Council of Europe level, data on recruitment of judges can be found in the CEPEJ studies n, 23, *European judicial Systems, Efficiency and Quality of Justice*, edition 2016 (2014 data), pp 81-111.

still appointed by elected officers) judge, even if it should not be underestimated that the jury can only establish the facts and not interpret the law.

Contrary to the first, the second model (the French-Euro-continental-model) finds its legitimation in the technical competence of the judge, selected through a concourse aimed at testing his knowledge of the law and of interpreting techniques. This model presupposes that identity and cultural background of the judge becomes irrelevant with regard to judging activities, as the law need only be applied as it stands, leaving only the technicality in the hands of the judge. Impartiality being a fundamental element – according to this model – means avoiding any possible influence from “parties” in the application of the law, whatever is the community or the corporation which the “party” belongs to.

It follows from this schematic distinction of the two models in the selection and legitimation of Judges that the Anglo-American model could seem to be more keen to adhere to the “temptation” of Reflective Judiciary, because as it does not lack links with the political process, which is representative of its own nature. However, apart from the discourse about juries, which cannot be deepened here, it is well known that the Anglo-American system provides Judges with several guarantees of independence (first of all life tenure), aimed at disconnecting the Judge from the political party that suggested his appointment¹⁹. It is thus not possible to say that the common law Judge is more “reflective” than the civil law Judge because we do not have sufficient normative elements to support this thesis²⁰.

3. Federalism

As we have seen in paragraph 1, federalism is one of the two major exceptions to the widespread application of the sovereignty theory (the other being the English mixed government). In fact the federal State challenges the indivisibility of sovereignty because it encompasses several States and the federal State insisting on the same territory and the same population, so that neither the member States nor the federal State can claim to be entitled with complete sovereignty²¹. If sovereignty is indivisible – as it is indeed according to Bodin’s teaching - either it belongs to the federal State, and then member States are not sovereign, or it belongs to each Member State in its territory, and then the federal State is not sovereign.

¹⁹ For UK, before and after the reform of 2005, see S. Shetreet, S. Turenne, *Judges on Trial. The Independence and Accountability of the English Judiciary*, Cambridge, 2013, passim.

²⁰ This is also the conclusion of S. Turenne, *Fair reflection of Society in Judicial Systems*, in S. Turenne (editor), *Fair reflection of society in judicial systems – A comparative Study*, Springer, Heidelberg, 2015, p. 1-22.

²¹ D. Grimm, cited, p. 51, The debate in the US, Switzerland and Germany about the possibility to reconcile the federal State and sovereignty is accurately reported by Grimm, pp. 51 – 67

The term “federal State” implies the separation, the partition of sovereignty and hence of the State powers through which sovereignty is exercised. But while the first and by far most studied feature of the federal State is the apportionment of the legislative power between the federal State and Member States, the study of the judicial system in federal States is more neglected²². This is perhaps due to the fact that, at least in Europe, there is a widespread dissociation between legislative and judicial federalism: only Germany and Switzerland have federal-style judiciary systems (however very different from the US system), while the jurisdictional function is strictly reserved to the central government in Belgium and Austria, as well as in States with accentuated regionalism, such as Spain, Italy and in States subject to devolution, such as the United Kingdom.

From a comparative perspective, the models followed to apportion the judicial power in federal States are mainly two²³: the US and the German, which to some extent is applied also in Switzerland. The first encompasses two separate judicial systems – actually, 51 different judicial systems, one for each State and one for the federal State – and allows the possibility for the federal Supreme Court to intervene as appellate judge on State court decisions only in specific cases, while the latter is a pyramidal model²⁴, where all first and second degree judges are local judges, appointed and administered by the *Länder*, and last instance judges are all Federal judges. Canada follows the second model, since the Founding Fathers explicitly refused to follow the two-tier US model considering it detrimental to correct and impartial application of justice²⁵. India too does not have parallel judiciaries at state and federal levels, but state systems which are subject to the federal Supreme Court²⁶.

In the first model, the main apportionment criterion is law-driven, in the sense that every judge (state/federal) has jurisdiction on cases regulated by its own law (member State judges decide cases subject to state law, while federal judges decide cases subject to federal law, in addition to other less common cases, according to art. 3 of the federal Constitution), so that finality of member State Courts decisions is guaranteed – except for cases where a final intervention of the federal Supreme Court is admitted. The second model, on the contrary, aims at the uniform application of the law (both federal

²² M. Comba, *Le declinazioni del pluralismo normativo nella forma di Stato multilivello: il Judicial Federalism degli Stati Uniti, Un modello (incompiuto?) di tutela pluralista dei diritti*, in *Federalismi* (www.federalismi.it), 31 maggio 2017, p. 1.11.

²³ F.G. Pizzetti, *Il giudice nell'ordinamento complesso*, Giuffrè, Milano, 2003.

²⁴ The German-Swiss model is extensively described by Pizzetti, *Il giudice nell'ordinamento complesso ...*, cit., p. 20 – 26.

²⁵ E. Ceccherini, *In Judiciary We Trust, the reflective Judiciary in Canada*, in this Issue, par. 3. In Canada, only the first level of Jurisdiction (Provincial or Territorial Courts) is subject to Provinces for organization and appointment, while the other two levels (Superior Courts and Court of Appeals) are federal, albeit they are located in provincial territories.

²⁶ D. Francavilla, *Diversity and the Judiciary in India: Supreme Court Judges in Indian society*, in this Issue, par. 1.

and state law), so that local and federal law are both interpreted and applied, at the lower levels, by *länder* judges, while they are both under the jurisdiction of federal judges in the last degree.

In the perspective of Reflective Judiciary, the US model seems nearer to the medieval system of *iura propria*, since every US citizen has the right to be judged by the Courts of his own State, if the applicable law has not been delegated to the federal Congress under article 1 of the federal Constitution. On the other side, the German model is clearly influenced by the unitary sovereignty discourse, since it is aimed at securing the uniform application of both *länder* and federal law throughout all the federal territory.

The study of judicial systems under the perspective of the federal State can, however, be approached also from another point of view: in fact the focus can be shifted from member State Courts and the finality of their decisions to the composition of federal Courts and, in particular, to the possibility for Member States to be somehow represented (or reflected) in federal Courts. In other words, if we look at the composition of (Supreme) federal Courts, it can happen that constitutional, legislative, conventional or whatever rule is competent, provides for the presence of judges representing territorial partitions of the federal State. As it will be seen more accurately in the following paragraph, and as it results from the other reports of this Issue, territorial or linguistic representation is provided at the constitutional level for federal Supreme Courts of three federal States (Canada, Belgium and Switzerland) where in fact there is no Judicial federalism at all (Belgium) or the Judicial system is German-like, with no guarantee of finality for decisions of cantonal Courts (Switzerland and Canada). In India, too, geographical diversity is guaranteed in the Indian Supreme Court, even if not by a constitutional provision then by informal practice. Conversely, in the US Supreme Court there seems to be no evident territorial representation (but reflection on the basis of gender, race, religion), perhaps rightly because judicial federalism is already satisfied with finality of member State Courts decisions.

This second approach in the study of judicial systems under the perspective of the federal State – that is the composition of federal (Supreme) Courts - can perhaps be considered not far from the contemporary theory of the Reflective Judiciary, which will be examined in the next paragraph, against the background of the historical and theoretical reconstruction briefly reported in the first three paragraphs.

4. Reflective judiciary

The definition of Reflective Judiciary is highly controversial and it cannot be discussed here because it is too vast and multifaceted. An accurate reconstruction can be traced in the paper from Anna Dziedzic, published in this Issue, whose Part II is in fact entitled: “*Two understandings of reflectiveness*”: reflectiveness can be assessed on what judges do or, as a second possibility, on what judges are, and this distinction is

derived from the two categories of representation described in the famous work of Hanna Pitkin: in the first, representation is conceived as an activity, where the representative acts for someone else in an agent/principal relationship (so called “responsive representation”), while in the second the representative stands for, is similar to someone else (so called “descriptive representation”)²⁷.

However, the fact itself that literature prefers the world “Reflective Judiciary” rather than “Representative Judiciary” is a clear signal of the underlying contradiction characterising the debate: a Judge cannot represent anybody because he must be impartial and if he represents someone he is partial. Therefore the “responsive representation” – the representative as acting for someone - cannot be applied to the Judiciary and this result allows the exclusion of any analogy between the modern theory of Reflective Judiciary and the medieval personality of law, as described in paragraph 1. Moreover, considering the anti-majoritarian nature of the Judiciary, that is his role a counter power towards the Legislative and Executive, it would be really contradictory to pretend that there is a representative nature of the Judiciary, so as to reproduce the same interests represented in Parliament.

The Reflective Judiciary is thus not intended to recognize *iura propria* to different communities or corporations, because it is developed under the monistic theory of law, subject to the monopoly of the political power, and under this perspective it seems not to question the main result of the sovereignty theory. Nor would it be admissible to imagine a Reflective Judiciary aimed at interpreting the (unique) law in different ways according to the groups or the corporations to which the parties belong, because that will be even logically contradictory.

4.1. Reflective Judiciary as descriptive representation

If the term “Reflective Judiciary” is not just a hypocritical way to name the representative judiciary – in the sense of responsive representation - but rather the choice of the wording marks a profound and well-meditated difference, then one must ask oneself, what are we talking about when we refer to the “Reflective Judiciary” And the answer must be sought in the idea of descriptive representation: “Reflective Judiciary” is aimed at making judicial decisions accepted and approved by a particular community for trust in the judiciary to subsist, in order to strengthen the judges’ credibility²⁸ (by the way, this is also what Montesquieu was referring to, in the quotation reported in par. 1). In other words, the “Reflective Judiciary” has to do with the perception by the people of justice being done, which is ultimately connected to the discourse about the legitimation of the judiciary. I am well aware that need

²⁷ H. F. Pitkin, *The Concept of Representation*, University of California press, 1967.

²⁸ Turenne, *Fair reflection ...*, cit., p. 12

for diversity in the composition of Courts can be justified also with other reasons, but here I will focus on the “Reflective Judiciary” as a legitimation for Judiciary, which is perhaps the more common, postponing the other reasons later on, in paragraph 4.2.

First of all it must be noted that the need for legitimation of the Judiciary can be felt only if interpretation is not considered a neutral but a creative activity, so that the Judiciary is not any more an invisible power, like in Montesquieu, but a real one. It is no coincidence that one of the most interesting literatures about legitimation of the Judiciary is the US one, having to address the position of the US Supreme Court as a self-empowered constitutional Court. And it is equally no coincidence that one of the strongest replies to the problem of legitimation of the US Supreme Court relies on the theory of the original intent, or textualism, restraining the Court’s interpretative activity only to the literal (or original, which may not be the same) meaning of the Constitution.

In reality, diversity in the composition of Supreme Courts is not the only way to foster reflectiveness of the Judiciary with a view to strengthening its legitimation: there are other means which can be utilized to this end, pertaining to the organization of the Courts and their efficiency. For example, length of processes (especially in Italy), perceived independence of Judges from the political and economic power, efficient communication of Judges’ activities and, above all, the reasoning of their decisions²⁹. However, composition of the Supreme Courts is the most common – and perhaps the easiest – feature studied in literature about the “Reflective Judiciary”, as well as in the reports of this issue.

For an ordered analysis of the issue, it seems necessary to begin with the cases where an explicit diversity criterion for the appointment of judges can be found in the Constitution or in other competent norms. According to the reports of this Issue, it results that such explicit criteria can be found in Canada, Belgium and Switzerland, while US and India lack such an explicit criterion, but are provided with informal practices or even constitutional conventions, which will be examined later. In the three cases cited, the kind of diversity almost uniquely taken into account is the language/territorial diversity: in Canada, out of nine judges, three are entitled to Québec³⁰; the Belgian Constitutional Court is composed of twelve judges, of which six belonging to the Dutch language group and six to the French language group and one of the twelve must have an adequate knowledge of German and, most notably, in 2014 a Law required the Court to be composed of at least a third of judges of each sex; in Switzerland, art. 175 of the Federal Constitutions states that the various geographical and language regions of the country must be

²⁹ Turenne, *Fair reflection ...*, cit., passim

³⁰ E. Ceccherini, *In Judiciary We Trust ...*, cit., par. 4

appropriately represented, which ensured that two or three of the seven Judges represent cultural minorities and are either French, Italian or Romanish speakers³¹.

Apart from the gender quota introduced in Belgium in 2014, all the diversity provisions existing in the three federal States mentioned above are related to language/territory and this stipulation is easily understandable, considering precisely that they are federal States, but do not have a judicial federalism structure like the US, which is a strong guarantee for finality of member States Courts' decisions. In addition, Canada and Switzerland, unlike the US, have linguistic pluralism which may justify the compulsory presence of judges understanding minority languages also for practical reasons. It is, however, still necessary to distinguish between the Swiss and Canadian cases, where the presence of judges from linguistic minorities can be considered as an expression of descriptive representation, aimed at helping minorities to accept the Court decisions, and the Belgian case, where there are not minorities, but two linguistic groups equally represented in the Court.

A different discourse is required by the analysis of European Courts, whose composition is strictly organized on a nationality basis³²: in this case, a federal State is lacking and *a fortiori* a federal Court. This situation justifies a nationality-based composition which seems to be a political requisite, strictly linked to the legitimation of the Court and not watered down by the introduction of a judicial appointment panel.

If we take into consideration informal practices or constitutional conventions imposing diversity in the composition of Supreme Courts, then the picture becomes much broader and more fragmented. Perhaps the easiest example is again the composition of the US Supreme Court: until the end of the XIX century the main concern was geographical representation, but with the XX century other diversity criteria came into consideration: religion, with the appointment of the first Jewish judge in 1916 (Louis Brandeis), race (Thurgood Marshall in 1967), gender (Sandra Day O'Connor in 1981) and other nationalities (Antonin Scalia in 1986, Sonia Sotomayor in 2009). In India, "*informal practices exist in order to promote a judiciary that is reflective of Indian society by taking into account the vast range of diversity in India with regard to states, religions, social background, and gender*".³³ In fact informal practices are very important in Indian procedure for appointment of Federal Judges, mainly regarding four types of diversity: geographical origin of the judges,

³¹ E. Belser, F. Cramer, R. Oleschak-Pillai, *The Long Journey of Women to the Courts: Some Evidence on Gender Diversity and Gender Awareness in the Swiss Federal Supreme Court*, in this Issue, par. III.1

³² M. Caielli, *Why do women in the judiciary matter? The struggle for gender diversity in European courts*, in this Issue, par. 2.

³³ D. Francavilla, *Diversity and the Judiciary in India: Supreme Court Judges in Indian society*, in this Issue, p. _____, par. 1.

religion, backward castes and gender, yet geographical representation is much more important than the other criteria³⁴.

It is, however, possible to say that presently the most widespread quest for diversity in the judiciary pertains to gender diversity, thanks to a vast literature on the subject³⁵ and in fact it is also the question more widely discussed in the papers of the Issue. The general outlook about gender diversity in the Judiciary, apart from the Belgian law of 2014 – which, however, is not yet completely implemented – seems to be quite unsatisfactory because generally speaking women are still a minority in top-ranking judicial positions³⁶.

4.2. Reflective Judiciary as a way to “judge differently”

Literature on gender diversity in the Judiciary is also very interesting for addressing the question whether women judge differently and, particularly, if women judge more favourably to women (do women represent women?)³⁷. Choosing to address this question means deciding to move from a definition of Reflective Judiciary limited to descriptive representation and trying to do the following step: diversity in the Courts is meant not only to achieve acceptance of judicial decisions by communities or corporations whose members are present in the composition of the Court, but also to influence the output of the Court. This does not mean to equate the “Reflective Judiciary” with “responsive representation”, but it gets closer than simple descriptive representation which only pretends to legitimize the Judiciary through the participation of members of different groups or corporations: in this case, it is not only a question of who judges are, but also of what judges do.

Given that increasing the number of women – as well as of minorities - in the Judiciary is an aim in itself because it should be the result of an equal opportunities policy, the point is whether the presence of women in the Courts really makes a difference in delivering justice, by “*asking the woman question*”³⁸. Feminist legal scholars in UK, in Canada and in the US set out to re-write judgments of their country Supreme Courts in a feminist perspective, namely as if the majority of the Court were composed by women (by feminist women)³⁹ and Mia Caielli, in the paper published in this Issue, criticizes the ECtHR decisions on religious dress from a “women’s” point of view⁴⁰. The assumption is that women can have

³⁴ D. Francavilla, *Diversity and the Judiciary in India...*, cit, par. 3, referring to A. Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court*, Delhi, Oxford University Press, 2014.

³⁵ M. Caielli, *Why do women in the judiciary...*, cit., par. 1

³⁶ M. Caielli, *Why do women in the judiciary...*, cit., par. 1

³⁷ M. Caielli, *Why do women in the judiciary...*, cit., par. 1 and 3

³⁸ M. Caielli, *Why do women in the judiciary...*, cit., par. 3

³⁹ M. Caielli, *Why do women in the judiciary...*, cit., par. 3

⁴⁰ M. Caielli, *Why do women in the judiciary...*, cit., par. 4

such a different approach to legal problems, due to their different understanding of reality, that inevitably they will produce a different judicial outcome if they were in majority. Moreover, according to some legal feminist studies, female judges could “*uncover how law was moulded by male life experiences and values and aim to change it by writing women’s life experiences and values into such legal principles as justice and freedom*”⁴¹. A distinction is necessary on this point, though: in fact it’s one thing to promote diversity in Courts in order to enrich the overall competence and experience of the Court and consequently to allow the Court to interpret the law also from different points of view and eradicate “*fundamental male bias*”⁴²; it’s another thing to foster the appointment of female judges in order to change how law is moulded and to modify male values allegedly underlying the law. The latter is certainly a “harder” version of the approach, implying not only interpretation of the law, but also its modification, with some consequences which will be further explored below.

The approach of Reflective Judiciary as a way to “judge differently” requires some comments.

First of all, every litigation lawyer is well aware that the composition of the Court matters: some judges are known for being more formalistic and other more interested to the *ratio* of the law; a President of the Court may be more keen to listen to long oral arguments while another will cut them short: more simply, every judge is usually tied to his or her own precedents and is thus likely to follow the same interpretation of the same law as he or she did in the past. However, it is always a question of a single judge’s positions and preferences, not of a judge as member of a group whose vision he is pretending to foster, apart perhaps from the case of judges who are strongly politically-oriented and as such linked to political parties, which is, however, another question. Yet returning to the initial matter, to say that women judge differently, in favour of women’s rights, is a highly hypothetical exercise, with no easy possibility to be tested or checked, especially in judicial systems where dissenting opinions are not admitted, as it is acknowledged in some reports on this Issue⁴³ and it is therefore very difficult, if not impossible, to assess it.

Moreover, awareness of women’s needs and of women’s perspectives on legal problems cannot necessarily be found only in women, but it can also be a question of education of judges, regardless of their gender, in order for them to be aware of all, or at least of the main points of view: “*diversity, then, can*

⁴¹ M. Caielli, *Why do women in the judiciary...*, *cit.*, par. 3, citing Tove Stang Dahl, *Women’s Law: An Introduction to Feminist Jurisprudence*, Oslo, Norwegian University Press, 1987, p. 55.

⁴² M. Caielli, *Why do women in the judiciary...*, *cit.*, par. 3, citing A. Baer, *Feminist Theory in the Law*, in R.E. Goodin (ed.), *The Oxford Handbook of Political Science*, New York, OUP, 2011, 307.

⁴³ E. Belser, F. Cramer, R. Oleschak-Pillai, *The Long Journey of Women to the Courts...*, *cit.*, par. 1: “*We are, however, not in a position to show a causal link between gender diversity and gender awareness of judicial outcomes*”; see also M. Caielli, *Why do women in the judiciary...*, *cit.*, par. 3.

be a factor in defining merit, taken in a broad and contextual sense, rather than the opposite of merit.”⁴⁴ In other words, merit can be widened to personal qualities and ability to understand and deal with people, correspondingly reducing advocacy skills in the selection of judges, as it has been done by the UK Judicial Appointments Commission⁴⁵.

Finally, and more important, if considered in its “harder” version, the examined approach can raise some doubts about its compatibility with the separation of powers and with democracy itself. In fact, if it implies that women judges will impose their values in order to eradicate male values enshrined in the law, then it will modify existing laws (or Constitution) through judicial decisions on the basis of the values shared by single judges. The line between interpretation and modification of the law is notoriously very fine, but it still exists and it cannot be overcome without jeopardising both the judicial function and the democratic process. In performing his or her professional activity, the judge shall not be driven by personal values and should not modify the clear wording of the law because if he or she does so, that judge betrays the basic judicial function. If the judge adheres to values different from those enshrined in the law he or she has to apply, that judge is certainly subject to a dramatic choice, but he or she has no choice but to follow the literal meaning of the law, which was approved by a truly representative Parliament⁴⁶. The “Reflective Judiciary” should not be used to get by judicial means what was not possible to get through the democratic legislative process.

⁴⁴ D. Francavilla, *Diversity and the Judiciary in India*..., cit, par. 1.

⁴⁵ Turenne, *Fair reflection* ..., cit., p. 19.

⁴⁶ N. Zanon, *Pluralismo dei valori e unità del diritto: una riflessione*, in Quaderni costituzionali, 2015, p.919.



About the Authors

- **Alfred C. Aman jr.** is Full Professor of Administrative Law at the Indiana University Maurer School of Law;
- **Mia Caielli** is Associate Professor of Comparative Public Law at the University of Turin;
- **Eleonora Ceccherini** is Associate Professor of Constitutional Law at the University of Genoa;
- **Mario E. Comba** is Full Professor of Comparative Public Law at the University of Turin;
- **Anna Dziedzic** is PdD Candidate at the Melbourne University School of Law;
- **Domenico Francavilla** is Associate Professor of Comparative Private Law at the University of Turin;
- **Anna Mastromarino** is Associate Professor of Comparative Public Law at the University of Turin.



Numero speciale / Special Issue

5/2018

9 novembre 2018

