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# Minority Vetoes in Consociational Legislatures: Ultimately Weaponized?

DEVIN F.J. HAYMOND\*

*In societies emerging from or at risk for conflict, dividing power among rival groups—called power-sharing—can be an appropriate arrangement to maintaining peace. But how can groups, who are often emerging from violent conflict, trust sharing a government with rival groups that were just recently shooting at them?*

*A potential solution is the minority veto, which allows minority groups to block the government from harming those groups' vital interests. But what sorts of change blocking mechanisms constitute a minority veto? Who gets the veto power, and when can they be used? Do minority vetoes function as effective incentives for ensuring consensus-based support and the protection of minority interests, or are they merely political weapons that logjam governmental actions?*

*This Paper outlines the advantages and disadvantages of various minority veto design options in the context of consociational power-sharing arrangements, and inspects the formal legislative minority veto mechanisms in Northern Ireland, Belgium, Bosnia-Herzegovina, Kosovo, and Macedonia. Minority vetoes can successfully protect minority groups' vital interests, but vetoes must be designed effectively in the consociational arrangement in order to avoid the veto's weaponization, political deadlock, and increased tensions.*

## INTRODUCTION

Power-sharing is seen as a critical political strategy for dealing with protracted conflicts: rival groups are more likely to accept peace when they are given a share of the power.<sup>1</sup> Consociationalism, often equated with power-sharing more generally,<sup>2</sup> is a theory of institutional design for deeply divided societies pioneered by Arend Lijphart in the 1970s. The aim of consociational power-sharing is to promote and incentivize consensus-based intergroup cooperation by dividing power among rival identity groups. Consociationalism has four

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<sup>1</sup> See generally BARBARA WALTER, COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS (2002).

<sup>2</sup> For the purposes of this Paper, the terms “consociationalism” and “power-sharing” are used both together and interchangeably.

institutional pillars: (1) a “grand coalition” of all significant ethnic communities within a society; (2) segmental autonomy; (3) proportionality; and (4) minority vetoes.<sup>3</sup> The grand coalition and segmental autonomy are the primary pillars, reinforced by proportionality and the minority veto.<sup>4</sup>

The first primary pillar of consociationalism is the grand coalition in which all major groups involved in the conflict are represented.<sup>5</sup> Leaders from all significant segments of society come together in the coalition to govern the country with a general emphasis on consensus-building.<sup>6</sup> Lijphart calls for an “overwhelming majority” of support needed in the grand coalition as opposed to a mere majority.<sup>7</sup> Willingness of group representatives to cooperate in the grand coalition, and the power-sharing arrangement more generally, is a vital precondition for the successful functioning of consociationalism.

The second primary pillar of consociationalism is segmental autonomy, or federalism. Minority segments are given autonomy over matters that are not common to all segments to the greatest extent feasible.<sup>8</sup> Ulrich Schneckener describes two types of segmental autonomy—territorial and personality. The former implies federal structures or territorial autonomy, whereas the latter “is realized through elected, non-territorial, self-governing communal chambers . . . or private institutions which obtain certain responsibilities for each community . . . .”<sup>9</sup> Federalism lends to the success of the grand coalition by removing a large number of potentially divisive problems from the decision-making process and limits the scope of issues in front of a

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<sup>3</sup> AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 1, 25 (1977).

<sup>4</sup> Joanne McEvoy, *We Forbid! The Mutual Veto and Power-Sharing Democracy*, in *POWER-SHARING IN DEEPLY DIVIDED PLACES* 253, 257 (2013).

<sup>5</sup> LIJPHART, *supra* note 3, at 25.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.* at 41.

<sup>9</sup> Ulrich Schneckener, *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, 39 *J. PEACE RESEARCH* 203, 222 (2002). Hybrid options involving both types of segmental autonomy are also possible, which is the case in Belgium.

consociational government.<sup>10</sup> By keeping groups separated and non-general issues decentralized, Lijphart theorizes that groups will not feel threatened by other groups or that their cultural identity is under fire. As will be shown below, segmental autonomy is perhaps the most important factor to consider when designing a minority veto.

With the need for all groups to be represented in the power-sharing arrangement, consociationalism calls for proportionality in all decision-making organs, including civil service appointments, government subsidies, military service, and perhaps even courts.<sup>11</sup> This is often accomplished via the use of a proportional representation voting system or reserved seats.

Even though groups are guaranteed power and proportionality in the government, some decisions of the central government may inevitably harm a particular group's interests: "A veto may be justified on the basis that guarantees of proportional representation of minority groups in a power-sharing assembly and/or executive are not sufficient to protect the vital interests of that minority because the minority may simply be outvoted."<sup>12</sup> When decisions affect the vital interests of a minority segment, the legitimacy and acceptance of the power-sharing arrangement is endangered.<sup>13</sup> Thus, to provide assurance to each segment, Lijphart calls for granting minority groups veto power that allows the veto areas of "vital interest."<sup>14</sup>

Lijphart described the minority veto as the "ultimate weapon" available to protect minority groups' vital interests in a power-sharing arrangement.<sup>15</sup> According to Lijphart, a minority veto is successful if it (1) effectively protect minorities' vital interests, and (2) is used sparingly and does

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 38.

<sup>12</sup> Shane Kelleher, *Minority Veto Rights in Power Sharing Systems: Lessons from Macedonia, Northern Ireland and Belgium*, 13 ADALAH'S NEWSLETTER 1, 3 (2005), <https://pdfs.semanticscholar.org/a192/0430890562b9b1a8c38e6f599e7cea957151.pdf>.

<sup>13</sup> LIJPHART, *supra* note 3, at 36.

<sup>14</sup> *Id.*

<sup>15</sup> Arend Lijphart, *The Power Sharing Approach*, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 491, 495 (Joseph V. Montville ed., 1990).

not become a political weapon that derails the political process.<sup>16</sup> The primary debate in the literature concerns whether the minority veto can avoid weaponization.

Lijphart argues that minority vetoes will not be weaponized because leaders will be incentivized not to use the veto due to feelings of security, fear of reciprocal veto use by rival groups, and the good will of leaders to avoid political deadlock.<sup>17</sup> Critics of the minority veto are highly skeptical of Lijphart's arguments. They argue that conflict groups will not be inherently disincentivized to abuse the "ultimate weapon," and its inevitable use will increase tensions and lead to political deadlock.

Another argument of Lijphart's critics is that those who do not agree to the power-sharing arrangement will use the veto with the purpose of sabotaging the political process and the power-sharing arrangement in general.<sup>18</sup> The acceptance of the power-sharing arrangement and a willingness to coexist is a prerequisite for consociationalism and the restrained use of minority vetoes. Of course there will be animosity between groups, oftentimes intense animosity, in power-sharing arrangements, but that animosity cannot outweigh those groups' acceptance of the power-sharing arrangement. In those situations, any design considerations discussed below will be minimally effective. Accordingly, this Paper will only be useful for the design of minority vetoes in consociational power-sharing arrangements where groups have some minimum level of willingness to accept the power-sharing arrangement, whatever that level may be.

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<sup>16</sup> "The provision works best if the minority veto does not have to be used very often in order to protect minority rights and autonomy." Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, 90 AM. POL. SCI. REV. 258, 262 (1996).

<sup>17</sup> McEvoy, *supra* note 4, at 257.

<sup>18</sup> Kelleher, *supra* note 12, at 5–6. "Where robust guarantees, including minority vetoes, are adopted, immobilism is a strong possibility, and it may be very difficult to overcome the stasis that immobilism can produce." Donald L. Horowitz, *Ethnic Power-sharing: Three Big Problems*, 25(2) J. DEMOCRACY 5, 7 (2014).

The goal of this Paper is to provide recommendations and considerations for designing a successfully functioning minority veto mechanism in a particular consociational power-sharing arrangement, and to contribute to the existing literature by providing a taxonomy of formal minority veto mechanisms presently existing in consociational legislatures. There are many ways to design a veto mechanism that effectively protects minority interests, but to avoid the veto's weaponization and political destabilization, the minority veto should have a limited universe and should trigger mandatory mediation procedures to promote intergroup cooperation and dialogue.

This Paper will proceed as follows. Part I illustrates the various ways that minority vetoes can be implemented and expounds on the advantages and disadvantage of each design option. Part II outlines the formal minority veto systems that exist today in the consociational power-sharing legislatures of Northern Ireland, Belgium, Bosnia-Herzegovina, Kosovo, and Macedonia. Part III provides recommendations and considerations for designing minority veto mechanisms in consociational power-sharing arrangements. A brief conclusion follows.

## I. MINORITY VETOES: DESIGN OPTIONS AND IMPLICATIONS

Though it is one of the four pillars of consociational power-sharing, Lijphart provides little guidance on how to implement minority vetoes in practice. Minority vetoes can take several different forms, and innovation in the field is ongoing. Vetoes can be found in the legislative assemblies, multi-part executive systems, the military, or the judiciary.<sup>19</sup> Likewise, vetoes can be formally granted, meaning they are explicitly granted, or can exist de facto as a product of a particular society's demographic breakdown, voting system, and legislative majority

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<sup>19</sup> Allison McCulloch, *The Use and Abuse of Veto Rights in Power-Sharing Systems: Northern Ireland's Petition of Concern*, in 53 *COMPARATIVE PERSPECTIVE, GOV'T AND OPPOSITION* 735, 738–39 (2018); Joanne McEvoy, *We Forbid! The Mutual Veto and Power-Sharing Democracy*, in *POWER-SHARING IN DEEPLY DIVIDED PLACES* 253, 260 (2013).

requirements.<sup>20</sup> As previously stated, the focus of this analysis is limited to formal minority vetoes in consociational power-sharing legislatures.

A successful minority is one that (1) effectively protect minorities' vital interests, and (2) is used sparingly and does not become a political weapon that derails the political process. An overview of the literature reveals three central design features of minority veto: (A) who can exercise the veto; (B) the matters over which the veto can be invoked; and (C) the effect of the veto on the political process.

#### A. *Who Gets Veto Rights?*

The first key issue that arises in relation to minority veto mechanisms is identifying an appropriate veto holder. Joanne McEvoy distinguishes between “predetermination” and “self-determination” of minority groups;<sup>21</sup> Allison McCullough labels these methods as “corporate” and “liberal,” respectively.<sup>22</sup> For the purposes of this Paper, the terms are used interchangeably.

Corporate veto rights refer to specifically naming groups who can use the minority veto based on identifiable ascriptive characteristics.<sup>23</sup> Corporate vetoes can be useful to get groups central to the conflict to commit to the new political arrangement in the first place.<sup>24</sup> By guaranteeing representation to specific groups, corporate minority vetoes are identifiable assurances to minority groups who may be extremely cautious about entering into agreements on the basis of general and vaguely worded grants of veto power.<sup>25</sup> However, the corporate approach runs the risk of excluding smaller minority groups the ability to protect their interests.

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<sup>20</sup> A straightforward example of an informal minority veto: Country A has two identity groups privy to the power-sharing arrangement in which there is a 100 seat legislature. Group 1 constitutes 50 of seats in the legislature and Group 2 fills the other 50 seats. If the voting threshold is 75%, each group will have a minority veto with 26 members, but they do not formally invoke a veto.

<sup>21</sup> McEvoy, *supra* note 4, at 259.

<sup>22</sup> McCullough, *supra* note 19, at 39–40.

<sup>23</sup> *Id.*

<sup>24</sup> McEvoy, *supra* note 4, at 255.

<sup>25</sup> *Id.* at 259.

Additionally, some argue that predetermination of groups central to consociations is incompatible with the International Covenant on Civil and Political Rights regarding human rights of political participation and that assigning a political office to a certain group is discriminatory and antithetical to international human rights norms.<sup>26</sup>

Alternatively, a liberal veto relies on numerical voting formulae rather than ascriptive features. Liberal vetoes do not exclude specific minority groups, thus granting smaller, underrepresented minority groups the opportunity to rally support for veto declaration against particular governmental action.<sup>27</sup> Similarly, a liberal approach does not risk explicitly excluding smaller minority groups. An advantage of self-determination is that it is up to the electorate to identify with and vote for communal or non-communal parties, thereby determining the groups that enter power sharing.<sup>28</sup> It avoids fixing groups' representation on a permanent or semi-permanent basis. Furthermore, a liberal approach can be preferable as mobility decreases groups' geographical concentration and shifts the overall demographics of the country.<sup>29</sup>

#### *B. Vital Interests*

A second design consideration for crafting an effective minority veto is the determination of what "vital interests" the veto is meant to protect. Like the first consideration regarding who can invoke the veto, the issues that qualify vital interests can either be predetermined or self-determined.

Predetermined vital interests exist in an exhaustive list, created by the parties present to the particular peace process or constitutional process. Predetermination of vital interests limits the veto's universe, which helps prevent weaponization of the veto for areas that are not truly of "vital"

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



interest. Allison McCullough is wary of using an exhaustive, predetermined list as it could fail to capture all vital interests: “[W]hile there is a general trend towards identifying culture, language and education as vital interests, this is not conclusive.”<sup>30</sup> If the government is used to harm a group’s vital interest, intergroup tensions could flare and put the entire power-sharing arrangement at risk.

Conversely, self-determined veto rights permit much greater latitude for minorities as groups are able to self-define their own vital interests. While a restrictive list can potentially fail to identify issues that could end up drastically affecting a minority group’s interests, the self-determination approach ensures that vital minority interests will not be excluded from the minority veto’s scope. Naturally, permissive self-determination of vital interests allows for greater potential for abuse of the veto as a political weapon rather than as a shield. Self-determination approaches offer flexibility and the ability to adapt to “circumstances on the ground as well as providing groups with a level of confidence that their voices and their interests matter.”<sup>31</sup>

It is important to note that, when vital interests are predetermined, no invocation is necessary; it is intended to be automatic, regardless of any invocation of the right, such as in Kosovo. However, when vital interests are self-determining, invocation of the veto is required. Invocation can take several forms. Invocation of Belgium’s Alarm Bell Procedure mandates a justificatory clause that explains the vital interest at risk, while invocation of Northern Ireland’s Petition of Concern simply requires the submission of a petition with the requisite number of signatures.

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<sup>30</sup> *Id.*

<sup>31</sup> McCulloch, *supra* note 19, at 752.

### *C. Effect of the Veto*

The third consideration is what effect the minority veto has on the political process. Veto effect seems to be overlooked in the literature compared to the first two considerations, especially in light of the importance of the incentives that vetoes provide to political actors.

Ulrich Schneckener outlines three types of veto rights: delaying veto, indirect veto, and direct veto.<sup>32</sup> Delaying vetoes suspend the legislation and implement mediation procedures.<sup>33</sup> For example, Belgium has developed a delaying veto called the “Alarm Bell Procedure.” If invoked, the offending law is suspended from the parliament and the matter is then referred to the federal cabinet, which must review the matter and send a “justified recommendation” to the involved house of the parliament within 30 days.<sup>34</sup> The federal parliament then reconsiders the matter in the light of the federal cabinet's recommendation.<sup>35</sup> Delaying vetoes are touted as being more conducive to negotiation and mediation between groups. They have the effect of singling out specific legislation for increased conversation between groups, which is an ultimate goal of power-sharing arrangements. The legislation can still ultimately pass, which will avoid political deadlock. However, without an ultimate guarantee that a particular bill will not pass, it cannot be said for certain that a vulnerable minority’s interests will be protected.

Indirect vetoes include increased voting thresholds or concurrent majority requirements.<sup>36</sup> For example, in Kosovo, laws that affect a community’s vital interest require “both the majority of votes of present and voting deputies from majority ethnic community and the majority of votes by the present and voting deputies from minority communities.”<sup>37</sup> This allows a simple majority

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<sup>32</sup> Schneckener, *supra* note 9, at 205.

<sup>33</sup> McEvoy, *supra* note 4, at 258

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Kosovo Const. art. 81 (2008, revised 2016).

of one community to veto the legislation. Indirect vetoes make it harder for a contentious bill to be passed, but does not absolutely guarantee minority interest protection. Unlike the delaying veto, there is no formally mandated mediation procedure for purely indirect vetoes, leaving no guarantee of intergroup cooperation. Unlike a direct veto, legislation can still pass through an indirect veto, which decreases chances for political deadlock but risks infringing on minority rights.

A direct veto has the effect of blocking legislation entirely.<sup>38</sup> Minority groups can shoot the legislation dead in the water. Direct vetoes are a guarantee to groups in the power-sharing arrangement that legislation will not pass. Direct vetoes are criticized for allowing legislative deadlock. Without mandated mediating procedures, there is no guarantee for intergroup communication and cooperation, which, in the zero-sum scenario presented by direct vetoes, would likely increase intergroup tensions.<sup>39</sup>

### III. FORMAL LEGISLATIVE MINORITY VETOES TODAY: A TAXONOMY

Below is a taxonomy of formal legislative minority veto mechanisms in Northern Ireland, Belgium, Bosnia-Herzegovina, Kosovo, and Macedonia. To provide context, each section will provide a brief overview of each country's consociational legislature. Then, each minority veto mechanism is described in detail. Finally, a look at how each mechanism has functioned is provided, save for the use of Macedonia's and Kosovo's minority veto mechanisms, for which I could find little information.

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<sup>38</sup> McEvoy, *supra* note 4, at 258. To my knowledge, no direct minority veto mechanisms exist in consociational legislatures today.

<sup>39</sup> *Id.*

<b><u>FORMAL LEGISLATIVE MINORITY VETO DESIGNS IN USE TODAY</u></b>			
<b>Country</b>	<b>Liberal/Corporate</b>	<b>Predetermined/ Self-Determined</b>	<b>Effect of Veto</b>
Northern Ireland	Liberal	Permissive	Indirect Veto
Belgium	Corporate	Permissive	Delaying Veto
Bosnia (Vital Interest)	Corporate	Self-Determined	Delaying Veto
Bosnia (Entity)	Corporate	Self-Determined	Indirect Veto
Kosovo	Corporate	Restrictive	Indirect Veto
Macedonia	Liberal	Predetermined	Indirect Veto

#### *A. Northern Ireland*

The 1998 Good Friday Agreement established a power-sharing arrangement that, combined with the 1998 Northern Ireland Act, resulted in the unicameral Northern Ireland Assembly (“Assembly”) and the Northern Ireland Executive (NIE).<sup>40</sup> The 108 members of the Legislative Assembly (MLAs) are elected proportionally by single transferable vote.<sup>41</sup> At their first meeting, members of the Assembly must register a designation of identity—Nationalist, Unionist or Other.<sup>42</sup> The Assembly has full legislative authority over areas that are not “Excepted”<sup>43</sup> or “Reserved”<sup>44</sup> to Westminster. The Assembly has “full legislative powers on most

<sup>40</sup> *Northern Ireland Act of 1998*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Northern\\_Ireland\\_Act\\_1998](https://en.wikipedia.org/wiki/Northern_Ireland_Act_1998).

<sup>41</sup> *Devolution Settlement: Northern Ireland*, GOV.UK, <https://www.gov.uk/guidance/devolution-settlement-northern-ireland>.

<sup>42</sup> Good Friday Agreement, Strand One, 6 (1998).

<sup>43</sup> Northern Ireland Act, Schedule 2 (1998).

<sup>44</sup> Northern Ireland Act, Schedule 3 (1998).

economic and social matters.”<sup>45</sup> The Northern Ireland Executive runs the government on behalf of the Assembly, and is comprised of members of all the major Unionist and Nationalist political parties.<sup>46</sup> It is made up of the First Minister and deputy First Minister who are equal joint Chairs, two junior ministers, and eight other ministers who are nominated by the Assembly.<sup>47</sup>

Northern Ireland’s minority veto—referred to as the “cross-community” voting procedure—is initiated by invocation of a “Petition of Concern.”<sup>48</sup> Northern Ireland takes a liberal approach regarding invocation of the veto as it merely requires 30 of the 108 members of the legislative assembly to sign a Petition of Concern, regardless of their community designation.<sup>49</sup>

Northern Ireland’s minority veto mechanism implements a permissive approach that does not restrict the use of the veto; the only restraint on the veto’s invocation is the thirty signature requirement. Once those thirty signatures are submitted, increased voting thresholds are triggered, making this an indirect veto. The contested bill can still pass if it gains either “parallel consent” or consent by “weighted majority.”<sup>50</sup> *Parallel consent* requires “a majority of those members present and voting, including a majority of the Unionist and Nationalist designations present and voting.”<sup>51</sup> *Weighted majority* requires a 60% overall majority “including at least 40% of each of the nationalist and unionist designations present and voting.”<sup>52</sup>

There is a considerable amount of attention paid to Northern Ireland’s minority veto mechanism, particularly in recent years, and it is widely agreed that the veto needs reform. The

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<sup>45</sup> These areas include health and social services, education, employment and skills, agriculture, social, security, pensions and child support, housing, economic development, local government, environmental issues, including planning, transport, culture and sport, the Northern Ireland Civil Service, equal, opportunities, and justice and policing. <https://www.gov.uk/guidance/devolution-settlement-northern-ireland>.

<sup>46</sup> Kelleher, *supra* note 12, at 3.

<sup>47</sup> *Overview of Government in Northern Ireland*, NI DIRECT, <https://www.nidirect.gov.uk/articles/overview-government-northern-ireland>

<sup>48</sup> *Id.*

<sup>49</sup> McCulloch, *supra* note 19, at 752.

<sup>50</sup> Good Friday Agreement, Strand One, 4 (1998).

<sup>51</sup> *Id.* at 5(i).

<sup>52</sup> *Id.* at 5(ii).

Northern Ireland Assembly collapsed in January 2017 when infamous “Cash for Ash” scandal pushed the Northern Ireland’s two largest parties—nationalist party Sinn Féin<sup>53</sup> and the Democratic Unionist Party (DUP)<sup>54</sup>—to the breaking point in their relations.<sup>55</sup> For roughly three years, negotiations to reopen the government were unsuccessful Northern Ireland was without a government.<sup>56</sup> Abolishing or reforming the Petition of Concern, Northern Ireland’s version of the minority veto, was one Sinn Féin’s primary demands in negotiation talks.<sup>57</sup> One political observer even called the Petition of Concern “the dirtiest word in politics.”<sup>58</sup>

Although designed to protect vital interests, Northern Ireland’s minority veto has largely been weaponized for political purposes unrelated to the protection of vital interests. The numbers show that the Petition of Concern was increasingly invoked over time: “In the first legislative period between 1998 and 2003, only seven were filed, whereas 118 were brought forward in the legislative period between 2011 and 2016.”<sup>59</sup> The Petition of Concern has been used for issues that are not specific (and thus, not vital) to either community, including marriage equality, welfare reform, and investigations into assembly members’ personal conduct.<sup>60</sup>

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<sup>53</sup> Sinn Féin is the largest Nationalist political party in Northern Ireland. *See generally* Kimberly Cowell-Meyers & Paul Arthur, *Sinn Féin*, BRITANNICA, <https://www.britannica.com/topic/Sinn-Fein>.

<sup>54</sup> *See generally* Kimberly Cowell-Meyers & Paul Arthur, *Democratic Unionist Party*, BRITANNICA, <https://www.britannica.com/topic/Sinn-Fein>.

<sup>55</sup> For more information on the scandal, see Rory Carroll, *Cash-for-Ash Fiasco: Northern Ireland's Enron on Craggy Island*, GUARDIAN (Sept. 28, 2018), <https://www.theguardian.com/uk-news/2018/sep/28/cash-for-ash-arlene-foster-accountable-but-not-responsible>.

<sup>56</sup> Henry McDonald, *Northern Ireland Assembly Reopens Three Years After Collapse*, GUARDIAN (Jan. 11, 2020), <https://www.theguardian.com/politics/2020/jan/11/northern-ireland-assembly-reopens-three-years-after-collapse>; *see also* <https://howlonghasnorthernirelandnotheadagovernment.com/about.html>.

<sup>57</sup> *Stormont Talks: DUP Says Discussions Are at A 'Critical Moment'*, BBC NEWS (Jan. 9, 2020), <https://www.bbc.com/news/uk-northern-ireland-51040786>.

<sup>58</sup> Allison McCulloch & Drew Mikhael, *Northern Ireland Reforms 'Ethnic Veto' to Help Get Its Legislature Back to Work*, WASH. POST (Jan. 18, 2020 at 7:00 AM), <https://www.washingtonpost.com/politics/2020/01/18/northern-ireland-reforms-ethnic-veto-help-get-its-legislature-back-work/#comments-wrapper>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

There are several deficiencies in Northern Ireland's minority veto mechanism. First, the veto mechanism is both liberal and self-determining, meaning anyone can invoke the veto for any reason.<sup>61</sup> This is particularly troublesome because the Assembly has wide-ranging legislative authority, consequently giving the Assembly authority over areas of vital interest and the minority veto a wide universe in which to operate. Second, there is no requirement for a justificatory clause a petition to explain how the proposed legislation might infringe on a community's rights.<sup>62</sup> Additionally, the veto does not have a mandated deliberation process or deadlock breaking mechanism that guarantees intergroup cooperation, which is both a goal of power-sharing and a method of easing intergroup tensions.

### *B. Belgium*

Belgium's minority veto is referred to as both the "Group Veto Procedure" and "Alarm Bell Procedure."<sup>63</sup> For certain votes in the federal parliament, deputies are required to designate themselves as part of a linguistic group. To invoke the Alarm Bell Procedure, 75% of the members of a linguistic group in either house of the bicameral parliament, must sign a "justified motion" (i.e. a motion with reasons for invocation of the veto) claiming that "the provisions of a draft bill or of a motion are of a nature to gravely damage relations between the Communities . . . ."<sup>64</sup> Belgium's veto is corporate as it grants the veto only to the three communities. Regarding when the veto can be invoked, Belgium takes a permissive approach, allowing invocation any time the requisite 75% of a linguistic group signs a "justified motion." The Alarm Bell Procedure "can be

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Kelleher, *supra* note 12, at 7.

<sup>64</sup> 1994 CONST. art. 54 (Belg.).

applied only once by the members of a linguistic group with regard to the same Government Bill or private member's bill.”<sup>65</sup>

Belgium implements a delaying veto as invocation results in the offending law's automatic suspension and the matter is referred to the Council of Ministers in the federal cabinet. The Council of Ministers, which must act by consensus rather than by majority, must make a “justified recommendation” to the involved house in relation to the matter within 30 days.<sup>66</sup> The federal parliament then revotes on the matter in the light of the federal cabinet's recommendation and expresses its opinion or decision.<sup>67</sup>

The Alarm Bell procedure has only been used twice, so it is safe to say that the mechanism has not been abused.<sup>68</sup> The significant levels of federalism in the country limits the universe of the veto and thus the opportunity for abuse. Likewise, the 75% threshold for invocation of the veto requires ethnopolitical groups to act by greater consensus and does not allow for political extremists to weaponize the veto. The justification requirement helps avoid scenarios when the veto is used nakedly over non-specific legislation (i.e. when the harm being argued is not specific a particular group or groups' vital interests). Additionally, the veto suspends rather than immediately defeating the bill. Any potential concerns about the ultimate passing of a bill even when the Alarm Bell has been rung are also greatly mitigated by the levels of federalism and decentralization. In addition, cooperation and deliberation among groups is ensured when the matter is referred to the Federal Cabinet, where the two main communities are represented equally and must act by consensus of cabinet members.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> McCulloch, *supra* note 19, at 756.



### C. Bosnia-Herzegovina

The Dayton Agreement resulted in a highly unique and somewhat complex federal structure. Bosnia-Herzegovina consists of two entities: the Federation (largely Muslim-Croat) and the Republika Srpska.<sup>69</sup> Each entity retains “all powers, competence and responsibilities which do not, according to the Constitution of Bosnia and Herzegovina, fall within the exclusive competence of the institutions of Bosnia and Herzegovina.”<sup>70</sup> Each entity has its own president, government, and parliament, with substantial competencies over all issues except foreign policy, foreign trade, monetary policy, refugee matters, and infrastructure.<sup>71</sup> Each entity is also allowed to introduce its own citizenship and maintain “special parallel relationships” with neighboring states (Croatia and Serbia).<sup>72</sup> After the entity division, there are cantonal, municipal, and local government divisions in the Federation.

With high levels of federalism, the central government is politically weak.<sup>73</sup> Each of the three groups hold *de facto* a third of the posts in the Council of Ministers and in the three-member state presidency.<sup>74</sup> The central legislature, the Parliamentary Assembly, is bicameral consisting of the House of Representatives and the House of Peoples.<sup>75</sup> The House of Representatives, the lower house, has 42 members, directly elected from their respective entities by proportional representation for four-year terms. The House of Peoples, the upper house, has 15 members, which are indirectly elected as they are appointed by the parliaments of the entities: 5 members elected by the National Assembly of the Republika Srpska (5 Serbian delegates), 5 members by the Bosniac club of the House of Peoples of the Parliament of the Federation of Bosnia and

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<sup>69</sup> General Framework for Peace, Annex 4 (1995).

<sup>70</sup> Bosnia-Herzegovina Constitution, art. 1 (1995).

<sup>71</sup> Schneckener, *supra* note 12, at 209.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Bosnia-Herzegovina Constitution, art. 1 (1995).

Herzegovina (5 Bosniac delegates), and 5 members by the Croatian club of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (5 Croatian delegates). Proposed laws must be introduced in the House of Representatives where they must pass through a committee review and a first and second reading.<sup>76</sup> The House of Peoples has an equal process of law review and ultimately has the final say on whether or not a law is passed.<sup>77</sup>

Bosnia-Herzegovina's Parliamentary Assembly has two distinct veto mechanisms. First, legislation of the Parliamentary Assembly can be vetoed if a majority of either Bosniac, Croat, or Serb delegates, declare a proposal to be "destructive of a vital interest."<sup>78</sup> As it is given to only those three groups, the veto is corporate.<sup>79</sup> Vital interests are self-determined for this veto as the constitution does not define the term in any way. If the invocation of the vital interest veto is unobjected, the bill cannot pass. When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of the vital interest provision,

the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court . . . .<sup>80</sup>

If no harmonisation can be established by the Joint Commission . . . the Constitutional Court of the Federation of Bosnia and Herzegovina shall be addressed to decide finally whether the law in question relates to a vital interest of a constituent people.<sup>81</sup>

The Constitutional Court will rule if the vital interest of the complaining ethnicity was threatened and, if so, the bill cannot pass.<sup>82</sup>

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<sup>76</sup> DINA ABDEL-FATTAH, *THE COMPARATIVE EFFECT OF MINORITY VETOES ON SHARED GOVERNANCE IN POST-CONFLICT CONSOCIATIONAL SOCIETIES: CASE STUDIES OF BOSNIA-HERZEGOVINA AND LEBANON* 55 (2010).

<sup>77</sup> *Id.*

<sup>78</sup> Bosnia-Herzegovina Constitution, art. IV(3)(e) (1995).

<sup>79</sup> General Framework for Peace, art. 11(e) (1995).

<sup>80</sup> *Id.* art. 11(f).

<sup>81</sup> *Id.*

<sup>82</sup> Birgit Bahtic-Kunrath, *Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process*, 39 NATIONALITIES PAPERS 899, 919 (2011).

The second minority veto in Bosnia-Herzegovina is referred to as an “entity veto.”<sup>83</sup> Even with a majority of votes, if “[t]he majority of votes does not contain one-third of the votes of Delegates from the territory of each Entity,” the law cannot be adopted. This entity veto is corporate as it specifically grants the power to those delegates who identify as either Bosniac, Croat, or Serb. The entity veto is an indirect veto as it increases the voting threshold to two-thirds within each Entity. It also implements a mediation process in hopes of resolving the dispute. The Constitution reads:

If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.<sup>84</sup>

A proposal is dead if it fails the second round of voting.

The vital interest veto has not been used frequently, but the reason is likely because the entity veto is more attractive. Birgit Bahtic-Kunrath argues the entity veto has been weaponized in Bosnia-Herzegovina.<sup>85</sup> He claims that the entity veto “enables the veto players to ‘hijack’ the parliament for their exclusionary ethnic interests and discourages cooperation and compromise between the veto players.”<sup>86</sup> He argues that the small number of Entity representatives discourage cooperation as representatives choose ethnic outbidding to retain their seat over cooperation.<sup>87</sup>

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<sup>83</sup> McCulloch, *supra* note 19, at 754.

<sup>84</sup> Bosnia-Herzegovina Constitution, art. IV(3)(d). (1995).

<sup>85</sup> See generally Birgit Bahtic-Kunrath, *Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process*, 39 NATIONALITIES PAPERS 899 (2011).

<sup>86</sup> *Id.* at 899.

<sup>87</sup> *Id.* at 915.

#### D. Kosovo

On April 19, 2013, the Brussels Agreement was negotiated between the prime ministers of Serbia and Kosovo. Under the agreement, municipal bodies in the Serb-majority north will retain autonomy in matters like health care and education.<sup>88</sup> Kosovo has a decentralization scheme in which every ethnic group is given specific powers (non-territorial federalism).

Kosovo's central legislature is unicameral that consists of 120 members elected by proportional representation from six electoral districts, 100 of which are directly voted for four year terms by proportional representation. The remaining 20 seats are given out as follows: 10 seats for the representatives of the Serbs, 4 seats for the representatives of the Romani, Ashkali and Egyptians, 3 seats for the Bosniacs, 2 seats for the Turks, 1 seat for the Gorans.<sup>89</sup> In Kosovo, no one party often has a chance of gaining power alone, so parties must work with each other to form coalition governments.

The Constitution gives a special guarantee to minorities not to be overruled by the majority on issues concerning their vital interests. Kosovo's minority veto is corporate as the Constitution grants the power specifically to each minority community. Kosovo's Constitution predetermines areas of vital interest in an exhaustive list. And it is an indirect veto as it results in increased voting thresholds. Specifically, the Constitution reads:

The following laws shall require for their adoption, amendment or repeal both the majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority:

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<sup>88</sup> Dan Bilefsky, *Serbia and Kosovo Reach Agreement on Power-Sharing*, N.Y. TIMES (Apr. 19, 2013), <https://www.nytimes.com/2013/04/20/world/europe/serbia-and-kosovo-reach-milestone-deal.html>.

<sup>89</sup> Kosovo Const. art. 64 (2008, revised 2016). See generally Jelena Lončar, *Power-sharing in Kosovo: Effects of Ethnic Quotas and Minority Veto*, in 359 PERSPECTIVES OF A MULTIETHNIC SOCIETY IN KOSOVO (J. Teokarević, B. Baliqi & S. Surlić eds., 2015).

- (1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in intermunicipal and cross-border relations;
- (2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution;
- (3) Laws on the use of language;
- (4) Laws on local elections;
- (5) Laws on protection of cultural heritage;
- (6) Laws on religious freedom or on agreements with religious communities;
- (7) Laws on education;
- (8) Laws on the use of symbols, including Community symbols and on public holidays.<sup>90</sup>

There is little information available addressing how Kosovo's veto functions, which likely means it is not abused. The predetermined vital interest list greatly limits veto points, making it hard to abuse.

#### *E. North Macedonia*

The Ohrid Framework Agreement was an agreement on reforms and amendments to the 1991 constitution, resulting in recognition of ethnic Albanians and other ethnic minorities as citizens of the Macedonian state, veto rights to ethnic minorities over laws affecting their vital interests, increased recognition of the Albanian language, and a commitment to proportionality in government.<sup>91</sup> The central legislature is unicameral, with between 120 and 140 MPs (currently 120), elected by proportional representation from 6 electoral districts, each contributing 20 MPs. Additionally, there are also 3 reserved seats elected from the Macedonian diaspora which are awarded only if the voter turnout was sufficient.<sup>92</sup>

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<sup>90</sup> Kosovo Const. art. 81 (2008, revised 2016).

<sup>91</sup> Kelleher, *supra* note 12 at 1–2.

<sup>92</sup> Constitution of North Macedonia, art. 69 (1991).

Macedonia's approach is to bundle all of its ethnic minorities into a single bloc for the purposes of minority veto protection. According to Macedonia's Constitution,<sup>93</sup> certain laws may only be passed by double majority vote in the Macedonian Assembly, namely, a majority within the Assembly as a whole that includes a majority of the votes of the Assembly members attending who "claim to belong to the communities not in the majority in the population of Macedonia."<sup>94</sup> Though the mechanism is liberal, the political realities show that "the ethnic Albanians have sufficient representation to veto legislation without the support of any of the other ethnic minorities" while smaller ethnic minorities can never veto legislation without the support of ethnic Albanians, meaning those groups are only protected to the extent that they overlap with the ethnic Albanian group.<sup>95</sup>

Macedonia takes a restrictive approach as it has opted to predetermine the "vital interests" of its ethnic minorities by specifically identifying each interest that is protected by veto rights. According to Article 5.2 of the Ohrid Agreement,

Laws that directly affect culture, use of language, education, personal documentation, and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and boundaries of municipalities must receive a majority of votes, within which there must be a majority of the votes of the Representatives claiming to belong to the communities not in the majority in the population of Macedonia.<sup>96</sup>

These increased threshold requirements fall into the indirect veto category. If there is a dispute regarding the provision above, the Committee on Inter-Community Relations is tasked with resolving the dispute.<sup>97</sup> The Committee, elected by the Assembly, consists of 19 members—7 Macedonians, 7 Albanians, and one member each from the Turks, Vlachs, Romas, Serbs, and

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<sup>93</sup> of North Macedonia, art. 69(2), 114(5) (1991).

<sup>94</sup> Ohrid Agreement, art. 5.2 (2001).

<sup>95</sup> Kelleher, *supra* note 17, at 4.

<sup>96</sup> Ohrid Agreement, art. 5.2 (2001).

<sup>97</sup> Constitution of North Macedonia, Amendment X(2) (1991).

Bosniaks.<sup>98</sup> When application of the minority veto is contested, “the Committee shall decide by a majority vote whether the procedure applies.”<sup>99</sup>

There is very little information available on whether Macedonia’s minority veto functions successfully. The predetermination of vital interests gives the veto a small universe in which to operate, and the Committee on Inter-Community Relations helps ensure that the veto is only used for those purposes.

#### IV. CONSIDERATIONS AND RECOMMENDATIONS

It is important to craft a minority veto with the entire power-sharing arrangement in mind to create a balance in the four pillars consociationalism. This Part highlights the minority veto’s relationship to each of the other three pillars of consociationalism (grand coalition, federalism, and proportionality) and highlights considerations and recommendations for the future design of minority veto mechanisms in consociational arrangements.

##### *A. Grand Coalition, Federalism, and Proportionality*

The countries described above show that minority veto mechanisms can be implemented in both unicameral and bicameral legislatures. If the legislature is bicameral, it should be noted whether there is a division of competencies between chambers. Proportional representation should be used for election of group leaders in order to ensure that groups are represented, but ethnic outbidding needs to be avoided. Learning from Bosnia-Herzegovina, risks of ethnic outbidding and outright veto weaponization can be mitigated by greater numbers of representatives per group in the legislature.

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<sup>98</sup> *Id.* Amendment XII(1)

<sup>99</sup> *Id.*

Federalism is an important condition for successful minority vetoes. Depending on the federal arrangement and the electoral system, the veto can act as a check on the central government, such as for Bosnia's entity veto. Federalism is particularly important when considering when the veto can be invoked. Federalism greatly reduces the likelihood that the minority veto will be used as it largely takes sensitive subject matter off of the legislative table and gives it to each respective group. If there is a high degree of segmental autonomy with decentralization of vital ethnic interests to local self-governance, the universe of subject matter over which veto rights can be asserted shrinks. Thus, veto rights are much less subject to abuse. In such circumstances, liberal vetoes might be preferred in order to avoid excluding and alienating smaller minority groups. Northern Ireland demonstrates how lack of federalism can lead to abuse of the veto, particularly when paired with a self-determining approach for vital interests. Restrictive veto approaches can moderate use of the veto in instances where federalism is not feasible or attainable, but that runs the risk of leaving out vital interests.

Proportionality in the power-sharing arrangement ensures that particular groups are represented in all stages of government, particularly the legislature. If underrepresented, groups may feel threatened and may be more inclined to abuse the veto.

### *B. Identity of the Veto Holder*

Determining who should get veto rights is context-specific for each societal conflict. Groups privy to power-sharing negotiations following periods of violent conflict will likely find explicit corporate veto power to be more attractive when agreeing to share power with rival groups. If the corporate approach is chosen, all major minority groups should be included in the power-sharing arrangement. If the corporate approach is implemented, the veto mechanism should require stringent intragroup voting requirements to avoid abuse, like with Bosnia's entity veto. If an act of



the legislature truly endangers that group's vital interests, there should be no problem perfecting the veto. If designing vetoes that rely on numerical calculations, demographic shifts are important to keep in mind.

If there is a high degree of segmental autonomy with decentralization of vital ethnic interests to local self-governance, the universe of subject matter over which veto rights can be asserted shrinks. Thus, veto rights are much less subject to abuse. In such circumstances, liberal vetoes might be preferred in order to avoid excluding and alienating smaller minority groups. Additionally, the liberal approach is more compatible with the International Covenant on Civil and Political Rights regarding human rights of political participation as it does not predetermine political rights to the detriment of smaller minority groups.

### *C. Vital Interests*

Closely related to the level of federalism (since it relates to subject matter of the minority veto) is whether vital interests are predetermined or self-determined. Limiting the areas over which a veto can be invoked is a useful tool to restraining minority veto abuse and ensures that the veto is used only for vital interests. However, the danger of leaving out subject matter that truly is of vital interest should not be taken lightly. There is no template list of interests that are vital to all peoples and societies; vital interests are specific to the society in question, so group leaders should be heavily involved in the crafting predetermined vital interest lists.

Whichever style is chosen, justificatory clauses should be included. Belgium provides an example of justificatory clauses in practice. They require parties to openly and directly point to specific vital interests allegedly harmed by proposed legislation or government action in order to invoke. This could have the added benefit of increasing communication and understanding between groups.

#### *D. Effect of the Veto*

As shown above, minority veto mechanisms commonly implement an indirect veto, which raises voting thresholds. While this makes it easier for groups to block harmful legislation, there is often no incentive for groups to engage in meaningful dialogue and collaboration. Accordingly, systems will inject greater voting thresholds into delaying vetoes. Delaying vetoes, which trigger a mediation process that encourages intergroup cooperation and deliberation, advance consociationalism's aim of consensus-based government. This process can implement an independent body or the constitutional court, or both. In those groups, it is important that all groups are represented, that those groups choose their own representatives, and that mediation is required. A good example is the vital interest veto process in Bosnia, where the invocation of the veto is reviewed by a joint commission and, if the joint commission cannot resolve the issue, then to the constitutional court. Deadlock-breaking votes should act based on consensus or supermajority support to ensure legitimate deliberation.

Where vital interests are predetermined, there is a textual basis for the justified motion and the determination of vital interest infringement. This could provide the proper basis for review by the constitutional court to determine if a vital interest listed in the constitution is actually violated. Alternatively, where vital interests are self-determined, intergroup dialogue important between groups and is less suitable for review by a court.

#### CONCLUSION

Minority vetoes can be effective if they provide the proper incentives for political actors in light of the overall consociational power-sharing arrangement. The design of a minority veto is heavily context-specific, so there are no generalizable best practices for minority veto design. Federalism and decentralization seem to be the primary method of restraining the use of minority

veto. With fewer issues subject to the vote of competing groups and with autonomy granted to groups, fewer occasions arise in which minorities vetoes are necessary to protect minority interests. The determination of minority veto rights should be an inclusive process that considers the rights of smaller ethnic, linguistic, or religious groups that are not primary players in the power-sharing arrangement. Regarding the effect that the veto has on proposed legislation, deliberation and mediation procedures should be implemented to ensure deliberation between groups.