THE AMBIGUOUS RELATIONSHIP OF CONSOCIATIONALISM AND CONSTITUTIONAL ADJUDICATION

by

András Gál

Submitted to

Central European University

Department of Political Science

In partial fulfillment of the requirements for the degree of Master of Arts

Supervisor: Professor Matthijs Bogaards

Budapest, Hungary

(2015)

Abstract

There is an arguable tension between consociationalism and constitutional adjudication, and between consociationalism and constitutionalism in a broader sense as well. Theoretically, the conceptual congruence between these notions is the most relevant dilemma. Empirically, there are two main questions concerning the role of constitutional courts in consociations. On the one hand, how they contribute to the stability of these political systems, and more importantly, whether they use their devices for liberalizing those state institutions, which mirror the entrenched nature of societal conflicts. The analysis of the concepts points to the fact that the ultimate answer to the normative dilemmas depends on how one approaches the broader concept of democracy, rather than a question of which school one follows concerning the more specific literature on democracy in divided societies. Empirically, through the analysis of the relevant concept, and the comparison of two constitutional courts operating in consociational systems (notably Belgium and Bosnia-Herzegovina), the thesis argues the courts have an ambiguous role, however this is not only a behavioral question, but also an important matter of institutional design. Ultimately, my thesis challenges certain aspects of the relevant literature, particularly regarding its emphases, and its explanations for certain phenomena.

Acknowledgements

Hereby, I would like to pay special tribute to my supervisor, Professor Matthijs Bogaards for his help and excellent professional support in writing my thesis. Furthermore, I am also very grateful for the help provided by Professor Nenad Dimitrijevic, who although not my supervisor officially, read a substantial part of my thesis and provided very useful feedback and inspiring comments. Furthermore my academic writing instructor, Robin Bellers, also gave very important help during the entire period of writing this piece of work. Finally, I would like to thank my family, friends, and flat mates for the personal support – especially the last group, which was mostly exposed to me in this special condition people call 'thesis writing'.

Table of contents

Introduction

The role of constitutional courts in consociational democracies is a surprisingly underdeveloped area of political science, in spite of its potential theoretical and normative insights and practical relevance. In my thesis I contribute to this generally narrow literature, in a systematic, though not perfectly comprehensive, manner. The rationale behind such a research project goes far beyond filling a research gap. From the perspective of political theory, analysing the relationship between consociationalism and constitutionalism can possibly reveal insightful and controversial aspects of the idea of constitutionalism: notably, how to approach rights and institutions, which are congruent with the concept of constitutionalism despite having an origin far from the normative basis of constitutionalism itself. Practically speaking, an empirical study of the design and functioning of constitutional courts in consociational systems can provide a deeper and more comprehensive understanding of the dynamics of such settings.

There are two plus one scope conditions regarding the empirical realm of my study: a consociational structure, an established mechanism for judicial review, and a sufficient degree of democratization. The first condition is based on the classical definition of consociationalism, given by Arend Lijphart (1969), describing consociations as systems characterized by proportionality, mutual veto, grand coalition, and segmental autonomy. According to this framework, few countries in the world can be described as consociations (Belgium, Bosnia and Herzegovina, Iraq, Lebanon, Malaysia, Switzerland), while there are also examples for entities which are parts of 'normal' democratic settings, but function as a consociational system as a sub-national unit (Northern Ireland, South Tyrol).

The other scope condition is the presence of judicial review in the political system. Hereby, I do not see any problems with employing a wide scope of research, including all courts having the rights of reviewing legislation on the grounds of constitutionality, and arbitrating in

conflicts on competences between state organs and sub-national units. This scope can include both centralized and diffuse models of judicial review (see: Stone Sweet 2012); however, from an empirical perspective, democratic countries classified as 'full' consociations, or countries where consociational entities function, all have a centralized model of judicial review with a constitutional court or council. In conclusion, the core scope conditions for my paper are the following: the presence of all consociational features on the one hand, and the existence of judicial review in the given political system on the other. The 'plus' scope condition, the sufficient degree of democratization is a sensitive issue, as categorizing such a broad label as 'democracy', could easily be controversial. Nevertheless, with such small set of countries, it is easier to deal with certain countries on an individual base. For instance, the cases of Iraq or Lebanon, both regarded as consociations in the relevant literature might be relevant, but fall short of demonstrating an appropriate quality of democracy. However, the problems with these cases will be elaborated in the empirical chapter of my thesis.

Regarding the state of this specific field of constitutional courts in consociationalism, its underdeveloped character might be explained with the fact that the inspiring model of the concept, the Netherlands itself never had a constitutional court. The most relevant contribution to the intersection between consociationalism and constitutional adjudication can be associated with Christopher McCrudden and Brendan O'Leary, who published a book dealing with the Belgian and the Bosnian courts (2013a), with a particular focus on the role of supranational legal norms and institutions, notably the European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR). Generally, one can identify two core dilemmas in their work; both have a normative nature, though one is rather conceptual, while the other is institutional. The conceptual question refers to the tension between the universalistic approach of the liberal human rights discourse and the particularistic nature of corporate

consociationalism,[1] especially regarding its pre-determining nature (see: Lijphart 1995),[2] when it comes to identifying the constituent peoples or groups. Probably the following quote describes the nature of this dilemma in the most concise way:

> Consociation is better understood to involve a clash between two different understandings of equality, rather than a clash between equality and consociation. An individualized and majoritarian conception of equality is undoubtedly put under pressure by consociation, but consociationalists seek to further equality between the consociated peoples or groups. (McCrudden and O'Leary 2013b: 483)

The second, rather institutional, dilemma, is on the appropriate approach to separation of powers doctrines, notably: in consociational settings, should power be dispersed among institutions or actors? In their work, McCrudden and O'Leary clearly take a stand beside the agency-based approach, and see political actors as key in mitigating conflicts or tensions, strongly emphasizing the sensitivity of political agreements, while they regard courts, independent state agencies, or international actors as rather 'external players'. Therefore, while acknowledging the legitimacy of certain judicial stances, the concept of 'judicial modesty' (McCrudden and O'Leary 2013b: 488-489) gains a crucially important role in their argument: this means the lack of the overly assertive manner of courts in probating legal norms derived from an international human rights discourse. Nevertheless, McCrudden and O'Leary focus on the concern for stability, viewing the approaches to the topic as a dichotomy between political and judicial decision-making. Therefore, in certain cases they disregard important aspects of institutional design shaping the behavior of the actors. In other terms, the embeddedness of the courts in consociational systems is strongly present in their argument, while the fact that they are designed as consociational institutions themselves is less emphasized. However, in my

[1] Corporate consociationalism is a specific model of power sharing, where the salient groups and identities are entrenched in the institutional structure, in a sense pre-determining the set of relevant groups. For a more detailed discussion on the different varieties of consociationalism, see: McGarry and O'Leary 2009.

[2] By pre-determination, Lijphart means the way of constituting groups and identities based on political base, from 'above', instead of establishing the devices for groups to mobilize themselves and express their identity as salient groups. The latter approach could be called as self-determination (Lijphart 1995).

thesis I argue that the design of the courts themselves is a secondary concern compared to the political context.

If one is seeking further literature, two sets of contributions can be distinguished as relevant. Firstly, if one approaches the topic from the side of constitutional adjudication, and focuses on democracies in divided societies (of which consociationalism can be classified as a sub-category), a fairly rich literature can be found, particularly focusing on the Supreme Court of Canada (e.g. Macfarlane 2012; Songer 2008; etc.). The constitutional architecture of the country itself includes a strong element of segmental autonomy, while the Court itself reflects the principle of proportionality in itself, as there is an official quota for judges coming from different linguistic communities. However, the majoritarian logic of political competition on the national level sets certain boundaries to the relevance of this literature in my scope of inquiry.

Furthermore, if one approaches the topic in an even broader sense, from the perspective of constitutionalism, there is also an important field of scholarly work on the relationship between liberal universalism and consociational pre-determination and particularism (see: Kymlicka 1995a, 1995b, 2000; Kymlicka and Norman 2000; Patten 2008, 2014; Shapiro and Kymlicka 1996; Taylor and Gutmann 1992; etc.). Certain theoretical considerations will be taken into account from these approaches as well; nevertheless I consider the conclusions of McCrudden and O'Leary as the main departure point for my research.

Beyond the notion of 'judicial modesty', McCrudden and O'Leary emphasize another term unique to the literature on constitutional courts in consociations, notably the concept of the 'unwinding' role of constitutional courts in these settings. The term could be most closely associated with Samuel Issacharoff (2004) and Richard Pildes (2008), while McCrudden and O'Leary apply it within a certain interpretation. The heart of the concept of unwinding is the

following: in the case political elites have no incentives to liberalize those consociational institutions which have normatively questionable features, courts might do so by means of constitutional review. Even if one has normative objections against consociational settings, one might have two concerns with the court playing this role. From a normative perspective, one might argue that such weighty decisions have to be made by political bodies with a democratic mandate (e.g. Issacharoff 2004). More practically speaking, an overly assertive manner by the courts might jeopardize political stability (McCrudden and O'Leary are close to this stance), as consociational settings are usually established to manage conflict-prone situations.

In my thesis, I aim to center the questioning around this arguably pertinent dilemma in the literature by providing a multi-angle view of the concept. Therefore, I identify three core research problems. First, whether the unwinding role of courts meets the normative standards of constitutionalism. By investigating this question, I analyze the most important concepts related to the field of inquiry - notably, consociationalism, constitutionalism and constitutional adjudication. Second, from a more analytical perspective, to what extent is it possible for courts to play the unwinding role in the constitutional architectures they are embedded into. In order to answer this question, I will focus on Belgium and Bosnia, as countries meeting the most appropriate scope conditions: consociational democracies operating with a centralized model of constitutional adjudication. Third, I examine whether the behavior of constitutional courts in consociations confirms the empirical hypotheses in the literature and the analytical inferences from the theoretical parts of my thesis. In other words, I am interested in the following questions: should constitutional courts act as unwanders? Can constitutional courts act as unwanders? Do courts act as unwinders?

In my thesis, I argue that the normative question is highly ambiguous, and the answer one might embrace does not depend so heavily on the way one approaches the topic of democracy in divided societies, as judicial review might have virtues, as well as drawbacks from both schools

(consociationalism and centripetalism). The analytical inquiry will show where the current questioning in the relevant literature is incomplete: notably, as seeing the unwinding activities by the courts rather as a perception on the role they are suitable for, instead of seeing the institutional constraints courts encounter. Finally, the empirical chapter illustrates the key points from the argument of the analytical chapter.

The three parts all have different scholarly potential. While the answers for the normative dilemmas strongly depend on certain theoretical departure points, the analytical inquiry relies on the current, rather empirically inspired, hypotheses in the literature. Therefore, the inferences in the three chapters could reflect on the validity of each other. In conclusion, I present a more nuanced theoretical framework, together with possible further directions in the study of this topic.

The three parts all have different scholarly potential. While the answers for the normative dilemmas strongly depend on certain theoretical departure points, the analytical inquiry relies on the current, rather empirically inspired, hypotheses in the literature. Therefore, the inferences in the three chapters could reflect on the validity of each other. In conclusion, I present a more nuanced theoretical framework, together with possible further directions in the study of this topic.

Chapter 1 - Theoretical concerns

In this part of my thesis, I aim to provide an overview of what theoretical considerations can be attached to the study of constitutional courts in consociations. Therefore, three key concepts - consociationalism, constitutionalism, and constitutional adjudication - will be discussed, with a special emphasis on how they are interconnected with each other. Furthermore, I will provide a critical review of the literature on the more narrowly defined scope of my study; there I will primarily focus on the development of those specific concepts which shaped the study on courts in consociations so far. These are the concepts of 'unwinding' and 'judicial modesty'.

1.1 Fundamental concepts

1.1.1 Consociationalism

The term consociationalism can be attributed to Lijphart, who published this idea in an article in 1969. According to Rupert Taylor, a distinguished scholar on consociational theory, in his departure point, Lijphart was concerned with Western European patterns of power sharing in the 20th century, particularly the Dutch model, which historically can be dated from the end of World War I until the end of the 1960s (Taylor 2009: 6). In his famous article, Lijphart (1969) listed the aforementioned four characteristics of consociational structures, notably: mutual veto, grand coalition, proportionality, and segmental autonomy. Later (according to Choudry 2008: 18-19), Lijphart streamlines his argument (furthermore in Lijphart 2012) by emphasizing power sharing (especially in the executive, which points back to the element of grand coalition) and segmental autonomy, regarding the other aspects as 'secondary characteristics that reinforce the first two' (Choudry 2008: 19)

Certain elements of these can be explicitly pronounced in constitutional structures, while others can be present implicitly. For instance, mutual veto can be given to representatives of

constitutionally recognized groups, while it can also be articulated with the requirement of a qualified majority in certain decision-making procedures. However, the requirement of a qualified majority (even beyond constitutional content) might not only be present in consociational structures of divided societies, but also in other, merely consensus-based institutional arrangements. Grand coalition and mutual veto can be articulated in a similar legal character, though they are substantially more bound to the concept of consociationalism. Requirements for a grand coalition can be regarded as something unique to consociational settings, as the constrain of shared rule in the central government can be regarded as the key distinguishing feature between decentralized states and consociational systems. Therefore, segmental autonomy can be described as a necessary, but not sufficient, characteristic of consociationalism. Nevertheless, segmental autonomy can be articulated in territorial (e.g. Bosnia-Herzegovina) or non-territorial forms (e.g. Lebanon), in itself only the latter can be seen, while territorial autonomy is usually combined with certain nationwide group-specific rights (e.g. Belgium).

Consociationalism, as an institutional blueprint for conflict management, and political arrangements in deeply divided societies, was challenged by an alternative solution, called centripetalism, primarily associated with Donald Horowitz. Among many concerns, two, strongly interrelated conceptual objections against consociationalism can be distinguished. Firstly, its pre-determining nature (see: Lijphart 1995); notably, that ethnic identities are articulated from above, and people have to embrace 'ready-made' identities if they wish to participate in political procedures and public life, generally. Their second core objection builds on the normative futility of pre-determined and constituted groups, and questions the capability of consociational arrangements to bring solutions even in the long term. The reason behind this objection points to the presumption that consociational structures fail to create a shared identity; if a shared society can emerge under consociational settings, it can happen through external

factors, like economic development, globalization, secularization, etc. Therefore, as an alternative, they recommend fostering centripetal initiatives and mechanisms (see: Horowitz 1993, 2000), such as: a president elected in a way that stimulates nationwide programs and initiatives (e.g. by alternative vote or territorial quotas); an electoral system supporting comprehensive national parties (e.g. by registration rules) and consensual candidates (e.g. alternative vote, single transferable vote, constituency pooling, etc.); federalism, but not following ethnic lines, rather in a way that fosters cooperation and shared governance on more levels.

Nevertheless, one can argue that it is very difficult to implement such programs, especially in situations where consociation is implemented, as the other alternative: post-conflict setting, or 'merely' states of deep mutual mistrust. From another perspective, those elites who could make power sharing work would be simply uninterested in institutions which force them to cooperate, and would rather opt for a decision where they can see guarantees for keeping their autonomy, and a certain degree of power. This is be one of the reasons why consociationalism can be observed as a more widespread arrangement for conflict solution and management. As the most illustrative cases for centripetalist solutions, one can mention Indonesia, Nigeria, or Fiji.

This distinction between consociationalism and centripetalism is particularly important, as these are regarded as the most important ideas in political-conflict management. The best known advocate of the idea is Donald Horowitz, who criticized consociationalism in many of his scholarly works (e.g. 1993, 2000) with the argument that consociational settings could easily entrench identities and group cleavages closely related to the heart of given conflicts. Instead, he offers the conceptual alternative of so-called centripetal majoritarianism, which is based around institutional-arrangement incentivizing, or even constraining actors to cooperate in the possibly broadest sense. As Bogaards summarizes the core of the concept, 'The idea is that moderation is fostered by cross-cutting cleavages and, if these do not exist or are limited in

society, then electoral institutions have to foster them deliberately at the political level.' (2008: 61). The core elements of centripetalism are the following: a centripetalist electoral system (alternative or single transferable vote, or different quotas for a qualified majority), crosscutting federalism, and strong presidential institutions (Horowitz 1993).

On the other hand, consociational theory itself was re-thought as well, with the question: is it possible to reconcile the aim for shared rule in consociationalism with the normatively grounded desire of self-determination, when it comes to public identities and political participation? The concept of liberal consociationalism is an attempt at that by promoting mechanisms for shared rule, but shaped in a way, which does not constitute the relevant groups themselves. Therefore, a categorization of consociational regimes is needed where the 'classical' notion of consociationalism can be labelled as corporate, while the alternative approach is called liberal consociationalism. Nowadays, Belgium, Bosnia-Herzegovina, and Lebanon are the most pertinent cases for the former, while Iraq, Macedonia, and Northern Ireland for the latter. However, in the following analysis, the word 'consociationalism' refers to the classical concept, for the reason that the main cases discussed in the thesis fall in this category. Otherwise, in other cases, the 'liberal' attribute will be pronounced.

1.1.2 Constitutionalism and constitutional adjudication

Constitutionalism can be defined as a set of norms, institutions and procedures creating, maintaining and promoting the following: rule of law, limited government, and guaranteed rights (see: Holmes 2012; Preuss 2000; Sajó 1999). In relation to the scope of my research, the following question can be posed: is there a conceptual congruence between constitutionalism and consociationalism, or do they contradict to each other? The answer depends on the element one focuses on, from this arguably thick definition of constitutionalism.

If one approaches constitutionalism from the direction of institutions and procedures, the two concepts are fairly close to each other. Concerning the aims of constitutional practices, guaranteed rights and the rule of law are absolutely present in consociational arrangements, as the different constituent groups are definitely interested in ensuring the substance (present in the element of segmental autonomy) and the enforcement mechanisms (referring to mutual veto) of their specific rights. Furthermore, limited government as such is also absolutely essential: it is articulated in all elements of consociationalism. Mutual veto limits arbitrary decision-making that promotes the interests of one group against another. A legally regulated grand coalition creates a mechanism, which inherently fosters policy-making in an inclusive manner, and does not allow the arbitrary rule of any group or decision-maker. Proportionality creates an insurance mechanism for non-arbitrary execution. Finally, segmental autonomy also creates a counterbalance against the central government. Nevertheless, from the institutional perspective, there is one overarching difference between the classical doctrines of separation of powers and consociationalism,[3] however sophisticated is the latter in terms of power sharing. In the realm of constitutionalism, institutions balance each other out; meanwhile, in consociationalism, balance is built into the institutions. This distinction becomes particularly relevant if one aims to examine the operation of constitutional courts, institutions relevant for separation of powers, and in settings where checks and balances are internalized in the institutions.

From a normative perspective one can get different impressions. On the one hand, the notion of citizenship is arguably essential in the normative concept of constitutionalism. Furthermore, it is also important to regard citizenship from a universal perspective. Therefore, one shall bear citizenship rights primarily for the reason of being subject to the constitution, and not for being

[3] Hereby, I have to add the fact that a considerable share of the literature on the conceptual approach to constitutionalism (especially those work which I refer to) was written by American scholars who primarily refer to the particular institutional environment their work is mostly related to.

a member of a group constituted by the document. At this point, there is a clash between the two ideas, as the logic of consociationalism (especially the 'classical', corporate understanding of it) is largely centered around societal groups, contrary to the rather individualistic approach of liberal constitutionalism. This problem also spills over to the question as to whether power sharing in consociationalism can substitute a classical approach to the separation of powers, as the mechanisms of power sharing are dependent on the elites who ought to control each other - nevertheless, the question remains as to what protection can the individual citizen trust when it comes to vertical relationships of power and accountability. This concern again points to the relevance of constitutional adjudication, a mechanism which could be regarded as an institution inherently designed for citizenship rights protection (see: Shapiro and Stone Sweet 2002).

By definition, constitutional adjudication is an activity of a designated institution, which is entitled to annul legislative acts brought before it, on grounds of the constitution, as to whether the given act complies or contradicts with the document. In an overwhelming majority of cases, this is done by courts, or institutions designed similar to courts. The former case is present in the diffuse constitutional model, where every court has the right to exert judicial review, the institution on the top of the judicial hierarchy is only different from the others in that it has the final authority to rule on the constitutionality of a legislative act, and provide a binding interpretation of the constitution with the same act. The latter case, where a special institution, usually built up by composition and procedures as a court, exerts judicial review and is labeled as the centralized model of constitutional review (see: Stone Sweet 2012).

By their logic of operation and inherent counter-majoritarian bias, courts can be regarded as natural allies of minorities, speaking socially and politically as well (Sadurski 2005: 87). Though it is more than intuitive that constitutional courts can be essential actors in consociations, regimes characterized by mutual guarantees and assurance mechanisms, on the other hand one should acknowledge that constitutional courts are suitable for being

counterbalances to political majorities. Nevertheless, the question arises: Are constitutional courts similarly suitable to settings where there is no clear distinction between majority and minority, or better and worse off groups? The answer of McCrudden and O'Leary is that they partially fit the picture, but shall not forget that consociational agreements are primarily created and maintained by the elites; therefore, courts should rather act 'modestly', handling the sensitivity of consociational agreements properly, with special care paid to the stability of these arguably fragile regimes. Nevertheless, this is the point where the explicit content of the consociational agreement determines to what extent is there a trade-off between the normatively desirable pursuit for universal human rights and the pragmatically favorable carefulness with the sensitivity of consociational agreements.

1.2 Key concepts and former contributions in the field of constitutional courts in consociations

Concerning the former contributions to the topic of constitutional adjudication, I regard the scholarly work of McCrudden and O'Leary as my primary departure point for two reasons: first, their specific focus on the field closely related to the scope of my research; furthermore, it is not only closely related to this field of inquiry, but it is also one of the few systematic contributions to this field. Therefore, I primarily aim to present their core arguments, stances, and the limitations of their approach. Furthermore, I also aim to put a greater emphasis on the key concepts they employ, by chronologically tracking back their use by those authors they are referring to. Hence, in this chapter I will first focus on the work of Richard Pildes and Samuel Issacharoff, who developed one of the most frequently used terms by McCrudden and O'Leary (regarding courts as 'unwinders' of conflict situations), and present how differently the concept is used in different works. In the following, I will outline the argument of McCrudden and

O’Leary, with a specific focus on their concept of ’judicial modesty’. Finally, before concluding, a conceptual alternative to their understanding of constitutionalism in divided societies (the so-called ‘constitutional incrementalism’ by Hannah Lerner) will be presented.

The term ’unwinding’ is an arguably essential concept in the literature on constitutional adjudication in divided societies, particularly emphasized by McCrudden and O’Leary. Its first relevant mentioning can be traced back to 2004, when Issacharoff published his article titled ‘Constitutionalizing Democracy in Fractured Societies’. His empirical scope included consociational arrangements, though not exclusively, as he compared Bosnia-Herzegovina, a classical case for corporate consociationalism with South Africa, a country experiencing consociationalism temporarily, but later shifted towards a ‘normal’ institutional setting, besides remaining a divided society. By using the term ‘unwinding’ (Issacharoff 2004: 81), he referred to the phenomenon of courts re-interpreting constitutional arrangements (based on the doctrines of universal constitutionalism) in order to decrease the group-specific entrenchment of institutions and practices.

In his approach to the the topic of constitutionalism, he applied a thinner definition compared to mine, emphasizing its government-limiting character: 'I use the term constitutionalism only to refer to the creation of basic law that restricts the capacity of the majority to exercise its political will' (Issacharoff 2004: 73). When talking about political institutions established in divided societies, his core considerations are nation building (which refers to the construction of a shared society and a shared identity) and transition management. Therefore, regarding consociationalism, he primarily focuses on the inclusiveness of these regimes (as he states: 'The allure of consociationalism was its understanding that state authority could not achieve legitimacy without inclusiveness' Issacharoff 2004: 88) as their positive feature.

All these understandings are important if one aims to understand the normative character of judicial 'unwinding', because Issacharoff is clearly supportive of transforming institutions based on primordial identities and group logics, but does not endorse an overly active judiciary engagement in this process. He does this primarily because of the lack of democratic legitimacy possessed by courts, as he writes:

> Rather than securing national unity through formal power sharing along the major axes of social division, constitutionalism tends to impose limits on the range of decisions that democratically elected governments may take (Issacharoff 2004: 75)

This particular stance is especially understandable, as one takes into consideration that the governability of consociational regimes was probably the most eminent concern in Issacharoff's article. Therefore, one could see a clear dilemma between the normative endorsement of institutional arrangements mirroring the values of (generally speaking) cosmopolitan constitutionalism and the pragmatic concern for the everyday operation of consociational institutions. This dilemma is present in probably every contribution to this topic; however, certain questionings might sound different.

The understanding on the concept of 'unwinding' was later developed Richard Pildes, a frequent co-author with Issacharoff. In his book chapter on the dynamism of democratic institutions (2008) in ethnically divided societies, Pildes provided a clearer understanding of the possible judicial role in institutional development within these settings. Nevertheless, Pildes had a distinct approach to political and judicial decision-making compared to Issacharoff. While Issacharoff emphasizes stability as the core value promoted by political decisions, in the eyes of Pildes, this stability rather means rigidity. This stance is primarily based on the presumption that the inherent logic of consociational agreements creates an institutional environment which makes the political actors interested in maintaining highly fragmented institutional architectures. Therefore, judiciaries with a capacity for constitutional review can be one of the

extra-political actors, who could move the design of political institutions towards a more integrationist approach.

The way McCrudden and O'Leary (2013a, 2013b) approach the possible role of constitutional courts incorporates both of the aforementioned stances in a certain way. They do not proclaim the supremacy of either politically negotiated, nor judicially imposed, decisions when it comes to the design and dynamism of institutional architectures. Instead, the core question in their work is, how much the courts use the power they are entitled to, especially for imposing external, universalistic values, which are parts of international legal norms and documents, but not the particular agreements establishing the given consociational arrangements (only by references to the supremacy of international law in these constitutions).

Besides the dilemma of what potentially destabilizing means for people endorsing judicial unwinding in consociational settings, another tension is present in the argument of McCrudden and O'Leary. This problem points to the constitutional basis of the adjudicative practice whether courts should primarily pursue the universalistic values of constitutionalism, or promote the specific rights established in the given national constitution. In content, these two might conflict on the basis that the individuals are equally entitled to fundamental rights because of being natural persons; meanwhile, the pre-determining nature of consociational constitutions frequently discriminates between groups, and allocates certain rights to individuals as group members. Nevertheless, this is not only a normative dilemma, as courts in consociations base their adjudication on constitutions which include highly context-sensitive group-specific rights as well as references to international human rights documents. No wonder why McCrudden and O'Leary gave the following title to a journal article preceding the publication of their book: *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-Sharing Settlements* (2013b), which title does not only include the questioning of stability, but also creates the label for 'human rights' adjudication. Altogether, the specific

nature of consociational democracies is well reflected in the structure and core questioning of the fact, as the main questions do not primarily point on the democratic mandate and legitimacy of the courts (as it is the case in numerous books analyzing and comparing constitutional courts), but rather their impact on the political system as a whole.

The fact that the book of McCrudden and O'Leary (2013a) deals with two European countries, (Belgium and Bosnia-Herzegovina, with a heavy emphasis on the latter case), gives further specific features to their analysis. First of all, the relationship between internal and external constitutional norms and institutions is an important aspect of both situations, for the fact that both countries ratified the European Convention of Human Rights (ECHR) and are under the jurisdiction of the European Court of Human Rights (ECtHR). Furthermore, a very frequently cited case also comes from the sphere of European politics: the example of Cyprus between 1960 and 1963, where the constitutional court supposedly played an active role in undermining the institutional framework of cooperation. The case of Cyprus is particularly important when reading McCrudden and O'Leary, as they refer to it as the clearest evidence for the de-stabilizing potential of constitutional courts. Altogether, their strong concern for stability could be the driving force behind their argument, where they create the term 'judicial modesty' (McCrudden and O'Leary 2013b: 488-489), which refers to the caution exerted by domestic courts concerning possible interventions in political processes. This is something McCrudden and O'Leary clearly endorse, in contrast to the assertive manner of the ECtHR in issues concerning the Bosnian consociational arrangement (2013a: 84).

However, it is also important what type of constitution the courts have as a basis for their decisions, and this aspect of the phenomenon seems to be partly overlooked by McCrudden and O'Leary. In their book, they only analyze the Bosnian constitution from the side of regime legitimacy and institutional architecture (McCrudden and O'Leary 2013a: 21-33), not placing too great an emphasis on the constitutions themselves. However, it is not only a political

question if courts behave in an active or passive manner, but certain features of the constitutional text could also enable, or even encourage, judicial activism; nevertheless, activism and an unwinding role are distinct concepts, as judicial activism itself could also foster further segregation.

In order to assess the activist potential of courts, one could find sources in two different sets of literature. On the one hand, there is the rich literature on judicial activism in general (e.g. Holland 1991; Sadurski 2005; Shapiro and Stone Sweet 2002; Stone Sweet 2000; etc.), while a less extended, but dynamically growing, group of works on constitutional design and constitution-making in divided societies (e.g. Choudry 2008, 2012; Lerner 2011; etc.) on the other. If one approaches the topic from one or the other angle, one might find different conclusions, though my aim is to find a middle ground between these two sets of contributions.

From one perspective, authors working on judicial activism in general emphasize accuracy and comprehensiveness of constitutional texts, which sometimes limit the power of courts, but brings them in a clearer situation, and helps them to maintain a greater degree of legitimacy. This simultaneously means that the more vague and inconsistent the constitutional text is, the greater sphere courts have for their activist practices. Therefore, if one aims to translate these inferences to the question of constitutional adjudication in divided societies, the following implication can be held: if one is willing to embrace a judicial role in unwinding consociational settings, a less cohesive constitutional text is absolutely appropriate; on the other hand, if one only trusts political solutions, a clear, comprehensive and parsimonious constitution shall be adopted.

A comprehensive alternative view on constitutional design is presented by Hannah Lerner in her book *'Making Constitutions in Deeply Divided Societies'* (2011). As she compares the constitution-making, and the evolution of constitutional material in Israel, India, and Ireland, a

clear empirical conclusion is made: ambiguous (or even non-formal) constitutions can accommodate societal differences as well as centripetal transformations. In order to achieve this, she recommends a combination of clear institutional and procedural provisions, alongside ambiguous self-definitions (Lerner 2011: 43-44) and group-specific rights. In general, she labels this idea as constitutional incrementalism. When it comes to the role of the judiciary, Lerner does admit its certain advantages, but in general, she has a clear stance besides solving problems by political means (2011: 44-46).

Ironically, her constitutional recommendations would rather foster an active judicial role in these regimes, at least according to the mainstream literature on constitutional courts. Furthermore, there are interesting questions which are present if one reflects on the conclusions of Lerner. Firstly, how can one tackle the self-interest problem of the elites, the concern of Pildes (2008)? Second, is it possible to separate provisions for identities and group-specific rights from institutions, especially in cases where the differences are highly institutionalized?

By bringing together slightly different contributions from the scholarly literature, I aim to find a middle ground between their lines of research in order to investigate my questions in a more careful and comprehensive manner. Therefore, when analyzing the constitutions and institutional architectures of the two given countries, I aim to highlight elements that foster judicial activism, and therefore enable courts to potentially play the unwinding role in consociations. Regarding the history of the two courts, their attempts at 'unwinding' or rather, preserving, the fractured setting will be the primary object of my analysis.

Chapter 2 - The constitutional design and environment of the courts

Taking the existing body of literature into account, three questions seem to be primarily important. Firstly, should courts be the unwinders of consociational settings? Second, could courts become unwinders? Finally, do courts play this unwinding role? In the former part of my thesis, I was focusing on the first question, discussing this normative tension. In this part of my work, I aim to focus on the second question, by comparing the constitutional frameworks surrounding these constitutional courts operating in consociations. Following that, I aim to focus on the more practical empirical questions, through a survey in the relatively short history of these institutions.

The empirical analysis of my thesis is seeking the answer for two core questions, closely related to the concerns in the existing literature. The first is, if courts could acts as unwinders of consociational settings. Though the dominant discourse in the literature sees this as a question of how the courts perceive their role; however, certain conditions in the constitutional design should enable this approach to their adjudicative practice. Second, I aim to examine if these courts have indeed performed the role the existing literature imputes to them.

In the first part of my analysis, I will examine the institutional design of these courts, alongside the institutional architecture where they are embedded. This inquiry will be done in two parts, one the one hand, by focusing on their consociational features, while taking a closer look on institutional arrangements fostering judicial activism in the following.

In my thesis, I focus on Belgium and Bosnia-Herzegovina for two general reasons. Firstly, these two countries are examples for those few, which are functioning as 'classical', corporate consociations, therefore the theoretical dilemmas raised concerning consociational setting can be presented through them the most illustratively. Second, constitutionally speaking, many

features are similar in the two cases, which would make any of the two case hardly comparable one on one with any other case study, particularly the presence of multidimensional (territorial and linguistic) federalism. Therefore, these two countries fulfill all the scope conditions established in the introduction: consociations, have provisions on judicial review, and could qualify as democracies.

Nevertheless, there are few countries, which constitutionally qualify as consociations, and also have established mechanism for judicial review, but do not reach a sufficient threshold regarding the democratic qualities of their political system. For instance, Iraq might be a relevant. case, as the relevant literature views the country as a consociational regime since the adoption of the post-war constitution in 2005 (Taylor 2009), and the Federal Supreme Court of the country has the right to judicial review (in Article 93 of the Constitution). Nevertheless, the regime has fallen short in maintaining democratic standards - though the rankings of *Freedom House* might not be used for every scholarly inquiry, the fact that the country never reached the 'partly free' or 'free' status on its index, could be illustrative enough (Freedom House 2015). Furthermore, Lebanon also could be seen as a possible country included in the analysis, but the anomalies around the democratic institutions and the postponed elections all question the appropriate democratic quality of the regime.

2.1 Belgian and Bosnian consociations compared

In this chapter, I primarily aim to introduce the most important features of the Belgian and Bosnian state architectures, particularly focusing on their consociational features. As there is a rich literature on these political systems (Keil 2013; Lijphart 1981), I do not aim to provide a complete and comprehensive description, but rather mention the most important background information. Talking about the nature of these institutional systems, it is hardly debatable that

both countries would be strong candidates for the title of the most complicated political system in the world. Normally, this constitutional environment would suggest a strong constitutional court, for the fact that complicated institutional provisions might frequently require jurisdictional arbitration, depending on the accuracy of the constitution's wording. However, these two courts are both far from being activist, for other context-specific reasons, which will be discussed in the following two sections.

Beside their complexity, the other feature similar in both cases is the top-down nature of their creation, as neither of them was created from below, in a motion of 'coming together', but rather through an intent to manage severe societal divisions with the help of certain political institutions. Nevertheless, beyond these common features, the stories of creating the federal structures are totally different. Before federalization and the establishment of sophisticated power-sharing structures, which one refers to as consociationalism, Belgium was functioning as a unitary and democratic state; meanwhile preceding its current constitutional regime, Bosnia was part of the decentralized but non-democratic Yugoslavia. Furthermore, with its ethnic diversity, Bosnia was regarded as 'Yugoslavia within Yugoslavia'; the character of the entity was also mirrored by the autonomy that different ethnic groups enjoyed (Bieber and Keil 2009: 341-342; Keil 2013: 53).

As Belgium went through the decades-long decentralization, both salient ethnic groups (the Dutch-speaking Flemish and the French-speaking Walloon) were interested in carrying on with the institutional procedure, though with different motivations and therefore different aims. One the one hand, the Walloon was the culturally dominant group (as Dutch was recognized as a state language only in 1932); on the other, Wallonia was worse-off in economic terms. Therefore, they were interested in a territorial decentralization, which would enable their economic catch-up (Swenden and Jans 2006: 879). Meanwhile, the richer Flemish regions

aimed for further cultural emancipation (2006: 879-880). These different ambitions resulted in a two-dimensional decentralization process.

Legally speaking, the division of the country into four linguistic regions (Dutch, French, German, mixed Brussels) in 1963 was the first important step (McCrudden and O'Leary 2013a: 48-49). This was followed by a new, federal constitution in 1970, which triggered an 18 years long incremental process of decentralization (Swenden and Jans 2006: 881). In the newly created structure, the linguistic communities and the territorial regions can be regarded as the cornerstones of the Belgian federal structure (see Articles 1-3 of the Constitution of Belgium). Both these communities and regions have their own legislative bodies governing the autonomous issues in their jurisdictions (Articles 116-117). Beside this, the aforementioned linguistic regions (Article 4) are also important regarding schooling and cultural institutions. In certain points, there might be contradictions and overlaps between these jurisdictions, which caused clashes in the reading of the legal system, triggering an important judicial case on the consociational institutions (the famous *Mathieu-Mohin* case before the ECtHR, which will be discussed in the last chapter of my thesis). The establishment of the constitutional court happened in a relatively late phase of this process, in 1984.

Nevertheless, Belgium not only functions as a complex federal state, but also as a consociation, as all other elements of consociationalism are detectable in the state architecture. Proportionality can be found in all spheres of the state within the overwhelming majority of public bodies and institutions (Peters 2006). Grand coalition is fostered by the constitutional provision requiring an equal number of Dutch- and French-speaking ministers in the federal cabinet (Article 99). Mutual veto is ensured by the requirement for qualified majority in several decisions, most importantly constitutional amendments.

Compared to the non-violent and incremental change in Belgium, Bosnia arrived to its current constitutional structure through radically different premises. Though during the lifetime of Yugoslavia, Bosnia was regarded as an example of peaceful co-existence between ethnic groups, during the severe and brutal Balkan wars, it became the venue of the most inexplicable war crimes and ethnic cleansings. The current institutional structure of Bosnia emerged from the civic war itself (between 1992 and 1995), as the country's constitution was an integral part of the Dayton Peace Agreement (United Nations 1995), which ended the fighting in 1995. The constitution has three very specific characters, which cast their shadow on the entire regime. Firstly, its imposed character. Though the political institutions were parts of the bargain, the constitutional document itself was written by foreign legal scholars, its original language was English, and only later received a Bosnian, Croatian, and Serb translation (para 6 *Sejdić and Finci v. Bosnia and Herzegovina*). Furthermore, the office of the High Representative was created as a quasi-procurator position by the international community (Keil 2013: 121-123); though the legal basis of its authority (the former Annex 10) is no longer part of the Bosnian constitution, the position is still mentioned in those part of the constitution which were meant to be provisionary, but are still there (e.g. Annex 2). Therefore, the constitution still bears the signs of an imposition, temporary character, and the framework of an international protectorate.

Though the constitutional text itself was written by a group of foreign experts, as the institutional arrangement mirrors the results of the negotiations, the mutual distrust between relevant groups can be clearly seen, for instance if one regards the core elements of consociationalism. Segmental autonomy is provided in a multi-layered model of federalism. This means that there is a territorial division of power in two levels. Firstly, on the national level, the country is divided into two units: the Federation of Bosnia and Herzegovina (not to be confused with the country itself, which bears the name simply Bosnia and Herzegovina, or Bosnia-Herzegovina in itself), and the Serbian entity, the so-called *Republika Srpska*. The

former operates as a federation within the federation, with 10 autonomous cantons, maintaining shared power between the Bosnians and the Croats. On the other hand, the *Republika Srpska* operates as a centralized unitary polity.

The further elements of the 'consociational package' are also very clearly present in the Bosnian constitutional architecture. For instance, proportionality is widespread, present in practically every public institution at the federal level (both levels of the federal structure; Keil 2013: 105). Furthermore, proportionality in many cases means parity. For instance, instead of having one person as the head of the state, a collective three-member Presidency was established, with one Bosnian, one Croatian, and one Serb. Furthermore, the upper chamber of the legislative also contains an equal number of representatives from every salient ethnicity, regardless of their demographic proportion. Both of these two institutions play an important role in maintaining another pillar of consociational regimes, mutual veto. Any member of the presidency (Article V/2/d of the Constitution), or the majority of representatives from each entity in the upper chamber (Article IV/3/e) can block legislation if they see the 'vital interest' of their ethnic group being jeopardized. In case of presidential veto, a qualified majority in the legislative is needed (Article V/2/d), while a veto in the upper chamber triggers the establishment of a joint committee with three members from every ethnic group if they can reach a consensus; if not, the Constitutional Court has to be invoked (Article IV/3/e-f). Finally, the grand coalition on the national level is ensured by the constitutional provision that prescribes that at least one-third of the cabinet members have to be from the Serb entity (Article V/4/b).

In conclusion, the core similarity between the institutional environments where the courts are embedded is their complexity. Beyond this, the historical background of the two polities, and the legitimacy behind the constitutions, which is the basis of their adjudication, are sharply different. Furthermore, the security factors and the international environment surrounding the courts is also fairly different, as the concern for stability has a different meaning in the

economically developed Belgium, which is deeply embedded in the European integration, compared to the post-conflict Bosnia. Finally, the fact that the Bosnian court is a quasi-international institution incorporated into the Bosnian constitutional structure also significantly changes its possibilities to perceive its own role and neutrality.

2.2 Constitutional courts and the institutional design of consociations

In this part of the thesis, I aim to examine two questions focusing on the connection between the institutional architecture of consociational regimes and the design of constitutional courts in these settings. The first question is if the position of constitutional courts within the state structure is influenced by the fact that the system as a whole is a consociation. The second is what characteristics of these courts mirror the core principles of consociationalism.

2.2.1 Political self-interest and the constitutional mandate of courts

If one approaches the relationship between political actors and constitutional courts, generally those groups can be regarded as actors interested in establishing strong courts, who otherwise cannot influence political decision-making (Sadurski 2005). Otherwise, politicians are generally interested in having less actors possibly constraining their capacity to act. This tendency particularly applies to consociations, where the views and preferences of several actors have to be taken into consideration, and the court has the capacity to act beyond the consensus of political actors. In addition, courts do not take part in negotiations, but judge the political decisions in the form it is cited before them - regardless of talking about an *ex ante* or *ex post* judicial review. Therefore, courts cannot be regarded as an additional party, but rather an actor whose decision is anticipated (Stone Sweet 2000) by everyone.

On the other hand, constitutional courts can fit the image of consociational democracies, primarily because of the strongly contractual nature of these settings. Since the mutually respected agreements are cornerstones of consociational regimes, an actor who can be regarded as the impartial interpreter of the common framework can substantially contribute to stability in such systems. From another perspective, constitutional courts can help in mutually ensuring the credibility of each other's commitments.

In the light of these presumptions, one can assume that elites in consociations are interested in having constitutional courts, which can act as arbitrators when the common commitments have to be enforced, but cannot substantially influence policy-making, especially in areas, which are less sensitive from the perspective of the consociational bargain. In the following, I will compare the constitutional mandate, certain procedural rules, and the regulations on composition procedures of the Belgian and the Bosnian constitutional courts, in order to test the validity of these intuitions.

2.2.2 Constitutional mandate

If one aims to establish an appropriate benchmark for the 'standard' perceived role of a constitutional court, probably Hans Kelsen, the quasi inventor of centralized judicial review could be the theoretically soundest option. In the *Pure theory of law* (1989) he defines constitutional courts as 'negative legislators' (1989: 16), maintaining the unity of the legal system based on its governing basic norm, the ultimate expression of which is that the first constitution should be obeyed. As the whole legal system should be the concern of the constitutional court, only the constitution itself should be untouchable for it.

Regarding the mandate of constitutional courts, there is a difference between them and courts in non-consociational regimes with a universal scope of adjudication. In some cases, this is

visible in the very strict constitutional boundaries on the jurisdiction of the constitutional adjudicator. In this manner, the Belgian constitution imposes limits on the scope of the Constitutional Court. The text itself precisely lists the articles, which contain the rights under the protection of judicial review (Articles 141 and 142). The court has limited freedom in providing an interpretation on its own jurisdiction; however the listed rights themselves have a wider scope. For instance, the provisions of anti-discrimination (alongside other fundamental rights listed in Article 11) are crucial in maintaining the consociational arrangement, but also many other issues can be regarded within this set of cases. Nevertheless, political scientists have seen this arrangement as one imposing substantial limits on the Constitutional Courts (Swenden and Jans 2006: 882).

In the Bosnian case, there are no 'hard' constitutional constraints, though interestingly the framers still expressed their original intentions with designing the constitutional court:

> The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, *including but not limited to*:
>
> - Whether an Entity's decision to establish a special parallel relationship with neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina
> - Whether any provision of an Entity's constitution or law is consistent with this Constitution.
>
> (Article VI/3/a; italics added)

One can clearly see that the constitution emphasizes those issues, which can be regarded as the cornerstones of the consociational agreement as a whole, therefore the constitutional text gives some insight to the original intentions of the constitutional framers.

2.2.3 Institutional accessibility

When regarding the scopes of powers of the courts, it also has to be considered which procedural and substantive conditions need to be met for these courts can apply their

constitutional powers. This question is highly essential, as there are more specific limits on bringing issues before constitutional courts in regimes of centralized constitutional adjudication compared to countries following the diffuse model, however greater degree of freedom these courts enjoy by having the right for abstract review. In most of the parliamentary democracies there is a combination of different institutions, who can initiate constitutional review. Usually *ex ante* reviews (where possible) can be triggered by heads of states, parliamentary minorities, or both. The *ex post* reviews - which are more common - can be usually initiated by a wider set of actors, often including institutions with a legal character (mostly the ordinary courts or the ombudsperson), a certain share of the parliament (between 10% and one third in most of the European democracies), the head of state or other state organs. These actors are present in the Belgian and the Bosnian arrangements as well; nevertheless, certain thresholds or institutional factors give then a considerably different character from what they have in standard parliamentary democracies.

In Belgium, only *ex post* review is possible with a system upholding two principles. On the one hand, every single citizen can initiate constitutional review of federal or regional legislation, if she can prove that she is affected by the given legislation (Article 142). This clearly presents a rights protection character of the court, beside its potential to defend those individual, but group-specific rights, which are crucial to the consociational agreement. On the other hand, the institutional channels of constitutional review are clearly tailored to resolve disputes between different entities. For initiating constitutional review, a majority of two thirds is needed both in the federal and the regional parliaments as well, it is clear that the core aim is to provide an opportunity for the entities to exert control on each other, and not giving an instrument for small- or medium size opposition parties.

On the first sight, the provision in Bosnia-Herzegovina rather resembles a classical arrangement on ex post review (same as in Belgium, ex ante review is not an option). However, the

specificities of institutions entitled with the initiative role rather link these procedures to the consociational structures. Firstly, contrary to Belgium, the individual citizen cannot initiate constitutional review herself - however, this is not outstanding in a comparative perspective. The right of ordinary courts to initiate (Articles VI/3/b and VI/3/c) does carry a character of human rights protection, therefore it is only relevant when speaking about group-specific rights.

More interesting observations can be made regarding the legislatures and the presidency. A quarter of parliamentarians are required to initiate an ex post review in any of the legislative bodies, which means the parliaments of the entities, the lower and the upper chamber of the federal legislature (Organic Law, Article 1). This threshold of one fourth can be present in any of the standard parliamentary democracies, but beyond the fragmented state structure, the electoral system makes this regulation supportive towards the consociational logic. Given that the electoral system is organized at the level of federal units, operating the party system follows the ethnic cleavages (Keil 2013: 118-121). Furthermore, as there is no national administrative threshold, only certain implicit limitations, the party system is highly fragmented: for instance, in the presently incumbent House of Representatives (the lower chamber of the federal parliament) there is no party above a 20% share in mandates (Parliament of Bosnia 2015).

Therefore, if political actors aim to trigger constitutional review, they can only do it in coalition; in an ethnically fragmented party system, the natural allies of certain parties could be their fellows from the same ethnicity. This means that crosscutting coalitions might be formed only alongside very fundamental issues. The same threshold in the House of People (federal upper chamber) also makes it difficult for political forces to challenge legislation on a constitutional ground, but enable ethnic cooperation on the other hand (as every group is represented by the one-thirds of the members, which means that even one representative from the five delegated by one groups can dissent, but not block the challenge). Finally, in several countries, the right of the head of state to initiate judicial review is one of her veto powers, what the head of state

could use as a person embodying national unity. However, the institution of Presidency rather symbolizes mutual distrust, as the three members of the body have the right to veto any presidential, by appealing to the vaguely defined 'vital interest' (Article V/2/d) of a given community.

2.2.4 Proportionality in court composition

The most striking differences between courts in divided and non-divided settings might be seen in the way they are composed. This difference is primarily in the provision on different judges belonging to certain groups, or meeting other specific criteria, beyond the usual professional requirements, concerning education, experience, age, etc. One can clearly discern the principle of proportionality, one of the cornerstones of consociationalism in these arrangements. However, this proportionality requirement in the design of the courts is not exclusive only to consociational regimes. It also exists in divided societies not embracing the full 'consociational package' (Lijphart 1969), like Canada or Macedonia. Concerning my research, the courts of Belgium and Bosnia-Herzegovina, both have further peculiarities beyond the quotas for judges. The Bosnian case has several highly unique characters, which partially make it very difficult to compare with other countries; meanwhile, the Belgian court is primarily interesting, as one can simultaneously see consociational and centripetalist tendencies in its design.

In Belgium, six judges have to come from the French- while six has to come from the Dutch-speaking community. Meanwhile, one judge from the twelve always has to be proficient in German. This design mirrors the pertinent division of society, which influences the design of every institution; even though other quotas are built in the system (e.g. none of the gender groups can consist more than two-thirds of the court), it is obvious, which approach to societal complexity is the most important one. Furthermore, the arrangement which says that half of

judges from both linguistic groups have to be former politicians, who served as members of the parliament for at least five years, suggests to be a consociational feature as well: through this arrangement, representatives of the political elite can take part in judicial decision-making in politically sensitive issues.

On the other hand, the selection procedure tends to be centripetalist, rather than consociationalist. In the process, both houses of the parliament have to present a list of candidates backed by a qualified majority (two-thirds) for the monarch (perceived as one of the few symbols of national unity, both in the 1980s and today), who chooses and appoints the judges (Organic Law, Article 34). This regulation encourages consensus, and fosters the selection of moderate, rather centrist candidates.

Contrarily, the Bosnian court does not include any centripetal mechanism, but rather offers a radical version of corporate consociationalism. The 9 members are selected in the following way: two judges are elected by the legislatures of their entities (in the Republika Srpska, the parliament itself elects them, while in the Federation of Bosnia-Herzegovina, the caucuses of parliamentarians from different nationalities do so), while the ECtHR appoints 3 judges. This institutional arrangement encourages political actors to appoint those judges who they see as the best representatives of their interests, rather than choosing consensual, centrist figures. Furthermore, the ethnic politicians are neither constrained by the usual professional requirement concerning judges, as the Bosnian constitution is rather vague in this issue setting only the following as a precondition: 'Judges of the Constitutional Court are required to be distinguished jurists of high moral standing' (Article VI/1/b).

2.2.5 Composition as the emphatic feature

In general, one can state that there are clear connections of polities being consociational, and the way their constitutional courts are designed, both regarding the external powers, and the internal requirements and organizations. Regarding the external powers and mandate, this can be primarily seen in the limitations on their scopes of power, or even in the constitutionally expressed priorities among their tasks. When it comes to the composition procedures and requirements, Bosnia can be seen as a clear case of corporate consociational thinking, while Belgium is an interesting mixture of consociational and centripetalist approaches.

As one poses the question if the design of constitutional courts help them being unwinders of consociational settings, the answer would be rather 'no' than 'yes'. On the one hand, all consociational elements in their design encourage the appointment of people not opened to such an undertaking (at least in the Bosnian case). On the other hand, limitations on their power often blocks courts, from touching the essential core of the agreements, and giving them only an assistant role in preserving the existing frameworks.

Furthermore, the core consociational features in the design of the courts are summarized in the following table:

Table 1: Core consociational features of the Belgian and Bosnian constitutional courts in comparison

Belgium		Bosnia and Herzegovina
limited to certain parts of the constitution	*constitutional mandate*	unlimited
two legislative chambers propose a list of candidates to the head of state (with a qualified majority of two-thirds), from which the head of state chooses the judges	*composition*	the legislative bodies of the entities elect the judges; in the Federation of Bosnia and Herzegovina, the Bosniak and the Croatian caucuses separately elect the judges
		3 judges appointed by the European Court of Human Rights (ECtHR)
6 Dutch-speaking and 6 French-speaking judges	*specific requirements regarding the judges*	none
at least one has to be proficient in German		
none of the genders shall be less represented than one-third of the court members		
half of the judges shall have a 5 years-long experience as members of parliament		
5 years of experience in certain specified offices	*professional requirements*	not specified
degree in law or political science		
single citizen, being affected by the given legislation	*actors who can initiate ex post abstract review*	members of the Presidency
national and sub-national legislative, if two-thirds of the representatives join the proposal, in all of the bodies		one-fourth of representatives in both houses of the parliament
ordinary courts		ordinary courts
federal and sub-national governments		

Sources: Belgium's Constitution with Amendments through 2012; Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009; Organic Law - Special Act of 6 January 1989 on the Constitutional Court [Belgium]

2.3 Consociational courts and judicial activism[4]

After examining the institutional features of the Belgian and Bosnian courts from the perspective of consociational theory, I aim to assess how much room they have for unwinding practices, based on their constitutional design. In this undertaking, I employ the framework established by Kenneth Holland in the introductory chapter of the book *Judicial Activism in Comparative Perspective* (1991). As judicial activism might be grasped as a rather behavioral phenomenon, Holland approaches it as the following:

> Judicial activism comes into existence when courts de not confine themselves to adjudication of legal conflicts but adventure to make social policies, affecting thereby many people and interests than if they had confined themselves to the resolution of narrow disputes. (Holland 1991: 1)

When discussing the relationship between constitutional design and judicial activism, Holland identifies certain institutional characteristics, which can foster judicial activism; namely, 'structural conditions' (1991: 7-9). These are the following: written constitutions, federalism, judicial independence, existence or absence of administrative courts, competitive party system, and low thresholds for initiating judicial review.

While the previous chapter was primarily focusing on how the courts themselves are designed, and their connection to consociational institutions, this section will deal with more general features discussed in the more general literature on constitutional courts. Therefore, I will not analyze the topic of thresholds for initiating judicial review, as the issue was already discussed in the previous section. Based on the conclusions of this section, as well as this chapter, the more exploratory part of my thesis follows, where the weight of theoretical speculations can be tested.

[4] This section of my thesis is substantially based on my term paper titled 'Regulating judicial modesty? - a comparative study on the Belgian and Bosnian constitutions', written for the course 'Democracy in Divided Societies' in the Winter term of the academic year 2014/15 at the Central European University

2.3.1 Written constitution

When discussing the importance of a written constitution with a bill of rights, Holland generally labels that as a possible 'source of parliamentary restraint and judicial power' (1991: 7). Nevertheless, later he adds that common law systems provide a more fertile ground for judicial activism (1991: 9). From a perspective outlined by Holland, the countries can be placed in the same categories: civic law systems with written constitutions, including catalogues of rights. Nevertheless, there are significant differences, which ultimately change the context in which the two courts have to operate. From these, I focus here on two.

Firstly, as it was mentioned in Chapter 2, the origin of the constitutions themselves is radically different. While the development of the Belgian federal structure is a result of an internal and incremental change (Swenden and Jans 2006), the Constitution of Bosnia and Herzegovina was one part of the Dayton Agreement - in a way, externally 'imposed' (Keil 2013). Therefore, it is clear that the Belgian Constitutional Court can base its decisions on a document with wider legitimacy compared to the Bosnian case.

Furthermore, the accuracy and the language of the text also heavily influence the situation of the constitutional courts. In general, vague constitutional provisions invite judicial activism, since the less clear the constitutional text is, the more the interpretation by the court matters. On the other hand, it is more difficult to develop public legitimacy with such a vague source of legitimacy. Though the limits of this paper do not allow a full elaboration on the qualitative differences between the two texts, in general, the Belgian Constitution is arguably clearer. Two relevant examples can possibly illuminate the nature of this difference. Provisions on mutual vetoes can be one example. In Belgium, the Constitution precisely lists those provisions, which can be used as a ground for legislative veto the Bosnian Constitution only applies the rather

vague term of 'vital interests'. On the other hand, criteria for eligible constitutional judges can be another example. While in Belgium, a specific law gives accurate descriptions concerning education, professional background, etc. of the judges, the Bosnian law only requires that 'Judges shall be distinguished jurists of high moral standing' (Constitution, Article VI/1/b).

Finally, the flexibility or rigidity of the constitutions also determines the room of maneuver for the given courts: the more difficult is it to change the document, the more inescapable is the binding interpretation provided by court. From this regard, the Belgian court has greater authority, as an attempt for constitutional amendment triggers new elections, where a qualified majority of the new legislation needs to approve the amendment (Article 195); meanwhile, in Bosnia, a qualified majority is enough (Article X/1), with certain Articles entrenched against amendments (Article X/2).

2.3.2 Federalism

According the analysis of Holland, federalism can be regarded as one of the most important factors, especially considering his observation that the strongest constitutional courts can be found in federal states (1991: 7). Later counter-examples occurred; especially the Hungarian Constitutional Court between 1989 and 1998 was regarded as the probably strongest and most activist body exerting judicial review in the world, in spite of operating in a highly centralized unitary state; furthermore, the post-transition Constitutional Tribunal in Poland can be cited as a similar example. Nevertheless, for good reasons, the constitutional provisions on vertical power sharing are important considering legal 'room' for judicial activism.

The cases of Belgium and Bosnia-Herzegovina clearly illustrate the pertinent connection between federalism and constitutional adjudication. This phenomenon can be regarded both in a direct and an indirect way. The direct connection can be illustrated with the fact that in both

constitutions the constitutional courts are the only actors directly commissioned with the task of maintaining the unity or congruence between federal law and the law created by sub-national units (see: Article 142 in the Belgian Constitution and Article VI/3/A in the Bosnian document).

The indirect effect comes from the mutual veto between certain actors, which can be legally grasped in the legislative division of labor between center and periphery; furthermore, between lower and upper chambers of the federal legislation. In both cases, the Belgian constitution provides arguably greater clarity, especially concerning the division of labor between the two chambers (Articles 77-81).

2.3.3 Administrative Courts

The existence or absence of administrative courts matters from a horizontal perspective of power sharing: notably, whether the compliance of state institutions with public law provisions is controlled solely by the constitutional court, or certain issues are ruled by an alternative body.

From this regard, there is a great contrast between the two cases. While Belgium resembles the French pattern (a court where former politicians are let in by the regulation of appointments, alongside a strongly competence-based administrative court), the Bosnian constitution completely lacks provisions on an administrative court. From the perspective of judicial activism, this question influences how great monopoly constitutional courts enjoy, when it comes to the enforcement of constitutional provisions.

2.3.4 Party system

Though the party system is not part of the strictly meant state architecture, it is also clear that the electoral system has a substantial role in shaping the party system. Nevertheless, if one

investigates, how the party system may foster or discourage judicial activism, the considerations of Holland might not be the most appropriate when speaking about consociationalism, taking the institutional regulations on party competition into consideration.

Generally, when emphasizing the importance of a competitive party system, Holland (1991: 9) is particularly concerned with the composition of the courts, whether those bodies (primarily the legislatures) who appoint the judges, are sufficiently balanced. In case not, judicial activism might depend on the temporary situation in the legislature: if those powers are in majority, who appointed the judges, courts might not be motivated in confronting with the legislature. Contrarily, if the aforementioned political side is in minority, courts could turn into their agents, and embrace an overly assertive manner.

From this perspective, the two courts are considerably different. Though the quotas settled for judges representing the different communities (Flemish and Walloon in the case of Belgium, while Bosnian, Croat, and Serbian in the case of Bosnia-Herzegovina) acknowledge the fact that not necessarily the political dimension is the most pertinent in the selection procedure, nevertheless, the procedures itself make a difference concerning the institutionalization of ethnic differences. This inference applies also besides acknowledging that both party systems are extremely fragmented. Given the fact that both houses of the Belgian parliament have to approve the list of candidates with a qualified majority, a consensus is needed both in the ethnic and the political spectrum. On the other hand, the Bosnian system lacks the need for consensus, as the different entities can nominate the judges without the consent of the other groups; furthermore, the different caucuses can appoint the judges with an absolute (and not qualified) majority.

Therefore, in these cases, not the competitive nature of the party system plays the general role, but rather the institutionalization of ethnic differences and the fragmentalization of the party

system. Therefore, one might suggest that the connection between party system and the possible position of the judiciary has to be strongly reconsidered when consociational systems are analyzed.

2.3.5 The link between texts and structures

Comparing the constitutional framework accommodating judicial review, one could observe that regarding the first set of aspects (concerning institutional architecture), there are more factors enabling judicial behavior for the Bosnian court. On the other hand, when it comes to the design of the court itself, the Belgian setting seems to enable judicial activism more.

Nevertheless, the possible activist capacities of the Bosnian court often come from factors, which are regarded as avoidable, such as vague constitutional language or lack of sophistication in the design of shared decision-making. From this point of view, the possibly activist behavior of the court could happen with the motivation of filling in legal gaps, or helping to move forward from governmental deadlocks; therefore institutional design does not only enable judicial activism, but in certain cases might urge for it, whether the court aims to exert 'judicial modesty' or not. On the other hand, regardless of the normative stances on centripetalism and individual rights discourse, the Belgian way of designing the framework (clearer position within the constitutional architecture, activist features included rather in the design of the court itself) could be perceived as more transparent, and also more predictable - and also less dependent on the self-chosen 'modesty' of the given court.

After establishing the theoretical framework for the analysis, and comparing the institutional environments of these courts, one can clearly see that there is a tension between certain presumptions in the relevant literature and certain peculiarities in the reality where they are positioned. Therefore, as taking one more step towards a more empirical view on the subject I

aim to turn towards the history of these institutions, since there establishment, which will be the topic for the final part of my thesis.

Chapter 3 - Constitutional courts operating in consociations: a brief comparison

After addressing the normative and analytical questions, I aim to turn toward the empirical inquiry in my thesis, focusing on the behaviour of courts. Therefore the core aim in this chapter is to assess the appropriateness of the theoretical frameworks established so far (both in the literature and my thesis), by comparing the record of Belgian and Bosnian constitutional courts, primarily based on scholarly literature, and reports by the Venice Commission, a body closely observing the actions of the two institutions.

Though the Belgian court is older than the Bosnian by more than a decade, the Constitutional Court of Bosnia-Herzegovina has more important landmark cases in adjudicating issues connected to consociational institutions. This makes the comparison particularly difficult; it is not a coincidence that the existing literature on constitutional courts in consociations heavily focuses on Bosnia.[5] Beyond the existence of easily recognizable landmark cases, the general adjudicative practice of the Belgian courts might explain this phenomenon, as most of its decisions are fairly cautious, which makes even the interpretation of the Constitution (broadly speaking) difficult from a general jurisprudential perspective (Theunis 2005: 4-5). Though I find this imbalance in the literature uncomfortable, I cannot incorporate a section of general Belgian constitutional jurisprudence in my thesis, which is a significant challenge even for the scholars working on Belgian constitutional law in general.[6] Due to the difficulties in comparability, I will discuss the historical record of the two courts separately, and draw comparing remarks in the conclusion of this chapter.

[5] For instance, the book by McCrudden and O'Leary (2013a) has only one chapter on Belgium, while the rest of the book focuses on Bosnia. As another example, Issacharoff (2004) compares the Bosnian court with the post-transition South African institution.

[6] In 2006, 11 years after the first judgment was rendered in the Constitutional Court of Belgium, the Court already had a record of 2,200 judgments (Theunis 2004: 4).

3.1 The Bosnian court: Between anticipation and socialization

During its relatively short history, the Constitutional Court of Bosnia-Herzegovina rendered several important decisions, which attracted wide international attention, even beyond the literature on consociationalism. Among these, especially the cases named *Constituent Peoples* (2000) and *Sejdić and Finci v. Bosnia and Herzegovina* (2009, usually referred to as '*Sejdić and Finci*') have drawn particular international attention. The former case was decided within Bosnia, while the second has gone beyond the borders of the country, as the Constitutional Court first (in 2006) dismissed the constitutional challenge of the applicants (Dervo Sejdić and Jakob Finci), who sought a remedy at the ECtHR. A few years later, in 2009, the ECtHR rendered a verdict, which qualified this as a landmark decision. Furthermore, beside these two, another case from 2004, called *Place Names*, will be discussed in this section.

Chronologically, the case *Constituent Peoples* is the first, as it happened in 2000. Alija Izetbegovic, the Bosnian member of the presidency, challenged the constitution of the Serbian entity (*Republika Srpska*), as it defined one ethnicity (Serb) as the constituent people of the federal unit (McCrudden and O'Leary 2013a: 86-87). On the one hand, this was problematic for discriminating against everyone else living in the territory of *the Republika Srpska*. On the other, the constitution of the other entity (Federation of Bosnia-Herzegovina) had a similar language, which altogether resulted in certain people (referred to as 'Others' in the constitutional language) being excluded from important constitutional provisions in the sub-national units (2013a: 87).

In its decision, the ECtHR focused on two major issues. Firstly, whether the preambles of the two entity's constitutions were legally binding - therefore if their provisions do cause discrimination in fact (para 11-25 *Constituent Peoples*). Second, whether the challenged sections of the two documents violated the core provisions of the federal Constitution. On the one hand, the court argued that the constitutional preambles have an important 'normative

character', therefore their content strongly matters (para 25 *Constituent Peoples*). The Court did so, even though the parliament of the *Republika Srpska* provided a sophisticated argument, invoking the scholarship of Hans Kelsen, the 'father' of centralized constitutional review, as well as interpretations on the US Constitution (para 11 *Constituent Peoples*); in its argument, the Court was rather focusing on the internal consistency of the constitutional text. On the other hand, the court declared all ethnic groups as constituent units in the entire territory of the federation (2013a: 87), which can be regarded as an arguably centripetalist view.

Choudry and Stacey regarded the conclusion of the decision as the following: 'consociational institutions of government are meant to encourage the peaceful co-existence of ethnic groups, individual rights that promote ethnic intermingling must be protected' (2012: 98). However, in the decision itself, it was obvious which group was more interested in maintaining the current situation, and who wanted to foster centripetalist tendencies, as the legislation was annulled after a ballot resulting in 5:4, with the support of the Bosnian and the international judges, against the votes of the Croatian and Serb members of the court.[7] Therefore, the *Constituent Peoples* decision is not only important from a jurisprudential perspective and the character of the consociation itself, but also strongly illustrates the effects of the design of the court itself.

A clearly different logic of decision-making applied at the *'Places Name'* case in 2004, where the judges unanimously struck down the attempt to re-name certain municipalities by the Republika Srpska (Choudry and Stacey 2012: 99). By re-naming the municipalities, the Serb authorities wanted to mirror the altered ethnic character of them (2012: 99), which demonstrated two core problems. On the one hand, from a moral perspective it was more than problematic to adopt the municipality names that mirrored the altered ethnic situation, which had changed due to the ethnic cleansing and persecutions of the civil war. Therefore, from a

[7] Furthermore, all Croatian and Serb judges attached a joint dissenting opinion to the decision.

more practical perspective the measures did everything but foster restoration and reconciliation (2012: 100). Interestingly, the conclusion of the decision was very similar to the Constituent Peoples, in spite of the strongly different way of making the decision itself. Though only an administrative act was challenged, the Court used clearly normative language when stating that 'the contested legal provisions are not consistent with the constitutional principle of the equality of the constituent peoples in Bosnia and Herzegovina' (para 55 *Places Name*). However, if we assuming that judges pursue the interest of their own entities, because of the logic of the appointment procedures, then this would suggest that at least the Serb members of the court would have defended the legislation, but in this case the court made a very clear and univocal decision.

Choudry and Stacey see this difference as an empirically detectable tendency, though they are rather tentative in explaining the mechanism behind it. Nevertheless, when it comes to explaining the phenomenon, they primarily point to the presence of the international judges in the body, who presumably have a socializing effect on the local members of the Court (2012: 102).

However, the presence of the international judges can be regarded as part of a possibly wider phenomenon, notably the effect of international law in general on the behaviour of the Bosnian constitutional court. However, one might observe that in the *Constituent Peoples* case, both sides substantially invoked international law, but the distribution of the votes in the case suggests a rather parochial decision-making logic concerning certain parties. Contrarily to that, in the unanimously decided *Places Name* case, one might only find references to two documents, the ECHR, and the UN Declaration of Human Rights (para 14 and 28 *Places Name*). So beyond this possible explanation, there are at least two factors, which might be taken into consideration. Firstly, from a rather 'soft' perspective, the literature investigating the relationship between constitutional adjudication and deliberative democracy points to the fact

that the institutional design and procedural regulations of constitutional courts frequently fosters deliberative virtues in decision-making, such as the endogenous changes of preferences, or the force of argument instead of interest (Ferejohn and Pasquino 2003). Second, the presence of the ECtHR can be regarded as a more 'hard' institutional constraint, as the judges could have anticipated the court in Strasbourg overriding their decisions, which might have meant a more radical intervention in the consociational equilibrium compared to a situation where the domestic court plays the unwinding role. From this regard, the Constitutional Court could clearly anticipate the stance of the international forums, as the monitoring body of the Council of Europe, the European Commission for Democracy Through Law (more commonly known as the Venice Commission) exerted very clear criticism on the corporate elements of the Bosnian consociation (McCrudden and O'Leary 2013a: 72-80; Scholsem 2002; Venice Commission 2001).

In some cases, the possible intervention by the ECtHR was not only anticipated by the Bosnian court, but ECtHR practically overrided some of its decisions. For instance in 2006, two gentlemen, named Dervo Sejdić and Jakob Finci, challenged the regulation on electoral regulations. As they identified themselves as Roma and Jewish citizens of Bosnia and Herzegovina, they were not eligible for membership in the collective presidency of the federation, and the upper chamber, the House of Peoples. After the Bosnian court turned down their constitutional challenges in three cases (in these decisions even the international judges were divided), they turned to the ECtHR, which declared this provision on electoral regulation discriminative. Unlike the former two cases, the Constitutional Court failed to play the unwinding role, however, one could also observe that the decision-making patterns operated slightly differently to the anticipated logic.

Nevertheless, regarding the 'big picture' international scholars endorse the activity of the Bosnian court rather than condemning it. For instance, Choudry and Stacey formed the following opinion:

> Furthermore, the Court has been a driver of moves towards greater integration in Bosnia and the decline of the consociational power-sharing arrangements often seen as indispensable to forging peace in a massively divided society (2012: 102).

On the other hand, one should also acknowledge the role of the ECtHR, either for its occasional judgments, or for the fact that the Bosnian court could easily anticipate its assertive behaviour. Therefore, other scholars, like McCrudden and O'Leary, rather emphasize the role of the ECtHR when it comes to unwinding moves towards the consociational arrangement (2013b: 478). Nevertheless, the differences between their situation is absolutely clear regarding their composition, institutional embeddedness, and the type of cases before them (as the ECtHR can only be invoked if all the domestic means for rights protection are exhausted). Furthermore, from the perspective of consociational theory, one should also see how clear the connection between composition rules, appointment procedures and judicial outcomes might be.

Nevertheless, one should also mention that the outcome was more mirroring the character of the ECtHR (an international court with the mandate of protecting human rights), than the decision itself. For instance, the ECtHR demonstrated a great degree of sensibility towards the peculiar nature of the Bosnian constitutional system, and expressed how much the body was concerned with political stability, together with the exhortations for finding alternative institutional solutions. The following statement illustrates this balancing behaviour of the Bosnian court:

> In addition, while the Court [ECtHR] agrees with the Government [of Bosnia and Herzegovina] that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that time may still not be ripe for political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities (para 48. *Sejdić and Finci v. Bosnia and Herzegovina*).

Furthermore, some members of the ECtHR not only demonstrated their concerns for stability, but expressed its primacy in their perception. The strongest case for this is the dissenting opinion of Judge Giovanni Bonello, who - in spite of being an international judge - formed a judicial doctrine, which would rather match the relevant concepts on domestic courts:

> The Court has ordered the respondent State to put the Dayton Peace Accords in the liquidiser and to start looking for something else. I, for my part, doubt that any State should be placed under any legal or ethical obligation to sabotage the very system that saved its democratic existence. It is situations such as these that make judicial self-restraint look more like a strength than a flaw (Dissenting opinion of Judge Bonello in *Sejdić and Finci v. Bosnia and Herzegovina*).

In his conclusion, he expressed his opinion on the possible consequences of the judgment in the conclusion of his opinion by saying that 'I cannot endorse a Court that sows ideals and harvests massacre' (Dissenting opinion of Judge Bonello in *Sejdić and Finci v. Bosnia and Herzegovina*).

Therefore one might conclude that on the level of the judgements and outcomes, the dichotomy established by Pildes and Issacharoff could be seen as valid. However, reading the texts and dissenting opinions of the judgements makes the picture even more opaque. Furthermore, one might also have different intuitions on the connection between the presence of international judges and the style of argumentation by the Constitutional Court of Bosnia and Herzegovina, as the Constituent Peoples decision richly contained international jurisprudence, but the votes by the judges clearly mirrored the locally entrenched interests and convictions. On the other hand, the *Places Name* case only mentioned certain international legal sources, but led to an outcome, in a unanimous way, which easily would have happened with an international court.

3.2 The Belgian Court: Cautious conclusions on cautious decisions

Similarly to the Bosnian court, the record of the Belgian court also meets the expectations one would have based on its design and institutional embeddedness, though the connection between

the arrangements and the outcomes cannot be seen as clearly as it is in the Bosnian case. For example, the connection between the composition procedures and decision-making patterns can be seen clearly in the Bosnian case, in Belgium one can only seek for the explanation of the 'non-finding', given the fact that only absolutely tentative decisions can be seen in the three decade long history of the Belgian court. This might intuitively mean that the incorporation of former politicians (who themselves were part of the establishment and maintenance of consociational structures) in the body can strengthen its caution, however, this speculation seems to be logical rather than unfalsifiable.

These premises all culminate in the fact that all the relevant judicial decisions on the Belgian consociational structure have been made in the ECtHR, as an appropriate remedy for the institutional injustices can be found only beyond the domestic frameworks of constitutional adjudication (Theunis 2005: 12). The jurisprudential literature mostly discusses two specific cases: the *"Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium" v. Belgium* (usually referred to as *Belgian Linguistics*) from 1968 and *Mathieu-Mohin and Cleryfayt v. Belgium* (usually referred to as *Mathieu-Mohin*) from 1987 (McCrudden and O'Leary 2013a: 47).

The *Belgian Linguistics* case presents a problem connected to segmental autonomy, which had not been remedied by the domestic constitutional court, but only on the European level. The heart of the issue was the following: in the region surrounding Brussels, belonging to Flanders, but having a considerable French-speaking population, there were clear incentives for all parents to bring their children to Dutch-speaking schools. Though education in French was not prohibited, there were substantial administrative barriers narrowing the option for parents (2013a: 52-53). The ECtHR found these measures discriminatory and disproportionate (para 7, 13, 19, 25, 32, and 42 of *"Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium" v. Belgium*), which can be regarded as discouraging the territorial co-

existence of different ethnic groups. On the other hand, the measures promoted by the court could be clearly regarded as centripetal.

The other case, *Mathieu-Mohin and Cleryfayt v. Belgium* not only touched the element of segmental autonomy from the consociational 'package', but also included concerns about the nature of political power-sharing. More importantly, in this case the ECtHR upheld the provisions of the electoral law, labelling it as 'not a disproportionate limitation' (para 57, *Mathieu-Mohin*). In this case, the core of the problem came from the multidimensional character of federalism, and requirements for qualified majority, as a certain number of parliamentarians are required for certain decisions (including constitutional amendments). However, if parliamentarians from a certain linguistic group were elected from a territorial constituency of the other group, the option was given to take the oath in his or her language (2013a: 60-61). Practically, this phenomenon was present in the Halle-Vilvoorde district, similarly to the Belgian Linguistics case. At first sight, this provision has gone beyond the ethno-federalist approach by giving an option to the parliamentarians; but on the other hand, this created inconsistency between the territorial and linguistic dimension of their representative role. Therefore, they were excluded from decisions requiring qualified majority. In adjudicating this case, the ECtHR found this arrangement on proportionality concurrent with its standards, arriving at the following conclusion:

> The French-speaking electors in the district of Halle-Vilvoorde enjoy the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors. They are in no way deprived of these rights by the mere fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council. This is not a disproportionate limitation such as would thwart 'the free expression of the opinion of the people in the choice of the legislature […]' (para 57, *Mathieu-Mohin*)

3.3 'Judicial modesty' revisited

The fact that in the second case even the ECtHR found those provisions satisfactory which were upheld by the Constitutional Court of Belgium, suggests that not only the composition of the court matters, but also the constitutional material the body has to adjudicate. From this perspective, a comparison of the two courts might be difficult, especially because of the ambiguous nature of the Bosnian constitution. Given the fact that the document mirrors the results of negotiations between actors with a questionable intent to establish a flourishing democratic order, but also under the supervision of the international community. On the other hand, the Belgian constitution is rather a 'domestic product', in a country deeply embedded in western legal tradition. Therefore, the comparison between these two cases re-emphasizes the fact that not only the institutional design and political environment of the courts matter, but also the constitutional text, which is the ground for its adjudication.

The answer to the question whether constitutional courts do play the role of unwinders in consociational settings could be answered differently in the two cases. The Bosnian court occasionally embraced the unwinding role (as was seen in the cases of *Constituent Peoples* and *Places Name*), while in other issues the court rather decided to maintain the consociational equilibrium (for instance, by adjudicating *Sejdić and Finci* on the domestic level). On the other hand, the behaviour of the Belgian court has clearly fit the framework of 'judicial modesty', as there is no evidence of the Belgian court challenging entrenched consociational institutions or practices. Nevertheless, the historic record of the courts clearly illuminates the connection between institutional design and the behaviour of certain actors. This connection is particularly clear if one regards the way the decision was made in *Constituent Peoples*, but also if one sees the difference between the manner of the domestic courts (which are not only embedded in consociational institutional architectures, but also internally organized as consociational institutions) and the ECtHR, a transnational body. On the other hand, the Belgian court made

decisions according to this logic, which presumably could have been behind the designing of the institution itself.

Conclusion

In the introduction, I attached three questions to the existing dilemmas in the relevant literature. Firstly, whether courts should play the unwinding role in consociational settings; in other terms, how one could approach the concept from a normative angle. Second, if the courts could play the unwinding role, to what extent do the constitutional frameworks surrounding them enable these bodies to do so. Finally, how much courts do to fulfil this role, so what empirical evidence exists on courts becoming unwinders in these settings, or whether there is evidence on the contrary of this.

Regarding the normative aspect of my research, the concept of constitutionalism and the notion of constitutional adjudication could be seen differently if their relationship to consociationalism is under investigation. Constitutionalism and consociationalism, at first sight, seem to have several points in common, as consociationalism is equated with a strong institutionalization of power dispersion, which fosters one of constitutionalism's core values, the limitation of the government. Furthermore, there are strong rights protection frameworks in consociational settings, which is essentially part of the concept of constitutionalism. Nevertheless, these features of consociationalism disregard an important element of modern constitutional thinking: the right given to every individual, without further regard. In the former aspect, this happens by allocating power primarily to the elites, in the latter through focusing on group-specific rights, in some cases at the expense of individual rights.

Concerning constitutional adjudication, the relationship is slightly different. Consociationalism means a highly fractured institutional architecture, with a sophisticated allocation of political power among groups and institutions. Intuitively, the more complicated the state structure is, the higher is the likelihood for jurisdictional debates; and the more jurisdictional debates occur, the greater the need appears for an impartial arbitrator. Nevertheless, if one takes into

consideration that constitutional courts can annul legislation, and therefore influence policy-making, based on its constitutionality, the role of the courts can be easily re-assessed, and they can be regarded as extra-political actors (in terms of being non-elected bodies, without a representative mandate), jeopardizing the consociational equilibrium. In addition, courts are not limited to influencing the dynamics of daily politics, but also the institutional architecture itself. On the other hand, constitutional courts could also contribute to the survival of the balance between actors and institutions, while taking those decisions, which the political actors are unwilling or unable to make.

On first sight, this potential action, called 'unwinding', could be assessed depending on the position one assumes in the debate on democracy in divided societies. People endorsing consociational solutions could see courts as a danger to the greatest achievement of consociationalism: stability. From a centripetalist perspective, the role of courts is rather ambiguous. On the one hand, courts might play a benign role with their capacity to 'open up' and liberalize rigid institutions entrenching societal differences. However, the instruments of courts are very likely to be insufficient to establish a coherent alternative to consociational settings, as constitutional courts could review pieces of law, but not create new ones. Therefore I suggest that normatively the potential unwinding activity by courts might be rather regarded from an even broader debate, notably the dichotomy between the republican way of seeing democracy, and the concept of seeing constitutionalism and democracy as concept mutually confirming each other.

In my analytical inquiry I turned towards the question whether courts have suitable devices to fulfil the unwinding role in consociational settings, or whether the normative questioning is a purely theoretical experiment. There are no strong barriers before courts, neither in the Belgian, nor in the Bosnian case, though on the other hand, one could clearly see certain elements in the design of courts hindering their intervention in the consociational equilibrium. Though only the

Belgian court encounters 'hard' legal constraints when it comes to the restrictions on its scope of powers, the regulations on the composition of both courts could potentially undermine their activistic manner. In the design of the Belgian court, the incorporation of former politicians might be an influential factor, though it is very difficult to empirically detect the internal mechanisms in the life of a court which released only very restrained decisions.

On the other hand, one could observe that the way the Bosnian court was designed, gives strong incentives for actors appointing the judges to pursue the interests of certain groups, rather than constraining the sides to find consensual figures. The effects of this arrangement can be clearly seen in the voting behaviour of the judges in the few cases on the consociational institutions themselves, adjudicated by the Bosnian court. In conclusion, the analysis on the institutional environment and design of the two courts has suggested that the constitutional courts in Belgium and Bosnia-Herzegovina (countries functioning as consociations, having a centralized model of judicial review) have certain disincentives to act as unwinders in these situations. Nevertheless, the aforementioned factors do not block them from such practices, but point to the fact that the role of constitutional courts in consociations not only depends on their perception of their own role, but also the legal framework where they are embedded in.

The empirical survey in the last chapter of my thesis does not see the ‘hypothesis’ of Pildes and Issacharoff falsified; McCrudden and O’Leary conclude that according to their works in consociations, domestic courts behave more 'modestly', while international courts embrace a more assertive manner (2013b: 490). Earlier, McCrudden and O'Leary arrived to the same conclusion, though it is important to add that they have not covered the case *Places Name*, which is a great example for a domestic court promoting centripetal measures unanimously. This event cannot be explained by the framework established for constitutional courts in consociations, but suggests the need to use literature on constitutional courts in a broader sense for a more comprehensive understanding on the topic. The low number of relevant cases gives

a tentative tone to all empirical findings, on the other hand the different patterns occurring in different decisions invite further research concerning the sociological background of different judges, and the specific concurring and dissenting opinions, which could possibly reveal the dynamics of the interaction between the local and the international judges.

However, further research could also investigate broader dilemmas connected to this topic, as the most interesting question seems to be how courts would behave in consociations, if they were not consociational themselves in their design. Though such an undertaking is not possible today, as one cannot find a country, which can be regarded as a clear case for consociationalism, which has a centralized-style constitutional court and which is only attached to the consociational polity, but does not contain any consociational element in its design. Nevertheless, further research on Lebanon would be useful in a research having more time and resources than an MA thesis, in order to gain a more comprehensive picture on the topic. Though the Constitutional Council of Lebanon also has consociational elements in its design, the 'output' of its adjudicative practice might give important insights.

From a practical perspective, the findings of my thesis illuminate the importance of institutional design in significantly different contexts. Again, the low number of cases does not allow unerring conclusions, however, certain practical arrangements seem to be clear. These are, for instance, the importance of centripetal mechanisms in appointment procedures, or the attachment of judicial institutions to the international epistemic community of legal scholars. Nevertheless, these devices could help institutions reaching their primary goals, but the ultimate ends could be seen from the perspective of the entire political systems, which are heavily shaped by history, and the normative convictions of those who shape them.

Bibliography

Bieber, Florian, and Soeren Keil. 2009. “Power-Sharing Revisited: Lessons Learned in the Balkans.” *Review of Central and East European Law* 34: 337–60.

Bogaards, Matthijs. 2008. “Comparative Strategies of Political Party Regulation.” In *Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development*, edited by Benjamin Reilly and Per Nordlund, 328. United Nations University Press.

Choudhry, Sujit. 2008. “Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies.” In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 3–40. Oxford ; New York: Oxford University Press.

Choudhry, Sujit, and Richard Stacey. 2012. “Independent or Dependent? Constitutional Courts in Divided Societies.” In *Rights in Divided Societies*, edited by Colin Harvey and Alex Schwartz, 273. Oxford: Hart Publishing.

Ferejohn, John, and Pascal Pasquino. 2003. “Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice.” In *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski, 21–36. Law and Philosophy Library, v. 62. The Hague: Kluwer Law International.

Freedom House. 2015. “Freedom in the World - Individual Country Ratings and Status, FIW 1973-2015.” https://freedomhouse.org/sites/default/files/Individual%20Country%20Ratings%20and%20Status%2C%201973-2015%20%28FINAL%29.xls (Accessed: 10 June 10, 2015)

Holland, Kenneth M.. 1996. “Introduction.” In *Courts, Law, and Politics in Comparative Perspective*, edited by Kenneth M. Holland, 1–11. New Haven: Yale University Press.

Holmes, Stephen. 2012. “Constitutions and Constitutionalism.” In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 1st ed. Oxford: Oxford University Press.

Horowitz, Donald L. 1993. “Democracy in Divided Societies.” *Journal of Democracy* 4 (4): 18–38.

———. 2000. *Ethnic Groups in Conflict*. 2nd ed. with a new preface. Berkeley, CA; London: University of California Press.

Issacharoff, Samuel. 2004. “Constitutionalizing Democracy in Fractured Societies.” *Journal of International Affairs* 58 (1): 73–93.

Keil, Soeren. 2013. *Multinational Federalism in Bosnia and Herzegovina*. Farnham, Surrey ; Burlington, VT: Ashgate.

Kelsen, Hans. 1967. *Pure Theory of Law*. Gloucester, Mass: Peter Smith.

Kymlicka, Will. 1995a. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford Political Theory. Oxford: Clarendon Press.

———. , ed. 1995b. *The Rights of Minority Cultures*. Oxford: Oxford University Press.

———. 2000. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. New York: Oxford University Press.

Kymlicka, Will, and W. J. Norman, eds. 2000. *Citizenship in Diverse Societies*. New York: Oxford University Press.

Lerner, Hanna. 2011. *Making Constitutions in Deeply Divided Societies*. Cambridge: Cambridge University Press.

Lijphart, Arend. 1969. "Consociational Democracy." *World Politics* 21 (2): 207–25.

———. , ed. 1981. *Conflict and Coexistence in Belgium: The Dynamics of a Culturally Divided Society*. Research Series (University of California, Berkeley. International and Area Studies), no. 46. Berkeley: Institute of International Studies, Universityof California.

———. 1995. "Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems." In *The Rights of Minority Cultures*, edited by Will Kymlicka. Oxford: Oxford University Press.

———. 2012. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. 2nd ed. New Haven: Yale University Press.

Macfarlane, Emmett. 2012. *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*. Vancouver, BC: UBC Press.

McCrudden, Christopher, and Brendan O'Leary. 2013a. *Courts and Consociations: Human Rights versus Power-Sharing*. Oxford: Oxford University Press.

McCrudden, Christopher, and Brendan O'Leary. 2013b. "Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements." *European Journal of International Law* 24 (2): 477–501. doi:10.1093/ejil/cht020.

McGarry, John, and Brendan O'Leary. 2009. "Power Shared after the Deaths of Thousands." In *Consociational Theory : McGarry and O'Leary and the Northern Ireland Conflict*, edited by Rupert Taylor. London: Routledge.

Patten, Alan. 2008. "Beyond the Dichotomy of Universalism and Difference: Four Responses to Cultural Diversity." In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 91–110. Oxford ; New York: Oxford University Press.

———. 2014. *Equal Recognition: The Moral Foundations of Minority Rights*. Princeton, N.J: Princeton University Press.

Peters, B. Guy. 2006. "Consociationalism, Corruption and Chocolate: Belgian Exceptionalism." *West European Politics* 29 (5): 1079–92.

Pildes, Richard H. 2008. "Ethnic Identity and Democratic Institutions: A Dynamic Perspective." In *Constitutional Design for Divided Societies: Integration or Accommodation?*, edited by Sujit Choudhry, 173–201. Oxford ; New York: Oxford

University Press.

Preuss, Ulrich Klaus. 1995. *Constitutional Revolution: The Link between Constitutionalism and Progress*. Atlantic Highlands, N.J: Humanities Press.

Sadurski, Wojciech. 2005. *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht, Netherlands: Springer.

Sajó, András. 1999. *Limiting Government: An Introduction to Constitutionalism*. Budapest: CEU Press.

Scholsem, Jean-Claude. 2002. "Opinion on the Implications of Partial Decision III of the Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the ('Constituent Peoples') of Bosnia and Herzegovina by the Amendments to the Constitution of the Republika Srbska." European Commission for Democracy Through Law (Venice Commission).

Shapiro, Ian, and Will Kymlicka, eds. 1996. *Ethnicity and Group Rights*. Nomos 39. New York: New York University Press.

Shapiro, Martin, and Alec Stone Sweet. 2002. *On Law, Politics and Judicialization*. Oxford: Oxford University Press.

Songer, Donald R. 2008. *The Transformation of the Supreme Court of Canada: An Empirical Examination*. Toronto ; Buffalo, NY: University of Toronto Press.

Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.

———. 2012. "Constitutional Courts." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 1st ed, 816–30. Oxford: Oxford University Press.

Swenden, Wilfried, and Maarten Theo Jans. 2006. "Will It Stay or Will It Go?" *West European Politics* 29 (5): 877–94.

Taylor, Charles, and Amy Gutmann. 1992. *Multiculturalism and the Politics of Recognition: An Essay*. Princeton, N.J: Princeton University Press.

Taylor, Rupert. 2009. "Introduction: The Promise of Consociational Theory." In *Consociational Theory : McGarry and O'Leary and the Northern Ireland Conflict*, edited by Rupert Taylor, 1–11. London: Routledge.

Theunis, Jan. 2005. "The Influence of the ECHR on National Constitutional Jurisprudence: The Example of the Belgain Constitutional Court." European Commission for Democracy Through Law (Venice Commission).

———. 2006. "The Interrelations between the Constitutional Courts and Ordinary Courts." European Commission for Democracy Through Law (Venice Commission).

Venice Commission. 2001. "Opinion on the Implications of Partial Decision III of the

Constitutional Court of Bosnia and Herzegovina in Case U 5/98 on the Issue of the 'Constituent Peoples.'" European Commission for Democracy Through Law (Venice Commission).

Legal and internet sources

ASE OF MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application No. 9267/81). 1987.

Belgian Linguistic Case (No. 2) 1 EHRR 252. 1968.

Belgium's Constitution of 1831 with Amendments through 2012. Accessed February 1. n.d. https://www.constituteproject.org/constitution/Belgium_2012.pdf?lang=en.

Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009. Accessed February 1. n.d. https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en.

Constituent Peoples' Decision of the BiH Constitutional Court. 2000.

"Constitutional Court of Belgium." n.d. Accessed February 1. http://www.const-court.be/

"Constitutional Court of Bosnia and Herzegovina." 2015. Accessed February 1. http://www.ccbh.ba/eng/

Dissenting opinion of Judge Bonello in *Sejdić and Finci v. Bosnia and Herzegovina (application Nos. 27996/06 and 34836/06)*. 2009.

Organic Law - Special Act of 6 January 1989 on the Constitutional Court. n.d.

"Places Name" Decision of the BiH Constitutional Court. 2004.

Sejdic and Finci v. Bosnia and Herzegovina (application Nos. 27996/06 and 34836/06). 2009.