MINORITY VETOES IN CONSOCIATIONAL DEMOCRACIES

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Contents

Abstract

Consociational democracy has been one of the most prominent theoretical approaches to the manner in which deeply divided societies are politically and constitutionally organized. One of the core elements of consociational democracies are minority veto mechanisms, which serve to safeguard the interest of minority groups in decision making processes. This type of protection of the interest of minority groups is to an extent damaging to the efficiency of the legislator, and bears potential for creating deadlock.

This paper aims to explore the ways in which different institutional arrangements of minority veto mechanisms function in practice, focusing on which elements of veto mechanisms bear a more significant risk of creating deadlock. In order to answer this task, the paper will expound different theoretical approaches to the subject, and relying on elements on different theoretical approaches it shall try and assert all the key elements of veto mechanisms from the point of the dichotomy of efficiency of the legislative process and the level of protection of minority groups.

The three selected comparators are Belgium, Bosnia and Herzegovina and Northern Ireland. All three of the countries are consociational democracies which employ legislative minority veto mechanisms, but with significant structural differences and differing effects.

Introduction

In societies with deep cleavages along pre-political collective identity markers the risk -- and cost -- of lasting political conflict is especially high. In response, political elites ended up with constitutional and political arrangements that aim to foster cooperation, or at least to prevent deadlocks. The resulting arrangements are sometimes described in the literature as consociational democracies.

Minority veto is considered to be an integral part of consociational democracy. It serves to protect the vital interests of minority groups in decision-making processes and it is supposed to create a sense of security for the minority group, with minimum negative effects towards the efficiency of the legislative decision-making process. Minority veto was originally perceived by Lijphart as a minority protection tool which would be used seldom, and therefore underestimated its dangers.[1] Later authors have developed a more cautious approach, aware of the dangers associated with minority vetoes.[2]

The veto mechanisms this paper will focus on are the alarm-bell procedure ("ABP") in Belgium, the vital national interest ("VNI") in Bosnia and Herzegovina, and the petition of concern ("PoC") in Northern Ireland. All three of the vetoes are a far cry from Lijphart's original light-hearted perception of minority veto, with ABP leading to a government falling in 2010,[3] VNI being

[1] Lijphart, Arend. *Democracy in Plural Societies : A Comparative Exploration*. Yale University Press, 1977, p. 37
[2] Bieber, Florian. "The Challenge of Institutionalizing Ethnicity in the Western Balkans: Managing Change in Deeply Divided Societies" *European Yearbook of Minority Issues Online* Vol. 3, no. 1, 2003, 89, 93;
O'Flynn, Ian. "Deliberative Democracy, the Public Interest and the Consociational Model." *Political Studies* Vol. 58, no. 3, June 2010, 572, 585;
Zahar, Marie-Joëlle "The Dichotomy of International Mediation and Leader Intransigence: The Case of Bosnia and Herzegovina", in O'Flynn, Ian, and David Russell, eds. *Power Sharing: New Challenges For Divided Societies*. Pluto Press, 2015, 123, 128
[3] Delpérée Francis, "European Belgium" in Blanke, Hermann-Josef, Pedro Cruz Villalón, Tonio Klein, and Jacques Ziller, eds. *Common European Legal Thinking*. Springer International Publishing, 2015, 465, 469

"systematically abused and now hamper[ing] all decision-making processes",[4] and PoC being dubbed "the dirtiest word in politics".[5]

The central dilemma is easy to pinpoint: although as its primary function minority veto seeks to protect the vital interest of a minority group, as an unavoidable consequence, any minority veto mechanism diminishes the efficiency of the legislative process through creation of deadlocks and stalemates. This comparative constitutional research project investigates how does differences in the institutional design of minority veto mechanisms influence the efficiency of the legislative process.

Following what Hirschl calls the "most similar cases" logic,[6] the paper is a "small-N" study of three constitutions that attempt to accommodate deep social divisions with, *inter alia,* a legislative minority veto.

Legislative veto was chosen due to the position that laws have in the hierarchy of legal acts. As the highest legal act, second only to constitution, laws regulate all activities of importance for the functioning of the society and all the groups within. Therefore, vetoing laws can be considered of higher priority for certain groups than vetoing the decisions of the executive. The second important feature of the selected veto mechanisms is that in all three of the countries the selected veto players decide on their own whether or not to initiate the procedure, therefore making the field of their influence on the efficiency of the legislation wide and subjecting it to the their will (to a certain extent).

[4] Parliamentary Assembly of the Council of Europe, Recommendation 2025 *The functioning of democratic institutions in Bosnia and Herzegovina*, 2013, para. 5, - available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20209&lang=en, last accessed June 6 2020

[5] "Northern Ireland Reforms 'Ethnic Veto' to Help Get Its Legislature Back to Work." https://www.washingtonpost.com/politics/2020/01/18/northern-ireland-reforms-ethnic-veto-help-get-its-legislature-back-work/, last accessed June 3, 2020.

[6] Hirschl, Ran. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. *Comparative Matters*. Oxford University Press 2014, p. 231

The first chapter will provide a theoretical foundation for the study of minority veto, looking at the concept of consociational democracy, and the place minority veto takes in this concept. The second chapter will present the basic elements of veto mechanisms and categorize the veto mechanisms in accordance with their effect on the legislation. The third chapter introduces the three selected comparators, which are then analyzed using the categorization and framework constructed in the second chapter. The ultimate chapter will attempt to assess the scarce empirical data which was available and make sense of them considering the findings of previous chapters. Finally, the conclusion will summarize the findings in light of the research question.

1. Theoretical foundations of minority veto

1.1. Minority veto as an element of consociational democracy

Formation of modern states has, at least in Europe, more often than not resulted in recognition/creation of collective identity markers which were accepted by the vast majority of citizens of these states. This is not to say that there are no other differing identities between those citizens, but a certain level of togetherness and homogeneity is the key aspect of these modern states. In this type of polities, the principle of majority decision-making is the key principle of functioning of the democratic institutions, subject to certain safeguards. In this type of societies the divisions are created around issues rather than identities, and therefore majority decision-making is acceptable, given that today's minority might become tomorrow's majority. Otherwise there is a risk of tyranny of majority, in which there is a permanent majority which imposes its will on the permanent minority without giving the latter the possibility to influence the decision-making process in any way, shape or form.

However, there is a minority of states in which collective uniform identities are not dominant and are in the shadow of other identity markers which are in turn not common to all citizens of the state but result in polarization of the population. Consequence of these differences are societies in which a deep cleavage exists along the lines of collective identity markers. In these societies the possibility of a tyranny of majority is considerably higher, with conflict, even an armed one, being a possible outcome. In order to preserve the state and prevent conflict between the different groups, political elites are inclined to create a constitutional and political system which would facilitate cooperation and accommodate different groups. One of important aspects of this cooperation is a conscious limitation, or sometimes even sacrifice, of the principle of majority decision making.

These political and constitutional arrangements developed in some societies divided on identity lines have been theoretically recognized by Arend Lijphart in 1968, under the name of "consociational democracy", as "deviant cases of fragmented but stable democracies",[7] which he contends to be the opposite of majoritarian democracy.[8] According to Lijphart the key element of success of these democracies is *cooperation* between the political elites.

Lijphart emphasized grand coalition or a cartel of elites as a constitutional solution fostering cooperation in divided societies. Introducing the concept of consociational democracy as both descriptive and prescriptive,[9] he defines its four elements: 1) grand coalition, 2) mutual veto, 3) proportional representation, 4) segmental autonomy.[10] Mutual veto, proportional representation and segmental autonomy are secondary elements to the grand coalition, which is the most important one.

The reason because of which the minority veto exists is the fact that the minority groups are not perfectly protected in the grand coalition. A grand coalition is a fact of political reality, and not a constitutional obligation. As such, it does not contain any formal rules which would prevent a simple majority which leaves out one of the groups to make a decision against the interests of the left out group(s). Minority veto, as a negative majority rule, which can easily be formalized, enables the minority to block the decisions of the majority if they affect the vital interests of the minority segment.[11]

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[7] Lijphart Arend "Consociational Democracy", in Lijphart, Arend. *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*. Routledge, 2007, 3, 28
[8] Lijphart, Arend. "Consociation and Federation: Conceptual and Empirical Links." *Canadian Journal of Political Science* Vol. 12, no. 3, 1979, 499, 500
[9] Kelly, Brighid Brooks. *Power-Sharing and Consociational Theory*. Springer International Publishing, 2019, p. 23
[10] *Supra* note 1, p. 25
[11] *Supra* note 1

1.2. Minority veto – a shift in perception

Lijphart states that although there seems to be a risk of tyranny of minority, there are three characteristics of the veto which exist in principle and which make it less dangerous than it seems at first. Firstly, it is a mutual veto, which means that both minority and majority segments have its privilege. Knowing that the other side may use it, should result in mutual reluctance to resort to it in the first place. Secondly, the mere fact that the possibility of veto exists creates a feeling of security for the minority segment (which should in itself suffice), and thirdly, all sides will recognize immobilism and deadlock is an inevitable consequence which affects all included parties, and will be careful to avoid them.[12] It must be noted that Lijphart has given his views on the minority veto in the 1970's, prior to its proliferation and subsequent abuse, and has viewed it from a theoretical point of view.

Lijphart's initial idea that veto mechanisms will be used rarely and with caution has been refined by later authors. In contrast to Lijphart who has approached minority veto as from a theoretical point of view with very little reference to its practical connotations, these authors have had a considerable body of practical usage of veto to analyze. As it was briefly mentioned in the introduction, subsequent developments of veto mechanisms are in sharp contrast to the way in which Lijphart foresees that the minority veto will be used. Frequent deadlocks, failures of government and obstruction of the decision-making procedures are a fact of life when it comes to minority vetoes in practice, at least in the three selected comparators. These developments and experiences with minority vetoes have led to a more cautious approach to veto mechanisms and the risks they entail, with the likes of Donald Horowitz noting that "where robust guarantees, including minority vetoes, are adopted that immobilism is a strong possibility, and it may be very

[12] *Supra* note 1.

difficult to overcome the stasis that immobilism can produce",[13] while Florian Bieber notes that although their purpose is to prevent the outvoting of the minority, they may have "the most serious negative repercussions on the functioning of any institutional arrangement".[14]

[13] Horowitz, Donald L. "Ethnic Power Sharing: Three Big Problems." *Journal of Democracy* Vol. 25, no. 2, 2014 5,7
[14] Bieber, Florian "Power sharing after Yugoslavia: functionality and dysfunctionality of power-sharing institutions in post-war Bosnia, Macedonia, and Kosovo" Noel, Sid, ed. *From power sharing to democracy: post-conflict institutions in ethnically divided societies*, McGill-Queen's University Press, 2005, 85, 95

2. Anatomy and impact of veto mechanisms

2.1. The basic elements of minority veto

Joanne McEvoy has attempted to deconstruct the veto mechanism to its core anatomical elements and categorize the subtypes of those elements. The following subsections are a presentation of her findings.

2.1.1 Veto players

The first element in her framework are the *veto players* – the institutional players which have the capacity to block decisions.[15] Relying on Lijphart's approach to consociation in general, McEvoy distinguishes two types of veto players, predetermined and self-determined. Pre-determined groups are identified in advance in power-sharing arrangements, while self-determination allows for groups to form themselves.[16] Following the same logic, McEvoy alongside McChulloch,[17] McGarry and O'Leary[18] label pre-determined actors "corporate" veto players and self-determined ones "liberal".

Corporate veto players are those which are determined by a fixed, unchangeable criteria such as ethnicity, religion or race, while liberal approach gives preference to numerical rather than

[15] McEvoy, Joanne "We Forbid! The Mutual Veto and Power-Sharing Democracy" in McEvoy, Joanne, and Brendan O'Leary, eds. *Power Sharing in Deeply Divided Places*. Philadelphia, Pennsylvania: University of Pennsylvania Press, 2013. p. 259

[16] Lijphart, Arend "Self-determination versus pre-determination of ethnic minorities in power sharing systems" in Kymlicka, Will. *The Rights of Minority Cultures*. Oxford University Press, 1995, 275, 275

[17] McCulloch, Allison. "The Use and Abuse of Veto Rights in Power-Sharing Systems: Northern Ireland's Petition of Concern in Comparative Perspective." *Government and Opposition* Vol. 53, no. 4, 2018, 735, 736

[18] McGarry, J., and B. O'Leary. "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription." *International Journal of Constitutional Law* Vol. 5, no. 4, 2007, 670, 675

ascriptive criterion[19] and "rewards whatever salient political identities emerge in democratic elections, whether these are based on ethnic groups, or on sub-group or trans-group identities".[20]

Corporate veto approach gives special status to certain groups. I contend that this approach may create a permanent division of society in three groups: the numerical majority which is devoid of the usual privileges that are connected to majority position, the minority/minorities recognized by the constitution and thus holders of veto power, and minorities which are not recognized by the constitution. The exclusion of certain minorities from the political processes and constitutional structure may result in cases of discrimination, as it is seen in *Sejdić and Finci v. Bosnia and Herzegovina*,[21] in Belgium where only two linguistic designations are acceptable in the parliament,[22] or more subtly in the case of the Northern Ireland where the cross-community support does not count in the votes of the "Others".[23]

Lijphart gives advantage to liberal approach because it, *inter alia*, avoids discrimination, avoids assigning individuals to groups who may wish to identify otherwise, and it gives equal chances to all ethnic segments.[24] McEvoy also considers liberal approach to be the better option, but admits that "that might not always be possible."[25]

[19] Haymond, Devin, "Minority Vetoes in Consociational Legislatures: Ultimately Weaponized?", *Indiana Journal of Constitutional Design*, Vol. 6, 2020, p. 7
[20] Cordell Karl, Wolff, Stefan, "Power sharing", in Cordell, Karl, and Stefan Wolff, *eds. Routledge Handbook of Ethnic Conflict.* London: Routledge, 2011, 300, 304
[21] In this judgement the European Court of Human Rights found that the Constitution of Bosnia and Herzegovina discriminates against national minorities, given that they cannot be elected to the Presidency of B&H, or delegated to the House of the Peoples.
Judgement is available on: https://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2974573-3281658, Last accessed on 1 June 2020
[22] Stojanović, Nenad. "Political Marginalization of 'Others' in Consociational Regimes." *Zeitschrift Für Vergleichende Politikwissenschaft* Vol. 12, no. 2, 2018, 341, 348
[23] *Ibid*, 357
[24] *Supra* note 16, 283-286
[25] *Supra* note 15, p. 272

The liberal approach to identifying veto players enables a certain fluidity and expands the space for inter-group coalition building, which in turn can make the divide between the groups smaller. Although self-determination sounds appealing, the experience of minority veto in Burundi suggests that when self-determination is used, the minority groups can lose their voice and ultimately lose their constitutional protection.[26]

Corporate approach does not bear the risk of endangering the minority in the same way, but on the other hand, I contend that it entrenches the divisions in the society and ensures that they will be hardly bridged. Liberal approach might enable divided groups to forge alliances, and therefore has an integrative function, while the corporate gives preference to accommodation of the minority groups and their protection. We may contend that the liberal approach might be more useful to fulfillment the overall goal of consociational democracy, which is fostering cooperation between the elites, while at the same time enabling the veto mechanism as a whole to fulfill its basic function, which is the protection of the minority. Even if not conducive of elite cooperation, acceptance of corporate veto players is often the only approach that is acceptable to all groups that make up the specific polity. Such is the case in Bosnia and Herzegovina were the veto mechanism was introduced as a part of a peace treaty, and the recognition of the warring parties was a *conditio sine qua non* for peace to be made.

2.1.2 Veto issues

The second element of veto mechanisms are the *veto issues*, or the specific subjects that the veto players can block. Veto issues can be limited to certain areas of policy or are they can be unlimited. This element of the framework introduced by McEvoy, Allison McCulloch dubs the

[26] McCulloch, Allison, and Stef Vandeginste. "Veto Power and Power-Sharing: Insights from Burundi (2000–2018)." *Democratization* Vol. 26, no. 7, 2019, 1176, 1187

unlimited veto issues as permissive veto rights, while the limited veto issues are named restrictive veto rights.[27]

Constitution makers may opt for permissive veto rights given that it is nearly impossible to decide *pro futuro* which areas may prove to be of vital interest of the minority. This elevated level of protection of interest of minorities is in essence a blanket veto which means that a risk of deadlock is significantly increased, and for this reason McEvoy suggests that "veto issues should be clearly defined".[28] The restrictive veto rights resolve that issue, but the inflexibility of an enumerated list of areas or subject matters can be too limiting when it comes to deciding whether a certain question falls under one of the enumerated areas, or as Ram and Strøm put it "an effective mutual-veto agreement must be… sufficiently inclusive to pacify all potential spoilers."[29]

I contend that it is useful to observe this dichotomy considering two opposing goals of the constitution maker: efficiency of the legislative process on one hand, and the level of protection of minority interests on the other. The less obstacles are there in the legislative procedure, the lower is the level of protection for the minorities, the more obstacles – higher the level of protection of minorities. Given their nature, we can connect restrictive veto rights to an effective legislator, while the permissive veto right can be connected to a higher level of protection of minorities.

2.1.3 Additional veto points and adjudication/dispute resolution mechanisms

Besides McEvoy's notions of veto players and veto issues, two more elements, introduced by McCulloch and Vandeginste will be useful in assessing the minority vetoes. McCulloch and Vandeginste's approach the veto mechanisms as they are used in practice, adding:

[27] *Supra* note 17, p. 741
[28] *Supra* note 15, p. 272
[29] Ram, Megha, and Kaare Wallace Strøm. "Mutual Veto and Power-Sharing." *International Area Studies Review*, Vol. 17, no. 4, 2014, 343, 351

1) The number of veto points and their place in the legislative process
2) The existence of an adjudication process and the need for justification of veto use.[30]

The first criterion is relevant because the higher the number of veto points in the procedure, the more empowered the minority group is, the less effective is the procedure. Additionally, existence of additional veto points might explain sparse usage of a specific veto which is being observed. When it comes to the second criterion, the existence of an outside check may curb the power of the minority and enable the adjudicator to balance between the need to protect the group and the efficiency of the legislative process.

2.2. General typology of veto mechanisms – effects on the legislative process

Ulrich Schneckener classified the effect of veto mechanism on the legislative process as delaying veto, indirect veto and direct veto.[31] Scheckener's typology defines the damage the veto can produce on the bill in question, highlighting whether the veto is a weapon for the minority or a mechanisms that is supposed to enable a decision made on a broader consensus in a divided society.

When using the *delaying veto*, the veto players stop the procedure until an institution outside of the parliament decides on the matter at hand. In this process veto players merely delay a final decision via inclusion of a third institution. With the *indirect veto*, the veto players trigger a special majority needed to pass a law once the veto is triggered. The special majority requirement in corporate consociations usually requires a majority inside every pre-determined group. While these two vetoes enable a bill to "survive" the veto (although much harder with the indirect veto), the *direct veto* enables the veto player to "stop any political action directly". Schneckener contends

[30] *Supra* note 26, p. 1179-1180
[31] Schneckener, Ulrich. "Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation." *Journal of Peace Research* Vol. 39, no. 2, 2002, 203, 221

that veto rights should be more limited to prevent the abuse of the veto mechanism, and therefore he prefers delaying and indirect veto to the direct veto,[32] as those approaches aim to facilitate compromise by inserting an additional opportunity to potentially cooperate across differences. Direct veto is not such a step: it arms the minority with a powerful weapon and allows it to take a bill hostage, and "kill" it if it chooses to do so.

[32] *Ibid*, 221-222

3. Minority veto in Belgium, Bosnia and Herzegovina and Northern Ireland

In Bosnia and Herzegovina, the VNI was introduced with the Constitution of 1995. The Constitution itself is part of the Dayton Peace Agreement, which ended a four-year long war in Bosnia and Herzegovina, and sought to establish a balance between the Bosniaks, Croats, and Serbs as the three main ethnic groups. Designing an efficient legislator was not a high priority, given the fact that Richard Holbrooke, the chief architect of the Dayton Peace Agreement was "was less focused on its long-term sustainability, and more interested in "getting the deal done"",[33] with him claiming that drafting the constitution will "not resolve the major issues"[34] in the peace talks.

In a similar manner, the Northern Irish PoC was introduced through Belfast Agreement in 1998, (the Good Friday Agreement), which was accepted through a referendum and put into force through the Northern Ireland Act 1998. Good Friday Agreement sought to end the decade-long conflict between the Unionists and Nationalists in Northern Ireland. As with the VNI, PoC was introduced to ensure that the groups which were previously in conflict cooperate in the legislative process. Contrary to Holbrooke, George Mitchell, the chief architect of the Good Friday Agreement, wanted to help create "an institutional and constitutional framework in which the parties could govern Northern Ireland for the future."[35]

In contrast, the development of ABP in Belgium did not come about via a peace agreement. It was part of a process of federalization of Belgium, a series of constitutional reforms inspired by the ever-present tension between the two linguistic groups, the Flemish and the Walloon. The ABP

[33] Curran, Daniel, James K. Sebenius, and Michael Watkins. "Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina." *Negotiation Journal* Vol. 20, no. 4, 2004, 513, 517
[34] Holbrooke, Richard C. *To End a War*. New York, Modern Library, 1999, p. 195
[35] *Supra* note 33.

is a part of an internal and organic development of a constitutional system, contrary to the VNI and the PoC.

While the Northern Irish employ only the PoC, Bosnia and Belgium have other procedures which may qualify as a veto. There is the entity veto[36] in Bosnia, and the special majority laws (which will be elaborated later) in Belgium. These two vetoes in Bosnia and Belgium qualify as an additional veto point in McCulloch and Vandeginste's terms.

3.1. Veto players

In BiH ethnicity is the basis of a corporate veto mechanism. Bosnia and Herzegovina has a bicameral parliament, and the veto players are the delegates in the House of the Peoples, the second chamber of the Parliamentary Assembly of Bosnia and Herzegovina, consisting of 15 delegates. A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniak, Croat, or Serb people by a majority of, as appropriate, the Bosniak, Croat, or Serb Delegates.[37] The Bosniak and Croat delegates are delegated by the respective Bosniak and Croat delegates of the House of the Peoples of Federation of Bosnia and Herzegovina, the bigger entity in Bosnia and Herzegovina, while the Serb delegates are delegated by the National Assembly of Republika Srpska, the smaller entity. The three ethnicities have five delegates each, which means that three delegates of a single ethnicity can initiate the veto procedure.

In the case of Northern Ireland, a liberal veto mechanism was adopted when it comes to the initiation the veto procedure. The number necessary for the initiation of the PoC is 30 out of total 90

[36] Article IV.3 d) of the Constitution of Bosnia and Herzegovina: "The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity."

[37] Constitution of Bosnia and Herzegovina, Article IV, 3. e), available at: https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009?lang=en, last accessed on 28 March 2020

members of the Northern Ireland Assembly ("the Assembly"). The total number of the members of the Assembly was 108, but it was lowered to 90 in 2016,[38] which shows the intention of the law maker to make it harder for a minority to hold the majority hostage. Additionally, the 'New Decade, New Approach' deal was announced by the Irish and British governments in 2020 and was endorsed by all the main political parties in Northern Ireland in which it is set out, *inter alia,* that a petition can only be triggered by members from two or more parties.[39] This further underlines an intent to make it harder for the PoC to be used.

Once the PoC is tabled, the vote on that matter shall require cross-community support:[40] "the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting".[41] The Members of the Assembly designate themselves as unionist, nationalist or other,[42] with members being able to change their designation only if they change their party membership.[43] Given that the final vote on the decision is still defined by an ascriptive, and not a purely numerical criterion, the veto procedure in the Assembly is not fully liberal, and it needs to be dubbed as hybrid type of veto mechanism.[44]

[38] Article 1 of Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016, available at: http://www.legislation.gov.uk/nia/2016/29, last accessed on 23 March 2020
[39] Article 2.2.3, Annex B, New Decade, New Approach Deal, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf last accessed on 23 March 2020
[40] Article 42 of the Northern Ireland Act of 1998, available at: http://www.legislation.gov.uk/ukpga/1998/47/body, last accessed on 28 March 2020
[41] Article 5 of the Northern Ireland Act of 1998 available at: http://www.legislation.gov.uk/ukpga/1998/47/body, last accessed on 28 March 2020
[42] *Supra* note 17, p. 745
[43] Article 5A of the Northern Ireland Act of 1998 available at: http://www.legislation.gov.uk/ukpga/1998/47/body, last accessed on 28 March 2020
[44] McCulloch, Allison. "Consociational Settlements in Deeply Divided Societies: The Liberal-Corporate Distinction." *Democratization* Vol. 21, no. 3, 2014, 501, 506

Article 54 of the Belgian Constitution introduces the ABP:

> *"Except for budgets and laws requiring a special majority, a reasoned motion signed by at least three-quarters of the members of one of the linguistic groups… can declare that the provisions that it designates of a Government bill or private member's bill can gravely damage relations between the Communities. In this case, Parliamentary procedure is suspended and the motion is referred to the Council of Ministers, which within thirty days gives its reasoned opinion on the motion and invites the House involved to pronounce on this opinion or on the Government bill or private member's bill that, if need be, has been amended."*[45]

The members of the Parliament are attributed to Dutch (Flemish) of French (Walloon) language groups - members elected from Dutch linguistic region are members of the Dutch linguistic group, and the members of the French linguistic region are the members of the French linguistic group.[46] Therefore the ABP employs a corporate approach. Article 43 of the Belgian Constitution recognizes the French and the Dutch speaking group, while the German minority is excluded.[47] In Belgium, the Dutch speaking group is 89 members strong[48] (66 needed for initiation of the ABP), and the French speaking group has 61 members[49] (45 needed for the initiation of the ABP), setting a high threshold for the minority, especially bearing in mind the fact the internal divisions within the

[45] Article 54 of the Constitution of Kingdom of Belgium, available at: https://www.constituteproject.org/constitution/Belgium_2014?lang=en, last accessed on 28 March 2020
[46] Popelier, Patricia, and Koen Lemmens. *The Constitution of Belgium: A Contextual Analysis*. Hart Publishing, 2015, p.114-115
[47] Veny, Ludo, and Brecht Warnez. "Techniques for Protecting Minority Languages under Belgian Federalism." *International Journal on Minority and Group Rights* Vol. 23, no. 2, 2016, 211, 231
[48] DOC 55 0002/003, Groupes Linguistiques, 27 January 2020, available on https://www.dekamer.be/doc/FLWB/PDF/55/0002/55K0002003.pdf , last accessed on 19 March 2020
[49] *Ibid*

linguistic groups along the party lines, with Belgium being dubbed a partitocracy whose parties often diverge in terms of ideological viewpoints.[50]

The constitutional formulation from the article 54 is as follows: "…provisions...of a Government bill or private member's bill can gravely damage relations between the Communities." If we are to teleologically analyze this formulation, we may conclude that the main goal of this provision is the protection of relations between the two communities. This choice of words is certainly indicative of a state-building intent of the constitution maker. The intention of can be juxtaposed against the text of the other two comparators, and is in sharp contrast to the Bosnian approach which makes no reference to any similar values. The language of the Bosnian Constitution does not enable for delegates of constituent peoples to invoke vital interest of any other ethnicity but their own, preventing even the hypothetical possibility of cross-ethnic support.[51] This approach is understandable given the circumstances of the drafting of the constitution. It is interesting to note the difference between the Good Friday Agreement where the PoC is introduced as one of the "safeguards to ensure that all sections of the community can participate and work together successfully",[52] and language of the Article 42 of the Northern Ireland Act which makes no such statement of intention. It seems that the George Mitchell's community building intentions were not followed through.

One more important feature must be noted - that is the total number of individuals necessary for the initiation of the veto procedure. In Bosnia and Herzegovina, only three delegates are necessary for the initiation of the procedure, while in Northern Ireland and Belgium those numbers are much

[50] *Supra* note 46, p.108
[51] Constitution of Bosnia and Herzegovina, Article IV, 3. e), available at: https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009?lang=en, last accessed on 28 March 2020
[52] Good Friday Agreement, Strand 1, paragraph 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf, last accessed on 1 June 2020

higher, 30 and 66/45 respectively. The smaller the number of individuals deciding, the bigger the possibility of using the veto, *i.e.* the easier it is to reach a consensus between the delegates/representatives. Thus, we can note that the Bosnian constitutions opts heavily in favor of protection of ethnic groups as opposed to efficiency of the legislator, while in Northern Ireland and Belgium attention is being paid to the latter.

A side note - members of the parliaments in Belgium and Northern Ireland are directly elected members, while in case of Bosnia, these are delegated/ non-elected members, which block the decision of the House of Representatives, which is a directly elected body – raising issues regarding democratic legitimacy.

3.2. Veto issues

The Constitution of Bosnia and Herzegovina does not give a definition of a vital national interest, and it is for every ethnic caucus in the House of the Peoples to decide whether or not a certain matter falls under their vital national interest, *i.e.* a permissive veto is employed.

Given the fact that Article 42 of the Northern Ireland Act of 1998 does not establish any specific areas in which the PoC may be invoked, it can also be concluded that the Northern Irish employ the permissive veto rights.

The Belgian Constitution employs permissive veto, prescribing that all areas of legislation (except budget and special majority laws) can be vetoed. Special majority laws in Belgium are para-constitutional device, used often since their introduction in the 1970,[53] in areas which deal with the organization and the competences of the sub-federal level, and the organization of the Constitutional

[53] Deschouwer, Kris "Kingdom of Belgium", Kincaid, John, ed. *Constitutional Origins, Structure, and Change in Federal Countries*. Montréal: McGill-Queen's Univ. Press, 2005, 48, 54

Court.[54] The Belgian Constitution refers to them in a number of articles as a procedure for legislation in certain areas, making them a restrictive veto. Special majority laws require a two-third majority overall, and a majority in the two language groups.[55] They present the first line of defense for the two language groups in Belgium, which makes the ABP a backup safeguard for the Dutch and French speaking groups. Therefore, the permissive character of the ABP is to be understood with an important caveat of special majority laws as an additional veto point.

Another important dimension for the research question at hand is the interplay between veto players and veto issues. Combining a strictly homogenous group (corporate approach) with a *carte blanche* in terms of areas to veto (permissive veto rights) goes in favor of the protection of interest of minority groups much more than other solutions which can be employed, on the detriment of efficiency of the legislator. This is the case with Bosnia and Herzegovina and Belgium – there is no co-operation possible between the groups, but all groups can veto every piece of legislation. On the other hand, the Northern Ireland Act prescribes a hybrid-permissive combination, which facilitates and encourages cooperation between the divided groups at the initial stage of the veto, but still requires a corporate criterion for the bill to pass, where an opportunity arises for the minority to rally around the flag.

It can be concluded with certainty that the corporate-permissive veto rights are extremely in favor of minority groups, as opposed to the efficiency of the legislation.

Bosnian corporate-permissive combination is especially empowering of minorities considering the small number of individuals which consist the veto player. In all the three comparators there is a heavily armed minority group, and concluding solely on veto players and issues, it seems that the

[54] *Supra* note 46, p.123
[55] Popelier, Patricia "Asymmetry and Complexity as a Device for Multinational Conflict Management: A Country Study of Constitutional Asymmetry in Belgium", in Popelier, Patricia, and Maja Sahadžić. *Constitutional Asymmetry in Multinational Federalism: Managing Multinationalism in Multi-Tiered Systems.* Palgrave Macmillan, 2019, 17, 25

Bosnian case opts most extremely in favor of minority groups. The Northern Irish liberal initiation of the veto may point to a wrong conclusion of the veto being a consensus promoting tool, but the final vote stays corporate. The position of the minority is further strengthened through the fact that a permissive veto is employed. The ABP, although a corporate-permissive veto, needs to be perceived as a back up to a primary veto mechanism, the super majority laws, which are corporate-restrictive, and prevent significant areas of legislation to be vetoed by the ABP.

3.3. Minority vetoes and dispute settlement mechanisms

We have previously noted that as one of important elements of the minority veto McCulloch notes the question of existence of an adjudication procedure and the justification of the usage of the veto by the veto player. I contend that the question of justification of the usage makes sense only if there is a body which reviews the justification. Therefore, this element can be rephrased in the form of a question: What role does the rest of the parliament and/or other institutions play in the veto procedure? While veto players and veto issues have been elements of constitutional design which drew a lot of attention, same cannot be said for the adjudication/dispute settlement mechanisms which exist in different consociational democracies. They are usually briefly mentioned in the literature, and this section will attempt to evaluate the effects these mechanisms have on the legislation.

In the Bosnian House of Peoples, once a threat to a vital interest is declared by a majority of delegates of one of the ethnic caucuses, the decision must then be adopted by a majority vote of the delegates within each caucus. Therefore, the majority of delegates in one ethnic caucus initiates the procedure, which enables that same majority to block the decision of the parliament at hand. According to the text of the Constitution, once the vital interest has been declared, ethnic caucus different to the one that invoked the VNI can, object to the declaration of a vital interest in which

case the vote is stopped, and a Joint Commission comprising three Delegates, one each selected by the Bosniak, by the Croat, and by the Serb Delegates will be assembled to try and resolve the issue in five days. If this Commission is unsuccessful, the Constitutional Court shall review the procedural regularity of the veto in an expedited process.[56] On the level of constitutional text, one could conclude that the VNI is an omnipotent tool in the hands of the three ethnic delegates. The Joint Commission relies on the consensus between the three ethnic caucuses and given the fact that it was established because of the lack of consensus, one cannot expect it to be successful. This mediation offers no incentive to the ethnic group that invoked the veto to change its opinion and side with other two ethnic groups in the House of Peoples.

The second step is the overview by the Constitutional Court, limited to procedural questions only. This would mean that the Court cannot interfere and investigate whether there is an actual VNI at stake in a specific bill, and whether it is being destructive to the VNI of some of the ethnicities. If we bear in mind the previously mentioned effects that the corporate-permissive veto has on the efficiency of the legislation, the lack of any type of substantive overview on the usage of the veto would leave the efficiency of the legislator at the mercy of any three ethnic delegates. Therefore, it is of small surprise that the Constitutional Court has taken upon itself to adjudicate not only on the procedural aspects, but also on the way the VNI has been used.

It has been noted that the Constitutional Court has started to interpret the VNI since 2004 and did not support the perception of the VNI as a subjective notion which is in exclusive discretion of an ethnic caucus.[57] The Constitutional Court has approached the issue of VNI through a three part

[56] Constitution of Bosnia and Herzegovina, Article IV, 3. f), available at: https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009?lang=en, last accessed on 28 March 2020

[57] "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative", European Commission For Democracy Through Law (Venice Commission), para. 31, 11 March 2005, available on https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e last accessed on 25 March 2020

test. The first part is the procedural aspect - the constitutional competence of the Court. Additionally, the Court adjudicates on whether or not there is a VNI at stake, and in the third part the Court decides whether or not that interest was injured.[58] Procedurally, the Court establishes the existence of a declaration made by an ethnic caucus, the opposition to the declaration and the appointment of the Joint Commission.[59] The caucuses have, more often than not, omitted to define the VNI at stake, but the Court did not find that as grounds to reject the claim, but has went on to define the VNI in the specific case itself, instead of the caucus.[60] The Court has "*declined to define* or enumerate exhaustively the elements of the vital interests of the constituent peoples", [61] and has "emphasized that the protection of the vital interests must not jeopardize implementation of the theory of the state functionality".[62]

After it confirms that a VNI exist, it then proceeds to establish whether or not the decision of the legislation is destructive to the VNI. If the Court establishes that the decision is destructive to the VNI, then the procedure is continued in the House of Peoples, with majority in each caucus required. If the Court decides otherwise, simple majority will suffice.[63]

The three-step approach of the Constitutional Court is designed to, in the Courts own words, disable the jeopardization of the state functionality. However, the so-called "functional" approach[64]

[58] Ademović Nedim, Goran Marković and Joseph Marko, *Ustavno pravo Bosne i Hercegovine*, Konrad Adenauer Stiftung Sarajevo, 2012, p. 203
[59] Steiner et al. *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung Sarajevo, 2010, p. 629
[60] Kulenović, Nedim "Uloga sudova/vijeća u određenju sadržaja pojma vitalnog interesa naroda", in Banović, Damir and Dženana Kapo, eds. *Šta je vitalni interes naroda i kome on pripada? Ustavnopravna i politička dimenzija: Zbornik sa konferencije*, Centar za političke studije, 2014, 36, 41
[61] Decision of the Constitutional Court U – 10/05, para. 22, available (in English) on http://www.ustavnisud.ba/dokumenti/_en/u-10-05-31024.pdf, last accessed on 25 March 2020
[62] Decision of the Constitutional Court U – 2/04, para. 31, available (in English) on http://www.ustavnisud.ba/dokumenti/_en/u-2-04-51325.pdf, past accessed on 25 March 2020
[63] *Supra* note 58, p. 203
[64] *Supra* note 59, p. 630

of the Court has its own faults. Its avoidance to define the areas which consist the VNI have been empowering to the Court but could be detrimental to the legal certainty of the legislative.

The Belgian Constitution prescribes that after the initiation of the procedure, the Council of Ministers ("the Government") will within thirty days provide a reasoned opinion and invite either the House of Representatives or the Senate (depending on where was the ABP initiated) to pronounce on this opinion or on the amended public or private bill. In terms of justification of the usage of the veto mechanisms, the Rules of the Procedure of the House of Representatives prescribe that "the motion must be substantiated".[65] The ministers are equal number Flemish and Walloon ministers, with Prime Minister excluded,[66] and the Government decides by consensus.[67] On the first glance, the Belgian ABP seems to empower the minority group the most. Once it has obtained the three quarters necessary for the initiation of the procedure, there are no formal checks on this majority to prevent the law from being enacted, because the Government merely provides an opinion. On the level of the constitutional text, the adjudication provided by the Government is without concrete consequences. However, the power of the three quarters of a linguistic group is not unlimited, but the limits of its power does not stem from the Constitution - they are of political nature. The Government must decide on an issue which has proven to be volatile in terms of inter-group relations, and to reach its decision it must obtain consensus between the Flemish and Walloon ministers. If the consensus is not reached in the allotted time slot, the Government will almost certainly fall.[68] The resignation of the Government may eventually lead to the dissolution of the House of Representatives, If the Government fails, the Parliament faces the task of voting in

[65] The Rules of Procedure of the Belgian House of Representatives, Rule 104, available on: https://www.dekamer.be/kvvcr/pdf_sections/publications/reglement/reglementE.pdf, last accessed on: 26 March 2020
[66] Article 99 of the Constitution of Kingdom of Belgium, available at: https://www.constituteproject.org/constitution/Belgium_2014?lang=en, last accessed on 28 March 2020
[67] *Supra* note 46, p.152
[68] Adams, Maurice "Disabling Constitutionalism. Can the Politics of the Belgian Constitution Be Explained?" *International Journal of Constitutional Law* Vol. 12, no. 2, 2014, 279, 285

a new Government, bearing in mind the highly contentious issue which has led to the dissolution of the previous Government. Depending on the success of these negotiations, the dissolution of the House of Representatives may also be a possibility, if there is "agreement expressed by the absolute majority of its members".[69] Therefore, when initiating the ABP the members of the linguistic group have to be wary of the possible political consequences of that decision. It is considered that the ABP has a dissuasive and preventive effect.[70] The role of the Government is that of a dispute settlement body, given that it provides a recommendation to the house from which the ABP was initiated. The possible consequence of a failure to reach a settlement in this dispute are those which shape the way in which this veto is to be perceived.

A justification for the usage of the PoC is not required,[71] however, the "New Decade, New Approach" deal (which has not been put into force *via* legislation) proposes that a petition must be accompanied by a statement of the grounds and rationale upon which it is being tabled.[72] "New Decade, New Approach" is a deal intended to restart the Northern Irish institutions after their collapse in 2017,[73] with the PoC being one of the stumbling blocks.[74] After the PoC was tabled by 30 members of the Assembly, the Assembly may establish an ad hoc committee to examine and report on whether a Bill or proposal for legislation is in conformity with equality requirements, including the ECHR and Northern Ireland Bill of Rights (which still has not been enacted). The Assembly shall vote to determine whether the proposed decision may proceed without reference to

[69] Article 46 of the Constitution of Kingdom of Belgium, available at: https://www.constituteproject.org/constitution/Belgium_2014?lang=en, last accessed on 28 March 2020
[70] Alen, Andre and David Haljan, *Belgium*, Wolters Kluwer Law and Business, 2012, p. 94
[71] Standing order no. 35 of the Northern Ireland Assembly, available on: http://www.niassembly.gov.uk/assembly-business/standing-orders/standing-orders/#a60, last accessed on 23 March 2020
[72] Article 2.2.1, Annex B, New Decade, New Approach Deal, available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf last accessed on 23 March 2020
[73] "What Is Stormont and Why Does It Matter?" https://www.bbc.com/news/uk-northern-ireland-politics-50822912, last accessed 2 June 2020
[74] "DUP 'flatly Rejects' Talks Impasse Is Its Fault." BBC News, December 20, 2019, https://www.bbc.com/news/uk-northern-ireland-50862299., last accessed 2 June 2020

the ad hoc committee.[75] In practice, the ad hoc committee was never established in regard to the PoC.[76] "New Decade, New Approach" suggests that the ad hoc committee will be introduced as a part of the procedure after the initiation of the PoC.[77] Given the fact that the proposed decision will be reviewed only in light of human rights legislation, we cannot view the ad hoc committee as a proper check on the usage of the veto. Situations in which there is no issue in regard to human rights, but which still present an abuse of the veto mechanism are entirely plausible, and a body whose sole task is to review whether or not there is an actual need to use the veto is necessary to prevent its abuse.

Out of the three selected comparators, only Bosnia and Herzegovina has a body whose competence is to overview the way in which the veto is used, and, if needed to annul the veto. However, this competence is not given by the Constitution, but is derived from the practice of the Constitutional Court, and the way it is performed prevents the establishment of legal certainty in this matter. Although leading to uncertainty, it is more protective of the efficiency of the legislator than the absence of any substantial control, which is the case in Northern Ireland, where the 30 members of the Assembly, have the power to both initiate the veto procedure and *de facto* the power to directly veto the decision of the Assembly. The fact that the Northern Irish veto enables inter-group cooperation in the matter, does not alleviate the dangers towards the efficiency of the legislator. The Belgian example on the other hand might prove itself to be most in favor of an efficient legislator out of the three. The inherent risk of usage of the veto is the failure of

[75] Standing order no. 60 of the Northern Ireland Assembly, available on: http://www.niassembly.gov.uk/assembly-business/standing-orders/standing-orders/#a60, last accessed on 23 March 2020

[76] Implementing the 'Petition of Concern', briefing note, Committee on the Administration of Justice, available on https://caj.org.uk/2018/01/22/implementing-petition-concern-caj-briefing-note-january-2018-s469/ last accessed on 23 March 2020

[77] Article 2.2.7, Annex B, New Decade, New Approach Deal, available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf last accessed on 23 March 2020

Government and potential dissolution of the House of Representatives, and this potential *boomerang* effect of the veto can certainly be considered as benevolent for a deadlock-free legislative procedure.

3.4. Impact of the minority veto on the final decision of the legislation

On the level of the constitutional text, the Belgian veto mechanism (ABP) falls under the category of delaying veto, as also acknowledged by Schneckener. It includes the federal executive, asking of it to prevent a decision which may threaten the relations between the linguistic communities. In that sense, the effect this veto has on the efficiency of the legislator is minimal – it merely prolongs the legislative procedure, but it does not enable the minority group the block the decision of the legislation, nor does it introduce a special majority – it requires for a consensus to be reached in the executive. This effect of the veto may be perceived as a counterbalance to the fact that APB is a corporate-permissive veto, which we recognized as being more angled to minority protection than consensus building. That being said, one needs to bear in mind the possible political consequences of the usage of this veto procedure.

Merely on the level of the text of the constitution, the Bosnian and Northern Irish veto trigger special majorities necessary for the proposed decision to be enacted. At first glance one might put them in the indirect veto bracket. However, the character of those majorities is such that their veto may block the decision by withholding their vote, making this a direct veto.

In Bosnia and Herzegovina, a small number of MPs necessary for the initiation of the procedure enables easier coordination throughout the process, therefore resulting in Bosnian veto being a prime example of a direct veto. According to the publicly accessible data, every time the

vital interest was invoked, it has resulted in an adjudication by the Constitutional Court, meaning that the Joint Commission has never proven to be successful, and that the law was never enacted by the majority in all three of the caucuses.[78] When it comes to the PoC in Northern Ireland, the current Assembly has 40 designated Unionist and 39 designated Nationalist out of total of 90 members,[79] making it possible for the 30 members of the assembly which initiate the procedure, to block the decision in question by voting against the proposal (if they are from the same designated group), qualifying the PoC as a direct veto.

3.5. Minority vetoes and vertical separation of powers

Before going into the evaluation of the manner in which veto mechanisms are used in respective states, an important caveat must be made about the interaction and the impact of vertical separation of powers on veto mechanisms. Lijphart emphasizes that federalism may serve to alleviate some of the tensions that are inherent to consociational democracy,[80] with Elazar claiming that consociations tend to have a longer life expectancy if they are within a federal polity.[81]

All three of the comparators are polities in which significant vertical separation of powers exists, with Bosnia and Herzegovina and Belgium being federations, and Northern Ireland being an entity within a devolved United Kingdom. In Belgium the trend of federalization that started in 1970 has resulted in a series of constitutional reforms, to the point that since 2003 demands for confederalism have become a priority for Flemish parties.[82] Most powers are now situated on the

[78] History of usage of the vital national interest, available on https://www.parlament.ba/Content/Read/39?title=Vitalninacionalniinteres, last accessed on 27 March 2020
[79] Results of the 2017 elections for the Northern Ireland Assembly, available on https://www.bbc.com/news/election/ni2017/results, last accessed on 23 March 2020
[80] *Supra* note 1, p. 51
[81] Elazar, Daniel J. "Federalism and Consociational Regimes," *Publius: The Journal of Federalism*, Vol. 15, Issue 2, 1985, 17, 31
[82] Romainville, Céline. "Dynamics of Belgian Plurinational Federalism: A Small State Under Pressure." *Boston College International & Comparative Law Review*, Vol. 38, 2015, 225, 237

sub-federal level, with the Flemish budget larger than the federal budget.[83] In Bosnia and Herzegovina federal entities have broad competences, with the central government being dubbed as "extremely weak",[84] so much so that the (federal) Council of Ministers had only three ministers up to 2000. In contrast, although Northern Ireland has gained certain competences from the UK by devolution, London continues to hold significant competences: *e.g* the Northern Ireland Assembly does not have taxation powers, with the Northern Ireland Office (a United Kingdom government department) maintaining competences in the area of elections, national security, legacy issues (usually public inquiries), the Crown Solicitors Office, and human rights.[85]

Given the nature of vertical separation of powers, there is an increased tolerance for deadlocks and immobility in all three systems: Northern Irish institutions could remain frozen for three years,[86] while Belgium holds the (unofficial) world record of 540 days of going without government,[87] and Bosnia waited more than 14 months with the formation of government.[88] Issues affected by a veto move on one level are dealt with by other levels of government: serving as safety valves, other levels of government decrease the pressure generated by paralysis permitting seemingly normal functioning of society (or at least daily life). At the same time, the area of competences in which the minority veto can be invoked is *prima facie* shrunk by the fact that there is a vertical separation of powers which significantly limits the competences of the level of

[83] Goossens, Jurgen, and Pieter Cannoot. "Belgian Federalism after the Sixth State Reform." *Perspectives on Federalism* Vol. 7, no. 2, 2015, 29, 45

[84] Woelk, Jens "The Constitutional Transition of Bosnia and Herzegovina Between Nationalism and European Conditionality" in Benedizione Ludovica and Valentina Rita Scotti, eds. *Proceedings of the Conference Twenty years after Dayton. The Constitutional Transition of Bosnia and Herzegovina*, LUISS University Press, 2016, 23, 30

[85] Murtagh, Brendan, and Peter Shirlow. "Devolution and the Politics of Development in Northern Ireland." *Environment and Planning C: Government and Policy* Vol. 30, no. 1, 2012, 46, 50

[86] "Stormont: Why Does Northern Ireland Not Have a Government? https://www.bbc.co.uk/newsround/38648719. Accessed June 2, 2020.

[87] "The Belgian Government Is Sworn In After 540 Days Without An Elected Government." https://www.politico.eu/article/12-people-who-ruined-the-european-parliament-election-democratic-deficit/the-belgian-government-is-sworn-in-after-540-days-without-an-elected-government/. Accessed June 2, 2020

[88] "Bosnia Gets Government after 14-Month Impasse 23.12.2019." https://www.dw.com/en/bosnia-gets-government-after-14-month-impasse/a-51785707. Accessed June 2, 2020.

government in which the veto can be invoked in the first place. The area of competences in which the veto can be invoked and the impact of the veto mechanism are in direct correlation, therefore the smaller the area in which the veto can be invoked, smaller its overall impact.

4. Minority vetoes in practice

In order to fully assess the impact that the three different veto mechanisms have on the legislative procedure, we must take into account the history of the usage of the three vetoes. At this point I consider it essential to put forward a disclaimer – the analysis that ensues does not attempt to firmly establish the causal connection between the procedural aspects of veto mechanisms and the empirical data put forward. It merely attempts to suggest possible explanations for the manner and the frequency of the usage of the veto. A proper empirical analysis would require much more data to come to more certain conclusions. That being said, it must be noted that the data on the usage of veto was scarce, and while the history of usage of veto in Belgium[89] and Bosnia and Herzegovina is analyzed in its entirety, the analysis of the usage of the PoC in Northern Ireland is limited to one term (2011-2016) which was available.

Belgian ABP has only been used on 2 occasions until 2019.[90] Last time it was used was in 2010 by the Walloon linguistic group, it ultimately resulted in the failure of Government.[91] The potential fatal consequences of the usage of the ABP have been previously elaborated which may serve to explain the fact that ABP has been used so rarely – the minority group can protect its interest, but the risk and the potential price to pay it is high. Additional veto points may serve to explain this as well. The previously mentioned special majority laws cover numerous areas defined by the constitution. This list includes some of the most important questions for the linguistic groups. It also must be noted that the fact that the Government consists of equal number Flemish and Walloon ministers which decide consensually helps understand this phenomenon. Up to 90%

[89] With limited literature and data (in English) available about the details of the two instances in which the veto was invoked

[90] Andeweg, Rudy B. "Consociationalism in the Low Countries: Comparing the Dutch and Belgian Experience." *Swiss Political Science Review* Vol. 25, no. 4, 2019, 408, 418

[91] *Supra* note 70, p. 94

of the enacted laws are government bills,[92] and the parity and consensus serve to ensure that neither group is displeased with the bill. Therefore, it is no surprise that the two bills in which the ABP was invoked were private MP bills.[93]

The history of usage of VNI may be the most peculiar one of the three. The corporate-permissive veto combination, alongside the small number of MP's needed for the initiation of the procedure would make us assume that the veto mechanisms will be used frequently. However, the veto was used only 17 times, 15 times by the Bosniak caucus (which is the majority ethnicity), and twice by the Croatian.[94] The lack of Serbian usage of the VNI may be explained through the existence of another veto point, the entity veto in the House of Representatives.[95] However, the lack of Croatian vetoes may be harder to explain, since they do not wield the numbers necessary for the entity veto in the House of Representatives.

One possible explanation is offered by the Venice Commission opinion, where it is noted that "the main problem with veto powers is not their use but their preventive effect. Since all politicians involved are fully conscious of the existence of the possibility of a veto, an issue with respect to which a veto can be expected will not even be put to the vote".[96] The chilling effect of a veto has is exceptionally strong, given that all the interested parties are aware of the corporate-permissive veto that Bosnia employs, which in practice means that any type of legislation can be

[92] *Supra* note 46, p. 121
[93] *Supra* note 46, p. 123
[94] History of usage of the vital national interest is available on https://www.parlament.ba/Content/Read/39?title=Vitalninacionalniinteres, last accessed on 27 March 2020
[95] During the 2006-2010 period, the Parliament enacted 175 laws, with 50 rejections through entity veto coming from representatives elected in Republika Srpska.
Bahtić-Kunrath, Birgit. "Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process." *Nationalities Papers* Vol. 39, no. 6, 2011, 899, 907-908
[96] Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative", European Commission for Democracy Through Law (Venice Commission), para. 32, 11 March 2005, available on https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e last accessed on 25 March 2020

very easily prevented from being enacted. Additionally, the small number of veto players needed to block the legislation enhances the discouragement.

One also needs to take into account the fact that there is another quasi-veto point in the Council of Ministers, namely the fact that the session of the Council of Ministers will not be held if at least one minister from every constituent people is not present.[97] The Council of Ministers is one of the main initiators in the legislative procedure, and Croatian ministers, who almost exclusively come from one political party, can nip the procedure in the bud. Looking at this from perspective of potential dangers for the minority groups, the fact that the Constitutional Court may rule that the VNI does not exist in certain area or in a specific instance, may serve to discourage the usage of the veto. But give the late stage in which the Constitutional Court gets involved, the explanations of chilling effect and additional veto points are more plausible.

The history of usage of the PoC is the most prolific example out of the three. Until October 2019, the PoC was tabled 159 times,[98] until 2017 "at least four" were co-signed by nationalist and unionist members,[99] which tells us that the vast majority of petitions of concern gets tabled by a single group, and shows that the PoC, although liberal when it comes to its initiation, has shown itself to be corporate with a fairly low number of exceptions. I contend that the veto players, knowing that they will *have to* group in the later stage of the veto procedure, *choose to* group in the initiation stage. In the 2011-2016 Assembly, out of the total of 115 motions of the assembly in which PoC was invoked, only 38 of them were resolved and became part of laws enacted by the

[97] Authentic Interpretation of the Law on Changes and Amendments to the Law on the Council of Ministers of Bosnia And Herzegovina Enacted by the Decision of the High Representative of 19 October 2007, para. 18, available at http://www.ohr.int/?p=67105, last accessed on 27 March 2020

[98] "What are the concerns over Stormont's role in proposed Brexit deal?" https://www.theguardian.com/politics/2019/oct/03/what-are-the-concerns-over-stormonts-role-in-proposed-brexit-deal Last accessed on 23 March 2020

[99] *Supra* note 17, p. 745

Assembly, with additional 34 being enacted by the House of Commons. The rest of the motions were withdrawn, failed the cross-community vote, were not pursued further, or were resolved after changing of the initial positions.[100] The fact that over a quarter of motions were subsequently enacted by the House of Commons serves to prove that an existence of vertical separation of powers may serve as a safety valve. This fact also serves to dispel presumptions[101] that the reason to blame the abuse of the PoC is the fact that Northern Ireland is not in a federal structure.

McCulloch points out two important facts regarding the usage of veto in this period. Firstly, one needs to bear in mind the fact that the PoC may be invoked multiple times on the same bill. This results in PoC being invoked multiple times on the same bill - while the number of motions is 115, McCulloch claims that the number of bills disputed is 33. Second, since 2007 the electoral success of DUP has enabled its members of the assembly to invoke the PoC without any support of other parties, resulting in DUP tabling over 70 PoC's, most of them without other parties.[102] The proposal of "New Decade, New Approach" to make it mandatory for PoC's to be tabled by at least two parties is certain to lead to a decrease of usage of PoC, in light of these facts.

The abundance of PoC can be additionally explained through two design features. Firstly, the fact that there is no dispute settlement mechanism on the PoC means that the members can be sure that the petition will produce the wanted effect – the will of the minority will be taken into account or the decision will not be enacted. We have seen that the Constitutional Court in Bosnia has taken a proactive approach when it comes to limiting the veto, while in Belgium the usage of the veto might have dire consequences. None of these two exist in Northern Ireland, and it is no surprise then, that the "New Decade, New Approach" deal has designated that PoC is to be used

[100] "Stormont's petition of concern used 115 times in five years", https://www.thedetail.tv/articles/stormont-s-petition-of-concern-used-115-times-in-five-years, last accessed on 23 March 2020
[101] *Supra* note 19, p. 24
[102] *Supra* note 17, p. 746

"only in the most exceptional circumstances and as a last resort".[103] Secondly, both Belgium and Bosnia and Herzegovina have other veto points which serve to alleviate the specific veto mechanism that was analyzed. Bearing in mind this difference, the frequent use of the PoC seems less extreme in comparison.

The fact that the proliferation of the PoC is a direct consequence of the fact that one party may invoke it, is particularly important to consider. Without the need for inter-group coordination and compromises, a single party veto player is more probable to abuse the veto. That being said, it is interesting to note that the current composition of the House of the Peoples of Bosnia and Herzegovina is such that in all three of the caucuses, the veto can be invoked by a single party,[104] this being a consequence of an extremely small number of delegates in this House. On the other hand, the Belgian veto player is designed in such a way that a "privatization" of a veto by a single party is not probable, due to the high number of votes needed for the initiation of the veto.

[103] Article 2.1, Annex B, New Decade, New Approach Deal, available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf last accessed on 23 March 2020

[104] SDA for Bosniaks, HDZ for Croats, SNSD for Serbs

Conclusion

In order to answer the research question and try and understand how do different forms of veto mechanisms affect the legislative process in the three countries, we have deconstructed the veto mechanisms to their core elements, assessed the effect that the veto mechanisms have on the legislative process *in abstracto*, and finally we have glanced at the way the veto has been used in practice.

When it comes to veto players, I would like to emphasize several findings which should be incorporated in all future theoretical considerations, which come from my observations on Northern Irish and Bosnian veto players. I concur with the already existing opinion expressed by many authors that self-determined veto players are less detrimental for the efficiency of the legislation. However, it needs to be added that the hybrid approach in Northern Ireland, where the veto player is liberal at the initial stage and corporate in the voting stage has almost the same effect as a fully corporate veto player. Additionally, recent experience teaches us that initiation of veto procedure needs to be a decision made with a broader base of consensus within the minority groups representatives, *i.e.* not by members of a single party, and in that regard, the proposal contained in "New Decade, New Approach" might prove to be vital for the prevention of abuse of the PoC. Some lessons are to be learned for Bosnia from these developments, where an extremely small number of individual make up the veto player, and with all of them currently coming from a single respective ethnic party, the sword of Damocles hangs over every decision which is to be made. Alongside the small number of individuals, the lack of their democratic legitimacy is a question that must be reassessed. Although there is no one size fits all recipe for an ideal veto player, the general notion that self-determined veto players are more acceptable can be supplemented with the

knowledge that internal design of veto players matters – cross party support and a bigger number of individuals may help prevent deadlocks.

Regarding the veto issues, I believe that from a point of constitutional design, there is a way to reconcile permissive and restrictive approaches of veto, and that that reconciliation is seen in Belgium. Putting up a restrictive veto as a primary method of protection of interest of minority groups makes the legislative procedure more foreseeable, while the existence of a permissive veto as a failsafe for minority gives it reassurance. Existence of an exclusively permissive veto, especially in combination with a corporate veto player has an enormous potential for deadlock, so much so that the mere potential may result in a strong chilling effect, as seen in Bosnia and Herzegovina. One may counter this and claim that Bosnia has an additional veto point as well, but it needs to be taken into account that this veto is permissive as well. Additional veto points are important piece of the structure which are crucial for a correct assessment of any single veto mechanism.

The point which I believe is most underestimated in the current literature on minority veto is the question of adjudication/dispute settlement mechanisms. An impartial arbiter on the way the veto is used, in which all the minorities are adequately represented could be a key factor for a reasonable approach to the usage of veto. Knowing that an invocation of a veto may be overruled could lead to a decrease in those invocations which are *prima facie* unfounded or used *mala fides.* Absence of such a mechanism is certain to lead to proliferation of usage of veto, as I believe is to be seen in Northern Ireland. Any further inquiries in this aspect of veto mechanism must take into account the political price of invocation of the veto as well, with the Belgian example being prominent.

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