

# Rectifying and Reinforcing: Constitutional Review in Consociations

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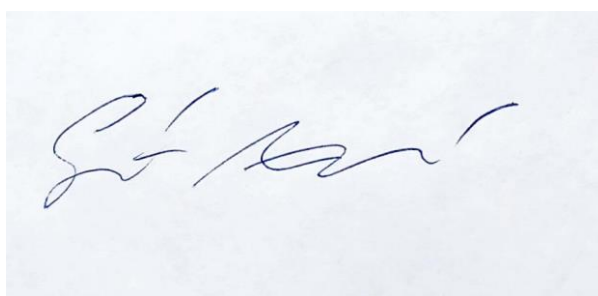
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## Declaration

I, the undersigned András Gál, candidate for the degree of Doctor of Philosophy at Central European University Doctoral School of Political Science, Public Policy and International Relations, declare herewith that the present thesis is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of work of others, and no part the thesis infringes on any person's or institution's copyright. I also declare that no part the thesis has been submitted in this form to any other institution of higher education for an academic degree.

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A handwritten signature in blue ink, appearing to read 'Gál András', is written on a light blue rectangular background.

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## Abstract

The role of constitutional review in consociations – a specific form of power-sharing built on elite cooperation – is a controversial phenomenon both for the conceptual difficulties surrounding it and its mixed empirical record. While authors in the relevant literature agree that constitutional courts may contribute to the protection of human rights in such regimes, they also warn of their undermining potential. The latter stems from an inherent tension between the individualistic, universal values promoted by constitutionalism and the group-specific provisions essential in consociations. The empirical record of constitutional review in consociations covers a variety of cases, ranging from judicial deference to cases of confrontational behavior undermining power-sharing settlements.

While the established literature primarily focuses on how courts contribute to the dynamics of consociational regimes (in other words, *what* they do), this research puts a greater emphasis on *how* these bodies fulfill general functions of constitutional courts, namely the protection and promotion of constitutional supremacy. The role of constitutional review is investigated in 3 consociations: Belgium, Bosnia and Herzegovina, and Northern Ireland. Comparing corporate and liberal consociations, gradually evolved and post-conflict settlements, civic and common law jurisdictions, offers a substantial diversity in the empirical material, enabling ‘consociation-specific’ inferences across cases.

From a normative perspective, the core argument of the dissertation is that due to certain gaps in the decision-making mechanisms of consociations, the involvement of non-majoritarian institutions, such as constitutional courts, is indispensable. This role primarily pertains to the protection of those groups who are deprived of the political instruments of pursuing their fundamental interests, such as non-recognized groups – also known as the ‘others’ – or internal minorities within major social segments.

These prescriptive claims are particularly underlined by the dissertation’s principal empirical findings. First, beyond the established literature’s dichotomous view on the role of constitutional courts in consociations, a third pattern emerges. While the established literature sees courts as either deferential towards political elites or confrontational in a way that aims for the liberalization of consociational institutions, this analysis shows that courts frequently buttress strained power-sharing institutions by making controversial decisions, *reinforcing* consociations. Second, courts in such contexts frequently employ so-called triadic interpretive methods – like

purposive interpretation or proportionality analysis – where the respective constitutional provisions are interpreted by invoking an external reference point. Third, courts in consociations are fairly consistent in their use of external references, which bears particular importance in post-conflict settings where courts frequently interpret constitutional provisions through the lens of the peace agreements establishing (or paving the way to) the respective consociational settlements.

The dissertation offers two core theoretical, and a number of practical implications. First, courts have a particular responsibility in filling certain decision-making gaps on behalf of underrepresented groups, such as the ‘others’ or internal minorities. Second, courts are at least as important in supporting the functioning of consociations by reinforcing strained institutional mechanisms, as much by threat their potential activism poses. In both regards, carefully designed constitutional mandates, external references, and appointment procedures can foster arrangements where human rights and power-sharing do not undermine, but mutually reinforce one another.

## Acknowledgements

Fortunately, and to some degree unfortunately, the years of my doctoral studies at CEU were filled with much, much more than conducting research and completing this dissertation. Unfortunately, through my doctoral studies I had to witness how my university is slowly driven out of my home country by nuanced and carefully targeted legislative and bureaucratic measures. Unfortunately, this deprived my university of its home where it got rooted in over 25 years and deprived my home country of a vibrant intellectual community and an institution with a global recognition. Nevertheless, I was fortunate to be part of CEU's community in these crucial times, experiencing its determination, resilience, and unity in standing up for free thinking and intellectual honesty despite its great diversity. I was also fortunate to fully enjoy and appreciate this diversity over my years at CEU, broadening my understanding of the world we are living in. Furthermore, I was fortunate to be part of a community that constantly inspires its members to reflect on all the profound questions social scientists can and should be concerned with.

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## 1. Introduction

This work addresses the controversial intersection of two controversial notions: consociationalism and constitutional adjudication. Since the pioneering article of Arend Lijphart coining the term ‘consociationalism’ was published (1969), this form of power-sharing – focusing on elite cooperation – has been subject of intense academic and political debates (Choudhry 2008a, 15–26; O’Leary 2005, 4–19). With its more than two centuries-long history, constitutional adjudication is a similarly contested notion, surrounded by complex academic and heated political debates. Though the nexus of the two phenomena can be seen through a number of empirical and normative dimensions, these have drawn fairly limited academic attention so far. The primary reason for this is that consociational scholarship is traditionally focused on institutions of the political elites, such as parties, legislatures and executives placing a smaller emphasis of non-elected governmental branches and institutions. Furthermore, constitutional review was not part of those consociations – or was present in a very limited form – which served as the inspiration for the original formulation of consociational theory, such as the Netherlands between 1917 and 1967; Belgium prior to its federalization (which commenced in 1970); Austria between 1945 and 1966; and Lebanon between 1946 and 1975 (Lijphart 1969, 216; R. Taylor 2009a, 2–6).

The relatively limited literature on the topic portrays the relationship between consociationalism and constitutional review as rather problematic, considering constitutional review much more of a threat to power-sharing mechanisms than a potentially supporting factor. This skepticism is driven by the conflicting natures of the two phenomena. On the one hand, consociations are largely built around the cooperation of ethnic or sectarian political elites, involving numerous informal practices (Andeweg 2000, 513; Helmke and Levitsky 2004, 725–29), confidentiality, and transactional approaches. Furthermore, as recognizing politically salient group identities is an essential feature of consociationalism, group-specific rights rooted in the social contexts are also essential in these regimes (Choudhry 2010; McCrudden and O’Leary 2013a, 35–39). On the other hand, the core idea behind constitutionalism is to limit the government through separation of powers and various procedures (discussed in *Chapter 2*). Moreover, the human rights conceptions behind such a view on a limited state implies a universalistic and individualistic approach to rights provisions.

Beyond the conceptual tensions between the two notions, the latter consideration poses a pragmatic threat to consociational institutions, which can be vulnerable to human rights challenges. For this reason, most of the established works on constitutional courts in consociations (e.g. Issacharoff 2008; 2013; McCrudden and O’Leary 2013a; Pildes 2008) suggest that institutions handling rights litigation in consociations – mostly constitutional courts – should embrace a restrained, context-sensitive, ‘modest’ approach when consociational institutions are challenged on grounds of equality provisions and discrimination. While not challenging the prevalent consensus in the literature on the importance of judicial prudence in deeply divided societies, I argue that the stability of consociational institutions often requires assertive interventions by the judiciary, when deference is either not an option or means taking sides in a dispute.

As this literature is largely case-rooted and empirically oriented, the prescriptions on judicial modesty are primarily based on certain influential cases, such as the failed consociational attempt of Cyprus (1960-63), the transitional consociation of South Africa (1993-96), or contemporary Bosnia and Herzegovina (1995-). In this dissertation, the importance of judicial involvement is underlined in three ways. First, by broadening the empirical basis of comparative analysis; unlike other contributions in this generally case-specific literature, this work compares three consociations (Belgium, Bosnia and Herzegovina, and Northern Ireland) with different background conditions: post-conflict and gradually evolved settlements; federal and unitary states; or *corporate* and *liberal* consociations (terms discussed below). Second, by introducing new analytical considerations in the comparative analysis; in other words, beyond looking at *more* cases, this work also aims to look at these cases *differently* than earlier contributions. Third, the normative justification of constitutional review in these contexts is also analyzed, integrating consociational scholarship with constitutional and democratic theory.

Given the tensions between consociationalism and constitutionalism, most authors (e.g. Issacharoff 2008; 2013; McCrudden and O’Leary 2013a; Pildes 2008) consider two potential avenues for constitutional courts: they either promote the universal values of constitutionalism in consociations, which are arranged on the basis of group identities and rights (in other words, potentially ‘unwinding’ corporate consociational institutions); or they defer to political elites, enabling the power-sharing mechanisms to sort out controversial questions. Through the analysis of a larger number of cases in a single comparative framework, a third pattern emerges, in which constitutional courts support weakened consociational mechanisms, either through assertively

intervening, or by deferring decisions in a way that effectively takes sides in sensitive debates. This I call judicial *reinforcement* of consociational structures and is clearly the outcome in a large share of judicial decisions included and analyzed in this work (with case selection principles outlined in section 1.4). From a normative perspective, I also argue that while political means of dispute resolution is preferable on a systemic level, in certain segments of constitutional architectures constitutional adjudication is *necessary* to address specific gaps in the institutional arrangements.

In order to situate the relevant positions in the broader discussions on consociationalism, first the origins and developments of consociational theory are discussed, alongside its major empirical and normative debates (1.1), with a particular focus on two issues. The first is the transformation of consociational settlements from informal elite cooperation to constitutionalized institutional architectures, which opened the way for constitutional review. The second is the introduction of those corporate provisions that complicate the relationship between consociationalism and cosmopolitan conceptions of constitutionalism. After introducing the major concepts and arguments in consociational scholarship, the core contributions and positions in the narrower literature on constitutional review in consociations are discussed (1.2). In section 1.3, the major objectives of the dissertation are presented, together with the work's major contributions to the field, and a brief outline of the following chapters.

### 1.1 Consociationalism

The term 'consociationalism' was coined in the seminal article of Arend Lijphart, titled *Consociational Democracy*, published in 1969. Initially, the term was defined in the following way: "[c]onsociational democracy means government by elite cartel designed to turn democracy with a fragmented political culture into a stable democracy" (1969, 216). In general, Lijphart's argument entered into dialogue with typologies emerging at that time which were classifying political regimes based on their political culture and the stability in their functioning (1969, 207–10). The most extensively discussed typology, by Gabriel Almond and Bingham Powell (1966) considers the homogeneity of a country's political system as an independent variable explaining its stability: therefore, even though the institutional setup of the Scandinavian countries largely differs from the Anglo-Saxon political systems, both groups of countries maintain stable regimes. On the contrary, continental European countries (e.g. post-World War II France or Italy) with a more fragmented political culture are classified as "crisis systems" (Almond 1958, 275), with

unstable governments and institutions. Nevertheless, Lijphart argues that certain countries deviate from this logic, like his home country, the Netherlands, its neighbor Belgium, or Switzerland. His ambition behind formulating consociational theory was to explain the paradox of stable democracy in fragmented political cultures.

By focusing on the countries which Lijphart considered ‘fragmented but stable’ two groups of key elements were identified. On the one hand, the cooperation among elites which requires their understanding of “the perils of political fragmentation”, their ability to “transcend cleavages” and to establish cooperation among each other and their commitment to maintain the established forms of cooperation (Lijphart 1969, 216). On the other hand, cooperation among the elites can result in the stability of the system only in case members of the societal groups consider their elites legitimate representatives – in other words, a certain degree of cohesion between the elites and their constituents is required. In Lijphart’s words, “[t]he elites have the ability to accommodate the divergent interests and demands of the subcultures” (1969, 216).

In the following decades, Lijphart modified his definitions and conceptual approaches multiple times, especially concerning the necessary and favorable factors for consociational settlements (Bogaards 1998; Lustick 1997); however, the core elements of the concept – primarily inter-elite cooperation and the politics of accommodation – remained untouched. The later most widely used definition can be found in his 1977 book, *Democracy in Plural Societies*, where the so-called ‘consociational package’, a list of four elements qualifying a regime as consociational, was formulated. These are: proportionality (both in the electoral system and other areas of state institutions), grand coalition, mutual veto provisions, and segmental autonomy (Lijphart 1977, 25). If a regime fulfills all four conditions, it qualifies as a consociation; if two or three are present, it can be considered a semi-consociation (McGarry and O’Leary 2009, 350) .

In identifying the relevant universe of cases, these defining features can be seen as overly narrow and broad at the same time. On the one hand, Rudy Andeweg claims that “[b]y insisting that all four should be present, and by ignoring other non-majoritarian mechanisms, Lijphart narrowed consociational theorizing unnecessarily” (2000, 512). By introducing the concept of ‘consensus democracy’ in his later works, Lijphart partly addressed the issue, while keeping the concept of consociational democracy in its original form, reserving it as the “stronger medicine” (1989, 41) for deeply divided societies. On the other hand, these four features can also be insufficient yardsticks for identifying instances of consociational power-sharing. The primary reason behind

this is that the presence or absence of consociationalism's defining features are often not formally tangible, but rather "largely behavioural and broadly defined" (Andeweg 2000, 513). For the same reason, grasping the temporal durability of these practices is also a challenge, namely seeing if their presence is permanent or temporary. Even though the more recent (mostly post-Cold War) instances of consociational power-sharing function in a more formalized manner, with consociational devices included in constitutions (Bogaards 2017, 148–50; Kerr 2006), informal practices and mechanisms still have an important role in the way these institutions practically function (Helmke and Levitsky 2004, 725–29).

Despite the fact that formal consociational institutions are often complemented or subverted by informal mechanisms and practices, the constitutionalization of consociational settlements is an important development in the evolution of consociational power-sharing, particularly relevant for this analysis. The establishment of formal rules invites the designation of an institutional actor providing a binding interpretation of the rules and arbitrating in debates on the application of these rules. Constitutional courts, by their specific mandates, politically balanced appointment procedures, and specific 'constitutional space' (Stone Sweet 2012, 818) guaranteeing their independence, are highly suitable candidates for such a role. This arbitrating role appears to be particularly important by taking a closer look on the reasons behind the constitutionalization of consociational institutions in the more recent settlements.

In his analysis on the power-sharing history of Lebanon, Matthijs Bogaards observes that consociational settlements established after the end of the Cold War share some important similarities: they were arranged following civil wars, with substantial external involvement (which, in some cases, rather meant imposition), and the provisions on the consociation's functioning were subsequently constitutionalized and adopted as formal rules (2017, 148–50). The lack of a voluntary, bottom-up formation of coordination rules necessitates formal provisions, which implies the need for a formal arbitrator.<sup>1</sup> Judicial empowerment in two of cases – Bosnia and Herzegovina and Northern Ireland – from the three polities discussed in this work can be explained through this lens. However, the constitutionalization of consociational mechanisms in Belgium – the third case in this dissertation – needs a different explanation for the consociation's peaceful, evolutionary development. Here general reasons partly influencing the other cases too can be mentioned, such as the global spread of constitutions, adopted in various 'waves' of

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<sup>1</sup> As Bogaards puts it: "instead of informal understandings, post-war institutional choices are usually based on written guarantees" (2017, 149).

constitution-making (Elster 1995, 368–70), or the increasingly broader constitutional provisions worldwide (Bellamy 2007; Shapiro and Stone Sweet 2002).

The first element of the ‘package’, proportionality, is present in multiple institutional dimensions: in electoral design, as well as the representation of salient groups in public bodies, like administrative authorities, law enforcement bodies, or the armed forces. The fundamental logic of consociational power-sharing requires an electoral arrangement that ensures that all politically salient groups have secured representation; proportional representation (PR) is a suitable solution with objectives, though other avenues are also available. For instance, single transferable vote (STV), a preferential method with multi-member districts (therefore also essentially proportional), employed in the Northern Irish consociation is also claimed to be a suitable choice, especially for the ways it enables electoral accountability within ethnic blocks (Garry 2014).

Second, segmental autonomy has an essential role in maintaining and reinforcing the connection between social segments and their representatives. Furthermore, it buttresses the same *status quo* which provisions on proportionality foster. Nevertheless, beyond these, from the four defining features of consociationalism, segmental autonomy is the least unique, but rather a widespread tool of managing social diversity and divisions, in various forms, ranging from territorial autonomy, devolution, or ethno-federalism to functional and non-territorial forms of autonomy. Based on the social settings, consociations also include different provisions on segmental autonomy. Bosnia and Herzegovina and contemporary Belgium represent the former set of solutions, while Lebanon, Northern Ireland, or the historical case of the Netherlands can be brought as examples for the latter.

The two further elements concentrate on the executive and legislative design of consociational polities. The third element of the consociational package, *mutual veto provisions* can be present in various forms and can be designated to various representatives of the segmental elites. At their core, they should provide a veto opportunity for actors considered to be legitimate representatives of their segments over issues pertaining to the vital interests of their group. For instance, these provisions can be manifest in legislative procedures,<sup>2</sup> veto rights designated to specific actors in

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<sup>2</sup> Either by specific procedural regulations (e.g. in Bosnia Herzegovina members of the collective Presidency, or the qualified majority of ethnic caucuses in the legislative upper chamber can claim an issue as vital national interest, designating it to a specific committee, later the Constitutional Court) or by widespread stipulations for qualified majorities (e.g. the so-called ‘alarm bell’ procedure in Belgium (*Chapter 7.1*) or the Petition of Concern in Northern Ireland (*Chapter 6.2*), modeled after the former).

systems where certain offices are reserved for the constitutionally recognized groups,<sup>3</sup> or the segmental cohabitation of constitutional branches.<sup>4</sup>

Finally, the fourth element of the consociational package, grand coalition is probably the most difficult to describe and define in legal or institutional terms, for numerous reasons. First, the notion can be understood in different ways. In this regard, Brendan O'Leary offers three different approaches (2005, 12–15): where all parties from all relevant segments are present, we have *complete* consociations; where at least the majority or the plurality within each segment is represented can be labelled a *concurrent* consociation; finally, in *weak* consociations every group is represented, but the governing coalition might include only the plurality of certain segmental political elites. Nevertheless, in all cases one can talk about a functioning consociation, therefore the core question is whether all constitutionally salient groups are *represented* in the governing coalition. Second, the character of the parties consisting the grand coalition also largely matters regarding the nature of the governing majority. In this regard, O'Leary distinguishes *ethnic*, *inter-ethnic*, *non-ethnic* or *consociational* parties (2005, 15–17). The first type explicitly aims to represent the interest of a given ethnic group; the second category refers to parties which aim to represent the interests of more than one ethnic group, reaching beyond the boundaries of their own group; the third aims to build a self-definition that transcends the categories of ethnic politics; finally the last refers to parties which manifest the features of consociationalism within themselves. The difficulty of identifying grand coalition practices comes from the fact that different types of these parties may cooperate in different forms of coalition, and also within different degrees of institutionalization, as grand coalitions are often present as informal practices rather than constitutionalized structures (Andeweg 2000, 513).

Both the types of participating parties and their framework of cooperation are largely dependent on which variant of consociational arrangements are employed. In this regard, the most salient divide in the literature appears to be between so-called *corporate* and *liberal* consociations (McCulloch 2014; O'Leary 2005, 15–16; R. Taylor 2009a, 6–10). The core underlying difference between the two models is in their approach to politically and legally relevant identities: while *corporate* consociations are built around a certain set of politically and legally recognized, identity-

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<sup>3</sup> e.g. in the case of Lebanon, where the presidential office is reserved for Christians, the prime ministerial for Sunnis and the parliamentary speaker's for Shi'as

<sup>4</sup> e.g. in the case of Bosnia where the presidential office is collectively held by representatives of the three constituent ethnic groups (Bosnian, Croat and Serb); the head of the presidency is distributed on a rotational basis, and all members of the Presidency have a veto right over all decisions.



based groups, *liberal* consociations aim to design institutions in a way that imposes inter-block cooperation but does not define legally the set of politically salient identities. In other terms, the distinction between corporate and liberal consociations illustrates the difference between power-sharing models based on *pre-determination* versus *self-determination* (Lijphart 1995).

Importantly, consociational theory has originally been an enterprise of understanding, describing and systematizing the functioning of consociational regimes, while the question whether consociationalism could be recommended or prescribed appeared later (Bogaards 2000). In other words, consociational power-sharing was invented independently from the works of political scientist – the Belgian and Dutch consociations had been functioning for five decades when Lijphart started theorizing their functioning in the late 1960s.<sup>5</sup> Furthermore, consociational power-sharing is permanently reinvented by politicians, diplomats, and other actors involved in managing conflicts, with a varying degree of contribution political scientists (O’Leary 2005, 18). As Lijphart (1985; 1989) and ‘revisionist’ proponents of consociationalism – most prominently O’Leary and John McGarry (2009a) – claimed that consociationalism is the best solution to achieve democratic governance in certain deeply divided societies (like South Africa or Northern Ireland), the accusation of ‘evangelical consociationalism’ was levelled at them, asserting that consociational theory turned from its empirical roots to the promotion of a specific power-sharing solution, making it a “degenerative research program” (Lustick 1997).

Lustick’s criticism is mostly based on certain empirical and epistemic questions; nevertheless, consociational theory induced debates of both empirical and normative nature, involving contentions from a wide range of ideological and epistemic backgrounds (liberal, socialist, conservative, constructivist, etc.). In a review article by Bogaards, Ludger Helms, and Lijphart, the most frequent critiques are listed as the following: “alleged poor democratic quality, the difficulties of policy making, clientism, the reinforcement of socio-cultural divisions, and the view of elites as the solution and citizens as the problem” (2019, 347). In a piece addressing the core critiques from a consociational angle, O’Leary clusters these – borrowing the terms of Albert Hirschman (1991) – as contentions of “Futility, Perversity, Jeopardy, and Denial” (2005, 4). The first and the last elements of the list pertain to empirical criticisms on consociational theory. The

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<sup>5</sup> It should be noted however that Lijphart’s publication coining the terms roughly coincided with the period which marked the end of consociationalism in the Netherlands (1967 is considered the closing date; Andeweg 2019, 8). Furthermore, the power-sharing settlement emerging after World War I in Belgium is different than today’s, as the cultural and religious cleavages were superseded by the currently prevalent linguistic divisions in the decades following World War II (Deschouwer 2013, 212).

‘futility’ camp of critiques, according to the classification of O’Leary, is mostly composed of conservative sceptics questioning the efficacy of consociational power-sharing in the contexts of “deeply rooted, zero-sum identity based conflicts” (2005, 4). In his view, the “more sophisticated variation of this position” (mostly associated with Donald Horowitz) asserts that “consociations are likely to work well only where they are not needed or are redundant” (O’Leary 2005, 4), and are inapt to govern deeply divided societies (D. L. Horowitz 2000, 573).

Nevertheless, the broader debates around consociationalism pertain to the normative vices and virtues of the power-sharing method – critiques which, again in O’Leary’s classification, attack the model on grounds of its presumed ‘perversity’ and ‘jeopardy’. From the numerous contentious issues, two stand out. One of them criticizes consociationalism for its focus on ethnic, sectarian, or national cleavages. First, liberal and socialist critiques claim that proponents of consociationalism neglect the constructed nature of ethnic and sectarian identities, treating them as primordial and ‘hard’, nearly unchangeable factors. Second, in their view designing institutions around these cleavages entrenches and perpetuates these divisions, never embarking on an avenue of integration. Beyond the negative social impacts of institutionalized ethnic or sectarian identities, negative incentives for political elites also contribute to this entrenchment – those who should work on easing tensions between social segments also owe their positions to the very same tensions and divisions. Third, by assigning important rights (such as access to education or public services) on the basis of group membership, consociations compromise a universal, individualistic conception of freedom and equality, prevalent in contemporary human rights discourses (Sajó and Uitz 2017, 374–76, 401–3). This salience of group-specific rights amplified the grievances of groups either not included in the fundamental mechanisms of consociational settlements (referred to as the ‘others’) or ‘internal minorities’ within recognized groups, e.g. secular or protestant Bosnians or Serbs in Bosnia and Herzegovina (Agarin, McCulloch, and Murtagh 2018; Stojanović 2018).

The other major criticism on consociations (“[t]he biggest stick with which consociationalists are beaten” in O’Leary’s words (2005, 6)) pertains to their democratic imperfections. This position was pioneered by Brian Barry (1975a; 1975b), and developed by a number of further contributions (e.g. Brass 1991; Jung and Shapiro 1995; Schendelen 1985). The primary issue in these works is electoral accountability, which is subverted by grand coalition prescriptions. In other words, citizens cannot go to the ballot box with the purpose of changing government, as their voice matters only within their segmental party competition, but the composition of the

government ultimately depends on coalition negotiations. Moreover, the proportional electoral designs do not incentivize any moderation from ethnic or sectarian elites, but rather foster a mechanism of centrifugal outbidding within the social segments, further diminishing electoral accountability.

While sharing consociational attitudes regarding the robustness of ethnic identities, Horowitz, a prominent sceptic of consociationalism, offers his conceptual alternative mostly addressing the democratic challenges in a model known as ‘centripetal majoritarianism’. The core idea behind the theory is to incentivize ethnic political elites to find common policy grounds and mutually acceptable candidates by vote pooling or alternative voting (AV) arrangements, presidentialism (avoiding divided executives), and cross-cutting federalism (D. L. Horowitz 1993; 2000). Though his decades-long debate with Lijphart is considered “defining” (Choudhry 2008a, 15) in the literature on politics in divided societies, institutional arrangements in various consociational regimes suggest that the conceptual tension between consociationalism and centripetalism should be understood in less sharp terms (Bogaards 2019a). Moreover, despite its thorough answers to the most pressing questions around consociationalism, centripetal majoritarianism has a modest empirical record in delivering the outcomes it promises, such as stable democratic competition or moderating mechanisms (Allison McCulloch 2013).

Proponents of consociationalism address these challenges in two primary ways. One is the argument of realism, both pertaining to the salience of ethnic or sectarian identities and the viability of more adversarial regimes (O’Leary 2005, 8–11). The other strategy defends the normative virtues of consociational regimes by referring to the appropriate theoretical frameworks for evaluating these regimes. In this regard, Lijphart defended the democratic character of consociationalism through interpreting it in the terms of Robert Dahl’s polyarchic theory (1977, 3–4), even though this argument invited further contention (Lustick 1997, 105; van Schendelen 1985, 156–57). In a less controversial argument, McGarry, O’Leary and Richard Simeon situate consociational theory within the normative school of accommodation in divided societies (2008, 58–63), together with multiculturalism, a concept with robust conceptual literature and normative defenses (Kymlicka 1995; 1996; Kymlicka and Norman 2000; Patten 2014). The defense of several specific feature in consociationalism is usually rooted in the conceptual approaches of accommodationalist theory. For instance – by assessing the relationship between consociationalism and universal human rights norms – O’Leary and Christopher

McCrudden refer to a frequent argument in the multicultural literature, namely the pervasive effect of group membership in certain contexts:

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 consociated *peoples and groups*. (McCrudden and O’Leary 2013b, 483)

In sum, the scholarly analyses on consociational power-sharing and the academic debates surrounding it have two important implications for researchers on constitutional courts in consociations. The first pertains to the increasing formalization of consociational settlements (Bogaards 2017, 148–50), as including power-sharing mechanisms in constitutions gave an important political dimension to constitutional adjudication, as constitutional courts get the responsibility of arbitrating in procedural debates. Second, the debate on the normative vices and virtues of consociationalism (Bogaards, Helms, and Lijphart 2019, 347; O’Leary 2005, 4–12) raise numerous concerns that apply to the relationship between constitutionalism and consociationalism (Murphy 2007, 83–87). The most important among these are the tensions between individual and group-specific rights, as well as universally understood and context-specific rights provisions. While procedural adjudication has the danger of alienating some of the parties cooperating, engaging in rights adjudication has the potential to put constitutional adjudication at odds with consociational settlements on a systemic level. For this reason, most of the relevant works have been focusing on the latter issue; in the following section, this literature is introduced.

### *1.2 Courts in consociations: a complicated relationship*

The academic literature on the nexus of constitutional adjudication and consociational power-sharing is relatively young: the first contribution specifically addressing this phenomenon dates back to 2004, when Samuel Issacharoff’s article entitled *Constitutionalizing Democracy in Fractured Societies* was published, introducing most of the core concepts in this literature. In the article Issacharoff compares the early years of the Bosnian power-sharing settlement with the transitional consociation of South Africa, and based on the contrast between the two, he offers a radical conclusion: a sufficiently robust form of constitutionalism is capable of substituting ethnic power-sharing institutions. In his words,

The role of judicially enforced constitutionalism offers a different avenue of nation-building than that assumed in the consociational models. 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. In many cases [...] constitutionalism emerges as a rejection of the formal political arrangements that characterised consociational experiments as nation-building. Rather than forecast the division of power that must hold in a fractured society, as does consociationalism, constitutionalism substitutes the “struggle to regulate political competition”, so that victors do not devour the process. (Issacharoff 2004, 1865)

Beyond his approval for heavily constitutionalized democracy, Issacharoff offers a prescription for constitutional courts in places where consociations are established, praising some of the decisions by the Bosnian court – especially its famous landmark decision from 2000, known as *Constituent Peoples* (discussed in *Chapter 5.2*). Here Issacharoff suggests that in their interpretation of institutional rules, constitutional courts can contribute to the reform of consociations by reinterpreting provisions in a more individualistic and egalitarian way, *unwinding* consociational provisions. His critical stance towards institutions designed along ethnic or sectarian lines remains similar in his later works (Issacharoff 2008; 2013), nevertheless he also embraces a sense of strategic caution, warning of the potentially destabilizing effects of judicial activism in contexts where cooperation among political elites is necessary. His frequent co-author, Richard Pildes offers similar conclusions with an emphasis on the legitimacy of judicial bodies, especially international human rights courts. In this argument, in consociations or deeply divided places, confrontative judicial decisions face “serious normative and pragmatic concerns” (2008, 197), especially if the political elites are willing to cooperate to some degree. Considering their different proximity and understanding of the sensitive issues in consociations, Pildes assumes that one can expect a greater degree of respect for power-sharing agreements from domestic constitutional courts, while more assertive decisions from international bodies.

The potentially unwinding effect of constitutional adjudication and the ‘judicial modesty’ of domestic constitutional courts, contrasted with the assertion of international human rights tribunals are core issues in the only published book in this field so far, co-authored by Christopher McCrudden and Brendan O’Leary, entitled *Courts and Consociations: Human Rights versus Power-Sharing* (2013a). The book compares judicial involvement in two consociations, Belgium and Bosnia and Herzegovina. While the former consociation emerged in a peaceful and evolutionary way, the latter is a product of a post-conflict settlement; therefore, courts in the two settings faced different types of questions, and more importantly, potential side-effects of

different magnitudes. The book places more emphasis on the Bosnian case, especially its judicial controversy attracting the largest international attention, *Sejdic and Finci vs Bosnia and Herzegovina* (ECtHR, 2009). Two controversial issues lie at the heart of the case: the rigidity of corporate consociational institutions, and the limitations imposed upon the ‘others’. Dervo Sejdic and Jakub Finci, both citizens of Bosnia and Herzegovina who ethnically identify themselves as Roma and Jewish – therefore belonging to the constitutionally defined ‘Others’ – challenged constitutional provisions reserving seats in the legislative upper chamber (House of Peoples) and the country’s collective Presidency for representatives of the three major ethnic groups: Bosnian, Croat, and Serb. As the domestic Constitutional Court refused to substantively address the issue, the case was litigated before the European Court of Human Rights (ECtHR), which declared the questioned provisions discriminatory.

Based on the trajectory of the case and other judicial controversies discussed in the book, McCrudden and O’Leary conclude that while domestic courts act with a necessary sense of caution – labelled as “judicial modesty” in one of their other works (2013b, 488–89) – the ECtHR embarked on an avenue of assertively promoting cosmopolitan values. The latter is observed as a recent development compared to the earlier experience of Belgium with the Strasbourg court in the 1960s and 1980s, when the ECtHR demonstrated a wider margin of appreciation towards consociational institutions and practices. In their conclusion, they assert that both domestic and international/regional courts should embrace a degree of strategic self-restraint as judicial activism in such contexts can be destabilizing (quoting the example of Cyprus 1960-63; 2013a, 40), and may also subvert judicial legitimacy. They argue – in line with authors addressing the broader subject of constitutionalism in divided societies (e.g. Lerner 2011) – that even though “consociations are best unwound”, institutional reforms should be done “by the parties who made the relevant bargain, with or without mediators (not arbitrators)” (2013a, 148). In their view, a lack of strategic prudence from courts may lead to a situation where decision-makers designing future consociations may “advise on the exclusion of bills of rights with wide application, and to seek to exclude regional courts and the jurisprudence of international human rights law” (2013a, 147). In other words, on the long run the choice for courts – especially international ones – is between judicial modesty or a setback for judicial empowerment in power-sharing contexts.

Both their case selection and analytical approaches are largely shared by Stefano Graziadei in his 2017 PhD dissertation, *Courts and the Consociation: Judicial Review of Founding Political Agreements*

in *Multi-National Democracies* (defended at the University of Antwerp). In his comparative study on Belgium and Bosnia and Herzegovina with a heavy emphasis on the ECtHR's role, particular attention is paid to the ways the judiciary treats socio-political facts, largely relying on Ran Hirschl's works on the interplay between political and judicial elites (2014). In this regard, Graziadei offers a *structural* approach<sup>6</sup> in constitutional interpretation – a notion originating in American constitutional law – both as the best way of understanding how courts deal with sensitive questions in divided contexts, as well as a viable approach to litigating consociational provisions on a long run.<sup>7</sup>

In a work somewhat separated from the rest of the literature, Alex Schwartz and Colin Harvey (2012) offer an important analytical overview on the institutional fit of consociational power-sharing and judicial review. In this work, Schwartz and Harvey address the perspectives of judicial empowerment in Northern Ireland, with a particular focus on the fact that the region lacks a specific bill of rights, even though its violent history, institutionalized patterns of discrimination, and post-conflict institutions might require specific human rights provisions, beyond the established European and UK frameworks. By addressing the general natures of consociationalism and judicial review, they argue that the two “share a certain functional affinity” (2012, 134), with numerous ambiguities.

Four connections points are identified, which are together labelled as the ‘accommodation theory’ of judicial empowerment in divided societies. First, both consociationalism and constitutional review are counter-majoritarian in term of limiting “the power of majority communities to impose their will upon minorities” (A. Schwartz and Harvey 2012, 134).<sup>8</sup> Second, a mechanism for rights-based constitutional review creates an insurance mechanism for minorities, especially those who are not included in the power-sharing architecture. Third, as consociational institutions and power-sharing procedures are constitutionally formalized,

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<sup>6</sup> In a nutshell, the *structural* approach focuses on reinforcing democratic procedures by addressing the key structural obstacles impeding them. In this regard, Graziadei primarily links his understanding of the notion (2017, 191–93) to Issacharoff's work (2008) on American constitutional law.

<sup>7</sup> Furthermore, one of the focal points of Graziadei's thesis (2017) pertains to the composition of constitutional courts, where he suggest that instead of understanding the legitimacy of ethnic composition provisions in the institutional design as a form of minority representation, one should regard constitutional courts power-sharing institutions, within the framework of consociational architectures. This argument is explicated in a separate article entitled *Power Sharing Courts* (Graziadei 2016).

<sup>8</sup> By analyzing the relationship of constitutionalism and consociationalism, Walter Murphy offers a similar point claiming that both aim to “lower the stakes of politics” (2007, 84).

constitutional courts can act as arbitrators enforcing these mechanisms.<sup>9</sup> The fourth point argues, largely in connection with this that “judicial empowerment helps to construct a stable and functional system of government in the otherwise destabilizing circumstances of divided societies” (A. Schwartz and Harvey 2012, 134).

On the other hand, Schwartz and Harvey also argue that some inherent features of consociational settlements discourage the proliferation of constitutional review in consociations. In this regard, they claim that “[t]wo of the four elements of consociationalism – inclusive power-sharing and minority/mutual veto power – either weaken or totally negate rational-strategic incentives for elites to support judicial empowerment” (2012, 134–35). Both elements make constitutional review redundant, as political elites can fulfill some functions of the constitutional courts: by inclusive power-sharing a procedural control can be maintained, while through mutual veto provisions there are insurance mechanisms for substantive issues. Though this approach does not account for the insurance mechanisms protecting politically not empowered minorities, Schwartz and Harvey offer this as an analytical theory comparing elite incentives for judicial empowerment in consociations, and not a normatively informed prescription for the institutional arrangements that should be established.

In conclusion, comparative works focusing on the role of constitutional courts in consociations all agree on the ambiguity of the two’s relationship, either due to their inherent features (A. Schwartz and Harvey 2012), or the stability and legitimacy challenges facing courts in deeply divided societies (Choudhry and Stacey 2012; Issacharoff 2008; 2013; McCrudden and O’Leary 2013a; Pildes 2008). Though Issacharoff’s first, pioneering work (2004) has starkly different prescriptive suggestions, his later contributions to the field (2008; 2013) are in line with other opinions in the literature. According to this consensus, the ‘unwinding’ of consociational institutions is welcomed, but rather by political and not judiciary means; in this proposition, constitutional courts should have a rather supplementary role where their instruments are used with a sense of strategic caution or ‘judicial modesty’.

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<sup>9</sup> The fact that constitutional review appeared only in the more recent cases of consociational power-sharing is somewhat overlooked in this analysis.



### *1.3 Research questions and outline*

Considering the state of the established literature, the clearest contribution of this work is offered through the breadth of its empirical framework: by adding Northern Ireland to Belgium and Bosnia, not only three cases are discussed instead of two, but the diversity of the comparative framework is largely increased. While Belgium and Bosnia – the countries addressed by former comparative works – are both polities with civic law systems and specialized constitutional courts, Northern Ireland is a common law jurisdiction with a decentralized judicial review regime. The various courts hearing cases linked to the implementation of the Belfast Agreement therefore have been confronted with similar issues as their counterparts are in Brussels and Sarajevo – especially the latter – but have been doing so in a different institutional landscape, different traditions of constitutional interpretation, and different conceptions of constitutional supremacy. This widened and diversified comparative framework has considerable potential to reveal significant patterns across cases.

Beyond the larger number of jurisdictions in the analysis, the increased number of judicial cases also opens new dimensions in the comparative analysis. In this regard, an important contribution of this study is to compare cases across consociational polities in a single analytical framework – moreover, the number of judicial cases or controversies in the analysis (16) exceeds the usual 3-5 in most of the relevant works. Two exceptions can be mentioned. One is the large-N analysis of Alex Schwartz and Melanie Janelle Murchison (2016) where the authors analyze altogether 5,190 judicial votes in various cases over a period between 1997 and 2013; nevertheless, the study focuses on variations between individual voting patterns within one country. The other is Graziadei's dissertation (2017), where over a dozen court cases are discussed, but the comparative inferences focus on within-case variations. In the present research, comparing different court cases from different jurisdictions in the same analytical framework yields a potential to find patterns across jurisdictions, identifying consociation-specific phenomena.

Beyond addressing ongoing discussions with an empirically extended approach, the comparative study also brings an analytical contribution to the literature, by addressing the uniquely consociational cases through the rather general perspective of constitutional theory. By emphasizing the notion of constitutional supremacy as the core idea behind constitutional review, a particular attention is paid to certain general features of the court decisions which have been largely overlooked by the established literature given its focus on consociation-specific

controversies. One of these is their treatment of the constitutional frameworks they are mandated to enforce, whether constitutional courts focus narrowly on the constitutional documents, use specific external reference points consistently, or embark on an eclectic use of references, broadening their own discretion. Closely linked to the question of interpretive sources, the courts' choices of interpretive methods are also under scrutiny. On the one hand, this inquiry connects to a broad literature on rights litigation in divided societies, but on the other hand it also aims to identify patterns in the way constitutional courts make their decisions in consociations. The latter question is also connected to the broader empirical investigation on strategic patterns in constitutional adjudication in consociations, by asking which interpretive methods serve which strategic outcomes. In other words, the question of *what* decisions courts make in consociations is followed by *how* these decisions are taken.

In sum, this work has three empirical objectives. The first is to reconsider the taxonomy of strategic choices of constitutional courts in consociations in a broader and more systematically cross-case comparative framework. The second is to examine how these courts understand and treat the constitutional frameworks they are mandated to enforce. Third, to identify patterns in their use of interpretive methods. These three objectives are addressed by the broadening the scope of the established literature, both in empirical and analytical terms: by including a larger number of cases in a comparative framework; and by introducing new considerations in the systematic comparison of cases.

While the empirical objectives of this work – particularly the first one – largely connect to the other works in this field, the normative propositions offered in the dissertation have much more of a pioneering character, considering the largely empirical roots of the prescriptive claims in the literature. None of the authors in this scholarly field challenge the normative supremacy of 'cosmopolitan values', understood as a universal and individualistic conception of equality, but a consensus also emerged on a preference towards political means of transforming consociational institutions in this direction. Nevertheless, these prescriptive arguments are not rooted in normative theory, but rather in sociological conceptions of legitimacy and pragmatic approaches to the viability of power-sharing settlements. A further common feature of these arguments is a *transitional* approach to the role of constitutional courts in consociations, as most authors are interested in whether courts confront with consociational provisions or defer to political elites in institutional matters.

In this work, the focus is on the place of constitutional courts in the *functioning* of consociations. This question is addressed in two primary ways. First, the classical theories on the legitimacy of constitutional review are analyzed, stressing their applicability in deeply divided societies – where consociations are established. Second, the peculiarities of consociational regimes are analyzed through the lens of normative democratic theories which have a particular focus on societal divisions. By scrutinizing certain insufficiencies of democratic decision-making – consensual as well as adversarial – I argue for the *necessity* of certain non-majoritarian mechanisms in consociations, functions that can be best performed by constitutional courts. In a nutshell, the normative analysis contributes to the field in three primary ways. The first is analyzing consociational institutions from the perspective of constitutional and normative democratic theory. Second, by scrutinizing the role of constitutional court in consociations by how they contribute to functioning of consociations, instead of investigating their potential role in the transformation of consociations. Third, by assessing the importance of constitutional courts in certain *segments* of consociational architectures – and identifying these– vis-à-vis looking at their *general* significance in consociations.

Considering the multifold objectives of the dissertation, the work consists of two major Parts. The first (*Part I*, consisting chapters 2 and 3) focuses on the conceptual and normative issues. While Chapter 2 and 3 outline the conceptual foundations on the dissertation and elucidate its normative, arguments, in *Part II* (*Chapters 4-7*) the empirical findings are presented. The final, concluding Chapter (8) of the dissertation discusses both the patterns among the country studies and the connection between the normative and empirical arguments.

*Chapter 2* introduces the primary ideas and historical roots of constitutionalism and constitutional adjudication to serve as a reference point for the normative analysis as well as some parts of the empirical investigation. By tracing back the intellectual and historical roots of judicial review, this survey chapter emphasizes that the core ideas behind constitutional review – and its primary justification – are constitutional supremacy and the separation of powers. Furthermore, questions around constitutionalism are divided societies is addressed, introducing the primary debates and problems in the field (e.g. integration vs accommodation; constitutional recognition).

Based on these emphases, *Chapter 3* addresses judicial review in consociations, presenting the primary normative argument of the thesis. Here I argue in favor of the legitimacy of constitutional

review in consociations, in two main steps. The first step presents a negative argument, demonstrating how claims questioning judicial legitimacy do not apply to divided societies, due to their self-imposed limitations. In the second step, the positive argument brings in Thomas Christiano's theory on 'persistent minorities' (1994; 2008) and their protection, applying it in the context of *divided* societies (while Christiano formulated his theory considering *diverse* ones). Based on the synthesis of Christiano's theory and the analysis of consociations from the perspective of constitutionalism, I argue that establishing judicial review is necessary for three reasons – also designating a minimal normative mandate for courts. The reasons are: the pervasive effects of possibly wrong institutional choices; the protection of groups which are not salient enough to be politically empowered; and the protection of internal minorities within the groups.

*Part II* turns to the empirical analysis of the three polities under investigation: Belgium, Bosnia and Herzegovina, and Northern Ireland. After the case selection criteria and the research design choices are discussed (*Chapter 4*), first Bosnia and Herzegovina is addressed for its influence on the core concepts in the relevant literature. In *Chapter 5*, a brief summary is given on the emergence of the Bosnian consociation, the peculiarities of its constitution and institutional design of its Constitutional Court are introduced, and six judicial cases are analyzed. Regarding the Court's role in regime dynamics, the domestic litigation preceding the *Sejdic and Finci vs. Bosnia and Herzegovina* case offers the richest insights. While the Constitutional Court was willing to embrace an unwinding role in local power-sharing, sharp U-turns were taken on the same issues as federal institutions were brought under scrutiny. From the perspective of constitutional supremacy, the Court remained consistent in employing Dayton's peace agreement (General Framework Agreement (GFA) on its official name) as its sole, and often decisive external reference point.

In *Chapter 6*, the analysis continues with Northern Ireland, a case addressed by numerous academic works, but neglected in the comparative literature on courts in consociations so far. Though the institutional setting is clearly different from other consociations – Northern Ireland represents the liberal model of consociationalism and lacks a purpose-built constitutional court – the way the judiciary handled legal challenges around the implementation of the Belfast Agreement has important implications for other cases too, especially in post-conflict contexts. The analysis of five cases demonstrates the importance of the political question doctrine in such settings, a traditional interpretive method in common law jurisprudence, nevertheless less significant in other countries (M. Tushnet 2002). In comparison with Bosnia and Herzegovina,

the use of the peace agreement (in this case the Belfast Agreement) as a primary reference point is an important parallel, but the judiciary's explicit strategy in delineating its boundaries between intervention and deferral brings new perspectives into the empirical analysis of constitutional review in consociations.<sup>10</sup>

The last case in the empirical analysis, Belgium is discussed in *Chapter 7*. In a country with a peaceful recent history and a consociation which rather emerged than was established, the Constitutional Court has been facing questions of different nature and can make its decisions under a significantly lower level of security-related pressure. Nevertheless, from the three courts under scrutiny the Belgian is clearly the most deferential, or 'prudential' in different terms. The analysis identifies the relevant historical institutional design factors – primarily the evolutionary character of the consociation and the incorporation of political elites into the Court – contributing to this paradox, and analyses five relevant cases or controversies. Though in a historical perspective, the Belgian body is arguably a prudential court (also demonstrated by large-N analyses, see: Popelier and Jaegere 2016), in certain cases the Constitutional Court took sides by deciding not to decide. Furthermore, in its one unwinding attempt – most likely led by strategic miscalculations and not assertive judicial activism – the Court triggered a lengthy political crisis, culminating in a major constitutional reform.

The *Conclusion* brings together the common traits and findings from the three country/region studies, identifying their common traits. The most important finding pertains to the role of courts in consociations. While the established literature is focusing on the dichotomy of deferential judicial behavior (or 'judicial modesty') and 'unwinding' consociational institutions by judicial intervention, this comparative study identifies a third pattern, in which constitutional courts reinforce weakened or challenged elements of consociational settlements by assertively intervening. Importantly, in these cases courts do not block political elites reforming consociations by consensus, but rather restore the *status quo* if any actor threatens it. Therefore, courts are important actors in maintaining the functioning of consociations, at least as much as their activism can potentially endanger it. The other core finding is on the consistency of courts in their use of external references: even the Belgian body has a primary external reference point – in their case European jurisprudence – demonstrating the peculiarities of public reasoning in

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<sup>10</sup> A preliminary version of the findings discussed in *Chapters 5* and *6* was published in a 2020 issue of the journal *Nation and Nationalism* (Gal 2020).

divided societies. Beside the presentation of these inferences, and the discussion of further patterns among the cases, the Conclusion also offers practical implications related to the dissertation's findings

## **PART I: Conceptual and Normative Perspectives**

The conceptual background concerning constitutionalism and constitutional adjudication is outlined in the following two chapters, providing normative and analytical reference points for the later, more country- and regime-specific inquiry. This explanation starts from the analysis of universal notions – like limiting the government, the rule of law, or fundamental rights – and progresses towards phenomena closely linked to the dissertation's subject, such as group-specific rights in divided societies, or the role of constitutional courts in such settings. Following this logic, in *Chapter 2*, first the idea of constitutionalism is presented, followed by constitutional supremacy, which is discussed together with the origins of constitutional adjudication. Subsequently, the institutional characters of constitutional courts are discussed from a functional perspective. Built on these conceptual foundations, *Chapter 3* first deals with the specific question of constitutional adjudication in divided societies, and is concluded by a normative claim, arguing for the necessity of constitutional review in such settings.

### **2. Constitutionalism and constitutional adjudication**

#### *2.1 Constitutionalism*

The core idea behind constitutionalism is the limitation of government (Sajó 1999; Waluchow 2017). In an extended fashion, constitutionalism can be defined as a set of values, institutions and procedures, establishing, upholding and promoting the limitation of government, the rule of law and the protection of fundamental rights.

Will Waluchow identifies constitution as a legal act which “consists of a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority” (2017). Historically speaking, the notions of constitutions and constitutionalism can be traced back to the 13<sup>th</sup> century, when certain European kings (King John of England (in

1215) and Andrew II of Hungary (in 1222) as the first examples) were able to deal with discontent only by giving certain legal guarantees to their subjects, limiting their own sovereign power.<sup>11</sup> European absolutist monarchies knew of legal acts regulating certain ‘constitutional’ functions. Still, these acts were lacking the substantive core of constitutionalism (Grimm 2012, 100–103), not limiting governmental authority, but simply codifying the structures of absolutist governments. In other words, these legal acts provided for a framework of the “rule by law” (Krygier 2012; Waldron 2016) instead of the “rule of law”.

Jon Elster (1995, 368–69) offers a useful chronology that identifies seven ‘waves’ of modern and contemporary constitution-making. The first period covers the passing of the first modern constitutions: the American (1787), French (1791) and Polish (1791). The second happened in the year of 1848, where liberal revolutions were accompanied by new constitutions, either as part of the revolutions (e.g. Austria, France, Switzerland, the so-called Frankfurt Constitution), or as reactions by the ruling elites (e.g. Prussia). The third and the fourth waves were happening after the two world wars: in the former case this was due to the birth of several independent countries, following the break-up of empires (e.g. Austria-Hungary, Russia, Ottoman Empire) while in the latter, several states were re-defining their own character – either as democratic (e.g. Federal Republic of Germany, France, Italy) or socialist countries (e.g. Czechoslovakia, Democratic Republic of Germany, Hungary, Poland). The fifth wave was connected to the fall of colonial empires, when newly independent countries made their own constitutions mostly through Africa and Asia. The sixth and seventh waves were, on the other hand connected to democratic transitions: the former to the fall of mostly right-leaning autocracies (Portugal, Spain, South Korea, etc.) in the 1970s and 1980s, while the latter to the collapse of the Soviet-ruled socialist block of Central and Eastern Europe at the late 1980s and early 1990s.

Constitutions of the 18<sup>th</sup> century marked the beginning of modern constitutionalism, by focusing on the institutional mechanisms concerning the limitation of government, the rule of law, and provisions of rights for the entire citizenry. In understanding the significance of the late 18<sup>th</sup> century constitutions – especially the American and French – two factors have great significance. On the one hand, the French and American constitutions were *revolutionary* acts. They were

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<sup>11</sup> For a more detailed discussion on the historical origins of constitutionalism, see: Holmes, Stephen (2012) ‘Constitutions and Constitutionalism’. In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 1st ed, 189–216. Oxford University Press.

enacted with the aim of establishing a new order, often by actors who lacked legal authority to engage in constitution-making, and in the name of new normative principles (primacy of liberty, the rule of law, limited government). On the other hand, the French and American revolutions were ground-breaking in terms of establishing new regimes with a legitimacy based on *popular sovereignty*, instead of references to divine will or historical facts. Nevertheless, the two revolutions were based on radically different readings of popular sovereignty, and therefore chose clearly different solutions to institutionalize political power (Preuss 1995, 41–53; 66).

The constitutional dynamics of the French revolution – which entailed the enactment of six constitutions between 1791 and 1804 – was deeply influenced by Jean-Jacques Rousseau and his understanding of popular sovereignty. Following Christopher Bertram’s account of Rousseau’s theory (2017), the sovereign is the people as a collective entity, where individuals have the role of making law by direct participation, and the government has the task of implementing collective decisions. Rousseau’s notion of the ‘*general will*’ invited a large number of responses, criticism and debates. Importantly, the *general will* is not equal to the aggregated preferences of individuals (‘will of all’), but rather a form of public consensus resting on the assumption that individuals are capable of leaving behind their individual will and interest. The general will can be discerned mostly by deliberation. From the perspective of popular sovereignty, in Rousseau’s theory the ultimate will is a property of the political community (meaning all of its members); this general will should not be constrained by any external force.<sup>12</sup> Therefore, Rousseau’s theory implied a radical reading of popular sovereignty, where limitation of government makes no sense as it would imply limiting the highest possible legislative authority: the people.

Rousseau’s thoughts largely influenced the French revolution through his impact on Emmanuel Joseph Sieyès. In his pamphlet *What is the Third Estate?* ([1789] 1963), Sieyès claims that the Third estate – encompassing the common people, opposed to the first two orders, the clergy and the aristocracy – was the productive class of the society, while the other two were undeservingly enjoying their privileges. In the view of Sieyès, popular sovereignty was supposed to gain prominence through the empowerment of the Third Estate – if sovereignty belongs to the people, then the governmental form should be designed accordingly ([1789] 1963, 125–32). However, unlike Rousseau, Sieyès was a strong supporter of representative government, as he saw

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<sup>12</sup> The notion of the ‘*general will*’ is most clearly elaborated in Rousseau’s influential work, *On the social contract* ([1762] 1988).



representative institutions as safeguards of the general consensus against particular interests (Preuss 1995, 48–49). Nevertheless, the articulated popular will was also to be the paramount authority for Sieyès, which could not be restrained by any external measure or consideration. Both authors see the people as a pre-political entity marginalized under the old regime (Preuss 1995, 49). The abolitions of the absolute monarchy required establishing the popular sovereignty (Arendt 1990, 90–93). In this picture, constraining the democratic government by constitutional means would mean illegitimately limiting the sovereign.

The American revolution and constitution-making was starkly different, largely due to the differences in the preceding constitutional regime. For the Americans, forsaking the old order meant to become independent from the Crown and to create a new institutional structure, without denying the core constitutional principles of the old order (Arendt 1990, 145–50). As British citizens, Americans enjoyed many of the rights accorded by the British constitution, supplemented by the rights guaranteed by their own colonial charters (Robertson 2015, 19–26). Therefore, after independence, enacting the constitution was regarded as the *creation of a new government* rather than the *replacement* of an old regime with the new one. Popular sovereignty was seen to be realized in the creation of institutions representing the people, and the constitution as an instrument empowering them. Importantly, in this view “political sovereignty is first created by a constitution and is not a pre-existing entity whose powers a constitution merely limits” (Preuss 1995, 30). Furthermore, if the popular will has to be mediated through institutions, it must be divided and fragmented; this assumption implies the division of political power both on vertical and horizontal levels, as well as the guarantees for individual liberty. Even though the French revolutionary constitutions also had provisions on individual rights and duties, they did not establish institutions which could protect these from arbitrary decisions by democratic majorities. On the contrary, in the American constitutional structure “[t]he desire to guarantee individual liberty is also reflected in the structure of the Constitution, in that it created no single center of public authority; instead, it left many powers to the states and divided the powers of the federal government, creating a system of checks and balances from which the idea of a single sovereign has been virtually eliminated” (Preuss 1995, 53). In a historical perspective, both traditions remained prominent, both in intellectual circles and among drafters of modern constitutions. However, modern constitutionalism is clearly rooted in the American tradition of popular sovereignty (Waluchow 2017), with its insistence on the separation of powers, the rule of law and robust mechanisms for rights protection.

Rights can be defined as “entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) to be in certain states” (Wenar 2015). Fundamental rights are supposed to be protected from the majority will and changing preferences of lawmakers. The concept of the rule of law comprises “a number of overlapping ideas, including constitutionalism, due process, legality, justice, and sovereignty, that make claims for the proper character and the role of law in well-ordered states and societies” (Krygier 2012, 233). It is a principle promoting institutional arrangements, rules and procedures ensuring that the government is subjected to law and cannot use its lawmaking capacity in an arbitrary fashion. Beyond yielding the non-arbitrary enforcement of law, this also sets requirements for legislative procedures, so they are transparent, foster a predictable enforcement of law and produce publicly comprehensible laws. In practice, this requires the enactment of coherent and comprehensible laws, their publicly open promulgation, and the prohibition of retroactive legislation and discriminatory measures.

## *2.2 Judicial review*

Constitutionalism is about the limitation of the government in procedural and substantive terms. Procedural prescriptions determine how lawmakers are elected, how they work, and how they decide. Substantive provisions impose value- and content-based limitations on what these majorities can or cannot do with this power. This idea implies two further questions. First, how are these limitations explicated? Second, how are they enforced? This section focuses on the latter question. This issue will be discussed through two highly influential theories on constitutional supremacy (John Marshall’s and Hans Kelsen’s), followed by addressing the questions of judicial review, the problems with institutional alternatives and the tension between judicial review and democratic principles. I first discuss the relationship between constitutionalism and judicial review. The second part of the section addresses the tension between judicial review and democracy.

### *2.2.1 Constitutionalism and judicial review*

Marshall and Kelsen are credited for the establishment of judicial review, even though their career paths were radically different, and their theories were conceived in starkly different settings. While John Marshall became the Chief Justice of the United States after serving as the Secretary

of State, Hans Kelsen spent most of his life as a scholar of legal theory. Later, he was involved in drafting the constitutions of the newborn Austrian and Czechoslovak states, and he also served as a member of the Austrian Constitutional Court, while after his removal from the body in 1930, he returned to the academia. And even though the institutional implications of their theories were different, their core message was largely overlapping: constitutional supremacy imposes the requirement of adherence to the constitutional norms on every element of the legal system.

The American tradition of judicial review was conceived in an early phase of the republic's history, when several competing visions on democratic institutions were present in the public discourse. This conflict came to the fore in the presidential elections of 1800, in which the Democratic-Republican Thomas Jefferson defeated the Federalist John Adams (Sajó 1999, 227). Jefferson held the direct expression of the popular will crucially important, and therefore had a large distrust towards any institution constraining the elected majority. His distrust particularly increased when Adams created new judicial positions and started a series of last-minute appointments before handing over the executive office. However, certain administrative failures occurred as the Secretary of State – John Marshall himself at that time – who was supposed to deliver the appointments, failed to file the papers in every case, and his successor, James Madison refused to do this after assuming his new office. One of those justices, William Marbury, still tried to achieve his appointment by requesting a *writ of mandamus* by the Supreme Court, so the judiciary would order his appointment by the executive (Sajó 1999; M. Tushnet 2000a).

The Supreme Court found itself in a highly sensitive situation, as Jefferson made it clear that in case the appointment was ordered, the executive would refuse to deliver it. In this open confrontation between governmental branches, the judiciary risked losing its authority. And even though the Court chose to retreat in the given situation (so the *mandamus* was not granted for Marbury), it was done in a way that empowered the judiciary on the long run. The Court, by that time led by Marshall, rejected the request claiming that the legislative act allowing the Court to issue *mandamus* writs (the Judiciary Act of 1789) was contrary to the Constitution (more accurately, its third Article), and that it was therefore void. In his reasoning, Marshall was pointing to two principles: separation of powers and the rule of law (Dimitrijevic 2015, 54). He declared that “[t]he government of the United States has been termed a government of laws and not of men”, emphasizing the connection between popular sovereignty and the constitutional regime, and adding that “[t]his original and supreme will organizes the government, and assigns

to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments” (Marbury v. Madison 1803). This position, of course, was starkly different from the one held by Jefferson who has seen his administration as the one representing popular will. By pointing to the constitution as the highest-level expression of the popular will, Marshall had nonetheless articulated his argument in a way that invoked constitutional supremacy in the first place, rather than the rivalry between governmental branches.

This position was further buttressed by Marshall’s emphasis on the binding legal nature of the constitution. In his words, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such construction is inadmissible, unless the words require it”. The probably most widely quoted sentence from the reasoning also echoes this point: “[...] there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it” (Marbury v. Madison 1803). However, beyond arguing for constitutional supremacy (which points to the rule of law), Marshall also had to give a reason for why the judiciary should be entrusted with the task of giving a binding interpretation on what the constitution means, and when are ordinary laws confronting it. Here he referred to the separation of powers, arguing that “[t]hose who apply the rule to particular cases must of necessity expound and interpret that rule” (Marbury v. Madison 1803). As a result of this reasoning in the precedent, a so-called diffuse model of judicial review evolved in the USA (to be more thoroughly detailed in the following section), where every court in the judicial system has the authority to judge the constitutionality of the legal act before it, while the Supreme Court has the role of the final interpretative authority for questions involving the federal constitution.

The other approach to constitutional supremacy by judicial review was offered by Hans Kelsen, whose positivist legal theory was primarily addressing the unity of the legal order. In his intellectual context, Kelsen found the legal theories of his time unsatisfactory for being either overly normative or descriptive in their nature (Marmor 2016). He aimed to formulate an internally consistent theory without any reference to extra-legal considerations, such as social norms or moral doctrines. This theory was most comprehensively formulated in his book *Pure theory of law* (1967). From the perspective of constitutional supremacy, the most important concept in Kelsen’s theory is the *chain of authorization*. The idea implies that every legal act is valid if it was enacted in accordance with all the higher-level legal acts; at the top of the hierarchy, one

can find the constitution, which authorizes every further legislative activity.<sup>13</sup> In this theory, constitutional courts (Kelsen 1942) have the role of ruling on the constitutionality of legislative acts (*positive legislation* in Kelsen's terminology), by performing the function of *negative legislation*.<sup>14</sup> The interpreter has a twofold role: on the one hand, to check the authorization of legislative organs; on the other hand, to rule on the compliance of legislative acts with the constitutional norms.

By discussing the institutional implications of ensuring constitutional supremacy, Kelsen departs from a separation-of-powers perspective, like that of Marshall. However, he suggests that constitutional review should be performed by one institution dedicated to this task exclusively.<sup>15</sup> He also favors the *abstract review* (the possibility of ruling on the constitutionality of a legal act without any specific case or controversy). The latter aspect has a specific importance in avoiding problems connected to the retroactive effects of judicial review, for instance the validity of lower-level legal norms (e.g. executive decrees or judicial precedents) linked to the invalidated legal act (Kelsen 1942, 189–90). Kelsen also argues that direct access to the constitutional court improves the unity of constitutional interpretation (1942, 194). These institutional innovations were introduced in the Austrian and Czechoslovak constitutions of 1920.

Though Marshall and Kelsen are known as figures behind distinctly different institutional arrangements, they share the claim that supporting constitutional calls for an adjudicative body can oversee the adherence to the constitutional norms (Troper 2003). This position is criticized

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<sup>13</sup> Though it is not directly linked to Kelsen's justification of judicial review, it is worth mentioning the idea of the *Grundnorm* to understand the coherence of Kelsen's theory. The Basic Norm is a concept which provides for the consistency of his construct, buttressing the validity of the constitution, as the final and paramount element in the chain of authorization. The Basic Norm addresses the following problem: in a legally consistent system, the constitution can only be valid if it was enacted in accordance with the previous constitution. This construct is vulnerable to an infinite regression problem: referring to the previous constitution fails to identify the original authority – or constituent power – behind the constitution. As Kelsen aims to build a theory free of extra-legal considerations, referring to the sovereignty of the first constitutional author, or the moral legitimacy of the first constitution are not options for him. Instead, he suggests that the validity of the first constitution has to be presupposed so the legal system can be considered internally coherent and self-sufficient. In the words of Carlo Accetti “the notion of the *Grundnorm* is not meant to function as an ‘ontological’ foundation for the validity of legal norms, but rather as a ‘transcendental’ condition for the existence of legal norms to begin with” (2016, 2).

<sup>14</sup> By characterizing the nature of judicial review, Kelsen describes it as a “legislative and *not purely* judicial function” (1942, 200; *italics added*).

<sup>15</sup> „The disadvantage of this solution [the diffuse model of constitutional review] consists in the fact that the different law-applying organs may have different opinions with regard to the constitutionality of a statute, and that therefore, one organ may apply the statute because it regards it as constitutional whereas the other organ will refuse the application on the ground of its alleged unconstitutionality. The lack of a uniform decision of the question as to whether a statute is constitutional, *i.e.* whether the constitution is a great danger to the authority of the constitution” (Kelsen 1942, 185).

from two angles. First, some deny both their reading of the constitutional supremacy and the legitimacy of judicial review – this debate will be addressed in Section 2.2 of this chapter, which focuses on the counter-majoritarian difficulty. Second, some agree with the idea of constitutional supremacy, but argue that other bodies, for instance the legislatures should be entrusted with the role of constitutional review. To present this position, first the role of other institutional arrangements will be addressed, followed by arguments against judicial review of the constitution.

In the former regard, Juliane Kokott and Martin Kaspar (2012) identify a range of institutional solutions which can enhance adherence to constitutional norms (even though they do not claim that these would be able to replace judicial authority). These arrangements can be clustered in 4 groups. First, the separation of powers – mainly as the interplay between the legislative and executive branches – can ensure that actors are mutually controlling each other. They place a strong emphasis on presidents: as legislatures and executives are usually intertwined in parliamentary regimes, heads of states with veto powers can be important controlling factors. Second, they point to quasi-judicial bodies, which have a consultative role in legislative procedures concerning the constitutional dimensions of the given decisions. So-called state councils in Francophone countries are typical examples, and their important distinctive feature vis-à-vis constitutional courts is the lack of binding effect of their decisions. Third, the possibility of procedural provisions focusing on the constitutionality of legislation. Most typically, this is manifested in constitutional committees of parliaments, which can make decisions with a binding effect – but in this case, governmental branches are not separated, and there is a very small chance for a decision-making logic that is different to the one in the legislature to prevail at the end of the day. Fourth, providing veto powers to political minorities (either in the parliament, or on other levels) can be an effective tool serving this aim.

However, one can have two reasons for not embracing any of these mechanisms as alternatives to judicial review: the unity of constitutional interpretation and the separation of powers. Both regimes of judicial review perform better in this regard compared to possible alternatives. While the centralized regime of judicial review provides a clear situation when it comes to the binding interpretation of the constitution, the diffuse model also has at least a designated final authority, the Supreme Court, in case the litigants reach that institutional level. Therefore, the clarity of constitutional interpretation would require a designated actor with final authority, in order to avoid an ‘interpretive anarchy’ (Alexander and Schauer 1997). However, it is still not self-evident why bodies packed with legal experts should be entrusted with this role – for instance, Mark

Tushnet argues that courts do not have any unique epistemic character which would justify their monopoly of interpretation (2000b). Though Tushnet presents convincing epistemic claims, his line of argument does not answer to the core of both Marshall's and Kelsen's theory, which is linked to the separation of powers.

In general, one cannot assume that any of the state branches can be trusted in regard of reading the constitution impartially, especially if they have explicit political agendas and seek re-election. In this regard, of course one can hold an objection against judicial authority with the first claim, as judges can also have their agenda in certain policy fields, but less with the second. In other words, while judges have the possibility to impose their own moral convictions or even personal interests on the rest of the population by interpreting the constitution arbitrarily, they have only a limited capacity in pursuing their agendas on the long run: they can strike down legislation, but do not have any positive legislative tools to coherently promote policies. Furthermore, as judges are usually not re-electable, they have much less interest in seeking for public approval, compared to politicians (or at least they do so in a different, less straightforward way).

### 2.2.2 *Democracy and judicial review*

So far, this section was concerned with the relationship between constitutionalism and constitutional review. The relationship between constitutional review and the democratic ideal is not less problematic. The critiques of constitutional review question the legitimacy of an institutional mechanism where non-elected and democratically unaccountable bodies can override the decisions of democratically elected and accountable legislatures. This dilemma has provoked enormous amounts of scholarly arguments and responses, and has been labelled – following the term of Alexander Bickel from his book, *The Least Dangerous Branch* (1986) – as the *counter-majoritarian difficulty*. In the following, three positions will be presented: first, the arguments of Ronald Dworkin and Jeremy Waldron, to illustrate the nature of the debate; next, I will focus on the theory of John Hart Ely, whose position offers important insights to the primary subject of my dissertation.

The two most widely established positions in the debate also reflect the most important schools in more widely understood democratic theory, which are known as *instrumentalist* and *proceduralist* positions (Christiano 2004). The former school sees institutions justified by the outcomes they deliver, while the latter points to their intrinsic characteristics. Ronald Dworkin,

considered to be the boldest defender of judicial review, develops the former argument, while Jeremy Waldron, the best-known critic of constitutional adjudication, defends the latter perspective.

Dworkin's legal and political theory is built on two premises. One is the integrity of ethics, morality and law (Dworkin 1986; 2011); the other is his understanding of dignity. In the former regard, he asserts that the issues of individual life choices, horizontal and vertical relationships should be considered in a way that there is no conflict between them. The first dimension – considering individual choices – is labeled as the domain of *ethics*. The second, regarding the treatment individuals owe to each other is called *morality*. Finally, the way state institutions treat their citizens is the matter of morally shaped law. While pursuing individual dignity on the first two levels implies individual duties, on the third level it entails rights as well. Dworkin's moral concepts are interpretative ones, and they have to be regarded in unity (Dworkin 2011) through proper interpretation. When it comes to the right understanding of law, one has the duty to interpret moral principles for given situations in a way that leads to morally right answers (Clayton 2002; Stavropoulos 2014). Therefore, Dworkin's definition and understanding of law is deeply rooted in a robust moral theory – which, in a way, also aims to distance itself from social facts and the notion of popular will.

The other underlying premise in Dworkin's theory is his specific understanding of dignity, addressing all the above-mentioned dimensions, but especially the duties of a state for its citizens. For Dworkin, dignity is understood in two principles: self-respect and authenticity. These entail two duties for the state towards its citizens, namely that it would treat them with *equal concern and respect* (Dworkin 1978; 2011). Equal respect for every citizen means to consider all individual lives equally valuable; on the level of state duties, this means to enable all citizens to live a life which is sensitive to their individual choices. On the other hand, equal concern entails the governmental duty of arranging social institutions in a way that individuals can exercise personal responsibility over their lives. In the classical typology of liberty, coined by Isaiah Berlin (1992), the former aspect would refer to its *negative*, while the latter to its *positive* side.<sup>16</sup>

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<sup>16</sup> However, Dworkin was critical towards Berlin's approach (2011, 364-68), particularly concerning his trade-off view between positive and negative liberty. Contrarily to Berlin, Dworkin argued that under the concept of dignity the two can serve the same goal. For him, liberty is an "interpretive concept and [...] we understand its meaning best when we tie it to the deeper value of personal responsibility" (Dworkin 2011, 367).



In terms of the institutional implications of his theory, Dworkin approaches political authority from an instrumental perspective: state institutions are legitimate if they can ensure just arrangements for individual dignity: “The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with these conditions” (1996, 34). The ‘defining aim’ of democracy is “that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect” (1996, 16). Therefore, Dworkin’s understanding of democracy and individual dignity become intertwined. On the one hand, he is not dismissive about democratic procedures, but is critical of conceptions of democracy prioritizing the majoritarian principle. He emphasizes that this approach to democracy is a conception of *constitutional* democracy (contrary to *majoritarian* democracy), where individuals of equal moral status exert collective self-government; taking part in that is a crucial element in individual dignity (Dworkin 1996, 23-25). Therefore, the judiciary has two, largely inter-linked roles: protecting the fundamental values of individual dignity, and safeguarding conditions enabling democratic self-government. Dworkin does not necessarily *prioritize* judicial authority, but rather *defends* it from majoritarian critiques, and views it as a crucial element of democratic procedures:

[Communitarians] rely on a dubious though rarely challenged assumption: that public discussion of constitutional justice is of better quality and engages more people in the deliberative way the communitarians favor if these issues are finally decided by legislatures rather than courts. This assumption may be inaccurate for a large number of different reasons. There is plainly no necessary connection between the impact that a majoritarian process gives each potential voter and the influence that voter has over a political decision. Some citizens may have more influence over a judicial decision by their contribution to a public discussion of the issue than they would have over a legislative decision just through their solitary vote. Even more important, there is no necessary connection between citizen’s political impact or influence and the ethical benefit he secures through participating in public discussion or deliberation. The quality of the discussion might be better, and his own contribution more genuinely deliberative and public spirited, in a general public debate preceding or following a judicial decision than in a political battle culminating in a legislative vote or even a referendum. (Dworkin 1996, 30)

The rights are not only central for Dworkin’s theory (1978), but are also similarly essential in the sharpest counter-opinion, the proceduralist theory of Jeremy Waldron (2001; 2006). Waldron also departs from the assumption that all citizens are individual rights-bearers. However, it is unclear what different rights exactly mean and entail. Instead of appointing an actor to interpret rights, Waldron holds that their content should be determined and specified through legislative

process. He asserts that regardless of the mechanism applied to determine what rights citizens hold, there will be disagreement among citizens. If disagreement is unavoidable, citizens should be ensured that the settlement was made in the fairest possible manner. In this regard, he holds that a legislative process where everyone has the opportunity to publicly deliberate concerning the rights individuals are entitled to and has an equal say at the main decision (in the legislative process, this is selecting the representatives – as everyone can take part at this phase) is the most just possible. In other words, the ‘one person, one vote’ regime is the most legitimate, as even those whose opinion did not prevail cannot object to the fairness of the procedure itself leading to the given decision.

Furthermore, plenty of authors have aligned themselves with one or another position: for instance, John Rawls (1993) or John Hart Ely (1980) are known as outspoken supporters of judicial review, while Mark Tushnet (2000b) or Richard Bellamy (2007) as its prominent critics. From these, the position of Ely is particularly important from the perspective of the above presented taxonomy, as he builds his argument concerning judicial review around a proceduralist approach – like Waldron – but arrives to the conclusion of supporting judicial review. His seminal work, *Democracy and Distrust* (1980) approaches the topic from the perspective of the importance and perils of democratic procedures, alongside the criticism of various schools in constitutional interpretation. As the book is primarily addressing the American constitution and political life, Ely is focusing on issues such as minority disenfranchisement, gerrymandering and further administrative flaws which systematically undermine the fairness of democratic procedures. Therefore, Ely suggests that constitutional adjudication is needed, but not to deliver just outcomes primarily – as that should be the domain of democratic procedures – but rather to rectify errors in democratic procedures. Therefore, as Richard Bellamy puts it (in slightly broad terms), the core difference between Dworkin and Ely is that the former is primarily concerned with the ‘output’ of democratic procedures, while the latter aims to fix the ‘input’ side of the equation (2007, 92).

Even though Ely’s theses were accepted with a degree of skepticism among proponents of democratic proceduralism, his basic argument resonates with proceduralist claims on the boundaries of their theories. On the critical side, Bellamy asserts that the distinction between fundamental rights, and rights solely connected to democratic participation is impossible, therefore Ely’s stance can easily lead to supporting full-fledged, outcome-centered constitutional

adjudication.<sup>17</sup> However, Waldron demonstrates more understanding concerning the limits of democratic procedures. On the one hand, he emphasizes that his strong proceduralist position stands only in settings where certain assumptions can be held. These are the following: legislative institutions elected by the adult population of a country are in “reasonably good working order”; judicial institutions function in a non-arbitrary way; a “commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights” is present; and the disagreement on rights is by nature “persistent, substantial” and is in “good faith” among people who care about rights (Waldron 2006, 1360). He also acknowledges that certain social settings may require judicial review concerning substantive rights, in case ‘topical’ and ‘decisional’ minorities coincide.<sup>18</sup> This assumption largely resonates with Christiano’s idea of ‘persistent minorities’ (1994; 2008), discussed in the following chapter. The common point between the two theories is that both authors admit that groups that are different in a salient way and are consistently in a worse-off position following the democratic procedures, deserve special institutional guarantees. As Waldron puts it, invoking Ely, “[m]inorities in this situation may need special care that only non-elective institutions can provide – special care to protect their rights and special care (as John Hart Ely points out) to repair the political system and facilitate their representation” (2006, 1403).

These considerations on the limitations of proceduralist theories are not central issues in the counter-majoritarian debate, but they remain crucial in understanding the place of constitutional adjudication in consociational regimes, for two main reasons. First, in these societies the assumptions laid down by Waldron concerning the societal conditions for democratic procedures are only partly met, especially when it comes to the mutual commitment to individual and minority rights, as well as the ‘good faith’ in debates around the disagreement concerning rights. The second issue concerns the twofold presence of ‘persistent minorities’. On the one hand, consociational arrangements usually cannot include all ethnic or religious groups in the societies

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<sup>17</sup> In Bellamy’s words: “The problem for Ely and those who follow him [...] is that you cannot judge whether a process is fair without a view of what counts as a fair outcome, and one cannot judge a fair outcome without referring to some account of fundamental values. Put succinctly, the only coherent way to adjudicate on the justice of democratic ‘inputs’ is to have some notion of what counts as a just ‘result’. As a result, the distinction between substantive and proceduralist approaches to judicial review collapses (2007, 110-11)”.

<sup>18</sup> In Waldron’s terminology, the phrase ‘*topical minorities*’ refers to groups whose durable preferences and interests are supported only by a minority share of the population; in a somewhat different regard, ‘*decisional minorities*’ are groups whose interests and preferences are disregarded by various democratic decisions (2006, 1397). In diverse societies, topical minorities are not permanently decisional minorities, as they can pursue their interests and preferences through bargaining, coalition-building, etc.

they aim to cover; therefore, certain groups become particularly vulnerable to the effects of legislative actions as they become ipso facto limited in their political actions. On the other hand, consociational arrangements are implemented in societies where all important and saliently large groups are different from each other in the way persistent minorities are from the otherwise homogenous majority. Therefore, the legitimacy of constitutional adjudication in consociational regimes has to be understood from a different approach, which is rather a side-track in the general debate concerning the role of constitutional courts but becomes an important consideration when deeply divided societies are under scrutiny.

### *2.3 Institutional arrangements of constitutional adjudication*

In the following section, institutional arrangements performing constitutional adjudication are addressed, from two angles. First, the institutional specificities of the two main models (diffuse and centralized) will be presented. Second, the political role of constitutional courts, or courts with the authority of performing constitutional adjudication will be discussed from a functional perspective.

In the diffuse model, every court has the right to interpret the constitution and to declare given legal acts unconstitutional, and the highest ranked court has a special role as the final authority in these issues. This model was first introduced in the United States and appeared in other common law countries as well. On the other hand, in certain countries one body is entitled to rule on the constitutionality of legal acts and provide a binding interpretation of the constitution. This body can either be a designated court or – more usually – a specific institution, designed for this purpose. This arrangement is called the *centralized model* of judicial review and is common in civic law countries. Alec Stone Sweet identifies three key differences between the two models. First, constitutional courts in centralized regimes have the right to review legislative acts on abstract ground, before or after their promulgation (often both), while courts in diffuse regimes can only act upon a specific case or controversy. Second, constitutional courts in centralized regimes do not have the constitutional mandate to preside over litigation. Finally, while a single institutional framework is provided for all courts in diffuse regimes, constitutional courts have a specific “constitutional space” (Stone Sweet 2012, 818), tailored to the distinctly political character of these institutions. The differences among the regimes can be largely explained by their historical backgrounds: while the diffuse model evolved over the course of two centuries,

shaped by often unplanned events, the development of the centralized model happened through a shorter period of time, in a more self-conscious manner.

Centralized constitutional courts were first established in Austria and Czechoslovakia – two newly formed states following World War I. Though this institutional model did not spread substantially in the interwar period (only Liechtenstein and Spain introduced similar institutions before World War II (Ferrerres Comella 2009, 3)), constitutional courts were established in a large number after World War II, within the different waves of democratization: first in new democracies following the Second World War (e.g. Germany, Italy);<sup>19</sup> later, in post-authoritarian regimes starting from 1970s (e.g. Portugal, South Korea, Spain); and finally, following the fall of the Iron Curtain, in post-socialist countries of the former Soviet Union and Central and Eastern Europe (Ferrerres Comella 2009, 3-5; Stone Sweet 2012, 819-20).<sup>20</sup>

There are multiple reasons why countries in transition chose both judicial review in general, and its centralized form in particular. First, the experiences of democratically elected parliaments driving countries in the direction of autocracies as well as past human rights abuses strongly suggested the need for an actor overseeing the legislature on the grounds of specially protected legislation, or often international legal norms. Second, most of these countries came from a civic law tradition, while the centralized form of judicial review has numerous structural advantages vis-à-vis the diffuse model (like the organization of the judiciary or the lack of precedent in civic law systems; see: Ferrerres Comella 2009, 20-24). Third, in most countries the judicial elite was deeply discredited: not only in countries with decades-long authoritarian experience, but also, for instance, in Germany, following its 12-years long Nazi rule. Therefore, filling a constitutional court with not much more than a dozen of well-qualified judges seemed to be less risky than authorizing every judge to interpret the constitution (Ferejohn and Pasquino 2003; Sajó 1999, 235). Finally, constitutional courts had a crucial role in handling legal systems in transition, where judicial review was an instrument for aligning the new legal regime to the constitutional norms,

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<sup>19</sup> In this wave of institutional development, France can be considered as the least typical case: the country functioned as a democratic state until its occupation by Nazi Germany in 1940; after being liberated, first a parliamentary system was established, which was replaced by a semi-presidential regime in 1958. The Constitutional Council (a body entrusted with the role of reviewing the constitutionality of legislation prior to promulgation) was established within the new institutional framework, largely influenced by the distrust towards the legislative on the side of the framers of the 1958 Constitution establishing the Fifth Republic (Stone 1992, 46–48).

<sup>20</sup> However, Poland and Yugoslavia already had a constitutional court before their change of regime, even though one might question the importance of these institutions in their respective settings.

especially during those years when the legislatures had no capacity to address all issues within the legal system (Epstein, Knight, and Shvetsova 2001; Sadurski 2005).

In the context of regime changes, Stone Sweet embraces the aforementioned arguments, but also offers a more general explanation, by suggesting that “[t]he Kelsenian court helps those who build new constitutional arrangements to resolve certain dilemmas, including problems of imperfect contracting and commitment” (2012, 820). In other words, if new institutional arrangements are established without embedded practices for their operations, a designated interpreter for the newly established rules can substantially enhance the willingness of parties to enter mutual commitments. To a different extent, the need for a final interpretive authority applies for established democracies as well – the role of constitutional courts in traditional parliamentary democracies has been the core focus of Stone Sweet’s influential work, *Governing with judges* (2000). He asserts that the role of constitutional courts can be understood in the wider context of non-majoritarian institutions and the logic of delegation. In joint work with Mark Thatcher (Stone Sweet and Thatcher 2002, 4), four common purposes behind delegation are identified: resolving commitment problems; overcoming information asymmetries in technical areas of governance; enhancing the efficiency of rulemaking; and shifting the blame of unpopular policies. Constitutional framers authorize constitutional courts mostly for the first reason – as Stone Sweet argues, “the more acute are the problems of imperfect commitment and contracting, the more authority – or discretion – the framers must delegate to the review courts if constitutional arrangements are to be successful” (2012, 822). In this regard, constitutional courts buttress the efficacy of the constitutional regime, by enhancing the credibility of commitments from the side of the political actors – which means that all actors can abide by the constitutional rules with the assumptions that the provisions will be implemented in a non-arbitrary fashion.

Though in the Kelsenian theory of constitutional adjudication, constitutional courts should be limited to the domain of *negative* legislation, today most scholars in the field agree that practically all constitutional courts are pushing the boundaries of *positive* legislation (largely due to the increasing proliferation of court competences by expanding right provisions in constitutions (Stone Sweet 2000; 2012, 817–19; Shapiro and Stone Sweet 2002)), which happens in two main aspects. First, by courts usually taking the continuous functioning of the legal order into account. In this regard, Allan Brewer Carías (2011) identifies two main ways where courts get involved in positive lawmaking concerning lower-level legal acts. On the one hand, by not necessarily annulling unconstitutional acts, but rather providing an interpretation for them which brings the

laws into harmony with the constitution. On the other hand, by giving temporary provisions for the cases of legislative omissions. Second, one of the most powerful tools for the courts is the exclusive right of providing a binding interpretation of the constitution.<sup>21</sup>

The more constitutional courts enter the area of positive legislation, the more features they share with other non-majoritarian institutions, which are directly involved in policy-making, for instance central banks or regulatory bodies. Beyond enhancing the credibility of various actors' commitments, constitutional courts can enhance the efficiency of rulemaking (especially by the case law they accumulate), as well as political actors can occasionally shift the blame for unpopular policies by, for instance, including unconstitutional elements in legislative acts on popular yet unrealistic policies. In the latter cases, constitutional courts might be the actors annulling legislation supporting a given policy – so political actors can avoid pursuing popular yet unrealistic policies by pointing to their constitutional constraints. From the four functions of non-majoritarian institutions identified by Stone Sweet and Thatcher (2002), only the issue of informational asymmetries is less relevant concerning constitutional courts, as one cannot expect jurists having competence in all policy fields their decisions impact. The latter concern is frequently echoed by critics of constitutional courts, by stressing the question: why should a body of jurists have the final word in *all* parts of legislation, regardless of their competence (which entails their knowledge on the impact of their decisions) in the given fields?

Beyond the general properties of non-majoritarian institutions, Stone Sweet distinguishes four unique functions for constitutional courts: providing a counterweight to legislative majorities (which means that constitutional courts are designed to confront certain political decisions and are not meant to complement decision-makers); pacifying the political sphere;<sup>22</sup> legitimizing public policy;<sup>23</sup> and protecting human rights (2000, 137). Furthermore, one also can notice that constitutional courts do not perform these functions only through constitutional review, but also through other competences. Beside arbitration in matters of jurisdiction and competence (which are closely linked to interpreting the constitutional text), various courts obtained further, specific licenses in the fields of reviewing international treaties prior to ratification,<sup>24</sup> conducting

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<sup>21</sup> For country-specific examples, see: Brewer Carías, Allan-Randolph. 2011. *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge University Press.

<sup>22</sup> This mostly refers to situations when a political debate can be more easily settled if the final word is spelled by an actor outside of the daily politics – in many regards, constitutional courts are suitable for filling this role.

<sup>23</sup> This feature refers to those situations when certain unpopular policies are presented as the only options for adhering to constitutional norms in certain areas of policymaking.

<sup>24</sup> This applies to most European countries, only with a few exceptions (Sadurski 2005, 306).

impeachment trials,<sup>25</sup> overseeing elections and referenda,<sup>26</sup> adjudicating cases concerning political parties and their compliance with constitutional norms,<sup>27</sup> and in some cases constitutional courts also have a formal role in constitutional amendment procedures<sup>28</sup> (Sadurski 2005: 13).

For assessing the role of constitutional courts in parliamentary democracies, one can list numerous arguments emphasizing the importance of constitutional courts as well as factors limiting their importance. On the one hand, constitutional courts possess final authority in their matters of competence which can be curtailed only by limiting their competences by changing the constitution. However, this requires either broad political consensus, or one political actor possessing a qualified majority (or sometimes more, depending on the constitutional provisions on amendment procedures<sup>29</sup>). In cases there is no political majority countering constitutional court decisions, these bodies can have a significant impact on legislation and policymaking. Their impact through the specific decisions can be considered a ‘direct effect’ of constitutional adjudication. Furthermore, the practices or behavioral norms developed by courts can have a significant impact on legislative politics, as political actors may begin to function in a way that anticipates the predictable court decision, which can be labelled as the indirect effect of constitutional adjudication. In this regard, Stone Sweet (2000) asserts that the very presence of constitutional courts transforms the dynamics of policymaking, pushing it in a direction where everything is understood and pursued following a legalistic logic. In his words, “[i]n the end, governing with judges also means governing like judges” (Stone Sweet 2000, 204).

On the other hand, political actors also have direct and indirect tools of pressuring constitutional courts. Changing the constitutional framework (both in terms of substance as well as the specific provision on courts) in reaction to specific court decisions (whether actual or anticipated) can be considered as direct effects of blunt political power. Also, changing certain lower-level acts can curtail the autonomy of courts, as substantive internal regulations are governed by that legislative

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<sup>25</sup> In the cases of e.g. Austria, Bulgaria, Croatia Czech Republic, Germany Hungary, Lithuania, Portugal, Slovakia, Slovenia, etc. Furthermore, the Lithuanian case is particularly important, as the first effective European impeachment procedure happened there.

<sup>26</sup> In the cases of e.g. Bulgaria, Czech Republic, France, Lithuania, Romania and Slovakia (Sadurski 2005, 13).

<sup>27</sup> In the cases of e.g. Germany or Portugal (Sadurski 2005, 13).

<sup>28</sup> In the case of e.g. Moldova.

<sup>29</sup> Constitutional amendments usually require a qualified parliamentary majority, but can have additional requirements, like confirmation by a new parliament (e.g. Belgium) or a referendum (mandatory in e.g. Republic of Ireland or should be issued under certain circumstances in e.g. France, Latvia Spain).



level.<sup>30</sup> Less direct and immediate, but also substantial pressure can be placed on courts by their funding (as constitutional courts are usually funded from central budgets). Furthermore, parliaments have a crucial role in selecting the judges – though this can be regarded a way of shaping the character of courts, rather than pressuring them.

Finally, both the autonomy and the possibilities for judicial activism for constitutional courts depend on a set of institutional factors. First, without the fundamental requisites of judicial independence (MacDonald and Hoi 2012), constitutional adjudication regimes become meaningless. Second, strict professional requirements set for judges can enhance the competence-based character of courts. Third, appointment procedures can be designed in a way that fosters the election of rather consensual, non-controversial figures. Fourth, the constitutional competences given to courts have a special importance concerning their possible impact. Fifth, the way courts can get involved is also crucial, especially in centralized regimes. On the one hand, this means the set of actors who can initiate judicial review (as very few courts can act *ex officio*, and they can usually do so in a limited range of issues). On the other hand, the conditions for actors reaching the courts can also be vital: for instance, whether a small or a large parliamentary opposition is needed to start a constitutional review; or whether a citizen should be directly affected by a law in order to trigger an abstract review. Needless to add, the more ‘accessible’ a court is, the greater significance it has the dynamics between political actors.

Though constitutional adjudication is far from being coeval with constitutionalism itself, today it is one of the most important institutional elements in mechanisms built to maintain constitutional supremacy – and in a contemporary perspective, the growing significance of the judiciary can be observed (Schmitter 2015, 41). Therefore, understanding the role constitutional courts play in democratic regimes, especially concerning its relationship with other branches of power is increasingly important in the systematic study of contemporary democracies. Furthermore, by investigating democracy in divided societies, courts are also important for the specific choices institutional designers made, as these regimes often require specific considerations addressing the peculiarities of their social settings. In other words, if constitutional

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<sup>30</sup> Often important decision-making provisions are included in legal acts on constitutional courts – legal acts that are not protected procedurally the way constitutions are. Therefore, occasionally simple majorities can re-define quorum requirements, raise ballot thresholds (so a simple majority of judges would not be enough to annul a legislative act, but only a qualified majority), limit courts in the freedom to choose the cases they want to deal with, or shape the internal working order of the body. For a recent example, most of these techniques were adopted in Poland during the Constitutional Tribunal’s crisis, in 2015-16.

adjudication points to sensitive questions connected to the separation of powers, a range of new questions appears once these institutions are positioned in contexts of *power-sharing*. In this regard, two primary questions bear particular importance. First, do the concerns connected to *separation of powers* collide with the aims of *power-sharing*? Second, are courts designed in a way that they could manage power-sharing, beyond being a counterweight vis-à-vis the other branches of power? As all consociational regimes – the sub-group of divided societies my research is focusing on – have a centralized form of judicial review, I focus on the peculiarities of these arrangements in the following.

### 3. Constitutionalism and constitutional review in divided societies

Building on the general presentation of constitutionalism and constitutional adjudication, this chapter turns to their application in divided societies, the contexts where consociations are established. Following the presentation logic of the previous chapter, first the implications of constitutionalism in a broader sense are discussed (3.1), followed by analyzing the perspectives for judicial review in such settings (3.2). Furthermore, in the third part of the chapter a normative position is also presented, arguing in favor of the legitimacy of constitutional review in consociations (3.3). The latter argument is presented in three steps: reviewing the prescriptive claims in the relevant literature (3.3.1); analyzing the applicability of normative theories on the legitimacy of constitutional courts in the context of deeply divided societies, arguing that constitutional adjudication is *permissible* even in the light of the most strongly procedural approaches (3.3.2); and based on Thomas Christiano's theory on 'persistent minorities', I argue for the *necessity* of constitutional review (3.3.3). Beyond discussing the peculiarities of constitutional review in deeply divided societies – particularly those where consociational power-sharing is established – this chapter also elucidates the normative standards guiding the empirical analysis, presented in *Part II* of the dissertation.

#### 3.1 Constitutions and constitutionalism in divided societies

The aims of constitutionalism and the institutional practices linked to it appear to easily fit the context of divided societies, for several reasons, addressed in the first half of this section. The term '*divided*' refers to societies which are fractured along ethnic or religious cleavages, where belonging to a group heavily influences the worldviews and preferences of its members. In order to prevent conflicts among groups, many of these countries adopted institutional solutions associated with the principles of constitutionalism, like extensive rights provisions or sophisticated power-sharing mechanisms (Choudhry 2008b). However, in these settings the ideas and practices linked to constitutionalism are often present in a strongly context-specific – and sometimes controversial – forms. For instance, power-sharing in these regimes is often arranged within the governmental branches, instead of their clear separation, which can result in the

discretion of political elites over a wide range of sensitive issues, subverting rights protection mechanisms. Moreover, certain important rights are distributed on a group-specific – and not an individual – basis, which compromises the classical liberal understanding of constitutional equality (Sajó and Uitz 2017, 374–76, 401–3). In the following, the peculiarities of divided societies are addressed mostly from the perspective of the theoretical concerns discussed in the previous chapter. The first issue is the identity or identities acknowledged by the constitutions, an issue with far-reaching symbolic and practical consequences. The second concerns the specific, context-sensitive choices regarding the institutional architecture established by the given constitutions.

The first issue, constitutional self-definition is primarily about setting the boundaries of the political community, and it can be approached from two directions. First, constitutional self-definitions have an important symbolic weight, and give a specific signal about the aspirations of the given political community. A political community can be defined as the multitude of individual citizens, or as a group organically bound together by history, language, culture and a mutual sense of belonging. Such self-definitions entail messages of inclusion or exclusion. Countries choosing a self-definition closer to the former approach usually aspire to build an institutional framework that can accommodate flexible and fluid identities. This way of self-definition is particularly prevalent in countries with mostly immigrant populations, like Argentina<sup>31</sup> or the United States of America. Countries opting for the latter approach refer to historical and cultural essentials with the aim of preserving those. This usually takes place in countries where sovereignty and independence was recently gained,<sup>32</sup> or the country has

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<sup>31</sup> The Argentinian Constitution is very explicit about this ambition: beyond the current members of the political community, its Preamble is also addressed to “all men in the world who wish to dwell in Argentinian soil”.

<sup>32</sup> For relatively recent historical examples, one can refer to Eastern European countries gaining independence after the fall of the Soviet Union and the Iron Curtain. For instance, when the Lithuanian Constitution makes its reference to the constituent power behind the document, it declares that “The State of Lithuania shall be created by the Nation. Sovereignty shall belong to the Nation” (Article 2). Importantly, the document does not refer to the ‘people’ but uses a term which entails certain cultural essentials. Furthermore, the preamble the Estonian constitution declares that constitution is enacted so the newly born state can “guarantee the preservation of the Estonian people, the Estonian language and the Estonian culture throughout the ages”. However, the constitution of the third so-called Baltic country, Latvia is probably the most explicit in this regard, by stating the followings in its preamble:

“The State of Latvia, proclaimed on 18 November 1918, has been established by uniting historical Latvian lands and on the basis of the unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries, to ensure freedom and promote welfare of the people of Latvia each individual.”

ambitions to stretch the boundaries of the political community beyond its state borders.<sup>33</sup> Even though these definitions might appear as abstract issues, mostly declared in constitutional preambles, their importance can be primarily understood through the so-called ‘normative character’ of the constitution; as Ulrich Preuss (1995, 30-31) puts it, constitutions do not only refer to the present social conditions, and the past events leading there, but also the future, by expressing some form of collective aspirations of the political community.<sup>34</sup>

Besides, national self-definition is usually closely linked with the recognition of different national identities, as well as the rights and duties entailed by it. On the one hand, this is important for the group-specific rights provided for minority groups, both in multiethnic and divided societies. On the other hand, in divided societies, which aim to manage governance through power-sharing at different governmental levels and branches, the constitutional recognition of ethnic or sectarian groups usually determines which groups get guaranteed representation in political decision-making. While both group-specific rights and inclusion in power-sharing schemes can be regarded as concessions to smaller ethnic groups, these arrangements are far from being hailed by liberal advocates of constitutionalism. The core criticism targets the act of corporate recognition: critics of group-specific rights (Barry 2001; Offe 1998; Waldron 1991; Ward 1991) as well as ethnic power-sharing (Barry 1975b; D. L. Horowitz 1993; 2000) are concerned about the essentialist logic of identifying ethnic groups and assigning individuals to them (or not leaving any alternative for them, but to choose one), the arbitrariness of setting boundaries between them, and the reproduction of ethnic antagonism through institutionally separating societal groups.

The general framework of the debate is succinctly presented by John McGarry, Brendan O’Leary and Richard Simeon (2008). In their taxonomy of approaches, they distinguish between

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“Since ancient times, the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the official language, freedom, equality solidarity, justice, honesty, work ethic and family are foundations of a cohesive society.”

<sup>33</sup> For instance, the generally inclusive Hungarian constitution which declares in its preamble that “nationalities living with us form part of the Hungarian political community and are constituent parts of the State”, but still prefers the term ‘nation’. This might be for the motivation that the constitution does not aim to exclude anyone living in the country’s territory, but contrarily, be inclusive towards ethnic Hungarians living outside of Hungary – especially in the neighboring countries as later the Preamble declares that “[w]e commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin”; in this case, referring to the ‘Carpathian Basin’ instead of ‘Hungary’ expand the geographical scope of the claim.

<sup>34</sup> For a more detailed discussion on the integrative functions of constitutional self-definitions, see: Grimm (2005) and Schwartz (2011).

constitutional solutions pointing toward the future of a 'shared society', or the preservation of those features which are held important by different groups. The former approach aims for *integration*, while the latter aims for *accommodation*. The core difference between the two approaches emanates from their understanding of ethnic identities: while the integrationist school sees them as fluid, malleable and superficial, proponents of accommodationalist policies rather perceive them as potentially stable, resilient and deeply entrenched.

Therefore, integrationist scholars endorse policies promoting a shared identity in the public realm, while allow cultural heterogeneity in the private sphere – the latter consideration constitutes an important difference between *integrationist* and *assimilationist* policies. McGarry, O'Leary and Simeon point out that the politics of *integration* is about emphasizing the shared elements of different identities, and the construction of a mutual identity, contrary to *assimilation*, which aims to impose one specific identity on all groups (2008, 42-44). The politics of integration approaches the interaction between identities through the formula of  $A+B=C$ , while the politics of assimilation rather in the form of  $A+B=A$  (McGarry et al. 2008, 42). On the other hand, the politics of accommodation is based on the assumption that the process of integration could perhaps succeed over a longer course of time, but the success cannot be guaranteed in each setting and context. In such a situation, the aims of stability and equality can be best served by institutions that accommodate possibly all identities, but at least those which have a sufficiently large-sized population behind them, by giving recognition to all languages and cultures in the public sphere, and providing institutional support (by self-government, educational institutions, etc.) for those groups which are considered salient. Depending on the proportions between different groups and the character of their relations, various institutional arrangements can be set up, ranging from multiculturalism (an institutional model accommodating different identities) to ethno-federalism (providing territorially based self-governance for ethnic groups), and consociationalism (an arrangement combining political power-sharing with segmental autonomy).

At the first glance, the fundamental features of constitutionalism would lean towards the politics of integration, given that this approach enables a greater degree of equality: if one aims to offer a cultural framework which is appealing to all social segments, it is easier to guarantee the same fundamental rights for everyone regardless of their group membership and to design difference-blind institutions. On the contrary, in institutional settings inspired by the model of accommodation, the rights one is entitled to are heavily dependent on the group membership,

contradicting the universalist requirements of constitutionalism. Furthermore, the equal enforceability of rights is also easier through an integrationalist approach – if the same rights apply to everyone and are adjudicated by the same judiciary (instead of group-specific bodies), a greater sense of individual equality can be present among societal members, compared to settings where cultural groups can deal with issues within their own discretion and autonomy. Finally, certain forms of assimilationist policies can also be in line with the preferences of constitutionalism, if a given identity has cultural traits which are illiberal at their core (Waldron 1991) – in these cases, the politics of assimilation can serve the convergence to a universalist approach to human rights (e.g. in areas of family law, communal conflict-management, religious dress codes, etc.).

The normative appeal of the integrationalist approach is not questioned by the most prominent accommodationalist scholars, regardless of the solution they offer, ranging from researchers of consociationalism (e.g. O’Leary 2005) to multiculturalism (e.g. Kymlicka 1995); instead, the practical applicability of such measures is under scrutiny. For instance, multiculturalists (e.g. Kymlicka 1995, 2000; Kymlicka and Norman 2000; Song 2017; Taylor and Gutmann 1994) depart from the assumption that every citizen should possess an equal status with others, but proceed to argue that in diverse and divided societies, individual rights only cannot deliver this. Certain forms of rectification are needed, which would be sensitive towards the linguistic and cultural differences among groups. Providing group-specific rights is one of the most tangible institutionalized solutions. Universalist objections against group-specific rights are taken into account.<sup>35</sup> However, the lack of group-specific rights would leave certain groups in an unquestionably worse-off position, as in certain areas of life that deeply affect group members – the state cannot stay neutral, mostly for pragmatic reasons. For instance, an official language or a set of official languages has to be designated, or certain culturally relevant holidays will or will not be included in the official calendars.<sup>36</sup>

Since the model of ‘benign neglect’ (Kymlicka 1995; Patten 2008) is not attainable, one has to find an institutional solution that aims to promote equality among groups, acknowledging that

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<sup>35</sup> As Kymlicka puts it: “Group-differentiated rights, in short, seem to reflect a collectivist or communitarian outlook, rather than the liberal belief in individual freedom and equality” (1995, 34).

<sup>36</sup> For pragmatic reasons, the issue of language policy is a particularly problematic question. As Alan Patten puts it: “Language looks like one of those areas of social life in which the state can hardly help but take a stand for or against certain identities and cultural and cultural attachments. The state cannot help but use some language or other(s) in conducting its own internal business, in offering services to its citizens, in organizing the public school system, and so on” (2008, 96).

in certain settings the group identities are resilient and important for their members. These institutional solutions can be designed with a concern for the given contexts where they are implemented, with certain universally valid liberal constitutional values held as normative yardsticks. This has two major implications. First, group-specific rights must be provided only to the extent they serve the equality between citizens with different identities and should not allow illiberal practices under the banner of cultural preservation. In this regard, Kymlicka suggests that group-specific rights should be provided along two principles: promoting *external preservation* and limiting *internal restrictions*. The former protects cultural identities from attempts and mechanisms of assimilation, while the latter refers to possible violations of individual rights through the cultural self-governance of minority groups. For example, provisions for using specific languages in education and public administration are measures serving external protection on the one hand, or specific family law provisions (e.g. child marriage, unequal terms of divorce, etc.) on the other hand can be mentioned. Therefore, multiculturalism aims to offer group-specific rights in a way that rather targets equal outcomes for citizens (instead of procedural equality), while setting boundaries for the extent individual rights can be compromised.

The latter consideration is one of the core concerns for Hannah Lerner as well, who offers a conceptual framework for understanding constitutions and constitution-making in divided societies. Not all of these countries are governed through formal power-sharing like consociations, the primary interest of my dissertation, but are more similar to countries where consociations are established, compared to diverse societies (the primary scope of multicultural theory). In her book *Making Constitutions in Deeply Divided Societies* (Lerner 2011), she outlines the framework of ‘constitutional incrementalism’ as a viable strategy for divided societies. It comprises four main elements. First is an ‘evolutionary’ approach to the constitution itself, which means that the constitution is designed in a way (e.g. with relatively flexible amendment procedures) that allows for constitutional revisions when the external circumstances change. The second element requires sidelining the majority rule by establishing non-majoritarian institutions (e.g. constitutional courts, technocratic governing agencies, etc.) and prescriptions for qualified majorities in legislative procedures. The third element is the inclusion of competing visions and definitions of identities in the constitutional framework, including constitutional self-definition and the boundaries of the political community.<sup>37</sup> Fourth, she suggests that the most sensitive

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<sup>37</sup> Though the Belfast Agreement of 1998 is only mentioned in the book (as Lerner focuses on the constitutional politics of the Republic of Ireland between 1921-37), it can be considered the most striking example for this



issues should be left at the discretion of political elites who can find common positions and compromises – unlike, for instance, constitutional judges who lack the bargaining and balancing capacity of legislators.

By discussing the possible shortcomings of the approach, Lerner identifies three sensitive issues, or potential threats: compromising fundamental (primarily individual) rights; arriving at an overly rigid constitutional framework; and rising tensions between the legislature and the judiciary. Constitutional adjudication can offer a solution for the first two challenges. First, with their final authority in constitutional issues, courts can play a specific role in protecting fundamental rights as much as the constitutional framework allows them, occasionally even beyond that, if they can successfully embrace an activist role. Second, courts can also ameliorate problems emanating from the over-rigidity of the constitutional frameworks, by issuing minor adjustments through their interpretive activities. Both possible behaviors can be largely enabled by the so-called ‘constructive ambiguity’, which aims to avoid clear-cut answers for sensitive questions in the constitutional texts, so answers could be found through long-term processes of deliberation. But both answers for the given problems can easily amplify the third challenge identified by Lerner, the sharpened tensions between the legislature and judiciary. The following section addresses this issue.

### *3.2 Constitutional review in divided societies*

After the normative foundations of constitutionalism and constitutional adjudication were presented, this chapter focuses on the legitimacy of judicial review in consociations. As works in the established literature with prescriptive ambitions (most prominently McCrudden and O’Leary 2013a) addressed the issue from a pragmatic approach, this chapter aims to offer a normative reference point for the empirical side of this dissertation. To elucidate this argument, first the established positions are discussed, followed by the presentation of my normative proposal. While the latter analysis takes both procedural and outcome-based conceptions of legitimacy into account, this argument is primarily rooted in the dualistic conception of political authority, offered by Thomas Christiano.

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phenomenon, as the agreement accommodates both the perspective of maintaining the union between Great Britain and Northern Ireland, as well as the possibility of a future Irish unification. According to the Agreement’s text, the signing parties “recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland” (Belfast Agreement, para 1.i).

The argument unfolds in two steps – a negative and a positive argument. The first part demonstrates how objections to constitutional review from a democratic perspective (presented in the previous chapter) do not apply to consociational settings; namely what circumstances qualify constitutional review as *permissible* in deeply divided societies. Here the primary focus is on the self-imposed limitations of critical positions on judicial review, pointing out those features of divided societies where these limitations apply. In the second step, my positive argument stands for the *necessity* of judicial review in these settings, employing Thomas Christiano's democratic theory. Though this theory was constructed to understand the authority of democratic institutions in *diverse* societies, its special attention towards groups separated from the majority by coinciding cleavages makes his framework particularly useful for *divided* contexts, where consociations are established. Here I argue that in order to mitigate the impact of deep societal divisions, consociational devices themselves are insufficient, and have to be complemented by constitutional review for three reasons: the pervasive effects of possibly wrong institutional choices; the protection of groups which are not salient enough to be politically empowered; and the protection of internal minorities within the groups. Concerning the evaluative aspects of political institutions (Christiano 2004), the negative argument focuses on a procedural, while the positive claim on a rather outcome-based approach.

### 3.2.1 *Pragmatic prescriptions: from 'incrementalism' to 'judicial modesty'*

Constitutional courts (or other bodies entitled with the right to review legislation on the grounds of constitutionality) can have a crucial role in divided societies, for two reasons. First, they adjudicate in an institutional setting where questions concerning the roles and competences of various constitutional bodies are uniquely sensitive, especially as the most important arrangements on institutional competences are usually codified in the constitutions or those documents which constitute the subject matter for constitutional courts. Decisions of constitutional courts are final (unless a constitutional amendment follows a given decision). These considerations are particularly relevant for those divided societies which are governed through various forms of power-sharing – often due to the fact that the sense of mutual trust is very low among the members of various groups (O'Leary 2005, 9–12). It follows that clear procedures and institutional provisions need to be laid down to make mutual commitments credible. Assigning an authoritative interpreter for the commonly agreed rules is one among

them. For this reason Alex Schwartz and Colin Harvey argue that one can see a ‘functional affinity’ (2012, 134) between ethnic power-sharing and constitutional review.

Second, constitutional courts have a particular responsibility in protecting basic rights in divided societies (Choudhry and Stacey 2012, 87–89; Shapiro and Stone Sweet 2002, 147–48; Stone Sweet 2000, 79). This responsibility stems from the prominence of group-specific rights in certain settings, which are usually provided in controversial policy areas, such as education or justice. For instance, there might be individuals who are not protected by group-specific rights (e.g. because their specific ethnic or religious group is too small for acknowledgement), or there are important individual rights which are either not addressed by the group-specific provisions or are even curtailed by them (e.g. freedom of religion in a setting where linguistic differences comprise the most contentious issue). For these persons, constitutional courts can grant guarantees which would not be provided by any other political actor.

Constitutional courts in divided societies can find themselves in a challenging situation for two reasons. First, they must balance between universal requirements of constitutionalism (individual rights, the rule of law and limited government), and the more context-specific considerations, with their heavy emphasis on group-specific rights and inter-group accommodation. Second, they should be attentive to the context of adjudication: as many divided societies are governed through some form of power-sharing, there will be situations in which the courts will have to take sides, favoring one party or another. While the first concern is present in the vast majority of divided societies, the second becomes increasingly salient as power-sharing mechanisms turn more sophisticated – the more complex the relationship between various parties and state institutions is, the more likely that it will trigger unexpected ramifications. For instance, a decision concerning fundamental educational rights can spill over to the domains of language policy, which can further point to the question of institutional competences, etc.

Empirically rooted prescriptive theories on constitutional adjudication in consociations (McCrudden and O’Leary 2013a), or in more broadly understood divided societies (Lerner 2011) acknowledge the salience of both problems, and emphasize the importance of democratic legitimacy behind institutional reforms. In McCrudden’s and O’Leary’s view, these reforms should be carried out “by the parties that made the relevant bargain, with or without mediators (not arbitrators)” (2013a, 148); in Lerner’s wording these sensitive issues should be “transferred to the political sphere” (2011, 44–46), instead of being handled by the judiciary, even if they

involve constitutional interpretation. Importantly, these approaches all imply that the context of divided societies necessitates a reading of the doctrines of constitutional supremacy and the separation of powers that would differ from their classical interpretations offered by Marshall and Kelsen. Contemporary scholars of democracy in divided societies instead approach the question of power-sharing as an issue which should be dealt with between representatives of societal groups, within constitutional branches, instead of emphasizing the division of power among state institutions. For instance, prescriptions for ethnic or sectarian power-sharing do not regard the judiciary as the primary counterweight to legislative majorities, but rather aim for institutional arrangements accommodating the counterweights within the given constitutional branches – like veto provisions within the legislative processes, reserved places in executive bodies, ethnic or sectarian quotas within judicial bodies, etc.

### *3.2.2 Negative argument: the limits of counter-majoritarian objections*

In the literature on the compatibility of constitutional adjudication and democracy, generally authors emphasizing the importance of democratic procedures and legislative sovereignty depart from a deontological approach towards democratic institutions, arguing for their intrinsic value regardless of the outcomes they deliver. This position naturally implies that constitutional adjudication and similar institutions limiting democratic decision-making are illegitimate. The core idea behind this approach is guaranteeing equality among citizens from the perspective of participation in democratic decision-making; in the account of Jeremy Waldron (one of the most ardent critics of constitutional adjudication), this position is also about rights, namely prioritizing participatory rights over guaranteeing other specified rights.<sup>38</sup>

Nevertheless, such a strong procedural position invites scrutiny on a number of possible ramifications. A commonly known objection to unrestrained parliamentary sovereignty is the warning against the possible tyranny of the majority, which claims that rights are necessary to protect those whose opinion, preference or interest have become the minority position from the excesses of majority caprice. Furthermore, proponents of judicial review also claim that certain rights hold a specific importance, so their guarantee should be beyond political contestation.

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<sup>38</sup> As Waldron puts it: “[...] judicial review should not be understood as a confrontation between defenders of rights and opponents of rights but as a confrontation between one view of rights and another view of rights [...] I am tired of hearing opponents of judicial review denigrated as being rights-sceptics. The best response is to erect the case against judicial review on the ground of a strong and pervasive commitment to rights” (2006, 1366).

From a proceduralist perspective, these objections can be met in two ways. First, by claiming that fundamental rights cannot be defined legitimately in any other way than through democratic procedures.<sup>39</sup> Second, by holding certain assumptions on the nature of political procedures, like the importance of deliberation preceding decision-making, the dynamic and self-correcting nature of democratic politics and the cross-cutting nature of cleavages. However, most of these are seldom present in contexts of deeply divided societies, where formal power-sharing is seen as one of the few, or the only viable institutional setup enabling democratic decision-making and preserving peace at the same time.

By defining the notion of ‘democracy’ Thomas Christiano highlights that equality in the democratic procedures, crucial to the validity of procedural accounts, can be understood in thinner as well as thicker concepts:

It may be mere formal equality of one-person one-vote in an election for representatives to an assembly where there is competition among candidates for the position. Or it may be more robust, including equality in the process of deliberation and coalition-building (Christiano 2015).

If asking the question whether certain democratic procedures can be legitimate with certain additional institutions – in this case constitutional courts – employing the latter reading can be more useful. Also, if one assumes that a deliberative process is present, and coalition-building before, after and in-between democratic decisions is possible, the case for unfettered proceduralism appears to be stronger compared to a situation where only the former assumptions are met, as these are likely to enable those self-correcting mechanisms of democracy which could meet the general objections against legislative sovereignty.

On the one hand, the process of deliberation enhances equality among individuals, by providing opportunities to influence the agenda of democratic decision-making; possibly extend the range of choices (either in terms of candidates or issues); and convince her fellow citizens with the force of stronger arguments. Therefore, the more empowered citizens are in deliberations preceding democratic decisions, the less elitist inequalities prevail (compared to settings with a more closed range of decisions), and the less likely unreasonable options are to appear as legitimate choices. In other words, the more stronger *arguments* matter, the less likely rights-violating decisions are

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<sup>39</sup> The following quote from Waldron gives a concise formulation for the heart of this argument: “[...] there is *something* appropriate about the position we are considering that the rights-bearers should be the ones to decide what rights they have, if there is disagreement about that issue – and something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard and too important to be left to the right-bearers themselves to determine, on a basis of equality” (2001, 251–52).

made. On the other hand, possibilities of coalition building – either before or after elections – decrease the danger caused by the tyranny of the majority: if one group's interests are gravely violated on one issue, the given group can still find partners along other issues and use its political capital to rectify its losses in the given issue. The division of a society on grounds of *ex ante* or *ex post* minority position is also employed by Waldron – in his distinction, these are labelled 'topical' and 'decisional' minorities (2006, 1397).

Democratic objections to judicial review applying in contexts of *homogenous* or *diverse* (but not *divided*) societies, governed by standardly adversarial democratic procedures are, however, a secondary concern for this argument, given my focus on *divided* societies. These considerations from proceduralist accounts on legislative sovereignty (e.g. Bellamy 2007; Waldron 2006, 1359–60), are nevertheless important for the assumption that these conditions are *necessary*, but *not sufficient* conditions for a complete objection to judicial review. Given the lack of these conditions in divided societies I argue that unfettered legislative sovereignty – especially in a sheer majoritarian form, without stipulations on qualified majorities in certain issues – cannot be justified in divided societies.

The core argument in this regard concerns the nature of societal cleavages in these settings. As the presence of 'coinciding' or 'mutually reinforcing' cleavages among societal groups is a core feature of settings where consociational power-sharing is implemented (Lijphart 1969, 221–22; O'Leary 2005, 20–28). On the one hand, this assumption explains why a consociational power-sharing is necessary – and why other, more open institutional settings might be unviable. As – borrowing the language of Waldron – *topical* and *decision* minorities cannot form alternating coalitions, democratic procedures lose their long-run mitigating effects. On the other hand, Lijphart argues that this societal structure reinforces the mechanism of elite accommodation:

Distinct lines of cleavage among the subcultures are also conducive to consociational democracy because they are likely to be concomitant with a high degree of internal political cohesion of the subcultures. This is vital to the success of consociational democracy. The elites have to cooperate and compromise with each other without losing the allegiance and support of their own rank and file. When the subcultures are cohesive political blocks such support is more likely to be forthcoming. (Lijphart 1969, 221)

Beyond blocking the possibilities of coalition-building, such a societal structure is also detrimental to the perspectives of deliberation, as the stronger the connection is between group membership and policy preferences, the more difficult it is for one individual to change her

preferences on a single issue, even if confronted by compelling arguments. In conclusion, the nature of societal divisions in contexts where consociational power-sharing is implemented does not allow any further assumption on the quality of democratic procedures beyond the ‘one person, one vote’ formula, for their impossibility of issue-based coalition-building and limited capacity to deliberate.

Moreover, in the context of divided societies, even ardent opponents of judicial review entertain the idea of considering it to be legitimate – or at least permissible. For instance, in the context of ‘diametrically divided’ societies (discussing the particular case of Belgium), Richard Bellamy acknowledges the lack of mitigating capacity on the side of democratic procedures (2007, 234–36). Furthermore, Waldron provides a more systematic approach by discussing the limits of legislative sovereignty. This has two implications for consociational regimes. First, in a more particular manner, he labels settings where decisional and topical minorities are aligned as non-core cases, where judicial review can be considered legitimate (Waldron 2006, 1401–6). This requirement applies to every context where a consociational method for power-sharing is employed.

Second, from a more general perspective, Waldron also elaborates certain conditions necessary for properly functioning democratic procedures. These are the following: legislative institutions elected by the adult population of a country are in “reasonably good working order”; judicial institutions function in a non-arbitrary way; a “commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights” is present; and the disagreement on rights is by nature “persistent, substantial” and is in “good faith” among people who care about rights (Waldron 2006, 1360). While some of these conditions (like the first and the last) are similarly present – or rather absent – in divided societies, others apply to a different degree for various consociational countries. For instance, a “commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights” or the non-arbitrary functioning of judiciary institutions can be present in countries with lasting liberal traditions and a decent record concerning the rule of law – like Belgium, for instance. Nevertheless, these are present to a smaller degree in post-conflict settings, or contexts with a history of systemic discrimination against one or more groups. In this regard, considering that consociational power-sharing is often implemented in post-conflict settings suggests a correlation between the introduction of this power-sharing method and the diminished presence of these crucial background conditions (A. Schwartz and Harvey 2012, 138–44).

### 3.2.3 Positive argument: *persistent minorities, rectifications and insurance mechanisms*

After providing a negative argument – i.e. why procedural objections against judicial review do not apply in the context of divided societies – I also aim to offer a positive proposition on why judicial review is *necessary* in these settings. Nevertheless, in this regard my analysis will go beyond purely intrinsic considerations and will employ a dualistic account on political authority, offered by Thomas Christiano. His theory is chosen for two reasons. First, his special attention towards the so-called persistent minorities – a concept explicated later in a more detail – includes a number of considerations that should be taken into account by investigating divided societies. For this reason, among the democratic theories addressing ‘standard’, homogenous or diverse social contexts, this theory is among the most easily applicable approaches for divided societies. Second, Christiano also aims to justify democratic institutions on procedural grounds, however, he acknowledges that this strategy might have limitations (primarily for the presence of ‘persistent minorities’), therefore certain instrumental elements are necessary to *complement* his primarily proceduralist account.

The core features of Christiano’s theory are outlined below, followed by an analysis of their applicability in consociational contexts. For three specific reasons – the pervasive effects of possibly wrong institutional choices; the protection of groups which are not salient enough to be politically empowered; and the protection of internal minorities within the groups – I argue that certain conditions in social settings where consociational power-sharing is employed make constitutional review particularly necessary and justified. This dualistic theory on democratic authority is chosen for its special attention towards coinciding cleavages while focusing on the phenomenon of *persistent minorities*. The similar type of cleavages Christiano sees challenging in *diverse* societies are much more broadly present in *divided* societies governed by consociations. Therefore, while agreeing with Christiano’s on his diagnosis pertaining to social cleavages, a different type of solution is proposed here, adjusted to the different environment.

Christiano’s argument departs from a proceduralist basis, with the assumption democratic procedures are justified for their intrinsic value. According to Christiano, in normal settings (where, for instance, all of Waldron’s general requirements are met) a person has good reasons to accept democratic procedures even if she does not agree with the outcome given that certain conditions are met, like the flexibility of the procedures (meaning that political decisions can be



overridden at different points of decision-making), the possibility to deliberate political issues or effective equality in participation. From all the above dimensions, probably the most striking issue is the flexibility (or reversibility) of decisions; in other words, those who lose today, can easily become the winners tomorrow, given the procedures are properly regulated. In this regard, the above discussed constraints on coalition-building appear again as a key factor rendering democratic procedures in these settings incomplete.

However, even in settings where all the core procedural requirements are met, certain groups are consistently in a worse-off position after democratic decisions, for the fact that beyond being in a minority position, a number of coinciding cleavages separate them from the rest of society. In Christiano's language this is described as being different in a 'highly salient way' and having a 'global' scope in their difference. Furthermore, two other defining features are mentioned: they can only reach their goals by compromise, and there is always a societal group which could dominate the other(s) by the rule of majority (1994, 173–74).

Three strategies are identified for overcoming the problem, and Christiano regards the third as the most favorable. The first is the so-called *resourcist-instrumentalist* approach. The departure points of this position are similar to the basic premises of proceduralist justifications: in the case every citizen has equal resources for participating in the democratic procedures, the outcomes are justified by the procedure. In this framework, the democratic procedure is understood in two steps: public deliberation and political decision. In the former aspect, access to information and freedom of expression is crucial, while in the latter, universal suffrage and fair electoral design is necessary. If this equality cannot be provided, additional measures are needed on instrumentalist grounds, supplementing the proceduralist account by addressing the inequalities persistent minorities suffer from. The second approach can be seen as the opposite of the resourcist account: the *pure outcome view*, which represents the instrumentalist approach in this comparison. Here the treatment of persistent minorities should be delivered in the way which guarantees the best possible outcome, regardless of how open, egalitarian, etc. the procedure itself is. From the classical theories on judicial authority, the former position resembles views which aim to correct and reinforce democratic procedures; while the latter gravitates closer to the rights-centric accounts of legitimacy.

The third option, *moderate proceduralism*, advocated by Christiano, rests on very similar foundations as the resourcist-instrumentalist approach, notably attributing intrinsic value to

democratic procedures alongside acknowledging their shortcomings. The main difference between moderate proceduralism and the resourcist-instrumentalist approach is the way legitimate outcome is defined: while the resourcist-proceduralist view emphasizes the equality of resources in democratic participation, the moderate proceduralist view sets a threshold, which has to be met; if it is not, supplementary measures are needed on instrumentalist grounds. This threshold is called the *minimum outcome standard*, which “specifies that a group of people is being treated unjustly when its interests are not being satisfied above a threshold” (Christiano 2008, 297).

By evaluating the applicability of this concept in a consociational setting, one might turn again to the definition which stipulates that “[o]ne group is considerably larger than the others so that it may be able to dominate in majority rule without compromise with any of the others” (Christiano 1994, 173–74). Though in some cases none of the ethnic or religious groups can claim majority, the problem of persistent minorities is still salient, for two reasons.<sup>40</sup> The first is that no permanent majority is needed to disenfranchise an ethnic, religious or social group: for instance, permanent coalitions of groups based on interest, or relative cultural proximity can leave one or more groups in a permanently disenfranchised situation. The other reason is the close connection between group membership and policy preferences: while in settings where ethnic or religious identities do not play an important role, democratic decisions can be made according to a centripetal logic, where different positions can get closer through deliberation or compromise. Nevertheless, in contexts where most policy issues are connected to the existential survival of a group – be it educational policy, infrastructural projects, etc. – only inter-group compromise is possible, but programs appealing to citizens belonging to other groups cannot transcend the cleavages.

As the structural conditions of divided societies suggest that the analytical tool of persistent minorities is useful in a differently understood way, the solutions offered by Christiano can also be reconsidered taking the difference between diverse and divided societies into account. First, the *resourcist-instrumentalist* approach is particularly useful in explaining how the classically understood consociational regimes function: those groups which would be normally limited in

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<sup>40</sup> In this regard, societies governed by consociational power-sharing represent different cases: while in Belgium and Northern Ireland – both with two dominant-sized groups – there is a majority group, in Bosnia and Herzegovina and Lebanon there has been no group historically in this position; nevertheless, the demographic trends in both countries are pointing towards one group obtaining this status.

simple majoritarian polities are empowered by veto licenses and constitutional stipulations to be included in grand coalitions. Though the consociational form of power-sharing itself invites a wide range of critics who – among other objections – challenge the overall democratic nature of these regimes (e.g. Barry 1975; Lustick 1997; van Schendelen 1985), these are secondary concerns for this argument. From the perspective of judicial legitimacy, the resourcist-instrumentalist approach simply creates certain tasks that are typically fulfilled by constitutional courts, primarily ruling on procedural matters, pertaining to electoral as well as legislative politics. Second, the *pure outcome* view would be the strongest argument in favor of judicial authority, however, it can also be challenged through a number of general and context-specific objections. Beyond the moral cost of discarding democratic values, Christiano also appeals to the limits of rational choice theories, illustrating the difficulty of establishing a single metric for evaluating outcomes. Moreover, the deeper the societal divisions are, the more difficult it is to establish standards for equal outcomes, given the divergent views on fundamental values and interests (A. Schwartz and Harvey 2012, 138–44).

Finally, moderate proceduralism is an approach mostly describing the way constitutional democracies in diverse societies function: the polity's life is governed by standard democratic procedures, and certain vulnerable groups are protected by special measures. In itself, this view would have problematic applicability in consociational settings: if one holds the assumption that standard, unregulated democratic procedures cannot work in settings otherwise governed by consociational devices, the unviability of democratic decision-making just leads to outcome-based decisions, providing the established minimal outcome for every group. Therefore, constitutional courts have an important role according to this approach: if democratic procedures work, this role is supplementary; if they do not, it is central.

Nevertheless, at this point one can contemplate the possible combination of the first and third approaches: on the one hand, groups are brought into an equal position according to the resourcist-instrumentalist approach, but the range of possible political decisions is still constrained by established minimal outcome standards. However, the question can be raised at this point: if consociational measures make groups equal in the decision-making process (or at least endeavor to do so), why should the rectified democratic procedure be constrained by the minimal outcome standards? In general, three answers can be given: the insurance against failed measures; the protection of internal minorities; and the protection of politically non-salient groups.

The first two issues are largely interlinked. As consociational mechanisms aim to mitigate the possible ramifications of purely majoritarian mechanisms in deeply divided societal contexts, substantial veto-rights are assigned to segmental elites, and representatives of smaller groups are brought into a better bargaining position through stipulations on grand coalitions.<sup>41</sup> This allows the protection of vital interests – as perceived by the group elites – but in case certain members of a group feel deprived of certain vital rights, finding political rectification is extremely cumbersome, given the otherwise pervasive effect of group membership on the whole polity's level. In this regard, establishing minimal outcome standards can help rectify injustices resulting from poor institutional design. These can be cases where the political procedures established to provide resources for every group are not assigned to the appropriate groups, for various reasons: either because group boundaries are not properly delineated by the institutional framework; or the institutional setup did not account for multi-level identities; or there are certain groups with a distinct identity, but too small for political recognition – for various reasons, these deserve specific attention.

These ethnic or religious groups which share most characteristics of persistent minorities, and for various reasons – usually their limited size – are not included in the governing mechanisms of power-sharing, can be understood as the minorities among the minorities, and practically every consociational setup has at least one of these groups: Germans in Belgium (even though they have certain self-governing rights), Jewish and Roma citizens of Bosnia and Herzegovina, immigrants from former British colonies in Northern Ireland or people of Polish ancestry in Lebanon. On the one hand, these groups are similarly marginalized as persistent minorities in diverse societies, on the other hand their situation is even more difficult: as power-sharing along ethnic and religious cleavages increases the saliency of differences derived from these divisions. Furthermore, a good share of consociational power-sharing mechanisms (especially the so-called corporate consociations)<sup>42</sup> not only organize political participation along societal divisions, but

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<sup>41</sup> Christopher McCrudden and Brendan O'Leary describe the phenomenon in the following way: "An individualized and majoritarian conception of equality is undoubtedly put under pressure by consociation, but consociationalists seek to further equality between consociated peoples and groups. They do not presume that there is one demos in which majority rule would be legitimate. Parity (in power-sharing) and proportionality (in representation, institutions, and allocations) of peoples may conflict with individualized and majoritarian conceptions of equality, especially when the latter presumes the existence of just one people" (2013b, 483).

<sup>42</sup> In *corporate* consociations, political power is dispersed among the most salient groups, which are usually constitutionally defined, and have clear representative quotas in state institutions and political decision-making bodies. Its main alternative is the *liberal* consociational model, which aims to arrange institutions in a way that imposes cooperation on the actors, but does not necessarily name the relevant groups, but find alternative ways, e.g. distributing cabinet seats by the proportion of parliamentary seats. However, these considerations can be applied

also pre-determine the representative share of specific groups. This means that groups not included in the main power-sharing mechanisms are also blocked from gaining representation by other means, for instance coalition-building, or formulating their political programmes in a way that appeals to other groups. Therefore, ensuring certain minimal outcome standards is even more striking in the case of politically marginalized groups in consociations, compared to similar groups in more adversarial democracies situated in diverse societies.

### 3.2.4 *The case for constitutional review in consociations*

This chapter offers a negative and a positive argument in favor of the legitimacy of judicial review in consociational settings. According to the former, as the necessary conditions for ordinary democratic procedures are not present in deeply divided societies – where consociational power-sharing is implemented – judicial review is *permissible* despite its counter-majoritarian character. Importantly, these conditions are identified by ardent critiques of judicial review. Nevertheless, the permissibility of judicial review does not necessarily lead to the conclusion that it is the best way to address the shortcomings of democratic politics in power-sharing contexts.

My positive claim is formulated in this search for alternatives, employing the framework of Thomas Christiano's democratic theory, which explains the rationales behind procedural adjustments and minimal outcome standards in consociations. The former entail certain consociational devices, providing procedural resources for ethnic or religious groups, like mutual veto provisions or grand coalition requirements; these measures already imply the necessity of an institution adjudicating matters regulated by constitutions. Nevertheless, the stronger claim for the necessity of judicial review is rooted in the indispensability of certain minimal outcome standards, for the following reasons: the pervasive effects of possibly wrong institutional choices; the protection of groups which are not salient enough to be politically empowered; and the protection of internal minorities within the groups. In order to uphold minimal outcome standards addressing these challenges, an actor ruling on the respect or breach of these standards is necessary. Assigning this role to the judiciary appears to be logical because special mechanisms to protect these minimal outcome standards are necessary to deal with situations where the legislative and executive branches failed to respect them.

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only in a limited range of issues (like political decision-making), but for other constitutive elements of consociationalism, like proportionality in public offices or segmental autonomy, the corporate logic is indispensable.

These arguments have implications both for the literature on constitutional review and power-sharing in deeply divided societies. From the perspective of the counter-majoritarian difficulty, the empirical limits of critical positions on judicial review are demonstrated by pointing to settings where their necessary conditions are least likely to be met. From the angle of power-sharing in deeply divided contexts, my primary purpose is to demonstrate that beyond the supposed ‘functional affinity’ among consociationalism and constitutional review (A. Schwartz and Harvey 2012, 134) a deeper structural linkage can be found between them. In the established literature, some (most prominently: McCrudden and O’Leary 2013a) argue that due to the general importance of constitutional courts in protecting human rights, a pragmatic balance between dynamic elite consensus and constitutional supremacy has to be found to accommodate constitutional review in these regimes. Nevertheless, from my normative premises I arrive at the conclusion that due to the peculiarities of consociational regimes, the rationale behind constitutional review in consociations is more compelling compared to democracies in homogenous or diverse settings. This I offer as a normative reference point for all further institutional inquiries on this issue.

## PART II: Constitutional Review in the Consociations of Belgium, Bosnia and Herzegovina, and Northern Ireland

While the necessity of constitutional adjudication in consociations is a claim supported both by normative and empirical arguments – in the former case, by the above presented position, in the latter by most of the established literature, discussed in 1.2 – the question of what kind of constitutional adjudication fits consociational regimes is not yet fully explored. Most of the major works in the field agree on the importance of individual rights – which are compromised in certain segments of consociations – but also share two pragmatic concerns about promoting these by judicial means. One is related to the legitimacy of institutional reforms: authors agree that the liberalization or ‘unwinding’ of consociational institutions through agreement among political elites can end in more lasting solutions (Issacharoff 2012; McCrudden and O’Leary 2013a, 148).<sup>43</sup> The other issue pertains to the stability of the respective regimes: in this regard, a concern is shared about the potentially undermining and destabilizing effects of assertive judicial decisions.

The second part of the dissertation contributes to these debates by including three polities, and sixteen judicial cases or controversies in a single comparative framework, broadening the empirical scope of analysis. As decisions related to institutional questions were selected for analysis, both concerns can be put under scrutiny. First, by analyzing the history of constitutional politics in three consociations, the assertive or deferential decisions of the courts can be interpreted from a regime-level perspective. In other words, in consociations with relatively flexible constitutional frameworks – where elites demonstrated a capacity to agree on reforms – unwinding decisions can be seen as particularly assertive, while to a lesser degree in settings with highly rigid institutional structures, where courts step up as driving forces behind institutional reforms. Second, by analyzing the impact of multiple decisions across consociations, a more nuanced image emerges on the role of courts in consociations, beyond the unwinding-deference dichotomy.

*Part II* of the dissertation consists of three case studies on constitutional review in the consociations of Bosnia and Herzegovina, Northern Ireland, and Belgium. For its influence on the comparative literature, first Bosnia and Herzegovina is discussed (*Chapter 5*), followed by the

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<sup>43</sup> Unfortunately, in these works it remains rather unclear if the authors have a normative or a sociological approach to legitimacy; though the broader context of their works suggests the latter, it does not become explicit in their discussions.

other post-conflict consociation, Northern Ireland (*Chapter 6*), and finally Belgium is addressed (*Chapter 7*). Nevertheless, first the case selection and research design choices are presented, while the cross-case patterns are analyzed in the final, concluding chapter of the dissertation (8).

#### **4. Empirical research design**

The following short chapter has two primary objectives. The first is explaining the reasons behind *what* is included in analysis, regarding both the polities as well as the specific judicial decisions under scrutiny; these are addressed in section 4.1. Second, outlining how the cases on both levels are analyzed (4.2). Furthermore, the interpretive methods and strategies occurring with a greater frequency across the three polities are shortly introduced, together with their particular relevance for divided societies (4.3).

##### *4.1 Case selection*

The purpose of the empirical research is to broaden the body of comparative literature, it therefore has primarily descriptive or exploratory ambitions (Gerring 2012), but also the potential to identify causal patterns. First, broadening the body of comparative works means giving accounts of judicial cases and histories of constitutional courts along the core concepts developed in comparative works on constitutional courts in consociations. Second, the broadened empirical material enables the revision of the taxonomies established in the comparative literature. Third, it also allows testing the established hypotheses in the light of broader empirical evidence, and to reformulate them, or formulate new ones. Given the number of potential cases and the way court cases and institutional histories can be compared, a small-N research design is developed, focusing on constitutional courts; in other words, the unit of analysis is constitutional courts, while the primary unit of observation is court decisions. Though sophisticated methodological guides are available for designing comparative case studies (e.g. Bartlett and Vavrus 2016; Rohlfing 2012; Seawright and Gerring 2008; Yin 2009), due to the limited universe of cases, none of the standard case selection techniques can be applied. Instead, following the objective of broadening the empirical coverage of the comparative study, I aim for maximal inclusivity within the scope conditions.



Three scope conditions are established. First, the given country, region or other entity should be clearly a case of consociational power-sharing, displaying all four elements of the ‘consociational package’ (proportionality, grand coalition, mutual veto, segmental autonomy). Second, the given polity should have an established constitutional review mechanism, situated within the entity. Third, whether the mandate of upholding constitutional superiority is either assigned to an ordinary or administrative court, or a specialized constitutional court is established for this purpose, the given body should meet the minimal requirements of judicial independence (see: MacDonald and Hoi 2012).

In the potential universe of consociational cases (following the suggestions of: Andeweg 2000; Bogaards, Helms, and Lijphart 2019; and Taylor 2009) four cases meet all these criteria: Belgium, Bosnia and Herzegovina, Northern Ireland, and Lebanon. Though the research design principles suggested maximal inclusiveness, Lebanon was ultimately not included for academic and logistical reasons. In the former regard, the scholarly literature on the Constitutional Council of Lebanon was lacking, making the country’s inclusion in such a comparative framework problematic.<sup>44</sup> In terms of logistics, the prolonged crisis around the country’s electoral reform (postponing the 2013 elections to 2018) and frequent unrest in the country during the data collection period prevented bridging the gaps in the academic literature and available data by fieldwork and interviews. Furthermore, certain polities were not included for their shortcoming in one of the scope conditions. For instance, Burundi would qualify as a consociation with a constitutional court; nevertheless the Constitutional Court of Burundi displayed a clear lack of independence in key decisions (Vandeginste 2015, 626–27). South Tyrol is also widely regarded as a consociation, with sufficiently independent institutions, nevertheless the region lacks a constitutional court (or functional equivalent) embedded in the consociational power-sharing architecture (Alcock 2001; Wolff 2004).

Following these considerations, the explorative analysis of the dissertation’s empirical part compares Belgium, Bosnia and Herzegovina, and Northern Ireland. Including corporate and liberal, as well as post-conflict and evolutionary consociations, centralized and decentralized regimes of judicial review in (federal) sovereign countries as well as a devolved unit makes this

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<sup>44</sup> Importantly, this means a limited number of works only on the Constitutional Council, while a rich body of academic literature is available both regarding the Lebanese consociation in general (e.g. Bogaards 2017; 2019b; Hamdan 2013; Knudsen and Kerr 2013; Mackey 2006; Nagle 2016; Rosiny 2015; Salamey and Payne 2008; Salloukh et al. 2015), and the country’s constitutional politics in particular, especially constitution-making and procedures of constitutional revisions (Bali and Lerner 2017; Donohue 2008; Farha 2017; Mallat 1994).

comparative study an analysis of diverse cases, increasing the generalizability of common patterns. From the perspective of the analysis, one important common trait is shared: all three polities are under the European Convention of Human Rights (ECHR), influencing judicial reasoning in all three cases, to a different degree though.

In the analysis, court decisions are considered to be the primary empirical source, complemented by interviews and secondary sources. In the cases of Bosnia and Herzegovina and Northern Ireland, due to the temporal distribution of cases, and the range of issues addressed, the focus is on the court decisions, while regarding Belgium, a larger emphasis is placed on interviews and secondary sources, given the fact that all the five court decisions meeting the selection criteria are focusing on one issue, the Brussels-Halle-Vilvoorde (BHV) controversy (with its background introduced in *Chapter 6.2*).

By all countries, the entire historical record of the respective courts was considered, and selection of cases is based on their relevance to the consociational method of power-sharing. In this regard, questions related to *institutions* and *procedures* are prioritized over matters of *implementation* and *policy*, unless the latter cases have a specific impact on decisions pertaining to the former issues. Therefore, cases displaying uniquely consociational dilemmas (e.g. by their relevance to power-sharing formulas) were prioritized over issues that have precedents in other multiethnic or multinational places (e.g. discrimination in employment). In broad terms, considering the elements of Lijphart's 'consociational package' (1977, 25), this entails a priority given to cases related to grand coalition and mutual veto, while less to proportionality or segmental autonomy. Nevertheless, through the case selection process decisions related to all of them were considered, and only proportionality-related cases were missed from the analysis (for reasons discussed below).

The selection of judicial cases happened in a three-step procedure. First, the relevant scholarly literature was surveyed, focusing on the case record of all three constitutional courts or courts exercising judicial review. In this survey, potential cases were identified based on their subject-matter.<sup>45</sup> Second, through the reading of cases, references to similar cases or precedents were also

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<sup>45</sup> In their comparative works, Christopher McCrudden and Brendan O'Leary (2013a) and Stefano Graziadei (2016; 2017) offer insights related to both the Belgian and Bosnian consociational settlements. Beyond these, Sujit Choudhry and Richard Stacey (2012), Sheri Rosenberg (2008), Alex Schwartz and Melanie Janelle Murchison (2016), and former international judge Joseph Marko (2004) provide an overview on the adjudicative practice of the Constitutional Court of Bosnia and Herzegovina. Considering the case record of the Belgian court, the works of Patrick Peeters (2012), Peeters and Jens Mosselmans (2009; 2017), Patricia Popelier and Josephine De Jaegere (2016), Popelier and Koen Lemmens (2015), and Popelier and Win Voermans (2014) were used as primary sources. The case literature on Northern Ireland includes the works of Gordon Anthony (2002; 2014), Kieran McEvoy and Alex

considered, in case these decisions covered a relevant subject-matter. Following these, in the third step, the constitutional courts or judges were contacted, and asked about potentially relevant decisions.<sup>46</sup>

Considerably different pictures emerged in the three polities. Due to peculiarities in its position within the political system – primarily the fact that the Constitutional Court can rule on all institutional matters, including constitutionalized provisions – the Bosnian consociation witnessed a number of highly salient court cases through its over two decades-long history, especially in the first years. For the international community’s involvement in the power-sharing settlement’s establishment and maintenance, as well as the institution’s international character, reviewing the Court’s case record was a relatively easy task even following the first step.

The Northern Irish case also demonstrates a rich adjudicative record, with an academic literature primarily focusing on the judicial decisions. Therefore, finding relevant cases was similarly straightforward; furthermore, as the Northern Irish courts referred to earlier cases with a greater intensity, the second phase of case selection had a larger importance. The temporal distribution of the cases related to the implementation of the Good Friday Agreement is similar to the one observed in Bosnia, involving numerous decisions through the years after the peace agreement, followed by a largely passive period in terms of constitutional litigation.<sup>47</sup>

Finally, selecting judicial decisions related to the Belgian consociational institutions has been the most challenging, given the evolutionary character of the power-sharing settlement (Deschouwer 2013; Swenden, Brans, and Winter 2006) and the highly prudential behavior of the Constitutional Court (Peeters 2012; Popelier and Lemmens 2015). Though all three phases of data-gathering were carried out, few cases were found with a similar relevance to the ones under scrutiny in Bosnia and Herzegovina and Northern Ireland. Beyond a small number of relevant and important decisions, the analysis of the Belgian court’s adjudicative practice relies on

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Schwartz (2015), John Morison (2009), Morison and Marie Lynch (2007), Schwartz (2012), and Schwartz and Colin Harvey (2012).

<sup>46</sup> With this purpose, a meeting with clerks of the Constitutional Court of Belgium, Etienne Peremans and Willem Verrijdt was arranged on June 20, 2018. Given the differences in the regulations, an opportunity was also given to interview Justice Lord Kerr, former member of the High Court of Justice in Northern Ireland, Court of Appeal in Northern Ireland, and former Justice at the UK Supreme Court (between 2009 and 2020, the first member of the UK Supreme Court from Northern Ireland) on June 11, 2018.

<sup>47</sup> Based on interviews with stakeholders, John Morison and Marie Lynch (2007, 129-31) claim that the intensity of litigation connected to the Good Friday Agreement has been under expectations – largely due to relatively deferential approach embraced by the Northern Irish and Westminster judiciary (discussed in *Chapter 6.3*)

scholarly literature and some large-N analyses (Popelier and Jaegere 2016; Popelier and Voermans 2014) to a greater extent. In this case, secondary sources and interviews are particularly important given the fact that the phenomenon under scrutiny is not a different pattern of decisions, but the very lack of similarly observable empirical instances compared to the two other polities in the analysis.

Altogether, sixteen cases are included in the analysis: six from Bosnia and Herzegovina, five from Northern Ireland and five from Belgium. Out of these, nine cases are addressing challenges related to central (i.e. polity- or nationwide) power-sharing institutions, so equality- and discrimination-related question pertaining to essentially consociational institutions. Furthermore, the three cases dealing with local power-sharing are all related to the governance of multiethnic or multilingual capitals (one case on Sarajevo and two on Brussels). Two cases are dealing with further institutional questions which are not directly covered by Lijphart's formula of consociational power-sharing, but significantly influence the polity's constitutional character. In Bosnia and Herzegovina, the *Constituent Peoples (U-5/98)* decision (Section 5.3) ruled on the binding effect of federal constitutional norms on the entity constitutions, extending the effect of group constituency to the constitutional order of the entities, strengthening the federal power-sharing settlement – and also limiting segmental autonomy in a way. In Northern Ireland, the two applications related to the Northern Ireland Human Rights Commission (from 2001-02 and 2018, Section 4.5) were about the potentially increased involvement of human right bodies established by the *Northern Ireland Act (NIA)* as well as the judiciary. Finally, two cases are related to the implementation of peace agreements: *Places Name (U-44/01)* from Bosnia and Herzegovina and *Williamson's application* from Northern Ireland. The former was included because an entity's symbolic public law measure (renaming numerous municipalities) was annulled due to specific sections of the peace agreement. Though the latter was related to a specific judicial decision, it was included for the interpretive standards it has set, which has been highly influential on later decisions.

While numerous academic works have reviewed antidiscrimination jurisprudence in the three polities (e.g. Anthony 2014; Popelier and Jaegere 2016; Rosenberg 2008; Schwartz 2012), these were not dealt with, for their limited relevance to the procedures and mechanisms of consociational power-sharing. One case can be mentioned as an exception: in *Parson's application for judicial review* (2002-03), a Protestant police candidate challenged the outcomes of the selection process, as he met all requirements, but was not enrolled partly due to the policy promoting a

greater balance of police members from a Catholic background ('treated as Catholic' in the legislative language; Topping 2008).<sup>48</sup> This case was considered for the centrality of police reform in the Northern Irish peace process – which has been one of the key issues in the Belfast Agreement's most major revision, the St Andrews Agreement of 2006 – however, the political salience of the question did not appear in the litigation. Instead, both the arguments and the judicial reasoning treated the issue as an antidiscrimination case, mostly mobilizing ECHR jurisprudence, ultimately defending the legitimacy of differential treatment and rejecting Parsons' application. In other words, though *Re Parsons* had the potential of becoming a politically important case, none of the parties handled it in that way.

#### 4.2 Analytical focus points

In broad terms, the analysis of the cases is guided by three primary questions. First, do the strategic choices of courts confirm the directional expectations laid down in the relevant literature? This is particularly important in cases not covered by the closely relevant literature. Second, how have courts balanced between upholding constitutional supremacy, and – often strategic – judicial deference? Third, closely related to the former question: what kind of sources have the courts employed in their reasoning? In other words, *what kind* of decisions have courts made and *how* have they made these rulings?

The first question is addressed through the conceptual framework provided by the earlier works on the topic (in chronological order: Issacharoff 2004; Pildes 2008; McCrudden and O'Leary 2013). In the established literature, the core concern has been the question whether constitutional courts in consociations respect the autonomous dynamics of power-sharing settlements through deferential behavior, or do they seek to proactively 'open up' or liberalize – in other words, 'unwind' – consociational institutions? In this regard, the various cases are

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<sup>48</sup> As part of the Belfast Agreement's implementation, an expert committee led by the former Governor of Hong Kong, Chris Patten made recommendations to improve the new Northern Irish police body's (Police Service of Northern Ireland or PSNI) legitimacy; these included improving the share of Catholic members of the body. When the report was issued, Catholics consisted only 8% of the police personnel, despite their 40% share in the population. The so-called Patten Report (1999) therefore recommended that until the share of Catholic servicemen reaches 30%, half of the newly enrolled policemen should come from this background. In Parsons' case ([2002] NIQB 46, [2003] NICA 20), 553 applicants met the requirements, and ultimately 308 were enrolled: 154 from a Catholic and 154 from a non-Catholic background ([2003] NICA 20, para 6). Based on merit, Parsons was ranked at number 514 in the overall list, while at number 370 among the 399 non-Catholics ([2003] NICA 20, para 7). Though a number of non-Catholic candidates were more qualified than him, the core of his complaint was that 10 of the Catholic applicants had lower scores than him ([2002] NIQB 46, para 18).

compared with a further dimension: namely how the courts' strategic choices relate to the established *status quo*? By either taking sides in a debate or blocking a mutually agreed decision do courts promote their own human rights-centered agenda – as most of the literature suggests – or do they simply preserve the established *status quo*? The analysis of the cases demonstrates that a further consideration has to be added to the dichotomous view on unwinding or deferral; namely that courts often act as *reinforcers* of consociations, buttressing weakened institutional elements.

The second question is closely linked to the former, nevertheless addresses a somewhat different aspect of judicial choices. While the strategic considerations investigated by the established literature pertain to the *impact* of judicial choices on the character of these regimes, focusing on the issue of constitutional supremacy points to the primary feature of constitutional adjudication, “defend[ing] the normative superiority of the constitutional law within the juridical order” (Stone Sweet 2012, 817). In this regard, the primary question is whether courts make their decisions in the name of constitutional supremacy, regardless of the impact of their decisions, or can one observe an *explicit* deference towards the autonomy of political procedures? Empirically, this can be investigated from two angles. First, if courts take confrontations with political elites in order to uphold constitutional norms. Second, if the court chooses a self-restrained approach, does it happen by remaining silent on certain issues, or do they embark on or embrace specific avenues of constitutional interpretation to reconcile constitutional supremacy and an appreciation for the sensitivity of power-sharing dynamics? In this regard, the analysis concludes that across cases, constitutional courts in consociations employ a specific toolbox of interpretive approaches (discussed in the following section), tailored to the needs of power-sharing institutions and a social context of social divisions.

The third aspect addressed in the analysis of cases focuses on a specific aspect of constitutional supremacy, the sources used by courts in their reasonings. This bears particular importance for the predictability of judicial behavior. The more limited and the more consistent courts are in their use of sources or references, the more political actors can develop reasonable expectations on judicial involvement. Beyond influencing the potential intensity of judicial involvement, this also influences the way political actors legislate and make other decisions, anticipating potential judicial responses. On the other hand, the more diverse and the less consistent courts are in defining their guiding norms, the less can political actors make decisions taking constitutional supremacy into account, and the more likely are confrontations with the judiciary.

### 4.3 Recurring interpretive methods<sup>49</sup>

Before turning towards the case studies, some approaches to constitutional interpretation, recurring with a great frequency across jurisdictions, are briefly presented. Through the various judicial decisions, three different approaches appear with greater frequency, and to some extent all of them are suitable for specific aspects of governing divided societies. These are: purposive interpretation, proportionality analysis and the use of the political question doctrine. The difference in contexts where these doctrines are used also implies an important variations between the polities under scrutiny. For instance, proportionality analysis is more common in European countries and is ‘systematically applied at the ECtHR’ (Sajó and Uitz 2017, 408), which explains its use in the Bosnian court – a body where 3 members are appointed following the ECtHR’s recommendations. On the other hand, as the political question doctrine is rooted in Anglo-Saxon legal systems (M. Tushnet 2002), it can be more expected to appear in a common law jurisdiction such as Northern Ireland.

Purposive constitutional interpretation aims to find a ‘proper’ instead of a ‘true’ meaning for constitutional provisions (Barak 2006, 123) – i.e. it asserts that specific questions and situations require an approach that suits their peculiarities.<sup>50</sup> In the definition of Aharon Barak, the notion of ‘purpose’ can be understood as the set of “values, goals, interests, policies, and the aims that the text is designed to actualize. It is the function that the text is designed to fulfil” (2007, 89). The application of purposive interpretation has a particular advantage in managing the institutional affairs of post-conflict settings, where the goals of reconstruction and reconciliation can serve as a commonly accepted reference point.

Proportionality analysis can be defined as the ‘rights-centred balancing of constitutional interests’ (Sajó and Uitz 2017, 408). Its departure point is that the limitation of a constitutional right can only be legitimate if it meets the requirements stipulated by a proportionality test, which, in its widely understood form includes the following elements (Barak 2012, 739; Sajó and Uitz 2017, 410). First, the legal norm violating constitutional norms serves a legitimate purpose. Second, there should be a rational connection between the purpose and the measure in question. Third, the measure is necessary – i.e. no less burdensome measure exists. Finally, the measure is proportionate, where the court investigates the balance between competing constitutional

<sup>49</sup> An earlier version of this overview was offered in an article by the author (Gal 2020, 600–601).

<sup>50</sup> For instance, in the interview with Justice Lord Kerr (June 11, 2018), the “contemporary needs of the [Northern Irish] society” were mentioned among the key considerations in adjudicating sensitive matters in the region.

interests. Importantly, the balancing exercise requires some kind of common denominator (Sajó and Uitz 2017, 414; Schlink 2012, 720) – which again appears to be a more easily addressable question in settings where the goals of reconstruction and reconciliation can serve this purpose. Furthermore, Moshe Cohen-Eliya and Iddo Porat argue that through applying proportionality analysis, courts can emphasize “facts and questions of degree rather than principles and categorical distinctions”, therefore “moderat[ing] the rhetorical exaggeration that characterizes the presentation of [rights] claims in the political sphere” (2013, 106).

Finally, the political question doctrine refers to the idea that for certain reasons an issue should be solved by elected bodies, therefore a court refuses to handle it. These reasons could be: the difficulty of finding a principled resolution to the issue; the stakes of the decision; a potential clash between governmental branches as the result of the decision, including the possibility of ignoring the judicial resolution; and the ‘self-doubt’ of the judiciary, emanating from its lack of democratic mandate (Bickel 1986, 184). The term originates from common law jurisprudence, and can be considered less influential nowadays (M. Tushnet 2002). However, this approach to sensitive questions is compatible with the recommendations outlined in the literature on constitutional adjudication in divided societies (Lerner 2011; McCrudden and O’Leary 2013a) which argue that the most controversial issues in these contexts have to be left to the political elites. The doctrine’s relevance for consociational settings is also highlighted by McCrudden and O’Leary, who – in their criticism of certain assertive ECtHR decisions – argue that

Perhaps what is required is a political question doctrine – one that encourages political and legislative resolution of controversial questions, and which urges modest restraint upon future courts. Unfashionable though it has recently seemed in the country of its birth, this doctrine might be profitably emulated in Strasbourg in these cases. (McCrudden and O’Leary 2013a, 116–17)

In sum, the most frequently employed interpretive methods across jurisdictions share two important common traits: an emphasis on context-sensitivity at the expense of categorical, universal answers; and an inherent acknowledgment of the salient political stakes in the relevant cases. The frequent use of these methods suggests that *how* these courts make their decisions largely meet the recommendations in the relevant literature on *what* strategies they should pursue.



## 5. Bosnia and Herzegovina

The first polity discussed in the analysis is not the oldest functioning consociation (which is Belgium), but the one most influential on the works addressing the nexus of consociationalism and constitutional adjudication, Bosnia and Herzegovina. By looking at cases heard by the Constitutional Court of Bosnia and Herzegovina through a constitutionalism-centered analytical angle (discussed in *Chapter 4.2*), these relatively well-known cases can be seen in a new light, and also inform the analysis of Northern Ireland and Belgium, polities relatively overlooked in comparative works (particularly the former).

### *5.1 From co-existence to imposed cooperation: a brief history of the Dayton Constitution*

Though Bosnia and Herzegovina is a place with a long history of ethnic co-existence (Carmichael 2015) its recent history is unfortunately marked by ethnic violence, tensions, and malfunctional cooperative mechanisms, introduced – in other views: imposed – by external actors. The institutional architecture of Bosnia and Herzegovina was laid out in the peace agreement concluding the Bosnian civil war (1992-95) and attempts of major constitutional reforms have been unsuccessful to this date (Keil 2013, 143–54; Perry 2015), so the current institutional setup largely bears the marks of the civil war, which broke out in the wake of Yugoslavia's disintegration.

Before the war, Bosnia and Herzegovina was often referred to as the 'Yugoslavia within Yugoslavia', a multi-ethnic entity within the pluri-national state (Keil 2013b). In the increasingly nationalistic climate of the late 1980s and early 1990s, amid the gradual disintegration of Yugoslavia and following the secessions of Slovenia and Croatia, two referenda were held on the republic's status. First, the most widely supported party among Serbs, the Serb Democratic Party (SDS) organized a referendum on the territories with a Serb majority in November 1991. In the referendum, voters were asked about remaining within Yugoslavia or seceding as a Republic of Bosnia and Herzegovina; 98% chose the former, and in certain areas the 'Serbian Republic of Bosnia-Herzegovina' was declared in January 1992 (Rosenberg 2008, 339). The second referendum was organized by the Republic's government on 28 February-1 March 1992, also on Bosnia's independence. With a turnout of 63%, 99% voted for independence; Serb citizens either boycotted the referendum or were kept away from voting by paramilitary activists linked to the SDS (Ramet 2005, 10).

Sporadic violence broke out following the second referendum, and the conflict heavily intensified after Bosnia and Herzegovina gained international recognition as a sovereign state on April 6, 1992 (Bildt 2015; Ramet 2005; Rosenberg 2008, 339). The war lasted until the end of 1995,<sup>51</sup> claiming 97-105 thousand lives (according to the estimates of the Sarajevo-based *Research and Documentation Center* and the *International Criminal Tribunal for the former Yugoslavia*), displacing over half of the country's population (4.3 million), reducing its industrial production below 10% of its pre-war level (Ramet 2005, 186). Beyond systematic ethnic cleansing and genocide, further war crimes – including mistreatment of prisoners of war, abuse and killing of civilians and rape – appeared on all three sides.<sup>52</sup> The brutality of the conflict made ending the hostilities and achieving a peace settlement extremely difficult, and the mistrust grown through the years became a ubiquitous obstacle for any future plan to organize a functioning Bosnian state.

Through the war, the Bosnian and Serb sides had relatively constant objectives, while the Croatian side's demands and position was largely influenced by the strategic maneuvers of its kin-state, Croatia. The political leader of Bosnian Muslims, Alija Izetbegovic aimed to establish the independent Bosnian republic as a unitary state with majoritarian political institutions, both because his ethnic group has been the largest and with the aim of avoiding the cumbersome governance of power-sharing systems (Ramet 2005, 10). For the Serbs in Bosnia – led by Radovan Karadzic and supported by Serb president Slobodan Milosevic – the primary aim was to remain under the rule of Belgrade, in one state with ethnic Serbs (Belloni 2009, 357–58; Burg and Shoup 1999, 81–92, 102–5, 120–23, 198). The Croats in Bosnia lacked a hegemonic figure similar to Izetbegovic or Karadzic, and their objectives largely depended on the state of the Croat-Serb war, especially in southern Croatia which borders the Croat-majority regions of Bosnia. Given the interlinkages between the two conflicts, Croatian president Franjo Tudjman had a central role in both coordinating Bosnian Croat war efforts and representing the community internationally. These objectives largely shaped the various proposal laid out to resolve the conflict through the course of the conflict before the final settlement was made in Dayton. Ironically, the eventual agreement largely resembled the very first international proposal offered by the European

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<sup>51</sup> Major military actions halted on October 12, 1995, opening the way to peace talks. The peace agreement ending the war was negotiated in Dayton, Ohio between 1-21 November 1992 and signed in Paris on 14 December 1995.

<sup>52</sup> Nevertheless, according to UN estimates as well as the indictments and judgements by the International Criminal Tribunal for the former Yugoslavia (ICTY), the overwhelming majority of these war crimes (around 90%) were committed by the Serb forces (Waller 2002, 266–67), further complicating the peace process as well as Yugoslavia's international relations following the conflict.

Community in 1992, also known as the Carrington-Cutileiro plan (Bildt 2015, 1). The plan was built around devolution of powers to autonomous regions which would all get an ethnic designation, except for the commonly governed capital Sarajevo. The Serb party rejected the proposal claiming more territories (amounting to two-thirds of the country) and maintaining the objective of creating a unitary Serb Republic with a continuous territory instead of a bundle of regions. Izetbegovic initially signed the agreement, but later (28 March 1992) withdrew his signature for his opposition to any kind of territorial partition in Bosnia. In January 1993 a similar plan with somewhat larger territorial units was introduced by UN Special Envoy Cyrus Vance and EC Representative David Owen – therefore known as the Vance-Owen Peace Plan or VOPP – but was rejected for similar reasons.

From the perspective of establishing Bosnia's institutional structure after the war, the so-called Washington Agreement signed in March 1994 was the first milestone. Though in the early stages of the war, Bosnian and Croat forces coordinated their actions against the Serbs, hostilities broke out between them by the end of 1992. Bosniaks and Croats joined forces again after Tudjman had to scale back his ambitions in Bosnia under American pressure. While Americans were interested in restoring the Bosnian state and not allowing border changes by force, Tudjman also needed their support in reclaiming control over the Serb-controlled areas in Croatia, amounting to a quarter of the country's territory. Beyond establishing a ceasefire and joint command of forces, the Washington Agreement (signed by Izetbegovic and Tudjman) laid out the constitutional structure of the Federation of Bosnia-Herzegovina, one of the two main territorial entities in the later federal state of Bosnia and Herzegovina. The Federation was divided into ten cantons: five with a Bosnian, and three with a Croat majority, while two were ethnically mixed (Keil 2013a, 119–22). No provisions were made for Serbs in the Federation but the Agreement established the “constitutional status of the territories with a majority of Serb population shall be made in course of negotiations toward a peaceful settlement at the International Conference on the Former Yugoslavia” (Washington Agreement 1994, *Section I*).

Following the advances of Bosnian-Croat military forces and a series of American airstrikes on Serb forces in August and September 1995, the Serbs (mostly Milosevic) became open to reaching a settlement. The negotiations in Dayton (1–21 November 1995) established the border between the Federation and the Serb Republic, splitting the country's territory in a 51–49% proportion. Furthermore, the country's constitution was also drafted as part of the peace agreement (also known as the *General Framework Agreement, GFA*), officially its *Annex IV*. Despite concerns over

the potential lack of governability, the international drafters of the constitution opted for a corporate consociational model, for two reasons: to have the Croats and Serbs – especially the latter – on board, and because of their fear of a rekindled conflict as an effect of sheer majoritarian decisions (Hayden 2005, 243–4). Interestingly – and probably unfortunately – the drafters ignored Bosnia’s constitutional legacy which could have shed light on certain problematic issues ignored by the Dayton framework, most prominently the political inclusion of the ‘Others’, citizens who neither identify themselves as Bosnians, nor as Croats nor Serbs. For instance, the 1990 Constitution of the Socialist Republic of Bosnia and Herzegovina established a seven-member collective Presidency, where 2-2-2 places were reserved for Bosnians, Croats and Serbs, with one seat for the Others. Though the Presidency’s institutional design largely resembled ineffective collective presidencies in socialist countries (Rosenberg 2008, 337), the provisions also demonstrate that inclusion of the Others had an established constitutional tradition in Bosnia, which could have been a reference point for drafters in Dayton. Instead, Dayton’s constitutional framework excludes the Others from the three-members Presidency and the legislative’s upper chamber the House of Peoples.

The externally imposed character of the Bosnian constitution is obvious: drafted in USA by foreign constitutional experts,<sup>53</sup> the English-language text was adopted by an agreement where only one of the three signatories held his position in Bosnia.<sup>54</sup> The fact that Tudjman and Milosevic signed the Dayton Agreement on behalf of the Croat and Serb communities further decreased the latter’s ‘ownership’ of the constitution; on the other hand, Bosnians refused to embrace the document for its content. Nevertheless, none of the parties could have been satisfied with the settlement; in the words of Marc Weller and Stefan Wolff, the agreement “appeared to deny to all sides that which they had vigorously sought to achieve during the war” (2006, 2). Instead of remaining in the increasingly Serb-dominated Yugoslavia, Serbs became a minority in Bosnia (with an autonomous republic though); instead of joining the newly created Croatian

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<sup>53</sup> In the memoirs of Carl Bildt, former prime and foreign minister of Sweden and the first High Representative for Bosnia and Herzegovina, the various parties had different inputs in the process. In his account, the American negotiators were focusing on drawing the borders between the Federation and the Serb Republic, while the European experts dealt with the institutional setup of the new federal state (Bildt 2015, 2-3).

<sup>54</sup> From the Bosnian side, Izetbegovic negotiated and signed the agreement as the Republic’s president and leader of the largest Bosnian party. On the Croatian side, Tudjman was a central figure through the entire conflict, and was negotiating on behalf of the Bosnian Croatian when the Washington Agreement (1994) was made. The Serbs were in a complicated situation, as Karadzic and Mladic were established leaders in their community, but because of their war crimes – for which both were convicted later – both were *persona non grata* in Dayton; therefore, Milosevic negotiated on their behalf.

nation-state, Croats found themselves even more connected to Bosniaks, in the Federation; and instead of creating a unitary republic, Bosniaks were the largest group in a divided country with a barely functional central government (Weller and Wolff 2006, 1–3).

Importantly, externally imposed constitutions are not unprecedented, and one can find successful and less successful examples. Successful cases include post-World War II Japan and – most prominently – the 1949 Bonn Constitution of the German Federal Republic (Elster 1995), while Afghanistan after 2001, and especially the 2005 Iraqi constitution are widely known as the less successful attempts (Arato 2009; Chesterman 2004). Beyond the temporal proximity of the latter cases, one can also observe that the success stories happened in rather homogenous societies, suggesting that the drafters of the Dayton constitution were facing a particularly difficult task in any case. By comparing the Dayton constitution with the post-war procedures in Germany and Japan, Robert Hayden observes that "[i]n the case of Bosnia, the attempt to impose a constitution was a part of an attempt to impose a state of nations that rejected inclusion within it" (2005, 243).

Designing a consociational structure without the consent of its future actors can be regarded an even more difficult, and almost unprecedented task. In the cases inspiring consociational theory (Austria, Belgium, the Netherlands and Switzerland; Lijphart 1969, 1977) power-sharing structures emerged from informal elite cooperation, and therefore had a voluntary character from the participants' side. To a certain degree, the Ta'if Agreement (1989) in Lebanon resembles mostly the situation in Dayton, as it established a formalized consociational settlement following a lethal civil war, with substantial external assistance (Farha 2017, 119). Nevertheless, the fact that the Ta'if Accords did not create a consociational settlement, but re-established an earlier functioning one with substantial adjustments (Lerner and Bali 2016, 268–74) constitutes a crucial difference. The informal power-sharing mechanism based on the National Pact of 1943 created a three decades-long power-sharing mechanism, until the outbreak of a long and devastating civil war (1975-90). Therefore, beyond formalizing the power-sharing agreement and recalibrating the balance among the key political institutions – and, therefore the constituent groups – the Ta'if Agreement reached back to a once functioning power-sharing tradition.

Besides the lack of 'ownership' from local actors, the international context presents another crucial difficulty in Bosnia. In consociational theory, the presence of a tangible external threat can be an important factor uniting political elites (Lijphart 1969, 217); in Bosnia, external forces

and the neighboring countries have an opposite effect. As the country's neighbors are kinstates for the two smaller ethnic groups (Croats and Bosnians), cooperation with them will usually be a more attractive alternative for their political elites over contributing to the settlement's functioning.

The tri-national character of the consociation is pronounced in the Preamble, which identifies Bosnians, Croatians, and Serbs as the 'constituent peoples'; the power-sharing provisions primarily regulate institutional interplay between these three groups. Furthermore, the constitutional category of the 'Others' is also established in the Preamble, which refers to those who do not self-identify with any of the constituent groups. Though these groups (the *Law on Rights of National Minorities* (2003) identifies seventeen of them) are provided certain cultural rights and assistances, as well a proportionate representation in public bodies, when it comes to elected offices, only municipal bodies or the territorially organized House of Representatives are available. Though the state structure more clearly binds ethnicity and territoriality than the Belgian arrangements do – where separate regional and linguistic legislatures exist – the years following Dayton Constitution's adoption witnessed a struggle for upholding a certain degree of multidimensionality. While various entities tried to constitutionalize their dominant ethnic groups as constituent peoples, the Constitutional Court was insistent on upholding the constituent status of all groups throughout the entire country (discussed in *Chapter 5.3*).

The arrangements for the federal institutions are designed both along territorial and ethnic dimensions. The federal parliament is bicameral, with an elected lower (House of Representatives) and delegated upper chamber (House of Peoples). The 42 members of the House of Peoples are elected proportionally, and according to Article IV(2) of the Constitution two-thirds of its members shall be elected from the Federation, while one-third from the RS. By describing arrangements for the House of Peoples, an ethnic element is introduced beside the territorial provisions:

The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation of (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs). (Article IV(1))

This connection between ethnicity and territoriality has been the basis of numerous later cases before the Constitutional Court, where the constitutional provisions themselves were under challenge, on grounds of conflicting provisions with the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR). The Court's jurisdiction to rule on the

constitutionality of constitutional provisions is granted by Article II(2) of the Constitution, which provides direct applicability for the ECHR as well as the Convention's supremacy "over all other law".<sup>55</sup> The federal Presidency is also designed to accommodate a tri-partite power-sharing settlement: Article V of the Constitution provides that two members, "one Bosniac and one Croat" shall be elected from the Federation's territory, with "one Serb" from the RS. The three members make decisions with certain consent procedures and represent the state on a rotational basis. Constitutional provisions on the House of Peoples as well as the Presidency were brought before the Constitutional Court for breaching the ECHR's antidiscrimination provisions (primarily laid down in Article 14), both from citizens identifying as 'Others' – therefore being categorically excluded from these offices – and citizens whose ethnic and territorial belonging did not match (e.g. Ilijaz Pilav a self-identified Bosniak residing in the RS). These cases on the conflict between the Constitution and the ECHR are discussed in *Chapter 5.3.3*.

The federal executive (Council of Ministers) – where a key element of the consociational package, the grand coalition arrangements are implemented – is arranged primarily along territorial lines. The Constitution provides that the Presidency collectively nominates the prime minister (Chair of the Council of Ministers), who has to be approved by the House of Representatives (Article V(4)). The prime minister nominates ministers and deputy ministers, who also have to be approved by the House of Representatives. Ministers and their deputies should come from different constituent groups (Article V(4)(b)). The primary power-sharing provision is linked to the Entity background of ministers as multi-ethnic membership in the cabinet is facilitated by the provision that "[n]o more than two-thirds of all Ministers may be appointed from the territory of the Federation" (Article V(4)(b)). Beyond connecting ethnicity and territoriality, the provisions – somewhat surprisingly – remain silent concerning the proportion of Bosnian and Croatian members in the cabinet.

The constitution based on the post-conflict equilibrium has not experienced major reforms, even though certain incremental institutional reforms have been carried out, mostly under foreign pressure (Bieber 2006). In this regard, a cautious and balanced – in terms of not crossing anyone's red lines – reform proposal in 2006, known as the 'April Package', got closest to deliver substantial outcomes, but ultimately failed to receive the sufficient support in the House of

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<sup>55</sup> The full article provides as the following: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law" (Article II(2)).

Representatives, where the procedure halted. The *April Package* aimed to enhance the federal government's efficacy in three areas: streamlining parliamentary decision-making; creating two new federal ministries; and re-organizing the federal Presidency, from a collective body of three equals into a more effective group of a President and two Vice-Presidents (Bieber 2006, 28; Perry 2015, 18).

Though a two-thirds majority was required in the House of Representatives, only 26 deputies (out of the 42) supported the motion instead of the necessary 28. Among the 16 deputies rejecting the amendment proposal 11 belonged to two parties, the Bosnian nationalist SBiH (Party for Bosnia and Herzegovina), and the Croatian Democratic Union (HDZ) because the amendment had no provisions on the territorial reorganization of the state, a vital issue in both parties' agenda and electoral platforms (Belloni 2009, 360–61; Keil 2013b, 142–43); furthermore, the 5 other objecting deputies came from different political parties and ethnic backgrounds (Perry 2015, 18). The reasons behind the SBiH's and the HDZ's rejection of the amendment shed light on the broader strategies pursued by ethnic elites since the establishment of the Bosnian consociation. These mostly pertain to the territorial re-organization of the state, a question intentionally overlooked by the *April Package*, as the three groups of ethnic elites have, within the constellation of three groups, mutually exclusive aims.

For the largest ethnic group, the Bosnians, the primary aim in the Dayton negotiations, and later discourses on constitutional reforms, has been the strengthening of the federal government; concerning the state's territorial reorganization, transforming Bosnia and Herzegovina into a regionalized state became an objective consistent with this strategic aim. On the contrary, for the Serb elites, preserving the Serb Republic's autonomy gained in Dayton was, and remains the primary strategic objective (Belloni 2009, 360; Keil 2013b, 150–51). The strategic horizon of the Croat elites is more complex: while the Federation shared with the Bosnians was a safeguard against potential Serb dominance – the Federation's structure was established together with military alliance in the 1994 Washington Agreement – in the post-conflict consociation it increasingly appeared as a limitation on Croat self-determination. In this regard, establishing a third, Croat entity became their primary strategic objective, a goal in which they gained the support of Serb elites too, whose long-term objective has been to develop the constitutional structure in a way that the self-determination of the three constituent nations would gain greater prominence, opening avenues for later devolution, or even secession (Belloni 2009, 361; Bieber 2006, 27; Keil 2013b, 149–51). Altogether, the strategic objectives and ambitions regarding



constitutional reforms point in two major directions. On the one hand, Bosnians would favor measures strengthening the central government and increasing the unity of Bosnia and Herzegovina as a whole. In this regard, the SBiH has been the most radical voice, advocating for a Bosnia without entities (Belloni 2009, 361). On the contrary, Croat and Serb political forces emphasize the self-determination of the constituent peoples; for Serbs, protecting their established autonomy sufficiently serves this purpose, but for Croats, a larger-scale reform agenda follows from this principle given their lack of a separate entity. In sum, major constitutional reforms have been thwarted either by the lack of interest in changing the established structure – from the Serbs – or by a sharp conflict of interests – between the Bosnians and the Croats.

During the war, and in the years following the Dayton Agreement, the Federation shared with the Bosnians appeared to be a safeguard for Croats vis-à-vis the Serbs, against whom the Croatian state also fought an armed conflict in parallel with the Bosnian war; nevertheless, later the Federation increasingly appeared as limiting framework for Croats. On the other hand, Serbs were interested in protecting segmental autonomy, resisting – ultimately unsuccessfully – reforms necessary for a functioning federal state, like a unified Ministry of Defense or a stable set of revenues for the central government.<sup>56</sup> In the discourse on state reforms, only the Croatian perspective changed with time: while initially the shared entity with Bosnians appeared to be a safeguard from Serbian dominance, later it became seen as an impediment for Croatian self-determination. The latter position led to demands for the creation of a third, essentially Croatian entity, eventually supported by the RS, in line with its consistently centrifugal preferences (Keil 2013b, 144–46).

## 5.2 *The Constitutional Court of Bosnia and Herzegovina*

The Constitutional Court's position within the polity is a particularly sensitive issue given the apparent conflict between certain constitutional provisions (particularly on the House of Peoples and the Presidency) and the ECHR. The ongoing struggle between the plurality/majority Bosnians aiming to expand the federal government and the Croat and Serb minorities protecting

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<sup>56</sup> By discussing developments in the federal structure, Soeren Keil argues that important steps enhancing the effectiveness of the central government were achieved through pressure from external actors. In the former regard, Keil considers the “creation of a Ministry of Defence at state level should, therefore, be the greatest success of centralisation in Bosnia and Herzegovina so far” (2013, 166) which happened in 2005. In the latter regard, the federal government's fiscal dependence on the Entities was eased in 2005, when a federal-level VAT was introduced (Keil 2013, 168-70).

their autonomy and self-determination also puts the Court into a complicated position, as decisions (like *U-1/99* on the federal cabinet's structure or *Constituent Peoples* on the entity constitutions) on institutional matters usually involved taking sides in such disputes.

In describing the Court's competences, the Constitution departs from the general claim that "[t]he Constitutional Court shall uphold this Constitution". Three mandates are explicitly mentioned in Article VI(3), but all with a note that the Court's competences are "including, but [are] not limited to" them. These are: ruling on disputes between Entities, federal institutions and the Entities or between federal institution; ruling on Entity constitutions; and scrutinizing the constitutionality of the Entities' "special parallel relationship[s] with a neighbouring state" (Article VI(3)(a)). The Court's constitutional review capacities primarily pertain to *ex post* review, while the body gets involved before a legislation's promulgation only in cases of a specific legislative deadlock. The latter refers to a specific legislative provision protecting 'vital interests' of constituent groups, which can be triggered according to Articles IV(3)(e) and IV(3)(f) of the Constitution, in case the majority of any constituent group's representatives in the House of Peoples finds a provision "destructive of [their] vital interest". In the procedure, first a special joint commission is formed to find a solution; if this body fails to find an agreement, "the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity" (Article IV(3)(f)). In the Court's practice, the 'regularity' it controls includes a review on the procedural as well as the substantive dimension of vital interest vetoes (Graziadei 2016, 85).

On the other hand, provisions on the abstract review make the Court relatively accessible for various political actors. According to Article VI(3)(a) of the Constitution, the *ex post* review of constitutionality of law can be initiated by any member of the Presidency, the prime minister, the Chair or Deputy Chairs of federal legislative chambers and legislative bodies (both federal and Entity-level) upon the request of the quarter of its members. The latter provision means that each constituent group can mobilize constitutional review on its behalf, in case a majority of its representatives agree on the vital nature of the issue. Furthermore, provisions allowing ordinary courts to refer cases for constitutional review (Articles VI(3)(b) and VI(3)(c)) buttress the Constitutional Court's capacity for protecting and promoting human rights.

Arrangements on the selection and appointment of judges are less striving for consensus and cross-community dialogue, but rather seek to provide sufficient guarantees for ethnic political

elites. From the nine members of the Court, six are appointed by the Entity-level legislatures:<sup>57</sup> two by the Serb Republic's National Assembly, two by the Bosnian caucus in the Federation's House of Representatives (lower chamber of parliament) and two by the Croat caucus of the same institution. As regards professional requirements, the Constitution somewhat vaguely states that "[j]udges shall be distinguished jurists of high moral standing" (Article VI(1)(b)). The remaining three members of the Court are the so-called 'international' judges, and the fact that they constitute the largest group means that together they can prevent two ethnic groups lining up against the third one. These three members are selected by the European Court of Human Rights (ECtHR), following consultations with the Presidency of Bosnia and Herzegovina; they cannot be citizens of any neighboring countries (Article VI(1)(1)).

The other factor balancing the broad opportunities given to ethnic political elites to appoint politically reliable candidates is the long tenure of judges, as they are appointed until their mandatory retirement age of 70 (Article VI(1)(c)). Nevertheless, the first appointed judges were done so for a five years-long period. Though academic works on the Constitutional Court's design (Graziadei 2016; Marko 2004; McCrudden and O'Leary 2013a; Rosenberg 2008) do not comment on the rationale behind this transitional provision, the most likely explanation might be the limited mandate of international human rights bodies in the Dayton Agreement. According to *Annex VI* of the GFA, numerous international bodies were established to address human rights abuses in the post-conflict setting, according to *Article XIV* of *Annex VI*, after five years the responsibilities of these institution shall transfer "to the institutions of Bosnia and Herzegovina" (GFA, *Annex VI*, *Article XIV*). Such an expected change in the institutional environment can easily explain such a measure for personnel adjustments.

The internal regulations of the Court are also built around the arithmetic balance among judges elected by constituent groups' institutions. From the nine members, three judges hold the positions of the President and the two Vice-Presidents. The presidential seat shall be filled on a rotational basis among members belonging to any constituent groups or members self-identifying as 'Others'.<sup>58</sup> The two Vice-Presidents shall belong to a different constituent group or the 'Others'

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<sup>57</sup> According to Article VI(1)(a) of the Constitution, two members are elected by the Assembly of the *Republika Srpska*, while the remaining four are elected by the House of Representatives of the Federation; in the latter case, the Bosnian and Croatian caucuses of the body separately elect their members.

<sup>58</sup> According to Article 83 of the Rules of Constitutional Court of Bosnia and Herzegovina, "the President of the Constitutional Court may not be from among the constituent peoples or Others that the former and the second former President were selected from, in two consecutive terms."

(Article 86 of the Rules of Constitutional Court of Bosnia and Herzegovina). The Court's primary decision-making body is the Plenary Court, consisting of all judges (Article 8). Regardless of the number of judges being present, the Plenary Court can only make decisions with the absolute majority of the Court's members (Article 9). On the one hand, this prevents one or two groups from paralyzing the Court's functioning;<sup>59</sup> on the other, by stipulating an absolute majority, none of the judges from one ethnicity can be circumvented without the support of at least one international member. A similar stipulation – the vote of altogether five judges regardless of the number of members being present – applies for the decisions of the Grand Chamber, a body that consists of judges elected by the Entity legislatures (therefore lacking the international members; Article 10). The Grand Chamber is summoned in cases of applications from unauthorized applicants or those judicial referrals which are not on the Plenary Court's agenda (Article 10(3)). Finally, the Chamber, composed of the President and the two Vice-Presidents, takes decisions on interim measures and administrative issues; it shall take decisions with unanimity (Article 12).

The Court's decisions are made with a high degree of transparency. Ballots are open and personal voting preferences are published in the session minutes (Article 45(2)(f)). Judges are entitled to publish their dissenting and concurring opinions (Article 43), which has an ambiguous effect on the Court's functioning. On the one hand, Joseph Marko – member of the Court between 1997-2002 as an international judge from Austria – argues that the possibility of dissenting opinions and transparency in general improve the legal quality of decisions. In his view, “the anticipation of dissent leads to the majority taking special care in argumentation and thereby also to the improvement is the quality of the reasoning of the decision” (Marko 2004, 33). Furthermore, dissent, similar to open ballots “acts as an instrument to let feelings vent and to release burdens along the lines of the ethnic composition of the Court as the judges who consider themselves representatives of their constituent peoples can prove to their ‘clients’ that they indeed have been ‘defending national interest’” (Marko 2004, 33). Nevertheless, Marko's logic also implies that this degree of transparency prevents deliberation within the Court; as judges might feel pressure from their constituent groups, finding consensus or any kind of common ground becomes much more difficult.

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<sup>59</sup> In the original edition of the Rules of the Constitutional Court, judges elected by all three legislative bodies or groups (at least one) had to be present for a ballot to take place; however, if the same judge was absent from the following session without justification, votes were allowed (Marko 2004, 30).

The rest of the regulations appear to follow standard provisions on constitutional courts – in some cases even overlooking certain context-specific needs: for instance, regulations on the Court's Registrar do not require ethnic balance within the Court's staff (Articles 106-9). Regulations on disqualifications and incompatibilities (Articles 90 and 96) cover standard – i.e. not related to the peculiarities of consociations – issues, like personal interest in a case, or hearing a case during one's earlier judicial career in the former regard; membership in a political party or official ties to private corporations appear in the latter regard. The only exception is made for part-time academic activities – this provision has particular importance because political actors have demonstrated a willingness towards selecting judges from academic backgrounds (Marko 2004, 31-2).

While the Constitutional Court of Belgium remained a complementary institution through the gradual process of federalization, the Constitutional Court of Bosnia and Herzegovina was given a much more prominent role at the consociation's establishment. Though the Court has a mixed record in using its competences (discussed in *Section 3 of Chapter 4*), its potential to intervene remains an important factor, especially in light of the international community's decreasing interest in managing the Bosnian power-sharing settlement. Implementing the ECHR's supremacy, adjudicating matters on the relationship between the federal government and the entities, or reviewing vital interest vetoes are all weighty competences where three major groups have competing visions on the state's future, and form their occasional coalitions accordingly. Beyond the sensitivity of the post-conflict setting's power-sharing dynamics, the Constitutional Court also has to cope with legitimacy challenges regarding both the constitution and the Court itself. In the former regard, the Constitution was drafted with the substantial involvement of external actors, and there was no opportunity for the country's citizens to give their consent. In the latter aspect, the Court's legitimacy is also subverted by the decisive role of the international members. In sum, the Court has important powers, nevertheless is based in a situation where these competences have to be used with an extremely high degree of care and precaution.

The Constitutional Court of Bosnia and Herzegovina was established by the Dayton constitution (adopted in 1995) and started to operate in 1997. In terms of the institutional environment surrounding the court, the first 5-6 years can be seen as starkly differently than the following period, for two reasons. First, until 2003, a parallel body for addressing certain human rights cases, the so-called Human Rights Chamber was established, so the court had to formulate its human rights jurisprudence alongside the presence of a somewhat similarly mandated

institution.<sup>60</sup> Second, the first members of the court had – exceptionally – a five-years long, non-renewable term, while the subsequently elected members are appointed with a tenure ending only with retirement. Therefore, the composition of the body has fully changed in 2002, and judges were working in conditions influencing judicial independence differently. In the latter regard, most of the relevant literature argues (e.g. MacDonald and Hoi 2012; Melton and Ginsburg 2014; Sadurski 2005) that long, non-renewable, or lifelong tenures are the most conducive conditions for an independently functioning judiciary. So in the Bosnian case, members of the first court had a less favorable environment in terms of judicial independence; because of their relatively short tenure, judges could have considered their later career perspectives (Sadurski 2005, 14–16).

In the most comprehensive analysis on the Bosnian court's adjudicative practice – provided by Alex Schwartz and Melanie Janelle Murchison (2016) – the two cohorts of judges did not display starkly different decision-making patterns, as in both periods ethnic background appeared to be the strongest determinant in voting patterns – nevertheless, the authors also conclude that this phenomenon is rather due to the lack of *impartiality* than the lack of *independence* (2016, 849). Concerning the institutional design of the court, and expected behavioral patterns displayed by the judges, two general issues stand out in their large-N analysis on the abstract review cases heard by the court between 1997 and 2013. First, the clear majority of cases (65%) were decided with unanimity, so one can see how legalistic concerns, collegiality and deliberative dynamics (Ferejohn and Pasquino 2003; Mendes 2013) made an impact; nevertheless, from those cases which can be mentioned among the controversial, or ‘uniquely consociational’ ones in the literature, only the *Places Name* decision (discussed in *Chapter 5.4*) was decided this way. In the rest of the cases touching upon issues related to power-sharing mechanisms, the court was divided, and primarily along ethnic lines (A. Schwartz and Janelle Murchison 2016). Second, these ethnic divisions were so openly manifested that some theoretical expectations on the effects of institutional provisions – e.g. long, non-renewable tenures – have not worked in the Bosnian case (A. Schwartz and Janelle Murchison 2016, 825).

In general, most commentators on the Court's case record (Begić and Delić 2013; Rosenberg 2008) assess it as rather deferential, despite the fact that its first prominent decision on the constituency of ethnic groups throughout the state (known as *Constituent Peoples*, discussed in

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<sup>60</sup> The primary difference in the two institutions profile was that beyond dealing with constitutional review, the Constitutional Court was competent only in cases referred to the body by ordinary courts, while the Human Rights Chamber was mandated to address human rights violations committed by any state institution.

Section 3.1) was an important unwinding attempt in the process of establishing entity institutions. Nevertheless, when the court faced issues linked to federal institutions, it gradually reversed its precedent established in *Constituent Peoples* (a process described in Chapter 5.3). Given the controversies within the Dayton framework as well as the direct effect of the ECHR (provided by Article II(2) of the Constitution) the Court has a rich case record despite its relatively short history. Some cases are linked to the fourth element of the ‘consociational package’, segmental autonomy, through preventing entity measures posing a threat on inter-community relations (as in the cases of *Constituent Peoples* and *Places Name*, discussed in sections 5.3 and 5.4). Furthermore, on shared rule among ethnic groups, the Court mostly had to deal with electoral arrangements (discussed in Section 3.3). In the following, the first two decisions are presented individually, while the cases related to the electoral arrangements in a common narrative, given the temporal proximity of the events and the close textual links between them.

### 5.3 *Constituent Peoples* (U-5/98, 2000)

In 1998, Alija Izetbegovic, the Bosnian member of the three-member collective presidency of Bosnia and Herzegovina, initiated proceedings before the Constitutional Court, challenging the constitutions of both entities, the Serb Republic (RS) and the Federation of Bosnia-Herzegovina for their provisions on the constituency of ethnic groups on their territory. While the RS identified Serbs as the only constituent ethnic group, the Federation of Bosnia-Herzegovina (the sub-federal entity of the Bosnian and Croatian population) adopted similar provisions, identifying the Bosnians, Croats and Others as constituent – all groups mentioned in the federal Constitution, except the Serbs. In his challenge, Izetbegovic argued that the respective provisions violate Articles II(4), II(6) and III(3) of the federal Constitution, in respect of limiting citizens of Bosnia and Herzegovina from exercising their rights on the entire territory of the country (U-5/98, para 10). The Court delivered its judgement in four partial decisions in 2000, annulling both sets of provisions.

In its reasoning, the Court focused on two major issues. First, it asked whether the preamble of the federal constitution was legally binding, i.e. whether its provisions on the constituency of all ethnic groups throughout the entire country is binding for lower-level legal norms such as entity constitutions (U-5/98, para 11–25). After concluding that the Dayton constitution’s preamble is legally binding, the court addressed the compliance of the challenged provisions with it as a

second step. Regarding the first issue, the Court argued that the constitutional preamble has a fundamentally ‘normative character’ (U-5/98, para 25), therefore serves as a “sound standard of judicial review for the Constitutional Court” (U-5/98, para 26) – and is also legally binding. Given the broader, more general character of the question, both the Court and the litigants tried to interpret the core questions through an angle beyond the federal constitution’s textual provisions. For instance, while the RS justified its decision by an essentialist logic resembling the intellectual legacy of Carl Schmitt,<sup>61</sup> the Court invoked the famous 1971 ruling of the French Constitutional Council (Stone Sweet 2007, 70–1; 80–1) defending its position on the binding character of constitutional preambles (U-5/98, paras 13 and 15).

In its reasoning on the constitutionality of the provisions in question, beyond the reference to fundamental principles laid down in the preamble and the general rights provisions of the Constitution, the Court employed purposive interpretation, invoking the goals established in the General Framework Agreement of Dayton – like establishing ‘peaceful relations’, a ‘pluralist society’ or enabling the relocation of displaced people. Importantly, the federal Constitution itself is also a document established by that framework. By explaining the role of these context-specific purposes, the Court argued that

It therefore follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination. (U-5/98, para 73)

Importantly, the Court was divided along ethnic lines in making the decision: the Bosnian and the international members of the body voted for annulling the respective provisions, while the Croat and Serb members voted for upholding the legislative texts in question, so the international members clearly demonstrated their willingness to take sides in a block when the constitutional *status quo* was under threat. In the reasoning’s text, the decision demonstrates how purposive interpretation is employed for resolving sensitive cases and the use of political documents as reference points. This use of external sources in the Court’s reasoning demonstrated the gaps in the constitutional provisions and the problems emanating from corporate consociational

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<sup>61</sup> To represent the argument provided by the RS, the Court offered the following quote from the hearings: ‘It is evident that the *Republika Srpska* can be called a state as her statehood is the expression of her original, united, historical People’s movement, of her people which have a united ethnic basis and forms an independent system of power in order to live really independently, although an independent entity within the framework of a complex state community’ (para 13).



arrangements.<sup>62</sup> Furthermore, from the perspective of regime dynamics the decision had particular importance as the Constitutional Court had the opportunity to shape the evolution of the entity institutions, as the respective constitutions were not agreed upon in the GFA so it was the court's responsibility to ensure that they are enacted in harmony with the federal constitution. Therefore, without a *status quo* to preserve, the court had the opportunity to shape the future development of the entity institutions, and also to set an important precedent. In this regard, the decision was seen as an attempt to set an 'unwinding' precedent and to "soften the hard edges of consociationalism and for making it clear that collective rights must be administered without prejudice" (Rosenberg 2008, 388).

#### 5.4 Places Name (U-44/01, 2004)

A clearly different logic of decision-making applied in the 'Places Name' case in 2004, where members of the Court unanimously struck down an attempt to re-name certain municipalities in the RS. The administrative act altering the name of numerous municipalities in the RS was challenged in 2001, by Sejfudin Tokic, the Deputy Chair of the House of Peoples (federal legislative upper chamber), himself a Bosnian delegate in the body. In most cases, the renaming happened simply by deleting prefixes referring to Bosnian links and by adding the *srpski/srpska/srpsko* (Serb) prefixes to the municipality names, e.g. *Srpski Brod* or *Srpska Kostajnice*<sup>63</sup> (U-44/01, paras 17 and 18). Together with investigating the admissibility of the request – whether the applicant had exhausted the possibilities for remedial on the sub-national level, where the legislation was enacted – in a dialogue with the judicial system of the RS, the Court concluded the case in three years.

In its judgement, the court applied a combination of purposive interpretation and proportionality analysis, placing the objectives laid down in the General Framework Agreement (GFA) at the center of its reasoning. In its purposive reasoning the court focused on the constitutionally established objective to restore the pre-war ethnic conditions laid down in Article II(5) of the Constitution. This article claims that "[a]ll refugees and displaced persons should have

<sup>62</sup> In many parts of the reasoning, the Court also addressed those conceptual problems around individual and corporate understandings of equality which have been in the center of the academic literature on constitutionalism and consociationalism (McCrudden and O'Leary 2013a, 35–39). The dilemma is analyzed in its sharpest form in paras 112-27.

<sup>63</sup> A full list of the municipalities in question can be found in para 17.

the right freely to return to their homes of origin”, including a right to restoration of the “property of which they were deprived in the course of hostilities since 1991” (Article II(5)). Importantly, a direct reference to the GFA is made in Article II(5), where the text provides that it should be read “in accordance with Annex VII [of] the General Framework Agreement”.<sup>64</sup> This is an exceptional way of making reference to the political agreement behind the constitution as in other salient cases throughout this analysis it was the given court’s discretion to employ the respective political agreements for interpreting the constitutional provisions; in this case, the connection is embedded in the Constitution itself.

In its reasoning, the Court focused on the relationship between the challenged measures and the constitutionally stated objectives and argued that the renaming ran counter to the planned trajectory of the peace and reconciliation process in two ways. First, by sending a symbolic message to all non-Serb former residents about the unwelcoming attitude of the authorities (*U-44/01*, para 49). Second, through providing an *ex ante* legitimation to those violent actions – like ethnic cleansing – which led to the altered ethnic character of these municipalities (*U-44/01*, para 52). Furthermore, the Court also invoked the antidiscrimination measures laid down in the Constitution (*U-44/01*, paras 45-48), as well its earlier position from *Constituent Peoples* on the constituency of ethnic groups throughout the entire country (*U-44/01*, para 47).

In para 51, the Court also made its use of proportionality analysis explicit, despite the fact that the legal representatives of the RS have “failed to advance any arguments that there existed an objective and reasonable justification” (*U-44/01*, para 50) for the measures under scrutiny. Nevertheless, the body decided to second-guess the possible justifications from the Serb Republic’s side (*U-44/01*, para 50), and subjected them to specific elements of proportionality analysis; two of these were identified. First, the Court assumed that the renaming of municipalities may serve the purpose of “placing an emphasis on the “Serb” character of certain towns and municipalities” (*U-44/01*, para 52), and dismissed the purpose as illegitimate within the constitutional framework. Second – in a more lenient approach – the Court assumed that in some cases the renaming may serve the purpose of distinguishing certain municipalities from their similarly named counterparts in the Federation’s territory (*U-44/01*, para 53). Nevertheless, beyond accepting its potential legitimacy, the court argued that “this aim could easily be achieved

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<sup>64</sup> The Constitution itself is labeled as Annex IV within the GFA.

by choosing prefixes or names which are ethnically neutral” (U-44/01, para 53), invoking the necessity test from proportionality analysis.

In its uses of interpretive sources, the Court was unusually eclectic, mobilizing constitutional provisions, through them – by the references in Article II(5) – the broader backdrop of the GFA, its own case law, and ECtHR jurisprudence (U-44/01, para 45). Given the fact that the reestablishment of the pre-war conditions of a multiethnic society is one of the most important political objectives laid down in the Constitution (Rosenberg 2008, 392), in this case the Court primarily acted as an implementer of the peace agreement – especially through its use of purposive interpretation and emphasis on Article II(5). Compared to the *Constituent Peoples* case, this decision was less worded as a potential landmark case, but still has special importance for the Court’s use of purposive interpretation and the unanimous decision despite the fact that the case was necessarily a question of taking sides in an institutional dispute.

### 5.5 Constitutional challenges of the electoral regime (2005-2009)

*Sejdic and Finci v. Bosnia and Herzegovina* (2009) is the most widely known case in the short history of the Bosnian court. Beyond its international exposure – the litigation went all along to the ECtHR – the case stirred great interest as it reflected on a uniquely consociational problem, the issues of inclusion, exclusion and delineating borders in the design of shared rule institutions. In particular, the electoral arrangements for the collective Presidency invited specific interest, even though the applicants, Dervo Sejdić and Jakob Finci also challenged the arrangement for the legislative upper chamber, the House of Peoples. By identifying themselves as Roma and Jewish citizens (therefore qualifying for the rights entitled to the constitutionally recognized group of the ‘Others’), they were not eligible for being elected to any of the aforementioned bodies. After the Bosnian court turned down their constitutional challenges on three occasions (in these decisions even the international judges were divided), litigation continues before the ECtHR, which declared this provision on electoral regulation discriminative. Unlike the two former cases, the domestic Constitutional Court refused to pursue an unwinding strategy, and occasionally turned against its own earlier precedents.

By the time Sejdic and Finci lodged their claims, the Constitutional Court ruled on cases linked to electoral arrangements on multiple occasions. By their relevance to the consociational architecture, three decisions stand out: cases no. U-4/05, U-13/05 and AP-2678/06. While the

Court ruled in favor of more complete accommodation regarding municipal arrangements (in case *U-4/05*), the body employed a narrow reading of the Constitution concerning federal institutions (in cases *U-13/05* and *AP-2678/06*). The fact that no claims from the constitutional ‘Others’ group have been ameliorated, allowed Sejdić and Finci to seek remedy in Strasbourg (McCrudden and O’Leary 2013a, 85).

In the first case chronologically (*U-4/05*), Nikola Spiric, deputy chair of the House of Representatives (lower legislative chamber) challenged the electoral arrangements for the municipal council of the capital Sarajevo. The electoral arrangement ensured a certain proportion of mandates for the representatives of the Bosnian, Croatian and the ‘Others’ group, omitting similar guarantees for the Serbs; importantly, the delineation of groups with guarantees followed the logic of the original constitution of the Federation which was overridden by the Court in the *Constituent Peoples* case. In its ruling, the Court ordered the local legislators to include Serb representatives in the system of guarantees, reiterating the key point of *Constituent Peoples*, concerning the validity of constituent status throughout the entire country. Both the argumentative strategy (quoting its own recent case law as the core argument) and the Court’s reasoning on its competences (by scrutinizing the admissibility of the request) appeared to be an attempt by the Court to strengthen its position in the institutional architecture of the power-sharing settlement.

In the latter regard, the Court argued that the relevant constitutional provision (found in Article VI(3)(a)) states that “[t]he Constitutional Court shall uphold the Constitution”, and before listing issues on which the Court should decide, the document mentions that the Court’s competence includes these, but ‘is not limited’ to them. In this reasoning, the Court understood this provision as a sign of incomplete contracting in the Constitution: “The framer of the Constitution could not predict the scope of all functions of the Constitutional Court at the time when the Constitution of Bosnia and Herzegovina was being adopted” (*U-4/05*, para 14). Therefore, as the Court’s necessary functions and competences could not have been predicted, the Court interpreted its own jurisdiction in a purposive manner, claiming that its competences should be understood in a way that allows the broadest framework for human rights protection: “In line with arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of violation of human rights” (*U-4/05*, para 16).

In many regards, the chronologically subsequent (*U-13/05*) decision on electoral arrangements of the Presidency and the House of Peoples (legislative upper chamber) was a sharp reversal of the decision. In this case, Sulejman Tihic, member (at that moment, Chair) of the Presidency challenged those provisions of the electoral regulation which connected ethnic group membership with territorial residence: namely that from the territory of the Federation, only self-designated Bosnian or Croatian, while from the RS only self-designated Serb candidates are allowed to run. Avoiding a confrontative situation, the Court declared itself ‘not competent to take a decision’ (*U-13/05*, Decision on Admissibility), sharply distancing itself from the broad and expansive language from the *U-4/05* case. By interpreting its own competence, the Court focused on its mandate to uphold the constitution, and distanced itself from the possible task of reviewing the Constitution’s compatibility with the ECHR – even though Article II(2) of the Constitution declares that the document “shall apply directly in Bosnia and Herzegovina” and “shall have priority over all other law”. The Court’s decision in this case raised numerous questions mostly for the fact that its probably most important landmark decision on the constituency of ethnic groups was specifically based on those international norms that the Court tried to distance itself from.

The decision left the Court divided, which became manifest in the separate concurring and dissenting opinions. For instance, in the former category, David Feldman, an international judge from Great Britain argued that the case should be admissible but dismissed on its merits. Regarding the admissibility of the case, Feldman emphasized the “constitutional status” (para 2) of the ECHR by Article II(2) of the Constitution, therefore the Court should take the norms of the ECHR into consideration regardless of the status of the legal norm affected by a case (para 4). Concerning the merits of the application, Judge Feldman defended the measures in question by reading the case through a purposive angle:

Nevertheless, the arrangements agreed in the General Framework Agreement for Peace and reflected in Article V of the Constitution can be seen as a special form of representative democracy (sometimes called ‘consociation’) modified to suit the special needs of the country. In my view, putting some model of democracy suitable for the special and pressing needs of the country is a legitimate aim, and there is a rational connection between the aim and the means adopted to pursue it. (para 7)

On the other hand, in her dissenting opinion, another international judge Constance Grewe (from France) emphasized the importance of considering the mentioned international norms part of the constitutional order by stating that “the Constitution of Bosnia and Herzegovina must

be viewed as a unity whose parts are closely connected and some provisions cannot be interpreted separately without taking into consideration the complementary meaning of other provisions". Furthermore, she reiterated the Court's position from the *U-4/05* case by pointing to the Court's "obligation of creating a state structure that can endure the test arising out of the obligation to establish the highest principles – the principles of a democratic state, the rule of law and free elections". Importantly, she emphasized the Court's responsibility in formulating a normative core for the constitutional order which can serve as a guideline for understanding more tangible institutional provisions.

Finally, in *AP-2678/06* the core question of the case was again concerning the connection between ethnicity and territoriality. Ilijaz Pilav, a self-designated Bosnian residing in the RS wanted to run for membership in the Presidency; nevertheless, in order to be registered in the list of Presidency candidates in the RS one had to be a self-designated Serb. In his application, Pilav claimed that the refusal he faced constitutes ethnic discrimination, violating Article 1. of Protocol 12. of the ECHR (*AP-2678/06*, para 7). The applicant's claim was not disputed by the court, but rather put under proportionality analysis and found to be a lesser constitutional interest compared to the ones served by the electoral regime. In this regard, the Court claimed that the electoral measures "serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights are proportional to the objectives of general community" (*AP-2678/06*, para 22), so dismissed the claim.

Similar to the *U-13/05* case, the decision provoked separate concurring and dissenting opinions; however, the dispute was less sharp, and reflected on more general issues. On the one hand, Judge Feldman defended the proportional method of interpretation by asserting that "[t]he task of the Constitutional Court under Article VI is to give effect to the Constitution, with all its inconsistencies, and make it as effective as possible in all the circumstances" (*AP-2678/06*, Dissenting Opinion of Judge David Feldman, para 4). On the other hand, Judge Grewe emphasized the importance and validity of external norms by claiming that "the Constitutional court grants the same importance to the Peace Agreement and its annexes and thus in case of conflict of norms, the case may only be resolved through a method of systematic interpretation" (*AP-2678/06*, Dissenting Opinion of Judge Constance Grewe).

Following these decisions, Sejdić and Finč applied directly to the ECtHR regarding the election of the Presidency and the House of Peoples. Their application primarily concerned ethnic discrimination, which has been even more straightforward compared to the other cases, as not only a mismatch between their territorial and ethnic affiliation prevented them from running for these offices, but their very group membership. In other words, the corporate consociational architecture does not accommodate the participation of people affiliating themselves with the constitutional category of the ‘Others’.<sup>65</sup>

The ECtHR’s decision confirmed Pildes’ hypothesis, as it delivered a considerably more assertive decision than the Constitutional Court in Sarajevo had done in similar cases. The ECtHR claimed that the electoral arrangements exhaust the category of ethnic discrimination, therefore breach Article 14. of the ECHR (pertaining to the prohibition of discrimination), Article 3 of its Protocol No. 1, and Article 1 of its Protocol No. 12. Nevertheless, until this day no major constitutional reform – or its attempt – has aimed to the rectification of the measures under question, as constitutional reform initiatives have been halted due to a lack of agreement on the overarching direction of the country’s constitutional future (discussed in *section 5.1*, pp 77-79).

#### *5.6 Peculiarities of abstract judicial review in a post-conflict setting*

In every case, the Bosnian Constitutional Court’s strategic choices were mostly dependent on the issue at stake: wherever established institutions were under question, the body embraced a deferential behavior, while in cases of evolving institutions, the Court more willingly embarked on an unwinding strategy. Furthermore, whenever the Court took the risk of confrontation with political elites, it happened when entity institutions and measures were challenged. Concerning the Court’s relationship to the relevant constitutional provisions, two important observations can be made. First, the Court did not confine itself to the constitutional text, but treated it as an organic part of the wider peace agreement’s framework; and the Court only exceptionally went beyond this, and therefore stayed away from the practices of activist transition courts which often draw their inferences from specific normative doctrines or comparative law (Stone Sweet 2012, 829). Second, the Court mostly employed purposive interpretation and – largely due to its strong links with the ECtHR – proportionality analysis.

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<sup>65</sup> A thorough conceptual analysis of the question is offered by: Agarín, McCulloch, and Murtagh (2018)

## 6 Northern Ireland

The most recently established consociational settlement in this analysis, Northern Ireland, stands out for three primary reasons. First, the power-sharing settlement does not govern a sovereign country, but a devolved entity of another state (the United Kingdom of Great Britain and Northern Ireland). Second, while Belgium and Bosnia and Herzegovina represent the ‘classical’, so-called *corporate* form of consociationalism, Northern Ireland mostly displays the logic of *liberal* consociationalism (McCulloch 2014; O’Leary 2005, 15–17), complemented with certain corporate provisions. Third, as a common law jurisdiction, Northern Ireland also has different arrangements on judicial review, lacking a specialized constitutional court. In other regards – primarily considering the external environment and the way power-sharing institutions evolved – the Northern Irish consociation displays similarities with both cases.

The parallel with Belgium is that the power-sharing architecture aims to govern a society divided into two major groups, and its institutions also have displayed a certain degree of flexibility through some important institutional reforms. In comparison with Bosnia and Herzegovina, the most important similarity is the post-conflict character of both power-sharing agreements as the Belfast Agreement of 1998 (also known as Good Friday Agreement) was as an attempt to resolve an armed conflict involving two external actors (a low-intensity conflict, nevertheless), standing behind the conflicting groups as kinstates or quasi kinstates. From the perspective of establishing and maintaining the settlement, the presence of external actors displayed one crucial difference however: while the Dayton Agreement aimed to decrease Croatia’s and Yugoslavia’s (later Serbia’s) involvement in Bosnian politics, the Belfast Agreement created institutional avenues for cooperation between Dublin and London over issues in Belfast. The primary rationale behind this is that only minor actors consider an independent Northern Ireland part of their long-term horizon (McGarry and O’Leary 2009, 66–7), while the two major groups, Unionist and Nationalists identify themselves along their preference to remain in union with the rest of the UK or joining a united Republic of Ireland. Also, the fact that the armed conflict in Northern Ireland had a substantially lower intensity and casualty rate compared to the Bosnian War (Bell 2000, 68) increased the likeliness of the eventual success of the settlement’s functioning.



### 6.1 *From Sunningdale to Belfast: the road to power-sharing*

The peculiar status of Northern Ireland reaches back to the centuries of British dominance over Ireland and the island's partition following World War I, when the Irish Free State was established (F. McGarry 2014; Patterson 2014; Whelehan 2014). The partition was initially structured by the *Government of Ireland Act (1920)* established by Westminster, dividing the island into two differently governed entities. While the larger entity – 26 of Ireland's 32 counties – formed the new Free State in 1921, recognised by the Anglo-Irish treaty of 1921 (ratified one year later), 6 counties with a larger Unionist population in the north were given the right to opt out and stay within the United Kingdom (Whelehan 2014, 632–34). The newly created legislative body for the respective counties (Parliament of Northern Ireland) declared its intention to opt out one year later, in 1922. The six counties remaining within the United Kingdom nevertheless remained bitterly divided over their common future: roughly two-thirds of the population favored to maintain the union with Great Britain, while the remaining one-third identified with the newly established Irish state (Bell 2000, 52). There are multiple approaches for labeling the two groups. Based on their national aspirations, one can use terms of 'Unionist' and 'Nationalist'. Considering the dominant religious communities within the groups, they have been also labelled as 'Protestants' and 'Catholics'. As the settlement behind current consociational regime recognizes the two groups as national communities (O'Leary 2004b, 284), I will follow a terminology emphasizing this dimension, therefore identifying the two major groups as 'Unionists' and 'Nationalists'. For similar reasons, the use of 'Belfast Agreement' is preferred over the term 'Good Friday Agreement'.

While the question of Northern Ireland remained a contested issue in the Anglo-Irish relations – the Irish Constitution adopted in 1937 expressed a territorial claim for Northern Ireland until 1998/99 – systemic discrimination against the Irish led to increased tensions within the region (Taylor 2009b, 312–4). By the late 1960s, these tensions culminated in an outbreak of violence, marking a period of low-intensity conflict known as 'The Troubles'. While the conflict escalated, the Parliament of Northern Ireland was also dissolved (in 1972), and direct rule was introduced, with the aim of replacing it with a body built around power-sharing between Unionists and Nationalists. The Sunningdale Agreement (1973) attempted to create these institutional mechanisms, but the power-sharing settlement collapsed in the following year (1974), mostly because the limited capacity of elites to 'sell' the agreement to their constituents, on both sides (O'Leary 1989).

While the Agreement was supported by the slight majority of Northern Ireland's entire population, it was rejected – also with a slight majority – within the demographically larger group, the Unionists (Tonge 2000, 44). On the other hand, the Nationalist majority's embrace of the Agreement was also lukewarm, either because of a hardliner rejection of both governments' (British and Irish) legitimacy (Connolly and Doyle 2018, 155–6) or a discomfort in the moderate camps towards the British government's dominance over the negotiations (Farrington 2007, 96). In order to ease this reluctance, Nationalist elites communicated the Agreement towards their constituents from the perspective of potential Irish reunification. This communication strategy is probably best represented with a quote from Hugh Logue's talk at the Trinity College (Dublin) in January 1974, where he presented the Agreement as a “vehicle by which Unionists will be trundled into a united Ireland” (Tonge 2000, 43). His words, as well as the broader Nationalist rhetoric during the negotiations, emboldened the Unionist opposition to the Agreement whose general strike starting in February 1974 contributed to the collapse of the already fragile Agreement (Connolly and Doyle 2018, 152–53).

Following Sunningdale's demise, direct rule from Westminster was introduced, which remained in force until 1998, when the Belfast Agreement established the currently functioning consociation. The two and half decades between Sunningdale and Belfast witnessed one important constitutional development, the Anglo-Irish Agreement (AIA) between London and Dublin in 1985. The AIA recognized the constitutional *status quo* on Northern Ireland already agreed in Sunningdale which asserted that Irish reunification could only happen with a majority consent on both sides of the Irish border (Connolly and Doyle 2018, 153–6). Politically speaking, this period also marked a process of moderation among both the Unionist and Nationalist hardliners. For the Unionists, shifting demographic trends suggested that their majority position might be threatened in some time, suggesting the need for a mutually acceptable power-sharing settlement (McGarry and O'Leary 2009, 21).<sup>66</sup> As for the Nationalists, their most radical political party, Sinn Féin has also gone through a process of moderation, coupled by a growing international pressure to negotiate, motivated by the wave of peace agreements in the early 1990s, such as the end of Apartheid in South Africa or the Oslo Accord on the statehood of Israel and Palestine (Connolly and Doyle 2018).

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<sup>66</sup> To illustrate the general trend, electoral figures show a slow, but steady growth in the support of Nationalist parties: from 30% in 1982 to 40% in 2005 (P. Mitchell and Evans 2009, 154–55).

Beyond certain major, slow-moving processes, the commitment of particular political actors in the later 1990s also played a large role in reaching a settlement. In Westminster, the Labour Party's commitment towards devolution and constitutional reforms, and its electoral victory in 1997 (led by Tony Blair) enabled the reconsideration of the traditional British model based on Westminster's absolute parliamentary sovereignty, opening the way for legal guarantees satisfying both parties (Morison 2009). On Dublin's side, pressure from Irish American lobby groups and political actors, and the diplomatic efforts by the Clinton administration largely contributed to the Nationalist consent to the Agreement (McGarry and O'Leary 2009, 39-42). The peace process leading to the Belfast Agreement was officially launched in December 1993 by the British and Irish governments, and was halted several times; its final stage started in July 1997 when the IRA announced its second ceasefire during the process (Guelke 2009, 103-5). Negotiations were concluded by the spring of 1998 and the Agreement was signed on April 10 – hence it is also known as the Good Friday Agreement. The Agreement's provisions were codified in several legal acts; most importantly, the power-sharing institutions agreed upon were codified in the *Northern Ireland Act* (1998; NIA hereafter). In most regards, the NIA contains most elements of a constitution – excluding a bill of rights – and has become acknowledged as the effective constitution of Northern Ireland.<sup>67</sup>

Not only the British side needed to demonstrate flexibilities on constitutional matters. While the Good Friday Agreement opened the possibility for reuniting Ireland in case the majority of Northern Irish people decide so (Article 1(2)), the Republic of Ireland also revoked territorial claims from its constitution (Annex B). Dublin got involved in the governance of Northern Ireland in two ways. First, an intergovernmental body (the North-South Ministerial Council, NSMC hereafter) was established where certain policy areas (agriculture, education, environment, health, tourism and transport) are coordinated between Belfast (or Stormont)<sup>68</sup> and Dublin (*Strand Two* of the Belfast Agreement). Second, a body for East-West cooperation was established between the British and Irish governments (the British-Irish Intergovernmental Conference or BIIGC) for cooperation on matters reserved by Westminster or not yet devolved to Stormont or the NSMC; when no cabinet is elected, or Northern Irish institutions are

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<sup>67</sup> In the words of Lord Bingham in *Robinson v. Secretary of State for Northern Ireland* (2002) – one of the landmark cases in adjudicating the NIA – the “1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution” (para 11).

<sup>68</sup> Similar to the term ‘Westminster’, the district's name, where the Parliament of Northern Ireland's house – later the Northern Ireland Assembly's – was built, became the synecdoche for Northern Irish governmental institutions, in academic literature as well as everyday language.

suspended under political impasse (possible under the legal framework between 2000-2007; Anthony 2008, 152) the Council deals with devolved matters (*Strand Three* of the Belfast Agreement).

## 6.2 *The liberal consociation of Northern Ireland*

The institutional setup of the power-sharing structure in Northern Ireland itself was designed to accommodate potential shifts in cleavages and transformation of identities, emphasizing self-determination instead of pre-determination (Lijphart 1995), making the Northern Irish settlement a *liberal consociation*. The core idea behind such settlements is making provisions for cooperation and power-sharing without specifying the groups which have to be necessarily included and their shares in elected bodies. Therefore, “liberal consociationalism avoids constitutionally entrenching group representation by leaving the question of who shares power in the hands of voters” (Alison McCulloch 2014, 503). Though this logic has been ubiquitous in the provisions on the legislative and executive bodies of Northern Ireland, in certain ways group membership and the official recognition of the Unionist-Nationalist divide remain essential (discussed below). Despite these corporate provisions, the Northern Irish power-sharing settlement is probably the purest functioning form of liberal consociationalism at the moment.

The central institution in the power-sharing is the legislative body, the Northern Ireland Assembly. Beyond legislating in all matters not explicitly reserved by Westminster and exerting a certain degree of control over the Executive,<sup>69</sup> the manner of Assembly’s composition determines the assignment of ministerial positions, including the First Minister’s (FM) and Deputy First Minister’s (DFM). The 90 members of the Assembly (MLAs) are elected in 18 constituencies across Northern Ireland, and – unlike Belgium and Bosnia – there is no legal connection between electoral districts and constituent group membership. In the 18 districts, seats are allocated using the single transferable vote (STV), a preferential method for assigning proportional representation. Compared to the party-list proportional representational systems – employed in Belgium and Bosnia – STV aims to favor moderate parties and provide mechanisms for the government’s cross-block electoral accountability (Garry 2014).

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<sup>69</sup> Ministers can only be removed by their own parties, or for breaching their pledge of office or a lack of commitment to “non-violence and exclusively peaceful and democratic-means”, with a qualified majority in the Assembly (NIA, Section 30).

Following the parliamentary elections, the cabinet's (the Northern Ireland Executive) composition is determined based on the size of party groups within the Assembly, using the d'Hondt method, which determines both the number of ministerial seats a party receives as well as the order of choosing them (though in practice the selection of executive posts has been coordinated through informal talks; Wilford 2009, 186). The exact size and structure of the cabinet are the only issues lacking a mechanical arrangement, where the FM and DFM should submit a joint proposal, considering the NIA's stipulation on the size of the cabinet. The latter should be between 6 and 10 according to *Section 17(4)* of the NIA; by establishing this size, the intention was to include 'significant' parties in the Executive (O'Leary, Grofman, and Elklit 2005, 207). Importantly, if a party is unwilling to participate in the Executive it may opt out; in that case, the cabinet seats will be redistributed among other relevantly sized parties (*Section 18(3)*).

The corporate elements of institutional design – the institutional recognition of the Unionist-Nationalist divide – appear in legislative procedures, the appointment of the Speaker, the FM and the DFM and since 2009, the election of the Minister of Justice. After the Assembly's election, newly elected MLAs have to identify themselves as 'Unionist', 'Nationalist' or 'Other'; in most decisions, support for legislative bills, parliamentary decrees or election of officials depends on their support within the self-designated communities. In specific questions, like election of the Speaker or the Minister of Justice, a majority within both communities is required; also, the same stipulation stood until 2006 pertaining to the election of the FM and the DFM. Furthermore if 30 MLAs submit a Petition of Concern – modeled on the Belgian 'alarm bell' procedure (see *Chapter 7.1*) – over a sensitive issue, 'cross-community support' is necessary for the passage of legislation (*Section 42*). 'Cross-community support' can be understood in two ways: either a concurrent majority within the self-designated Unionist and Nationalist groups; or an overall 60% support in the Assembly, and at least 40% of support from both the Unionist and Nationalist blocks (*Section 4(5)(b)*).

Thus far, the peace agreement's implementation has been fairly difficult. Conflicts between the two blocks have led to the suspension of the power-sharing institutions on multiple occasions. The longest deadlock, occurring between 2002 and 2007, also caused the revision of several crucial institutional provisions, based on the St Andrews Agreement (2006). To understand the underlying reasons behind the reform, it has to be mentioned that between 1998-2002, due to the stipulations on cross-community support, the Executive was dominated by the largest moderate parties within both blocks: the Ulster Unionist Party (UUP) and the Social Democratic

and Labour Party (SDLP). Nevertheless, with time both the hardliner Democratic Unionist Party (DUP) and the Sinn Féin increased their electoral support. Therefore, beyond meeting the specific demands from both blocks, an approval from both block's dominant political force was necessary. To gain it, both parties needed a guaranteed connection between electoral results and leading roles in the Executive. In this regard, the NIA's respective provisions were changed in a way that the right to nominate the FM and DFM is automatically assigned to the largest parties of the two largest party blocks (*Section 16A(4-5)*),<sup>70</sup> replacing the mechanism based on cross-community vote (Anthony 2008; J. McGarry and O'Leary 2009a).

Cross-community voting remained a part of cabinet formation, as part of resolving the St Andrews Agreement's other key issue, policing and justice. While the primary unionist demand was Sinn Féin's acceptance of the newly established Police Service of Northern Ireland (PSNI) and the complete decommissioning of the Irish Republican Army (IRA) – Sinn Féin's military wing – Nationalists demanded the devolution of policing and justice in exchange (Anthony 2008, 153–6). Given the contentious nature of the policy field, the Minister of Justice is chosen with cross-community vote similar to the FM and DFM before the St Andrews Agreement (*Section 21A(3)*); accordingly, in the past 10 years since the office was created, the liberal, non-sectarian Alliance Party (self-designated in the 'Other' block) has given the Minister of Justice, except for an 8 months-long period in 2016-17 (D. Mitchell 2018, 343).

The St Andrews Agreement has also been important in terms of enhancing the autonomy of Northern Irish political processes. In this regard, three specific issues can be identified. First, following experiences of political deadlock in the early stage of power-sharing, legislation was introduced allowing Westminster to intervene by easing the procedures of suspension; following republican demands the legislation in question the *Northern Ireland Act (2000)* was repealed as part of the St Andrews Agreement (Anthony 2008, 152; McGarry and O'Leary 2009a, 35). This issue had particular importance both regarding the autonomy of Northern Irish institutions and the power balance between Unionists and Nationalists: by default, Unionist – for whom identification with Great Britain is an essential question – consider direct rule from Westminster much less intrusive – at least on a symbolic level – than Nationalists do. Therefore, by curtailing Westminster's ability to intervene, the St Andrews Agreement reduced Unionist incentives to

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<sup>70</sup> In case there is no single largest party within a block – i.e. two or more parties simultaneously have the largest number of Assembly seats – the number of first preference votes in the STV system determines which party is entitled to nominate the FM or DFM (*NIA, Section 16C(2)(b)*).

create or to hold on to political impasses. The other issue pertaining to the autonomous dynamics of the power-sharing settlement was the Assembly's increased capacity to hold ministers accountable (primarily pertaining to their adherence to the Ministerial Code), through the Assembly's committees and internal mechanisms within the Executive (Anthony 2008, 160–2). Finally, the Agreement also included a revised Pledge of Office emphasizing power-sharing among the FM and the DFM, as well as the obligatory participation in bodies fostering North-South and East-West cooperation, both for the FM and DFM nominating ministers and the participant ministers themselves (Anthony 2008, 158). The latter provision had specific importance because nominating ministers into the cooperative bodies had been instrumentalized by several political actors before 2002 (discussed in *Chapter 6.5*).

Altogether, the Northern Irish consociation's institutional dynamics appears to have greater similarities with the Bosnian case: both being post-conflict settings and designed alongside peace negotiations, with the help of external actors. However, in comparison the fact that certain provisions have been successfully revised demonstrates a greater degree of flexibility. Both the imbalances in expectations connected to political impasses – as Nationalist forces found these much more burdensome – and the changing political landscape suggested the need for revisions. In the latter regard, critiques of the consociational arrangement point out that the politics of accommodation brought the emergence of radical voices in both blocks, as the hardliner DUP and Sinn Féin gained electoral support at the expense of moderate parties like UUP and SDLP (McGarry and O'Leary 2009a, 55). Nevertheless, this transformation of the electoral landscape also included the moderation of hardliners, measured in their policy positions (J. McGarry and O'Leary 2009a, 55–57). In the account of Paul Mitchell and Geoffrey Evans, this was due to the DUP's and Sinn Féin's strategy for moving beyond the role of “electoral niche players”, by moderating their policy platforms, while rhetorically still emphasizing their zeal in protecting their segmental interests (remaining their “pre-eminent tribunes”; 2009, 157).

### 6.3 *The judiciary and its role in the settlement*

While the Belfast Agreement thoroughly reshaped the institutional landscape of Northern Ireland, the judiciary remained untouched in the settlement, except a promised Criminal Justice Review (O'Leary 2004a, 369). The lack of institutional reform concerning the judiciary is somewhat surprising considering the transitional character of the Belfast Agreement and the

potential legal challenges to the Agreement's measures and provisions. In the former regard, Northern Ireland's situation became partially similar to cases of transition from autocracy to democracy, where a new constitution co-exists with the legal order inherited from the previous regime. In these cases, specialized constitutional courts have proven to be effective in reconciling the two systems and upholding or promoting the superiority of the new constitution (Sadurski 2003; 2005; H. Schwartz 2000). Though it was not an authoritarian past that Northern Ireland has left behind, its history through the 20<sup>th</sup> century (including the decades preceding the Agreement) is tainted with human rights abuses and the political marginalization of the Nationalist minority (O'Leary 1989). Also, changes in the Executive's character could have implied reforms in the judiciary, given the fact that the strong executive branch was transformed into a power-sharing institution, so the traditional balance of a strong executive and deferential judiciary in its pre-Agreement form does not exist anymore (Morison and Lynch 2007, 122–23).

In the years following the Belfast Agreement, academic and juridical communities were concerned about the Agreement facing legal challenges, both locally, concerning its implementation and in Westminster, regarding its institutional provisions (O'Leary 2004a, 353–57; 2004b, 271–72; Morison and Lynch 2007, 129). In the perspective of some years, only the latter was proven to be real (discussed in the following section), though concerns were present at the time of the agreement – and through the years immediately following it – that its provisions were vulnerable to challenges on grounds of equality, concerning the standards set by the ECHR and the UK's *Human Rights Act (1998)*. A specific bill of rights addressing the peculiarities of Northern Ireland has not been drafted to this date, despite ongoing discussions on its importance (O'Leary 2004a; A. Schwartz and Harvey 2012). From the academic commentaries on the relationship between the Belfast Agreement and the ECHR (e.g. McCrudden 2007; O'Leary 2004a) Brendan O'Leary raised the sharpest concern on the Agreement's lack of attention on the judiciary:

[...] if all other public bodies, including the police are to be rendered consistent with the Agreement, why should the judiciary be exempted from reform, especially if they are inevitably to play a larger role in the determination of law and the qualification of public policy? Unless and until the composition of the judiciary is addressed, many will be reluctant to have the judiciary enjoy the power to strike down legislation of executive activity. (O'Leary 2004a, 369)

In general, O'Leary's primary concern is that while Northern Ireland's consociational structure of government is adjusted to the deep divisions within its society, its current human rights regime is not. A general, context-blind reading of the ECHR and the *Human Rights Act (1998)* may not



sufficiently appreciate the aims served by the consociational form of government, together with the formal equality concessions made in order to enable its functioning. Moreover, in O’Leary’s opinion a universal standard of equality – such as the ECHR – falls short in appreciating the needs of a post-conflict society – like specific provisions for states of emergency (2004a, 353) – and measures aiming to rectify past injustices and traces of systemic discrimination, such as proportionality measures in public bodies or affirmative action policies (2004a, 357–8). Therefore, his primary concerns are establishing a Northern Ireland-specific human rights framework, and a reform of the judiciary that formally adjusts its composition to the divided nature of the society, increasing its legitimacy across communities (O’Leary 2004b, 371–2).

Despite the lack of formal provisions on the judiciary’s composition, scholarly works on the Northern Irish judiciary’s history emphasize some informally implemented adjustments. Relatively autonomous within the United Kingdom (K. McEvoy and Schwartz 2015; Morison 2015, 132), the Northern Irish judiciary was dominated by the local Unionist majority until the 1980s. This dominance was mitigated by the end of that decade, when the proportion of judges from Unionist and Nationalist backgrounds roughly mirrored their shares in the entire society (K. McEvoy and Schwartz 2015, 167). However, no formal provision was enacted to maintain this balance, and none has been done so ever since. For instance, the *UK Constitutional Reform Act* (2005) states that judicial “[s]election must be solely on merit” (Article 63 (2)), with the supplementary provision that the selecting bodies “must have regard to the need to encourage diversity in the range of persons available for selection for appointments” (Article 64 (1)). The latter provision addresses all possible dimensions of diversity (racial, gender-based, etc.) without specifically acknowledging the dominant cleavage points in the Northern Irish society.

A largely similar situation is present in the design of institutions hearing cases from the entire UK, where judicial decisions from Northern Ireland can be appealed. Until 2009, this body has been the so-called Law Lords, the legal committee of the legislative upper chamber (House of Lords), where justices were appointed by the monarch, based on the recommendation of the Prime Minister. In 2005, a law was enacted establishing a Supreme Court (*UK Constitutional Reform Act* 2005), to formalize the separation of the judiciary from the legislative. The establishment of the UK Supreme Court (UKSC hereafter) also had the importance of involving the devolved units – including Northern Ireland – in the appointment procedure: the selection committee should have representatives from the judiciary systems of all devolved units, while the final recommendations have to be made following a consultation with their governments.

The lack of a purpose-built constitutional court in the Northern Irish case is particularly interesting given the fact that the polity has a constitution in a functional sense, though the state where it belongs to – the United Kingdom – lacks legal traditions of constitutional adjudication. Though the Northern Irish settlement was designed in a way that is less vulnerable to those issues which triggered constitutional controversies in Belgium and Bosnia – like the connection between ethnicity and territory or the explicit reservation of key political offices to certain groups – the power-sharing mechanisms are highly novel and unique within the British constitutional order.

Since the enactment of the Belfast Agreement in 1998 (also known as Good Friday Agreement or GFA), a number of controversies related to its implementation have arisen which also resulted in judicial cases where the plaintiffs challenged primarily executive, but also some legislative decisions on grounds of their violation of the Northern Ireland Act (NIA), the polity's *de facto* constitution. As the NIA was considered a special legal instrument in the British constitutional order, people being involved in the negotiation process – according to the interview-based research of John Morison and Marie Lynch (2007) – expected that intense litigation would follow its implementation. In this regard, the overall number of cases linked to the NIA was below expectations, for which Morison and Lynch identified altogether six reasons based on their interlocutors' opinions (2007, 130–31).

First, an overall satisfaction with the negotiation process preceding the Good Friday Agreement. Second, an overall trust in the legal experts involved in the negotiation process and the Agreement's codification. Third, according to their interlocutors, "most politicians instinctively disliked turning to the courts to resolve what they saw as an essentially political issues" (Morison and Lynch 2007, 131), also considering engagement in litigation as a sign of political weakness. Therefore (fourth), given their political understanding of the settlement, when mobilizing extra-parliamentary means of pursuing their interests, instead of litigation, parties on both sides preferred appealing to the British or Irish governments to speak on their behalf. Fifth, parties also often lacked the professional and financial resources to pursue the risky, complex and usually lengthy litigation. Finally, the deferential approach embraced by the judiciary in the first few cases – through its so-called 'soft-edged review' – further discouraged parties from pursuing their interests through a literal and legalistic reading of the NIA.

In the following, four different controversies are discussed to present the Northern Irish and British judiciary's role in implementing the NIA. In all cases, multiple judicial decisions are discussed as litigation happened on multiple appellate levels. However, some decisions are discussed in greater or smaller detail as courts on a higher appellate level often relied on the reasoning of the lower-level courts. From the relevant cases listed by the literature focusing (Anthony 2002; Morison and Lynch 2007) on the judiciary's role in the Northern Irish consociation the ones dealing with uniquely consociational problems were selected, with one exception: though *Re Williamson's Application* (discussed in below) was not related to the NIA itself, the interpretive method employed in all subsequent cases – the so-called 'soft-edged review' – was introduced there.

#### 6.4 *Re Williamson's Application (1999-2000)*

The first case concerning the Belfast Agreement was much more related to the peace process than the institutions established for power-sharing but still established important principles for cases more closely connected to institutional provisions – in the sense of addressing the rules of the game itself. Though the controversy was not connected to the constitutional document of the Northern Irish polity (the NIA), the legal basis of Williamson's quest for judicial review (the *Northern Ireland (Sentences) Act 1998*) is rooted in the same political agreement – the Good Friday- or Belfast Agreement – as the NIA itself. Therefore, beyond formulating a position on its relationship towards the executive, the High Court and the Court of Appeal became involved in a question related to the framework agreement's enforcement. Both bodies have heavily relied on the political question doctrine and took a deferential position.

Michelle Williamson herself is the daughter of two victims (George and Gillian Williamson) of a terror attack in 1993, committed by a supporter of the Provisional IRA (PIRA), Sean Kelly. Though Kelly was sentenced to lifelong imprisonment, he was released in 2000 under the provisions of the *Sentences Act*. The act allowed the release of paramilitary members imprisoned for qualified crimes committed before April 10, 1998 (the day when the Good Friday Agreement was signed) whose organization was maintaining a 'complete and unequivocal ceasefire' (Section 3 (8)). In her application, Williamson argued that as the PIRA was not holding the 'complete and unequivocal ceasefire', the Secretary of State for Northern Ireland should have specified the PIRA as a non-compliant organization, which would have made Kelly's release unlawful. To

demonstrate the PIRA's non-compliance, Williamson referred to two incidents in July 1999 (when the release itself happened), a murder and a weapon smuggling from the USA, both involving the PIRA. The Secretary of State, Marjorie Mowlam, did not dispute the connection between the PIRA and the aforementioned actions, but instead released a statement that in her 'overall judgement', the ceasefire was not broken, therefore PIRA's specification as a non-compliant organization was not necessary. In this regard, the applicant claimed that the wrong test was taken, as in relation to the Sentences Act, the Secretary of State for Northern Ireland (SSNI hereafter; member of the British cabinet) is supposed to judge the status of individual organizations, not the overall peace process.

According to the *Sentences Act*, by specifying an organization, the SSNI "shall in particular take into account" the following four conditions: a commitment to "the use now and in the future of only democratic and peaceful means to achieve its objectives"; the organization is not involved "in any acts of violence or of preparation for violence"; the organization is not "directing or promoting" other organizations' violent actions; and full cooperation with the relevant administrative bodies (*Northern Ireland (Sentences) Act 1998*, Section 3(9)). On the one hand, both courts and all litigants agreed in their expressed opinions that by scrutinizing solely the deeds of the PIRA, specifying it as a non-compliant organization was an straightforward judgement. Nevertheless, both courts placed strong emphasis on the wording of Section 3(9), as – according to their interpretation – the four conditions are not listed as elements of a functional test, but rather an emphatic element of a decision-making mechanism which ultimately rests on the discretionary judgement of the SSNI<sup>71</sup> – paving the way for a broader, more contextual assessment of the ceasefire. Furthermore, by scrutinizing Mowlam's adherence to the relevant statutory language, the Court of Appeal concluded – with a wide margin of appreciation – that by claiming that the ceasefire as such was "not broken down", the SSNI "did make her decision not to specify the PIRA by reference to the correct test, notwithstanding a certain imprecision in her statements" ([2000] CARE 3169, page 12).

Furthermore, in dismissing the application, both courts have ultimately put their emphasis on the political question doctrine. In the High Court's decision, Lord Kerr argued that the specification of the various organizations is not a mere question of legal interpretation, but

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<sup>71</sup> In the Court of Appeal's wording, "[i]t is apparent, however, that section 3(9), especially by the use of the words "in particular", is intended to leave open a degree of discretion to the Secretary of State about the grounds on which he reaches his decision" ([2000] CARE3169, pages 10-11).

“require[s] the deployment of political judgement as well as analytical skills” ([1999] KERF3105, page 16), therefore he left the executive decision unchallenged. With a similar approach, the Court of Appeal argued that the nature of the question required a ‘soft-edged review’, meaning that

the court should in such circumstances be somewhat more ready than in some other cases to assume a higher degree of knowledge and expertise on the part of the decider, which is an ordinary and normal exercise of judicial assessment of evidence ([2000] CARE3169, page 15)

The Court of Appeal further emphasized the decision’s importance in managing the peace process by claiming that

[i]t is part of the democratic process that such decisions should be taken by a minister responsible to the Parliament as long as the manner in which they are taken is in accordance with the proper principles the courts should not and will not step outside their proper function of review ([2000] CARE3169, page 16)

Though reference to the ‘proper principles’ suggests the existence of certain standards for judicial scrutiny, the court did not further specify its understanding of this matter. Nevertheless, the High Court was fairly open concerning its political understanding of the case by claiming that “[w]e cannot repeat too often or too clearly that a judicial review is not an appeal against the merits of decision under review” ([2000] CARE3169, page 16) stressing the political nature of cases linked to the NIA’s implementation, at the expense of reading the NIA in the perspective of a close statutory interpretation. In conclusion, the *Williamson* case bears specific importance for the fact that the standard of ‘soft-edged review’ was introduced here – a framework for putting the political question doctrine into practice, which appeared in most of the subsequent cases.

### 6.5 *Re De Brun’s Application* (2001)

The chronologically first case dealing with controversies around the NIA involved taking a side in a dispute between governing parties, especially because the SSNI’s decision was not under scrutiny, but the Northern Irish First Minister’s (FM). Both courts hearing the case applied the political question doctrine in a way that reflected the different dynamics of this controversy: the notion of soft-edged review was again invoked, yet ultimately not applied, in which regard the courts made an attempt to delineate the boundary between executive discretion and constitutional supremacy. Furthermore, the case also established a precedent for using the Belfast Agreement’s – by nature political – text as a primary guideline for purposive interpretation. This

practice has been followed throughout the following cases of judicial review based on the NIA's provisions.

The controversy arose from the decision of David Trimble, First Minister at that time, who refused to nominate two Sinn Féin members of the cabinet (Bairbre de Brun and Martin McGuinness) to the North-South Ministerial Council (NSMC), a body fostering cooperation between Northern Ireland and the Republic of Ireland. Importantly, the NSMC has greater significance for the Republican parties, so being prevented from participation in it by a Unionist's choice created a particularly sensitive situation. Especially as in his decision, Trimble did not refer to any of the personal or professional traits of the ministers but identified their party membership as his primary reason behind the decision. Nevertheless, he did not claim that the party membership as such is fundamentally problematic but refused to nominate them with a specific collateral purpose, in order to put pressure on Sinn Féin to use its influence to accelerate the decommissioning of Republican paramilitary forces. Given the pertinence of the issue, the two ministers challenged this executive decision at the judiciary. In their petition, the applicants invoked the antidiscrimination clauses of the NIA, but both courts turned down these claims, for two reasons. First, because Trimble has nominated members of the Sinn Féin in the past; second, as the ministers were not nominated for their group membership in general, but in order to pursue a specific purpose, laid down in the Belfast Agreement. Instead, both courts focused on the balance between interpreting the NIA's provisions and employing the political question doctrine – in their words, 'soft-edged review'.

In this regard, both the High Court and the Court of Appeal acknowledged the legitimacy of discretionary choices by the First Minister in order to put the Belfast Agreement into action, nevertheless these choices had to be done taking into account other provisions of the Belfast Agreement as well. On assessing the scope of political discretion, Lord Kerr argued in the High Court's (unreported) judgement that "[t]he subjective nature of the decision and the political considerations which inform it place it firmly in the category of soft-edged review", nevertheless only with the condition that "the First Minister would be exercising his discretion in assessing the suitability of the prospective nominee to contribute to the work of the [NSMC]" (Anthony 2002, 408–9). The latter consideration was taken from the Belfast Agreement's text which neither prioritizes the improvement of relations between Northern Ireland and Republic of Ireland, nor the decommissioning process, and therefore does not allow the FM to instrumentalize one provision in order to promote another. In this regard, both courts concluded that the

discretionary judgement of the FM can only be exercised for reasons inherent to the given provisions' purposes; in the case of the NSMC, this might be pertaining to the qualities of the nominated ministers or the policy issues addressed by the NSMC's work. Nevertheless, Trimble was candid about the collateral purpose of his decision throughout the nomination process as well as the litigation.

After both court ruled that Trimble's nomination choices were unlawful, he appealed to the Law Lords, but later rescinded his application due to his satisfaction with the progress made in decommissioning (Anthony 2002, 410). Beyond the precedents the judgements have set – in terms of delineating the limits of soft-edged review and the use of the Belfast Agreement as an interpretive standard – the courts made two important steps from the perspective of regime dynamics. First, once one party aimed to use its position in order to gain larger influence – the Unionists using their First Ministerial positions to accelerate the decommissioning process – the judiciary intervened in order to restore the *status quo* among parties. Second, and also closely related, the courts preferred buttressing institutional provisions vis-à-vis specific processes and outcomes. In conclusion, the courts decided to limit executive discretion, in order to reinforce the cooperative dynamics of the power-sharing settlement as a whole.

#### 6.6 *Re Morrow's and Campbell's Application (2000-02)*

Roughly simultaneously with De Brun's case, another debate within the Executive was brought to the judiciary; however, in this case the hard-liner Unionist, anti-agreement DUP was sanctioned, and sought for judicial remedies. Partly due to its generally anti-agreement position and partly due to the controversies around IRA's decommissioning, the DUP embraced a set of measures to protest against the presence of Sinn Féin members in the Executive (McCrudden 2004, 215), as well as initiating a procedure to suspend them. Beyond the DUP's general abstention from the NSMC's work, two of the party's front-line politicians – Peter Robinson and Nigel Dodd – decided to withdraw from the Executive and be replaced by two other members: Maurice Morrow and Gregory Campbell (which happened on 27 July 2000). Nevertheless, according to the party's press release (issued on 31 May 2000), Morrow and Campbell were appointed to "act in a holding capacity only", as in the DUP's view adhering to the "Ministerial Code of Conduct or [to] any notion of collective responsibility introduced by the Executive"

would have compromised their promise to “abide by their election manifesto commitment to the electorate” (DUP 2000).

The DUP made it clear that it considers the resignations temporary, until Section 30 of the NIA is triggered. The latter provides for a mechanism in which ministers not committed to peaceful and democratic means or breaching their pledge of office can be excluded from the cabinet – if the Assembly approves the motion with a qualified majority – for a period of twelve months. For the interim period, the DUP nevertheless promised to “uncover and reveal what is going on at the heart of the government [...] exposing each of Trimble’s concessions to Sinn Féin/IRA”. In reaction – roughly a week later, on June 8 – the Executive adjusted some of its internal policies to the DUP’s claims, considering their renunciation of cabinet solidarity: the respective ministers were not invited to the cabinet meetings, and confidential inner documents were not circulated to them. The latter measure was closely linked to the DUP’s statement on “exposing each of Trimble’s concessions to Sinn Féin/IRA” and its promise to “reveal what is going on at the heart of the government”. Though an option was left open for the ministers to have their ministerial status fully restored, the FM and DFM demanded “appropriate and satisfactory public assurances” ([2001] NIQB 13, page 5) to provide that.

In order to retain their ministerial rights, Morrow and Campbell sent a memorandum (on 8 September 2000) to the FM and DFM assuring them about their respect for the Ministerial Code of Conduct and cabinet solidarity, however the addressees found this insufficient, as long as the respective ministers had not distanced themselves from DUP’s official position on cabinet participation. In this regard, Trimble and Mallon (the FM and DFM) argued that they cannot be assured of their confidentiality and solidarity as long as the ministers are “saying one thing in public but another in private” ([2002] NIQB 4, page 17). Following Trimble’s and Mallon’s decline, Morrow and Campbell challenged the measures before the judiciary; in McCrudden’s words, “[w]hile they regarded themselves as able to exclude *themselves* from full participation, the DUP was prepared to use judicial review to resist their exclusion by others from full participation (McCrudden 2004, 215).

In the first decision made by the High Court the FM’s and DFM’s arguments prevailed. In this case, the applicants stressed their equal status to other ministers, and their need to access the given documents to sufficiently participate in the Executive inner deliberations, contributing to its work beyond their own portfolio. In contrast, the Executive largely repeated its earlier stated



reasons for excluding the given members – the jeopardy placed upon policy formation by their potential access to confidential documents. In the High Court’s decision – signed by Lord Kerr – the FM’s and DFM’s choice was upheld, largely accepting the Executive’s arguments. In this regard, the Court accepted the Executive’s assumptions on the DUP’s potentially detrimental effect on policy processes requiring a certain degree of confidentiality. Furthermore, Kerr also argued – following a close reading of the NIA’s respective provisions – that the ministers neither had an *ex officio* entitlement to access the confidential documents, nor were they unable to perform their ministerial duties without them ([2001] NIQB 13, page 8-12). Finally, Kerr also invoked the principle of soft-edged review ([2001] NIQB 13, page 15), underlying a certain degree of executive discretion in issues pertaining to the functioning of the power-sharing settlement. As Kerr mostly built his conclusion on close statutory interpretation, the political question doctrine was not employed in this case, except for short reference at the end of the decision. Nevertheless, the decision’s impact on the settlement’s functioning was similar to those which were built upon soft-edged review as the judiciary took side with that party whose measures were contributing to the settlement’s functioning, again, reinforcing the consociational structure.

Contrary to the majority of cases in this analysis, the next appellate level decided to revert Kerr’s choice and give an access for Morrow and Campbell to the confidential documents. Though the appellate court neither questioned the reasonableness of Trimble’s and Mallon’s measures, it also argued that in the way these have been applied, a legitimate expectation was created, so after a certain point the FM and DFM did not have full discretion in applying their measures. The latter notion refers to a concept in administrative law which accommodates judicial remedies for situations “when public authorities make decisions which differ from what individuals have been led to expect by previous administrative decisions or representations” (Schønberg 2000, 1).<sup>72</sup>

On the one hand, the legitimacy of the Executive’s concerns on Morrow’s and Campbell’s commitment towards the Executive’s functioning was upheld through the use of proportionality analysis ([2002] NIQB 4, page 18). On the other hand, the Court’s assertion on Morrow’s and Campbell’s legitimate expectations were based on the way Trimble’s and Mallon’s measures were implemented in practice. While no confidential documents were circulated to them between June 8 (the announcement on the Executive’s reaction to DUP’s manifesto) and December 14, afterwards they were promised to receive these documents if their content had “immediate

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<sup>72</sup> Legitimate expectations have three hallmark features: they are based on predictive beliefs or calculations; they have a prescriptive nature; and they should not be based on a contractual (i.e. reciprocal) basis (Brown 2017, 6-7).

relevance to [their] Departments” ([2002] NIQB 4, page 19). In their reasoning, both the FM’s and DFM’s shifting positions and the lack of clear delineations in core issues – such as boundaries of “immediate relevance” – signaled that the limitation imposed upon the DUP ministers did not happen “in accordance with a fair, rational and clearly articulated policy” ([2002] NIQB 4, page 23). Furthermore, the FM and DFM also invoked the lack of Morrow’s and Campbell’s participation in the cabinet meeting as “an entirely new factor” ([2002] NIQB 4, page 23) in their official correspondence, which the appellate body considered a similarly arbitrary and inconsistent measure. Though in terms of reasonableness, the Court took side with the Executive, for its position on the applicants’ reasonable expectations, it decided on the unlawfulness of the Executive’s decision. In other words, the court decided to uphold the legitimacy of the measures, nevertheless annulled them because of how they had been implemented ([2002] NIQB 4, page 25).

The judiciary’s strategic choices were mixed in this case, and largely resemble the dynamics of *De Brun*’s case. The High Court aimed to defend the restrictive measures imposed upon the non-cooperative actors, protecting actors committed to power-sharing. Nevertheless, on the appellate level the court insisted that these restrictive measures – even if deemed reasonable – should be implemented in a consistent and predictable fashion. In other words, the judiciary again aimed to reinforce consociational procedures, but also aimed to delineate the boundaries of executive discretion. Nevertheless, while *De Brun* was concluded with the assertion that even if collateral measures are taken, it has to be done in cooperation (among the FM, the DFM and the subjects of the measures), *Morrow and Campbell* is much less conclusive in this respect.

#### 6.7 *Robinson v. Secretary of State for Northern Ireland (2001-02)*

The probably most important judicial case linked to the Belfast Agreement, *Robinson v. Secretary of State for Northern Ireland* was also linked to the controversies around PIRA’s decommissioning, and bears specific importance for two reasons. First, the litigation was related to the formation of the Executive, shaping the rules regulating the most important power-sharing institution. Second, the NIA’s constitutional character was explicitly pronounced here for the first time (on the appellate level).

The ‘consociational’ character of the case stems from the fact that the functioning of a key power-sharing institution, the grand-coalition arrangement was under scrutiny. The key legal reference

point of this case, Article 16 of the NIA provides that the Northern Ireland Assembly has 6 weeks to elect a First Minister and Deputy First Minister following parliamentary elections or by any other situation leaving these two positions vacant – failure to elect these officials triggers new elections. In 2001, FM David Trimble resigned in connection with the controversy around the PIRA’s decommissioning; following an unsuccessful attempt for re-election just before the deadline, and a successful ballot two days after, the SSNI John Reid appointed Trimble and Mark Durkan from SDLP as FM and DFM. Following their appointment, the anti-agreement DUP’s Peter Robinson (same person from the controversy around *Morrow and Campbell’s* application), challenged the SSNI’s choice as a violation of the NIA. According to the timeline laid down in Article 16, the NIA was violated in a way that gave very little room for further interpretation; yet both the Belfast courts and the Law Lords embraced purposive interpretation to the degree that resulted in turning down the application.

In the High Court’s unreported judgement, Kerr argued that “the purpose of the Northern Ireland Act 1998 [...] would be frustrated” if a close, textual interpretation would be given for the provisions (Anthony 2002, 414). Furthermore, the political question doctrine was again deployed by claiming that the SSNI’s decision “is taken in a political context and the political considerations which inform it place it firmly in the category of soft-edged review where it is inappropriate for the courts to intervene” (Anthony 2002, 415). The Court of Appeals shared the High Court’s conclusions, though it put more emphasis on interpreting the NIA’s procedural provisions through a purposive approach than scrutinizing the balance between statutory provisions and executive discretion, as the High Court and the Law Lords have done. In this regard, the Court of Appeal demonstrated its appreciation towards the given procedural provisions,<sup>73</sup> but ultimately defended the SSNI’s discretion in using his appointing authorities to uphold the functioning of the power-sharing settlement as much as possible. In this regard, Justice McCollum (the judge wording the judgement) stated that “[i]t would seem perverse if Parliament intended to avoid such an election [of the FM and DFM] where the parties were capable of achieving it simply because six weeks have elapsed since the vacancy had occurred” ([2002] NICA 18C, page 7).

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<sup>73</sup> In its reasoning, the Court of Appeals states that “[t]he imposition of a six week deadline for the holding of an election is a sensible one to avoid endless manoeuvring between parties which have little in common” ([2002] NICA 18C, page 7).

Following the petition being turned down by the Northern Irish judiciary, Robinson appealed to the Law Lords, which largely shared the conclusion of the two Northern Irish courts and followed a similar line in its reasoning, but also aimed to connect its argument to a broader view on British constitutionalism. The Westminster body built its argument on two major premises: the peculiar character of British constitutionalism and a purposive reading of the NIA. In the former regard, the body embraced an ambiguous stance. On the one hand, the Law Lords argued that the NIA can be considered a constitution in a functional sense, which also puts certain legislative and executive decisions under scrutiny, based on their compliance with it. In the words of Lord Bingham:

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. ([2002] UKHL 32, para 11)

On the other hand, Lord Bingham also softened the implications of his claim in the very next sentence by claiming that “the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody” ([2002] UKHL 32, para 11), reinforcing the interpretive practices of the Northern Irish courts, primarily their use of ‘soft-edged’ review. Beyond following the established practice of soft-edged review in cases linked to the implementation of the NIA, he also aimed to put his reasoning into the perspective of a wider context, considering the nature of the UK’s constitutional architecture. In this regard his key claim was that the country’s constitutional framework is not one “in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose” (para 12); instead,

[...] matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment [sic] they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude. ([2002] UKHL 32, para 12)

In this interpretation, dissolving the Assembly following the expiry of the 6 week-long time frame is not necessarily a *mandatory*, but rather a *discretionary* matter for the SSNI.

In conclusion, the *Robinson* case stands out for two reasons. First, probably in none of the other cases has there been such a wide gap between one’s expectations based on the statutory language

and the eventual outcome. Second, following the pattern established in *De Brun's* case, the courts made decisions focusing on the process of inter-bloc cooperation, providing a form of external support for the institutional provisions, reinforcing the power-sharing settlement. While in *De Brun's* case the courts have set the limits of purposive interpretation and the political question doctrine for this reason, in *Robinson* the same objective led to the most open and far-reaching application of both, among the cases linked to the implementation of the NIA.

#### 6.8 *Re Northern Ireland Human Rights Commission's Applications (2001-02 and 2018)*

As the balance between promoting human rights and respecting power-sharing agreements has been one of the core issues of the relevant literature, the role of human rights institutions, particularly regarding their relations with the judiciary is therefore a question of specific interest. In Northern Ireland, the latter issue got under scrutiny in two cases, related to proceedings initiated by the Northern Ireland Human Rights Commission (NIHRC), a body established by the Belfast Agreement with the purpose of protecting and promoting human rights. In the first case, the Commission offered an intervention in an investigation on the Omagh bombing, but the Coroner overseeing the case dismissed it; after this, the NIHRC applied for the Coroner's decision to be reviewed by the judiciary. While the Belfast courts rejected the application, the litigation continued in Westminster where the Law Lords concluded that the Commission could offer such interventions, but considering it is up to the given court's decision. Subsequently, this right of the NIHRC was also put into legislation (in 2007, in the *Northern Ireland Sentences Act*). In the second occasion, the NIHRC applied for the judicial review of the Northern Irish abortion law, claiming its inconsistency with the ECHR; in this case, the UK Supreme Court – hearing cases related to the ECHR – concluded that though the Commission was right in its position, it did not have the standing to initiate the proceeding. Importantly, the Supreme Court made this decision with a narrow majority.

Established as part of the Belfast Agreement's institutional framework, the NIHRC started its functioning in 1999, with the purpose of keeping “under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights” (NIA Section 69 (1)). The NIHRC is mandated with promoting human rights through multiple channels: advising the SSNI, the Executive Committee and the Northern Ireland Assembly; assisting individuals; and further advocacy activities, like conducting research related to the situation of

human rights, running awareness-raising campaigns, etc. In cases where the exact meaning of these provisions got under question, the possible character of the judicial system was at stake, especially as – in the lack of a Northern Ireland-specific catalogue of rights – the UK's wider human rights regime has been in place which has not been tailored to the controversies possibly arising in a deeply divided society. The potentially deeper involvement of the NIHRC was more immanent in the 2018 case, nevertheless the chronologically first case from 2001-02 also had important institutional implications.

The first case was linked to an explosion with twenty-nine death casualties which happened on 15 August 1998, only a few months after the Good Friday Agreement was signed. During the investigation (on 16 August 2000), the Coroner asked if the NIHRC wished to make a formal submission on human rights issues connected to the procedure; the Commission did use the opportunity, but the Coroner ultimately decided not to use it ([2002] UKHL 25, para 2). The Commission aimed to review this decision, in order to ensure that the human rights aspects of the case were appropriately taken into consideration. On the one hand, the Belfast courts turned down the application and gave a narrow reading for the NIHRC's procedural competences, following a purposive way of interpreting the NIA's provisions. On the other hand, Justice Kerr formulated a dissenting opinion – also along the lines of purposive interpretation – which was later highly influential in the Law Lords' decision partly overriding the former decisions, providing a more expansive reading of the NIHRC's competences.

In reading the case, the Belfast courts followed numerous patterns established in earlier cases. First, the courts were explicit about the purposive nature of their interpretation. In the Court of Appeal's wording, "[t]he provisions of the Act investing powers in the Commission must be looked at in the light of the stated objectives of the Act and in sympathy with its general import" ([2001] NICA 17, page 13). However, the body also stated – in the same sentence – that reconstructing the political motivations cannot lead "to read[ing] something into the provisions which has not been enacted or to add to them at will" ([2001] NICA 17, page 13). For reconstructing the possible political objectives, the courts followed the pattern of using the Belfast Agreement's text as a primary reference point, but also aimed to find a closer perspective on the specific provision pertaining to the NIHRC's competences, so transcripts of the parliamentary proceedings related to the NIA's enactment were also invoked. Based on these, the courts emphasized the political nature of the NIHRC over its legalistic character.

Following the same logic, the courts rejected the Commission's right to intervention on grounds of a separation-of-powers logic. Beside raising logistical concerns over the NIHRC's potential involvement in litigation – pointing to the potential extra costs and prolonged procedures resulting from its involvement – the Court of Appeal had two more fundamental concerns, both stemming from its position on the Commission's political nature. First, the Court argued that the “public perception of the independence of the judiciary” might be jeopardized by the intervention of a “Government agency” ([2001] NICA 17, page 13). The second point – in a similar vein – stressed that the intervention of the NIHRC threatens equal opportunities in judicial proceedings, as the party whose position is supported by the Commission's arguments “would be entitled to feel aggrieved if a publicly financed and prestigious body was permitted to intervene by the court in opposition to his interests” ([2001] NICA 17, page 14). Furthermore, the Court of Appeal has also taken a step further in understanding the Commission's place in the Northern Irish polity's system of governmental branches, emphasizing its focus on *human rights vis-à-vis other rights*:

The Commission will always be seen as a champion and upholder of human rights and, therefore, presumably will favour the party whose human rights are strongest. There may, moreover, be competing rights not protected by the Convention [the ECHR] and the person relying on them would certainly not regard the Commission as disinterested. ([2001] NICA 17, page 17)

Unfortunately, the Court of Appeal's majority did not specify how it exactly understood the range of rights outside human rights in human rights litigation. On the one hand, the Court might have followed the basic logic of proportionality analysis where rights claims are translated into constitutional interests but did not stick to its terminology. On the other hand – which is more likely – the Court possibly followed the general tradition of British constitutionalism which considers legal acts on a same level, not regarding one or another supreme.<sup>74</sup>

In his dissenting opinion attached to the argument, Judge Kerr also opted for purposive interpretation, but arrived at different conclusions, as he was focusing on the consistency of the NIA's provisions instead of understanding them with the help of external reference points. In his reasoning, separating the advisory functions from the right to intervention would be

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<sup>74</sup> Importantly, this ruling was made before the introduction of the UK's *Constitutional Reform Act* (2005) which designated a group of legal acts, mostly touching upon institutional and human rights issues as legislation with a constitutional value; moreover, the decision happened only shortly after the UK's *Human Rights Act* (1998) was enacted, so human rights litigation was happening in a largely unfamiliar environment.

‘incongruous’, and goes against the broader logic of the NIA’s relevant provisions. Furthermore, he also argued that similar bodies in the UK (e.g. the Equal Opportunities Commission) do have the right to offer interventions – nevertheless directly mandated by the statutes establishing them. In this regard, maintaining consistency in UK law was also one of his primary arguments (Anthony 2002, 412–13).

By hearing the case on the next appellate level, the Law Lords focused much more on Kerr’s dissenting opinion than the majority’s reasoning. The Westminster body found the concerns of the Belfast courts less striking in terms of the imbalances created by the Commission’s right to intervene and emphasized that this is a *capacity* on the NIHRC’s side and not a *power*. Beyond downplaying the equal opportunity concerns leveled by the Belfast courts, this reasoning puts the ultimate responsibility in the discretion of the court hearing the specific case. In the words of Lord Slynn in the Law Lords’ ruling,

The fact that the question is concerned with capacity rather than power in my view is important. The final decision lies with the court which can allow or refuse the Commission’s application to intervene, invite or not ask for help from the Commission as *amicus curiae*. ([2002] UKHL, para 25)

In conclusion, the Law Lords accepted the Commission’s appeal, and allowed the NIHRC to offer interventions in judicial proceedings. Later this right was explicitly granted by statutory provisions within the *Justice and Security Act (Northern Ireland)* in 2007. Furthermore, the same statute also empowered the Commission to initiate proceedings if it was able to identify an actual or potential victim.

While the Commission’s capacity to intervene in ongoing judicial proceedings became explicit both by judicial and legislative decisions, its potential to initiate proceedings became a crucial issue when the NIHRC initiated the judicial review of the abortion legislation in Northern Ireland, claiming its inconsistency with the ECHR. The case was heard by the UK Supreme Court (the body responsible for cases related to the application of the ECHR in the UK), and though the body agreed with the Commission’s substantive claims, it rejected the petition because of the lack of an actual or potential victim. Similar to the case from 2001-02, the UKSC aimed to determine the Commission’s competences through applying purposive interpretation – both the court majority rejecting the NIHRC’s petition and the minority arguing for its acceptance. Focusing on the statutory language, the UKSC majority argued that it would be ‘implausible’ to assume these far-reaching competences to be congruous with the legislator’s will, especially as it



“would amount to *carte blanche* to the Commission, without having to establish any standing or interest other than its general interest in promoting and protecting human rights” ([2018] UKSC 27, para 60). Furthermore, the Supreme Court’s majority also argued that allowing the Commission to initiate judicial review proceedings would amount to the establishment of abstract review and *actio popularis*,<sup>75</sup> which are both largely alien to common law constitutionalism.

On the contrary, the dissenting minority – voiced by the opinion of Justice Kerr<sup>76</sup> – arrived at different conclusions, primarily based on the parliamentary proceedings of the *Sentences Act*. In these documents Kerr found that the legislation “makes provision to extend the powers” of the NIHRC which includes that “the Commission can bring test cases without the need for a victim to do so potentially”.<sup>77</sup> Therefore, the decision by the Court majority ultimately “inhibit[s] the bringing of proceedings by statutory bodies which have been specifically empowered to do so in order to address violations of the Convention rights” ([2018] UKSC 27, para 194). Based on Kerr, and the other dissenting members of the UKSC, concluded that “[t]he Commission’s power to act on behalf of potential victims, and importantly, to act pre-emptively would be robbed of its essence if an ‘unlawful act’ was interpreted in a narrow, literal sense” ([2018] UKSC 27, para 180).

While in the 2001-02 cases around the Commission’s standing, the litigation resulted in its empowerment, in 2018 the UKSC’s majority blocked the NIHRC from initiating the proceedings it wished to. Therefore, in terms of competences the judiciary helped extending them towards intervention capacities but not in taking one step further (even compared to the extended statutory provisions). Nevertheless, seeing these two decisions together as a nuanced interpretation from the judiciary might be an exaggeration as more than one and a half decade has passed between the two final rulings. Also, substantial legislative changes happened in relevant issues, both pertaining to the Commission’s competences (as in the case of the *Justice and Security (Northern Ireland) Act* of 2007) and the wider constitutional context of the UK (mostly through the *Constitutional Reform Act* of 2005). However, both cases, dealing with the potential

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<sup>75</sup> Understanding the NIHRC’s competence to initiate judicial review proceedings as *actio popularis* is problematic if one uses the traditional understanding of the term, as it refers to a judicial review proceeding initiated by ordinary citizen(s) or even simply natural person(s). This conceptual misunderstanding is also challenged by Lord Kerr in para 194.

<sup>76</sup> The same person whose rulings appear in earlier cases by the Belfast courts; later he served as a member of the UK Supreme Court between 2009 and 2020.

<sup>77</sup> The document is mentioned together with the notice that it is not part of the Act and neither endorsed by the Parliament.

role of a human rights institution in a consociation share two important features. First, the fact that almost all courts were divided in all cases demonstrates the controversial nature of the issue despite the fact that empowering a human rights institution in very broad and general terms does not directly mean taking sides in the power-sharing context. Second, in both cases the relevant courts aimed to understand the Commission's role in a context-specific approach, employing purposive interpretation.

#### *6.9 Peculiarities of concrete judicial review in a post-conflict setting*

The fact that the Northern Irish (and British) judiciary got involved in the Belfast Agreement's implementation through cases of concrete judicial review meant that the courts also faced different cases compared to the Constitutional Court of Bosnia and Herzegovina. While the latter made its landmark decisions in abstract review cases, judicial review linked to the NIA were mostly pertaining to executive actions, and decisions made by Westminster bodies on managing the power-sharing settlements. Though the various courts adjudicating cases based on the NIA had the opportunity to intervene in the dynamics of the power-sharing settlement, the judiciary remained consistent in making choices that help the consociation keep running, either by relative deference (e.g. *Williamson*), confrontation with the executive (e.g. *De Brun*) or assertively purposive interpretation (e.g. *Robinson*). Furthermore, the judiciary's commitment in assisting the consociation was explicit in its application of the so-called 'soft-edged review', which aimed to describe the use of the political question doctrine, together with its limitation (mostly pronounced in *Williamson*). Finally, the use of the Belfast Agreement as an interpretive guideline for the NIA – similar to the Bosnian court's use of the GFA – appears to be a common trait for courts in post-conflict settings, where the goals of reconciliation and reconstruction can serve as reference points for purposive interpretation or proportionality analysis.

## 7 Belgium

In the last case study, the Constitutional Court of Belgium is discussed. Beside the fact that, similar to Bosnia and Herzegovina, Belgium is a federal state governed with a corporate consociational arrangement, both the consociation's trajectory and the Court's history are considerably different from the two previous cases. While both the Bosnian and the Northern Irish consociations were established as post-conflict settlements with relatively rigid structures, the Belgian case witnessed a peaceful and gradual evolution of both the federal and the consociational institutions. The adjudicative record of the Constitutional Court is similar along the same considerations, lacking stark landmark decisions; the cases that happened to have a major impact on the consociation's overall structure (discussed in 7.4) retrospectively appear to be strategic miscalculations, rather than assertive judicial interventions. The different, 'prudential' character of the Court implies a different narrative too, as in this chapter a larger emphasis is put on interviews and large-N studies given the scarcity of landmark cases.

### *7.1 Power-sharing and multidimensional federalism: a brief history of the Belgian consociation*

From the three countries in this analysis, Belgium has the longest consociational history. On the level of informal mechanisms, elite cooperation dates back to 1918 (Deschouwer 2013; Taylor 2009a, 6), while the current institutional structure started evolving in 1970 through Belgium's gradual federalization, and gained its current format through six major milestones – also known as 'state reforms' (Peeters and Haljan 2016). The process represents a typical example of top-down federalization, where federation was not an act of 'coming together', but rather an attempt to preserve the unity of the state (Swenden and Jans 2006).

Historically, the two dominants linguistic groups, the Flemish and the Walloon, entered the federalization process from different positions, which shaped their different interests and motivations: while the French-speaking Walloons were in the culturally dominant position (as Dutch became an official language only in 1932), the Dutch-speaking Flemish were better-off in economic terms. Therefore, while the Walloons aimed for economic convergence, the same process was regarded as a steppingstone for cultural emancipation by the Flemish (Swenden and Jans 2006, 879-80). These diverse motivations resulted in a two-dimensional federation, dividing the country into linguistic communities (Dutch-, French- and German-speaking) and territorial units (three regions: Flanders for the Dutch-, Wallonia for the French-speaking community, the

multilingual capital Brussels; the German-language territory within the region of Wallonia as a special entity). The first important step was the establishment of linguistic regions in 1963, while the broader constitutional framework encompassing the changes in vertical and horizontal power-sharing was adopted in 1970, launching a long, gradual and still open-ended process of federalization (McCrudden and O'Leary 2013a, 48–49). The latest constitutional amendment was completed in 2014, concluding the so-called Sixth State Reform (Peeters and Haljan 2016).

From the two dimensions of federalization, power-sharing structures primarily acknowledge the salience of linguistic divisions. The upper chamber of the federal legislative, the Senate, is composed of delegates from both the regional and community parliaments (Article 67 of the Constitution). The federal executive (Council of Ministers) is divided along linguistic lines: Article 99 of the Constitution provides that half of the ministers should be Dutch-, while the other should be French-speaking. The numerically lesser German-speaking group does not have guaranteed seats in the federal executive, only in the upper chamber of the legislative (the Senate). The largest, and most important federal institution, the House of Representatives (lower chamber)<sup>78</sup> has consociational features in its procedural regulations, but not its compositions which is organized along territorial and demographic axes. In the latter regard, the number of seats assigned to each province (between 1970–2002, electoral districts) is determined on the basis of a census conducted in every ten years (*Article 63 of the Constitution*).

As the demographic advantage of the Flemish community is reflected in the number of deputies (for instance, 89–61 under the current arrangement), the institutional arrangements balance this with mutual veto provisions, from which the so-called ‘alarm-bell procedure’ is the most important. According to *Article 54* of the Constitution, the procedure can be triggered if at least three-quarters of the deputies within the Dutch- or the French-speaking groups of the parliament hold the opinion that the “bill can gravely damage relations between the Communities”. Once the procedure is launched, the motion can only be passed with a qualified majority, requiring a majority from both linguistic groups (also stipulating that the majority of deputies are present in both groups) and a two-thirds support overall.

In general, the combination of proportional representation and mutual veto provisions has not been contested through the series of constitutional reforms, except for one stumbling block for

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<sup>78</sup> The House of Representatives elects the federal executive (Council of Ministers) and hold the leading role in lawmaking, while the Senate is rather a control body with veto rights primarily.

both communities: the bilingual electoral district consisting of Brussels and the neighboring province, known as the Brussels-Halle-Vilvoorde district – usually referred to as ‘BHV’. The district has been a sensitive issue for its importance in the long-term visions of ethnic elites. While Flemings regarded the bilingual status of an electoral district on Flemish territory a violation of Flemish self-determination (Graziadei 2017, 195–96), the lack of reciprocity towards Flemings residing in Wallonia was also a source of concern (Peeters and Mosselmans 2009). On the other hand, Walloons prioritized maintaining a Francophone corridor between Brussels and Wallonia, preventing any Flemish claim on Brussels in case of the country’s potential partition. During reforms of the electoral system, the arrangement around BHV remained repeatedly untouched; when the Constitutional Court got involved, it assumed different positions on different occasions. In 1994, it demonstrated appreciation for the special status of BHV; while on the same matter in 2003, following a challenge related to the 2002 electoral reform, the Court’s intervention had long-reaching, and largely unexpected political consequences (see *Section 7.4*).

The activist approach embraced by the Court in 2003 can nevertheless be considered an exception as well as an event disproving the apparent intentions behind the institution’s design. In the former regard, the Court’s overall history (discussed in *section 7.3*) demonstrates a deferential role, respecting the autonomous dynamics of power-sharing. Furthermore, by looking through the historical trajectory of the Court’s position in the country’s constitutional architecture and even its current form, one can clearly see how the institution was designed to have a complementary function in the Belgian state’s power-sharing architecture.

## *7.2 From Court of Arbitration to Constitutional Court*

The Constitutional Court was established and gained its current profile through the gradual process of federalization. Established in 1980 as the Court of Arbitration, within the Second State Reform, it was designed to primarily rule on questions of competences, between the federal legislative chambers, the regional and the community parliaments. The court’s jurisdiction was extended during the Third State Reform of 1988-89, when the body was granted the right to review legislative acts regarding their compliance with the constitutional principles of equal treatment, non-discrimination and freedom of education. A constitutional amendment in 2003 extended the authority of the court to the areas of taxation and foreigner’s rights (Peeters 2012).

The latest constitutional reform (2012-14) assigned the issues of party and campaign finance to the Court (Peeters and Haljan 2016).

In its current form, the Constitution of Belgium (in Article 141) designates the Court's mandate in three main tasks: adjudicating conflicts between federal and lower-level laws and rules; ruling on the compliance of federal, regional- and communal-level legislation with the fundamental rights provisions of the Constitution (laid down in Articles 8-32), with a particular regard to antidiscrimination provisions; and issues related to jurisdictional debates and matters of competence between regional and community bodies and federal institutions. Though the Court's competence to rule on antidiscrimination matters opens the door to constitutional litigation over a wide range of issues (discussed in *Section 7.3*), in general one can see that the institution was not designed as a constitutional court which is mandated to uphold the constitution's supremacy over the entire legal order (Stone Sweet 2012, 818).

The only aspect in which the institutional provisions broaden the Court's accessibility for constitutional review is pertaining to the procedures triggering abstract review: though a high threshold is set for legislative bodies to initiate constitutional review with regards to the respective provisions (two-thirds of any federal or regional/community legislative), the Belgian Court is one of the few constitutional courts which is directly accessible for natural persons – both Belgian and foreign nationals. In the latter regard, applicants have to demonstrate a 'justified interest' in their petition, namely that they are in fact or potentially affected by the legislation under scrutiny (Article 142 of the *Constitution*). Furthermore, federal, regional and community governments can also refer cases to the Court, making constitutional review a suitable mechanism serving inter-block accountability and enhancing the credibility of the constitutional framework in conflicts among linguistic groups. In sum, constitutional review is easily accessible for both individuals and institutions or groups representing regions and communities, which bears the potential of making the Constitutional Court frequently involved.

In addition to the scope of competences, provisions on the election and appointment of judges also demonstrate that this institution was designed to meet the specificities of a consociational polity. The selection arrangements primarily stipulate cross-community dialogue throughout the procedure: the House of Representatives and Senate alternately present a list of potential candidates, approved by two-thirds of their members (Article 32, *Special Act of 6 January 1989 on the Constitutional Court*). From these lists, the monarch, the most constant actor on the political

landscape, makes the appointment. As both legislative chambers are designed in a way that balances between the number of Dutch- and French-speaking members, the two-thirds threshold also means a stipulation for a certain degree of consensus across linguistic groups.

The most uniquely ‘consociational’ features in the Court’s design can be seen in the personnel requirements for judges, including their linguistic group membership, experience and professional background. The consociational design of these arrangements is apparent in two dimensions. On the one hand, the provisions apply the usual balancing between linguistic groups by stipulating that half of the members should be Dutch- while the other should be French-speaking, while at least one member should be also fluent in German.<sup>79</sup> This balance is also stipulated for the appointed staff of the Court, like legal secretaries and registrars. On the other hand, the Court was also designed in a way that acknowledges its unique, partly judicial, partly political character, alongside the sensitivity of political bargains in consociations. In this regard, half of the judges should meet certain professional requirements,<sup>80</sup> while the other half should have at least five years of experience as members of federal, regional or community-level legislative bodies. By including former legislators with first-hand experience in crafting political agreements, institutional designers aimed at ensuring that the Court would adjudicate legislative acts with a greater appreciation of the sensitivity of these settlements. Therefore, the twelve members of the Court provide a combination of balances: there are six Dutch- and six French-speaking judges; six of them are coming from a legal and six from a political background, ultimately resulting in three judges from each combination:

**Table 7.1: composition of the Constitutional Court of Belgium**

Dutch-speaking, from legal profession (3)	French-speaking, from legal profession (3)
Dutch-speaking former legislators (3)	French-speaking former legislators (3)

*Note: one judge (among those who come from a legal profession) shall be fluent in German, and a minimum 2/3-1/3 balance among genders shall be maintained, regardless of which gender may constitute the majority*

<sup>79</sup> Furthermore, Article 34 of the organic law also requires that the gender balance within the Court should at least be within a 2/3-1/3 proportion, regardless of which gender provides the majority.

<sup>80</sup> The organic law on the Constitutional Court (*Special Act of 6 January 1989 on the Constitutional Court*) requires five years of experience in one of the following positions: justice, attorney-general, first advocate-general or advocate-general at the Supreme Court; member of the Council of State, auditor-general, first auditor or first legal secretary at the Council of State; legal secretary at the Constitutional Court; professor or associate professor of law at a Belgian university (Article 34).

The internal procedural regulations of the Court laid down in 1989 *Special Act* also reflect a pattern of bipartite balancing. The Court has two presidents, one from each linguistic group, who preside on a yearly rotational basis (Article 54). In the standard setting of the Court's operation, six of the judges – three Dutch and three French-speaking – shall be present, complemented by one of the presidents (Article 55); at least one of the judges from both legal and political backgrounds has to be present (Article 55). A full session of the Court can be requested by two judges (irrespective of their linguistic or professional backgrounds); in a 'full' session, ten judges have to be present (Article 56). In case eleven judges are present, the most junior member from the group in majority abstains from voting (Article 56). The Court decides with a simple majority (Article 55), but the thorough arrangements prevent judges from one of the linguistic groups 'outvoting' the other. There are no further procedural hurdles (like stipulations on qualified majorities).

In conclusion, the Belgian consociation and the constitutional court embedded in it have been functioning along Lijphart's original formulations on the fundamental logic of consociations: based on elite cooperation with a high level of confidentiality and relatively low level of control by federal constitutional bodies beyond the legislative and executive. Regarding the power-sharing settlement in general, the fact that the Belgian consociation was not established in a post-conflict setting yields numerous advantages: the unusually deep level of distrust among parties following these situations, the need to address human rights abuses usually accompanying violent conflicts, or economic hardships resulting from the need for reconstruction are all absent here. Furthermore, the gradual development of the current institutional structure allowed political actors to incrementally adapt to the evolving institutional environments, in difference to those settings where constitution designers had to adapt to radically new rules and institutions. Finally, Belgium's general level of economic development and active involvement in the European integration both contribute to an overall sense of stability which can lower the conflict potential in certain situations.

On the other hand, the Court's design, considering both its competences and composition, minimizes the Court's potential for conflict, primarily serving as a procedural arbitrator, especially in its original design. Though later human rights issues were also included in the Court's jurisdiction, due to the Court's generally prudential behavior, these cases do not demonstrate the dichotomy of human rights-centered court versus pragmatic political elites (McCrudden and O'Leary 2013b) as sharply as they do in other jurisdictions. Though the Belgian



consociation is far from well-functioning – considering the numerous governmental deadlocks or inefficiencies in governance (Peters 2006) – throughout its history, the Constitutional Court has proven to be a complementary, ‘prudential’ (Popelier and Jaegere 2016) actor with a minimal potential for conflict with political decision-makers.

Similar to Bosnia and Herzegovina, Belgium also has a constitutional court which is specifically designed to fit the regime’s general power-sharing logic: however, while the composition of the Bosnian court is tailored to a tri-partite power-sharing regime, the Belgian institution has the mandate to rule on disputes between groups in a diametrically divided society. Nevertheless, from its institutional design the strongest impact is a generally consociational element, and not just the 50-50% share of Flemish and Walloon members of the Court: the incorporation of political elites by the prescription that half of the members should have legislative experience. By including representatives of the political elites, institutional designers made sure that half of the judges will have first-hand experience from legislative procedures, and therefore would have an appreciation for the sensitivity of political agreements and would form their strategic behavior accordingly. Therefore, while the institutional design of the Bosnian court resulted in a number of decisions along the tri-partite logic of the power-sharing architecture (as well as the mitigating effect of the international members), the politically ‘tamed’ character of the Belgian court has also been proven. This happened either through the lack of stark decisions, or the fact that the most controversial decision of the Court (73/2003) – on the bilingual electoral district of Brussels Halle-Vilvoorde (BHV hereafter) – made a large impact due to the strategic miscalculations of the of the Court rather than its assertive activism (Peeters and Mosselmans 2009).

Furthermore, for a number of reasons – primarily the lack of English translations – cases decided in Brussels have reached a limited attention by international scholars, who primarily focused on those cases which ended up in Strasbourg, before the ECtHR. Also, the fact that throughout its history the Belgian court was consistently deferential towards the bargains reached by political elites also contributed to this modest interest from the international scholarly community. In the absence of multiple landmark cases, this section will analyze the adjudicative practice of the court in a partly different way. In the first half, based on interviews and secondary sources, the general questions on judicial self-perception, interpretive practices and extraconstitutional sources are addressed. After that, a contextual analysis of the 73/2003 decision on the BHV controversy, and litigation following to the Sixth State Reform – which was largely triggered by the 73/2003 decisions – concludes this chapter.

### *7.3 Leaving the settlement on its own: general characteristics of the Belgian court's record*

In order to have a more nuanced understanding of the Belgian court's historical record, one has to take a few factors into account that make the Belgian case different even within the group of idiosyncratic countries that adopted a consociational form of power-sharing. First and foremost, from the countries discussed in this analysis, Belgium is the only case for a consociational settlement which was not established in a post-conflict situation. Second, due to the evolutionary character of power-sharing in Belgium, one cannot identify any central political settlement similar to the Dayton Accords or the Good Friday Agreement. Third, some of the country's core institutions – in this context, most importantly: public administration, law enforcement, ordinary and administrative court – had long uninterrupted periods of operation. Fourth, the country's administrative court (Council of State) is an important institution in its judicial system – a important consideration in light of theories on judicial activism (Holland 1991; Stone Sweet 2012), which identify the presence of administrative courts partly curtailing the capacity of constitutional courts to operate with a high level of discretion. In this regard, a good share of relevant cases was heard by the Council of State before being lodged to the Constitutional Court. Finally, it is also important to consider that Belgium is not only a member of the European Union, but also has a long record of being committed to the project of European integration – a factor not shared by the other EU member state in this analysis, the United Kingdom for instance. This consideration has a particular importance regarding the extraconstitutional standards in the court's adjudicative practice.

The first two elements contribute together to the court's textual approach, along certain aspects of its competences. Firstly, the evolutionary character of the federalization (partly due to the lack major landmark events in the process, like violent conflicts) left the consociation without a 'founding moment' where representatives of the major ethnic groups could have declared the long-term objectives behind the power-sharing settlement. Contrarily to the post-conflict settings where the consociational settlement is considered an intermediary step in the path of long-term reconciliation, necessary to end the conflict, here the federalization is much more viewed as an emancipatory process for the country's linguistic communities. Therefore, the Belgian court is lacking a political statement that declares the long-term objectives of the polity shared by all parties.

Nevertheless, this does not mean that political actors do not reach agreements in important strategic questions; the main difference lies in the frequency and flexibility of these agreements. For instance, the relevant literature points to one occasion where a non-codified political agreement was invoked in the court's reasoning (Popelier and Lemmens 2015, 206); nevertheless, when asking about similar cases during my interviews with the clerks of the Constitutional Court (conducted on June 20, 2018), the answer was that this instance (decision 124/2010) has "to be understood as a strict exception",<sup>81</sup> also because "such political agreements will often be translated into legislation". The latter consideration also points to the evolutionary and autonomous nature of the polity's development: the fact that the current institutional structure was formed through six major state reforms demonstrates the relative flexibility of the constitutional structure (despite the weighty amendment provisions).

Finally, the court's general reasoning strategy is also influenced by the constitutional limits on its competences. As discussed in Chapter 4, the Court's competences are defined in a way that it can investigate the constitutionality of certain legislative acts vis-à-vis *specific* constitutional *articles* – pertaining to questions of competence and fundamental rights. Nevertheless, in practice the court can understand this jurisdiction in a broader sense in a way that "formally, the Court bases its competence on one of the review norms it is allowed to use, but it combines this reference norm with another high norm which is used for interpretive purposes, but which in fact often turns out to be the 'actual' reference provision" (quote from the interview with the clerks of the Constitutional Court on June 20, 2018). On the one hand, the Court does this through the antidiscrimination provisions (Articles 10 and 11 of the Constitution), as overseeing violations of the Constitution through discrimination is among the Court's constitutionally defined mandates (under Article 142). On the other hand, the organic law on the Constitutional Court also authorizes the Court to rule on matters related to fundamental rights (defined by Articles 8-32 of the Constitution).

Concerning the external standards and references in the Court's jurisprudence, numerous scholarly references (Peeters 2012; Popelier and Voermans 2014; Theunis 2005), as well as my interlocutors at the Constitutional Court pointed to European law, both meaning the ECHR as well as European Union law, as the primary benchmarks. Two reasons can be mentioned at the first glance. First, a pragmatic one: if the domestic judiciary of Belgium (including the Council of State and the

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<sup>81</sup> For the reason that the decision has to be understood "in a context of distribution of legislative competences, because the rules dividing the competences had always been understood and applied by the administration and the legislators in conformity with the said uncoded agreement" (quote from the interviews on June 20, 2018).

Constitutional Court) takes European law into account, it can maximize its perspectives for being a compliant member state. As the clerks of the Brussels court have put it: “[b]y applying the Luxembourg and Strasbourg jurisprudence as minimum standards, the Constitutional Court also tries to avoid judgments by these European Courts in which Belgium is condemned for human rights violations”. Second, appealing to European law can also have an important role because European integration is not a contested issue among the major ethnic groups, therefore – with certain limits – European law can be regarded as a common ground for parties, and may help the Court to “depoliticize the outcomes of the litigation” (Popelier and Voermans 2014, 110).

However, in general the court is altogether considered a prudential institution, respecting the autonomy of political processes within the power-sharing settlements, carrying out decisions in a highly deferential way (Graziadei 2017; Peeters and Mosselmans 2017; Popelier and Lemmens 2015). The latter observation is clearly illustrated by the statistical observations of Patricia Popelier and Josephine de Jaegere who aggregated data on the sources used by the Constitutional Court between 1985 and 2015; from all their subcategories,<sup>82</sup> references made to Parliamentary proceedings are by far the most frequent: 85,5% in average, while 96% in the last observed year, 2015 (2016, 201). Furthermore, issues related to shared rule between the main linguistic groups are decreasing in number given the centrifugal dynamics of Belgian federalism. Firstly, this pertains to the general dynamics of the recent state reforms which were pointing to the further decentralization of the polity (Swenden, Brans, and Winter 2006). Secondly, the mutually exclusive nature of competence transfers (meaning that once a competence is transferred to another level of government, all the others are not competent anymore) amplifies the effect of decentralizing measures (Swenden, Brans, and Winter 2006, 864).

#### *7.4 Controversies of the shared rule: litigation on the Brussels-Halle-Vilvoorde district (1994, 2003)*

While most of the cases mentioned by both the English-language literature, as well as the experts I have conducted interviews with were primarily related to the fourth element of the consociational ‘package’, segmental autonomy, only a particular controversy around prescriptions on shared rule – namely the election of the federal legislative – stands out: the bilingual electoral district of Brussels-Halle-Vilvoorde (BHV). As the country’s predominantly French-speaking

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<sup>82</sup> Which are: own case law, case law of other national courts, case law of ECJ and ECtHR, advisory reports to the Council of State, parliamentary proceedings, political agreements.

capital Brussels is surrounded by Flemish territories, the linguistic and political rights of francophones living in the vicinities has been a long-standing concern for Walloon elites. Furthermore, the anti-separatist argument from the Walloon side claiming that in the case of divorce Brussels would be the first concession Flemish elites would have to make has stronger credibility with a substantial francophone population around Brussels.<sup>83</sup> On the other hand, the linguistic rights granted for the French-speaking citizens is seen as a limitation on the autonomy and self-determination of Flemish elites (Graziadei 2017, 195-96). Given the sensitivity of the issue, the unique status of the district has not changed in essence through the series of state reforms.

In a nutshell, the core issue around the conflict was on keeping the district bilingual or dividing it; Walloon elites were clinging to the former option, and Flemish political forces were continuously campaigning for the latter. While the educational, administrative and judicial rights of francophones in the regions surrounding Brussels have induced several cases resulting in – essentially deferential – judgements by the ECtHR<sup>84</sup> the most important decision – in terms of impacting the political dynamics of the federation – delivered by the Court (Court of Arbitration, at that time) was concerning the electoral arrangement to federal bodies. Regarding the federal legislative, the arrangement was providing that French-speaking citizens living in the Halle-Vilvoorde district (an administrative unit within Flanders and Flemish Brabant) had the right to vote for French electoral lists, while this provision was not reciprocated for Flemish citizens in Walloon territories. When the issue was brought before the Court in 1994 (*Decision 90/94*), the Court addressed the issue through proportionality analysis, and found that the district's exceptional status is necessary to uphold the balance between the legitimate constitutional interests of the established linguistic groups.<sup>85</sup>

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<sup>83</sup> Furthermore, from a Walloon perspective, establishing a Francophone 'corridor' between Brussels and Wallonia would be essential for securing Brussel for the Walloon in the potential case of a 'divorce' (Peeters and Mosselmans 2009, 14-15).

<sup>84</sup> Most famously, the *Belgian Linguistic case* (1968) on educational rights and *Mathieu-Mohin and Clerfayt v. Belgium* (1987) on electoral arrangements for regional and communal parliaments.

<sup>85</sup> Following the Court's wording in the summary of the judgement: "The decision to keep the Brussels-Hal-Vilvorde constituency, comprising communes located in two separate regions (the Flemish region and the Brussels-Capital region), for elections to the federal chambers and the European Parliament was taken for the sake of arriving at a general compromise and securing the essential balance between the interests of the various communes and regions within the Belgian State. This aim may justify the distinction made by the challenged provisions between electors and candidates in the constituency of Brussels- Hal-Vilvorde and those in other constituencies, provided that the measures taken can reasonably be regarded as not disproportionate. They would be if they disregarded fundamental freedoms and rights [...]" (Constitutional Court of Belgium, 1994).

The idea of leaving the solution for political elites prevailed for the following decade, until 2003, when the Court somewhat surprisingly reversed its previous position, in a judgement delivered following the federal elections that year, in which the arrangement was ruled to be unconstitutional. In its reasoning, the Court addressed the arrangements following an electoral reform in late 2002 and scrutinized partly the new aspects of the electoral system, but mostly those elements which have been present in the federal institutional architecture since Belgium shifted toward a consociational form of government. From the perspective of the symbolic debate around BHV, the most important novelty of the reform was the shift from electoral districts to provincial electoral lists (following the administrative divisions of the regions); however, the BHV district was kept together as a *sui generis* geographical unit (Peeters and Mosselmans 2009, 6–7). Furthermore – the probably most essential reform element – an electoral threshold of 5% was introduced. Though the Court addressed the amplified effect of electoral thresholds for parties present in both federal entities (73/2007 paras B.12 and B.20.2), most of the reasoning dealt with issues linked to the general nature of the multilingual electoral district – primarily the lack of reciprocity for Dutch-speaking citizens in Walloon territories.

Through the judgement, the Court consistently applied the technique described by its clerks, referring to the anti-discrimination clauses of the Constitution (Articles 10 and 11) as well as the corresponding articles of the ECHR (primarily Article 14 – the same one as the central provision in the *Sejdic and Finci* case), and then referring which constitutional provisions can be used for interpretive purposes in conjunction with these. Therefore, considering the fact that the Court scrutinized the fundamental features of the arrangement, the timing of the case remains an important question – as well as a mystery for scholars (Graziadei 2017; Peeters and Haljan 2016; Peeters and Mosselmans 2009). The probably strongest hint for the temporal dimension can be found in para B.9.6 where the Court argues that the balance behind the agreement is ‘not immutable’.<sup>86</sup> Therefore, the Court has not reversed openly its case law as the Bosnian constitutional court has around the electoral arrangements, but declared its previous rulings *outdated*. In this regard, setting a deadline for the legislative to find a constitutionally sound solution is largely similar to the German Federal Constitutional Court’s practice in cases where an act passed the test of constitutionality at a point of time, but “later is found to violate the

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<sup>86</sup> The German text of the judgement, which I used for analysis states that “[d]ie Elemente dieses Gleichgewichts sind nicht unveränderlich” (73/2003 para B.9.6); this can be translated in a way that the elements of the ‘balance’ being not immutable, referring to the compromise behind the status of Brussels-Halle-Vilvoorde.

Constitution due to changed circumstances or a change in the court's case law" (Peeters and Mosselmans 2009, 9).

Though the Court tried to mitigate the consequences of its decision by leaving the results of the most recent elections intact, invoking a prohibition of retroactivity (73/2003 para B.21), the decision had long-reaching consequences, both temporarily and politically speaking. First, the court decision became a ticking time bomb, while the long-term fate of the district remains a stumbling block in the coalition-forming negotiations after the following elections (in 2007). Moreover, the final decision arrived in roughly a decade, when the Sixth State Reform was concluded in (discussed in the following Section). This, together with the fact that in 73/2003 the Court repeatedly claimed that reaching the final decision should be the responsibility of political actors, the most plausible explanation for the Court's motives could be hastening the political elites to reach a new agreement on the BHV district. Though the timing can be considered rational for a number of reasons – after an electoral reform, and closely following elections themselves, so political elites would have the maximal time to reach a new compromise – the changes in the electoral law probably did not have that gravity which would have justified the weighty decision the Court has made, even if the body was unaware of the possible consequences.

Beyond the timing of the decision, certain procedural hurdles also contributed to the escalation of the crisis. Though an electoral law dividing BHV was passed by Flemish parties in an interim period as the federal – symmetrically bilingual – coalition was formed in 2007-08 and no parties were bound by coalitional solidarity, the Walloon parties had enough constitutional guarantees to ultimately block these initiatives (Peeters and Mosselmans 2009, 12). In this regard, the so-called 'conflict-of-interest' and 'alarm-bell' procedures established by the Institutional Reform Act (1980) can be considered (Peeters and Mosselmans 2009, 13-4). These provisions ensure that in case a qualified majority of representatives from one linguistic group claims that their group's interests are overlooked, a special procedure can be triggered where delegates from both federal legislative chambers and the regional/community parliaments can work out a mutually agreeable solution. Importantly, if representatives from any groups find the solution insufficient, the question can be blocked.

This procedure largely resembles the Joint Commission procedure in Bosnia, where a special commission from the upper chamber's members is formed to resolve the issue in which

representatives of any constituent group assert that ‘vital interests’ of their group are in danger (laid down in Article IV(3)(f) of the Constitution of Bosnia and Herzegovina). If the special commission fails to find a solution within five days, the issue is referred to the Constitutional Court for an “expedited process review” of “procedural regularity” (Article IV(3)(f)). The latter means that ultimately the Constitutional Court can decide on whether the given issue can truly be considered a matter of ‘vital interest’ – which is particularly important given the fact that the Constitution does not specify those issues which can fall under this consideration (Begić and Delić 2013, 454). Nevertheless, this instrument to resolve a deadlock is absent from the Belgian procedural regulations. In this regard, the Court’s decision on the unconstitutionality of the BHV district created a situation where the Court ultimately lacked the instruments to resolve the issue. This was further amplified because the implications of the 73/2003 decision on the electoral process as a whole were unclear and contested, among political actors as well as academic commentators (Peeters and Mosselmans 2009, 11).

### *7.5 Adjudicating the Sixth State Reform (2014-15)*

Though the BHV district’s status was the primary driving factor behind the Sixth State Reform, the restructuring – negotiated and codified between 2012-14 – eventually led to a broader package of changes. Due to this expansion of the reform’s scope and certain procedural provisions, the amendment happened in a somewhat convoluted way. Furthermore, as not all elements of the agreement were constitutionalized, certain provisions – primarily related to the status of Brussels and six of its peripheral municipalities with substantial Francophone population – were brought under constitutional review by Flemish nationalist parties. In their view, some elements of the compromise were discriminatory according to the Constitutional Court’s standards established in its 73/2003 judgement. On the other hand, the federal Council of Ministers defended the provisions – joined by the French Community’s government – by stressing the essential ties between the constitutional amendments and the respective provisions, claiming that the latter also emanate from the ‘Constituent’s will’. In all three cases closely linked to shared institutions (72/2014, 96/2014 and 81/2015) both parties therefore aimed to provide their own definition for the ‘Constituent’s will’; in all three cases, the Court demonstrated an inclination to accept the federal government’s position, eventually upholding the respective provisions.



Importantly, the word ‘constituent’ appears only once in the Belgian Constitution, in Article 198, the closing article of Title VIII (the section of the Constitution outlining the amendment provisions), where the text provides that “[i]n agreement with the King, the Constituent Houses [*the legislative chambers adopting the constitutional amendments*] can [*numerous technical provisions pertaining to constitutional amendment procedures listed*]”. Furthermore, the fact that no other institution is mentioned in the preceding Articles (195-97) of Title VIII also makes the legislative’s constituent status clear, which is also mirrored in academic commentaries on the constitution (Peeters and Haljan 2016, 418–9; Popelier and Lemmens 2015, 39) . By debating cases on the Sixth State Reform, identifying the exact scope of constituent institutions was a minor issue with nuanced differences; instead, the main point of contention was rather to delineate the boundary between the ‘Constituent’s will’ and codified constitutional provisions.

This task was particularly difficult because the generally lengthy constitutional revision procedure was further complicated due to the unexpectedly broad range of issues covered by the negotiations. According to Title VIII of the Constitution, a sitting parliament can assign certain parts of the Constitution for revision, which entails the legislative’s immediate dissolution and new elections (Article 195). In this stage of the procedure, the legislative – therefore the ‘pre-constituent’ (Peeters and Haljan 2016, 418) – does not have to determine the content of the amendment, only the articles considered for revision. Following the elections, both legislative chambers can deliberate potential amendments with at least two-thirds of their members being present; changes can be adopted with a support of “at least two thirds of the votes cast” (Article 195).

The amendment procedure formally started in 2010 and building a sufficiently broad coalition behind the constitutional reform took 541 days, so negotiations were concluded in 2012. In order to find a balance between the numerous competing interests a broader range of issues was included in the negotiations than originally indicated in 2010, when the amendment procedure was triggered. In order to avoid a second election on the same constitutional amendment – and to avoid threatening the carefully crafted balance – a unique strategy was followed: as Article 195 (on constitutional revision procedures) was also among those parts of the Constitution which were considered for amendment, the legislative added the newly covered articles as exceptions. The arguably innovative solution was challenged at the Council of Europe (by the *New Flemish Alliance*), nevertheless the Venice Commission concluded that “there was no breach of either the letter of spirit of the Belgian Constitution, nor did it violate any European norms and principles”

(Peeters and Haljan 2016, 420; Venice Commission 2012). Though the drafters of the amendment heavily relied on external legal and technical advice, they expected the State Reform being “not insulated from legal challenge” (Peeters and Haljan 2016, 415) neither in domestic, nor international forums.

Patrick Peeters and David Haljan highlight six major areas covered by the Sixth State Reform (2016, 414–8). First, a number of competences (e.g. tenancy, living environment, water and waste management or criminal procedure of young offenders) were transferred to the communities and regions symmetrically, furthering the centrifugal dynamics of the federalization. Second – along the new policy licenses – the communities and regions received further fiscal competences. Third, probably the most significant change, the Senate went through a major reform, becoming a delegated body (instead of its former elected-appointed hybrid character). Fourth, the relationship between the federal entities was rebalanced, bringing the German community and Brussels as a region to an equal level with the other communities and regions. Fifth, horizontal cooperative mechanisms were introduced among communities and regions pertaining to a number of policy areas. Sixth – and finally – the BHV district was divided with a compromise: while the electoral district was divided between Brussels and Flemish Brabant, Francophones residing in the six peripheral municipalities of Brussels received certain rights and guarantees including the opportunity to vote for electoral lists registered in the capital’s region.

From those constitutional challenges of the Sixth State Reform which closely touch upon the consociational method of power-sharing, two were dealing with this new electoral arrangement; meanwhile, the third challenge addressed the judicial provisions on the six peripheral municipalities. In all cases, Flemish nationalists filed the constitutional challenges, either as individuals (like Bart Laeremans and Dominiek Lootens-Stael, both members of *Vlaams Belang* in 72/2014) or under the legal personality of their parties (as the *New Flemish Alliance* was among the plaintiffs in the 96/2014 and 81/2015 cases). On the other hand, beside the federal Council of Ministers, the French Community’s government presented arguments defending the measures under challenge. The structure and essence of the arguments was similar in all three cases: while the plaintiffs invoked the antidiscrimination provisions of the Constitution and the ECHR, the defendants claimed that the respective provisions are part of the ‘Constituent’s will’ – despite not being constitutionalized – and therefore are immune from constitutional review. Though the sides employed different reasoning strategies throughout the three cases, the Court ultimately decided them based on its position on this matter, rejecting all three constitutional challenges.

For instance, in the chronologically first case (72/2014), interpreting the ‘Constituent’s will’ was a secondary concern for the litigants as both sides presented their core arguments in terms of proportionality analysis. The plaintiffs, Bart Laeremans and Dominiek Lootens-Stael (both members of the Flemish nationalist *Vlaams Belang*) challenged the electoral provisions for the regional parliament of Brussels, where Francophone residents of the six peripheral municipalities also have the right to participate. In their reasoning, they argued that both the arrangement’s ramifications for Flemish parties and the lack of reciprocity towards Dutch-speaking citizens of Brussels (who constitute a minority in the capital region but cannot channel their votes to the neighboring Flemish constituencies at any levels) are discriminatory.

In this regard, the plaintiffs invested less in questioning the objectives behind the measures (i.e. meeting an intercommunal bargain) but stressed their disproportionality to the end they pursued (72/2014, A.14.2). The issue of proportionality was differently approached by the federal Council of Ministers, as it primarily stressed the legitimate purpose of ‘pacification’ between the communities (72/2014, A.20), and extended its argumentation with the political question doctrine. In the latter regard the federal body argued that even if the object can be pursued by alternative means, those should not be identified through constitutional interpretation, but by legislative deliberation instead, stressing the difficulty of reaching the compromise under question (72/2014, A.21.4). The delicate nature of the compromise was also highlighted when the Council of Ministers aimed to – eventually successfully – reconcile potential conflicts between constitutional norms and legislative provisions in question by claiming that the legislation is in line with the Constituent’s will (72/2014, A.19.2). In the same regard, the plaintiffs claimed that such a unity cannot be observed in a constitutional sense (72/2014, A.14.3).

In its decision, the Court eventually focused on the issue’s immunity from judicial review, instead of the case’s merits. Therefore, the Court’s reasoning neither assessed the legitimacy of the purpose behind the measures, nor their alternatives or proportionality; instead, it focused on defining the scope of the Constituent’s will as well as its immunity from judicial review. In both regards, the Court offered a generously deferential reading. In the former regard, it claimed that the whole *political* agreement behind the Sixth State Reform should be understood as the Constituent’s will (72/2014, B.13.2); as such – in the latter regard – it should be immune from constitutional review, even in questions related to fundamental rights (72/2014, B.14). Following

this line of argumentation, the Court rejected the application and upheld the provisions in question.

The chronologically second case in this analysis (96/2014) challenged the reorganization of the judiciary in the region surrounding Brussels, primarily the six peripheral municipalities. In the new arrangement, the entire Halle-Vilvoorde region came under the scope of the Flemish judicial authorities; nevertheless, Francophone residents of the six peripheral municipalities received special accommodation, with a contingent of prosecutors available from the bilingual judicial district of Brussels. In the latter, a quota of 80/20 was established for the proportion of Francophone and Dutch-speaking personnel; furthermore, the General Prosecutor's office was reserved for the French-speaking community, with a provision for a Dutch-speaking adjutant (Peeters and Haljan 2016, 416–7). The plaintiffs challenged multiple aspects of the arrangement, and multiple parties joined the case on both sides, resulting in the by far longest and most complicated court reasoning from the cases under scrutiny. Regarding the most sensitive issue, institutional provisions for Francophone citizens in the peripheral municipalities, the Court followed a very similar reasoning as it had done in the 72/2014 case, deferring by understanding the provisions as the constituent's will. Nevertheless, the Court accepted the challenge pertaining to the arrangement on the linguistic group memberships of the General Prosecutor and her adjutant in Brussels.

In the latter regard, the Court concluded that reserving the Prosecutor General's office for the Francophone linguistic group primarily violated the principle of parity (96/2014, B.97.3) – present in other federal judicial and legal institutions – without reasonable justification (96/2014, B.101.3), constituting a case of discrimination (96/2014, B.103.5). Nevertheless, emphasizing the principle of parity pointed to a potential solution with minor adjustments, as the original setup also aimed to create a balanced allocation of competences between the Prosecutor General and its adjutant. On the other hand, the access to French-language litigation in the six peripheral municipalities touched upon a much more sensitive issue with a significantly smaller room for further adjustments. As the question of accommodating the interests of Francophones in the peripheral municipalities reached to the heart of the BHV controversy – namely Flemish self-determination versus maintaining a linguistic bridge between Wallonia and Brussels – the Court again demonstrated a highly deferential approach, ultimately rejecting the primary application.

The arguments related to the judicial district largely resembled the ones presented in 72/2014. While the Council of Ministers and the French Community's government emphasized the provision's immunity to judicial review because of the Constituent's choice (96/2014, A.26.3.2), the plaintiffs aimed to define the latter in a narrow fashion, understanding either constitutional provisions, or at least legal norms adopted with a qualified majority as such 96/2014, A.12.2.1, A.26.2). Similar to the previous case, the parties defending the respective provisions emphasized the political character of the Constituent's will (96/2014, A.13.1), and the 'essential' connection between the bargain behind the State Reform and the specific provisions under scrutiny (96/2014, A.16.2, A.17.8; an argument largely accepted by the Court 96/2014, B.22.2). By assessing the arguments, the Court largely repeated its position in 72/2014, emphasizing the absolute supremacy of the Constituent's will, even in questions pertaining to fundamental rights (96/2014, B.22.1, B.57.2, B.63.2, B.109.3).

The third case in this analysis (81/2015) displays largely similar arguments as the two previous. As in the first case, the nationalist New Flemish Alliance lodged the constitutional challenge, focusing on the Senate's composition due to the changes in the electoral arrangements around BHV. In their view, the fact that Francophone parties can garner support from the six peripheral municipalities, while the same provision is not reciprocated for parties in Flemish Brabant with Dutch-speaking citizens of Brussels, constitutes a case of discrimination (81/2015, B.8) in influencing the composition of the delegated Senate. Similar to the previous cases, the parties defending the provisions under challenge – again, the federal Council of Ministers and the Government of the French Community – emphasized the Court's lack of competence to adjudicate matters emanating from the Constituent's choice (81/2015, A.10.3, A.13.1). Though the plaintiffs brought certain novel arguments to the debate around the Constituent's status, the Court again upheld the respective provisions.

Regarding the application's stance on the Constituent's status, the plaintiffs first asserted that in the Belgian 'constitutional system' the primary standard of judicial review should be the Constitution, and no extraconstitutional source can be considered as the 'Constituent's will' (81/2015, A.14.5). Nevertheless, assuming that the notion of 'the Constituent's will' is taken into consideration, they also emphasized the fact that the King is mentioned along the 'Constituent Houses' in the aforementioned Article 198 of the Constitution (81/2015, A.14.5). Though during the previous constitutional reforms, the federal cabinet representing the King

became a recognized practice (Popelier and Lemmens 2015, 39), the plaintiffs argued that as the King's position on the respective provisions is unknown, it is impossible to determine the Constituent's will. In the same paragraph (81/2015, A.14.5), the plaintiffs also argued the entire legislative did not support the questioned provisions, therefore they should not be treated with a special status, trumping constitutionalized norms. Nevertheless, in its decision the Court made it clear that it considered the parties behind the agreement on the constitutional reform to be the constituent force; following this focus on the political agreement – instead of only the explicitly constitutionalized provisions – the Court also asserted that the constitutional reform on the Senate's structure was discussed “in conjunction” with the electoral provisions (81/2015, B.10.2). By dismissing the plaintiffs' arguments on the Constituent's nature, upholding the respective provisions became a logical choice, especially as the Court reiterated its previous position on the Constituent's choices being immune from challenges even related to fundamental rights (81/2015, B.12).

In the three cases challenging certain elements of the Sixth State Reform – which were included in the agreement but were translated into ordinary legislation – the Constitutional Court demonstrated a particularly high level of deference. In this regard the Court protected the political agreements to the degree of treating constitutional supremacy a secondary concern compared to the sensitivity of political agreements: the chronologically first case (72/2014) can serve as the clearest example, where the ‘Constituent's will’ is regarded even above the protection of fundamental rights (para B.14). This type of abstention from involvement resembles the way the political question doctrine was employed in the Northern Irish cases, with certain differences, however. While in Northern Ireland the judiciary distanced itself from certain questions due to the nature of the subject matter, in Belgium the Constitutional Court deferred due to the decision-making agent: once the same actors implemented a decision who agreed upon a constitutional reform – in the context of the very same amendment procedure – the legislation in question bears the special status of constitutional provisions – and in a certain way are treated above them. Though applying a doctrine developed for concrete review cases might entails certain conceptual challenges in the context of abstract review, by addressing the Court's strategic choices and treatment of constitutional supremacy this parallel is the most insightful in this comparative analysis.

### 7.6 Prudential constitutional court in an evolutionary consociation

In conclusion, the Belgian Court has confirmed both the expectations laid down in the literature on domestic courts in consociations, as well as certain specific institutional design choices, primarily the cooptation of political elites in the body. Both in terms of preserving the *status quo* and emphasizing the importance of political solutions (instead of judicial ones) the Court had a very similar understanding of the judiciary's role in consociations as its counterparts in Bosnia and Herzegovina or the United Kingdom. However, while the latter two institutions occasionally had to step up to restore or reinforce certain consociational devices, the Belgian court mostly deferred in sensitive questions, considering the relatively dynamic nature of the institutional architecture.

Due to the frequency of constitutional reforms, the Court usually chose to respect the latest settlement with the assumption that it reflects an equilibrium at the moment; though this flexibility could have brought the Court to the assumption that elites would also be willing to accommodate necessary changes, this calculation can only be assumed pertaining to the 73/2003 case (at least based on political and academic commentaries). However, instead of nudging the elites to solve the BHV problem, the decision had a butterfly effect, resulting in a politically eventful decade concluding in a comprehensive constitutional reform. Nevertheless, this one controversy should not distort the general image of the Belgian Constitutional Court as a highly prudential institution, demonstrating a great sense of appreciation towards the autonomy of power-sharing dynamics. Therefore, the primary contours of the Court's strategy and self-perception is largely similar to the other two courts', while the differences can be largely accounted to the dynamic nature of the Belgian constitutional system and the peaceful nature of the power-sharing settlement.

## 8 Conclusion

Following the case studies analyzing the constitutional review practices in three different consociations, their common traits and differences are discussed in this final, concluding chapter. Nevertheless, before presenting the comparative inferences, the structure and broader arguments of the entire dissertation are reviewed (8.1), followed by a discussion on the comparative patterns (8.2), the dissertation's impact on the relevant literature (8.3), its policy-relevant implications (8.4), and its broader, general messages (8.5).

### 8.1 Summary

The dissertation contributes to the literature on constitutional courts in consociations both by broadening the empirical scope of comparison and introducing new ways of looking at the subject-matter. The latter entails addressing the phenomenon from a normative angle as well as analyzing the empirics from the perspective of constitutional theory.

Given this theoretical commitment, *Chapter 2* introduces the notions of constitutionalism and constitutional review establishing a conceptual framework for the later analyses. In the chapter, constitutional supremacy and separation-of-powers are highlighted as the primary justifications behind constitutional review. The former is problematic in consociations given the tension between the fundamental logics of the two phenomena: transactional approaches and elite cooperation in consociations, and, on the other hand, the essential role of public reasoning in constitutional adjudication (Rawls 1993, 231–39). A further tension stems from the differences in dispersing power between consociations and more adversarial constitutional democracies. In the traditional understanding of separation-of-powers, competences are divided between governmental branches, i.e. institutions with different responsibilities, led by officials appointed in different ways and with different regularity. In this traditional constitutional landscape, constitutional courts have a specific 'constitutional space' (Stone Sweet 2012, 820) as a major counterbalance to the elected legislative and executive branches, usually led by the same political actors(s) in parliamentary regimes. In contrast, consociations disperse power *within* governmental branches, through their grand coalition prescriptions and mutual veto provisions. Therefore, constitutional courts can also be regarded as superfluous insurance mechanisms, unnecessarily complicating the already cumbersome decision-making procedures within consociations.



Building on these conceptual foundations, *Chapter 3* offers a normative proposition, asserting that constitutional review is *necessary* in consociations because these societies include significantly sized – following Thomas Christiano’s terminology (1994; 2008) – ‘persistent’ minorities, groups whose interests cannot be represented or protected through the means of democratic politics – neither adversarial nor consociational. The features of these groups imply the necessity of constitutional protections and extra-parliamentary mechanisms to enforce them, for three consociation-specific reasons: rectifying the pervasive effects of potentially wrong institutional choices; the protection of groups which are not salient enough to be politically empowered; and the protection of internal minorities within the segments. Though my position’s support for judicial assertion in certain situations resonates with Issacharoff’s (2004) robust conception of constitutionalism, it also shares important similarities with McCrudden’s and O’Leary’s emphasis on elected bodies. While Issacharoff primarily sees the role of constitutional review in consociations as transitional – with its *unwinding* mandate – McCrudden and O’Leary consider the judiciary’s role within consociations as not being provisional, but potentially long-lasting. Similar to their approach, my proposition also considers the judiciary’s role in consociations secondary to the responsibility of political elites, beside pointing out those crucial areas where the judiciary’s role is indispensable, regardless of its role in preserving or dismantling the regimes by deference or unwinding.

This dichotomy of deference or unwinding is reconsidered in the empirical part of the dissertation (presented in *Chapters 4, 5 and 6*), comparing three different consociations, including post-conflict and gradually evolved settlements; federal and unitary states; as well as corporate and liberal consociations (*table 8.1*). While the established literature mostly assesses the role of courts on a dichotomous scale between unwinding consociational institutions and respecting the autonomous dynamics of power-sharing by deferring to the political branch, the comparative analysis identifies a third strategy: *reinforcing* consociational structures. In this context, reinforcement can be defined as judicial intervention, occasionally taking sides in certain debates, in order to support the functioning of the power-sharing settlements or to buttress weakened institutional mechanisms (or usually both). From a comparative perspective, this phenomenon is far from marginal, as 8 of the 16 cases (*table 8.3*) in the analysis have a clearly reinforcing outcome, while two (*Constituent Peoples* and *Re Morrow*) also include certain reinforcing provisions.

**Table 8.1: General features of the consociations**

	Belgium	Bosnia and Herzegovina	Northern Ireland
<i>origins</i>	gradual federalization	post-conflict	post-conflict
<i>consociation</i>	corporate	corporate	liberal
<i>salient groups</i>	3	3	2
<i>state structure</i>	multidimensional federation	multilevel federation	unitary

From the three institutions, first the Constitutional Court of Bosnia and Herzegovina is discussed first (in *Chapter 5*) because the most relevant concepts in the literature originate from works analyzing the Sarajevo court. Beyond scrutinizing judicial decisions attracting substantial international attention (e.g. Choudhry and Stacey 2012, 95–104; McCrudden and O’Leary 2013a, 86–92; Rosenberg 2008) such as *Constituent Peoples* (2000) or *Places Name* (2004), addressing other cases from a different angle (particularly the domestic litigation preceding *Sejdic and Finci*) provides important insights. While the Court was willing to follow an assertive, unwinding behavior when segmental autonomy or local power-sharing were at stake, it took sharp reversals when more sensitive questions, such as the legislative upper chamber’s (House of Peoples) or the collective Presidency’s composition were at stake. In the Court’s decision-making practices, the frequent use of ‘triadic’ methods, purposive interpretation and proportionality analysis, the body acted in line with recommendations for divided societies (Cohen-Eliya and Porat 2013; Schlink 2012). Furthermore, the use of the proportionality analysis, the ECtHR’s standard decision-making approach, logically follows from ECHR’s direct applicability and the ECtHR’s role in appointing the international judges. The most consistent, and also most insightful pattern in the Bosnian cases pertains to the Court’s use of external sources in triadic reasonings: the political agreement including the Constitution, known as the General Framework Agreement (GFA) or Dayton Accords. By prioritizing political agreements before human rights documents, the Court majority demonstrated its dedication towards the functioning of the consociational settlement.

In the other post-conflict setting, Northern Ireland (*Chapter 6*) the use of external references displays the most important similarity. As the Sarajevo court treated the Dayton agreement as its primary reference point, for the various judicial bodies adjudicating matters related to the region’s effective constitution, the Northern Ireland Act (NIA), the political agreement behind the NIA, the Belfast (or Good Friday Agreement) was the primary reference point and decision-

making standard. Nevertheless, the courts hearing the relevant cases mostly embraced purposive interpretation, as proportionality analysis has limited traditions in common law jurisdictions. Furthermore, triadic approaches were less prevalent in the Northern Irish context, as the judiciary frequently used the political question doctrine to endorse controversial executive measures. Importantly, stepping aside in these cases was not serving judicial deference empowering political elites collectively, but supporting executive decisions – either from Stormont or Westminster – imposing cooperation on the parties. In other words, by not deciding in specific cases the judiciary always took sides, and consistently in a way that reinforced power-sharing mechanisms – and not by preferring a specific actor or a set of outcomes.

Regarding the political circumstances, the third case, Belgium (*Chapter 7*) has less similarities with the other two as the power-sharing settlement evolved gradually, without any violent conflict (or its immanent possibility) in the background. Importantly, the Belgian institutional architecture has demonstrated a high degree of flexibility throughout the past decades as altogether 6 major constitutional reforms (also known as ‘state reforms’) have taken place since 1970, when the country’s federalization began. As political elites demonstrated a capacity to respond to institutional challenges through agreements, the Constitutional Court embraced a more deferential, ‘prudential’ approach, avoiding confrontation with political elites. One exception, the Court’s 2003 decision on the Brussels-Halle-Vilvoorde (BHV) district, can be mentioned, where the body aimed to unwind certain consociational provisions; this led to a prolonged political crisis, and eventually to the most recent (sixth) state reform in 2011. The politically most sensitive cases of the Court later were also linked to the BHV district, where elements of the Sixth State Reform were challenged by Flemish hardliners. By deploying the political question doctrine, the Court refused to address the challenges, protecting the qualified majority’s agreement from a minority dissent.

## 8.2 Discussion

In the three case studies, judicial decisions related to three differently arranged consociations (corporate vs liberal, bi- vs tripartite, gradually evolved vs post-conflict), adjudicated by three differently designed courts or judicial regimes demonstrate some deviations largely connected to their institutional environments, but also displayed important similarities. In the former regard, the Constitutional Court of Belgium, partly composed of former legislators (*table 8.2*), consistently demonstrated an appreciation for political agreements. The Sarajevo court, designed

along the controversies of a tripartite power-sharing settlement and having a close connection with the ECtHR, demonstrated the salience of ethnic group membership (A. Schwartz and Janelle Murchison 2016) in its case record and frequently employed proportionality analysis. The Northern Irish judiciary and the appellate bodies in Westminster partly adhered to the British traditions of a deferential judiciary towards the executive (Morison and Lynch 2007, 122–3) with certain adjustments. Nevertheless, the fact that despite their starkly different institutional backgrounds, shared patterns in their adjudicative practices suggest that these factors should be related to the consociational character of these courts, which are facing uniquely consociational dilemmas. As the empirical analysis in the dissertation has an explorative character, these common traits are crucial in identifying the key findings.

**Table 8.2: Institutional features of constitutional courts**

	<b>Belgium</b>	<b>Bosnia and Herzegovina</b>	<b>Northern Ireland</b>
<i>judicial review model</i>	centralized	centralized	decentralized (multilevel)
<i>appointment of judges</i>	both legislative chambers propose a list to the Monarch with a 2/3 majority; the Monarch selects half of the candidates	legislatures of federal Entities (in the Federation, the Bosnian and Croat caucuses)	merit-based procedures within the judiciary
<i>diversity provisions</i>	6 Dutch- and 6 French-speaking 6 by professional merits, 6 with legislative experience	none	none
<i>abstract review procedure</i>	any natural person with a justified interest federal, regional, or community governments federal, regional, or community legislatures (2/3 of members) ordinary courts	Presidency members heads of federal and entity governments federal and entity legislatures (1/4 of members) ordinary courts	none
<i>ballot</i>	secret	open	Stormont: secret Westminster: open
<i>dissenting opinions</i>	no	yes	yes

In the three polities under scrutiny, altogether sixteen judicial cases or controversies are compared. In the selection of judicial decisions, the primary objective was to choose cases dealing with uniquely consociational dilemmas, with specifically consociational institutions and having the potential to substantially change the rules of power-sharing. Based on these considerations, the selection of specific judicial rulings was guided by the relevant academic literature, the help of interlocutors (e.g. judges or court clerks), and references within the case material (the case selection procedure is described in greater detail in *Chapter 4.1*). The sixteen cases or controversies

most clearly touch upon consociational dilemmas. In Bosnia and Herzegovina, these are *U4/05*, *U-13/5*, *AP-2678/06* (on electoral arrangements, the domestic cases preceding *Sejdic and Finci*), *Constituent Peoples* (on the constituency of ethnic groups in the entities) and *U-1/99* (on the structure of the federal government). In Northern Ireland, three cases stand out in this regard: *Re De Brun* (on the North-South Ministerial Council (NSMC) and the First Minister's discretion vis-à-vis cooperation with the Deputy First Minister), *Re Morrow* (on withholding confidential information from ministers whose party openly refuses to cooperate), and *Re Robinson* (on the rules of cabinet-formation). In Belgium, all cases can be seen as equally relevant given the fact that they are all linked to the same institutional controversy, the BHV district; the only exception might be *81/2015*, which is related to the judicial district around Brussels, and not elected bodies.

Beyond these, certain cases are included for other considerations, despite their looser connection to power-sharing institutions. The most important among these might be *Re Williamson* in Northern Ireland, a case related to the decommissioning process following the Belfast Agreement. Though not directly linked to any power-sharing institution (the decision under challenge was made by the Secretary of State for Northern Ireland in Westminster) the judiciary's use of the political question doctrine – established as 'soft-edged review' – became a standard for later decisions. The *Places Name* case in Bosnia and Herzegovina is addressed for similar reasons, but in a different way: the Court's unanimous ruling, overruling an entity's decision (in this case, the Serb Republic), is important in this analysis to demonstrate how the precedents laid down in *Constituent Peoples* gained prominence (before the Court's sharp reversal in *U-13/05*). Finally, some cases are relevant for the fact that they pertain to the judiciary's place within the consociational architecture. For instance, in both applications of the Northern Ireland Human Rights Commission (2001/02 and 2018), the judiciary could have empowered the Commission to intervene in cases without its direct involvement, increasing the potential scope of human rights litigation. Nevertheless, the judiciary refused to do so in both cases (with a narrow majority in the second case nevertheless), therefore abstaining from widening its own space to act.

The similarities among the cases are tangible in three different dimensions: pertaining to regime dynamics, the interpretive methods employed by the courts and external sources are mobilized in the reasonings. The first, related to the courts' contribution to the dynamics of consociational settlements also offers some reconsiderations for the established literature. While the empirical

works on the topic (Issacharoff 2004; 2013; McCrudden and O’Leary 2013a; Pildes 2008) focus on the dichotomy of the potentially unwinding strategy and judicial deference respecting the autonomy of political dynamics, one can also observe a pattern of buttressing weakened institutions – often by assertively intervening or taking sides – *reinforcing* consociational settlements.

This dynamic is present in all three cases, with different political stakes. In the cases where the Constitutional Court of Belgium rejected challenges to the Sixth State Reform (in its 72/2014, 96/2014, and 81/2015 decisions), the body protected a settlement endorsed by a qualified majority vis-à-vis a dissenting minority (Flemish nationalists) from one segment. In contrast, in reinforcing decisions, the Bosnian, and particularly the British and Northern Irish bodies took sides with parties in a minority or plurality position (e.g. *U-1/99* in Bosnia and Herzegovina, or *Re De Brun* in Northern Ireland). The reinforcing strategy can be seen as the most widespread in the Northern Irish cases, where executive (both local and Westminster-level) decisions were put under scrutiny, and the various judicial bodies in Stormont and Westminster consistently (with one exception: the appellate decision in *Re Morrow*) made those choices which either imposed cooperation on both parties or supported legally fragile acts driven by the commitment to cooperation (most eminently in *Robinson*). The judiciary’s consistency in supporting the power-sharing mechanisms can be seen in the variety of cases where its reinforcing choices were made – regardless of the cases involving taking sides or not, employing ‘soft-edged review’ or delineating its limits (see *table 8.3*).

In the Bosnian and Northern Irish cases, the assertively reinforcing nature of certain decisions can be largely explained by their post-conflict surroundings, as these institutions face an imperative of preserving peaceful conditions and contributing to the maintenance of the nascent power-sharing mechanisms. Since promoting *cooperation* itself usually entails taking sides, this strategy can be considered a rather assertive judicial behavior, for slightly different reasons in the two post-conflict contexts. In Bosnia and Herzegovina, the reinforcing decisions consistently favored Bosnian interests at the expense of the segmental autonomy of the Serbs, therefore the Court took sides consistently in one direction. In Northern Ireland, taking sides was somewhat less sharp for the ambiguity of the conflicts appearing before the judiciary: in *Re Williamson*, the Secretary of State’s decision favoring Republicans was upheld, while in *Robinson* again Westminster’s choice – in this case, on maintaining the power-sharing cabinet – was protected

vis-à-vis Unionist hardliners. In this regard, only *Re De Brun* involved clearly taking sides, as the decision favored Republican politicians against a measure imposed on them by a moderate Unionist First Minister. Nevertheless, the gap between the textual provisions and the outcomes of litigation demonstrates a higher degree of judicial discretion and assertion.

The stakes of certain decisions in post-conflict settings therefore views the assertion reinforcing judicial choices in different degrees. In the case of Belgium, the lack of a violent conflict backdrop did not encourage the local Constitutional Court to embark on an unwinding strategy, but instead it became known for its deferential, ‘prudential’ approach to the consociational settlement. Here, given the frequency of state reforms, the Court was understandably able to assume a more patient position in institutional matters, trusting that the most contentious issues can be solved in the gradual process of federalization. The only case where the Court appeared to act as a driving factor in institutional reforms (73/2003) resulted in destabilization and political deadlock.

The second finding pertains to the set of interpretive approaches. In most cases, a specific set of interpretive methods is employed across most cases (*table 8.3*). All three – purposive interpretation, proportionality analysis, and the political question doctrine – fit the needs of divided societies and power-sharing settlements in various ways. Purposive interpretation and proportionality analysis are useful methods to address divisive issues invoking external reference points; the political question doctrine offers an avenue for leaving certain issues to the discretion of political elites, together with delineating the boundaries of judicial deference (as happened in *De Brun*). The use of these methods varies across legal cultures, so while proportionality analysis mostly appeared in the two continental European countries, the political question doctrine was primarily employed in Northern Ireland, a common law jurisdiction.

Furthermore, the use of various interpretive methods across these cases is also closely linked to their essential features. This appears the most clearly in the use of purposive interpretation (appearing in six cases), which is employed in cases where the courts embrace an assertive strategy, in unwinding (three occasions) and reinforcing (also three) decisions. In this regard, proportionality analysis appears to be much more of a double-edged sword, as the four cases where it appeared resulted in diverse outcomes, including cases from all three categories of outcomes (unwinding, deference, reinforcing). Finally, the use of the political question doctrine is also ambiguous. Intuitively, it is a suitable interpretive tool for the judiciary to step aside in a

potential conflict with the legislative or executive branches. Nevertheless, in the context of deeply divided societies, most decisions – including inaction and deference – entail taking sides and confronting with one or another actor. Therefore, in the two cases where the doctrine's 'original' version, rooted in common law jurisprudence was employed, it appears as a tool for the judiciary to reinforcingly support the functioning of the power-sharing settlement by avoiding a close, textual application of certain constitutional provisions.

The Belgian court's approach in litigating the Sixth State Reform also embraced the doctrine's essence, with certain differences though. While the doctrine's original understanding, rooted in common law constitutionalism (M. Tushnet 2002), focuses on how the type of question leads the court to abstain from deciding on issues, here the author of the challenged measures got special protection for the procedural justification behind the agreement, referring to the broad consensus behind it. Despite these legal differences, the political significance of these decisions was largely the same, as the judiciary deferred toward actors keeping the power-sharing settlements active, even at the expense of interpreting power-sharing rules very vaguely.



Table 8.3: List of judicial cases

Decision	Impact	Interpretive method	Institutional issue	Taking sides
<i>Constituent Peoples</i> (BiH)	unwinding, reinforcing	purposive	segmental autonomy	–
<i>Places Name</i> (BiH)	reinforcing	purposive, proportionality analysis	segmental autonomy	+
<i>U-4/05</i> (BiH)	unwinding	purposive	local power-sharing	+
<i>U-13/5</i> (BiH)	deference	textual (purposive)	central power-sharing	–
<i>AP-2678/06</i> (BiH)	deference	proportionality analysis	central power-sharing	–
<i>U-1/99</i> (BiH)	reinforcing	textual	central power-sharing	+
<i>Re Williamson</i> (NI)	reinforcing	political question doctrine	implementation of peace agreement	+
<i>Re De Brun</i> (NI)	reinforcing	purposive	central power-sharing	+
<i>Re Morrow</i> (NI)	unwinding (reinforcing)	legitimate expectation (purposive, proportionality analysis)	central power-sharing	+
<i>Re Robinson</i> (NI)	reinforcing	purposive, political question doctrine	central power-sharing	–
<i>Re NIHRC</i> (NI)	N/A	purposive	human rights regime	–
<i>90/1994</i> (BE)	deference	proportionality analysis	central power-sharing	+
<i>30/2003, 73/2003</i> (BE)	unwinding	proportionality analysis	central power-sharing	+
<i>72/2014</i> (BE)	reinforcing	political question doctrine	local power-sharing	+
<i>96/2014</i> (BE)	reinforcing	political question doctrine	local power-sharing	+
<i>81/2015</i> (BE)	reinforcing	political question doctrine	central power-sharing	+

The interpretive methods in parentheses are employed in two cases: either the concurring and dissenting opinions, if different than the ones in the judgement; or the first judgement in the case if the appellate level made a different decision. In the ‘Taking sides’ column, ‘+’ means that the decision clearly benefited one or another constituent ethnic group, while ‘–’ means that the decision was neutral from the perspective of ethnic divisions.

The clearest similarity among the three cases can be observed in the courts’ use of external sources. Though one can find jurisprudential references and comparative law in some of the reasonings (e.g. in *Constituent Peoples* or the NIHRC’s applications), in most cases all courts had a primary reference point across decisions. In the post-conflict settings, this has been the respective political agreement establishing the power-sharing settlement; beyond having a special character concerning their legitimacy (signed by all relevant actors from all sides), these documents also contain long-term objectives that courts can use in their purposive reasonings. In the gradually evolved consociation of Belgium, such a document related to a single founding moment is missing, but the Court still acknowledged the need for a mutually agreed standard, and embraced the framework of European law given the wide commitment towards the European integration project within the Belgian society (beside a number of pragmatic reasons; see Popelier and Voermans 2014).

### 8.3 Contribution and further research agenda

These results address two major issues in the relevant literature. The first is related to the taxonomy of judicial strategies in consociations: while authors in this field (e.g. Issacharoff 2004; 2008; 2015; McCrudden and O’Leary 2013a; Pildes 2008) have mostly seen the judiciary’s choices between deference or confrontation with the political elites, this comparative analysis sheds light on a new dimension, dealing with the ways courts *support* power-sharing through their *reinforcing* decisions.

The second is related to the way these decisions are made. While some works have addressed the question of which interpretive methods suit the needs of consociations (e.g. McCrudden and O’Leary 2013a, 116–18), court cases in such contexts were not comparatively investigated on this ground. By addressing this gap, the comparative analysis offers an explorative inference stressing the prevalence of purposive interpretation, proportionality analysis, and the political question doctrine – all three methods meeting the needs of divided societies in one or another way. Though investigating court decisions on basis of the inner procedures would be a similarly promising avenue, with these three jurisdictions a comparative exploration is untenable for institutional reasons: voting records are only public in the Constitutional Court of Bosnia and Herzegovina<sup>87</sup> and the Westminster courts, while in Belgium even dissenting opinions cannot be published.

Beyond these two issues in the literature, systematically observing the use of external sources is a new consideration brought into the comparative literature by this research.<sup>88</sup> Here the prevalence of peace agreements in post-conflict settings is an essential observation, informing later research in such context. Furthermore, the fact that the Belgian body also has its primary external reference point – European law (Popelier and Jaegere 2016) – implies the importance of a primary standard in the use of triadic interpretive strategies; therefore, students of peacefully established consociations might also seek for these functional equivalents of peace agreements.

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<sup>87</sup> In this regard, the article of Alex Schwartz and Melanie Janelle Murchison entitled *Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina* (2016) observing the connection between ethnic background and voting behavior in court decisions can be regarded as a pioneering work, both conceptually and methodologically; nevertheless due to the lack of available data from other jurisdictions, replicating it in comparative studies is impossible.

<sup>88</sup> On a case-specific level, Gordon Anthony offered pioneering work on the use of the Belfast Agreement in litigating cases linked to the Northern Irish power-sharing settlement (2002, 410).

In sum, this work contributes to the established literature by broadening both the analytical perspectives for scrutinizing the subject-matter and the empirical scope of comparison, finding a newly identified pattern in judicial strategies, where courts actively reinforce consociational mechanisms. Following the same logic, broadening the analytical framework beyond these three cases could enhance both the typologies employed in this emerging field of literature, and also could bring new considerations into the ongoing empirical discussions within the subject. For further research, Lebanon might be the likeliest candidate, as a long-functioning consociation with a constitutional court. Moreover, Burundi and South Tyrol might also be of interest to consociational scholars, though to a lesser extent than Lebanon. In the former case, the Constitutional Court displayed an apparent lack of independence in certain key decisions (Vandeginste 2015, 626), while in the latter, only a limited form of judicial oversight is established (Alcock 2001, 14–15).

A further potential avenue is comparative research on issues addressed by the normative argument, especially the protection of internal minorities, which was mostly avoided in the cases under scrutiny.<sup>89</sup> While the comparative analysis of this dissertation focuses on decisions dealing with institutional matters (i.e. the functioning of the consociational settlement itself), such cases are more likely to be found in antidiscrimination jurisprudence.

#### *8.4 Implications and policy recommendations*

The findings of this dissertation offer a number of empirical and normative propositions both for academic and policy communities. Given the interdisciplinary nature of the research, very few takeaways are relevant for only one audience but can be rather formulated along the lines of institutional and implementational questions. The former set of conclusions focus on the place of constitutional courts in consociations, their interactions with other institutions, and their contribution to the dynamics of the power-sharing settlements. These matters are primarily of interest to consociational scholars, analysts of political processes, and institutional designers in divided societies. The latter set of conclusions, related to the interpretive methods employed by constitutional courts, their use of external sources, and internal dynamics in decision-making are

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<sup>89</sup> Pervasive effects of adverse institutional design choices are present in most of the cases from Belgium as well as the court decisions on the electoral arrangements in Bosnia and Herzegovina. The latter cases also demonstrate how decisions related to the treatment of the ‘others’ are adjudicated.

primarily relevant to constitutional scholars, researchers of courts, legal practitioners, and advocacy groups. Though there are numerous overlaps in the interests of the two sets of audiences, the implications are primarily discussed in these two streams.

The frequent and relatively consistent use of external sources, the prevalence of ‘triadic’ interpretive methods, where courts litigate between various positions based on their proximity to the court’s established standards (Schlink 2012, 720) are primarily of interest to the latter audience. In the Belgian and Bosnian cases, the constitutional courts follow this approach through proportionality analysis; the judiciary dealing with the Northern Irish cases by the use of purposive interpretation. This finding implies that constitutional review can be most effectively mobilized along such triadic reasoning strategies. While comparative legal research already identified how triadic methods suit the needs of divided societies (Barak 2007; Cohen-Eliya and Porat 2011; 2013), the analysis of cases also revealed the prevalence of the political question doctrine in these contexts – an approach elsewhere treated as relatively outdated (M. Tushnet 2002). As constitutional courts in consociations make the reasons for their deferral explicit in a large share of their deferential decisions, actors aiming to mobilize constitutional review in such settings should consider their litigation strategies along the core features and application of the political question doctrine.

From the more general, institutional inferences – relevant for institutional designers and consociational scholars – the most important conclusion is that constitutional courts are much less a threat to consociational settlements than partners in maintaining, supporting, or reinforcing strained consociational structures. This partly confirms the hypothesis of Issacharoff and Pildes on the ‘judicial modesty’ of domestic constitutional courts when it comes to lack of assertive unwinding decisions (McCrudden and O’Leary 2013b, 488–89); but also sheds light on the active side of such institutions supporting consociational settlements, asserting that constitutional courts buttress consociational structures not only by deferral, but also through intervention. On the other hand, constitutional courts also occasionally engage in judicial interventions aiming to decrease the salience of corporate provisions and to promote a more universal and individualistic conception of equality, unwinding (Issacharoff 2004) consociational institutions. Nevertheless, empirical evidence suggests that – primarily based on the Bosnian experience – these interventions happen in cases with lower political stakes, like controversies around local power-sharing institutions. Therefore, in managing consociational settlements, constitutional courts appear to be different partners on different levels: while in local contexts

they have the capacity to push a reform agenda, they embrace a supporting, reinforcing, and occasionally deferential strategies when it comes to the central power-sharing institutions.

Beyond the empirically rooted claims on how constitutional courts contribute to the institutional dynamics of consociations, I also argue, on normative grounds, that considering certain groups and functions, constitutional review is necessary within institutional architectures of consociational institutions. This argument is based on Thomas Christiano's theory on 'persistent minorities' (1994; 2008), groups that cannot pursue their vital interests by democratic means, but need supplementary institutional mechanisms, either on procedural or outcome-specific grounds. By their essential features, consociational settlements produce such entities, like groups without specific political recognition (known as the 'others'), internal minorities within recognized groups, or even recognized groups in case institutional design choices do not yield sufficient insurance mechanisms for them. Based on this normative argument, I also propose – primarily to consociational scholars and institutional designers – that constitutional courts should have a role in shaping the outcomes of certain decisions where groups similar to 'persistent minorities' are affected but insufficiently involved. As these groups are often too small, or too difficult to delineate to obtain a permanent place in decision-making mechanisms, constitutional courts are suitable actors to protect their interest by enforcing – again borrowing the terminology of Christiano – constitutionally established 'minimal outcome standards' (1994; 2008). This implies that beyond supporting intersegmental cooperation, constitutional courts also have an important role in dealing with decision-making gaps that are unlikely to be sufficiently addressed by segmental elites.

In sum, constitutional courts in consociations have a crucial role in consociations for three reasons. First, as constitutional courts are suitable actors for resolving jurisdictional debates in all kinds of democratic regimes, their role in addressing such issues is particularly salient in consociations, regimes with complex institutional structures and procedures. The adjudicative practice of all three courts demonstrate that constitutional courts are effective reinforcers of power-sharing mechanisms. Second, by enforcing constitutional provisions, constitutional courts are able to rectify the negative consequences of decisions made by excluding certain affected groups. Third, constitutional courts can also support decision-making in deadlock situations by ruling on outcomes along the lines of mutually accepted standards, through triadic approaches to constitutional interpretation.

Through the application of these standards, courts also have the potential of nudging elites to move on from stalemates produced by *constructive ambiguity* – a situation where the parties decide not to decide on sensitive issues, in hope of finding a solution later. On a practical level, this implies that instead of finding a marginal place for constitutional courts within power-sharing contexts, they should be situated within consociational architectures in a way that maximizes their reinforcing potential and empowers them to fill in decision-making gaps to protect persistent minorities.

The institutional design of constitutional courts can be tailored to these purposes in two primary directions. First, beyond following general measures fostering the appointment of “independent and judicious” judges (D. Horowitz 2006, 130), selection procedures should maximize cross-community dialogue and consensus stipulations. These can be extended with specific personnel requirements, such as a proven record of working in inter-ethnic (or inter-sectarian) institutions, experience with legislative procedures (e.g. working as legal experts in consociational legislatures), or experience in implementing international human rights norms.

The second avenue to adjust the place of constitutional courts in consociations is carefully arranging the conditions of initiating constitutional review. Here the primary purpose is to make constitutional review most easily accessible to those actors who are interested in preserving the stability of the power-sharing settlement and those who are linked to marginalized groups, the ones in the greatest need of judicial intervention. The former objective can be pursued by enabling those bodies to trigger constitutional review which are based on cooperation, such as power-sharing executives or legislative committees; and by establishing a relatively high threshold for parliamentary groups to avoid constitutional courts being too frequently involved in policymaking. Protecting marginalized groups can be supported by empowering specific right-protecting and -promoting bodies, such as human rights commissions, human rights chambers, or minority representatives to initiate constitutional review with a lower administrative threshold.

### *8.5 Human rights versus power-sharing?*

At first glance, the relationship between consociational power-sharing and constitutional review can be best understood through two conceptual tensions, both assuming a central position in the relevant literature. One of them pertains to the difficult relationship between human rights – understood in a universalistic, egalitarian, and individualistic way – and power-sharing

institutions. The other is related to the two sides of constitutional adjudication, procedural and substantive review procedures. While procedural review clearly fits the logic of consociational power-sharing, adjudicating substantive matters appears to be at odds with it.

In this dissertation I argue that neither of them fully grasps the most crucial elements of this nexus but can be applied only in different segments of consociational architectures; in certain areas, constitutional review has a normatively necessary, and practically essential role. In my normative argument I suggest that by establishing mandates for constitutional courts in consociations, the attention should shift from regime dynamics (i.e. whether constitutional courts contribute to the unwinding of consociational institutions) to certain inherent features of consociations in the light of constitutionalism as a normative standard. In the latter regard I argue that by their fundamental logic and features, consociations produce groups which can be considered ‘persistent minorities’ whose interests cannot be sufficiently protected through democratic means, neither adversarial nor consociational. In order to ensure a ‘minimal outcome standard’ for these citizens, non-elected and non-majoritarian institutional mechanisms are necessary. Given their fundamental features, I also argue that constitutional courts are the best candidates to fill this gap. Therefore, while agreeing with scholars dealing with consociations (e.g. Issacharoff 2008; 2015; McCrudden and O’Leary 2013a) or with divided societies in a broader perspective (e.g. Lerner 2011) that ethnic or sectarian institutions should be unwound by political elites, constitutional review is necessary in certain aspects of the *functioning* of consociations. This also implies that while procedural arbitration clearly fits the logic of consociational power-sharing, there is also a specific place for outcome-based constitutional adjudication which make consociational settlements more consistently display some of their underlying principles, most prominently the politics of accommodation.

The essential role of constitutional courts in consociational settlements is also demonstrated in the prevalence of reinforcing decisions (in 8 out of 16 cases). Furthermore, this type of judicial support is not limited to procedural litigation, as reinforcing decisions happened in cases involving both procedural (e.g. *U-1/99* in Bosnia or *Re Robinson* in Northern Ireland) and substantive (e.g. *Re Williamson* in Northern Ireland or *81/2015* in Belgium) questions. The fact that both ‘sides’ of constitutional adjudication produce reinforcing decisions suggests that limiting the constitutional judiciary role is not the best avenue to create a peaceful co-existence between constitutional adjudication and consociational power-sharing. Instead, carefully designed appointment procedures, abstract review requirements, and external standards as

reference points (e.g. peace agreements) are needed. In this case, a balance can be established where not only constitutional adjudication and consociationalism, but also human rights and power-sharing could reinforce each other.



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