Beyond “unwinding”: Constitutional review strategies in consociations

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Abstract
This article contributes to the emerging literature on the role of constitutional courts in consociational democracies. While most works have approached the topic from the perspective of regime dynamics, this analysis focuses on how courts relate to the constitutions they are mandated to enforce. Beyond addressing the empirical question of what choices courts make in their balancing between universal values and stability, this article also investigates how courts do this balancing. Through the analysis of seven cases from two consociations, Bosnia and Herzegovina and Northern Ireland, I argue that courts embrace specific interpretive approaches (proportionality analysis, purposive interpretation, and the political question doctrine) to reconcile the ideas of constitutional supremacy and respect for political agreements. The analysis also demonstrates how—by their nature political—framework agreements establishing consociational settlements become primary reference points for interpreting constitutional documents.

KEYWORDS
consociationalism, constitutionalism, constitutional courts, power-sharing
The relationship between power-sharing and constitutional review has been an important issue in the past decades—inspired both by conceptual tensions and controversial examples. For instance, the role of the South African constitutional court during the country’s transition from Apartheid (Issacharoff, 2004; Roux, 2016; Sunstein, 2001) drew attention to the possibly positive effects of constitutionalism in managing deep ethnic, religious, or cultural divisions. However, one can also find less successful stories: Scholars commenting on the failed power-sharing attempt in Cyprus between 1960 and 1963 (Adams, 1966, McCrudden & O’Leary, 2013a), all agreed on the essential role of the constitutional court in the settlement’s collapse.

On the conceptual level, the ambiguity of the relationship between these institutional phenomena is also apparent. On the one hand, power-sharing and constitutional review appear to be closely linked to each other: Arend Lijphart lists judicial review among the core features of consensus democracy in general (Lijphart, 2012), and the literature on judicial review also sees a strong connection between federal arrangements—which often come together with power-sharing settlements—and constitutional review (Stone Sweet, 2012). On the other hand, one can also assume that in settings where reaching agreements is particularly cumbersome and informal practices and institutions play an important role (Andeweg, 2000, p. 513), a body representing a sharply different logic than the power-sharing settlements can substantially complicate its functioning. In this paper, the role of constitutional courts is investigated in a specific type of power-sharing settlement, consociational democracies. Beyond representing a complex form of power-sharing, consociations are importantly two-dimensional, as they provide mechanisms of shared rule and segmental autonomy (1977).

A good share of the established literature on the topic (Choudhry & Stacey, 2012; McCrudden & O’Leary, 2013a; Pildes, 2008) has primarily focused on the role constitutional courts play in the dynamics of these regimes, reflecting on the institutional compatibility of judicial review and consociational power-sharing. In this regard, the seminal articles of Samuel Issacharoff (2004) and Richard Pildes (2008) have been the departure point for later works, where he suggested that constitutional courts have the potential of opening up, liberalising, in other terms “unwinding” consociational institutions. The normative appropriateness of liberalising consociational institutions has not been questioned—though questions on the legitimacy of courts doing so have been raised (e.g., Pildes, 2008, McCrudden and O’Leary 2013b)—later contributions to the field (e.g., McCrudden & O’Leary, 2013a) were mostly focused on the pragmatic dimension of this strategy, stressing the undermining potential of unwinding constitutional interpretations.

Nevertheless, the question how—and with what differences—these courts perform the primary roles of constitutional courts has remained a secondary concern; under the term “primary roles”—based on the classical theories of judicial review, explicated in Section 2—upholding the constitution and being a counterbalance to the legislature are meant. Through reviewing seven cases linked to two consociational polities—from Bosnia and Herzegovina and Northern Ireland—I argue that by the use of specific interpretive approaches—primarily purposive interpretation and the use of the political question doctrine—courts aim to reconcile constitutional supremacy with respect for political agreements. From the perspective of the established literature on the topic, this also means that courts have a wider perspective for strategic choices than a dual approach between unwinding and deference; instead, courts often actively buttress consociational structures, reinforcing the power-sharing settlements. Furthermore, as the political agreements behind the constitutions are frequently used as interpretive standards, I also argue that, in consociational contexts, one has to embrace an extended understanding of what the constitutional framework is.

Importantly, answering questions concerning the normatively appropriate relationship between constitutionalism and consociationalism is not the primary concern of this analysis. Instead, the main question relates to the institutional compatibility between consociationalism and constitutional review: By investigating how courts deal with the framework they have to enforce, including their own role in it, one can have a clearer picture on whether constitutional courts in consociations follow a strategy that adapts to the circumstances of consociational settlements, whether they stick to a close reading of their constitutions or provide a reading informed by
universal ideas. This question is answered through the following steps: First, the conceptual debate is introduced; in the second section, details of the empirical research design are outlined; the third and fourth sections explain the institutional architecture of two polities selected on basis of their case material—Bosnia and Herzegovina and Northern Ireland—and analyse selected judgements delivered by courts entrusted with constitutional review. The final, concluding section, reflects on the questions elaborated in the Introduction, as well as the possible implications of the findings. I argue that, in the dilemma between promoting human rights and respecting the sensitive political agreements, courts frequently opt to employ interpretive approaches which either fit the context of divided societies (like proportionality analysis), help bringing in external reference points (in these cases, usually peace agreements—such as purposive interpretation), or avoid conflicts between governmental branches (by using the political question doctrine).

2 CONSTITUTIONALISM, CONSTITUTIONAL REVIEW, AND CONSOCIATIONALISM

The core feature of constitutionalism is that certain rules and principles bear a specific status above ordinary legislation, which either block holders of legislative and executive power in certain areas or can be circumvented only through special procedures (Holmes, 2012; Preuss, 1995; Waluchow, 2017). The notion of judicial review is closely connected to the idea of constitutionalism, as it can be defined as a mechanism for an external body to assert control on legislative or executive bodies if they transgress the constitutionally established norms. This can be done by the judiciary as the third branch of government, or a specialised body; the former is known as the centralised and the latter as the decentralised form of judicial review (Stone Sweet, 2012, p. 818).

In the two most influential accounts for the theory of constitutional review, offered by John Marshall and Hans Kelsen, two principles are commonly present justifying it: constitutional supremacy and separation of powers (Kelsen, 1942, 1967; Troper, 2003; Dimitrijevic, 2015, p. 54). The logic of the former argument is the following: If the constitutional provisions are not enforced, then the constitution is not supreme, and this also means that there is no legal norm limiting the government. The second principle, separation of powers, is necessary to answer the following question: If someone has to determine what is constitutional and what is not, why should the judiciary, or a body functioning like a court, be entrusted with this role? In this regard, the assumption that the legislative and executive may not necessarily be the best actors to control themselves implies that another actor within the constitutional architecture should be entrusted with this role. Therefore, the classical justifications of judicial review are not primarily based on epistemic considerations that assume that judges are, by the nature of their profession and knowledge, the most capable of interpreting the constitution.

The term "consociationalism" first appeared in an influential article by Arendt Lijphart (1969), where he addressed the puzzle of democratic stability in fragmented societies. His analysis primarily pointed to the importance of cooperation among segmental elites and the cohesion between these elites and their constituents. Later, Lijphart provided a more systematic definition of the consociational model, identifying four defining features of consociational democracies: proportionality, grand coalition, mutual veto, and segmental autonomy (Lijphart, 1977). Though originally present in the Low Countries, Austria, Switzerland, and post-independence Lebanon, consociationalism became a widespread strategy for cooperation in divided societies, like Bosnia and Herzegovina, Northern Ireland, or South Tyrol.

Since the concept of consociationalism appeared in academic discourse, it has given rise to numerous empirical and normative debates. According to Brendan O’Leary, "[c]ritics of consociational ideas are especially prominent in the liberal, socialist and feminist traditions" (2005, p. 4), but the field attracts only limited attention from scholars of constitutionalism. In one of the few accounts on the nexus of the two concepts, Walter Murphy identified one common feature and three points of tension (2007, pp. 83–87). Regarding the common feature, Murphy suggests that "[l]ike constitutionalism, consociationalism tries to lower the stakes of politics" (2007, p. 84), which resembles the...
principle of limiting the government. Nevertheless, consociationalism does not address the limitation of government vis-à-vis its subjects but rather limits the majority or majorities with mutual veto provisions.

The first tension Murphy mentions concerns the status of groups left out of the power-sharing settlement; these groups cannot benefit from the mutual veto provisions if their rights are not protected by constitutional guarantees. Second, consociationalism seems to tolerate restrictions of individual rights for the sake of guaranteeing group-specific rights and the autonomy of ethnic or religious groups. Finally, the value of electoral accountability in the segmented electoral systems is diminished (Murphy, 2007, pp. 85–86). The tension between individual and group-specific rights appears elsewhere too. For instance, Christopher McCrudden and Brendan O'Leary argue that “an individualized and majoritarian conception of equality is undoubtedly put under pressure by consociation, but consociationalists seek to further equality between consociated peoples or groups” (McCrudden and O'Leary 2013b, p. 483).

These tensions point to the ambiguous relationship between constitutionalism and consociationalism. It seems that consociationalism challenges, or at least understands differently, the core features of constitutionalism: limited government, the primacy of individual liberty, and the meaning of equality before law. Therefore, constitutional courts can find themselves in a complex position, given their human rights-centred character (Stone Sweet, 2000, p. 137) on the one hand, and the sensitivity of power-sharing settlements on the other. To face this challenge of balancing, scholars in the field identified three possible strategies. First, Issacharoff suggests that a well-designed regime robustly exhibiting the traits of constitutionalism might be a better option for divided societies than adopting formal power-sharing, and constitutional courts should have a prominent role in managing these transitions (2004, p. 1865). Second, constitutional courts can be suitable actors for liberalising or “unwinding” consociational institutions (2004)—a position that became normative departure point for other authors (McCrudden & O'Leary, 2013a; Pildes, 2008) as well. Finally, constitutional courts can also become actors preserving or reinforcing consociational institutions (e.g., Choudhry & Stacey, 2012; McCrudden & O'Leary, 2013a; Popelier & Lemmens, 2015). Nevertheless, works specifically dealing with constitutional courts in consociations largely focused on the second option, the unwinding potential of courts, considering both their possible impact on regime development and its dangers.

3 | EMPIRICAL QUESTIONS AND CASE SELECTION

Given the emerging character of this literature, a substantial amount of exploratory work is needed to observe patterns in institutional design and adjudicative practice. As this article deals with a specific question, only a selected range from the universe of cases can be presented here. Regarding the cases studied, three scope conditions are established. First, the given polity should function as a clear case of consociational power-sharing, exhibiting all four elements of the “consociational package” (Lijphart, 1977). Second, the given polity should have a constitutional court or a body with the right to rule on the constitutionality of legislative and procedural matters. Third, the democratic procedures and judicial independence (MacDonald & Hoi, 2012) should be on the level that ensures that a control body like the constitutional court has meaningful authority. Applying these conditions results in 5 possible cases: Belgium, Bosnia and Herzegovina, Lebanon, Northern Ireland, and South Tyrol. The 3 sovereign countries have their own constitutional courts, which are all substantially tailored to the peculiarities of consociational power-sharing by their composition, appointment procedures, institutional accessibility, and internal regulations. In the cases of Northern Ireland and South Tyrol, the national appellate and constitutional courts of the United Kingdom (together with the regional courts in Northern Ireland) and Italy can adjudicate constitutional matters linked to the consociational power-sharing.

From these five possible cases, this article focuses on Bosnia and Herzegovina and Northern Ireland; these polities were chosen for their extensive case material, so inferences drawn based on them might be helpful in investigating further cases. Given the limited universe of cases and their complexity in multiple dimensions, one cannot apply
any of the established case selection techniques (Seawright & Gerring, 2008) with full consistency; therefore, it cannot be stated whether this analysis falls closer to a comparison of most similar or most different cases. Nevertheless, beyond an important common factor—namely, that both courts function in post-conflict settings—one can also find important differences that increase the explanatory value of observations on common points.

Four primary differences between the cases can be highlighted. First, while Bosnia and Herzegovina is a clear case for centralised constitutional review, the Northern Irish context is much more akin to the decentralised model—a crucial difference in this analysis, as litigation often continued at appellate levels. Second, the Bosnian court was designed to be an arbitrator for a consociational polity and therefore has consociational features in its own design as well. On the contrary, the courts hearing cases related to the Northern Irish power-sharing settlement (The High Court and The Court of Appeal in Belfast, and the UK Supreme Court, earlier the Law Lords in London) are neither constitutional courts according to the centralised model of judicial review nor are designed in a way that relates to the specific circumstances of a power-sharing settlement. Third, though both polities fall under the scope of the European Convention on Human Rights (ECHR), the European human rights regime has a more emphatic role in Bosnia and Herzegovina, due to the Convention’s supremacy over the Constitution, declared in the Constitution itself (Article II (2)), as well as the European Court of Human Rights’ role in appointing one-third of the judges. The aforementioned institutional differences are more thoroughly discussed in Section 3, which compares the institutional design of the courts. Finally, the power-sharing settlements represent the two main types of consociationalism: its so-called corporate and liberal versions.

By investigating the records of constitutional adjudication in these two polities, primarily those cases were selected that touch upon the consociational method of power-sharing and are distinctly consociational issues. Therefore, cases related to institutional devices of shared rule are prioritised. Beyond addressing their contexts, the textual analysis of the court decisions will especially focus on how courts relate to their constitutional frameworks in the reasonings and the normative reference points they establish. Due to the differences in the institutional setups, the Northern Irish case offers judicial decisions from three different levels in the judicial hierarchy, while regarding Bosnia and Herzegovina, the relevant decisions are concentrated in the case record of the centralised constitutional court.

4 | INSTITUTIONAL BACKGROUND

By analysing the institutional context of the judicial decisions, two issues should be primarily addressed. The first concerns the general role of the constitutional court in the political system: its constitutional mandate, core competences, institutional accessibility, and also the composition of the court, which is usually determined by other state organs, for example, by the nominating and appointing roles of legislatures, executives, heads of state, and so forth. The second issue concerns provisions on the internal organisation of courts, especially their decision-making mechanisms, requirements for qualified majorities, and provisions on the transparency of deliberations. In the following section, these dimensions of the constitutional court of Bosnia and Herzegovina and altogether four bodies in the United Kingdom and Northern Ireland (the legal committee of the House of Lords, the UK Supreme Court, the High Court of Northern Ireland, and the Northern Ireland Court of Appeal) are briefly addressed.

Consociational features in the institutional design of constitutional courts can be more expected in cases where the given court presides over cases only related to a consociational settlement—and to a lesser extent for courts in federal or devolved countries where regional or devolved units might be consociational. One of the most apparent among these features is the composition of the courts (Graziadei, 2016; McCrudden & O’Leary, 2013a, pp. 39–42). In Bosnia and Herzegovina, every constitutionally recognised ethnic group is represented in the constitutional court—each by 2 members. As the Bosnian consociational settlement is built around sharing power among three groups, this allocation results in a situation where two groups can easily align against a third one on certain issues. In
order to solve this problem, three international members were included besides the 6 “domestic” judges. They are appointed together by the European Court of Human Rights (ECtHR) and the collective Presidency of the country.

The balancing factor is especially necessary as the election procedures do not foster the election of consensual figures (Article VI(1) of the Constitution). This is apparent in the lack of requirements for inter-block negotiations, as appointing the judges is at the discretion of the political elites of ethnic groups: the legislature of the Serb Republic (RS) elects two judges, while the Bosnian and the Croatian caucuses in the legislature of the Federation of Bosnia-Herzegovina elect the other four members. Besides, the professional requirements are also vague as the constitutional text only stipulates that “[j]udges shall be distinguished jurists of high moral standing” (Article VI(1)(C)). Nevertheless, the tenure until retirement (age of 70, with the exception of the first court which was elected for 5 years) is in support of releasing judges from political pressures.

Beyond the composition and appointment procedures of the court, its role within the institutional architecture suggests an institution, which was established to hold parties accountable to the commonly agreed rules. The article in the constitution establishing the court (VI(3)) mentions three tasks: ruling on jurisdictional matters, acting as an appellate court in matters pertaining to the Constitution, and upholding the constitutionality of legislation—both federal and regional. By specifying the jurisdictional matters, the text explains that this task “includes” but “does not limit” the court to certain specific roles like overseeing the parallel foreign relations of the entities and the compliance of entity legislation with the federal constitution. The court’s arbitrational character is also strengthened by the formalised role it has in legislative deadlocks (which is, however, limited to procedural matters). Procedurally, the designers of the court did not aim to strengthen its consensual character, so there are no provisions on qualified majority in decision-making. A simple majority constitutes a quorum, ballots are open, and there is a possibility to publish dissenting or concurring opinions.

The institutional design in Northern Ireland is starkly different. On the one hand, Northern Ireland is in a particular constitutional situation, as the codified version of the Good Friday (or Belfast) Agreement, the Northern Ireland (1998) Act (NIA) performs most functions of a constitution, while the broader polity, the United Kingdom still lacks a constitution consolidated in a single document. This can result in unique situations where the de facto constitution of Northern Ireland is interpreted by bodies whose primary function is not to interpret constitutional documents but to work with a wider body of legal acts as their constitutional framework.

Moreover, none of the courts adjudicating Northern Irish cases have any consociational features in their design. First, Northern Ireland lacks a centralised constitutional court designed in a way that takes the political character of the institution into account. Second, the Northern Irish judiciary has always enjoyed a considerable degree of autonomy within the UK (McEvoy & Schwartz, 2015; Morison, 2015, p. 132), but there were no specific provisions on fostering a specific cross-community balance in court members. While from the late 1980s, the Protestant/Unionist dominance in the number of judges was mitigated (McEvoy & Schwartz, 2015, p. 167), there has not been and still is no provision addressing this dimension of court composition. 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 appointments” (Artcile 64 (1)). Nevertheless, 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. Until 2009, this body has been the "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 formalise the separation of the judiciary from the legislature. The establishment of the Supreme Court mattered in 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.
5 | JUDICIAL DECISIONS

5.1 | Case selection

In what follows, selected cases linked to the Bosnian and the Northern Irish power-sharing settlements are presented, preceded by a short introduction of some recurring interpretive doctrines. From Bosnia and Herzegovina five and from Northern Ireland, three cases are discussed. The former set of judicial decisions is analysed in two parts: one on the constituent status of ethnic groups in regional entities, while the four cases linked to various electoral arrangements are discussed together. Meanwhile, the Northern Irish cases are presented in chronological order and all of them in a narrative that analyses decisions on various levels of litigation together. The cases were selected based on their relevance to the consociational form of power-sharing and institutions: Altogether six cases or controversies are included in this analysis.6 From the possible universe of cases, I prioritised those that most closely reflect on specifically consociational problems, with probably one exception: Re Williamson’s Application (, 2000, discussed in Section 5.5), for its influence on the later cases in Northern Ireland.

5.2 | Recurring approaches by courts

Before presenting the individual cases, some general approaches to constitutional interpretation across a number of cases are briefly presented. Through the cases, 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 difference between the polities under scrutiny. For instance, proportionality analysis is more common in European countries and is “systematically applied at the ECHR” (Sajó & Uitz, 2017, p. 408), which explains its use in the Bosnian court—in a court where 3 members are appointed following the ECHR’s recommendations. On the other hand, as the political question doctrine is rooted in Anglo-Saxon legal systems (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 a “true” meaning for constitutional provisions (Barak, 2006, p. 123)—that is, it asserts that specific questions and situations require an approach that suits their peculiarities. 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 fulfill” (2007, p. 89). The application of purposive interpretation has a particular advantage in managing the institutional affairs of postconflict 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 & Uitz, 2017, p. 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, p. 739; Sajó & Uitz, 2017, p. 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—that is, no less burdensome measure exists. Finally, the measure is proportionate, where the court investigates the balance between competing constitutional interests. Importantly, the balancing exercise requires some kind of common denominator (Schlink, 2012, p. 720; Sajó & Uitz, 2017, p. 414)—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 emphasise “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" (Cohen-Eliya & Porat, 2013, p. 106).

Finally, the doctrine of political question 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, p. 184). The term originates from common law jurisprudence and can be considered less influential nowadays (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 & O’Leary, 2013a), which argue that the most controversial issues in these contexts have to be left to the political elites.

5.3 | Constituent peoples (U-5/98, 2000)

The first commonly known case in the history of the Bosnian constitutional court was related to the segmental autonomy of ethnic groups, and in its—divided—decision, the court reinforced the status quo laid down in the Dayton Agreement. In 1998, Alija Izetbegovic, the Bosniak member of the three-member collective presidency of Bosnia and Herzegovina, initiated proceedings before the constitutional court, challenging the constitutions of both federal 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, by identifying three constituent groups, the Bosnians, Croats, and Others—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), in respect to 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, declaring the provisions in question unconstitutional regarding both entities.

In its decision, the court applied a purposive interpretation setting the goals established in the General Framework Agreement of Dayton—like establishing "peaceful relations," a "pluralist society," or enabling the relocation of displaced people—as standards. 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. From the perspective of regime dynamics, the case demonstrated an important clash between the central government and federal actors aiming for greater segmental autonomy. In terms of constitutional supremacy, the decision demonstrates how a court employs purposive interpretation, based on a tangible set of external sources—primarily the framework agreement including the constitution itself. This use of external sources in the court’s reasoning demonstrated the gaps in the constitutional provisions and the problems emanating from corporate consociational arrangements. However, the reason why this case has an eminent place in the Bosnian Constitutional Court’s jurisprudence is its attempt to "soften the hard edges of consociationalism and for making it clear that collective rights must be administered without prejudice" (Rosenberg, 2008, p. 388).
5.4 | Constitutional challenges of the electoral regime (2005–2009)

Regulations on the electoral regime constitute an important but also highly sensitive part of consociational architectures, crucially influencing how power-sharing settlements function. This can be one reason why Sejdić and Finci v. Bosnia and Herzegovina (2009) is the most widely known case in the short history of the Bosnian consociation. Beyond its international exposure—as it was concluded before the ECHR—the case stirred great interest because it addressed both the delicate balance among various actors and the crucial institutions within the architecture of the Dayton Framework. The applicants, Dervo Sejdić and Jakub Finci, identified themselves as Roma and Jewish citizens (therefore qualified for the rights entitled to the constitutionally recognised group of the "Others") and were not eligible for membership in the collective presidency of the federation and the upper legislative chamber, the House of Peoples. Following three ambiguous decisions by the Bosnian Constitutional Court on the matter (discussed below), Sejdić and Finci turned to the ECHR, which declared that their lack of opportunity in running for these offices exhausts the category discrimination according to the ECHR. Due to their relevance to the consociational architecture, three decisions on the electoral arrangements stand out: cases no. U-4/05, 2005, U-13/05, 2006, and AP-2678/06, 2006. While the court ruled in favour of more complete accommodation regarding municipal arrangements (in U-4/05), the body employed a narrow reading of the constitution concerning federal institutions (in U-13/05 and AP-2678/06).

In the first case (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 scrutinising the admissibility of the request) appear 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 is “including” these but “is not limited” to them. In this reasoning, the court understood this provision as a sign of incomplete contracting (Sunstein, 2007) in the constitution: “The framers 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 jurisdiction through a purposive approach, 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 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 Tihić, member (at that moment, Chair) of the Presidency, challenged those provisions of the electoral regulation that connected ethnic group membership with territorial residence: namely, that from the territory of the Federations, only self-designated Bosnian or Croatian, while from the RS only self-designated Serb, candidates are allowed to run. Avoiding risk of confrontation, 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 of U-4/05. By interpreting its own competences, 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 the 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 court was divided on the decision, which became manifest in the separate concurring and dissenting opinions. 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 emphasised 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 through a combination of purposive interpretation and proportionality analysis:

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), emphasised the importance of considering the said 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 U-4/05 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 emphasised 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 again concerned 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 constituted ethnic discrimination, violating Article 1 of Protocol 12 of the ECHR (AP-2678/06, para 7). In its decision, the court did not invest too much in disputing this claim but put it under the scope of proportionality analysis, finding that the electoral provisions "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).

Following these decisions, Sejdic and Finci applied directly to the ECtHR concerning the election of the Presidency and the House of Peoples. Their application primarily concerned ethnic discrimination, which has been even more straightforward compared with the other cases, as not only did a mismatch between their territorial and ethnic affiliation prevent them from running for these offices, but their very group membership was at issue. In other words, the corporate consociational architecture does not fully accommodate the participation of people affiliating themselves with the constitutional category of the "Others."

The ECtHR's decision confirmed the directional expectations from the established literature—as one can expect more cautious decisions from domestic courts and bolder measures from international bodies (McCrudden & O'Leary, 2013a, pp. 42–45)—as it delivered a considerably more assertive decision than the constitutional court in Sarajevo had done in similar cases. In the ECtHR majority's opinion, 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, the fact that no electoral reform up to now has followed the ruling also demonstrates the limitations upon the functioning of international human rights courts, as their rulings do not have the same effect as domestic courts do. On the other hand, the strategic turns the Bosnian court has taken also demonstrate the limitations of "grounded," domestic constitutional courts.

5.5 | 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 more "political" cases—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 organisation was maintaining a "complete and unequivocal ceasefire" (Article 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 noncompliant organisation, which would have made Kelly’s release unlawful. To demonstrate the lack of PIRA’s noncompliance, Williamson referred to two incidents in July 1999 (when the release itself happened), a murder and a weapon smuggler 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 noncompliant organisation 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; a member of the British cabinet) is supposed to judge the status of individual organisations, not the overall peace process.

Both the High Court and the Court of Appeal dismissed the petition, primarily invoking the political question doctrine. In the High Court’s decision, John Kerr argued that the specification of the various organisations is not a mere question of legal interpretation but "require[s] the deployment of political judgement as well as analytical skills" ([1999] KERF3105, p. 16), therefore 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 circumstance 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, p. 15)

The Court of Appeal further emphasised 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, p. 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 these standards. In conclusion, on the first occasion the court faced a sensitive political question, it opted to defer by an exemplary application of the political question doctrine.

5.6 | Re De Brun’s application (2001)

The chronologically first case dealing with controversies around the NIA also involved taking a side in a dispute between governing parties. Importantly, in this case, it was not the SSNI’s decision that was under scrutiny, but the Northern Irish First Minister’s; therefore, the political question doctrine was applied differently. 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 to the North-South Ministerial Council, a body fostering cooperation between Northern Ireland and the Republic of Ireland. In his decision, Trimble did not question the ministers’ capability of performing their duties, but he refused to nominate them with a collateral purpose, in order to put pressure on Sinn Féin to use its influence for accelerating the decommissioning of Republican paramilitary forces.

In their decisions, 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 the one hand, the political question doctrine was again invoked through references to the soft-edged review, as Kerr acknowledged the First Minister’s discretionary power in the nomination process; however, the court also argued that the particular action taken by Trimble had not served the purpose of the statutory provisions. In Kerr’s opinion, “a decision not to nominate in order to bring pressure on a political opponent does not involve any assessment of his suitability for the nomination nor does it seek to fulfil the purpose of section 52” (2002, p. 409). Therefore, in this case, the use of the political question doctrine was placed under scrutiny through a purposive interpretation. Furthermore, in providing the purposive interpretation of the relevant statutory provisions, the court referred to the Belfast Agreement, establishing its importance as an interpretive source (2002, p. 409), in a similar fashion as the Bosnian court treated the Dayton Agreement.

5.7 | Robinson v. Secretary of State for Northern Ireland (2002)

Probably the most comprehensive assessment of the Belfast Agreement as a constitutional framework was given in a case concerning coalition-forming following a legislative election in Northern Ireland. The influence of the case can be illustrated by the fact that by hearing a case on the Northern Irish abortion regime, the UK Supreme Court reached back to the Law Lords’ reasoning from 2002 to explain the constitutional nature of legislation connected to the Belfast Agreement ([2018] UKSC 27, para 211). Both the Northern Irish and the Westminster courts embraced a strongly purposive interpretation, reinforcing the discretionary powers of the SSNI.

The key legal reference point in this case, Article 16 of the Northern Ireland Act (NIA), provides that the Northern Ireland Assembly has 6 weeks to elect a First Minister and Deputy First Minister following parliamentary elections or a governmental vacancy, and to decide on the allocation of the ministerial positions. Though parties are entitled to an inclusion in the executive cabinet proportionally with their parliamentary representation, the range of governmental portfolios covered by the given ministerial positions remains a sensitive question. In 2001, forming the cabinet took 44 days after the First Minister’s resignation, so the deadline was
exceeded by 2 days. John Reid, the SSNI, still gave his legal approval. In this case, 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, p. 414). Furthermore, the political question doctrine was again deployed by claiming that the SSNI 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, p. 415). As the Court of Appeal neither ruled in favour of Robinson’s petition ([2002] NICA 18C), the litigation continued before the Law Lords, which followed the practice of purposive interpretation but also aimed to connect its reasoning to a broader view of 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 asserted that the UK does not have a constitution “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. On its interpretive approach, the Law Lords asserted that the NIA has to be read “generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody” ([2002] UKHL 32, para 11). In conclusion, the Robinson decision stands out for two reasons. First, probably in none of the other cases has there been such a large gap between one’s expectations based on the statutory language and the eventual outcome. Second, departing from a reflection on the general nature of British constitutionalism, this case produced the most comprehensive interpretation employing the political question doctrine.

6 | CONCLUSION

The central empirical question of this paper—namely, how constitutional courts in consociations make their choices, compared with the ideal types of constitutional adjudication—has led to two important conclusions. On the one hand, the use of proportionality analysis demonstrates that courts do not interpret rights categorically, allowing room for more context-specific considerations. Though established scholarship (Cohen-Eliya & Porat, 2013) on proportionality analysis suggests that it is a suitable tool for courts in divided societies, it is also important to note that its use is widespread beyond this realm (Sajó & Uitz, 2017, p. 408). Furthermore, the mere fact that a court employs proportionality analysis does not necessarily mean that the body acts with a sense of strategic caution—as the example of Sejdic and Finci before the ECtHR demonstrates. On the other hand, purposive interpretation and the political question doctrine are not similarly widespread; therefore, their broad use by courts in consociations can be considered something more specific to these regimes (at least to the extent that they are used). The use of the latter two approaches in judgements demonstrates the courts’ willingness to reconcile constitutional supremacy and a respect for sensitive political agreements, following the recommendations of McCrudden and O’Leary (2013a).
Nevertheless, providing constitutional interpretations that allow executives to treat constitutional provisions flexibly means, at the end of the day, a diminished understanding of constitutional supremacy. In this regard, the most striking question is what do courts hold on to most closely? Based on the review of cases from two different polities, the answer is the wider framework agreements, which, in both cases, serve as an interpretive guideline for courts. This demonstrates how constitutional frameworks in certain—in this case, postconflict—settings are understood as a unity of legal and political documents.

Two practical implications follow from these theoretical conclusions. First, domestic constitutional courts often do not simply defer when facing political questions but reinforce certain consociational structures by interpreting constitutional provisions through the framework agreements. Second, in order to understand the uniquely consociational character of constitutional adjudication in power-sharing settlements, beyond including more countries and cases in comparative studies, a greater emphasis has to be put on the connection between the overall political agreements and constitutional interpretation—especially on the purposive approach that usually bridges the two.

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ENDNOTES

1 The works of Brendan O'Leary (2005) and Rupert Taylor (2009) can be recommended as reviews on these debates.

2 Nevertheless, it has to be noted that some electoral arrangements—like single transferable vote (STV), used in Northern Ireland—allow for inter-block electoral accountability; see Garry, 2014.

3 On the one hand, the fact that courts on multiple levels can exert judicial review brings the Northern Irish judiciary closer to the decentralised model. Nevertheless, unlike other polities with decentralised regime—like Canada or the USA—there is only one court on each appellate level.

4 The “corporate” form of consociations refers to those settlements where power-sharing is organised around a set of recognised entities; Belgium or Bosnia and Herzegovina are typical examples. On the contrary, “liberal” consociations aim to accommodate transformations in identities, including their emergence, changing salience, and so forth through prescribing mechanisms for cooperation without identifying the relevant groups or their predetermined place in the structure. The best-known example for the latter is Northern Ireland, which is considered to have normative advantages over corporate consociations as they emphasize self-determination over predetermination (Lijphart, 1995; O'Leary, 2005: 15–6; Taylor, 2009: 6–10; McCulloch, 2014).

5 Except for containing a Northern Ireland-specific bill of rights; for a more elaborate discussion on the matter, see Schwartz & Harvey, 2012.

6 From the Bosnian cases, the decision known as Places Name (U-44/01, 2004) is particularly noteworthy for the purposive interpretation provided by the constitutional court as well as the fact that it is one the few decisions taken on sensitive issues where all judges voted unanimously. From Northern Ireland, the most relevant case left out of this analysis, Re Murphy’s Application ([2001] NI 425), was touching upon the relationship between the Northern Irish legislative Assembly and Westminster. Certain orders of the Secretary of State for Northern Ireland (SSNI) were under challenge. These were challenged after the Assembly was suspended following a Unionist refusal to share power due to issues around the decommissioning of the Provisional IRA (PIRA). In their decisions, the Belfast courts reinforced the discretionary powers of the SSNI, ensuring the governability of Northern Ireland in the cases of political stalemates, but also taking away incentives from Unionists to cooperate in certain situations. Similarly, the constitutional status of Northern Ireland was the issue in a recent ruling delivered by the UK Supreme Court on the issue of the UK triggering Article 50 of the Lisbon Treaty in order to leave the European Union ([2017] UKSC 5). In a nutshell, the sections dealing with Northern Ireland (paras 132-35) were focusing on whether the self-determination given to Northern Ireland in Article 1 of the NIA (i.e., that Northern Ireland can unite with the rest of the island if the majority of its populations wants to do so) also meant that the people of Northern Ireland have a separate voice in the EU membership of their polity. In this regard, Northern Irish self-
determination was overridden by an orthodox reading of Westminster-centred parliamentary sovereignty (for a broader discussion, see McCrudden & Halberstam, 2017). For further related cases from the Northern Irish power-sharing settlement, see Morison & Lynch, 2007.

7 In many parts of the reasoning, the court also addressed conceptual problems around individual and corporate understandings of equality, which have been in the centre of the academic literature on constitutionalism and consociationalism (McCrudden and O’Leary 2013b: 483). The most concentrated conceptual analysis can be found under paras 112–27.

REFERENCES

Adams, T. W. (1966). The first republic of cyprus: A review of an unworkable constitution. The Western Political Quarterly, 19(3), 475–490.

Andeweg, R. (2000). Consociational democracy. Annual Review of Political Science, 3(1), 509–536.

Anthony, G. (2002). Public law litigation and the Belfast Agreement. European Public Law, 8, 401–422.

Barak, A. (2006). The Judge in a Democracy. Princeton, N.J: Princeton University Press.

Barak, A. (2007). Purposive Interpretation in Law. Princeton: Princeton University Press.

Barak, A. (2012). Proportionality (2). In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press.

Bickel, A. M. (1986). The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2nd ed ed.). New Haven: Yale University Press.

Choudhry, S., & Stacey, R. (2012). Independent or Dependent? Constitutional Courts in Divided Societies. In C. Harvey, & A. Schwartz (Eds.), Rights in Divided Societies. Oxford: Hart Publishing.

Cohen-Eliya, M., & Porat, I. (2013). Proportionality and Constitutional Culture. Cambridge: Cambridge University Press.

Dimitrijevic, N. (2015). Always Above the Law? Justification of Constitutional Review Revisited. In Constitutional Review and Democracy. Utrecht: Eleven International Publishing.

Garry, J. (2014). Holding parties responsible at election time: Multi-level, multi-party government and electoral accountability. Electoral Studies, 34, 78–88.

Graziadei, S. (2016). Power sharing courts. Contemporary Southeastern Europe, 3(1), 66–105.

Holmes, S. (2012). Constitutions and Constitutionalism. In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press.

Issacharoff, S. (2004). Constitutionalizing democracy in fractured societies. Journal of International Affairs, 58(1), 73–93.

Kelsen, H. (1942). Judicial review of legislation: A comparative study of the Austrian and the American constitution. The Journal of Politics, 4(2), 183–200.

Kelsen, H. (1967). Pure Theory of Law. Gloucester, Mass: Peter Smith.

Lerner, H. (2011). Making Constitutions in Deeply Divided Societies. Cambridge: Cambridge University Press.

Lijphart, A. (1969). Consociational democracy. World Politics, 21(2), 207–225.

Lijphart, A. (1977). Democracy in Plural Societies: A Comparative Exploration. New Haven: Yale University Press.

Lijphart, A. (1995). Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems. In W. Kymlicka (Ed.), The Rights of Minority Cultures. Oxford: Oxford University Press.

Lijphart, A. (2012). Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries (2nd ed ed.). New Haven: Yale University Press.

MacDonald, R. A., & Hoi, K. (2012). Judicial Independence as a Constitutional Virtue. In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press.

McCrudden, C., & Halberstam, D. (2017). Miller and Northern Ireland: A Critical Constitutional Response. Rochester, NY: Social Science Research Network.

McCrudden, C., & O’Leary, B. (2013a). Courts and Consociations: Human Rights versus Power-Sharing. Oxford: Oxford University Press.

McCrudden, C., & O’Leary, B. (2013b). ‘Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements’. European Journal of International Law 24, 2, 477–501.

McCulloch, A. (2014). Consociational settlements in deeply divided societies: The liberal-corporate distinction. Democratization, 21(3), 501–518.

McEvoy, K., & Schwartz, A. (2015). Judging and Conflict: Audience, Performance and the Judicial Past. In A.-M. McAlinden, & C. Dwyer (Eds.), Criminal Justice in Transition: The Northern Ireland Context. Oxford; Portland: Hart Publishing.

Morison, J. (2015). Finding Merit in Judicial Appointments: NJAC and the Search for a New Judiciary in Northern Ireland. In A.-M. McAlinden, & C. Dwyer (Eds.), Criminal Justice in Transition: The Northern Ireland Context. Oxford; Portland: Hart Publishing.
Morison, J., & Lynch, M. (2007). Litigating the Agreement: Towards a New Judicial Constitutionalism for the UK from Northern Ireland? In J. Morison, K. McEvoy, & G. Anthony (Eds.), Judges, Transition, and Human Rights. Oxford: Oxford University Press.

Murphy, W. F. (2007). Constitutional Democracy: Creating and Maintaining a Just Political Order. Baltimore: JHU Press.

O'Leary, B. (2005). Debating Consociational Politics: Normative and Explanatory Arguments. In S. J. R. Noel (Ed.), From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies. Montréal: Chesham: McGill-Queen's University Press.

Püides, R. H. (2008). Ethnic Identity and Democratic Institutions: A Dynamic Perspective. In S. Choudhry (Ed.), Constitutional Design for Divided Societies: Integration or Accommodation? Oxford; New York: Oxford University Press.

Popelier, P., & Lemmens, K. (2015). The Constitution of Belgium: A Contextual Analysis. Constitutional Systems of the World. Oxford: Portland: Hart Publishing.

Preuss, U. K. (1995). Constitutional Revolution: The Link between Constitutionalism and Progress. Atlantic Highlands, N.J: Humanities Press.

Rosenberg, S. P. (2008). Promoting equality after genocide. Tulane Journal of International and Comparative Law, 16, 329–393.

Roux, T. (2016). Constitutional courts as democratic consolidators: Insights from South Africa after 20 years. Journal of Southern African Studies, 42(1), 5–18.

Sajó, A., & Uitz, R. (2017). The Constitution of Freedom: An Introduction to Legal Constitutionalism. In New York, NY. Oxford: Oxford University Press.

Schlink, B. (2012). Proportionality (1). In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press.

Schwartz, A., & Harvey, C. J. (2012). Judicial Empowerment in Divided Societies: The Northern Ireland Bill of Rights in Comparative Perspective. In C. J. Harvey, & A. Schwartz (Eds.), Rights in Divided Societies. Oxford: Hart.

Seawright, J., & Gerring, J. (2008). Case selection techniques in case study research: A menu of qualitative and quantitative options. Political Research Quarterly, 61(2), 294–308.

Stone Sweet, A. (2000). Governing with Judges: Constitutional Politics in Europe. Oxford: Oxford University Press.

Stone Sweet, A. (2012). Constitutional Courts. In M. Rosenfeld, & A. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law. Oxford: Oxford University Press.

Sunstein, C. R. (2001). Designing Democracy: What Constitutions Do. New York: Oxford University Press.

Sunstein, C. R. (2007). Incompletely Theorized Agreements in Constitutional Law. Social Research, 74(1), 1–24.

Taylor, R. (2009). Introduction: The Promise of Consociational Theory. In R. Taylor (Ed.), Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict. London: Routledge.

Troper, M. (2003). The Logic of Justification of Judicial Review. International Journal of Constitutional Law, 1, 99–122.

Tushnet, M. (2002). Law and prudence in the law of justiciability: The transformation and disappearance of the political question doctrine. North Carolina Law Review, 80, 1203–1235.

Waluchow, W. (2017). Constitutionalism. In E. N. Zalta (Ed.), The Stanford Encyclopedia of Philosophy. Metaphysics Research Lab: Stanford University.

LEGAL SOURCES

AP-2678/06 (Constitutional Court of Bosnia and Herzegovina). 2006.
Case U-5/98, “Constituent Peoples” Decision (Constitutional Court of Bosnia and Herzegovina). 2000.
Constitution of Bosnia and Herzegovina. 1995.
Constitutional Reform Act (UK). 2005.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). 1953
Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (UKSC 5). 2017.
Northern Ireland (Sentences) Act. 1998.
Northern Ireland Act (UK). 1998.
Re Conor Murphy Application's for Judicial Review (NICA 425). 2001.
Re Michelle Williamson Application for Judicial Review (CARE3169). 2000.
Re Michelle Williamson Application for Judicial Review (KERF3105). 1999.
Re Peter Robinson’s Application for Judicial Review (NICA 18C). 2002.
Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland) (UKHL 32). 2002.
Sejdic and Finci v. Bosnia and Herzegovina (ECHR). 2009.
U-13/05 (Constitutional Court of Bosnia and Herzegovina). 2006.
U-4/05 (Constitutional Court of Bosnia and Herzegovina). 2005.
U-44/01, "Places Name" (Constitutional Court of Bosnia and Herzegovina). 2004.
