

## Constitutional Courts in Consociations: Beyond the logic of regime dynamics

Departmental Seminar, 17 February 2016

András Gál

Consociationalism and constitutional review are both intensely debated topics in normative political theory; however, very few works have been dedicated to investigate the relationship between these two notions. Given the fact that my normative conclusions would apply to a specific universe of cases, I aim to introduce my theoretical inquiry with with a throughout empirical research on the constitutional politics of consociations.

The main question of my research is whether the existence of constitutional review enhances or deteriorates democratic qualities in a consociational democracy. If yes, a further question applies: is there a model for constitutional review which could claim normative superiority. Hereby, I am only partly interested in the most widespread distinction in the literature on constitutional adjudication (whether a diffuse or centralized model is applied), while I aim to focus on peculiarities of courts in these settings. Notably, their degree of embeddedness: whether they are inherent parts of the consociational regimes (e.g. Belgium, Bosnia and Herzegovina and Lebanon), or function in a polity 'above' the consociation, (e.g. Northern Ireland and the UK Supreme Court, or the European Court of Human Rights (ECtHR) for the European cases?

Unlike previous contributions in this field of research, my project focuses on the operational logic of consociations rather than their dynamics. In other words, previous scholars dealing with the topic were mostly interested in how constitutional courts contribute to the change or stability of consociational regimes, by 'unwinding' or 'entrenching' them,<sup>1</sup> with a different degree of 'judicial modesty'.<sup>2</sup> Instead, my primary concern is about the normative properties of consociations themselves, and the way normative credentials of constitutional review relate to these peculiarities.

I aim to break down my research into three main parts, which are closely relying on each other. Firstly, I scrutinize the democratic qualities of consociations. This would be done partly by regarding the ideal type of consociational regimes from the angle of theories on constitutional democracies. Based on the findings of this analysis, I aim to move towards the analysis of the constitutional architectures and politics of existing, and important historical (e.g. Austria, the Netherlands) cases of consociationalism. In this part, there will be a special emphasis on two particular questions: firstly, to what extent were and are consociational institutions and practices constitutionalized; secondly, were/are there any bodies or institutions in those regimes with a similar function as constitutional courts, councils, etc., without an explicit constitutional mandate?

Secondly, the democratic qualities of constitutional review will be examined, mostly by employing the core arguments of the normative debates around the democratic legitimacy of constitutional adjudication to the context of consociations. Finally, in the third, concluding part part of my research I aim to see how the two sets of findings relate to each other: whether there is any overlap between them, and whether they neutralize or amplify each other? In conclusion, I aim to contribute to the normative literature on consociationalism with providing a robust reading on the logic and operation of constitutionalism in consociational democracies.

---

<sup>1</sup> Issacharoff, Samuel. 2004. 'Constitutionalizing Democracy in Fractured Societies'. *Journal of International Affairs* 58 (1): 73–93.

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

<sup>2</sup> McCrudden, Christopher, and Brendan O'Leary. 2013. *Courts and Consociations: Human Rights versus Power-Sharing*. Oxford: Oxford University Press.