

Exploring the deliberative performance of a constitutional court in a consociational political system

A theoretical and empirical analysis of the Belgian Constitutional Court

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Abstract. This paper analyzes the role and position of the Belgian Constitutional Court (CC) in order to characterize its interference with politics. In establishing constitutional courts, legislators can pursue multiple objectives. Initially, the CC's role was limited to upholding the complex political agreements that characterize Belgium's consociational system. During the last decades, the CC developed into a venue for deliberation, with extended accessibility for societal stakeholders and a wide set of reference norms. This makes that the initial legislator's expectation that the court will protect existing political agreements might conflict with its deliberative potential. Empirically, we demonstrate this tension and analyze its nature. For this purpose we analyze a sample of CC rulings between 1985 to 2013 (n=300). More concretely, we will investigate the CC's cases by looking at the type of plaintiff and defendant, subject of legislation, composition of the court, reference norms, structure and content of the reasoning.

Key words: constitutional courts, deliberation, consociationalism, consensus democracy

Introduction

This paper analyses the deliberative potential of constitutional courts in consociational political systems. For this purpose we focus empirically on the functioning of the Belgian Constitutional Court (CC). While literature on the US Supreme Court is extensive, there is not much systematic knowledge about the European constitutional courts, or judicial politics more generally. We agree with HÖNNIGE who argued that a proper comparative understanding of democratic politics needs to account for the functioning of constitutional courts, more precisely their composition rules, access routes and the degree in which these courts are isolated from political pressure.¹ Our aim is to contribute to these theoretical and methodological challenges, by analyzing the functioning of the Belgian CC.

Conceptually, we confront the consociational nature of the Belgian polity with the deliberative potential of the CC. In doing this, we hope to contribute to a better understanding of how courts affect the nature and functioning of democratic institutions. Although consociationalism can effectuate conflict management in a pluralistic society², some authors question its democratic quality. Consociational bargains reflect elite-centered negotiations which take place behind closed doors and are dominated by political parties. Such negotiations do not entail a direct and broad-based citizen participation in the policy process. Also, policy outcomes strongly depend on the negotiation strategies pursued by the bargaining elites, rather than rational arguments.³ The role CCs may play in consociations is not well-understood. On the one hand, constitutional review might reinforce democracy by adding a deliberative component and providing a forum to challenge legislation that is part of a consociational bargain. On the other hand, if CCs declare some (part of) existing legislation as unconstitutional, this might threaten consociational peace and trigger the need for a new round of negotiations. This implies a serious drawback for democratically elected politicians and might even encourage them to severely limit and constrain the court's discretion and competences.

The next section of the paper explores the complex relation between constitutional review and democracy. Following this, we list various factors that affect the deliberative potential of a

¹ C. HÖNNIGE (2011), 347.

² On consociationalism and the related concept 'consensus democracy': A. LIJPHART (1969); (1977); (1984); (1999); (2008). For more information about the confusion between those concepts: M. BOGAARDS (2000), 395-423. For clarity reasons, we will only use the concept 'consociationalism' in this paper.

³ H. J. STEINER (1991), 1551-1552; J. S. DRYZEK (2005), 222; M. BOGAARDS (2006) 120.

constitutional court. Next, we examine the Belgian CC and its deliberative potential. More concretely, our evidence shows that since its inception (in 1983 as the *Court of Arbitration*) the CC has developed into a venue for deliberation, although its primary function was to guard consociational bargains and deal-making. The Belgian CC, and how it developed over time, is a highly interesting case. It allows us to assess the deliberative potential of CC, and the attribution of court rulings to democratic government, in a political system that is strongly characterized by consociational politics. Next, we present some preliminary findings of a large-N mapping of a sample CC rulings, which show that the role and position of the CC changed considerably over time. Overall, our quantitative and qualitative evidence illustrate that, despite the fact that institutional and substantive discretion of the CC has grown, the Belgian CC is a prudent player and hesitates to take a blunt stance vis-à-vis the legislative entities. Nevertheless, it also indicates that the fact that the CC has gradually enlarged its deliberative potential causes challenges for its functioning. In some cases, the CC has to look for a balance between the protection of fundamental rights and the preservation of consociational peace.

Theoretical framework: constitutional review and democracy

Although many democratic systems have established some type of constitutional review⁴, many scholars still raise the counter-majoritarian objection.⁵ According to these authors, courts lack democratic legitimacy to reject or overrule legislation or policies approved by the people's elected representatives. On the other hand, when it comes to the functioning of consociational democracies, LIJPHART argues that constitutional review might be desirable as it offers additional protection for minorities and/or stabilized political bargains. One of the key features of consociationalism is the restriction of government by simple parliamentary majorities.⁶ However, from a democratic perspective one might question judicial review even stronger when legislation is the product of broad and encompassing supermajorities as is often the case in consociational democracies.

Yet, democratic legitimacy cannot be identified with the simple balancing of majorities and minorities. In this regard, some authors argued that (temporarily) electoral supremacy alone

⁴ On the global spread of constitutional review: T. GINSBURG (2010), 81-98.

⁵ Most vehemently: A. M. BICKEL (1961) and J. WALDRON (1999)

⁶ A. LIJPHART (1999), 223; A. LIJPHART (2002), 52. Although LIJPHART defends the consociational model vigorously, here he seems to imply its democratic shortcomings. See also R. ANDEWEG (2000).

cannot justify the supremacy of a political decision.⁷ Others have enumerated the “malfunctions, blind spots and burdens of inertia” of a majority decision-making process⁸, weakening the democratic credentials of its outcome.⁹ Much of the consociational literature accounts for how the balancing of majorities and minorities affects the politics in heterogeneous politics and can, in this way, be seen as an alternative to a simple majoritarian model. Nonetheless, not all malfunctions, e.g. time pressure, competing priorities and strategic voting, can be addressed by a supermajoritarian policy process.¹⁰ Moreover, in a consociational system, decision-making powers are strongly delegated to party political elites, thus constraining the possibility for a broad range of citizens to directly and effectively participate in the policy process.¹¹ Instead of being attentive to individual rights, there is a strong focus on group rights.¹² Also, party elites tend to combine all sorts of political issues in large package deals in which a negotiation logic – namely how to aggregate diverging viewpoints – prevails. Therefore, political outcomes do not necessarily reflect rational arguments that result from a creative and reasoned exchanges of diverging viewpoints. From this perspective, both majoritarian as supermajoritarian decisions might not be as democratic as critics of judicial review presume.

To overcome the counter-majoritarian objection, some authors argue that democratic legitimacy should thus be defined more widely.¹³ SAGER, for example, points out that democracy is defined by two, equally important, elements: an electoral and a deliberative modality. The first element means that citizens participate in the political process through voting for their representatives in parliament and government. However, democracy also implies that the diversity of citizen’s viewpoints is seriously taken into account, even considering the variety of perspectives in a heterogeneous society. This second element is captured by the deliberative modality¹⁴, and is inspired by the theoretical literature on deliberative democracy.¹⁵ Deliberative theorists put forward a transparent, reasoned weighing of interests, to achieve the best possible policy results. Much attention is paid to the

⁷ A. GUTTMAN AND D. THOMPSON (2002), 154.

⁸ POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 201.

⁹ A. MAZMANYAN (2013), 169, referring to J. FERREJOHN AND P. PASQUINO (2002), 25.

¹⁰ M. BOGAARDS (2006) 120.

¹¹ J. S. DRYZEK (2005), 222: “Elections have little meaning, as the same political parties will often govern in an oversized coalition.”

¹² H. J. STEINER (1991), 1551-1552.

¹³ For an overview: V. F. COMELLA (2009), 87.

¹⁴ L. G. SAGER (2006), 72-76, 200-207 and 218-219.

¹⁵ E.g. J. S. DRYZEK (2000); J. ELSTER ET AL. (1998); J. M. VALADEZ (2001).

fundamental notions of rationality, reasonableness and mutual respect. Instead of relying only or predominantly on the force of electoral strength, they promote persuasion by the better argument.¹⁶ The main interaction mode of a deliberative decision is arguing, instead of voting or, what is mainly the case in consociational systems, bargaining. When political actors bargain, this should lead to an exchange of resources and potential benefits, while when they argue, they try to induce effective changes in the factual beliefs or preference of others.¹⁷ In practice, the electoral and deliberative modality are intertwined and mutually reinforcing. Separately, they cannot guarantee the democratic quality of a political system.

Although deliberative theorists seem to agree on what a deliberative performance substantively includes, it is not always clear which institution should be responsible for this result. Some deliberative theorists are skeptical about the role of courts¹⁸, but many accept that they can provide an additional deliberative forum. SAGER is even more positive about the deliberative quality of constitutional review. He argues that, while legislators are best suited to fill in the electoral modality, (constitutional) courts might be more apt to function as deliberative institutions.¹⁹ He states that a “*deliberative legislative assembly is at best a conceptual goal rather than a practical reality*”.²⁰ Legislators usually give some socio-economic justification, but they do not always substantiate policy decisions with legal or scientific arguments.²¹ Even when legislation is evidence-based, this might not be clarified in preparatory documents. Importantly, in consociational systems, much policymaking (usually big decisions and bargains) is consciously kept opaque.²² Courts on the other hand are expected to examine the arguments of all involved parties profoundly, and respond in a juridical and logical way.²³ Key is the overall strength or robustness of the argument, and not only the political support a particular political view enjoys.²⁴ The logic according to which courts operate makes them distinct and independent from day-do-day politics. In this way,

¹⁶ These arguments must be couched in terms that are accessible to everybody and could in principle be accepted by anyone. A. GUTMAN AND D. THOMPSON (2002), 165-166 ; J. HABERMAS (1989), 90-91.

¹⁷ On these three interaction modes: J. BEYERS (2008), 1194-1200; J. ELSTER ET AL. (1998); A. S. YEE (2004).

¹⁸ A. GUTMANN AND D. THOMPSON (2003); J. WALDRON (2009); C. F. ZURN (2007)

¹⁹ SAGER sees the judiciary as a “*quality control inspector*”. L. G. SAGER (2006), 74-75 en 200-207.

²⁰ L. G. SAGER (2006), 204.

²¹ Time limits and political rationality and culture outweigh the concern for informed decision-making, See E BOHNE (2009), 65.

²² POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 205. For an evaluation of the regulatory culture in Belgium, see OECD, *Better Regulation in Europe. Belgium* (Paris, OECD 2010). It was for example observed that “*the involvement of politicians in rule drafting makes the implementation of impact assessment particularly difficult*”.

²³ The legislator might use the same methods as courts, but is not obliged to do so. R. MARUSTE (2007), 10.

²⁴ L. G. SAGER (2006), 203.

courts can provide an indirect but explicit justification for legislative outcomes.²⁵ Nonetheless, when a CC cannot find constitutional support for existing pieces of legislation, it is expected to declare the legislation null or void, or constructively modulate its initial meaning.²⁶ From this perspective, constitutional review can reinforce the legal quality of democratic policymaking, rather than weakening it.

Deliberative performance of a Constitutional Court

However, not all constitutional courts fulfill these deliberative expectations. Building on other literature²⁷, we can identify four key ingredients for evaluating the deliberative performance of a CC. Firstly, the court should provide a deliberative forum, where all rational arguments are collected and examined. Although access routes to the court are usually legally determined, the court should present an institutional openness to a diversity of societal stakeholders and external sources, to gather as many viewpoints as possible. Next, the court should deliberate internally as to define and refine the arguments applicable to each case. Thirdly, this should lead to an elaborate but precise justification for the court's ruling. This ruling should not only enumerate all arguments for each presented plea, but reflect the internal process that has led to the decision. And finally, these ruling should stimulate reactions from society, provoking, when appropriate, a legislative initiative or a new round of adjudication. The goal should not be to close, but instead to facilitate and enrich the democratic debate. These four aspects relate to the different sets of variables as described in our research design.

Before we can look into how the Belgian CC developed in this regard, we will first examine possible factors influencing its development as a deliberative institution. According to MENDES, deliberative performance is a consequence of a “*complex interaction between the institutional devices, the ethical traits of deliberators, the legal materials, and the political landscape.*”²⁸ Various factors influence a court's ability to act as a deliberative institution, restricting or stimulating the four ingredients of deliberative performance. We subdivide those

²⁵ J. FERREJOHN AND P. PASQUINO (2002), 24.

²⁶ However, this activist approach is not generally accepted. J. JAEGERE (2014), 22-32.

²⁷ FERREJOHN J. AND PASQUINO P. (2002), who made the distinction between internal deliberation between the judges and external dialogue with other constitutional agents; C. H. MENDES (2013), who added a temporal aspect, defining three consecutive phases of deliberation: public contestation, collegial engagement and a deliberative, written decision; and POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), who argue that a CC, next to providing a deliberative forum, should enhance a democratic and deliberative lawmaking process.

²⁸ C. H. MENDES (2013), 105. MENDES' intention was not to provide a readymade institutional design, but to enumerate all procedural, substantive en contextual “*facilitators*” (pp.142-175) maximalizing the court's possibilities to act as a deliberator.

factors in three, interrelated, categories: institutional, behavioral and contextual factors. We will give a short overview of these categories, before analyzing them more concretely for the Belgian CC. Firstly, each CC has to function within a fixed institutional framework, decided upon by the legislator. For deliberative performance, essential elements are a wide access to the court, an extensive set of reference norms and a variety of sanctioning possibilities.²⁹ However, this cannot be regarded separately from behavioral and contextual factors, because those affect how the court will function within its institutional framework. A court, conscious of its deliberative role, will make maximal use of the given competences, or even extend them if it deems this to be appropriate. A strong deliberative court will also be inclined to find ways to communicate with the legislator and society, e.g. with an elaborate reasoning or diversity of sanctioning modalities. On the other hand, the political and historical context may create certain expectations towards a constitutional court and depending on what is at stake, these factors might limit or widen the court's room for manoeuvre. In the next section, we will look into these indicators more specifically regarding the Belgian Constitutional Court.

The deliberative potential of the Belgian CC

INSTITUTIONAL FACTORS - In evaluating the current institutional design of the Belgian CC, we must conclude it has developed gradually into a fully-fledged human rights court with considerable deliberative potential. In what follows, we focus on the key factors that shaped this development. Firstly, in addition to its legal independence, the Belgian CC has a strong pluralistic structure. Among the twelve judges, there is always a double parity: between professional lawyers and former politicians, and between the Dutch- and French-speaking judges.³⁰ The latter reflects the linguistic heterogeneity of the Belgian society. Former politicians are often lawyers as well, but this is not a legal requirement.³¹ Under the reservation of a collegial culture, this diversity ensures that different perspectives can be incorporated into the CC's decision making process.³² Also, the independency of the court is enhanced by its supermajority appointment method³³ and life tenure of the judges.³⁴

²⁹ MENDES argues that the classical distinctions (e.g. concentrated/diffuse systems, abstract/concrete review and weak/strong models) have a "*limited, if any, bearing on deliberation*". C. H. MENDES (2013), 141-144.

³⁰ When the case is submitted to seven judges, there are at least three Dutch-speaking and three French-speaking judges. Of these seven, there are at least two judges who are former politicians, at least two legal experts. When the case is submitted to the CC in full session, there are at least ten judges, and in any case as many Dutch-speaking and French-speaking judges. (Article 55-56 of Special Law of 6 January 1989 on the CC).

³¹ E.g. one of the current judges Jean-Paul Snyers, was a former school teacher.

³² For empirical evidence : A. VERMEULE (2006).

³³ The judges are elected by a two-thirds majority vote of the members present, alternately by the House of Representatives and by the Senate.

Secondly, a wide access to the court is guaranteed. Apart from institutional petitioners, all legal entities or citizens demonstrating an interest are entitled to initiate and/or intervene in an annulment or preliminary procedure. The president of parliament can only initiate an annulment procedure on request of two thirds of parliament³⁵, hereby limiting the possibility for the parliamentary opposition or other minorities to initiate or intervene in a case.³⁶ On the other hand, the court incites additional interventions, by informing governments and parties before a referring court and placing an announcement in the official gazette.³⁷ All this increases the range of perspectives that can be addressed by or incorporated in the court proceedings.³⁸

Furthermore, the CC can review legislation against competence allocating rules and the fundamental rights in the Constitution. Other constitutional clauses are excluded. The CC also refuses to review legislation against procedural requirements³⁹, for example the obligation to negotiate with the trade unions⁴⁰ or other consultation committees.⁴¹ When comparing this with other countries, this seems restricted.⁴² However, studying the behavioral indicators (infra) will lead to another conclusion. The same can be said about the CC's sanctioning possibilities. The law allows the CC only to simply annul/uphold legislation, or declare it (un)constitutional. Nonetheless, when appropriate, it can also decide upon a moderation of the retroactive effect of an annulment, giving the legislator a delay to 'repair' unconstitutional legislation.⁴³ Further sanctioning modalities, that the CC developed itself, will be discussed below.

Finally, all rulings, including information about the parties and their arguments, and a yearly report are published on the CC's website. Hence, all involved parties, the legislator and society as a whole, are informed about the court's case law. However, on the other hand, the

³⁴ According to MENDES, these are joint mechanisms to tackle the risk of partisanship and other deliberative failures. C. H. MENDES (2013), 156-159.

³⁵ Initially a threshold of only one third was suggested. However, this would go against majority principle, and was therefore declined. Subamendment of R. GIJS en D. ANDRÉ of 27 april 1983, *Parl.St.* Senaat No. 246-13, 2.

³⁶ However, the CC accepts that political parties can interfere in a procedure as a legal entity, under the condition they can demonstrate an interest.

³⁷ POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 213.

³⁸ C. H. MENDES (2013), 162.

³⁹ Except those that require the involvement or agreement of other federal entities (art 30bis Special Law on the Constitutional Court).

⁴⁰ CC No. 107/98, 21 October 1998, B.3.1.

⁴¹ CC No. 136/2000, 21 December 2000, B.40.

⁴² POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 215-218; 226-229.

⁴³ Although the CC isn't formally competent to do so, the court has also exceptionally executed such moderations in preliminary procedures. S. VERSTRAELEN (2014).

deliberations among the judges are kept secret, and decisions are expressed in a single voice without dissenting opinions. More transparency about the reasoning process would further enhance the CC's deliberative potential.⁴⁴

BEHAVIORAL FACTORS – These factors encompass the court's attitude toward its task as constitutional adjudicator. An atmosphere of openness, collegiality and transparency and an awareness of its role in society enhances the court's deliberative potential. Although this is difficult to measure directly, there are some visible elements indicating how the court interprets its competences. Like MENDES, we consider the link between institutional and behavioral indicators as bi-directional: “*proper devices tend to encourage deliberative attitudes; the right attitudes may lead to a constant refinement of the procedures themselves*”.⁴⁵ When evaluating the Belgian CC's evolution since its establishment, we have evidence in support of this proposition.

An excellent illustration is the expansion of the set of reference norms, which were initially limited to the competence allocating rules. When, in 1988, the competences concerning education were attributed to the sub-national level, the CC gained the competence to review legislation against the rights and freedom regarding education, as well as the equality principle. The latter was primary meant to guarantee educational equality, thus offering additional protection for the political agreement concerning education.⁴⁶ However, the CC used this opening to link this clause to other constitutional clauses as well as EU-law, international law and unwritten legal principles.⁴⁷ This increased the impact of the CC on constitutional debates.⁴⁸ The CC also developed a proportionality test, taking into consideration arguments brought forward by the legislator, especially when parliamentary documents refer to scientific studies, advices and consultations. Therefore, review against the equality clause has led to a careful balancing of rights and interests.⁴⁹ By expanding its own competence, the original ‘Arbitration Court’ developed (since 1983) into a more deliberative

⁴⁴ POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 219.

⁴⁵ C. H. MENDES (2013), 146.

⁴⁶ Report of 8 June 1988, No. 100-3/2, 17 en 20; Report of 14 June 1988, No. 24, 509;

⁴⁷ The government was aware of the wider protection this review could offer. Some mentioned that every discrimination could possibly be reviewed against other rights in the Constitution or the ECFR. Report of 8 June 1988, No. 100-3/2, 2.

⁴⁸ POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 216.

⁴⁹ POPELIER P. AND PATIÑO ÁLVAREZ A. A. (2013), 229.

institution. A further recognition of this evolution came in 2003, when the legislator officially extended the CC's competences to the constitutional set of fundamental rights.⁵⁰

A similar story can be told about the sanctioning modalities.⁵¹ Instead of limiting itself to a simple declaration of (un)constitutionality, the CC has developed a middle way with diversified methods to answer a question of constitutionality. When there are several possible interpretations of the reviewed legislation, the court will pronounce a 'conformable interpretation', specifying how the legislative text can be applied in a constitutional way. When a certain disposition is unconstitutional in every possible interpretation, one would expect the CC to simply declare this part of the legislation null or void. However, sometimes, the CC will nevertheless constructively modulate the meaning of the legislative text, to avoid a declaration of unconstitutionality. For example, when the CC considers the scope of a certain (e.g. anti-discrimination) law too narrow, it can declare that the law also has to apply to another category of individuals (e.g. women). Lower courts, applying the modified legislation in concrete situations, are expected to take this case law into account. A last possibility is to establish an 'extrinsic legislative gap'.⁵² In these cases, the CC declares the reviewed law as such constitutional, but uses the case to identify an unconstitutional gap in the legislative system as a whole. This gives the legislator an explicit incentive to react, by remedying the legislative gap. This variety of sanctioning modalities stimulates constitutional dialogue. Case by case, the CC might push the legislator to review its legislation, or stimulate citizens to initiate new procedures. Each time new and additional arguments are presented to the Court. Interestingly, the federal legislator has picked up this challenge in a more general way, and established a special committee that has to (among other things) monitor and scrutinize the CC's case law.⁵³

CONTEXTUAL FACTORS - Finally, the CC's deliberative performance is influenced by the overall political environment wherein it has to function. These contextual factors might hamper the court's ability to sufficiently make use of all its institutional possibilities. Belgium is a deeply divided society, characterized by disagreements between the two main language

⁵⁰ Legislative act of 9 March 2003, modifying the Special Law of 6 January 1989 on the Constitutional Court.

⁵¹ J. DE JAEGERE (2014), 22-32.

⁵² A constructive modulation of the text, to fill in a legislative gap, is only possible when this gap is located 'in the reviewed legislation'. This is called an 'intrinsic legislative gap'.

⁵³ Law of 25 April 2007 establishing a parliamentary committee for the evaluation of legislative acts.

groups. To avoid deadlock and protect minority rights⁵⁴, the French-speaking minority (in Belgium), but also other minorities (Flemings in Brussels; German-speakers in Wallonia) gained specific rights of power-sharing. The importance of consociational power-sharing institutions is described by LIJPHART, who made it his life work to identify counter-majoritarian solutions for divided societies.⁵⁵ The basic underlying premise of these solutions is that they effectuate conflict management, by means of an institutionalized alternative to the rule of majority. Essential features include the formation of oversized coalition governments, proportional electoral system, mutual veto-powers and segmented autonomy. During the last decade, criticism on the consociational nature of the Belgian system has become stronger. Establishing workable governing coalitions has become more and more difficult.⁵⁶ The last government formation lasted 541 days, establishing an international record, and also the current formation is taking several months. It seems more and more difficult to transcend the deeply rooted differences between the Dutch- and French-speaking parts. One could argue that the stabilizing effect of consociational structures and mechanisms has declined, but nonetheless many political elites still hang onto consociational mechanisms.⁵⁷

LIJPHART pointed at the usefulness of constitutional review in a consociational polity. Restricting the parliamentary majority, e.g. through judicial review of their legislative work, is one of the key features of consociationalism. Constitutional review also offers protection for minorities, giving them an additional possibility to participate in the public debate. From a theoretic perspective, consociationalism and deliberative constitutional review thus seem a logical association. However, in practice this might not be as obvious as LIJPHART argued. When specific pieces of legislation are declared null or void by a CC, this can constitute a serious drawback for political actors. Eliminating one small element from a package deal can jeopardize the delicate balance achieved between different segments that constitute a consociation. And worse, it might be necessary to restart difficult and long negotiations. Also, the transparent nature of constitutional review might conflict with the opaque nature of such policymaking.⁵⁸ One might argue that the constraining power of a CC could incentivize the political elite to limit the court's discretionary powers in order to protect their own political autonomy.

⁵⁴ A majoritarian system would not function in such a pluralistic state. Instead of alternating power, the Flemish community would then permanently exclude the French-speaking minority from the policy process.

⁵⁵ A. LIJPHART (1969); (1977); (1984); (1999); (2008).

⁵⁶ E.g. D. CALUWAERTS (2012), 14, 72; D. SINARDET (2010), 347.

⁵⁷ K. DESCHOUWER (2006), 895-911.

⁵⁸ P. POPELIER (2013), 483.

This was especially the case in Belgium, where the CC was initially established as a neutral arbiter of conflicts of power between the federal and subnational levels of government.⁵⁹ Several institutional features point out the government's will at that time (1983) to protect the legislator's prerogatives: limited access, a restricted set of reference norms, and the composition of the court in accordance with a double parity rule.⁶⁰ The first two features – access and reference norms – were repeatedly extended, transforming the CC into a venue for deliberation. Although we suggested that diversity in the CC's composition can enhance its deliberative potential, the double parity rule was initially meant to protect consociational agreements. The idea thereby was to avoid a CC that would limit itself to a restrictive juridical reasoning, against the general will of the political representatives and devoid of political sensitivities.⁶¹ Parliamentary and political experience would give the court's judges insight into the, to be preserved, balance between the different political authorities.⁶² This expectation is less pronounced nowadays, but it is still present. For example, in preparatory documents on the reform of the CC in 2003, a government official made a comment about the legislation related to the language border, suggesting that they did not expect a CC ruling of unconstitutionality, considering the presence of former politicians in the CC, who understand the intricacies of political negotiations.⁶³

In short, historical and institutional elements suggest that the Belgian CC, although initially created as a guardian of consociationalism, has developed into a venue for deliberation. Deliberative constitutional review can contribute to the quality of democratic governance, and in this way counter the anti-majoritarian criticism that stressed the electoral modality. For a constitutional court to fully develop its deliberative potential, the political context is a determining factor. However, views on the compatibility between judicial review and consociationalism differ from a theoretical and practical perspective, hence thwarting the possibility to predict the CC's deliberative performance.⁶⁴ While the legislator might, on the one hand, gradually stimulate and accept a strong deliberative review, on the other hand, it

⁵⁹ 'Community Pact' of 24 May 1977; The government explicitly declared that the initial "Arbitration tribunal" would not be a real constitutional court. Report of 30 march 1983, *Parl. St.* Senaat No. 246/2, 28.

⁶⁰ Report of 14 June 1988, No. 22, 470.

⁶¹ Explanatory memorandum of 23 may 1980, No. 435/1, 12.

⁶² Report of 30 march 1983, No. 246/2, 145 and of 25 November 1988, No. 483/2, 2.

⁶³ Report of 17 januari 2003, No. 2099/003, 7.

⁶⁴ As POPELIER and PATIÑO ÁLVAREZ accurately stated, "*deliberative judicial review fits better in the theoretical concept of consensus democracies, but, in practice, is at odds with consociational decision-making*, P. POPELIER, AND A. A. PATIÑO ÁLVAREZ (2013), 204.

could also limit the CC's ability and expect the CC not to challenge political bargaining, but rather to protect consociational agreements.

Research design

Empirically, we will look into the CC's overall deliberative performance, evaluating the four elements as mentioned above: forum for deliberation; internal deliberation; reasoning and justification; and constitutional dialogue. Next, we will concentrate on the CC's deliberative performance in cases dealing with delicate legislation that is part of consociational bargain. Our results might indicate that the CC demonstrates certain caution, hampering the possibility to make use of its deliberative potential. Another possibility is that the CC uses this potential to nevertheless find a way out in order to protect constitutional and fundamental rights. In this paper we present some preliminary results of our larger ongoing project.

For this paper, we drew a random sample of 300 cases from the whole set of cases between 1985 and 2014 (n=3647).⁶⁵ The sample was stratified in the sense that we sampled a proportionally equal number of cases from each year. In total, we coded 80 variables:

1. A first set of 9 variables identifies some key procedural aspects such as whether we deal with a annulment procedure/preliminary question, area in which litigation is situated, date of the petition/referring judgment, whether there was a prior preliminary ruling of the ECJ and so on.
2. Second, we want to establish whether the CC provides an effective deliberative forum. More precisely, we will code the involved parties in separate categories: individuals, interest groups, business, regional/local government et cetera. This coding allows us to investigate the nature of initiating and intervening parties and to assess the access to the court. The larger and the more diverse the set of parties involved, the larger the institutional openness of the CC as a deliberative forum, which in turn stimulates its reasoning possibilities as more arguments need to be tackled.
3. Third, considering the secrecy of deliberation and absence of dissenting opinions, it is difficult to investigate directly how the judges interact with each other. However, despite the double parity rule, it is still interesting to code the exact composition of the court for each case. For example, the presence of a certain judge with specialized knowledge on a

⁶⁵ For the overall project we will code and analyse all 3647 cases; this paper presents some preliminary finding of our pilot study.

legislative subject might cause a particular shift in CC's the case law. Or, a deliberation in full session might point at the delicate nature of the examined case in the eyes of the court.

4. Fourth, we carried out an extensive argumentation analysis. We coded the reference norms brought forward by the involved parties, more in particular: equality clause, other constitutional clauses, relating inter- or supranational law. We also coded the references made by the CC to: other (inter)national case law, preparatory documents, or scientific studies.⁶⁶ MENDES argues a deliberative court should commit itself to a certain approach toward the available legal sources.⁶⁷ To make full use of its deliberative potential, the CC should examine as much as possible reference norms and, even more important, in particular other (external) sources. For example, it should use precedents to build up a coherent case-law. Without conferring absolute weight to precedents, references to own case-law show that the court is self-reflective and gives decisions historical depth, without wasting too much deliberative energy.⁶⁸ Because of the positive orientation of the CC towards inter- and supranational institutions, we also expect many references to rulings delivered by other international courts. This intra-judiciary interaction can widen the debate, maintain the system's coherence and give additional support to the CC's ruling.⁶⁹ Most of these variables could be easily deduced from the ruling, but some demanded more interpretation. For example, when referring to the legislator's objective, the court's attitude can be neutral, positive or negative, or it can draw attention to a discrepancy between the text and the legislator's will. We expect more deference to the reviewed law, when the CC attitude towards the legislator's objective can be interpreted as 'positive'.

5. Fifth, we coded the court's ruling, more precisely whether it consists of simple declaration of (un)constitutionality, interpretative or constructive modulation, extrinsic gap, temporal moderation et cetera. Instead of measuring a general stance, we coded all separate responses to the parties' pleas. Constructive decisions give room to the legislator to follow up on the court's case law, enhancing constitutional dialogue. On the other hand, these sanctioning modalities can also reflect the CC's reluctance to annul delicate legislation.

Next to the overall measurement of the CC's deliberative performance, we paid special attention to cases wherein delicate legislation was reviewed. Following variables might point

⁶⁶ To find patterns in these references, and for further analysis we will use the program Nvivo.

⁶⁷ C. H. MENDES (2013), 177-178.

⁶⁸ C. H. MENDES (2013), 181-182.

⁶⁹ C. H. MENDES (2013), 183-184 and 189-194

out this delicate nature: e.g. a high number of initiating parties, a high number of pleas from the involved parties, explicit references to a political agreement, when the rule of parity was strictly applied and when the decision was taken in plenary session. Our hypothesis is that in delicate cases there will be a higher percentage of declarations of constitutionality, or at least strategic quotations or references (e.g. ECHM case law), reflecting the court's concern to protect fundamental rights. For example, a reference to a specific consociational agreement, in combination with a positive attitude towards the legislator's objective and few or no other references, suggests a 'hands-off' approach from the CC. Even more significant is a scenario where the CC declares a law constitutional, although it revealed a negative attitude towards the legislator's objective. This implies that there was a strong incentive to protect this legislation, although the CC doesn't support its goal. On the other hand, human rights arguments might justify the annulment legislation that is part of a consociational bargain. We expect the court to develop (even) more elaborate reasoning, to overcome its reluctance to threaten consociational deals. A deliberative approach might offer a 'way out', for example by referring to external sources like international (case) law or scientific studies. When a (partial) annulment would overturn a certain consociational balance, a solution might lie in pronouncing a constructive ruling. This means that the CC would modulate the legislative text, so it doesn't (fully) reflect the legislator's objective anymore. Hence, the court would contribute to the protection of fundamental rights, without causing too much damage to the consociational agreement.

Data analysis

In what follows, we will look into some descriptive statistics reflecting the CC's deliberative performance. We focus on three characteristics of a deliberative institution: (1) deliberative forum, (2) reasoning and justification and (3) constitutional dialogue. To determine a potential evolution in the CC's case law, we compare differences between two periods: from 1985-1999 (P1: 146 cases) and 2000-2014 (P2: 154 cases). Special attention will be paid to the results that reflect the CC's reluctance to act as a deliberative institution when dealing with delicate legislation. We will look into several case studies, to give more depth to our preliminary findings.

DELIBERATIVE FORUM - Despite the wide access to the CC, the amount of involved parties is not exceptionally high. However, comparing the periods P1 and P2, we noted a few remarkable trends in the type of litigants. The most obvious is the increase of the number of

cases where interest groups were involved (P1: 16% > P2: 28%), and decrease of the executive federal (P1: 10% > P2: 5%) or regional (P1: 27% > P2: 14%) and legislative (P1: 4% > P2: 1%) entities. More and more individuals find their way to the CC, as initiating party (P1: 36% > P2: 45%) or as intervening party (P1: 26% > P2: 37%). Also, they lodge their case more often as part of a group (more than five) than as a single individual (P1: 4% > P2: 10%). A smaller growth was noticeable for the business group (P1: 23% > P2: 28%). The other categories remained more or less stable: local governments (P1: 12% > P2: 9%) and institutions with a task of public interest (P1: 8% > P2: 7%). The same can be said about the overall variety in involved parties. During the first period, the average number of different types of litigants was 1,67, while the average is 1,69 in the second period. We can conclude that, although there is scarcely an increase in variety per case, the nature of involved parties has shifted towards more private and less institutional petitioners. There is a bi-directional relation between the nature of these involved parties and the sort of pleas raised before the court. During the first period, there was a prevalence of the competence allocating rules (35%) and equality clause (67%). In more than one third of the cases, the CC thus had to act as an arbiter of conflicts between the federal and/or subnational level(s). When looking into the results of the second period, we can conclude that this initial role has diluted (P2: 12%). The equality clause was even more raised during P2 (88%), and increasingly in relation to other constitutional clauses (P1: 16% > P2: 33%), EU law (P1: 2% > P2: 10%), the European Convention of Human Rights (P1: 13% > P2: 32%), other international law (P1: 6% > P2: 18%) and unwritten legal principles (P1: 3% > P2: 12). This is logical, because institutional petitioners are more interested in the observation of competence allocating rules while private petitioners would want to protect their fundamental rights.

REASONING AND JUSTIFICATION - Another important feature of a deliberative court, is the effort to thoroughly substantiate its ruling. Our data show a particular evolution concerning the CC's reasoning. There is an upward trend in all categories of references to internal as well as external sources: precedents (P1: 13% > P2: 29%), other national case law (P1: 5% > P2: 12%), legislative advice of the Council of state (P1: 3% > P2: 7%), scientific studies (P1: 0% > 3%), ECJ case law (P1: 1% > P2: 9%) and ECHR case law (P1: 0% > P2: 14,3%). Given that the average amount of pleas has remained relatively stable (P1: 2,50 > P2: 2,33), it is not the length of the motivation, but the quality of the arguments that has augmented. This is even

more strongly confirmed when we only look into the data from the period 2009-2014.⁷⁰ We can conclude that, although these percentages still seem rather low, the CC increasingly uses precedents and other external sources to substantiate its ruling, which points to an overall propensity to develop into a deliberative court.

An excellent illustration of the reasoning qualities of the CC is case No. 144/2012⁷¹. In this case, the CC dealt with legislative act confirming an executive decision concerning certain environmental permits. Due to this homologation, the review of the permits was restrained from the Council of State (competent to review executive decisions), and given to the CC (legislative decisions). Several individuals and interest groups criticized the fact that the CC can only review the content of the decision, and not the procedural aspects⁷². Therefore, they made reference to an environmental EU directive⁷³, which stipulated that there should be a possibility of a complete review for all acts to which the Directive applies. In what followed, the CC made a detour via the EU Directive to expand its own competences. It build up an extensive and complex reasoning to declare the law unconstitutional. First, the CC referred a preliminary question to the ECJ, regarding the interpretation of the field of application of the EU directive.⁷⁴ The ECJ stated that a complete review is not obligatory for legislative decisions, provided that all relevant information was taken into account in an in-depth preparatory procedure.⁷⁵ Although the CC is not competent to review the parliamentary procedure, the CC nevertheless did look into procedural aspects, to determine whether the Directive was applicable to the homologation.⁷⁶ Based upon the preparatory documents, the CC noted that the Parliament had been prohibited to alter, or even investigate, the permits as drawn up by the executive. The CC stated that this simple ‘ratification’ of the executive decision is insufficient to consider the law as a proper legislative act. Therefore, the absence of a complete review was contrary to the EU directive. The CC declared the homologation unconstitutional, by linking the EU directive to the equality clause.⁷⁷ This case is remarkable

⁷⁰ E.g. reference to ECJ case law: 14,8%; ECHR case law: 16,7%; scientific studies 3,7%.

⁷¹ CC No. 144/2012, 22 November 2012. A similar reasoning was followed in CC No. 29/2014, 13 February 2014.

⁷² Some of those permits were, prior to this homologation, suspended or annulled by the Council of State because of errors committed during the executive decision-making procedure.

⁷³ Council Directive 85/337/EEC of 27 June 1985 (now: Directive 2011/92/EU of the European parliament and of the Council of 13 December 2011) on the assessment of the effects of certain public and private projects on the environment.

⁷⁴ CC No. 30/2010, 30 March 2010.

⁷⁵ ECJ C-182/10, *Solvay e.a.*, 16 February 2012.

⁷⁶ CC No. 144/2012, 22 November 2012, B.13.

⁷⁷ *Ibid.*, B.14.1.-B.14-3.

because, without any further legal ground, the CC verified the adoption procedure of the reviewed legislation. It condemned that, although there was a parliamentary majority, not all interests were taken into account during the preparatory procedure.

Another interesting example is case No. 186/2005⁷⁸, in which the CC dealt with a tax law stimulating the manufacturing of environment-friendly products. Several firms had asked for an annulment because the law promoted reusable products with a tax relief, but excluded products made from recycled materials. The CC made references to several scientific studies, proving that the environmental impact of the production of recycled products, under specific conditions, can be as equally low as manufacturing reusable products. Therefore, the exclusion of recycled products was considered disproportional to the legislative goal. The CC specified that it was the legislator's task to enumerate the conditions under which recycled products would also profit from the tax relief. Moreover, the CC explicitly stated that the legislator should take into account the results of the scientific studies.⁷⁹ Not only did the CC thus use external sources to justify its own decisions, it also stimulated the legislator to consider the strength of this scientific argument and, if appropriate, rewrite the legislation.

CONSTITUTIONAL DIALOGUE – Evidence shows that the CC, as a true deliberative institution, addresses the parliament as an institution to be persuaded, but that can equally persuade in return.⁸⁰ In most cases of the CC, the legislator's objective concerning the reviewed law was one of the main guidelines. Moreover, the percentage of cases where no reference was made to this objective has dropped from 25% (P1) considerably to 12 % (P2). In one fourth of the cases, the CC also explicitly makes a reference to the legislator's freedom of policy (P1: 23% > P2: 25%). In annulment procedures⁸¹, this reference leads to a remarkable result: more pleas are rejected (In 82% of the cases instead of 68%), and less are accepted (43% instead of 52%). There are also more interpretative or constructive rulings (25% instead of 15%). Our evidence shows that, when the CC explicitly takes into account the legislator's discretion, e.g. in criminal⁸² or tax law⁸³, there is a higher chance of a declaration of constitutionality ($\text{Chi}^2=3.108, p=.078, \text{df}=1$).

⁷⁸ CC No. 186/2005, 14 December 2005.

⁷⁹ *Ibid.*, B.15.5.

⁸⁰ C. H. MENDES (2013), 186-187.

⁸¹ In preliminary rulings, we noted a similar effect, but not as distinct. With a reference to freedom of policy: declaration of unconstitutionality: 13%, constitutionality 61% and modulation 22%. Without this reference the percentages are 19%, 65% and 23%.

⁸² E.g. CC No. 182/2008, 18 December 2008, B.5.5-B.5-7.

Furthermore, the legislator, as the defendant party, can also give additional arguments in pursuit of a declaration of constitutionality. When reviewing legislation against the equality clause, the CC takes into account the (dis)proportionality between the effects of the legislation and the legislator's goal. In practice, this means that the CC has to, possibly implicitly, attribute a certain value to this goal. Evidence shows that when the CC's attitude towards the legislative goal is positive, there is more chance that it will declare this piece of legislation constitutional. We tested this for annulment procedures ($\text{Chi}^2=8,844$, $p=.003$, $df=1$), as well as for preliminary procedures ($\text{Chi}^2 =6,748$, $p=.009$, $df=1$). There are different possible reasons for the court to have this positive attitude, e.g. public security⁸⁴. More remarkable however, is that the CC also considers the protection of consociational peace as a favorable goal. When the CC in these cases pronounces a declaration of constitutionality, even when the reviewed legislation might have questionable effects, the CC still acts as a guardian of consociationalism.

In case No.18/90⁸⁵ for example, the CC dealt with an electoral law for local authorities. This legislation was part of a delicate political agreement and imposed specific rules for the authorities in the periphery of the bilingual region of Brussels. The goal of these dispositions was, as confirmed by the CC, to guarantee the 'pacification' of the relations between the Dutch- and French-speaking community. The initiating parties, mostly individuals with an executive function in these municipalities, argued that this legislation was contrary to the equality clause. The CC stated that the distinct rules in these municipalities were actually more laborious and could cause an unnecessary prolongation of the electoral procedure. Nevertheless, the CC didn't consider this disproportionate to the overriding public interest of the legislative goal.⁸⁶ Despite the considered drawbacks, all five pleas were thus rejected, and the CC decided to uphold the law.

We observed the same protective attitude when the CC reviewed legislation following from other institutionalized negotiations, for example between employers and workers. In case No. 136/2000⁸⁷, more than ten doctors and some medical interest groups demanded the annulment

⁸³ E.g. CC No. 63/2013, 8 May 2013, B.4.2.

⁸⁴ E.g. CC No. 154/2007, 19 December 2007, B.33.4; CC No. 10/2008, 23 January 2008, B.8.

⁸⁵ CC No. 18/90, 23 May 1990.

⁸⁶ *Ibid.*, B.9.1-B.10-2.

⁸⁷ CC No. 136/2000, 21 December 2000.

of the legislative act concerning the health insurance. Based upon a relevant analysis of the legislation by these applicants, the CC noted that the reviewed legislation could have negative consequences for the financial means of doctors and hospitals, and could even lower the quality of care provision. However, the CC considered these consequences probable, but not definite. A premature decision would interfere in budgetary policy decisions, and would disrupt the balance of the consultations between employers and worker. Despite the probable drawbacks, the disposition was therefore upheld by the CC.⁸⁸

These examples above show that the legislator can still persuade the CC to protect consociational agreements. Nevertheless, the CC also addresses the legislator as an institution to be persuaded. To stimulate a legislative initiative, the court's rulings are an effective form of communication. For each case, we coded the answers of the CC to all individuals pleas brought forward by the involved parties. The first thing that strikes us when comparing P1 and P2, is the steep increase of modulated rulings, in annulment procedures (P1: 8% > P2: 31%) as well as in preliminary procedures (P1: 14,5% > 29%).⁸⁹ In contrast, the absolute number of pleas that were merely rejected (declaration of constitutionality) or accepted (unconstitutionality) remained relatively stable.⁹⁰ The CC developed these modulated rulings as middle way between a declaration of constitutionality and unconstitutionality. They give a clear signal to the legislator, especially when the modulation constructively alters the text of the reviewed disposition. In that case, lower courts have to act in legal vacuum until there is a legislative initiative. This is problematic because, one the one hand, to act in conformity with the Constitution, they should apply the disposition in its altered meaning, but on the other hand, they have to act *contra legem* when they follow the constructive ruling of the CC. As mentioned above, this has stimulated the federal legislator to establish a special committee to follow up the court's rulings. This committee can suggest legislative initiatives when this is desirable for legal certainty. Modulated ruling are thus a strong communication tool with the legislator. We can conclude that there is a visible interaction between the CC and the legislator. This reciprocal dialogue has been very important to the development from the CC into a true venue for deliberation.

⁸⁸ *Ibid.* B.18, B.28-B.30.2.

⁸⁹ This is even more clear when we only look into the results of the period 2009-2014: in annulment procedures there were 42 % modulations, and in the preliminary rulings 35%.

⁹⁰ Annulment procedure: constitutional (P1: 71,4% > P2: 73,8 %) and unconstitutional (P1: 49,4% > P2:47,7%) - preliminary procedure: constitutional (P1: 65,2 % > P2: 63,2%) and unconstitutional (P1: 26,1% > 12,6%)

Conclusion

In this paper we explored the deliberative performance of a constitutional court in a consociational political system, namely the Belgian CC. Although constitutional review can mean a drawback for political actors in a consociational polity, we argue that it can enhance the democratic credentials of the political system. Next to an electoral modality, which focusses on voting and bargaining, it adds a deliberative component, which puts central a reasoned weighing of interests. Therefore, the CC can provide access to those excluded from the policy process, and, give (additional) arguments to substantiate policy decisions.

To perform as a deliberative institution, certain conditions should be met. An evaluation of the institutional, behavioral and contextual factors has led to the conclusion that the CC currently has a considerable deliberative potential. This is the result of a long process, wherein the CC's procedural and substantive discretion has gradually expanded. Nevertheless, some institutional elements, like the double parity rule for the composition of the court, referring to the CC's role as guardian of consociationalism, were maintained. Also, evidence shows that the legislator still expects the CC to act prudently when reviewing legislation that resulted from a consociational agreement. Empirically, we have measured the CC's deliberative performance, taking into account how this political context might hamper the possibility to effectively make use of its deliberative potential.

Our quantitative and qualitative observations show that the CC has developed into a full-fledged human rights courts with robust deliberative features. More and more private petitioners and intervening parties find their way to the court, suggesting an institutional openness of the CC to collect their different viewpoints. An overwhelming majority of the pleas brought forward by these parties are based upon the equality clause, giving the CC the opportunity to evaluate the proportionality between the legislative goal and possible effects of the legislation. Although this was not a formal competence of the CC until 2003, the CC also accepts that the equality clause can be linked to other fundamental rights in the Constitution and relating EU and international law. The initial institutional design has clearly not prevented the CC to increase its deliberative potential. Furthermore, the quality of the CC's reasoning has augmented considerably, making use of all sorts of internal sources, e.g.

precedents and other national case laws, as well as external sources, e.g. European or international case law and scientific studies. And finally, although strictly legal there is no middle way between a declaration of constitutionality or unconstitutionality, the CC has developed a variety of sanctioning modalities. The CC's rulings communicate precisely why the reviewed legislation was deemed (un)constitutional, and when appropriate, how this can be remedied. As was the case for the reference norms, the CC has expanded his competences of its own motion. It is significant that the institutional design of the CC, affected by behavioral factors, has led to these unintended consequences.⁹¹ Considering the lack of information on the internal deliberation of the CC, it is too early to withdraw definite conclusions. However, we believe that the others aspects of deliberative performance cannot be realized without an extensive deliberation between the judges of the court. We can also note that, although the double parity rule was introduced to avoid case law opposing consociational agreements, the CC has acted otherwise. Moreover, diversity between the judges might even enhance the deliberative performance of the CC. Once again, the institutional choices of the legislator have, unintendedly, caused the development of the CC into a deliberative institution.

On the other hand, our evidence also indicates that the CC shows deference to the legislator's will, especially when the CC's attitude toward the goal of the reviewed legislation is positive. A case study analysis shows that the CC considers the will to protect consociational peace as an 'overriding public interest'. When executing a proportionality test, it is likely that possible negative effects will be considered proportional to this legislative goal. Hence, it will more difficult for the involved parties to persuade the CC to nevertheless declare the legislation unconstitutional. Our observations show that, in these cases, there is indeed a higher chance of a declaration of constitutionality.

We believe that our preliminary results, as expected, prove there is tension flowing from the dual role of the CC. On the one hand, the CC acts as a deliberative institution, but on the other hand, it is reluctant to threaten consociational peace, even when solid arguments might justify a declaration of unconstitutionality. In our ongoing project, we will identify scenarios in which this tension might occur, and further analyze the judicial-political interaction with respect to the Belgian CC.

⁹¹ P. PIERSON (2004), 115-119, 162-163. PIERSON argues that, in the case of judicial-executive relations, unanticipated consequences seem to run almost entirely in one direction: an expanded role for courts.

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