JUDICIAL POWER AND CONSOCIATIONAL FEDERATION: THE BOSNIAN EXAMPLE

Alex Schwartz[*]

I INTRODUCTION

It is an understatement to say that federalism is contested in Bosnia-Herzegovina. The country's Constitutional Court has been both a major protagonist and victim of that contestation. On the one hand, it has embraced a striking judicialization of 'mega politics', intervening in the kind of 'matters of outright and utmost political significance that often define and divide whole polities.'[1] On the other hand, the Court has also been internally riven by the same ethno-national divisions that afflict the society more generally;[2] it has been criticized and threatened by powerful elites;[3] and its decisions have often been unimplemented and sometimes openly defied.[4]

Elsewhere, I have argued that the Bosnian Constitutional Court has not always shown sufficient sensitivity to the limits of judicial power and, consequently, may have exacerbated some of these difficulties.[5] I will not revisit those criticisms here. Instead, this article considers some of the theoretical implications that the example of Bosnia-Herzegovina may have, both for our understanding of the role of courts in deeply divided federations and for our understanding of judicial power more generally. Some scholars predict that constitutional courts will be deferential to power sharing arrangements.[6] It is also theorized that constitutional systems that fragment political power—as the federal and consociational aspects of the Bosnian system clearly do—will tend to empower courts.[7] The Bosnian experience is not a straightforward

---

* University of Hong Kong.

1 Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review Political Science* 93, 93.

2 See Alex Schwartz and Melanie Janelle Murchison, 'Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina' (2016) 50 *Law & Society Review* 821.

3 See ibid.

4 See EU Delegation to Bosnia and Herzegovina, *Flash Report: Non-Execution of the BiH Constitutional Court Decisions* (European Union, 2015).

5 Alex Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia' (2017) *Law & Social Inquiry* (advance online publication) <https://doi.org/10.1111/lsi.12335>.

6 See Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford University Press, 2013).

7 On the 'fragmentation hypothesis', see John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65(3) *Law and Contemporary Problems* 41.

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

vindication of either of these theoretical expectations. The cases canvassed here show how the Constitutional Court has actively transformed the workings of federalism and power sharing in Bosnia-Herzegovina. At the same time, the challenges the Constitutional Court has faced suggest that consociational federalism may be an especially precarious environment for judicial power.

II THEORIES OF JUDICIAL POWER AND CONSOCIATIONAL DEMOCRACY

One of the most important questions in comparative constitutional law and judicial politics is the question of what factors make courts more or less consequential.[8] An influential line of theory proposes that federalism is a key driver of both the establishment of constitutional review and the subsequent growth of judicial power.[9] A federal division of legislative and executive competencies creates a compelling rationale for empowering an independent constitutional tribunal; elites dispersed across the system's constituent units and orders of government need a mechanism to protect their respective turfs against jurisdictional encroachment. Moreover, jurisdictional disputes between orders or units of government create opportunities for courts to assert themselves and establish their supremacy over constitutional interpretation—authority that can later be leveraged in other kinds of disputes that have little or nothing to do with federalism.[10] Although the universe of polities with constitutional review is much broader than the universe of federal systems, it is notable that many early adopters of constitutional review—e.g. Austria, Australia, Canada, the United States, and Switzerland—were classical federations.[11]

These intuitions about federalism are related to another line of scholarship that emphasises how political fragmentation insulates courts from political interference and court-curbing retaliation.[12] The idea here is that the more a political system is divided and host to multiple veto points, the more difficult it becomes for any one faction to control or discipline the judiciary. If, for example, judicial appointments require the cooperation of both the legislature and the executive and each of those institutions is controlled by a different political party, then the courts are unlikely to be beholden to any single faction. Similarly, a court will be relatively unconstrained by the threat of

8 Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013).

9 See, eg, Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771. For a critical overview of this literature, see Tom Ginsburg, 'The Global Spread of Constitutional Review' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 81.

10 Barry Friedman and Erin F Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 *Columbia Law Review* 1137.

11 Miguel Schor, 'Mapping Comparative Judicial Review' (2008) 7 *Washington University Global Studies Law Review* 257, 264. It should also be noted that, for most early adopters, constitutional review was not available for individual rights, but rather was—and in some of these cases still is (eg Australia, Switzerland)—confined to disputes about the division and separation of powers.

12 See Ferejohn, above n 7. See also Matthew C Stephenson, '"When the Devil Turns …": The Political Foundations of Independent Judicial Review' (2003) 32 *Journal of Legal Studies* 59; Mark Tushnet, 'Political Power and Judicial Power: Some Observations on Their Relation' (2006) 75 *Fordham Law Review* 755.

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

court-curbing retaliation if the associated mechanisms—impeachment of judges, salary freezes, ouster clauses and constitutional amendment, etc.—require the cooperation of more than one faction. In such circumstances, it is only where the preferences of all the relevant veto players align against a court that judicial power can be checked.[13]

Both the federalism and fragmentation hypotheses have some obvious relevance for consociational democracies. By definition, consociational democracies institutionalize political fragmentation; on the assumption that the polity is already deeply divided—and so inter-group or cosmopolitan parties are unlikely to succeed—consociational arrangements seek to ensure that multiple parties, representing all major societal 'segments', control the various institutions of government. The classic consociational formula—first articulated by Arendt Lijphart—is composed of four institutional features: inclusive executive power-sharing (i.e., government by 'elite cartel' or 'grand coalition'), group autonomy (in either territorial or functional forms), proportional representation (with respect to the election of legislators and/or in the composition of the public service and the allocation of public funds more generally), and mutual veto powers (at least over matters of particular group interest).[14] The group autonomy aspect of consociational democracy can take the form of a full-blown federal division powers (e.g. Belgium, Bosnia-Herzegovina, Switzerland). Where this occurs, one would think that the conditions are especially ripe for dramatic judicial empowerment. The federalism component creates the need for an umpire to settle jurisdictional disputes. Meanwhile, power sharing and veto points fragment political power in such a way that no faction can unilaterally control or discipline the courts.

But consociational veto points are probably a double-edged sword for judicial power. While they may help to deter court curbing, they can also make the implementation of judicial decisions more cumbersome. Constitutional systems differ with respect to the effect of a judgment of unconstitutionality on the legal validity of legislation, but generally speaking the choice is between invalidating a law with immediate effect or delaying its invalidity, leaving it in force for some definite period of time to allow the legislature to amend or repeal the law accordingly.[15] In either case, compliance problems can arise. In the first instance, the executive may simply ignore the decision and continue to apply the law as it was. In the second instance, the legislature may fail to amend or repeal the law as required. Indeed, a law that regulates some essential aspect of the state—in education, elections, or criminal trial procedure, and the like—will *need* to be replaced or amended if it is found to be unconstitutional. Consociational veto points will tend to raise the coordination costs of doing this and therefore may delay or impede compliance with judicial decisions. Furthermore, a fragmentation of political power also diffuses responsibility for compliance. Rather than having to answer for non-implementation of judicial decisions, individuals and political parties that work within power-sharing legislatures and executives might easily deflect blame for intractable deadlock onto their rivals.

---

13 See George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press, 2002) ch 10.

14 Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977).

15 See Anthony Nibblett, 'Delaying Declarations of Constitutional Invalidity' in Frank Fagan and Saul Levmore (eds), *The Timing of Lawmaking* (Edward Elgar, 2017) 299.

These are not the only problems consociationalism might cause for judicial power. The underlying socio-political divisions that lead to consociational settlements in the first place create other potential threats. Consociational arrangements are adopted to manage deep divisions of group identity, be they religious, linguistic, or ethno-national. It is precisely because these divisions are already salient across so many aspects of public life—including and especially in party politics and elections—that the consociational formula is prescribed by political scientists and sometimes adopted in practice.[16] In such contexts, majoritarian winner-take-all democracy is a recipe for violent conflict. The problem, as Samuel Issacharoff puts it, 'is not simply that some win and some lose. Rather, there is a predictability to who wins and loses', a predictability based on what are effectively ascriptive group characteristics.[17] Meanwhile, a majority faction is able to monopolise the distribution of 'legislative goods' and reward itself with 'a superordinate share of representative positions', thereby entrenching a position of dominance.[18] The idea then is that by accommodating salient group differences the stakes of politics can be lowered and the potential for political violence can be defused. But no one expects that consociational arrangements will reduce the salience of group affiliations, at least not in the short term; indeed, the alleged tendency of consociational democracy to indefinitely entrench group differences is one of the main reasons why critics say it should be rejected.[19]

Where group affiliations are politically salient, as they will be in consociational settings, we should expect them to pervade constitutional disputes and, by extension, judicial politics and behaviour. We have plenty of empirical evidence to suggest that constitutional adjudication tends to be influenced significantly by political ideology and partisan loyalties.[20] Judicial politics scholarship has historically conceptualised these extra-legal influences as reflecting a judge's position on a left–right ideological spectrum; the field's focus has been on the US (particularly the US Supreme Court) where disagreement between 'liberals' and 'conservatives' is pronounced and pervasive. Politics in much of the world probably does divide along a comparable left–right spectrum of disagreement. But where it does not, or where left–right ideological differences are less pronounced, we should expect judicial behaviour to reflect other influences.

16 Arend Lijphart, above n 14. See also John McGarry and Brendan O'Leary, *The Northern Ireland Conflict: Consociational Engagements* (Oxford University Press, 2004).

17 Samuel Issacharoff, 'Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence' (1992) 90 *Michigan Law Review* 1833, 1860.

18 Ibid 1871.

19 See, eg, Rupert Taylor, 'The injustice of a consociational solution to the Northern Ireland problem?' in Rupert Taylor (ed), *Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict* (Oxford University Press, 2001) 309-329; and Ian O'Flynn, 'The Problem of Recognising Individual and National Identities: A Liberal Critique of the *Belfast Agreement*' (2003) 6 *Critical Review of International Social and Political Philosophy* 129.

20 For a global overview of the literature, see Nuno Garoupa, 'Empirical Legal Studies and Constitutional Courts' (2011) 5 *Indian Journal of Constitutional Law* 25. For the US context in particular, see Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002); Lee Epstein, William M Landes and Richard A Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013).

Formatted: Font: Italic

Formatted: Not Highlight

That a constitutional court is divided along some political fault line is not necessarily a problem for judicial power. The US Supreme Court is a very powerful institution, despite the fact that its decisions are predictably influenced by judicial ideology and many people know this; the confirmation process for nominees to the Supreme Court highlights and broadcasts the importance of a justice's ideology on her decisions, even if nominees invariably attempt to portray their approach to adjudication as purely legal. And yet, despite this politicization, the US Supreme Court is mostly obeyed (as far as we can tell) and it appears to enjoy a reasonably high degree of diffuse public support.[21] But a comparable politicization in contemporary consociational settings is probably an especially acute danger to judicial authority. These settings are likely to be post-conflict polities where the rule of law is frail or deteriorated and the legitimacy of the state and its institutions is still contested.[22] In such places, reliable compliance with judicial decisions is not to be taken for granted. But the concern is compounded where judicial power is seen less as a mechanism for the impartial resolution of disputes and more as a device to be used by one group against its rivals. The more one finds oneself on the wrong end of this relationship, the less incentive one has to comply with court decisions.

To illustrate both the opportunities and challenges that consociational federations create for judicial power, the following section reviews the experience of the Bosnian Constitutional Court. Particular attention is paid to three dramatic judicial interventions which have shaped the development of federalism and power sharing in Bosnia and also exposed the limits of judicial power.

III BOSNIA-HERZEGOVINA: CONSOCIATIONAL FEDERALISM AND CONSTITUTIONAL DISPUTES

Since the breakup of Yugoslavia and the *Dayton Agreement* that ended the Bosnian War, constitutional law and politics in Bosnia-Herzegovina has been animated by three different and often competitive visions of the state. The first is a consociational model in which power is shared horizontally between three ethnonational communities—Bosniaks, Croats, and Serbs—across all levels of government. Consistent with this model, there are veto powers for each community over legislation and policy,[23] the state presidency is a three-person office held jointly by a representative from each of the three 'constituent peoples', and executive power is shared in a Council of Ministers.[24] The Bosnian Constitutional Court is also designed to include two judges of each constituent people (with the remaining three judges being 'internationals').[25] The second vision is a federal model in which each the ethnonational groups are allocated

21 James L Gibson and Gregory A Caldeira, 'Has Legal Realism Damaged the Legitimacy of the US Supreme Court?' (2011) 45 *Law & Society Review* 195.

22 See Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law after Military Interventions* (Cambridge University Press, 2006).

23 *Constitution of Bosnia and Herzegovina*, Arts IV.3(e), V.2(d). In addition to the 'vital interest' veto, the *Constitution* also creates what is effectively an 'entity veto' over state-level legislation. On the use of these veto powers, see Birgit Bahtić-Kunrath, 'Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process' (2011) 39 *Nationalities Papers* 899.

24 *Constitution of Bosnia and Herzegovina*, Arts V.4(b), 4.3(e).

25 *Constitution of Bosnia and Herzegovina*, Art VI; see Schwartz, above n 5.

Formatted: Font: (Default) Book Antiqua, 9 pt, Italic
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt

defined territories for the purposes of collective self-government. Hence, the country is divided into two sub-state 'entities' with extensive legislative powers, the Serb-dominated Republika Srpska ('RS') and the Bosniak-majority Federation of Bosnia-Herzegovina ('FBiH').[26] The latter is divided further into ten cantons, three of which are Croat-majority. The third vision is an integrationist one in which the polity is supposed to transcend (or even reverse) the consequences of the conflict and, ultimately, share a common civic identification with the state. Though less apparent in the text of the Constitution, this third vision has informed some of the Constitutional Court's most important decisions. All of this is stewarded by the Office of the High Representative, an extension of the international community empowered to supervise the day-to-day civilian implementation of the *Dayton Agreement* and issue binding decisions akin to legislative decrees.[27]

To uphold these arrangements, the Constitutional Court ('the Court') is entrusted with three categories of jurisdiction: 1) abstract review in disputes arising under the *Constitution* between the sub-state entities, between the state and the entities, or between institutions of the state;[28] 2) appellate review in questions of constitutional law decided by any other court;[29] and 3) referrals from any other court on questions of constitutional law.[30] In addition to these three bases of jurisdiction, the Court can also be activated to review the use of the so-called 'vital interest' veto where legislative deadlock cannot otherwise be resolved.[31]

From early on, the Court's abstract review jurisdiction was activated in divisive highly politicized disputes among Bosnia's governing elites. One of the Court's most daring and controversial decisions in this capacity was *Case U-5/98*, decided in 2000 (about three years after the Court commenced its work). At issue in *U-5/98* was the constitutionality of sub-national constitutions in both the RS and FBiH entities. Both the constitutions of RS and FBiH were promulgated during the Bosnian War and therefore pre-date the *Dayton Agreement* and the *Constitution of BiH*. Consequently, both display many of the trappings of an independent state: they make provisions for a flag, coat of arms and an anthem;[32] they each include a catalogue of fundamental human rights and freedoms;[33] and each establishes a legislature, executive branch and a constitutional court of their own.[34] Originally, the *RS Constitution* also included language in its preamble proclaiming the 'inalienable right of the Serb people to self-

26 *Constitution of Bosnia and Herzegovina*, Arts I.3, III.2.
27 See *General Framework Agreement for Peace in Bosnia and Herzegovina*, Annex 10.
28 *Constitution of Bosnia and Herzegovina*, Art VI.3(a). Such disputes may only be referred to the Court by 'a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity'.
29 *Constitution of Bosnia and Herzegovina*, Art VI.3(b).
30 *Constitution of Bosnia and Herzegovina*, Art VI.3(c).
31 *Constitution of Bosnia and Herzegovina*, Art IV.3(f).
32 See *Constitution of the Federation of Bosnia and Herzegovina* art 5(1); *Constitution of Republika Srpska* art 8.
33 *Constitution of the Federation of Bosnia and Herzegovina* pt II; *Constitution of Republika Srpska* pt II.
34 *Constitution of the Federation of Bosnia and Herzegovina* pt IV; *Constitution of Republika Srpska* pt V.

Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt

determination' the 'democratic right, will and determination of the Serb people from the Republika Srpska to link its State completely and closely with other States of the Serb people'. In addition, Article 1 proclaimed RS to be 'a State of the Serb people and all its citizens'; Article 7 made the language and Cyrillic script the official language; and Article 28 provided for material support for the Orthodox Church (the religion of most Serbs); and Article 80 included provisions for defense and international relations. The *FBiH Constitution* included similar provisions: it identified its constituent peoples as Bosniaks and Croats (with no reference to Serbs); it made Bosnian and Croatian its official languages; and it provided for foreign relations and defense powers.

These provisions were challenged in *Case U-5/98*, an abstract review petition brought by Alija Izetbegović (then the Bosniak member of the state-level Presidency). Izetbegović argued that the entity constitutions violated a principle of 'the equality of constituent peoples': in the case of the RS, the entity constitution reflected a mono-national and distinctly Serb-centric conception of the polity; in the case of the FBiH entity, the entity constitution granted special recognition and rights to Bosniaks and Croats but failed to include Serbs on equal footing. Although nothing in the substantive body of the state-level *Constitution* explicitly prohibited any of this, Izetbegović claimed that the entity constitutions contravened an overarching constitutional principle—referenced in the Constitution's Preamble—guaranteeing the collective equality of Bosniaks, Croats and Serbs, as 'constituent peoples'. The majority of the Court agreed with the core of this argument and invalidated several of the challenged provisions in both entity constitutions (the Serb and Croat judges dissented from the judgements in most important respects).

The majority's decision ties the principle of the collective equality of constituent peoples closely to the objective of reversing the effects of ethnic cleansing and rebuilding a 'multi-ethnic' Bosnia; the majority found this purpose to be implicit in the Constitution's preamble, which refers to 'peaceful relations within a pluralist society', the right of all refugees and displaced persons 'to freely return to their homes of origin' protected by Article II.5 of the *Constitution*, and the more detailed provisions on refugees and displaced persons contained in Annex VII of the *Dayton Agreement*.[35] The reasoning here then is that the failure to respect the equality of constituent peoples at the entity levels creates a barrier to the return of refugees and displaced people. Indeed, the majority's decision relied on statistical data showing ethnic discrepancies in refugee return and in public service position (i.e., the judiciary, public prosecutors, and police) as evidencing pervasive discrimination at the entity levels.[36]

The story of *U-5/98* is significant, not only because it illustrates the remarkable confidence that the Court displayed so early in its career and in such a political case. It also illustrates the clash between all three of the competing constitutional models described above. On an abstract level, the case represents a kind of rejection of the federal model, i.e., discrete territorial units of ethno-national self-government, in favor of a multi-ethnic integrationist model. In a more concrete sense, the attempt to marry the equality of constituent peoples with the objective of reversing the effects of ethnic cleansing creates serious tension with the ethnic federalism that is otherwise built into the Bosnian constitutional system, particularly in the case of RS where Bosnian Serbs did (and still do) treat the entity as a vehicle for Serb collective self-government. At the

35 *Case U-5/98* (Partial Decision Part 3, 1 July 2000) para 54.
36 See ibid paras 86–95 (on the RS entity) and 130–137 (on the FBiH entity).

Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt

same time, *U-5/98* has contributed to a hardening of consociationalism across the entire territory of BiH.[37]

In the decision's immediate aftermath, an impasse arose because the invalidated entity-level constitutional provisions needed to be amended to reflect the Court's decision. To broker agreement on the substance of these amendments, the High Commissioner established parallel constitutional commissions in both entities. A multi-party agreement was eventually signed between most of the main political parties, including the largest Bosniak and Serb parties at the time (but excluding the main Croat party). Amongst other things, that agreement provided for what was effectively a symmetrical arrangement: the system in RS would be transformed into a subnational power-sharing system in exchange for including Serbs on equal footing with Bosniaks and Croats within the already existing power-sharing arrangements in the FBiH.[38] The RS National Assembly amended the *RS Constitution* to address the minimal requirements of *U-5/98*, but backtracked on commitments to create symmetrical power-sharing arrangements.[39] Following the subsequent failure to pass the necessary constitutional amendments in the FBiH legislature, the High Representative intervened and imposed a range of amendments to the entity constitutions, expanding power sharing to all levels of government and requiring that all three constituent peoples within both entities be accorded the same status and rights.[40]

The bold intervention of the Court in *U-5/98* is consistent with the prediction that consociational settings will empower courts to assert themselves. But the implementation problems the case generated also illustrate how multiple veto players complicate compliance. Indeed, *U-5/98* foreshadowed similar compliance problems that would arise in subsequent cases. Two cases—both involving electoral law—show how these problems can be destabilizing.

The first such case, *Case U-9/09*, concerned the electoral system for the city of Mostar. Mostar is the capital and largest city of the Herzegovina-Neretva canton, one of two cantons in FBiH with a mixed and more balanced population of Bosniaks and Croats. The city was the site of significant violence during the Bosnian War and it remains a deeply divided place. Finding stable, satisfactory arrangements for the governance of Mostar has been one of the most challenging—and seemingly intractable—of Bosnia's many post-war challenges.

In 1994, prior to the *Dayton Agreement*, Bosniak and Croat factions agreed to allow the city to be governed by a transitional EU body for a period of two years to help restore some basic functionality to the city. In 1996, an 'interim statute' creating provisional arrangements for elections and municipal government in Mostar was created and local elections were soon held (notably in advance of local elections throughout the rest of BiH). The interim statute institutionalized the segregated geography that had crystalized during the war: the city was divided into six separate mini-municipalities, three of which were predominantly Croat and three of which

37 See, eg, *Case U-3/13* (26 November 2015).
38 Florian Bieber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (Palgrave Macmillan, 2005) 128–9.
39 Ibid 129.
40 See ibid 68–73, 80–3.

were predominantly Bosniak.[41] A pan-Mostar city council was also established—composed of a Mayor and Deputy Mayor together with equal numbers of representatives from Bosniaks, Croats, and 'Others'—to administer a 'Central Zone'. These arrangements failed to produce anything resembling a normal functioning city; the city council almost never met and almost all public services and utilities—including municipal police and electricity—were inefficiently duplicated across the six 'municipalities' and, for that reason, also segregated along ethno-national lines.[42]

In 2004, then High Representative Paddy Ashdown sought to push forward more extensive reforms in Mostar. Using the HR's law-making power, Ashdown decreed a statute that reconstituted Mostar as a single entity with a single city council and a single mayor. In lieu of equal representation for constituent peoples within a 30-member council, the new statute set both the floor and the ceiling for group representation within a 35-member council: at least four councilors had to be returned from each of the three constituent peoples, with no group allowed to hold more than 15 seats. These arrangements were not popular. As Croats became a majority in Mostar, the Croat parties had come to favor a city council without ethnic quotas. Meanwhile, and for the same reason, the Bosniak parties had come to oppose a single unit of city government. After a challenge at the FBiH entity-level Constitutional Court failed on jurisdictional grounds, an abstract review petition was eventually brought to the state-level BiH Constitutional Court by the Croat Caucus within the House of Peoples of the BiH Parliament.

Though several lines of argument were advanced to challenge the constitutionality of the 2004 statute,[43] the one that prevailed claimed a violation of the right to elections on the basis of equal and universal suffrage. First, it was argued that the Statute malapportioned the electorate into constituencies of varying sizes, significantly enhancing the voting power of some while diluting the voting power of others. Although each of the six constituencies would elect an equal number of councilors, the largest constituency was 400 per cent the size of the smallest and, consequently, a vote in the latter would be four times as powerful. In addition, it was argued that the statute disenfranchised those residing in the Central Zone relative to those residing elsewhere in the city; the latter could vote for three councilors to represent their area as well as for a city-wide councilor, whereas the former could only vote for a city-wide councilor.

While recognizing that 'the requirement of equal suffrage cannot require exact equality in the weight, or effect, of each elector's vote' as this would be 'unattainable in practice', a majority of the Court found that neither the extreme differences between

41 See Sumantra Bose, 'Mostar as Microcosm: Power-Sharing in Post-War Bosnia' in Allison McCulloch and John McGarry (eds), *Power-Sharing: Empirical and Normative Challenges* (Routledge, 2017) 189, 193–4.

42 Ibid.

43 See *Case U-9/09* (26 November 2010), para 71. In addition to the argument detailed here, it was also argued that the quotas discriminated against Croats with respect to the right to vote or stand for office in periodic elections with universal and equal suffrage, a breach of Article 25(b) of the *International Covenant on Civil and Political Rights*, and therefore also a breach of Article II(4) of the *Bosnian Constitution*, which prohibits discrimination in the enjoyment of a range of international and supranational human rights. This argument failed. The Court reasoned that although the quotas were prima facie discriminatory, they could be justified for the sake of power sharing in the context of a deeply divided and post-conflict setting.

Formatted: Font: (Default) Book Antiqua, 9 pt

Formatted: Font: (Default) Book Antiqua, 9 pt, Italic

Formatted: Font: (Default) Book Antiqua, 9 pt

the constituencies in Mostar nor the relative disenfranchisement of Central Zone voters could be justified as proportionate, in the sense of being objectively and rationally related to any legitimate aim.[44] The Court reasoned that both the evident malapportionment as well as the relative disenfranchisement of residents of the Central Zone were merely measures of administrative convenience, as opposed to 'necessary, reasonable or proportionate steps to develop a power-sharing structure or a multiethnic community in Mostar'.[45]

With respect to both of these violations, the Court delayed the operation of its judgment, giving the legislature six months to redefine constituency boundaries and make any necessary changes to the system of electing city councilors. In the Court's words, to immediately invalidate the statue would 'leave the affected constituencies entirely disenfranchised …'.[46] Six months was a very optimistic timeframe. Agreement on the necessary changes was not forthcoming and so, when the mandate of the last elected officials expired in 2012, Mostar was unable to hold elections and form a new government. The Court later issued a ruling against the City of Mostar and the BiH Parliamentary Assembly on the failure to implement its decision, but to no avail.[47] Since then, six rounds of multi-party talks have failed to broker agreement between the main Bosniak and Croat parties on Mostar's election law. The former favor retaining some system of autonomous mini-municipalities while the latter favour a simple unified majoritarian system. Consociationalism—at both the entity and canton levels—ensures that neither of these perspectives can be unilaterally imposed. But the price of this protection has been a seemingly intractable impasse that impedes compliance with one of the Court's most high-profile decisions.

A similar but potentially even more destabilizing impasse has arisen in the wake of another of the Court's election law decisions: *Case U-23/14* (sometimes called 'the Ljubić case'). *U-23/14* was an abstract review petition, brought by the Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, challenging the constitutionality of several provisions of the Election Law of Bosnia and Herzegovina, specifically with respect to how representatives are elected to the FBiH House of Peoples. Ironically, the Election Law was part of the package of reforms and constitutional amendments imposed by the High Representative to give effect to the Court's earlier decision in *U-5/98*. To implement *U-5/98*, the *FBiH Constitution* was amended to reduce the number of delegates in the FBiH House of People and require that an equal number of delegates to that body are drawn from each constituent people. The Election Law supplements this by providing that delegates from each constituent people are to be elected to the House of Peoples from the legislature of each canton in numbers 'proportionate to the population of the canton as reflected in the last census',[48] subject to the condition that each canton must send (at least) one delegate from each constituent people.[49] The background motivation for the challenge was to prevent 'civic Croats', i.e. those who are not affiliated with any of the nationalist

44 Ibid para 75.
45 Ibid para 77.
46 Ibid.
47 *Case U-9/09: Ruling on Failure to Enforce* (18 January 2012).
48 *Constitution of Bosnia and Herzegovina*, Art 10.12(1).
49 *Constitution of Bosnia and Herzegovina*, Art 10.12(2): 'Each constituent people shall be allocated one seat in every canton.'

Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt

Croat parties, from being elected to the House of Peoples and consequently undermining its capacity to champion specifically Croat national interests.

The petitioner claimed that the requirement of electing at least one representative from each constituent people in each canton, regardless of demographics, was a violation of the Article I.2 of the *Constitution*, which provides that Bosnia 'shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.' Advancing an explicitly consociational interpretation of the institutions, the argument was that the FBiH House of Peoples must be understood purposively and in contrast to the FBiH House of Representatives: 'As the composition of the House of Representatives expresses the will of voters, it follows that the composition of the House of Peoples must express the will of the constituent peoples.'[50]

The Court accepted this purposive line of argument, drawing attention also to the various functions performed by the FBiH House of Peoples that relate to protecting the collective interests of the constituent peoples, i.e., delegates to the House of Peoples of the State of BiH are selected from amongst delegates to the House of Peoples; activating the 'vital national interest' veto. The Court concluded that 'it undisputedly follows that the principle of the constituent status of peoples … may be realised only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation.'[51]

Although the Court did not specify what these criteria are, it explained that the existing arrangements run afoul of the standard because they 'make it possible for the representatives of one constituent people to afford legitimacy to the representatives of another constituent people in the cantonal legislative body.'[52] This is so because the cantonal assemblies, who select delegates to the House of Peoples from within their own ranks, are themselves elected on an open electoral list for which any voter may vote for any candidate, regardless of ethnicity. There is therefore no guarantee that the representatives of each constituent people in the House of Peoples are supported by members of their respective ethnic communities. Moreover, the requirement that at least one member from each group will be returned from each canton effectively guarantees that some of these members—those coming from cantons with more homogenous demographics—will be there because they are supported by members of other groups.

Critics of consociational democracy will not like *U-23/14*. The arrangements it strikes down—in so far as they encourage politicians to seek support across community boundaries—are precisely the sort of thing that many critics would endorse as the better, more conciliatory, institutional design for deeply divided places.[53] And even some proponents of consociational democracy will have reason to find fault. The contemporary theory of power sharing draws an important distinction between 'corporate' and 'liberal' consociations.[54] The corporate variety manages deep

50 *Case U-23/14* (1 December 2016), para 9.
51 Ibid para 51.
52 Ibid para 52.
53 Donald L Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2007) 49 *William & Mary Law Review* 1213.
54 See John McGarry and Brendan O'Leary, 'Iraq's *Constitution* of 2005: Liberal Consociation as Political Prescription' (2007) 5 *International Journal of Constitutional Law* 670; Allison

Formatted: Font: (Default) Book Antiqua, 9 pt, Italic
Formatted: Font: (Default) Book Antiqua, 9 pt
Formatted: Font: (Default) Book Antiqua, 9 pt

divisions by pre-determining which groups will benefit from consociational rights and protections. In contrast, a liberal consociation 'rewards whatever salient political identities emerge in democratic elections, whether these are based on ethnic groups, subgroups, or on trans-group identities.'[55] The political system in Bosnia has always been squarely on the corporate side of this distinction. But the Court's decision in *U-23/14* pushes this further to the point of seeming to preclude any experimentation with more liberal alternatives that might give voice to other constellations of interests.

Regardless of what school of constitutional design one subscribes to, there is little doubt that *U-23/14* has been a destabilizing event. The parties have yet to agree on how to amend the Election Law. Various proposals have been put forward and debated. The most recent round of multi-party negotiations managed to produce a Draft Law on Constituencies which, according to its authors, 'is completely in line with the *FBiH Constitution* and which fulfils the principles of the Ljubic ruling. It is also harmonized with the recommendations of the Venice Commission'.[56] But the negotiations that produced the draft only involved the Bosniak and 'multi-ethnic' opposition parties in the FBiH. HDZ, the largest Croat party, boycotted the negotiations. Their proposal—which would draw Croat representatives, for both the FBiH House of Peoples as well as the state House of Peoples, exclusively from Croat-majority cantons—was previously rejected in the Bosnian Parliament.[57] In addition, the package includes reform of the presidency to prevent inter-ethnic voting (as presently Bosniaks may vote for the Croat member of the three-person presidency, a feature that allows non-nationalist Croats to occupy that office). Reform of the presidency along the lines proposed by the HDZ is probably a non-starter; any reform will have to address the European Court of Human Rights' 2009 decision of *Sejdić and Finci* which found the existing corporate consociational arrangements to be discriminatory with respect to the 'Others' (in order to hold the office one must declare oneself a Serb, Croat, or Bosniak).[58] Efforts to broker agreement on how to implement *Sejdić and Finci* have gone nowhere, even though compliance with the decision is effectively a precondition to the eventual goal of Bosnian EU membership.[59]

Despite the impasse over ~~the~~ election law, elections were held in October 2018. ~~Consequently,~~ Aabsent any fix in the near future, the FBiH – and by extension the country as a whole – is now facing a genuine constitutional crisis. But even if this

McCulloch, 'Consociational Settlements in Deeply Divided Societies: The Liberal–Corporate Distinction' (2014) 21 *Democratization* 501.

55 McCrudden and O'Leary, above n 6, 13.

56 'Five Parties Strike Deal on Election Law', *N1 Sarajevo* (online), 17 June 2018, <http://ba.n1info.com/a266982/English/NEWS/Five-parties-strike-a-deal-on-Election-Law.html>.

57 See Katarina Andelković, 'The Standoff over the Electoral Law in Bosnia and Herzegovina', *European Western Balkans* (online), 12 January 2018, <https://europeanwesternbalkans.com/2018/01/12/standoff-electoral-law-bosnia-herzegovina/>.

58 *Sejdić and Finci v Bosnia and Herzegovina* (European Court of Human Rights, Grand Chamber, Application Nos 27996/06 and 34836/06, 22 December 2009).

59 Valery Perry, 'Constitutional Reform Processes in Bosnia and Herzegovina: Top-Down Failure, Bottom-Up Potential, Continued Stalemate' in Soeren Keil and Valery Perry (eds), *State-Building and Democratization in Bosnia and Herzegovina* (Routledge, 2016) 31.

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Not Highlight

current crisis is resolved, the election law cases have probably done some lasting damage to judicial power – in so far as they have helped to normalize the non-implementation of the Constitutional Court's decisions. High profile episodes like the outright defiance of the Constitutional Court following its decision to invalidate a national holiday in the RS entity (on the grounds that the holiday was Serb-centric and therefor contrary to the equality of constituent peoples) are just the tip of the iceberg.[60] Several reports and studies confirm that non-compliance is a recurring problem across the Court's output.[61] The Criminal Code of Bosnia-Herzegovina makes 'non-implementation' of judicial decisions an offence punishable by up to five years' imprisonment, but this does not appear to be a credible deterrent.[62] Assigning individual responsibility for a failure to implement a decision is often practically or politically impractical and prosecuting all of the relevant politicians would be absurd.[63] It should be noted too that all of this occurs in a context in which the Court's authority and neutrality are openly questioned, in part because of conspicuous ethno-national divisions in cases like *U-5/98*.[64]

IV CONCLUSION

Bosnia-Herzegovina should be studied closely by anyone interested in federalism in divided societies. Few places in the world are as deeply divided or as damaged by ethno-national conflict. The country is also home to what is arguably the strongest and most complex example of consociational democracy the world has ever seen. The merits and future direction of this system continue to be fiercely contested. For better or for worse, the Constitutional Court has actively participated in this context, advancing a purposive—if sometimes destabilizing—reading of the political settlement.

Students of judicial power should also take note of the almost paradoxical dynamic of judicial power in Bosnia. The institutional features that have allowed the Court to make bold interventions with little fear of retaliation have also contributed to a crisis of authority in which noncompliance has been normalized. If the current trajectory is maintained, the Court risks becoming a mere advisory body. The next phase of constitutional development in Bosnia may well show if a complex consociational federalism can survive in such a deeply divided place when the tribunal initially

60 *Case U-3/13* (26 November 2015).

61 See EU Delegation to Bosnia and Herzegovina, *Flash Report: Non-Execution of the BiH Constitutional Court Decisions* (European Union, 2015); Damir Banović, Sanela Muharemović, and Dzenana Kapo. *Strengthening the Capacity of the Constitutional Court of Bosnia and Herzegovina: How to Improve Decision Implementation and Enforcement?* (Center for Political Studies, 2014).

62 *Criminal Code of Bosnia-Herzegovina* art 239.

63 Even where noncompliance is more blatantly deliberate, the Prosecutor's Office has either decided not to pursue indictments or the state court has quashed charges on the grounds that individual officials cannot be held responsible for legislative actions or omissions. See Dzana Brkanic, 'Bosnian Serb "Statehood Day" Referendum Charges Rejected', *Balkan Insight* (online), 19 July 2017, <https://www.balkaninsight.com/en/article/bosnian-serb-statehood-day-referendum-charges-thrown-out-07-19-2017>.

64 For empirical tests of these accusations, see Schwartz and Murchison, above n 2; and Schwartz, above n 5.

Formatted: Not Highlight

Formatted: Font: (Default) Book Antiqua, 9 pt, Italic

designed to provide authoritative settlement of disputes has lost—or failed to ever gain—the legitimacy needed perform this function reliably.