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Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation

Nedim Kulenović

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Author:

Nedim Kulenović

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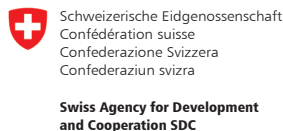
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Introduction

That Bosnia and Herzegovina ('BiH') is still, twenty years after the end of the war, a country in transition – not only towards a stable post-conflict society, but also from a 'moderate authoritarian socialism'¹ towards a democratic form of government with a different economic system – is a living reality. In the words of the Constitutional Court of Bosnia and Herzegovina ('BCC' or 'the Court') itself, the fact of transition is 'indisputable'. Moreover, because of that, the country 'has a dominant tendency to become a part of the general stream of internationalization (primarily to join the European Union), which implies a high level of democracy within all segments of society.'² In fact, the parlance of BCC is a witness to an even more specific meaning of transition, one that denotes a sufficient passage of time which would warrant the movement away from the discriminatory power-sharing mechanisms initially justified by the circumstances of necessity,³ towards a 'pluralisation of ethnocracy',⁴ or even its transcendence. What is the proper role of the Court in this process of transition?

Writing already in 1996, on the dawn of the new era of the Court, the first president of the post-Dayton BCC expressed this general dilemma by indicating that the Court is expected to contribute 'to the protection and further development of democratic socio-political and legal unity in the country', but without ever itself becoming a 'writer of constitution and statutes.'⁵ This general concern expressed in the early years of the Court was not followed by a genuine debate on the proper role of BCC in the Bosnian constitutional system, which was odd considering the problematic nature of the Constitution that resulted from the General Framework Agreement for Peace in Bosnia and Herzegovina ('Dayton

¹ Christian Steiner and Nedim Ademović (eds), *Constitution of Bosnia and Herzegovina: Commentary* (Konrad Adenauer Stiftung 2010) 21.

² Case U-14/09, 30 January 2010, 15.

³ See Separate concurring opinion of Judge David Feldman and Separate dissenting opinion of Judge Constance Grewe in case AP-2678/06, 29 September 2006. Also case U-14/12, 26 March 2015, 70. For the notion of necessity in this context see Edin Šarčević, 'Notstand und volkerrechtliches Verfassungsexperiment' in Klaus Stern and Klaus Grupp (eds), *Gedachtnisschrift für Joachim Burmeister* (C. F. Müller 2005) 359.

⁴ Edin Hodžić and Nenad Stojanović, *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights in the Case of Sejdić and Finci v. BiH* (Analitika 2011) 15.

⁵ Ismet Dautbašić, 'Ustav Bosne i Hercegovine (Dejtonski) i ustavno sudstvo u Bosni i Hercegovini' [Constitution of Bosnia and Herzegovina (Dayton) and Constitutional Courts in Bosnia and Herzegovina] (1996) *Godišnjak Pravnog fakulteta u Sarajevu* 35, 39-40. Translations in the text are the author's, unless otherwise provided.

Agreement').⁶ Indeed, the Constitution established a deeply decentralized and unstable state, described by one of the former judges of the Court as 'the weakest federal system in the world',⁷ and by another as an outright confederation.⁸ It also institutionalized what Yee called 'ethnic sovereignty',⁹ a number of power-sharing mechanisms that, because of their often discriminatory nature,¹⁰ stand in apparent conflict with the wide-ranging entrenched human rights protections. Having such a Constitution in focus, which framed a system of government for a truly unstable and 'fragile democracy',¹¹ BCC was faced with a formidable challenge: on the one hand, it was expressly tasked with the 'upholding' of such Constitution (Article VI/3), and on the other, there seems to have been an implicit understanding – in view of its composition, competences, and positioning – that the Court was to provide 'some remedy for the potential ills in the governmental structure'¹² created by the Constitution itself.

The largely unexamined role of BCC in such processes of transformation is made more interesting by a peculiar fact of the Constitution of BiH: despite all of its shortcomings, it proved to be tenacious. Even though it has been noted that the establishment of 'an enduring constitutional scheme appears to be quite difficult, particularly in new democracies outside of Western Europe and North America',¹³ BiH features one of the oldest constitutions in the region which, in twenty years of its existence, has seen only one formal amendment,

⁶ See eg Paul C. Szasz, 'The Dayton Accord: The Balkan Peace Agreement' (1997) 30 Cornell International Law Journal 759, 768.

⁷ Joseph Marko, 'Constitutional Reform in Bosnia and Herzegovina 2005-06' (2005/6) 5 European Yearbook of Minority Issues 207, 213. Similarly in Dautbašić (n 5) 36.

⁸ See Snežana Savić, *Konstitutivnost naroda u Bosni i Hercegovini* [Constituency of Peoples in Bosnia and Herzegovina] (Pravni fakultet u Banja Luci 2000) 19. See also Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 Max Planck Yearbook of United Nations Law 1, 26.

⁹ Sienho Yee, 'The New Constitution of Bosnia and Herzegovina' (1996) 2 European Journal of International Law 176, 187. See also Ronald C. Slye, 'The Dayton Peace Agreement: Constitutionalism and Ethnicity' (1996) Yale Journal of International Law 459.

¹⁰ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos 27996/06 and 34836/06 ECHR 2009; *Zoričić v. Bosnia and Herzegovina*, no. 3681/06 ECHR 2014; *Pilav v. Bosnia and Herzegovina*, no. 41939/07 ECHR 2016.

¹¹ See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

¹² Yee (n 9) 191. Rosenberg has likewise argued that the framers, 'deeply concerned with the injustice perpetuated during the war', gave the Court 'extraordinary tools to eliminate the perpetuation of past discrimination'. Sheri P. Rosenberg, 'Promoting Equality After Genocide' (2008) Tulane Journal of International and Comparative Law 329, 391.

¹³ Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 10.

of slight importance.¹⁴ Despite the fact that the country still features a deeply divided society and an unstable political system, in those two decades its constitutional system has changed to a significant degree. Although BCC still refuses to define the form of the governmental structure, maintaining that the ‘complexity of the constitutional order of BiH indicates a *sui generis* system’,¹⁵ the number of the transferred and assumed competences at the state level, along with the accompanying establishment of numerous new institutions, suggests that BiH is now a more robust asymmetrical federation.¹⁶ The political regime of consociational democracy, particularly at the lower levels of government, has – to use the terminology of a leading scholar of the Bosnian Constitution – also gone through a significant transformation from an ‘exclusive’ to a ‘participatory ethnocracy.’¹⁷ In what follows, we will argue that BCC has had an important part to play in this informal constitutional transformation, mainly through its powers of abstract review, on both axes: in relation to state structure and to the political regime in the country. Such focus will also facilitate the examination of the Court as a political institution and a policymaker.

In the examination of the contribution of BCC to this process of democratic transition, consolidation and social transformation in BiH, we will employ a multi-level case study approach, where on one hand we will examine the Court as an institution, while on the other we will focus on its specific decisions. Having that in mind, in the first part of the article, we will explore the competence, composition and positioning of BCC and will try to ascertain how such institutional features of the Court have influenced its overall performance. In the second part, we will particularly focus on the question to what degree can it be said that the Court was activist, also trying to characterize the nature of such activism and the understanding of the very notion in the Bosnian context. That will be done, not only by broad overview of BCC jurisprudence in focus areas, but also, in the third part, by more detailed analysis of its landmark decisions. Finally, we will focus on the effects of that activism and its consequences for the Court’s legitimacy.

¹⁴ Amendment I to the Constitution of BiH entrenched the position of the Brčko District of BiH, which had already existed for ten years following the Decision of the Arbitral Tribunal in 1999, thus ratifying a *fait accompli*.

¹⁵ Case U-1/11, 13 July 2012, 64.

¹⁶ Goran Marković, *Bosanskohercegovački federalizam* [Bosnian Federalism] (Službeni glasnik/University Press 2012) 134.

¹⁷ Edin Šarčević, *Ustav iz nužde: konsolidacija ustavnog prava Bosne i Hercegovine* [Constitution from Necessity: Consolidation of Constitutional Law in Bosnia and Herzegovina] (Rabic 2010) 42-46.

1.

Institutional Features

Even though, unlike in other Central and Eastern European countries, BCC was not just another ‘clear case of institutional borrowing’;¹⁸ because of the previous tradition of constitutional adjudication in the former Yugoslavia, the non-participatory nature of the negotiations, conducted in secret on another continent,¹⁹ leave a lot to be desired in terms of identifying the specific purpose that the drafters of the Constitution may have envisioned for the Court, beyond the reflex that such an institution is now a routine feature of all the new democracies.²⁰

Being that it is an institution whose primary goal should be the control of constitutionality, it is to be expected that BCC should have an ‘in-built tendency’ to some judicial activism, particularly in that such institutions have little room or incentive to refuse to deal with issues that come before them,²¹ regardless of their controversial nature. This is done against the background of research that indicates that there are ‘conditions under which constitutional courts tend to be relatively activist’, particularly when they perform the judicial review of legislation,²² on which we focus.

¹⁸ Kasia Lach and Wojciech Sadurski, ‘Constitutional Courts of Central and Eastern Europe’ (2008) 3 *Journal of Comparative Law* 212, 217.

¹⁹ Derek Chollet, *The Road To the Dayton Accords: A Study of American Statecraft* (Palgrave Macmillan 2005) 133 (‘The negotiations would be conducted in secret. The delegates were not allowed to talk to the press... [C]omplete seclusion would allow the talks to proceed with minimal concern about how victories or concessions might play in the next day’s papers’).

²⁰ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 6; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008) 25; Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *The Georgetown Law Journal* 961, 964.

²¹ Victor Ferreres Comella, ‘The Rise of Specialized Constitutional Courts’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 271. See also Martin Shapiro, ‘The European Court of Justice: Of Institutions and Democracy’ (1998) 32 *Israel Law Review* 3, 7.

²² Comella, ‘The Rise of Specialized Constitutional Courts’ (n 21) 271. Also Victor Ferreres Comella, ‘The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism’ (2004) 82 *Texas Law Review* 1705.

1.1. Model of Constitutional Review

If we keep in mind the understanding of traditional functions of the constitutional courts,²³ it can be concluded that BCC is in essence endowed with the usual scope of such competences, including abstract, concrete and appellate review.²⁴ In some segments, the scope of the competences of BCC are narrower than is usual, particularly relating to the function that de Visser designates as 'ensuring the integrity of political office and related processes' that relate to the resolution of disputes arising in connection to elections, impeachment, decision of possible prohibition of political parties, and verification of the regularity and constitutionality of referendums.²⁵ Furthermore, the access to the Court for the purpose of the review of constitutionality of general legal acts is comparatively narrow,²⁶ particularly in excluding standing to citizens, or to other bodies such as Ombudsman.

The Constitution of BiH has opted – with one exception, relating to ethnic veto in the House of Peoples – for a system of centralized *a posteriori* strong constitutional review,²⁷ which would tend to move the Court to a more activist position in relation to a decentralized model.²⁸ In a number of decisions, BCC made clear the priority of the constitutional courts over ordinary courts, and by extension the priority of BCC over entity constitutional courts, in this division of labor regarding constitutional jurisdiction, indicating that 'ad hoc review of legal validity of legislation by the ordinary courts is not only unlawful, but is not in accordance with the constitutional principle of the rule of law from Article I/2 of the Constitution of BiH and the principle of legal security incorporated in it'.²⁹ The Court added that such adjudication of ordinary courts outside of their subject-matter jurisdiction would even lead to an arbitrary application of procedural

²³ See Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014) 98.

²⁴ Steiner and Ademović (n 1) 631. See also Constitutional Court of BiH, 'Jurisdiction' <www.ccbh.ba/o-sudu/nadleznosti/?title=uvod&lang=en> accessed 12 March 2015.

²⁵ De Visser (n 23) 168-169. Compare also Andrew Harding, Peter Leyland and Tania Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' (2008) 3 *Journal of Comparative Law* 1, 5.

²⁶ Article VI/3.a), VI/3.c) and VI/4 of the Constitution of BiH.

²⁷ Review is *strong* insofar as it empowers the Court to strike down legislation as unconstitutional, and where the legislature cannot override such decision through ordinary legislative procedure. The Constitution does provide for a variant of *weak review* in context of ethnic veto, under Article IV/3.f) of the Constitution, and a variant of *weak basic structure review* in context of amendment procedure where ethnic veto can also be invoked, since in both cases the final decision is taken by the legislature. See generally Joel I. Colon-Rios, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143.

²⁸ Ferreres Comella, 'The Rise of Specialized Constitutional Courts' (n 21) 272.

²⁹ Case AP-1603/05, 21 December 2006, 37.

law and thus to a violation of the right to fair trial.³⁰ It also considered that when ordinary courts determine that the law they are applying is unconstitutional, they cannot only refer such a statute to BCC, as is their right under the Constitution, but are in fact obligated to do so.³¹ Moreover, in the same case it concluded that its appellate jurisdiction necessarily includes the right of concrete constitutional review, since '[i]f this was the other way around, the Constitutional Court would be deprived of its function as "a court."' ³² Previously, the Court determined, by a majority vote, that the notion of the 'judgment of any other court' under its appellate jurisdiction includes also the decisions of the constitutional courts of the entities of BiH, including their Councils for the Protection of Vital Interests, as specific bodies within those courts charged with determination of whether the draft statutes of the entity legislatures violate particular ethnic interests.³³ Indeed, in these several moves over the years, the Court has asserted its 'monopoly over constitutional adjudication', to use Sadurski's phrase.³⁴

1.2. Composition and Selection Procedure

BCC has nine members, of which six are national and three international. Four national members of the Court are elected by the House of Representatives of the Federation of BiH ('FBiH') entity, while the other two are selected by the National Assembly of Republika Srpska ('RS') entity. The three international members of BCC are selected by the President of the European Court of Human Rights ('ECtHR') after consultation with the Presidency of BiH. Regarding eligibility, the Constitution is rather laconic, providing only that the judges should be 'distinguished jurists of high moral standing', with another condition for international judges, namely that they cannot be citizens either of BiH or of any neighboring country. The tenure of the judges is to seventy years of age, except for the initially appointed judges, whose term of office was five years, without a possibility of reappointment.³⁵

A notable feature of such selection process is that the Constitution adopts the 'federal' principle of representation for the selection of the national judges, where the representative bodies of the constituent entities have the sole role in

³⁰ Case AP-2840/13, 12 February 2014, 34.

³¹ Case U-106/03, 27 October 2004, 33.

³² *ibid* 34.

³³ See Case U-5/99, 3 December 1999 (regarding constitutional courts); case AP-2821/09, 12 January 2010 (regarding Councils).

³⁴ Sadurski (n 20) 19. For latest developments, see e.g., case U-18/14, 9 July 2015 (denial of jurisdiction).

³⁵ See Article VI/a (composition), Article VI/b (eligibility) and Article VI/c (tenure) of the Constitution of BiH.

the selection.³⁶ This, however, results in an asymmetry or legitimation deficiency as seen in the fact that the Parliamentary Assembly of BiH has no role in the selection of the judges of BCC,³⁷ even though the Court has interpreted its competences as containing the power of abstract review over the legislation adopted at the state level.³⁸ The nature of such an appointment process raises the obvious problem of ‘preventing the dominant party within the legislature from always prevailing.’³⁹ Combined with the fact that the selection does not require any type of ‘super-majority’, and furthermore considering the very loose eligibility conditions for BCC – indeed the lowest of any judicial appointment in the country, including the Ombudsman – there is little in the path of such concerns.

The selection procedure allows the entities to pack the Court with individuals whom they believe would best protect their interests. This would point towards the prediction that national judges would tend to be more skeptical towards legislation aimed at strengthening the central state or that makes changes to the balance of competences between the two levels of government. Considering, however, that BiH is a complex state with features of an ethnic federation, it seems warranted taking the ethnic element as a salient factor in consideration of the behavior of judges, as well as the manner in which the hybridization of the Court has influenced its behavior.

1.2.1. Ethnicisation

The selection pattern for the national judges at BCC points towards the conclusion that the constitutional custom has formed such that the three dominant ethnic groups, the so-called ‘constituent peoples’, are to have two judges each at the Court, and moreover, that the Serb judges are to be selected from RS and Bosniak and Croat judges from the FBiH entity,⁴⁰ with the former president of BCC going so far as to claim that such a custom ‘follows the spirit of the Constitution and the principles through which the Constitution is implemented.’⁴¹

³⁶ Steiner and Ademović (n 1) 675.

³⁷ See Marković, *Bosnian Federalism* (n 16) 134. The same is true with the legislation of the Brčko District of BiH.

³⁸ Case U-1/99, 14 August 1999.

³⁹ Harding, Layland and Groppi (n 25) 13.

⁴⁰ See eg Lejla Balić, ‘Ustavni običaj u Bosni i Hercegovini - Osvrt na izbor sudija Ustavnog suda Bosne i Hercegovine’ [Constitutional Custom in Bosnia and Herzegovina - Review of the Selection of Judges of the Constitutional Court of Bosnia and Herzegovina] (2009) *Godišnjak Pravnog fakulteta u Sarajevu* 13.

⁴¹ Miodrag Simović, ‘O jemstvima nezavisnosti ustavnih sudova’ [On the Guarantees of Independence of Constitutional Courts] in Edin Šarčević (ed), *Ko bira sudije ustavnog suda?* [Who Selects the Judges of the Constitutional Court?] (Foundation Public Law Centre 2012) 256.

The last citation points to the conclusion that the judges of BCC do see their selection, at least in important part, as a form of ethnic representation in line with the general ethnic outlook of the Constitution. This is evidenced in the Rules of the Court, which is adopted by the judges of BCC pursuant to the Constitution. In the first 'Rulebook' of the Court, adopted in 1997, the ethnic elements were particularly evident in the rules on quorum and in the selection of the president and vice-presidents of the Court.⁴² Judges selected in the new term of BCC did not remove these ethnic elements from the (now) 'Rules of the Court', but rather reinforced them further.⁴³ In 2014, the Court adopted new Rules which finally removed all the ethnically exclusionary provisions from the previous Rules, as well as the ethnic rule on the quorum.⁴⁴ As explained by the registrar of the Court, who also acts as a *de facto* spokesperson for BCC, until that point the Court was hesitant to change the Rules before the amendments to the discriminatory aspects of the Constitution itself. However, it 'evolved' in that understanding, deciding that the Court itself should make that first step.⁴⁵ The Rules still recognize that judges are (also) members of constituent peoples, for example in provisions dealing with the selection of president and vice-presidents.

Such ethnicisation of BCC is criticized for not being 'in accordance with the principle of independence of judges',⁴⁶ since the 'ideal of justice should be that ethnicity plays no part in judicial decision-making'.⁴⁷ To what degree has this ethnicisation influenced the voting behavior of the individual judges? It must be mentioned that the Court is virtually unanimous in the cases from its appellate jurisdiction, which is the vast majority of its case load, but also in its concrete review cases (85% unanimity) and in cases dealing with the ethnic veto (91% unanimity). One international commentator has suggested that domestic judges 'acted as representatives of their constituent group of population rather than as independent personalities',⁴⁸ while a prominent Bosnian constitutional scholar has indicated that the separate opinions of the national judges 'correspond every

⁴² Article 37 (on quorum) and Article 80 (selection of president and vice-president of BCC) of the Rulebook of Constitutional Court, *Official Gazette of BiH*, 2/97.

⁴³ Article 87 of the Rules of Constitutional Court (*Official Gazette of BiH*, 60/05), making it clear that only members of constituent peoples can be selected as president and vice-president of the Court.

⁴⁴ Rules of the Constitutional Court of Bosnia and Herzegovina, *Official Gazette of BiH*, 22/14.

⁴⁵ On file with author.

⁴⁶ Steiner and Ademović (n 1) 675.

⁴⁷ Yee (n 9) 190. See also Venice Commission, 'Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina' CDL-AD(2005)039.

⁴⁸ Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press 2008) 291. See also Alex Schwartz and Melanie Murchison, 'Judicial Independence in Deeply Divided Places: An Empirical Analysis of Bosnian Constitutional Court' (on file with the author). A former international judge at BCC similarly concluded that the 'national judges appear to act as representatives of their constituent group of the population', with regards the first term of the Court. See Joseph Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance' (2004) *European Diversity and Autonomy Papers* 5, 31.

time with the ethnic affiliation and ethnically-based political option.⁴⁹ Such a claim is too strong considering that separate opinions were issued in cases which cannot reasonably be brought into connection with any identifiable ethnic interests, but that of course does not mean that ethnic interests do not calculate in judges' adjudicative behavior regarding their possible activism. Thus, for example, McCrudden and O'Leary have extended the hypothesis 'which predict[s] judicial restraint from finding consociational arrangements incompatible with human rights'⁵⁰ to the Bosnian context, claiming to have identified a 'distinct pattern of judgment among the judges appointed from Bosnia',⁵¹ with Bosniak judges being more hostile to consociational arrangements, in contrast to Serb and Croat judges.

1.2.2. Hybridization

The general understanding of the commentators regarding this feature of the Court is reflected in the view that the inclusion of the international members was part of a state-building program⁵² and that the drafters must have envisioned that the 'Court would have great significance in the difficult times after the armed conflict.'⁵³ It has been noted that such a Constitutional provision 'by its very existence reduces mechanically the possible cases of local political influence.'⁵⁴ As noted by one of the former international judges at BCC, the drafters must have been aware that, by providing that local judges are to be selected by the parliaments of the entities, they 'would only elect judges from their own constituent people', which would in practice lead to division of BCC along ethnic lines.⁵⁵ Thus, the inclusion of the foreign judges in BCC seems to have been done for the purpose of fulfilling the 'function of a *pouvoir neutre* in the divided societies, where constitutional politics tend to play out along ethnic lines', thus perhaps also contributing to 'building of a common identity.'⁵⁶ Finally, there is a purely instrumentalist argument that judges from developed Western European

⁴⁹ Edin Šarčević, *Dejtonski ustav: karakteristike i karakteristični problemi* [Dayton Constitution: Characteristics and Typical Problems] (Konrad Adenauer Stiftung 2009) 76.

⁵⁰ Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford University Press 2013) 45.

⁵¹ *ibid* 92.

⁵² Stefan Graziadei, "'Viewers Should Not Try This at Home.'" Die Verfassungsgerichte Bosnien-Herzegowinas und Kosovos in deren Rolle als Schlichtungsinstanzen in ethnopolitischen Konflikten' (2014) 1 *European Diversity and Autonomy Papers* 9.

⁵³ Steiner and Ademović (n 1) 675.

⁵⁴ Constance Grewe, 'The Contribution of the Constitutional Court of Bosnia and Herzegovina to the Protection of the Constitutional Values' (Venice Commission conference, 29-30 September 2011) 33.

⁵⁵ Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina' (n 48) 29.

⁵⁶ Grewe and Riegner (n 8) 40, 43.

democracies should act as epistemic authorities on the European Convention on Human Rights ('ECHR') and the rule of law in a post-socialist country.⁵⁷

Regarding the element of expertise, it is certainly true that the persons selected to serve as international judges at BCC were all individuals with distinguished academic careers, judges at the highest national or international courts, but also individuals with a keen understanding of the local circumstances.⁵⁸ In the words of a former president of BCC, Miodrag Simović, 'the foreign judges gave enormous contribution, particularly in the first term of [BCC] and the first years of the new term of the Court', when BCC dealt with 'very delicate decisions.'⁵⁹ Grewe and Riegner's comments regarding the identity building and legitimacy strengthening function of the international judges is more contentious. Even though agreeing that the provision had its justification at first, most of our interlocutors now see such a feature as unnecessary, and as overstaying its welcome almost twenty years later,⁶⁰ with one constitutional scholar noting that such hybridization of BCC is 'demeaning',⁶¹ while the first president of the Court after the Dayton Agreement saw in it 'elements of protectorate'.⁶²

Considering the composition of the Court as well as its underlying ethnicisation, there exists an obvious possibility of international judges, along with the judges of one ethnic group, outvoting the judges of the other two, and thus 'influenc[ing] the power play between the ethnic groups in [BiH].'⁶³ Although this may be a solution to the 'impasses that may plague the legislature and executive

⁵⁷ See Edin Šarčević, 'Verfassungsgebung und "konstitutives Volk": Bosnien-Herzegowina zwischen Natur- und Rechtszustand' (2002) 50 Jahrbuch des öffentlichen Rechts 493, 508; Christian Steiner, *Friedenskonsolidierung durch Verfassungsgerichtsbarkeit in Bosnian und Herzegovina* (Nomos 2015) 528.

⁵⁸ Louis Favoreu, 'Cahiers du Conseil constitutionnel no. 11 (Dossier Bosnie-Herzégovine) - décembre 2001' (*Conseil Constitutionnel*) <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/cahiers-du-conseil/cahier-n-11/entretien-avec-m-le-doyen-louis-favoreu.52115.html> accessed 12 February 2015.

⁵⁹ On file with author.

⁶⁰ Interview with Zlatko Knežević, judge of BCC (Sarajevo, 28 May 2015); interview with Nurko Pabrić, judge of the Cantonal court in Mostar (Mostar, 21 March 2015); interview with Aleksandra Martinović, judge of the Constitutional Court of FBiH (Sarajevo, 25 June 2015); interview with Lazar Prodanović, representative in the Parliamentary Assembly of BiH (Sarajevo, 13 May 2015). For similar views by current president of BCC Mirsad Čeman, see 'Bilo bi bolje da su u Ustavnom sudu samo domaće sudije' [It Would Be Better if Only Domestic Judges Were at the Constitutional Court] *Dnevni avaz* (Sarajevo, 25 February 2016) 3. See also 2nd Session of the House of Representatives of the Parliamentary Assembly of BiH, Transcript, 11 January 2007, 17 (the exposé of Nikola Špirić, at the time the Chairman of the Council of Ministers of BiH).

⁶¹ Interview with Goran Marković, professor of constitutional law (Sarajevo, 18 March 2015).

⁶² Dautbašić (n 5) 39.

⁶³ Samo Bardutzky, 'The Strasbourg Court on the Dayton Constitution Judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009' (2010) 6 *European Constitutional Law Review* 309, 315.

branches',⁶⁴ particularly political actors from RS entity see such a possibility as a mechanism of outvoting generating mistrust in BCC.⁶⁵ This stance had its most clear expression in the Declaration adopted by the National Assembly of RS in early 2015, where it considered unacceptable having 'foreign nationals to be judges of a constitutional court of one sovereign country', calling for the adoption of the Statute on Constitutional Court which would rectify this. More ominously, it indicated that it will 'determine its relationship regarding both the legality and the legitimacy of adoption and further validity of the decisions' of BCC, which were 'specifically damaging only to one nation', that were made after 2001 when the term of office of the firstly appointed international judges expired, and the Parliamentary Assembly of BiH failed to regulate the issue of their membership.⁶⁶ Indeed, the parliamentarians from RS have on several occasions introduced legislative initiatives, which also included the provision on the removal of international judges,⁶⁷ but all failed to get support of most of the parliamentarians from FBiH, who considered that the time was still not ripe for the transition from a hybrid to a fully domestic Court. The decision not to remove international judges from the Court is seen by the political establishment from RS as a strategic choice, since international judges are widely perceived as supporting the strengthening of the central state.

In this context, McCrudden and O'Leary have characterized the behavior of international judges as 'unpredictable, but with a tendency of restraint', at least with regards to the challenges to existing power-sharing mechanisms.⁶⁸ The cases on the merits where a block of international judges along with two judges of one ethnic group outvoted the four judges of the other two ethnic groups are rare but substantively significant since in all of them, international judges voted with Bosniak judges, showcasing substantial activism.⁶⁹ Indeed, in these and other cases, as well as in their academic writings, international judges seem to concur

⁶⁴ Yee (n 9) 191.

⁶⁵ Prodanović (n 60). See also 23rd Session of the House of Representatives of the Parliamentary Assembly of BiH, Transcript, 22 June 2000, 62, 72, 100; 24th Session of the House of Representatives of the Parliamentary Assembly of BiH, Transcript, 27 July 2000, 34; 3rd Session of the House of Representatives of the Parliamentary Assembly of BiH, Transcript, 7 February 2001, 9.

⁶⁶ 'Declaration Regarding the Request of Review of Constitutionality of the Statute on Holidays of Republika Srpska Before the Constitutional Court of Bosnia and Herzegovina in the Case Number: U-3/13', *Official Gazette of RS*, 46/15.

⁶⁷ For the latest initiative, see Parliamentary Assembly of BiH, 'Prijedlog Zakona o Ustavnom sudu Bosne i Hercegovine' [Proposal of the Law on Constitutional Court], 27 December 2015 <www.parlament.ba/sadrzaj/zakonodavstvo/u_proceduri/default.aspx?id=61493&langTag=bs-BA&pril=b> accessed 28 December 2015. Reasonably read the Constitution suggests that only the *method* of selection may be changed.

⁶⁸ McCrudden and O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (n 50) 92.

⁶⁹ See Case U-5/98-III, 18 and 19 August 2000 (Constituency of peoples); Case U-25/00, 23 March 2001 (Statute on Travel Documents); Case U-26/01, 28 September 2001 (Court of BiH); Case U-14/12, 26 March 2015 (Constitutions of entities).

with the diagnosis of the ‘basic problems’ of the Constitution, as identified by one of the former judges – namely, ‘identification of territory and ethnic identity, the deadlocks resulting from veto mechanisms, and the need to strengthen state institutions.’⁷⁰

1.3. Independence

The selection process for BCC has been the subject of much debate and criticism in Bosnian legal literature, focusing on the alleged poor professional qualifications of the appointed judges and the endangerment of its independence through politicization,⁷¹ particularly of those judges ‘having political history.’⁷² It could be expected that the behavior of judges would reflect their previously strongly held political views, whether those favoring the strengthening of the central state, as is the case with political parties based mainly in FBiH, or further decentralization of the country, as is the case with political parties mostly situated in RS. To what degree there is a more direct interaction with, influence on or even political pressure on individual judges is an issue which is difficult to determine,⁷³ although some testimonies are particularly telling in that regard.⁷⁴ The Bosnian public was a witness to at least one such prominent episode. In late 2009, the media published a letter by judge Krstan Simić, a former politician of the Serbian nationalist SNSD party, written to the president of his former party,

⁷⁰ Marko, ‘Constitutional Reform in Bosnia and Herzegovina 2005–06’ (n 7) 217. See also Separate opinion of judges Feldman and Grewe in Case U-4/04, 18 November 2006; Dissenting opinion of judges Grewe and Caca-Nikolovska in case U-25/14, 9 July 2015 and case U-26/14, 9 July 2015.

⁷¹ See Edin Šarčević (ed), *Ko bira sudije ustavnog suda?* [Who Selects the Judges of the Constitutional Court?] (Foundation Public Law Centre 2012). See also ‘Miješanje politike u izbor sudija’ [Interference of Politics in the Selection of Judges] (*Centar za istraživačko novinarstvo*, 23 June 2008) <www.cin.ba/mijesanje-politike-u-izbor-sudija/> accessed 26 April 2015; ‘Politička pripadnost važnija od stručnosti’ [Political Affiliation More Important than Expertise] (*Centar za istraživačko novinarstvo*, 30 June 2008) <www.cin.ba/politicka-pripadnost-vaznija-od-strucnosti/> accessed on 26 April 2015.

⁷² Interview with Judge Mirsad Ćeman, president of BCC (Sarajevo, 2 June 2015).

⁷³ See e.g., Matthew Parish, *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia* (I. B. Tauris 2010) 165–169; Renata Radić-Dragić, ‘Politički uticaj na izbor sudija ustavnih sudova – prekršaji sudske neovisnosti’ [Political Influence on Appointment of Judges in Constitutional Courts: Violation of Judicial Independence] in Elma Demir (ed), *Human Rights and the Judiciary in Bosnia and Herzegovina: a Report on Implementation of Recommendations in the Justice Sector in Bosnia and Herzegovina from the Universal Periodic Review of the UN Human Rights Council* (Association for Democratic Initiatives/University of Sarajevo Human Rights Center 2014) 77.

⁷⁴ In his dissenting opinion in Case U-5/98-III, 1 July 2000, Judge Mirko Zovko recalled the ‘different pressures and most serious insults which grew into most grave threats, not only to me but also to my colleagues’. Joseph Marko, judge rapporteur in that case, also recalled one of the Croat judges complaining to him in that case that he felt pressures from ‘general to cardinal’ in Marko, ‘Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance’ (n 48) 30.

in which he informed him, among other issues, of the liability of his colleagues in the Court to lobbying.⁷⁵

The Court's resoluteness during the affair with Judge Simić, who was removed from BCC by consensus of other judges for 'deliberately undermining the reputation and dignity of [BCC] and dignity of a judge',⁷⁶ in the words of a former president of the Court, was 'the proof that [BCC] enjoys but also protects its autonomy and independence effectively.'⁷⁷ BCC was certainly aware that the affair would, 'for a long time', inevitably have an impact on its image and legitimacy, and consequently the Court would 'have to make an extra effort to regain the undermined confidence of the public and public authorities in its autonomy, independence, impartiality and professionalism.'⁷⁸ The Constitution provides some important resources for that purpose, such as a long term and stability of office, as well as compensation which may not be diminished during judges' tenure.

The issue of financing came to the fore when the Court reviewed for constitutionality the legislation that determined and reduced the salaries of the judges of BCC, and of other officials, as part of general expenditure cuts. In its decision, adopting the request for the review of constitutionality and striking down the Statute in part relating to the Court, BCC emphasized the importance of its financial and overall independence, 'particularly in the institutional context of [BiH], marked by the predominance of the Entities and the relative weakness of the central State', since without a strong and independent Court, the 'central institutions of [BiH] and the integrity of its Constitution would be jeopardized.'⁷⁹ The Court indicated that respect for its independence 'requires as a minimum that [BCC] proposes its own budget and the manner of use of its own budget to the Parliamentary Assembly to adopt it.'⁸⁰ Finally, although it recognized that the economic situation in the country may require salary adjustments across the board, the Court determined that any changes which would result in the reduction of the salaries of the judges during their tenure would require amendments to the Constitution in view of Article IX.⁸¹ The cited case also gave the opportunity to the Court to clarify the nature of its 'rules of court', which is another important factor of its independence. The Constitution is mostly silent on important aspects concerning the functioning of the Court. It provides that BCC itself shall

⁷⁵ Decision of the Constitutional Court pursuant to the Recommendation for Dismissal of the Judge of BCC Krstan Simić, K-I-15/10, 4 March 2010, 18.

⁷⁶ *ibid.*

⁷⁷ Valerija Galić, 'Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies' (Second Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 16-18 January 2011) 6.

⁷⁸ Decision of the Constitutional Court pursuant to the Recommendation for dismissal of the judge of BCC Krstan Simić, K-I-15/10, 4 March 2010, 58.

⁷⁹ Case U-6/06, 29 March 2008, 29.

⁸⁰ *ibid* 30.

⁸¹ *ibid* 35.

adopt its own rules by a majority of all its members. Considering the very sparse provisions of the Constitution, this provides the Court with substantial room for maneuvering.⁸²

All of these factors – term of office, stability of office, financial independence, and almost complete control over the procedure, functioning and organization of the Court – clearly indicate the intent of the framers to secure the independence of the Court, endowing it with a ‘special position’ within the constitutional system.⁸³ These factors also work to mitigate, to the degree possible, the fallout from the politicization inherent in the selection procedure.

1.4. Conclusion

We tend to believe that the granting of an unqualified power of abstract control of legislation, coupled with the silence of the Constitution on ethnic parity in the composition of the Court and the absence of power-sharing mechanisms in its decision-making procedures – issues not overlooked in other institutions – as well as the almost unprecedented complete control of BCC over its rules of procedure, support the idea of the Court as an institution designed with an activist outlook. Provisions relating to the tenure and stability of office, coupled with an established political and financial independence, further support this conclusion. Insofar as it is true that ‘[l]egal interpretation is always *actor-relative*’,⁸⁴ so that the place of such an actor in the ‘economy of trust’ affects the level of discretion accorded to it ‘to depart from the text when doing so furthers the purpose of the text in question’,⁸⁵ the institutional features of the Court also indicate an unusual level of trust conferred upon it by the framers.

That the Constitution and the design of the Court facilitate judicial activism does not predetermine the Court’s actual behavior. A lot of other extra-constitutional factors would have to be taken into consideration. Indeed, it has been argued that constitutional courts embedded within a broader consociational culture of power-sharing would have a tendency of restraint in undermining such hard-attained compromises.⁸⁶ Consideration of these tendencies would require an analysis of the Court’s actual output, to which we turn next.

⁸² See Valerija Galić, ‘Položaj i uloga Ustavnog suda Bosne i Hercegovine u primjeni Europske konvencije za zaštitu ljudskih prava i osnovnih sloboda’ [Position and Role of the Constitutional Court of Bosnia and Herzegovina in the Implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms] (2006) 37 (11-12) *Pravna misao* 63. See also case U-7/13, 27 September 2013.

⁸³ Case U-6/06, 29 March 2008, 10.

⁸⁴ Scott Shapiro, *Legality* (Harvard University Press 2011) 358.

⁸⁵ *ibid* 355. See also Rosalind Dixon, ‘Constitutional Drafting and Distrust’ (2016) 13 *International Journal of Constitutional Law* 819.

⁸⁶ See McCrudden and O’Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (n 50).

2.

Ascertaining the Court's Activism

The actions of BCC have occasionally been characterized as 'activist' by dissenting minorities, although it does not seem that they have always shared the same understanding of the concept, which is to a degree understandable considering that it is a 'notoriously slippery term'⁸⁷ and one that is 'crude and unavoidably political.'⁸⁸ In particular, it is not always clear if it is used in a derogatory manner to stigmatize the allegedly improper use of judicial power or not. The former president of the Court, Miodrag Simović, in a dissenting opinion to a decision of the Court striking down a statute, has identified what he calls 'positive judicial activism' as a description of the Court's 'cautious' behavior, or one where it acts with 'moderate restraint', as opposed to 'new judicial activism' which is 'unrestrained.'⁸⁹ In his dissent in a later controversial case, joined by the other judge selected from RS, where the Court again expanded its jurisdiction to the bylaws when they raise constitutional issues, judge Simović repeated his concerns relating to 'new [unrestrained] judicial activism', disparaging what he saw as an over-reliance of political actors on BCC in the resolution of their political battles by other means.⁹⁰ The understanding of 'positive judicial activism' by Mirsad Ćeman, the current president of the Court, is one where BCC has shown 'enviable and justified interpretative breadth and responsibility' and a 'respectable level of extensive understanding and interpretation of constitutional text.'⁹¹ This reflects his views in another case where, although he did not use the language of 'activism' or 'restraint', he criticized the majority for dismissing the request for control of constitutionality for 'formalistic' reasons instead of extensively interpreting the Constitution through the use of a 'functional approach.'⁹² Both of these positions beg the question as to what 'cautious' or

⁸⁷ Sujit Choudhri and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*' (2003) 48 McGill Law Journal 525, 531.

⁸⁸ Keith E. Whittington, 'The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review' (2014) 89 Notre Dame Law Review 2219, 2226.

⁸⁹ Dissenting opinion of Miodrag Simović in case U-16/11, 13 July 2012, 2.

⁹⁰ Dissenting opinion of Miodrag Simović in case U-10/14, 4 July 2014, 3.

⁹¹ Dissenting opinion of Mirsad Ćeman in case U-13/14, 4 July 2014.

⁹² Dissenting opinion of Mirsad Ćeman in case U-7/10, 26 November 2010. See also Dissenting opinion of Zvonko Miljko in case U-40/00, 2 February 2001, 3. Judge Marko, in his extrajudicial writings, has defended the Court's judicial activism as 'a must under the given circumstances', in Joseph Marko, "'United in Diversity?'" Problems of State- and Nation-building in Post-conflict Situations: The Case of Bosnia and Herzegovina' (2006) 30 Vermont Law Review 503, 541.

'responsible' behavior implies, but they do show that judicial activism is a concept that is 'hard to use as a neutral description of judicial behavior.'⁹³

One avenue out of this definitional conundrum is through the use of what Choudhri and Hunter call a 'quantitative definition' of judicial activism, which focuses on 'outcomes (i.e., whether a government wins or loses) and posits that courts are more activist the more frequently they find that democratically elected institutions have acted unconstitutionally.'⁹⁴ The authors do recognize a number of problems with a quantitative approach, probably the most important one being that it does not discriminate between decisions in terms of their importance and substance. Sadurski offers a more sophisticated understanding underlying that beyond the mere substitution for the legislature's views those of the court regarding the proper interpretation of the constitutional provision, a further factor has to be ascertained, namely that 'it is possible for the court, within the set of argumentative resources available to it, to uphold or to strike down the law.'⁹⁵ Furthermore, such an assessment, according to Sadurski, 'involves two criteria: the importance of the laws invalidated ... and the nature of the reasoning leading to such invalidation.'⁹⁶ We do agree with Choudhri and Hunter that without an empirical approach 'the factual support for the claims made in the judicial activism debate cannot be verified.'⁹⁷ For that reason, we will first briefly approach the issue of judicial activism of BCC through a quantitative approach, attempting to identify the general patterns and trends in the Court's behavior before engaging in a more qualitative analysis of the Court's jurisprudence, as suggested by Sadurski. The trends that we particularly want to ascertain through quantitative analysis are the general rate of invalidation of statutes, the rate of invalidation of sub-state statutes compared to federal statutes, and a comparison of invalidation rates of the first and second term of the Court.

2.1. Quantitative Approach

The dataset that we considered consisted of all the decisions on the merits from the Court's abstract review and referral (or concrete review) competence, which amounted to ninety-five decisions over the nineteen-year period (1997 to mid-2016) during which the Court has been active. We have excluded decisions on admissibility since the rules on standing are clear and decisions of the Court are, with few exceptions, unanimous. We use the expression 'invalidation rate', to

⁹³ Whittington (n 88) 2226.

⁹⁴ Choudhri and Hunter (n 87) 532.

⁹⁵ Sadurski (n 20) 96.

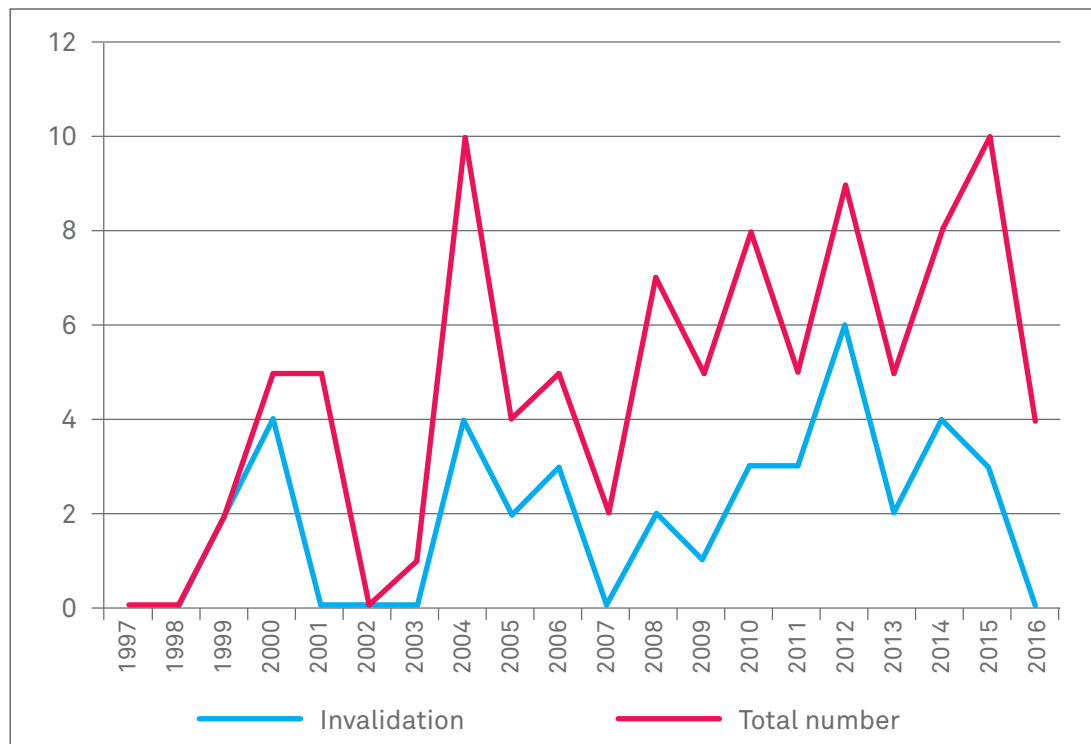
⁹⁶ *ibid* 97.

⁹⁷ Choudhri and Hunter (n 87) 534. Also Richard A. Posner, 'Foreword: A Political Court' (2005) 119 *Harvard Law Review* 32, 34.

describe a broader specter of phenomena, independent of the temporal effects of the decisions, or the fact that the decision relates to the whole statute or some of its provisions.

Looking at the data, we can conclude the following. The overall rate of invalidation is 41%, and it is higher in cases of referrals by the ordinary judiciary (50%) than in abstract review of constitutionality (38%). One reason for this could be that the ordinary judiciary is more cautious in exercising its rights, thus focusing on cases where they consider unconstitutionality to be more clearly evident. Moreover, the Court was unanimous in all court referral cases except three, compared to abstract review where it was unanimous 58% of the time. Regarding the overall invalidation rate, it is difficult in the abstract to conclude whether that supports the judicial restraint claim or not.⁹⁸ We must have in mind that the Court does not have discretionary control over its docket, which results in claims of dubious quality being presented to it, and in such circumstances, rejection of requests should not be read as an exercise of judicial restraint but rather as a consequence of simple application of constitutional provisions. Moreover, in the peculiar context of BiH, the Court may exercise activism by upholding the laws imposed by the High Representative for BiH ('HR'), as explored in more detail in section 2.2.2.

Table 1: Cases Decided on the Merits from Abstract and Referral Competence of BCC



⁹⁸ In Canadian context, Choudri and Hunter suggested that similar figures do not support activism claims. See Chaoudri and Hunter (n 87) 545.

Furthermore, the Court is more likely to invalidate as unconstitutional sub-state legislation (47%) than state legislation (33%). Explaining a similar tendency of the Supreme Court of the United States of America, Whittington explains that this could be due to 'relative political vulnerability of the states to federal judicial oversight', as well as 'the relative abundance and diversity of state laws compared to congressional statutes.'⁹⁹ These considerations hold for the Bosnian context as well. Moreover, unlike entity legislatures that contain only one weak veto point that has in practice effectively been neutralized by the constitutional courts of the entities, at the state level there are two veto points in the legislative process, one of which is not subject to constitutional adjudication. This results in frequent legislative blockades and sparse legislative output.¹⁰⁰ Thus, the rare legislation adopted is expected to be the result of a wide compromise and thus be more moderate and less vulnerable to judicial review. The difference in the invalidation rate could also buttress the claim concerning the Court's state-building function.

As for the actors that have initiated most of the cases before the Court for the purpose of the review of legislation for its constitutionality, a clear disproportion is evident: the reference by the executive is responsible for almost two-thirds of the cases, while only one-fifth of the cases were initiated by the legislatures at all the levels of government. Notably, the Parliament of FBiH, the legislature of a federal unit comprising more than half of the country, has initiated cases before BCC only three times in twenty years, while the Assembly of Brčko District of BiH has never done so.

One important aspect to consider in relation to the last point is the dynamics of the relationship between the Court and the parliamentary minority and the degree to which the latter has found in the Court its natural ally against the majority and the government.¹⁰¹ This analysis, however, is made difficult by the fact that the Bosnian consociational political regime, particularly at the state level, by its very nature necessitates large coalitions incorporating parties representing all the dominant ethnic groups,¹⁰² and should in theory lessen the potential conflict between the remaining opposition and the governing coalition. Furthermore, the already mentioned strong veto points in the legislative process, combined with the fact that the coalitions are often very unstable, result in a very scant legislative output at the state level that could be challenged by the opposition before the Court in the first place. Thus we are particularly interested in those instances in the first term of the Court, where the HR intervened in the

⁹⁹ Whittington (n 88) 2227.

¹⁰⁰ See Ivana Marić (ed), *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine: stanje - komparativna rješenja - prijedlozi* [Decision-making Process in the Parliamentary Assembly of Bosnia and Herzegovina: the State, Comparative Solutions, Proposals] (Konrad Adenauer Stiftung 2009); Birgit Bahtić-Kunrath, 'Of Veto Players and Entity-voting: Institutional Gridlock in Bosnian Reform Process' (2011) 39 Nationalities Papers 899.

¹⁰¹ See Sadurski (n 20) 93-96.

¹⁰² Marković, *Bosnian Federalism* (n 16) 218-219.

legislative process, and imposed statutes after the impasses in the legislative process at the state level, and which were then challenged as unconstitutional by representatives from RS. That in all of the cases from its formative period BCC sided not with the democratically elected representatives but with an extra-constitutional force that imposed legislation in a domestic legal system, and all for the purpose of the strengthening of the central state and the rectification of the deficiencies of the circumstances of constitutional-making, further demonstrates the reality of Court's activism and its role as a policymaker.

Comparing the first five-year term of the Court with the second (at this moment) fourteen-year term, we also note statistically different rates of invalidation of legislation, namely 50% in the first term, compared to 39% in the second. We should bear in mind, as seen in Table 1, that the Court dealt in a lower number of cases in its first term. However, we must notice that the Court was much more divisive in its first term, and more profoundly so. With regards to the first point, in its first term the Court was unanimous in only 25% of cases, while it was unanimous in 70% of cases in its second term. On the second point of the more profound nature of its divisiveness, it must be noted that the Court split into five-to-four majorities on five occasions during its first five-year term,¹⁰³ while in the following fourteen years this would only happen once more (in 2015). This is congruent with the general intuition in the literature that the Court was much more activist in its first term. Indeed, commenting on the unanimous decision of the Court from 2004, striking as unconstitutional the legislation regulating the ethnically exclusive names of the cities in RS, the former international judge at BCC, David Feldman, considered that it 'may herald an era in which loyalty to entities or peoples is subordinated to legal professionalism and loyalty to the Constitution and the Court.'¹⁰⁴ Statistically speaking, this prediction seems warranted and may also be explained by the fact that the first-term Court also dealt with some of the most controversial issues and thus took them off the agenda.

¹⁰³ If we count admissibility decisions, the Court was split five-to-four on eight occasions in its first five-year term.

¹⁰⁴ David Feldman, 'Renaming Cities in Bosnia and Herzegovina' (2005) 3 *International Journal of Constitutional Law* 649, 660. Also Sujit Choudhry and Richard Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies' in Colin Harvey and Alex Schwartz (eds), *Rights in Divided Societies* (Hart Publishing 2012).

2.2. Qualitative Approach and the Issue of Interpretation

The Constitution does not prescribe for any single method of its own interpretation.¹⁰⁵ The provision regulating the jurisdiction of BCC does provide that the Court 'shall uphold this Constitution',¹⁰⁶ a statement that itself necessitates interpretation.¹⁰⁷ This is made more challenging by the nature of the Constitution that is a result of a compromise, produced after strenuous negotiations between warring parties, and which is in the form of a short and 'incompletely realized agreement',¹⁰⁸ characterized by 'vagueness' and 'very laconic formulations'.¹⁰⁹ What consequences, according to BCC, this has for the interpretation of the Constitution can be seen in the words of the current president of the Court:

[C]onstitution of BiH as it is, is in fact a product, I would say, of American legal school, not of European continental law, and that is a significant difference. Thus, a very short Constitution ... [o]n one side allows and provides the Constitutional court with a wide space for dynamic understanding of the constitutional norm, that is in some parts very, so to say, general, but has been concertized through practice ... [A]nd on the other side it allows for the evolutive interpretation of the Constitution ... And that is, to say the truth, a consequence of the characteristics of the Constitutional text.¹¹⁰

Whether the Court in a fragile democracy such as BiH should decide to follow the position according to which the courts should show judicial restraint¹¹¹ or a perspective that requires the constitutional courts to show judicial activism by 'fulfill[ing] the incomplete project of constitutional compromise',¹¹² seems to be a matter of choice informed by other normative considerations. The

¹⁰⁵ See Case U-5/04, 27 January 2006, 15. See also case U-10/05, 22 July 2005, 28.

¹⁰⁶ Article VI/3 of the Constitution of Bosnia and Herzegovina.

¹⁰⁷ See Case U-5/04, 27 January 2006, 15. See also case U-10/05, 22 July 2005, 28. See also Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance' (n 48) 20-21; Grewe and Riegner (n 8) 45; David Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation' (a paper delivered to the round table of the IACL, at Université Montesquieu – Bordeaux IV on 15 and 16 October 2004).

¹⁰⁸ On general notion see Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 20) 983. Also Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harvard Law Review 1733.

¹⁰⁹ Grewe and Riegner (n 8) 45; Grewe (n 54) 3.

¹¹⁰ Ćeman (n 72).

¹¹¹ See e.g., Ruth Gavison, 'The Role of Courts in Rifted Democracies' (1999) 33 Israel Law Review 216.

¹¹² Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 20) 979. See also Nedim Ademović, 'Značaj i metode tumačenja kroz praksu Ustavnog suda Bosne i Hercegovine' [Importance and Methods of Interpretation through the Practice of the Constitutional Court of Bosnia and Herzegovina] (2012) 5 (9) Anali Pravnog fakulteta Univerziteta u Zenici 29, 34.

former international judge at BCC, David Feldman, similarly indicated that even though the text of the constitution sets the outer boundaries of acceptable interpretation, in the final analysis the text 'is a source of inspiration rather than a determining factor', which means that 'constitutional courts must make an authoritative choice between possible constitutional interpretations', after consideration of the practical consequences of such choices.¹¹³ Such views are also espoused by some in domestic scholarship. Bosnian constitutional scholar from RS, Goran Marković, drew a similar conclusion from the 'incomplete, unclear and contradictory' nature of the BiH Constitution, indicating that it allows 'the possibility of different interpretation, not only dependent of accepted method, but also on the different interests and reasons that lead to such acceptance', reasons which are 'very often of political, and not legal nature.'¹¹⁴

Any teleological interpretation of the Constitution that BCC, or its majority, might choose must have some goal or purpose of the Constitution as its object. It has been suggested by a former international judge at BCC that '[t]he reconstruction of multiethnic society is a goal of the Constitutional Court of Bosnia-Herzegovina, although there's no pure, positivistic legal ground for it.'¹¹⁵ Indeed, from very early on, BCC, first in a slim majority of the judges but later more broadly, mustered all the available resources provided by the constitutional text to reconstruct an intention of the drafter which would lead preponderantly towards the goal of the reintegration of the society. The Court has most visibly located such a goal in the provisions of the Constitution, and indeed the Dayton Agreement as a whole, which provide for the return of refugees and displaced persons to their homes, which the Court has characterized as the 'main' or the 'primary' goal of the whole Dayton Agreement.¹¹⁶ How much interpretative space this approach provides the Court can be seen in the decision in which it struck down as unconstitutional the provision of the Statute on Citizenship of BiH that provided, in relevant part, that the '[c]itizenship of BiH is lost through the voluntary acquisition of another citizenship, if otherwise it is not provided in a bilateral agreement between BiH and that state', even though the Constitution expressly provides that the '[c]

¹¹³ Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation' (n 107) 2. Of similar views are Sunstein and Posner, who are very skeptical of the idea of a mandatory approach to constitutional interpretation but indicate that the choice that has to be made should be informed by 'what seems best' (Posner), or what would make the constitutional system 'better than worse' (Sunstein). See Richard Posner, 'Democracy and Distrust Revisited' (1991) 77 *Virginia Law Review* 641, 650; Cass R. Sunstein, *Constitutional Personae* (Oxford University Press 2015) 44.

¹¹⁴ Goran Marković, 'Funkcionisanje države i metodi tumačenja' [Functioning of the State and the Methods of Interpretation] (2012) 5 (9) *Anali Pravnog fakulteta Univerziteta u Zenici* 35, 50.

¹¹⁵ Cited in Cindy Skatch, 'Rethinking Judicial Review: Shaping the Toleration of Difference' in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (Central European University Press 2005), 71.

¹¹⁶ See eg Case U-5/98-III, 30 June and 1 July 2000, 73; Case U-16/00, 22 February 2001; Case U-14/00, 4 May 2001; Case U-14/02, 30 January 2004; Case U-83/03, 22 September 2004.

itizens of [BiH] may hold the citizenship of another state, provided that there is a bilateral agreement... between [BiH] and that state'. After recalling that the Constitution was adopted in 'specific historical circumstances' that coincided with the end of armed conflict in BiH, which displaced a large segment of the population, the Court concluded that 'as an institution which will "uphold this Constitution", it is absolutely certain that the intention of the constitution-drafter was not to aggravate the return of the refugees to their homeland.'¹¹⁷

As will be argued further, beyond the goal of the reintegration of the society, the Court has also been active in the strengthening of the initially extremely weak central state. Unlike the reintegration of a multiethnic society, which is parasitic on the express right to return, the Constitution provides the facilities for the strengthening of the central state but leaves the decision as to whether they will be used to political discretion. Precisely the fact that there was no political will to use such facilities necessitated interventions of the HR in the legal system of BiH, which were then challenged and legitimized before the Court. Having this in mind, it seems justified to chart the choices made by BCC over the years, particularly for the purpose of the reintegration of the society and the strengthening of the central state, in order to determine the degree to which it was an activist court.

2.2.1. The Court's Engagement with the Political Regime: The Unwinding of Consociational Compromises

The political regime of BiH can be uncontroversially characterized as consociational.¹¹⁸ Indeed, at the time the Dayton Peace Agreement came into force, the country saw the existence of three more or less well-defined ethnocracies on its territory with a high level of cultural autonomy and political self-organization.¹¹⁹ One of the aspects of the Court's activism can be seen in its potential role, as some authors have framed it, of an 'unwinder of ethnic political bargains',¹²⁰ instantiated in the form of a number of consociational arrangements, in order to facilitate the goal of the reintegration of the previously multicultural society, where collective rights were less pronounced.

We should recall that consociational arrangements consist of the following four elements: a) sharing of executive/legislative powers, b) community autonomy, c) proportionality, and d) mutual veto.¹²¹ Having that in mind, we understand

¹¹⁷ Case U-9/11, 23 September 2011, 36.

¹¹⁸ See e.g., Florian Bieber, 'The Challenge of Institutionalizing Ethnicity in the Western Balkans: Managing Change in Deeply Divided Societies' (2003) 3 *European Yearbook of Minority Issues* 89.

¹¹⁹ Šarčević, *Constitution from Necessity* (n 17) 42.

¹²⁰ Richard H. Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) 195.

¹²¹ See Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements' (2013) 24 *European Journal of International Law* 477, 480.

the relevant process objectively as any act (conscious or unconscious) of the Court that has the effect of undermining consociational political arrangements. However, a subjective view would hold that for a court to unwind ethnic political bargains, in a way that is significant from a normative perspective, it would have to understand an individual political arrangement that it is undermining as consociational and act with a requisite intent to abolish or weaken it, because conversely, the unwinding might be seen as collateral damage of otherwise uncontroversial adjudicative activity. In our view, the objective approach seems more warranted, particularly bearing in mind that the evidence of such intent might not be readily apparent. This stems from the general tendency of the courts to couch their decisions in purely formalistic terms, sometimes characterized as conscious subterfuge,¹²² in order to control the damage their judgment might cause. Nevertheless, such intent can often be gleaned from the reasoning of the courts, particularly through dissenting opinions, or the court submissions of (sub)state bodies. For that purpose, we will briefly analyze the four elements constitutive of consociational arrangement in Lijphart's understanding to show how the Court has undermined each of them to varying degrees.

2.2.1.1. Sharing of Executive/Legislative/Security Powers

For Lijphart, this presents one of the primary characteristics of consociational democracy, consisting in the idea of 'the participation of the representatives of all significant groups in political decision-making, at the executive level',¹²³ and possibly also in legislative and other areas.¹²⁴ What is important to note here is that although the Court, in principle, cannot touch the power-sharing mechanisms contained in the Constitution of BiH, it has constantly used its authority to limit the consociational fallout in the rest of the constitutional system. In the decision U-5/98-III, the Court thus indicated that power-sharing mechanisms entrenched in the Constitution, insofar as they are of a discriminatory nature, are 'legitimized solely by their constitutional rank and therefore, have to be narrowly construed'.¹²⁵

Bearing in mind the importance of this consociational element, because of which it has largely been entrenched in the Constitution of BiH, the Court has not had many opportunities to deal with it. Of interest here is the case where the Court evaluated the constitutionality of the Law on the Council of Ministers of BiH and the Ministries of BiH, which foresaw, as one of the earliest compromises of the new coalition of ethnic parties, the existence of two Co-Chairs and a Vice-

¹²² See Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305.

¹²³ Arend Lijphart, 'The Wave of Power-Sharing Democracy' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press 2002) 39.

¹²⁴ McCrudden and O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements' (n 121) 480.

¹²⁵ Case U-5/98-III, 30 June and 1 July 2000, 68.

Chair of the Council of Ministers, contrary to the Constitution. The Court did not have much trouble declaring the relevant provisions of this Law, which clearly had the intent of extending the power-sharing arrangements, as unconstitutional, but it restricted its language to that of hierarchy of norms.¹²⁶ The constitutional courts of the entities, or their respective councils for the protection of vital interest, using the reasoning of BCC, have similarly rejected claims of discrimination in cases where the claimants demanded the introduction of power-sharing mechanisms of some sort in various executive or legislative contexts.¹²⁷

2.2.1.2. Community Autonomy

Being the second of the 'primary characteristics,' this element means that the 'groups have authority to run their own internal affairs, especially in the areas of education and culture.'¹²⁸ We accept as a presumption that this area of autonomy is, in a certain meaningful sense, exclusionary, either territorially or functionally, so that others that enter this area of autonomy are expected to forgo their claims of accommodation. Keeping that in mind, we can conclude that this element was a subject of frequent activity of the courts at all the levels of government, which was almost exclusively oriented toward the 'unwinding' of the very strong consociational arrangements existing at the end of the armed conflict that might be affiliated with this element. On most fundamental level, the Court clearly rejected the sentiment reflected by the representative of National Assembly of RS in an oral argument before the Court as late as 2006: '[RS] in any case remains – whether someone likes it or not – on symbolic level, an entity – mother of Serbs.'¹²⁹ After its decision in case U-5/98-III, the idea of entities as exclusive ethnic bases, regardless of the possible support such an idea might garner on the relevant territory, is a legal nonstarter.

Such reasoning has informed the unwinding that is witnessed in areas regarding the insignia (flags, coats of arms, anthems) of entities, cantons and municipalities, where the courts on all levels were unanimous that any symbols, on any territory, regardless of the manner in which they were adopted or the structure of population that resides there, are unconstitutional if they do not include the traditional heritage of other constituent peoples.¹³⁰ The decisions on the names of cities with exclusive ethnic connotations, which were declared unconstitutional, can also be viewed in this light.¹³¹ The test implicit in the

¹²⁶ Case U-1/99, 14 August 1999. See also case U-1/98, 5 June 1998 (admissibility decision).

¹²⁷ In context of FBiH, see e.g., case U-8/03, 8 October 2003 and case U-18/06, 13 September 2006.

¹²⁸ Lijphart (n 123) 39.

¹²⁹ Case U-4/04, 18 November 2006, 27.

¹³⁰ At the state level, see case U-4/04, 31 March 2006 and U-4/04, 18 November 2006. At the level of RS, see e.g., case UV-4/07, 25 July 2007 (melody of anthem), UV-3/08, 22 December 2008 (coat of arms and the text of anthem), case UV-5/11, 20 September 2011 (Orthodox New Year).

¹³¹ Decision U-44/01, 27 February 2004.

reasoning of BCC, and taken up later by constitutional courts at lower levels, is one that leaves two options for the authority intending to express or entrench its cultural autonomy: (ethnic) incorporation or (ethnic) neutralization. The Court has remained steadfast with this reasoning, even in the face of unanimous opposition of all political parties and public opinion in the relevant entity, as was the case with RS and its Law on National Holidays of RS, a provision of which was declared unconstitutional in a highly contested decision which has generated one of the most serious constitutional crises since the end of the war.¹³²

In a number of cases dealing with education, the Court was clear that any arrangement for the purpose of the protection of only one language, like the so-called 'national universities' or 'national schools', would be unconstitutional, again regardless of the territory (and demographics) where it was established.¹³³ Attempts geared towards 'national television' did not fare better, either.¹³⁴

2.2.1.3. Proportionality

The cases dealing with this element of consociational democracy again point to a clear trend of the courts, on the basis of BCC's jurisprudence, to deny any claims for positive discrimination, in the forms of ethnic parity or proportional representation, even if that would alleviate the results of ethnic cleansing and genocide. If arrangements already exist which favor some groups, the avenues open to authorities are, again, incorporation or neutralization. That was the case with the Statute of the City of Sarajevo, which in the end decided for the solution of incorporation.¹³⁵ In cases where the provisions are facially ethnically neutral, the Court regularly rejects all claims for ethnic inclusion, regardless of the possible justifications.¹³⁶ Using BCC's reasoning, the entity constitutional courts routinely reject requests for the introduction of proportional representation made with regard to, not only the legislative or executive bodies, but also other institutions such as museums, healthcare institutions, governing boards of other institutions and others.¹³⁷

¹³² Case U-3/13, 26 November 2015. Needless to say, both judges from RS strongly dissented.

¹³³ For the state level, see case U-8/04, 25 June 2004. For the level of FBiH, see case U-28/04, 3 November 2004.

¹³⁴ Case U-10/05, 22 July 2005. Both Croat judges dissented in that case.

¹³⁵ Case U-4/05, 22 April 2005.

¹³⁶ For state level, see case U-7/05, 2 December 2005 (city councils of Banja Luka and Istočno Sarajevo), case U-5/05, 27 January 2006 (Parliament of the FBiH), case U-13/09, 30 January 2010 (House of Representatives of the Parliamentary Assembly of BiH, House of Representatives of Parliament of FBiH, and National Assembly of RS).

¹³⁷ For the level of FBiH, see e.g., case U-8/03 and case U-29/05. For the level of RS, see e.g., case UV-5/07, case UV-1/08, case UV-2/08, case UV-1/09, case UV-3/09, case UV-2/10, case UV-5/10, case UV-1/11.

2.2.1.4. Mutual Veto

The relevant provision of the Constitution, which provides that the Court shall review the invocation of the ethnic veto 'for procedural regularity', was read by most foreign¹³⁸ and domestic commentators,¹³⁹ but also by actors of the local political establishment,¹⁴⁰ at face value as limiting the Court to procedural, rather than substantive assessment. Indeed, the available records of the negotiations at Dayton indicate that the wording was used strategically to prevent the Court from acting meritoriously on this issue.¹⁴¹ The Court, conversely, from its very first case dealing with this competence concluded – due to the alleged 'vagueness of the norm',¹⁴² as one of the judges put it – that its jurisdiction naturally includes, not only the assessment of whether the procedure was followed, but also whether the draft legislative act concerns the vital interest of a constituent people in the first place; and if it does, whether the act is destructive to such interest, thus erecting a very high threshold that has to be met for the veto to be successful.¹⁴³ In the words of the Court, '[T]he protection of vital interest must not lead to unnecessary disintegration of civil society as a necessary element in modern statehood.'¹⁴⁴

The direct consequence of this move by the Court, which subverted the intention of the framers for the purpose of the easing of legislative procedure, was the neutralization of this veto point, which was made largely ineffective and has had a success rate of only 18%. The Court's animosity to consociational

¹³⁸ See Paul C. Szasz, 'The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia' (1995) 19 *Fordham International Law Journal* 392; Yee (n 9) 188; Fred L. Morrison, 'The Constitution of Bosnia-Herzegovina' (1996) 13 *Constitutional Commentary* 145, 149; Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M.E. Sharpe 1999) 370; Carsten Stahn, 'Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken - Neue Hoffnung für das Friedensmodell von Dayton?' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 665, 677; Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers 2005) 150; Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative' CLD-AD (2005) 004-3, 11-12 March 2005, 32.

¹³⁹ Rajko Kuzmanović, *Ustavno pravo* [Constitutional Law] (Pravni fakultet u Banja Luci 2002) 317; Steiner and Ademović (n 1) 808; Šarčević, *Constitution from Necessity* (n 17) 388-389.

¹⁴⁰ See e.g., Vinko Radovanović, 27th Session of the House of Peoples of Parliamentary Assembly of BiH, 29 July 2004, Transcript, 4, 7; Branko Zrno, 37th Session of the House of Peoples of the Parliamentary Assembly of BiH, 19 October 2009, Transcript, 26.

¹⁴¹ See Nystuen (n 138) 75-76.

¹⁴² Mato Tadić, *Ustavni sustav i ustroj pravosuđa u Bosni i Hercegovini: priručnik za pravosudni ispit* [Constitutional System and Structure of Judiciary in Bosnia and Herzegovina: Handbook for the Bar Exam] (Ministarstvo pravde BiH 2009) 48. In the words of the international judge at BCC, the Court's interpretation of the notion of vital interest 'tends to favor the integration and reconciliation of ethnic groups', in Grewe (n 54) 9.

¹⁴³ Case U-2/04, 28 May 2004, 23; Case U-8/04, 25 June 2004, 16, 20.

¹⁴⁴ Case U-10/05, 22 July 2015, 28. See also case U-5/98-III, 1 July 2000, 55.

mechanisms could also explain its uncharacteristically restrictive interpretation of its jurisdiction in a case where a broad coalition of Bosniak parties challenged a clearly unsupportable interpretation of the RS constitution by the constitutional court of that entity, which made the use of this veto mechanism completely ineffective in RS as well.¹⁴⁵

* * *

Contrary to McCrudden and O’Leary’s interpretation of the Court’s landmark decision in case U-5/98-III, we consider it to be a part of the ‘unwinding canon’ which, legally at least, removed the idea of entities, or other political and territorial formations, as an ethnic bases that can be justified in any form. It also presented a founding precedent for all the later decisions of the same canon. The principle of the constituency of peoples, established in that case, is open only to narrow interpretation, and after the almost complete abandonment of the test for the determination of discriminatory intent,¹⁴⁶ it cannot be used for the purposes of affirmative action. This significantly limits the propagation of consociational mechanisms within the system, contrary to intentions of the ethnic political establishment in all parts of BiH.

The brief survey also supports the hypothesis that the Court would be highly suspicious of claims concerning collective ethnic rights, in the form of consociational power-sharing arrangements. Indeed, the Court framed this project within the rhetoric concerning the prohibition of (collective) discrimination, often invoking the case law of ECtHR. Such parlance of BCC also supports Issacharoff’s claim that the challenges to consociational arrangements are ‘likely to be based on “fundamental rights” arguments, and are likely to be made on the basis of “higher authority at the international level.”’¹⁴⁷ McCrudden and O’Leary were also correct with their hypothesis that the request for review of the constitutionality of power-sharing arrangements will only be successful if it employs a particular kind of reasoning, namely claims of facial ethnic discrimination.¹⁴⁸

¹⁴⁵ Case U-7/10, 26 November 2010.

¹⁴⁶ See e.g., Joseph Marko, ‘Comments by Prof. Dr. *Joseph Marko*, the judge rapporteur in the Case No. U 5/98 (line 10)’ in Steiner and Ademović (n 1) 83. The applicant also invoked discriminatory intent argument in case U-26/13, 26 March 2015, 14, but BCC did not even consider it.

¹⁴⁷ Samuel Issacharoff, ‘Democracy and Collective Decision Making’ (2008) 6 *International Journal of Constitutional Law* 231, 261. Also McCrudden and O’Leary, ‘Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements’ (n 121) 490.

¹⁴⁸ See McCrudden and O’Leary, ‘Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements’ (n 121) 488.

2.2.2. The Court's Engagement with State Structure: Dialectic of Legitimation

The Dayton Constitution established a very weak and unstable central state, so much so that one author has noted that it made the 'American Articles of Confederation of two centuries ago look like a centralized, unitary form of government.'¹⁴⁹ It has also been recognized that the state, even in the absence of formal amendments, has undergone a transformation in the last two decades and has moved closer to a state where traditional features of a federation are more evident. The role of the Court in this process of transformation cannot be denied, and the broad stroke overview of its jurisprudence shows that this was done in two steps, namely in the expansive interpretation of the scope of state competences and the legitimation of state-building interventions by the HR.

2.2.2.1. On Scope of State Competences

Article III of the Constitution of BiH provides for a short list of responsibilities of the institutions of BiH, followed by a provision that all governmental functions and powers that are not expressly assigned in the Constitution to the institutions of BiH are those of the entities. The plain reading of the provisions, as reflected in one of the notable early commentaries on the Constitution by an author from FBiH, but also espousing a view widely shared within academia and the political establishment in RS, is that the Constitution provided for a system of 'dual federalism', and it grudgingly rejected the suggestion of 'joined competences' between state and entity levels of government, lamenting that 'the Constitution simply does not recognize' such a notion.¹⁵⁰ Indeed, in drafting the relevant provision on the responsibilities of state institutions and those of the entities, the framers were certainly aware of the Constitution of the FBiH, adopted just a year earlier as part of the Washington Agreement, which expressly provided both for joined competences of the Federation and its cantons and for more direct mechanisms of their cooperation.

The Court, however, already in its second partial decision in the landmark case U-5/98, rejected both of these conclusions, finding that the competences of the state are not limited to the list provided in Article III/1 and, moreover, that because of the necessary cooperation between different levels of government, the implied powers must be taken into consideration.¹⁵¹ In the same decision, the Court introduced the notion of 'framework legislation' at the state level as a manner of operationalization of the idea of shared or concurrent competences, justified by the need for harmonization of entity legislation for the purpose of the

¹⁴⁹ Morrison (n 138) 145. Nurko Pobrić, *Ustavno pravo* [Constitutional Law] (Slovo 2000) 342-343, also concluded from the absence of the competence of the state in the area of defense, police powers or regular judiciary, that the central government 'barely exists'.

¹⁵⁰ Pobrić (n 149) 342-343.

¹⁵¹ Case U-5/98-II, 18 February 2000.

implementation of laws in a non-discriminatory manner and for the removal of obstacles to free movement of goods and capital.¹⁵² Indeed, the Court concluded that there was a positive obligation of the state to adopt ‘minimum standards for a unified civil private law for [BiH].’¹⁵³ The importance of this move was emphasized in the extrajudicial writing of the judge rapporteur in that decision who confirmed that the Court aimed to ‘establish a clear constitutional basis for economic integration and, thereby, the integration of the state as such.’¹⁵⁴ Importantly, the Court did not stop there but rather reasoned that the general constitutional provision on the catalog of rights ‘grants a general authority to the joint institutions of BiH to regulate all matters enumerated in the catalogue of human rights.’¹⁵⁵ The judge rapporteur later lamented that the dormancy of this avenue for the expansion of state competences was ‘due to the ignorance of all political parties and their constitutional experts who do not read the decisions of the Constitutional Court.’¹⁵⁶

Still, this particular reasoning would allow the majority of the Court a year later, in the face of four strong dissents, to legitimize the imposition of the legislation by the HR which established a new judicial instance at the state level, primarily based on the need to secure the rule of law, as well as the rights to fair trial and effective remedies from ECHR.¹⁵⁷ Although this move significantly widened the possible scope of state competences, it still left some areas uncovered since they could not easily be subsumed under the obligation of the state to secure the highest level of internationally recognized human rights and fundamental freedoms to all persons within its territory. Needless to say, the Court would close this gap as well, primarily through the expansion of the power of the Parliamentary Assembly to enact legislation for the purpose of the implementation of various commitments made at the international level, particularly those relating to EU integration, as part of the broad foreign policy objectives of the Presidency of

¹⁵² Case U-5/98-II, 18 February 2000, 28. The Court also called for the adoption of framework legislation on official languages, justifying such stance by need for protection of basic normative principles such as those of ‘pluralist society’ and ‘market economy’. See Case U-5/98-IV, 18 and 19 August 2000, 34.

¹⁵³ Marko, ‘Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance’ (n 48) 29. See case U-5/98-II, 18 February 2000, 14 and 29. It could be argued that this avenue opens similar channels of informal constitutional change, in a context of particularly rigid constitution, as those made by framework statutes in the US. See William N. Eskridge Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press 2011).

¹⁵⁴ Marko, “United in Diversity?” (n 92) 538.

¹⁵⁵ Case U-5/98-II, 18 February 2000, 13.

¹⁵⁶ Marko, ‘Constitutional Reform in Bosnia and Herzegovina 2005-06’ (n 7) 214.

¹⁵⁷ Case U-26/01, 28 September 2001, 24-25.

BiH.¹⁵⁸ Moreover, the Parliamentary Assembly's power was also interpreted to include legislation that 'significantly facilitated' the responsibilities enumerated in Article III/1 of the Constitution, even if not directly based on them.¹⁵⁹

2.2.2.2. The Relationship with the HR

The Constitution does provide for the possibility of the introduction of additional responsibilities at the state level and the establishment of institutions to carry out such responsibilities, but such actions require either consent of the entities or broad political support in the Parliamentary Assembly. Indeed, a strong veto mechanism in the Parliamentary Assembly, the so-called 'entity voting', made sure that no legislation that intruded into the competences of the federal units, principally those of RS, could easily get support in the Parliamentary Assembly. In order to overcome this crucial obstacle to economic integration and the strengthening of the central state, the Court had to resort to the radical option: a change in the rule of recognition.

Faced with chronic legislative impasses in the period immediately after the war, the international community resorted to a creative reinterpretation of the HR's mandate regarding the civilian implementation of the Dayton Agreement, under Annex 10 of the Agreement,¹⁶⁰ which allowed it to unilaterally impose and amend legislation, including entity constitutions, to dismiss elected government officials, to annul decisions of courts, including BCC, and more. The HR resorted to the imposition of substantial legislation aimed at the strengthening of the central state, including on citizenship, design of bank notes, flag and anthem, laws on standardization, border service, travel documents, the state court and much else.¹⁶¹ Particularly critical of this move by the HR was the political establishment in RS, whose political leverage in the state parliament was thus abolished. They pointed out that the HR's actions ran contrary to the purpose of its mandate under Annex 10, which does not include executive and legislative prerogatives, and that its later resort to so-called Bonn Conclusions presented

¹⁵⁸ See e.g., Case U-9/07, 4 October 2008 and case U-17/09, 27 March 2010. This issue is controversial in other federal contexts, as seen in a debate as to whether treaties can expand the legislative powers of Congress in Nicholas Quinn Rosenkranz, 'Executing the Treaty Power' (2005) 118 *Harvard Law Review* 1867.

¹⁵⁹ Case U-9/07, 4 October 2008, 18.

¹⁶⁰ OHR would also resort to the section XI(2) of the Conclusions of the Peace Implementation Conference held in Bonn. See 'Bosnia and Herzegovina 1998: Self-sustaining Structures' (Peace Implementation Council, 10 December 1997) <www.ohr.int/pic/default.asp?content_id=5182#11> accessed 14 February 2015.

¹⁶¹ See Office of the High Representative, 'High Representative's Decisions by Topic' <www.ohr.int/decisions/archive.asp> accessed 14 February 2015.

nothing other than an *ad hoc* reinterpretation of the Dayton Agreement, contrary to the intention of the parties.¹⁶²

The Court would confront this issue for the first time in a case brought before it by the members of the political parties from RS in the House of Representatives of the Parliamentary Assembly against the Law on State Border Service imposed by the HR. In a very short decision, with both judges from RS dissenting, the Court put forward a theory of functional duality, by which the HR, as a power of the international community, intervenes in another legal system, substituting its authorities, in this case the Parliamentary Assembly of BiH, in order to fulfill its mandate allegedly conferred to it by the international community. In practical terms, BCC considered that it does not have jurisdiction to review the powers of the HR, or the discretion of its use, but that once the powers are implemented in the form of decrees, which are then published as statutes in the Official Gazette of BiH, the Court has regular powers of abstract control of constitutionality in relation to them.¹⁶³ The Court did not scrutinize the legal basis given by the HR for its actions but uncritically accepted them.¹⁶⁴ It did note that the status of the HR is not remarkable, and that similar examples could be seen in the mandates under the regime of the League of Nations and ‘in some respects’ in the examples of Austria and Germany after the Second World War.¹⁶⁵ After it accepted that the HR can, in principle, substitute for the democratically elected legislator and impose binding statutes in a domestic legal system, the Court proceeded to justify the constitutionality of the statute on merits, using the strategy relating to the interpretation of state competences indicated previously.

* * *

In the early post-Dayton period of chronic political instability and inaction, BCC and the HR, in the words of a former international judge at the Court, were the only ‘two institutions which acted against the disintegration of state and

¹⁶² See e.g., views of the former president of BCC from RS in Snežana Savić, ‘Neke specifičnosti pravnog poretka Bosne i Hercegovine: Uloga Visokog predstavnika za Bosnu i Hercegovinu’ [Some Peculiarities of the Legal Order of Bosnia and Herzegovina: The Role of the High Representative for Bosnia and Herzegovina] (2004) 1 (1) *Pravna riječ* 53, 57. Conversely, politicians from FBiH, particularly Bosniak national parties, have strongly criticized HR for its later inactivity. See Samir Huseinović, ‘Silajdžić se UN-u žali na Lajčaka’ [Silajdžić Complains About Lajčak to the UN] *Deutsche Welle* (14 December 2008) <www.dw.com/bs/silajd%C5%BEi%C4%87-se-un-u-%C5%BEali-na-laj%C4%8Daka/a-3874413> accessed 15 February 2015.

¹⁶³ Case U-9/00, 3 November 2000, 5-6.

¹⁶⁴ That there was room for a serious analysis can be seen from writings of scholars who deny that the HR has any such powers. See e.g., Tim Banning, ‘The ‘Bonn Powers’ of the High Representative in Bosnia and Herzegovina: Tracing a Legal Figment’ (2014) 6 *Goettingen Journal of International Law* 259, 302. See, however, *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 *et al.*, ECHR 2007-XII.

¹⁶⁵ Case U-9/00, 3 November 2000, 5. See also Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (Cambridge University Press 2008) 350-355.

society.¹⁶⁶ In this effort, they were not like ships passing each other at night. The Court's approach regarding the issue of the HR's interventions paved a way for a particular 'dialectic of legitimation', in Balkin's terms,¹⁶⁷ by which the HR would break the legislative gridlock, at the same time allowing the Court, in the aftermath of the challenge to the HR's actions by political actors, to legitimize the HR's actions in the admissibility stage, along with a widening of the state competences in the merits stage.¹⁶⁸ This close symbiotic relationship aimed at the integration of the state is particularly well exemplified in the following candid admission of former judge Joseph Marko:

[T]he entire system was based upon the tacit consensus between the Court and the High Representative that the Court in exercising its power to review all legislative acts whomever they will emanate from will always confirm the merits of his legislation as can be seen from those judgments.¹⁶⁹

The cited statement was quickly picked up by the political establishment of RS which regularly cites it in its reports to the UN Security Council as evidence of political collusion between the Court and the HR.¹⁷⁰ Whatever the merits of RS's critiques of the Court's approach, it seems undeniable that BCC 'did provide the ground for a strengthening of the state responsibilities in order to counterbalance the disintegrative forces flowing from the division of powers.'¹⁷¹ Indeed, this paved the way for a significant transfer of competences to the state level and the establishment of numerous new institutions so that now the 'existing legal basis [on responsibilities of state and entities] does not reflect

¹⁶⁶ Joseph Marko, 'Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina' (2004) 1 *European Diversity and Autonomy Papers* 5, 9.

¹⁶⁷ Jack M. Balkin, 'Constitutional Interpretation and Change in the United States: The Official and the Unofficial' (2015) Yale Law School Public Law Research Paper No. 542, 10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594925> accessed 15 May 2015.

¹⁶⁸ See also case U-16/00, 2 February 2001; case U-25/00, 23 March 2001; case U-26/01, 28 September 2001.

¹⁶⁹ Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance' (n 48) 18. HR tolerated BCC's review of its interventions, because this legitimation was beneficial to it as well. See e.g., Philippe Leroux-Martin, *Diplomatic Counterinsurgency: Lessons from Bosnia and Herzegovina* (Cambridge University Press 2014) 218.

¹⁷⁰ See e.g., President of the Republic, 'Republika Srpska's 12th Report to the UN Security Council', October 2014 <www.predsjednikrs.net/wp-content/uploads/2014/11/Republika-Srpska-12th-Report-to-UNSC.pdf> accessed 12 February 2015.

¹⁷¹ Marko, 'Post-conflict Reconstruction through State- and Nation-building' (n 166) 11. Also Joseph Marko, 'Integration durch Recht: Anmerkungen zur Funktion der Verfassungsgerichtsbarkeit am Beispiel der Judikatur des Verfassungsgerichts von Bosnien und Herzegowina' in Monika Mokre, Gilbert Weiss and Rainer Bauböck (eds), *Europas Identitäten. Mythen, Konflikte, Konstruktionen* (Campus 2003) 174.

the existing legal situation in the country, *i.e.*, its constitutional reality.¹⁷² An attempt to rectify this situation through the codification of all the informal constitutional changes, including the introduction of ‘framework legislation,’ or the so-called ‘European clause,’ allowing the Parliamentary Assembly to live up to the country’s international commitments, failed with the downfall of the so-called ‘April package’ of constitutional amendments in 2006. This resulted in the perpetuation of counter-interpretation of the Constitution by the political and legal establishment in RS, which continues to challenge the Court’s jurisprudence in this area.¹⁷³

¹⁷² Steiner and Ademović (n 1) 575.

¹⁷³ See e.g., President of the Republic, ‘Letter by the President of the Republika Srpska with the analysis of ‘The Legal basis of Republika Srpska’s planned referendum’, 28 July 2015 <www.predsjednikrs.net/en/письмо-председника-республике-српске-2/?lang=en> accessed 3 August 2015.

3.

Case Studies

To appreciate how these considerations play themselves out in the adjudicative practice of the Court, we briefly overview three important cases in order to strengthen the initial activism hypothesis. We initiate the assessment with one partial decision in a landmark case of the Court, generally considered to be a pinnacle of its activism, because of its important impact on both the nature of the political regime in the country and its effects on the state structure. For methodological purposes, we have relied on what Hirschl calls the ‘most difficult case’ design of inference-oriented analysis to test whether our hypothesis can survive further case studies most unlikely to be in favor of it.¹⁷⁴ For that reason, we have chosen two landmark cases that present the most important challenges to the hypothesis in order to assess if it can survive them. These were instances where the Court expressed judicial restraint, even though it had enough argumentative resources and was expected to act in an activist fashion.

3.1. Case Concerning the Constitutionality of Entity Constitutions (U-5/98-III)

3.1.1. Relevant Background

That the post-war political situation in BiH was characterized by a very unstable *modus vivendi*, procured through threats of further NATO bombardments, rather than more robust and voluntary overlapping consensus on the future of the state, is generally not disputed.¹⁷⁵ In the words of the second president of the Court, the initial entity constitutions ‘contained the constitutional projection of entities as countries in full capacity’ and the changes were needed ‘in the sense of constitutional organization of entities as part of the state of BiH, rather than countries.’¹⁷⁶ The Constitution did provide that the entity constitutions were to be

¹⁷⁴ Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 *American Journal of Comparative Law* 125, 145.

¹⁷⁵ See e.g., David Feldman, ‘The Role of Constitutional Principles in Protecting International Peace and Security Through International, Supranational and National Legal Institutions’ (2008) 6 *New Zealand Journal of Public and International Law* 1, 2.

¹⁷⁶ Kasim Begić, ‘Uvodna riječ’ [Introduction] (2000) 4 (5) *Bilten Ustavnog suda Bosne i Hercegovine*, ix, x.

amended within three months from its entry into force, in line with its supremacy clause, but the internal contradictions and antimonies left a lot of doubts as to the extent of the changes that were needed.¹⁷⁷ Already in 1998, the Bosniak member of the Presidency of BiH challenged numerous provisions of the entity constitutions – from the use of certain expressions such as ‘borders’ to designate inter-entity boundary lines, to provisions on extradition, asylum, the national bank of RS, state property, official languages, the position of the Orthodox church in RS and other issues – and it immediately became clear that the decision of the Court could have far reaching legal and political consequences.

Over the course of the year 2000, the Court delivered four partial decisions in which it upheld most of the challenges to the entity constitutions,¹⁷⁸ striking many of their provisions as unconstitutional, and putting in motion a strenuous and somewhat bizarre process of ‘implementation’ of the decision, as will be explored further. Because of the constraints of this study, we cannot give due regard to all the decisions, nor to all of their interesting and complex legal aspects. Rather, we will focus in our analysis on those aspects of the decision where the Court has allegedly exemplified most activism. Of particular interest is its third partial decision – the second being an object of brief analysis in the previous section – that significantly divided the Court, and in which it had to consider the extent to which the claims of collective ethnic equality, as allegedly enunciated in one line of the Preamble to the Constitution, could be used to challenge the very concept of sovereignty and the constitutional nature of the constituent entities as exclusive political communities of Serbs (RS) and Bosniaks and Croats (FBiH), respectively.

3.1.2. Decision

The crucial question guiding the Court’s legal analysis of the constitutionality of the exclusive ethnic designation of two entities is exemplified in the following dilemma: ‘Does the last line of the Preamble, particularly the designation “Bosniaks, Croats and Serbs, as constituent peoples (together with others)” contain a constitutional principle [which] in relation with other provisions could serve as a standard of control?’¹⁷⁹ The Court sidestepped the issue of the normativity of the Preamble through the invocation of the Vienna Convention

¹⁷⁷ See e.g., Venice Commission, ‘Opinion on the Compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina’ in *Opinions on the Constitutional Regime of Bosnia and Herzegovina* (Venice Commission 1 January 1998), 17-23.

¹⁷⁸ Case U-5/98-I, 28, 29 and 30 January 2000; Case U-5/98-II, 18 and 19 February 2000; Case U-5/98-III, 30 June and 1 July 2000; U-5/98-IV, 18 and 19 August 2000. Decisions of the majority are cited by paragraphs, while dissents are cited by pages as numerated in *Bilten Ustavnog suda Bosne i Hercegovine 2000. godina* [Bulletin of the Constitutional Court of Bosnia and Herzegovina 2000] (Ustavni sud BiH 2001).

¹⁷⁹ Case U-5/98-III, 30 June and 1 July 2000, 51. See also Marko, “United in Diversity?” (n 92) 535.

on the Law of Treaties and the jurisprudence of the Canadian Supreme Court.¹⁸⁰ This, in turn, forced the Court to establish what rights and obligations and other normative consequences a short descriptive designation of three dominant ethnic groups as ‘constituent peoples’ in effect would have. The four dissenters in the case, namely two Serb and two Croat judges, as well as some of the representatives of entity legislatures, vigorously denied that the last line of the Preamble established the principle of collective ethnic equality on the entire territory of BiH, including its constituent entities, but rather only collective political participation and representation at the state level. For that purpose, they put forward a number of arguments, two of which are of particular interest.

The first argument related to the unclear meaning of the phrase ‘constituent peoples’, which the dissenters claimed should be interpreted through the use of historical interpretation, and which can thus be connected to the argument from function of the Dayton Agreement, which in their view predominantly supported the idea that the Constitution legalized the *status quo* and the position of entities as exclusive ethnic bases where respective ethnic groups realize their ethnic sovereignty.¹⁸¹ The second argument put forward reached the same conclusion through the analysis of the institutional structure of the Constitution,¹⁸² namely the fact that the Constitution establishes two entities, one of which has an unambiguously ethnic name,¹⁸³ and that parity at the state level is achieved through the election of ethnic representatives exclusively from ‘their’ ethnic bases, such as the case with the Presidency of BiH and the House of Peoples of the Parliamentary Assembly, where such constitutionally entrenched ethnic

¹⁸⁰ Case U-5/98-III, 30 June and 1 July 2000, 19, 26.

¹⁸¹ Case U-5/98-III, 30 June and 1 July 2000, 37, 46 (expert of the House of Peoples of the Parliament of FBiH), 40 (expert of the National Assembly of RS); Dissenting opinion of Judge Miljko 99; Dissenting opinion of Judge Savić 113; Dissenting opinion of Judge Popović 127; Dissenting opinion of Judge Zovko 138 (‘[W]e [can] conclude that THERE WAS NEVER ANY MENTION that the structure of the entities will be changed by the final peace agreements in relation to the constituent peoples’). American diplomat Richard Holbrooke, considered one of the ‘architects’ of Dayton Peace Agreement, indicated a similar view in a candid TV interview: ‘Decision for the country to be divided on ethnic basis was made by the citizens of your country, and not USA. I did not like that in Dayton. I told president Izetbegović that I did not like that. I also told Haris Silajdžić, presidents Tuđman and Milošević that I did not like that. The people insisted on that’. Cited in Šarčević, *Dayton Constitution* (n 49) 60.

¹⁸² Case U-5/98-III, 30 June and 1 July 2000, 31; Dissenting opinion of Judge Savić 112-113; Dissenting opinion of Judge Popović 125-126; Dissenting opinion of Judge Zovko 148-149.

¹⁸³ Dissenting opinion of Judge Popović 127 (‘If Republika Srpska is not a state of Serbian people... then why did the Constitution of BiH... recognize the name “Republika Srpska” and what could the word ‘srpska’ [Serbian - NK] mean if not that it is a state of Serbian people...’); Dissenting opinion of Judge Zovko 138 (‘But it is NOT CLEAR to me, how after the decision of the Court on constitutionality of peoples on the entire territory of BiH, could an entity named “Republika Srpska” continue to exist’).

discrimination would not make any sense if all the constituent peoples were enjoying equality everywhere.¹⁸⁴

For its part, the Court recognized the intent of the framers towards the affirmation of the 'continuity of [BiH] as a democratic multinational state',¹⁸⁵ in the fact that the Preamble designates the dominant ethnic groups as 'constituent peoples', and endows them with the status of 'peoples',¹⁸⁶ which is in 'clear contrast in relation to the category of national minorities'.¹⁸⁷ The Court's particular understanding of the notion of 'democratic multinational state' led it to conclude that territorial organization 'cannot be used as a constitutional legitimation for ethnic domination, national homogenization or the right to maintain the effects of ethnic cleansing',¹⁸⁸ and furthermore, that in principle segregation 'is not a legitimate goal in democratic society'.¹⁸⁹ Regarding the second argument, BCC particularly relied on the fact that ethnic representatives are not delegated to state institutions by their ethnic counterparts but are rather elected by all the citizens of the entities.¹⁹⁰ It also rejected the argument regarding the alleged legalization of the *status quo*, concluding that the 'global goal of the Dayton peace agreement was to secure the return of refugees and the displaced persons to their homes and thus to establish again the multiethnic society that had existed before the war without any territorial divisions with ethnic sign'.¹⁹¹ The Court thus enunciated the general principle of the constituency of peoples as prohibiting 'any special privileges for one or two of those peoples, every domination in structures of government and every ethnic homogenization through segregation based on territorial principle'.¹⁹²

The Court then proceeded to reach the same conclusion of unconstitutionality but rather through the consideration of the arguments of individual discrimination, particularly through the invocation of the antidiscrimination provisions of the Constitution, and various international human rights instruments incorporated in it, and particularly Annex VII of the Dayton Agreement on the return of refugees, which provided in its Article I/3.a) that the entities must eliminate all 'domestic

¹⁸⁴ Dissenting opinion of Judge Savić 112 ('If Bosniaks, Croats and Serbs were constituent peoples, individually in each of the entities, Bosnia and Herzegovina would not be a complex state union, as it is under Dayton peace agreement (Constitution of BiH), namely the very *raison d'être* of the entities would disappear'). As noted by one commentator: '[BCC] declare[d] the basic structure of Dayton constitution to be unconstitutional', in Robert M. Hayden, "'Democracy without a Demos? The Bosnian Constitutional Experiment and the Intentional Construction of Nonfunctioning States' (2005) 19 East European Politics & Societies 226, 249.

¹⁸⁵ *ibid* 53.

¹⁸⁶ *ibid* 52.

¹⁸⁷ *ibid* 63.

¹⁸⁸ *ibid* 61.

¹⁸⁹ *ibid* 57.

¹⁹⁰ *ibid* 67.

¹⁹¹ *ibid* 73.

¹⁹² *ibid* 60.

legislation and administrative practice with discriminatory intent or effect.’ The Court went on to give a concrete meaning to this provision in a detailed four-pronged antidiscrimination test.¹⁹³ After consideration of available statistical data, the majority concluded that the designation of RS as a ‘state of Serb people’ in the constitution of RS, as well as the invocation of ‘Bosniaks and Croats as constituent peoples, along with others...’ in the constitution of FBiH, has to be read literally in showcasing the discriminatory intent of its creators.¹⁹⁴

3.1.3. Commentary

The decision in the case U-5/98 is arguably the most famous and controversial case of BCC and has also been the Court’s most widely cited decision internationally.¹⁹⁵ In particular, its third partial decision radically challenged the very concept of sovereignty and political identities of entities, and by extension the state as a whole, and it can be cited as one of the paradigm instances of the ‘judicialization of pure or mega politics’ in Hirschl’s terms.¹⁹⁶ Judicial activism of BCC in this case can be recognized at all the levels identified by Sadurski: at the level of importance of the legal acts challenged, namely the significant provisions of the entity constitutions, a substantial room for choice left to the Court by Constitutional text, allowing it also to rule otherwise, as well as the nature of its very normatively heavy and contentious legal reasoning. In reaching its decision the majority of the Court, unable to identify a provision indicating clear normative conflict, was forced to employ an entire arsenal of interpretation methods, namely textual, systematic, teleological and historical, with varying degrees of persuasiveness. Indeed its legal reasoning has justly been described as ‘very result oriented.’¹⁹⁷

The decision was widely seen by the political and academic establishment in RS, and partially in FBiH, as overstepping BCC’s mandate, and the Court was

¹⁹³ *ibid* 79. As judge rapporteur explained, the Court ‘implicitly incorporated’ the case-law of the US Supreme Court when constructing the anti-discrimination test. See Marko, ‘Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance’ (n 48) 10.

¹⁹⁴ *ibid* 99-140.

¹⁹⁵ See e.g., Stahn, ‘Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken’ (n 138); Nicolas Maziau, ‘Le contrôle de constitutionnalité des constitutions de Bosnie-Herzégovine. Commentaire de décisions de la Court constitutionnelle, Affaire n° 5/98 Alija Izetbegovic’ (2001) *Revue française de droit constitutionnel* 195; Anna Morawiec Mansfield, ‘Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina’ (2003) 103 *Columbia Law Review* 2052; Rosenberg (n 13) 382-391.

¹⁹⁶ See Ran Hirschl, ‘The New Constitutionalism and the Judicialization of Pure Politics Worldwide’ (2006) 75 *Fordham Law Review* 721; Ran Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93. This case was cited by all the interlocutors in interviews when asked about the most important decisions of the Court.

¹⁹⁷ Stahn, ‘Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken’ (n 138) 689.

openly accused by dissents of acting as a ‘constitution-maker, a mechanism for the simplest manner of the change of Constitution of BiH.’¹⁹⁸ The extrajudicial writings of the judge rapporteur show that the Court was faced with much wider room for maneuvering than is recognized in the majority decision. As judge Marko correctly notes, ‘[i]t immediately became clear that due to the vague language of the constitutional text, there was not an obvious solution despite all of the arguments in the written statements of the parties.’¹⁹⁹ Faced with the choice between historical interpretation (and the intent of the drafters) and teleological interpretation,²⁰⁰ which would have led it to two completely different results – ethnic segregation or integration of the society – the bare majority of BCC, against four vigorous dissents, decided for the latter, fully aware that in such a situation a choice is ‘in the final analysis ... a political question resolved by applying the majority principle in the decision making process of the court.’²⁰¹

As was already indicated, the Court used two different and independent lines of argumentation to reach the same result, the first one establishing the principle of collective ethnic equality and the second one challenging the provisions of entity constitutions using an antidiscrimination test closer to an individualist paradigm. The first one was more burdensome, requiring the Court first to unlock the normative potential of a vague line of the Preamble, and then establish the ‘overarching principle of the Constitution’,²⁰² namely collective ethnic equality, as a standard of control. In building up the theory of (unwritten) constitutional principles, the Court relied heavily, and uncritically,²⁰³ on two different decisions of the Canadian Supreme Court. Importantly, in order to fill up the principle with usable content, the Court had to infuse the Constitution with an egalitarian ethos that allegedly guided the framers, including the negotiators of RS, regardless of the fact that its army had committed genocide in Srebrenica just months before. All four dissenters spent considerable time diffusing this idea, particularly emphasizing the fact that RS was effectively legalized in Dayton, with its ethnically exclusionary name, despite its horrendous track record of human rights

¹⁹⁸ Dissenting opinion of Judge Savić 122. Also Dissenting opinion of Judge Popović 132; Dissenting opinion of Judge Zovko 135 (‘My position is that the decision of the Court on the constitutionality of peoples is the most obvious REVISION of the General Framework Agreement for Peace in Bosnia and Herzegovina’).

¹⁹⁹ Marko, ‘“United in Diversity?”’ (n 92) 535.

²⁰⁰ Marko, ‘Post-conflict Reconstruction through State- and Nation-building’ (n 166) 11. See also Marko, ‘Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: First Balance’ (n 48) 35.

²⁰¹ Marko, ‘“United in Diversity?”’ (n 92) 540. Indeed he is very candid, characterizing the interpretative acrobatics in that decision as ‘rationalization[s]’, done for the purpose of ‘integration of state, economy, and multiethnic society, and not the other way round’. Similarly on ‘political alternatives’ opened to BCC in this decision, in Marko, ‘Integration durch Recht’ (n 171) 171.

²⁰² Case U-5/98-III, 30 June and 1 July 2000, 63.

²⁰³ See e.g., Jean Leclair, ‘Canada’s Unfathomable Unwritten Constitutional Principles’ (2002) 27 *Queen’s Law Journal* 389.

violations against the non-Serb population that its negotiators now allegedly recognized as co-equals. This line of argumentation was unpersuasive, not only to four domestic dissenters, but also to international judge Hans Danelius from Sweden, who in his concurring separate opinion unambiguously rejected the idea of the normativity of the Preamble but also distanced himself from the entire line of argumentation concerning collective ethnic equality, rather basing his decision on standard discrimination analysis from individualist human rights discourse.²⁰⁴ The opinion of Judge Danelius shows that the Court had an avenue of a more restrained reasoning opened to it.

The Court's normative choices were praised by many for its contributions to a particular theory of (collective) equality and for 'using the BiH Constitution to soften the hard edges of consociationalism.'²⁰⁵ Others, including later international judges at BCC,²⁰⁶ joined Judge Danelius' reasoning in criticizing the Court for unnecessarily relying on 'collectivist and ethnic logic',²⁰⁷ which legitimized it in the legal culture and thus 'entrenched the ethnic aspect of the Constitution.'²⁰⁸ Indeed, the decision was followed by a burdensome process of the 'implementation' of the decision and its principle of collective ethnic equality, although the decision did not formally require its implementation since it simply invalidated legislation contrary to Constitution.²⁰⁹ Thus, the Court's use of the first line of argumentation had an unintended consequence of propagation of discriminatory consociational mechanisms from the state level throughout the constitutional system²¹⁰ and necessitated the Court's intervention fifteen years later.²¹¹

²⁰⁴ Concurring separate opinion of Judge Danelius 93-96. Judge Danelius did not even consider it necessary to rely on the four-tier antidiscrimination test established by his four colleagues in the majority.

²⁰⁵ Rosenberg (n 13) 388. Also Mansfield (n 195).

²⁰⁶ Grewe and Riegner (n 8) 20-21; Feldman, 'Factors Affecting the Choice of Techniques of Constitutional Interpretation' (n 107) 8. See also Stahn, 'Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken' (n 138) 689-690; Hayden (n 184) 250.

²⁰⁷ Grewe (n 54) 6.

²⁰⁸ McCrudden and O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (n 50) 87.

²⁰⁹ See Maziau (n 195) 216. However, as indicated by the Venice Commission, the 'very elaborate reasoning used by the Court to reach its conclusion had to lead to a much more thorough – and politically arduous – overhaul of the two [entity] Constitutions'. Venice Commission, 'Comments on the Implementation of Decision U5/98 ("Constituent Peoples") of the Constitutional Court of Bosnia and Herzegovina by the Amendments to the Constitution of the Republika Srpska' CDL (2002) 127, 1 October 2002, 3.

²¹⁰ See e.g., Zlatan Begić and Zlatan Delić, 'Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing Fair Solutions' (2013) 11 *International Journal of Constitutional Law* 447, 454-463.

²¹¹ Case U-14/12, 26 March 2015. BCC found the power-sharing mechanisms relating to presidents and vice-presidents in both entities, introduced after its decision in case U-5/98-III, as unconstitutional.

3.2. Case Concerning the Constitutionality of the Labor Law of RS (U-19/01)

3.2.1. Relevant Background

The last decision of the first mandate of BCC proved to be one of its most controversial, and it heralded the end of its ‘heroic period’: instead of a bang in the form of a truly transformative decision, it ended in a whimper signaling the limits of the Court’s activism. The case was brought by the Bosniak member of the Presidency of BiH, and it concerned Article 152 of the then Labor Law of Republika Srpska entity which provided for the rights of workers whose employment relationship was terminated illegally after December 31, 1991. Considering the circumstances prevalent at the time the provision was covering, it was primarily geared towards individuals who lost their jobs during the campaign of ethnic cleansing of the non-Serb population from the territory of the then secessionist *de facto* regime of RS. In essence, the indicated provision prescribed that such individuals only have a right to file a request for severance pay within three months from the effective date of the Law. In its detailed summary of facts and the survey of the historical context, the Court itself recalls the circumstances of ‘massive displacements and expulsions of people based on ethnic origin’, including the use of ‘more subtle means’ of ethnic cleansing, such as the termination or suspension of labor relationships with employees on ethnic grounds.²¹²

The applicant claimed that the Law – by maintaining the *status quo* particularly by not providing for the right of workers to continue with their former employment – in effect legalized the consequences of ethnic cleansing and infringed the right to return provided in the Constitution. He emphasized that the ‘possibility to take up the former working relationship is a “key condition” for a maintainable return’,²¹³ which would otherwise become illusory. In this argumentation he relied heavily on the Court’s reasoning from the decision in case U-5/98-III, which concluded that the content of the right of return from the Constitution was filled up by the concrete duties of the entities as indicated in Article 2 to Annex VII of the Dayton Agreement.²¹⁴ The urgency of the situation is also seen in the estimates from the relevant period, indicating that the unemployment rate among the returnees was as high as 92%.²¹⁵ The respondent in this case, the

²¹² Case U-19/01, 2 November 2001, 4 and 5.

²¹³ *ibid* 10.

²¹⁴ Case U-5/98-III, 1 July 2000, 95, namely a duty ‘to create the necessary political, economic and social conditions to the voluntary return and harmonious reintegration’.

²¹⁵ ‘Brotherhood and Disunity, in Survey of the Balkans: A Ghost of a Chance (special section)’ *Economist* (New York, 22 January 1998) 9.

National Assembly of RS, did not provide the Court with its reply to the request for the review of constitutionality.

On 2 November 2001 a heavily divided Court, by five votes to four, rejected the request of the applicant and decided that the indicated provision of the Law was consistent with the Constitution of BiH.

3.2.2. Decision of the Court

Considering the fact that the Convention does not protect the right to work, the Court concluded that the claim of alleged discrimination under Article 14 ECHR cannot be pursued under that provision.²¹⁶ It thus proceeded with the examination of the possible infringement of Article II/2 of the Constitution which contains a non-discrimination clause, in relation to the right to work under Article 6/1 of the International Covenant on Economic, Social and Cultural Rights and the rights of refugees and displaced persons under Article II/5 of the Constitution. In relation to the last point, the Court concluded that ‘the public authorities in [BiH] are also obliged to refrain from discrimination when issuing acts or regulations in the context of the individual’s enjoyment of the right to work as well the right to return to one’s home.’²¹⁷

Faced with a provision which was facially ethnically neutral, the Court first had to determine whether it could still be considered to make such a differentiation between certain individuals or groups. Analysis of the relevant provision through historical context led it to conclude that the provision does implicitly distinguish between members of different ethnic groups, namely Bosniak and Croat employees which suffered discriminatory dismissals during the relevant period, and employees of Serb ethnicity whose employment relationships were not affected in a similar manner by the campaigns of ethnic cleansing on the territory of RS.²¹⁸ Thus, the main issue to be determined by the Court is whether such different treatment in the Labor Law could be justified.

Since the National Assembly of RS did not provide its reply to the request of the applicant, it was for the Court to reconstruct a possible legitimate aim that the Labor Law, in its contested provision, pursued. It first considered a possible aim of ‘stabilization’ of working positions of the employees who had replaced those illegally dismissed, but it rejected this suggestion since it could not prevail over the interests of dismissed employees, particularly considering that they were victims of discriminatory practice, and many were still unemployed. The Court then concluded that the aim of the contested provision is the creation of ‘legal certainty for those companies that ceased or reduced their activities due to the war, and which were after the war faced with the problem of resuming

²¹⁶ Case U-19/01 (n 212) 15.

²¹⁷ *ibid* 18.

²¹⁸ *ibid* 22.

their work under the conditions of a market economy.²¹⁹ It emphasized that the pursuit of such an aim could also be ‘essential for investors in such companies and for the general development of the economy.’²²⁰ The Court indicated that this aim conflicted with the rights and interests of those illegally dismissed to be reinstated into their previous employment relationships, and after recognizing that such interest is of ‘high importance,’ it dismissed it, considering that the public interest ‘could reasonably be considered to prevail.’²²¹ The Court also concluded that the choice of the measure, namely the payment of severance pay in relation to the duration of the employment, was a proportionate measure, which does not ‘entirely neglect the individual’s economic interest in his or her former working position.’²²² Regarding the amount of the severance pay, the Court emphasized that the legislator enjoyed a certain margin of appreciation, ‘within the limits laid down in the Constitution’, and that in the ‘view of the difficult economic conditions of the private and public companies affected,’ it could not be concluded that it transgressed this margin of appreciation.²²³

3.2.3. Commentary

The decision is notable for how much it concedes to the applicant, both in terms of facts concerning the clear pattern of past discriminatory treatment, recognition of implicit differentiation of treatment in a facially neutral legislative provision, and the clear rejection of one possible justification of such different treatment. The Court’s unequivocal statement of facts was praised as part of the project of the ‘judicial establishment of the truth in the process of analyzing and overcoming the past’, particularly in circumstances where other means to affect that are non-existent.²²⁴ On the other hand, the Court proceeds to reject the request in a cursory manner, with reasoning contained in three short paragraphs, recognizing the priority of one interest over another without further elaboration, and deferring to the margin of appreciation enjoyed by the legislator as to the amount of the severance pay, apparently considering the prevalent economic situation at the time as a decisive factor. The decision of the majority in this case stands in stark contrast to the soaring language of the same Court a year earlier in the cited decision U-5/98-III.

The Court’s proportionality analysis was particularly chastised since the payable amount ‘in most cases does not exceed the equivalent of few hundred Euros’, and thus seemed ‘completely inadequate to constitute fair compensation

²¹⁹ *ibid* 25.

²²⁰ *ibid*.

²²¹ *ibid* 26.

²²² *ibid* 27.

²²³ *ibid*.

²²⁴ Steiner and Ademović (n 1) 138.

to the workers.²²⁵ The fact that discriminatory dismissals had a negative impact on a number of other socio-economic rights, such as the right to pension, as a result of subsequent unemployment, was also emphasized.²²⁶ This reflects the view expressed in the dissenting opinion, namely that Article II/5 of the Constitution, dealing with the right to return, also includes the obligation for returnees to be 'provided with the necessary conditions to make a living in their familiar surroundings.'²²⁷ Recalling also the applicant's claim that the provision as it stands does not allow for sustainable return, the decision of the majority is hard to square with the alleged goal of the framers of the Constitution for the reintegration of the society. This missed opportunity was particularly emphasized by the international judge Joseph Marko, who was the driving force behind the Court's previous decision and who was the only dissenter to express his views in writing. In Marko's opinion, the right to return, as previously elaborated by the Court, makes the 'categorical exclusion of reinstatement and the lack of any equivalent compensatory solution' clearly disproportional to the aim to be achieved.²²⁸ He further considered that the legislator's actions, and in extent the Court's decision, had the effect of upholding and 'in some way legalis[ing]' the results of grave human right violations in the form of ethnic cleansing, 'thereby creating new discrimination.'²²⁹ His opinion is also important as it charts the road not taken if the Court had been activist. Starting with a 'constitutional imperative of utmost importance' to avoid the legalization of discriminatory practices or their reinstatement in effect through new legislation, he indicates the need for the proportional distribution of economic burden generated by war between all parts of the population, and also public and private sectors.²³⁰ One way this could be done is through an adoption of an 'affirmative action plan to re-employ at least a certain number of Bosniac and Croat men and women', which would then 'bring the right to return into balance with the public interest in a sustainable economy.'²³¹

We can only speculate to what degree this particular Law and the Court's decision upholding it had on the relative failure of Annex VII, and the process of return of the displaced,²³² but it seems undeniable that the decision of the majority presents a 'backwards step in relation to the goal of the Dayton

²²⁵ 'Behind Closed Gates: Ethnic Discrimination in Employment' (*Amnesty International*, 26 January 2006) 37<www.refworld.org/docid/43fb355c4.html> accessed 21 March 2015.

²²⁶ *ibid* 38.

²²⁷ Dissenting opinion of judge Marko in case U-19/01 (n 212) 12.

²²⁸ *ibid* 12.

²²⁹ *ibid* 7.

²³⁰ *ibid* 16.

²³¹ *ibid*.

²³² Even in 2015 UNHCR's representative in BiH lamented the fact that 'minority returnees' still need support to obtain sustainable solutions. Andrew Mayne, 'Bosnia and Herzegovina 20 years on from Dayton' (2015) *Forced Migration Review* 9.

Agreement²³³ of reintegration of the pluralist society, at least as enunciated by the same Court a year earlier, and thus it seems to present a formidable challenge to the central hypothesis of this paper. It would be a case where activism would not be surprising, considering the argumentative resources already present in the Court's jurisprudence and as recalled by judge Marko. Importantly, however, the context of this case did not present an opportunity for the Court either to unwind a consociational bargain or to strengthen a central state. Rather, we would argue that its potential socio-economic implications should be seen as a salient factor that could explain the Court's ruling, considering the general circumspection of constitutional courts, exercising strong review powers, when facing social welfare rights.²³⁴ Indeed, also in later cases the Court has afforded a very wide margin of appreciation to the legislator in this area, concluding that it needs 'very strong evidence' that the legislator has overstepped the limits of its free discretion when dealing with issues with 'important economic consequences.'²³⁵ Such a stance is explainable in the context of an economically weak country, even if the reasoning of the Court is not always satisfactory.²³⁶ It cannot be excluded that the Court may have also been influenced by the difficulties of the implementation of its decision in the case U-5/98 from a year earlier.

3.3. Case Concerning the Electoral Discrimination (AP-2678/06)

3.3.1. Relevant Background

This case originated with the appeal lodged by the Party for Bosnia and Herzegovina ('Stranka za Bosnu i Hercegovinu') and Ilijaz Pilav, a Bosniak politician from Srebrenica, against the judgment of the Court of BiH and the decisions of the Central Election Commission of BiH from mid-2006, upheld by that judgment. Since Pilav declared himself as Bosniak, the Central Election Commission of BiH rejected his application for certification as a candidate for the Presidency of BiH from RS entity, since that could only be done with regards to individuals of Serbian ethnicity²³⁷.

The appellants considered that Pilav was directly discriminated against on the grounds of ethnic or national origin, in violation of Article 1 of Protocol No. 12 of

²³³ Graziadei (n 52) 26.

²³⁴ See e.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008).

²³⁵ Case U-83/03, 22 September 2004, 58. Also Case U-26/00, 21 December 2001; Case U-15/07, 4 October 2008, 35.

²³⁶ See e.g., partially dissenting opinion of Judge Feldman in case U-83/03, 22 September 2004.

²³⁷ Case AP-2678/06, 29 September 2006, 4.

the ECHR. Furthermore, they considered that Pilav, as a Bosniak from RS, was also discriminated against as being a member of a national minority, in violation of Article 4 of the General Convention for Protection of National Minorities. Finally, it was argued that his equal right to stand for election and be elected, from Article 25 of the ICCPR, was also violated. The applicants emphasized that pursuant to Article II/2 of the Constitution, the rights and freedoms set forth in ECHR and its Protocols shall apply directly in BiH and that they ‘shall have priority over all other law.’

On September 29, 2006, BCC, by a seven-to-two majority, dismissed the appeal as ill-founded.

3.3.2. Decision

Since the decision of the Central Electoral Commission had a clear basis in the Election Law of BiH and the Constitution itself, the Court had to directly confront the allegations of the applicant Pilav concerning direct discrimination based on his national or ethnic origin.²³⁸ After noticing that not every differential treatment constitutes *a priori* discrimination, but only that which is lacking objective or reasonable justification, particularly citing Article 25 of the ICCPR and its notion of ‘unreasonable restrictions’, the Court proceeded in the following three paragraphs to determine whether the restrictions in the case can be justified.²³⁹ It noticed that the ECtHR, in its interpretation of Article 3 of Protocol No. 1 to the ECHR, is of the position that the rights to vote and to stand for elections are not absolute and, moreover, that the countries enjoy a wide margin of appreciation in the organization of their electoral systems. Having that in mind, the Court concluded that the relevant provisions of the Election Law of BiH, and of the Constitution itself, ‘should be viewed in the light of discretionary right of the State to impose certain restrictions when it comes to the exercise of individual rights.’²⁴⁰ Immediately after that, the Court concluded that the restrictions are justified ‘by the specific nature of internal order of [BiH] that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialog between opposing parties’ and, moreover, that the relevant provision of the Constitution was included precisely for the purpose of ensuring that the members of the Presidency come only from the three dominant ethnic groups. After this conclusion, which by the logic of the analysis is a recognized legitimate aim of the provisions, the Court proceeded to justify it again: the indicated restrictions are justified ‘at this moment since there is a reasonable justification for such treatment’, having in mind ‘the current situation in BiH and specific nature of its constitutional order as well as bearing in mind the current constitutional

²³⁸ *ibid* 17.

²³⁹ *ibid* 19.

²⁴⁰ *ibid* 21.

and law arrangements.²⁴¹ Finally, the Court concluded that the restrictions do not place an excessive burden on the applicants since they are proportional to 'the objectives of general community in terms of preservation of the established peace, continuation of dialog, and consequently creation of conditions for amending the mentioned provisions of the Constitution of (BiH) and Election Law.'²⁴² The Court also briefly considered and rejected the arguments based on Article 4 of the Framework Convention for the Protection of National Minorities, concluding that Bosniaks from RS do not have a minority status and thus cannot invoke minority rights in their arguments against the complete exclusion from a public office.²⁴³

3.3.3. Commentary

A first thing to notice about such a landmark decision of the Court is its uncharacteristically jumbled, unsubstantiated and circular reasoning, which could partially be explained by the fact that the decision was made in summary proceedings after the applicant submitted the appeal just several days before the general elections.²⁴⁴

In her excellent analysis of the Court's decision, Elisabeth Raulston sees the basic legal error in the reasoning of BCC in its misapplication of the relevant standard of review in justifying its decision: it relied solely on its electoral rights standard, under Article 3 of Protocol 1, and completely disregarded the ECtHR's discrimination standard, under Article 14.²⁴⁵ She particularly cites the *Aziz* case,²⁴⁶ in which the ECtHR made clear that in a situation where inequality of treatment is 'a fundamental aspect of the case', as was certainly true in this context, a discrimination claim has to be considered besides electoral rights claims. Even though *Aziz* presented an analogous case in that it concerned an individual who was disqualified from voting based on his ethnic origin, BCC did not even consider it. Instead, it relied on electoral rights cases that did not concern discrimination claims. Furthermore, Raulston considers that the Court even applied the electoral rights standard 'in an incorrect and incomplete manner.'²⁴⁷ Namely, she insists that, consistent with the ECtHR's case-law, BCC had to consider whether the imposed restrictions limited Pilav's electoral rights to the extent that they were

²⁴¹ *ibid* 22.

²⁴² *ibid*. The paradoxical nature of this reasoning, namely that upholding of discrimination is a necessary condition for its elimination, did not go unnoticed. See Hodžić and Stojanović (n 4) 26.

²⁴³ *ibid* 23.

²⁴⁴ *ibid* 24.

²⁴⁵ Elisabeth Raulston, '(Un)justifiable? A Comparison of Electoral Discrimination Jurisprudence at the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina' (2013) 28 *American University International Law Review* 669, 688.

²⁴⁶ *Aziz v Cyprus*, no. 69949/01, 22 June 2004.

²⁴⁷ Raulston (n 245) 691.

no longer effective, whether such restriction pursued a legitimate aim, and finally, if the means used were proportional. The conclusion that Raulston reached was that BCC 'erred on each of these three points'.²⁴⁸ Raulston's analysis is compelling and reflects the reasoning that the ECtHR itself adopted when it reviewed Pilav's application in 2016.

What is remarkable is that even this case is open to an activist reading. Here the Court recognized a right for itself to consider this issue on the merits, regardless of the fact that the challenged statutory provisions faithfully reflect those in Constitution. This was the last in a string of cases where the Court, in a very short period of time, made its approach less rigid regarding the compatibility of Bosnian law with its international obligations, first finding that it was not competent to review the compatibility of the Constitution with the ECHR²⁴⁹ and then finding that it also did not have competence to review the compatibility of the statutes transposing constitutional norms with the Convention.²⁵⁰ Both cases dealt with discriminatory provisions in statutes and the Constitution with regard to the Presidency of BiH and the House of Peoples of the Parliamentary Assembly. Thus, after the *Pilav* case all the sub-constitutional legislation, regardless of its content, is contestable. Importantly, the Court did not make a categorical conclusion but rather unsuccessfully attempted a proportionality analysis. In a sense, the Court's decision upholding the consociational arrangements in that case is of suspensive effect regarding its unconstitutionality, putting forward an implicit sunset clause, within the overall anti-consociational paradigm.

²⁴⁸ *ibid* 690.

²⁴⁹ Case U-5/04, 27 January 2006.

²⁵⁰ Case U-13/05, 26 May 2006.

4.

Understanding General Trends

4.1. Extensive Interpretation of Abstract Review Powers

It has been suggested that the Court's jurisprudence 'seems to oscillate between rather restrictive and more extensive conceptions of judicial review.'²⁵¹ The most popular of the self-restraining strategies that the Court employed in its decisions upholding the constitutionality of statutes, as also exemplified in two analyzed cases, was the recognition and accordance of a margin of appreciation to the legislature, and the HR when he substituted the legislators,²⁵² but it has also occasionally invoked the presumption of constitutionality and the need for conform interpretation of a statute with the Constitution.²⁵³ On the other hand, it has never invoked the political questions doctrine, even in the cases dealing with the ethnic veto, and has mostly avoided delaying strategies.²⁵⁴ Generally, however, we have to conclude that the Court has predominantly adopted a broad interpretation of its abstract review competence, which was conducive to its activism. This was in part facilitated by the open-textured nature of the Constitutional text, but also by the Court's particular understanding of its own crucial role in the constitutional system, as reflected in the view that in the face of many still unanswered constitutional questions, 'the *only* authoritative and competent interpretation is that of the Constitutional Court.'²⁵⁵ This self-legitimation of its extensive interpretation approach allowed the Court to settle a particularly vexed issue concerning its jurisdiction to review the constitutionality of bylaws, competence not expressly included in the Constitution, adopting a position that 'whenever it is possible [BCC] has to interpret its jurisdiction so as

²⁵¹ Grewe and Riegner (n 8) 46.

²⁵² See e.g., case U-16/00, 2 February 2001; case U-19/01 (n 212) 27; case U-83/03, 22 September 2004, 58.

²⁵³ See e.g., case U-42/01, 26 March 2004, 22; case U-44/01, 27 February 2004, 57; case U-14/02, 30 January 2004, 17; case U-15/07, 4 October 2008, 35. Some are more skeptical about this. See e.g., Maziau (n 195) 416.

²⁵⁴ At times when BCC temporarily had a vacancy of judges from a particular nation, delaying strategies were employed in order to strengthen the output legitimacy. See e.g., Feldman, 'Renaming Cities in Bosnia and Herzegovina' (n 104) 656. For criticisms of Court's refusal to adopt delaying strategy, see dissenting opinion of Judge Simović in Case U-16/08, 28 March 2009.

²⁵⁵ Case U-4/05, 29 October 2004, 14 (emphasis added).

to allow the widest possibility for elimination of the consequences of the violation of those rights.²⁵⁶ Inevitably, the Court has transgressed this self-imposed limitation, to the chagrin of the dissenters.²⁵⁷

The Court has also used this extensive interpretation method when acting beyond its traditional role as a negative legislator in Kelsenian terms. In one of the cases from the ‘unwinding canon’, where the National Assembly of RS failed to act upon the decision of the Court striking down as unconstitutional a number of statutes in RS concerning the ethnically exclusionary names of the cities,²⁵⁸ the Court ‘temporarily’ substituted the legislator and changed the names of thirteen cities in RS.²⁵⁹ Emphasizing the temporary nature of its decision, and its ‘overall constitutional role of objective guardian of the Constitution’, the Court unconvincingly reasoned that it had not taken up the role of a legislator,²⁶⁰ even though it acted ‘vigorously’ upon the delay of implementation, to use the expression of a former international judge.²⁶¹ As confirmed in extrajudicial writings of a former president of the Court, BCC was seriously considering acting as a positive legislator on another occasion before the Parliamentary Assembly of BiH finally acted itself.²⁶² Finally, on a number of occasions the Court has also ruled on the unconstitutionality of legal omissions in already existing statutes.²⁶³

4.2. Factors that Impact the Position and Role of the BCC

Analysis of the Court’s institutional features has indicated that they are conducive to its activism. The ongoing debate on the possible removal of international judges confirms that this particular feature is not only seen but is also, in fact, still an essential element of the Court’s activist output. This is

²⁵⁶ Case U-4/05, 29 October 2004, 16. Also case U-7/05, 2 December 2005.

²⁵⁷ See e.g., Case U-10/14, 4 July 2014; case U-28/14, 26 November 2015. See also very laconic justification of admissibility in cases dealing with contractual agreements of RS government with US lobbying firms in case U-15/08, 3 July 2009.

²⁵⁸ Case U-44/01, 27 February 2004.

²⁵⁹ Case U-44/01, 22 September 2004.

²⁶⁰ *ibid.*

²⁶¹ Feldman, ‘Renaming Cities in Bosnia and Herzegovina’ (n 104) 662.

²⁶² Miodrag Simović and Milena Simović, ‘Granice ovlašćenja Ustavnog suda Bosne i Hercegovine u postupku ocjene saglasnosti zakona sa Ustavom Bosne i Hercegovine’ [Limits of the Jurisdiction of the Constitutional Court of Bosnia and Herzegovina in the Procedure for the Assessment of the Compatibility of Statutes with the Constitution of Bosnia and Herzegovina] (2014) 53 (68) *Zbornik radova Pravnog fakulteta u Nišu* 45, 48-49.

²⁶³ See Case U-6/12, 13 July 2012, 33; Case U-7/12, 23 December 2013; Case U-29/13, 28 March 2014. In the last two cases the legislator has not yet adopted the relevant provisions. See also Case U-1/08, 25 January 2008, 23.

also conditioned by the mostly predictable behavior and ideological leanings of domestic judges which is to a large part a consequence of a problematic appointment procedure. Also, having a Constitution riddled with very vague egalitarian commitments allows the Court to legally ground its activist moves,²⁶⁴ and it can even play in its favor the asymmetrical commitment of the parties to the text, in particular RS's constant invocation of the 'original Dayton' which borderlines with 'constitutional idolatry'.²⁶⁵ The Court has also largely benefited from the lack of what Sadurski has called 'meta-constitutional' challenges to Court's legitimacy – namely, in view of the express inclusion of the power of judicial review in the Constitution, the debate as to whether it *should* have been included.²⁶⁶ It is notable that political actors from RS, despite their concerns for Court's legitimacy, still regularly resort to BCC for the settlement of highly charged political issues, as witnessed during the current political crisis begotten in the publication of the 2013 census results.²⁶⁷ The Court has also made great use of the prominent position of the ECHR in the Constitution, not only in routine extensive references to ECtHR jurisprudence in almost every decision, but it has also used its authority in making conceptual leaps, as in its unwinding canon, which it would otherwise be hard pressed to justify.

The most important external factor is the HR, who was essential in allowing the Court, particularly in its crucial formative period, to position itself as an important actor, unconstrained by the need to reference other actors' 'tolerance intervals'.²⁶⁸ This explains the Court's daring attitude in its first term, where it was willing to engage in a contentious review of significant legislation, despite very low input legitimacy due to the manner of appointment of domestic judges and the wide perception of the 'ethnic bias' of its members, which further engendered very strong opposition both within the Court and in a large part of a wider political community. This also goes on to confirm the view of those theorists who consider that 'an external source of support outside the domestic political structure' may be a key variable explaining the level of activism of constitutional courts.²⁶⁹ Thus, in its first term, it could be characterized as an 'Unconstrained court' in Roux's typology of constitutional courts, considering that it was 'relatively well

²⁶⁴ Such features have led Law to classify the Bosnian Constitution under universalist ideological archetype. See David Law, 'Constitutional Archetypes' Washington University in St. Louis Legal Studies Research Paper No. 16-02-01, 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=273251> accessed 20 February 2016.

²⁶⁵ Jack M. Balkin, 'The Distribution of Political Faith' (2012) 71 Maryland Law Review 1144, 1170.

²⁶⁶ Cited in Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 German Law Journal 1345, 1357.

²⁶⁷ 'Ustavni sud zaprimio Bosićevu apelaciju u vezi sa popisom' [Constitutional Court Received Bosić's Appeal Regarding the Census] *Nezavisne novine* (Banja Luka, 29 June 2016) 6.

²⁶⁸ Lee Epstein, Olga Shvetsova and Jack Knight, 'The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Government' (2001) 35 Law & Society Review 117.

²⁶⁹ Issacharoff, 'Constitutional Courts and Democratic Hedging' (n 20) 1011.

insulated from political attack', and that with the disengagement of the HR it has increasingly moved towards the model of 'Constrained court', since it is more open to political retaliations and has to 'mediate the demands of law and politics' to a greater degree.²⁷⁰ It remains to be seen to what degree Bosnian commitment relating to accession to the EU, and the EU's strong presence in BiH, will compensate for the HR's disengagement.

Closely related to this consideration is the manner in which the architecture of the political scene in BiH frames the Court's capacity for independent action. It has been argued that in the context of a fragmented political process, and the absence of a single dominant political party, the constitutional court would be less concerned with majoritarian retaliations.²⁷¹ This seems to hold for the Bosnian context, characterized by a low election threshold, and a proportional election system, which results in a fragmented political scene. On the other hand, it could be argued that the wide or grand coalitions, at least at the state level, which are necessary corollaries of a consociational political regime, should be seen as a surrogate for the dominant political party. This thought, however, would seriously downplay the level of continuing political fragmentation, even within governing coalitions, which shelters the Court from sustained political retaliations, but not from unenforcement of its decisions.

4.3. Outer Boundaries of Activism

As already suggested the Court is unwilling to directly challenge the discriminatory power-sharing arrangements in the Constitution itself. This particularly became clear in its refusal – due to alleged conceptual impossibility – to include the discriminatory provisions of the Constitution in 'all the law' over which the ECHR has express 'priority' under Article II/2 of the Constitution itself.²⁷²

The importance which BCC still grants to consociational mechanisms, or rather their alleged continuing necessity for the preservation of peace, can be seen in the case where the Court reviewed the constitutionality of several provisions of the Statute of the City of Mostar and the relevant provisions of the Electoral Law. There the Court upheld, in a daring feat of *non serviam* to the ECtHR,²⁷³ the consociational arrangements in the City Council, indicating that '[t]he measures serve a legitimate aim in that they put in place a power-sharing structure which

²⁷⁰ Theunis Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence' (2014) 5 Constitutional Court Review 33, 55.

²⁷¹ Ginsburg (n 20) 252.

²⁷² Case U-5/04, 27 January 2006. This position of the Court forced the applicant to withdraw his other request for the review of the constitutionality of the name of RS entity. See case U-18/05, 7 July 2006.

²⁷³ Case U-9/09, 26 November 2010, 70.

it is reasonable to hope will gradually improve the quality of the political process in the city.²⁷⁴ Again, however, the constitutionality of the current arrangements is conditional on the political state of affairs, particularly bearing in mind that the 'difficulties faced in Mostar ... have been and remain particularly intractable and severe.'²⁷⁵ This provisional maintenance of the power-sharing arrangements, as in the *Pilav* case, may be understood as a middle ground between Strasbourg's activism and BCC's complete deference to the former. Although this approach is faced with problems of dealing with the empirical questions underlying normative reasoning, it seems to present a pragmatic position, considering the circumstances. The *Pilav* case ironically shows the possibility of its own activist reading, precisely in the Court's evolution on the issue of admissibility of the challenges even to legislation that faithfully transposes clear constitutional norms, and opens a possibility of the disapplication of constitutional provisions in practice, by not giving effect to Constitution's implementing legislation. This activist position stands in an uneasy relation to BCC's duty to uphold the Constitution, which forces the Court to turn to pragmatic solutions.

The last point can particularly be witnessed in a case where the Court had to consider the constitutionality of power-sharing arrangements in the constitutions of the both entities in BiH, dealing with the election of their presidents, which were imposed by the HR as a part of the implementation of the Court's landmark decision in the analyzed case U-5/98-III. In a decision that rectified most of the Court's legal failings from the *Pilav* case, the bare majority of the Court concluded that a difference in treatment cannot be justified.²⁷⁶ Four judges, two Serbs and two Croats, dissented in this case, considering that it is premature and that the Court should await the amendments to the state Constitution by the legislator pursuant to the *Sejdić and Finci* decision, before ruling on the similar discriminatory provisions in the entities.²⁷⁷ They reminded the majority that the ECHR is not above the Constitution and, moreover, that the Court is not a constitution-maker 'despite some lack of logic in constitutional solutions and contradictions with European Convention.'²⁷⁸ They also considered that the contested provisions fit within the 'general institutional system of entities' and that the Court has effectively changed its decision in the case U-5/98-III.²⁷⁹ The pragmatic move of the majority in this case can be seen in the fact that it determined the unconstitutionality of the discriminatory provisions of the entity constitutions without invalidating them or ordering the legislatures to

²⁷⁴ *ibid* 71.

²⁷⁵ *ibid*.

²⁷⁶ Case U-14/12, 26 March 2015.

²⁷⁷ Partially dissenting opinion of judges Galić, Simović, Tadić and Knežević in case U-14/12, 26 March 2015, 2.

²⁷⁸ *ibid* 3.

²⁷⁹ *ibid* 5.

change the relevant provisions before the implementation of the decisions in the cited *Sejdić and Finci* and *Zornić* cases decided before the Strasbourg court.²⁸⁰ The decision of the Court, which still presents an exercise of judicial activism for the reasons indicated by dissents, represents a strategic move of the majority in view of problems that it could face with the enforcement of the decision in the current political circumstances in the country, and having in mind the current position of the HR, which does not intervene in the domestic legal system anymore as part of its exit strategy. A potential challenge to this consideration is the Court's decision in a politically highly charged case dealing with the Law on Holidays in RS, provisions of which it declared unconstitutional despite very loud opposition from RS. The move can be explained by the Court's perception that this decision would not face similar vexed issues of enforcement, since the contested provisions would eventually simply cease to be valid.

4.4. Perceptions of the Court and Its Legitimacy

Most of the interviewees were divided as to their enthusiasm for the institution, depending on the entity from which they come, but there is a general agreement that the input legitimacy of the Court is seriously hampered by its flawed appointment procedure.²⁸¹ In line with the analysis of the ethnicisation of the Court, the instances of possible ethnic outvoting are particularly negatively perceived, principally in RS. This was lately witnessed with the Court's decision on the Law on Holidays in RS, whose output legitimacy was widely criticized in RS as an alleged instance of internationals/Bosniak ethnic outvoting,²⁸² which proved to be incorrect after the publication of the decision. Regarding its output legitimacy, two interviewed judges of the Court inferred the support of the public for the institution by the overwhelming number of the appeals received.²⁸³ There are no available public surveys on the perception of the Court which could corroborate this conclusion, and moreover, it seems to eschew the fact that in many ways the appeal to BCC is largely considered to be a routine legal remedy, perhaps as a consequence of the Court's readiness to often act as a fourth-instance body in relation to the regular judiciary. Still, it cannot be denied that the Court's decisions are generally praised, not only for developing a coherent human

²⁸⁰ Case U-14/12, 26 March 2015, 75. The Court thus effectively introduced a second variant of weak review for which it had no basis either in the Constitution or in the Rules of the Court, which only provides for strong review. See Nedim Kulenović, 'Constitutional Court of Bosnia and Herzegovina: Adjudication of Power-Sharing Arrangements in Sub-State Constitutions' (2016) 1 *Vienna Journal on International Constitutional Law* 120.

²⁸¹ On file with author.

²⁸² See e.g., M. Filipović, 'Preglasavanjem vraćaju BiH u 1992.' [Through Outvoting They Are Returning BiH to 1992] *Večernje novosti* (2 December 2015) 4.

²⁸³ On file with author.

rights dogmatic, under its appellate jurisdiction, but also more generally for its contribution to democratic consolidation.²⁸⁴ However, this does not necessarily translate to the sociological legitimacy and the overall acceptance of the Court's work. Particularly critical of the Court is the political establishment of RS.

It has been noted that the question of interpretation of constitutional text and the sort of reasoning enunciated by the constitutional courts in their decisions 'is of prime importance to the establishment and maintenance of legitimacy' of such courts.²⁸⁵ Indeed, the Court's reliance on the teleological and functional interpretation methods, providing it with extensive interpretation techniques, used for the purpose of the reintegration of a multiethnic society and the strengthening of the central state, has never been without controversy. To the degree that it is possible to identify any meaningful debates regarding constitutional interpretation in the Bosnian context, it would be a debate between the proponents of the 'spirit' and the 'letter' of the Dayton Agreement and the Constitution, which is reminiscent of the debate between the 'originalists' and 'living constitutionalists' in the United States but without accompanying elaborate theoretical justifications. Already in the first years after the end of the war, the second President of RS, Biljana Plavšić, insisted on the implementation of the 'letter of the agreement', and expressed her strong opposition to the use of 'the nebulous concept of the "spirit of Dayton" to blur the issue and legitimize ad-hoc reinterpretation of the agreement.'²⁸⁶ The current president of RS, Milorad Dodik, has also been a vocal critic of the teleological interpretation, stating publicly that RS does 'not want to accept the interpretations that are given in the form of the "spirit of Dayton"',²⁸⁷ and has particularly accused the international community of perpetuating the political crisis through the 'imposition of the principle of respect towards the "spirit", and not the "letter" of Dayton.'²⁸⁸

This study comes at a time when attacks on the Court's legitimacy and authority have reached their critical point. So far the Court has had to adopt ninety-three decisions on unenforcement,²⁸⁹ including its decision on the Statute of the city of Mostar and the relevant provisions of the Electoral Law of BiH, preventing the election of the new mayor and the proper functioning of the

²⁸⁴ See e.g., Skatch (n 115) 71; Graziadei (n 52) 48; Maziau (n 195) 414; Steiner (n 57) 524-525.

²⁸⁵ Harding, Leyland and Groppi (n 25) 17.

²⁸⁶ Cited in David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 2000) 71.

²⁸⁷ Cited in Boro Marić, 'Dodik: Pravo će pobediti silu' [Dodik: The Law Will Defeat the Power] *Politika* (18 April 2011) <www.politika.rs/rubrike/region/Dodik-Pravo-ce-pobediti-silu.lt.html> accessed 23 March 2015. It was widely reported in the media that '[Vladimir] Putin and Dodik have agreed that the letter of Dayton, and not its spirit, should be respected', after Dodik's visit to Russia in 2011. Dejan Šajinović, 'Dodik i Putin razgovarali o jačoj saradnji RS i Rusije' [Dodik and Putin Talked About Stronger Cooperation Between RS and Russia] *Nezavisne novine* (Banja Luka, 24 March 2011) 2.

²⁸⁸ 'Dodik: poštovati slovo, a ne duh Dejtona' [Dodik: The Letter of Dayton, Not the Spirit, Should be Respected] *Nezavisne novine* (Banja Luka, 19 February 2011) <www.nezavisne.com/novosti/bih/Dodik-Postovati-slovo-a-ne-duh-Dejtona/80062> accessed 23 March 2015.

²⁸⁹ Constitutional Court of BiH, 'Decisions on Unenforcement' <www.ccbh.ba> accessed 19 July 2015.

City Council of Mostar.²⁹⁰ Furthermore, the current President of RS continues with his vitriol against the Court, which he accuses of being a ‘criminal place in charge of conducting constitutional rearrangement of BiH under the influence of foreigners’, or more radically, a ‘place of political rape.’²⁹¹ The crisis reached its highpoint when the National Assembly of RS adopted a resolution on the organization of a referendum on the legitimacy of the Court and Prosecutor of Bosnia and Herzegovina,²⁹² considered unconstitutional by the political establishment in RS, even though BCC upheld their constitutionality fifteen years earlier in a controversial decision.²⁹³ A month earlier the same legislature adopted a declaration effectively threatening the Court with unenforcement if it were to strike the relevant provision of the Law on Holidays of RS as unconstitutional,²⁹⁴ a promise which it upheld when the Court acted as predicted.

Faced with this reality of an ever greater political defiance, and being aware that the HR has long ago stopped being a dog that bites and is now just barking at what it sees as blatant violations of the Dayton Agreement and clear erosion of the rule of law,²⁹⁵ the Court finds itself at the crossroads. The latest jurisprudence of BCC indicates, as noted in previous sections, that this development may have driven the Court to potentially reassess its role in the constitutional system and become more aware of its strategic choices and its growing vulnerability in the face of potential political retaliations.

²⁹⁰ Case U-9/09, 26 November 2010. See also Case U-9/09, 18 January 2012, on non-enforcement.

²⁹¹ Cited in 43rd Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 8 May 2013 <www.ohr.int/other-doc/hr-reports/default.asp?content_id=48022> accessed 24 February 2015.

²⁹² ‘Okončana Deseta posebna sjednica: usvojena odluka o raspisivanju referenduma’ [The Tenth Special Session Over: The Decision on Calling of Referendum Adopted] (*Narodna skupština Republike Srpske*, 15 July 2015) <www.narodnaskupstinars.net/?q=la/vijesti/okon%C4%8Dana-deseta-osebna-sjednica-usvojena-odluka-o-raspisivanju-referenduma> accessed 20 July 2015. On the same occasion, the President of RS predicted that the referendum might be successfully challenged before the Court but that it would be organized despite of that.

²⁹³ Case U-26/01, 28 September 2001.

²⁹⁴ ‘Declaration Regarding the Request for Review of Constitutionality of the Statute on Holidays of Republika Srpska Before the Constitutional Court of Bosnia and Herzegovina in the Case Number: U-3/13’, *Official Gazette of Republika Srpska*, 46/15.

²⁹⁵ 47th Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 11 May 2015, 24 <www.ohr.int/other-doc/hr-reports/default.asp?content_id=49127> accessed 19 February 2015; Special Report of the High Representative to the Secretary-General of the UN on the Implementation of the GFAP in BiH, 4 September 2015, 8 <www.ohr.int/other-doc/hr-reports/default.asp?content_id=49202> accessed 19 February 2015 (‘[O]ne of the most serious violations of the [Dayton Agreement] since its signing 20 years ago and puts under serious threat peace implementation since then’).

5.

Conclusion

In his lone dissenting opinion in the landmark case concerning state property, Judge Zlatko M. Knežević cited American constitutional scholar Mark A. Graber in chastising the majority for displaying 'less interest in determining what is constitutional than in making arguments that they believe will help the social movements they favor [to] achieve desired ends constitutionally.'²⁹⁶ He reminded the Court that its task is to interpret the Constitution and 'not to stretch the membrane of constitutionality to where it does not belong.'²⁹⁷ The aim of this study was to provide one description, rather than normative justification, of the manner in which BCC may have overstretched its mandate and acted in an activist fashion.

It seems clear that any theory of informal constitutional changes in the Bosnian context must account for the important role of BCC in such a transformation and state-building project. We believe that the Court's jurisprudence supports the view that BCC has exercised activism both in the areas of state structure and political regime, where the Court has proven to be (a hesitant) unwinder of consociational compromises and (a more eager) enabler in the efforts geared towards the strengthening of the central state. But even the Court's apparent restraint in the face of the Constitutional entrenchment of discrimination is belied by the evolution of its positions which amount to the possibility of the disapplication of discriminatory provisions of the Constitution through the striking down of legislation that faithfully implements it.

As noted, the Court is going through the most difficult period of its existence, its legitimacy being challenged in ways previously unimaginable. Even though institutional features do not hamper the Court's activism, they do undermine its legitimacy, particularly in view of its appointment process. It is an institution cognizant of its own transformative limitations²⁹⁸ and more eager to adjust to the changing political landscape, adopting strategic solutions in its mediation between apology for the failings of the constitutional system and the utopia of liberal democratic ideals. This pragmatism will not sit well with everyone, but it may be the only way for the Court to retain its role of a 'just and dependable protector of the Constitution ... its values and human rights.'²⁹⁹

²⁹⁶ Dissenting opinion of judge Knežević in case U-1/11, 13 July 2011, citing Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press 2006) 1.

²⁹⁷ *ibid.*

²⁹⁸ See e.g., Marko, 'Constitutional Reform in Bosnia and Herzegovina 2005-06' (n 7) 212; Grewe and Riegner (n 8) 33.

²⁹⁹ Case U-4/05, 29 October 2004, 14.

About the Author

Nedim Kulenović is a doctoral candidate at the Faculty of Law of the University of Sarajevo. He was a member of several Bosnian professional non-governmental organisations, advocating legal reforms. As an employee of the Association “Vaša prava Bosnia and Herzegovina”, a largest non-governmental free legal aid provider in Bosnia and Herzegovina, he has represented parties before domestic and international courts and other bodies, including European Court of Human Rights and the UN Human Rights Committee. He has written several articles, book chapters and case-notes for domestic and international publications. His current interests include: constitutional theory, comparative constitutional law, legal philosophy, human rights, migration law, and competition law.



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