Global Constitutionalism (2017), 6:1, 131–165 © *Cambridge University Press, 2017*
doi:10.1017/S2045381716000253

Courting peace: Judicial review and peace jurisprudence

JENNA SAPIANO *

University of St Andrews, School of International Relations, Arts Faculty Building, The Scores, St Andrews, KY16 9AX

Email: jms233@st-andrews.ac.uk

Abstract: The current debate measuring the trade-offs between democracy and judicial review is unable to analyse the influence of courts in post-conflict states. However, a court with authority over constitutional review is commonplace in new constitutions, including those that have been drafted (or revised) as part of a political settlement. This article suggests that judicial institutions are as important as political institutions in sustaining a political settlement. As this article sets out, the parties to a peace process are required to make numerous compromises to negotiate new (or revised) institutional arrangements. Several cases are considered which illustrate how domestic constitutional courts were asked to mediate between tensions inside the political settlement. In all of the examples, the courts interpreted peace to be the most important constitutional value, or the primary purpose of the constitution. The judiciary played a role in maintaining the constitutional link to the elite pacts of the peace agreement, while acknowledging that the link should not preserve elite pacts permanently or without limit. The article argues, first, that these cases constitute evidence of an emergent global 'peace jurisprudence' based on purposive interpretation and a principle of proportionality that protects the foundations of the political settlement, and, second, questions the extent to which international courts are willing or able to adopt this jurisprudence.

Keywords: constitutions; judicial review; peace agreements; peace jurisprudence; proportionality; purposive interpretation

* I would like to thank Tony Lang, Kenneth Campbell, Mihaela Mihai and the anonymous reviewers for their helpful comments on early drafts of this article. I would also like to thank the other authors in this issue for their comments and insights. A special thanks to Christine Bell for overseeing this project and the Political Settlements Research Project for its funding. This article was presented as a part of a panel at the ICON-S Conference in July 2015. All errors remain my own.

> The map metaphor serves to introduce two of the features of constitutions: a map is both schematic and drawn from a particular perspective. However ingenious the cartographer in representing dimensions on the page, an act of imagination is required to comprehend the reality of the terrain from the signs and symbols of the map. Constitutional documents share these features.[1]

I. Introduction

Transitions from war to peace often require new (or revised) constitutional arrangements to give clarity to the post-conflict state and to legitimise the emerging political settlement. However, a constitution is not the sole legal or political document required to govern this transition. Constitutions are often preceded by peace agreements as the political and legal pacts that dictate the terms of peace and the intentions of the parties in transitioning out of a state of war. Constitutions then follow, and sometimes even constitute a form of peace agreement (such as the Interim Constitution in South Africa). I use the term 'peace agreement constitution' to describe these constitutions rather than post-conflict constitution, as other authors in this issue have done, as it makes clear that such constitutions are not autonomous or free-standing, but are in a mutually constitutive relationship with the peace agreement that provides the legal and political authority for their enactment.[2] Vivien Hart, whose passage is cited above, suggests that constitutions are a part of a canon that, 'borrowing from its literary counterpart, becomes a whole set of definitive sources rather than just one'.[3] The peace process and agreement are part of the canon of a

[1] V Hart, 'Constitution-Making and the Transformation of Conflict' (2001) 26 *Peace and Change* 153, 158.

[2] This term has not been coined here; see, for example, C Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373 and JS Easterly, 'Peace Agreements as a Framework for *Jus Post Bellum*' in C Stahn *et al.* (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP, Oxford, 2014) who uses the concept 'peace agreement constitution' as a comparative tool. See also C Bell, *On the Law of Peace* (OUP, Oxford, 2008); J Widner, 'Constitution Writing in Post-Conflict Societies: An Overview' (2008) 49 *William and Mary Law Review* 1513; H Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 *University of Pennsylvania Journal of International Law* 239; K Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2005) 6 *Chicago Journal of International Law* 663; J Darby and R Mac Ginty (eds), *The Management of Peace Processes* (Palgrave Macmillan, London, 2000); and R Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformations' (1997) 106 *Yale Law Journal* 2009 who uses the term 'transitional constitution'.

[3] Hart (n 1) 157.

peace agreement constitution that together form a part of a constitutional discourse that 'emphasizes process'.[4]

This article considers the role of constitutional (or apex) courts[5] in post-conflict societies, and in particular how their adjudicative function relates to the peace agreement and political settlement. In the first part of this article, I outline the traditional debate between political and legal constitutionalism, suggesting that these standard arguments on judicial review are unable to adequately assess the place of courts in protecting the core of the political settlement in peace agreement constitutions. From there, I assess how purposive constitutional interpretation[6] and the principle of proportionality[7] are being adopted into the jurisprudence of courts interpreting peace agreement constitutions. I use cases from Northern Ireland, Bosnia-Herzegovina and Colombia, where courts have addressed the validity of the underlying elite pact at the heart of the constitutional order.[8] In the cases under review I suggest that the

[4] Ibid.

[5] I use the term 'constitutional court' or 'court' in this article for consistency when talking in general about an apex court, although in some jurisdictions the court of last resort on constitutional issues is a separate supreme court.

[6] See A Barak, *Purposive Interpretation* (Princeton University Press, Princeton, NJ, 2005).

[7] There have been a number of recent publications on this topic: including, *inter alia*, R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford, 2002); A Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP, Cambridge, 2012); J Bomhoff, *Balancing Constitutional Rights* (CUP, Cambridge, 2013); M Cohen-Aliya and I Porat, *Proportionality and Constitutional Culture* (CUP, Cambridge, 2013); GCN Webber, *The Negotiable Constitution* (CUP, Cambridge, 2009); G Huscroft, BW Miller and GCN Webber, *Proportionality and the Rule of Law* (CUP, Cambridge, 2014); S Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in VC Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP, Cambridge, forthcoming) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726794>. See also K Möller, *The Global Model of Constitutional Rights* (OUP, Oxford, 2015) and K Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights* (Hart, Oxford, 2014), who argues that the principle of proportionality is part of an emerging 'global model' of rights.

[8] The cross section of variables used to isolate the case studies allow for sufficient difference in context and similarities in structure and implementation for lessons to be drawn from the comparative analysis. The case studies were selected for having protracted conflicts, with high civilian casualties. In Bosnia-Herzegovina and Northern Ireland, the peace agreement and constitution resulted in a termination of the conflict (although the stability of that peace is fragile, it is holding). In Colombia, the civil war continued past the adoption of the 1991 Constitution, however, it ended the conflict between the state and some of the rebel groups, including the M-19. The constitution is relevant in the ongoing peace process. See MJ Cepeda Espinosa, 'The Peace Process and the Constitution: Constitution Making as Peace Making?' (2016) *Blog of the International Association of Constitutional Law* available at <https://iacl-aidc-blog.org/2016/07/04/manuel-jose-cepeda-espinosa-the-peace-process-and-the-constitution-constitution-making-as-peace-making/>. Northern Ireland, as a sub-state entity, stands out as

constitutional court found peace to be foundational to the constitution – noting the relationship of the constitution to the underlying political settlement that drove the peace agreement. However, in none of these cases did the court find that the peace agreement was beyond question. In different ways, the courts in all three jurisdictions accepted that the political settlement needed to stay open to other possibilities and re-evaluation. The second part of the discussion briefly turns to the jurisprudence of international human rights courts, suggesting that international courts are less well placed to make reasoned judgements as to how the demands of justice should be balanced against the demands of peace, showing also how different regional courts have taken different approaches. In conclusion, I suggest that there is an emerging global 'peace jurisprudence' which requires traditional theories of constitutional adjudication to be re-evaluated.

II. Courts, constitutions and peace

Peace is a contested term and an ambiguous concept. In an unsophisticated narrative, war is nothing more than the absence of peace and peace the absence of war. Yet, the meaning of peace is ephemeral, moving with international political shifts, so that where peace was once thought of as contrary to being in a state of war, the present understanding of peace is more complex, and requires attaining a certain level of development, satisfying the rule of law, and recognising and complying with basic human rights norms. Furthermore, peace must not be thought of as a momentary event but rather as a process, without a clearly defined (or definable) end point.[9]

a case study in this article. However, the Belfast Agreement and the Northern Ireland Act (1998), I argue, are together an example of a peace agreement constitution at a sub-state level. The case, *Robinson v Secretary of State for Northern Ireland,* also stands out as a decision from the Judicial Committee of the British House of Lords as the court of last resort on matters concerning the implementation of the Agreement and Act. This is different from Bosnia-Herzegovina and Colombia, which both established strong-form constitutional courts under the new peace agreement constitution. However, in *Robinson* the House of Lords made a very clear determination on the status of the Belfast Agreement and Act, although the House of Lords (and now the Supreme Court) is an example of weak-form judicial review.

[9] R Mac Ginty, *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (Palgrave MacMillan, Basingstoke, 2008) 18. The recognition that peace is a process is reflected in the idea of the political settlement, which conceives of the peace agreement, constitution drafting and ongoing political transition as a continuous negotiation process (V Fritz and AR Menocal, *Understanding State-Building from a Political Economy Perspective: An Analytical and Conceptual Paper on Processes, Embedded Tensions and Lessons for International Engagement Report for DFID's Effective and Fragile States Teams* (Overseas

Peace agreements can be understood as written documents agreed by the parties to the conflict that hold the purpose of ending that conflict. There may be several documents, for example, pre-negotiation agreements, ceasefire agreements, negotiation agreements, implementation agreements, and, in some cases, a (interim) constitution,[10] which are negotiated as part of the political settlement and which may all be categorised as peace agreements. Still, like 'peace', the meaning and the legal standing of peace agreements are vague. Christine Bell argues that,

> despite the prevalence of documents that could be described as peace agreements, and the emergence of legal standards addressing them as a category, the term 'peace agreement' remains largely undefined and unexplored. The label is often attached to documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures.[11]

In fact, peace agreements often go beyond the immediate arrangements necessary to end violence in laying a foundation for a new (or revised) constitution. Many peace agreements set out the principles of a new constitution, such as in Cambodia, where the provisions for a new constitution were outlined in the Comprehensive Peace Agreement (Paris Agreement) or Burundi, where the Arusha Accord laid out the principles for a new constitution. In Bosnia-Herzegovina, the constitution was included as an annex to the Dayton Peace Accord. There are also constitutions that resemble peace agreements, such as the Colombian Constitution of 1991, which was written as part of an ongoing (and continuing) peace process. Some interim constitutions also resemble and perform the function of peace agreements. For example, in South Africa,

Development Institute, London, 2007). While it is believed that many states (the US or Australia, for example) exist in a state of peace, there is also constant contestation in the political space that has the potential to trigger political violence (however mild). For example, there are have been past and ongoing racial tensions in the US and continuing discrimination against indigenous communities in Australia, which have implications on the constitution in both cases. There are also concerns with structural violence that exist long after the cessation of conflict. There is, however, more space and time for constitution drafting or amending where there is no violence or near-violence.

[10] For example, the 1993 Interim Constitution of South African. There is scope to argue that the peace agreements can be likened to an interim constitution, an interim constitution may perpetuate the 'status quo' or baseline constitution that would be difficult to then later on deviate from when forming a new, permanent constitution. However, interim constitutions can also be seen as a more useful conflict resolution practice than drafting a permanent constitution immediately following the end of the conflict. For more on interim constitutions see Charmaine Rodrigues's article in this issue and K Zulueta-Fülsher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools* (International IDEA, Stockholm, 2015).

[11] Bell (2006) (n 2) 374.

the Interim Constitution was in fact the main peace agreement. In Nepal the Interim Constitution, passed shortly after the Comprehensive Peace Agreement, outlined the procedures for the drafting of a new constitution. In Zimbabwe and Kenya, the constitution was required as part of the settlement between political parties following disputed elections that resulted in violence, but not full-scale civil war. There are also cases that would fall under the category of peace agreement constitution in which the constitution and peace agreement are being drafted concurrently, although not necessarily in collaboration in all instances. Such cases include the current processes in Somalia, Yemen, and Libya. The purpose and intention of the constitution in all of these cases was to further the peace process as part of the political settlement.

There are advantages and drawbacks in connecting peace processes and constitution drafting.[12] What may be considered negative or positive during the peace or constitution-making processes in the immediate aftermath of conflict, may have different long-term implications. However, peace agreement constitutions, like all constitutions, are living documents subject to the judicial (and legislative) procedures of the state, and which, over time, can begin to resemble something quite unlike the compromise document that emerged at the end of the conflict.

The ideal-type constitutional document finds authority in 'the people'; the people being a source of authority for a constitution that is intended to be enduring.[13] However, the moment of constitutional founding is limited in time;[14] beyond that moment, 'the people' become an abstraction rather than a continuous source of authority. In the same way, peace agreements are negotiated and signed by certain people in a moment of time, but the 'peace' they bring must be developed and tied to new constitutional arrangements that embody a new political settlement. Peace agreement

[12] M Kaldor, for example, argues that peacemaking and constitution drafting need to be kept separate in the context of 'new wars'. Although, as this article points out, there can be tensions in linking these two processes, I do not agree with this (dated) argument. In practice, peacemaking and constitution drafting often cannot be separated. M Kaldor, 'How Peace Agreements Undermine the Rule of Law in New War Settings' (2016) 7 *Global Policy* 146. See also M Brandt *et al*., *Constitution-making and Reform: Options for the Process* (Interpeace, Geneva, 2011) 257–8 which lists both risks and opportunities of linking conflict resolution and constitution-making; J Widner, 'Constitution Writing and Conflict Resolution' (2005) 94 *Commonwealth Journal of International Affairs (Roundtable)* 503, who looks at the relationship between constitution-writing and violence.

[13] See OO Varol, 'Temporary Constitutions' (2014) 102 *California Law Review* 409, who makes a descriptive and normative case against constitutions written with the intention of being permanent; see fn 6, 411 for a list of those who make a case for enduring constitutions and a short description of their arguments.

[14] M Loughlin, *The Idea of Public Law* (OUP, Oxford, 2004) ch 6.

constitutions, like many constitutional documents (regardless of their origin), are typically elite-brokered pacts, often negotiated and signed at the exclusion of broader participation.[15] A compromise constitution cannot be understood as an end point if it is to function in a deeply divided state emerging from high-level conflict. To view the constitution as a process (a 'means') rather than a codified set of rules (an 'ends'), perhaps requiring several iterations, breaks with the traditional understanding of the constitution as an entrenched and lasting document.[16]

Judiciaries (and legislatures) must continually (re)interpret and (re) negotiate their constitution, allowing it to move from its founding political moment and adapt to address unforeseen situations, to progress beyond the customs and norms that were held at the moment of its enactment. Likewise, a peace agreement constitution must move on from the divisions and tensions that existed at its signing to establish a sufficient level of stability, introduce new political and legal institutions, and simultaneously accommodate warring factions while moving towards a more united national identity. However, a peace agreement constitution is, by necessity, a compromised and imperfect document, which may not be able to overcome tensions inherent in it. Courts, in their capacity to interpret and (re)negotiate the constitution, also in a sense (re)interpret the peace agreement as they articulate the nature of the political settlement captured in the peace agreement constitution. Courts must balance the stability of the political settlement captured in the past on the one hand, with more universal and general ways of understanding the constitution's foundation on the other, in order to enable its more particularistic understandings to be transcended over time.[17]

III. Political and legal constitutionalism

Even with the close connection between peace agreements and constitutionalism, evaluation of judicial review and the role of courts in transitional constitutional orders has focused on democratisation rather

[15] There are, of course, efforts to make peace processes more inclusive, see V Hart, 'Constitution-Making and the Right to Take Part in a Public Affair' in LE Miller (ed), *Framing the State in Times of Transition* (USIP Press, Washington, DC, 2010).

[16] For more on entrenchment and unamendability in post-conflict (and post-authoritarian) constitutions, see Silvia Suteu's article in this issue.

[17] VC Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2008) 49 *William and Mary Law Review* 1249. Jackson points to the paradox of constitution making in post-conflict environments, in which constitutions are both political pacts of the moment and foundational, legal documents that hold universal and general principles to help elites rise above that moment.

than peace. Tom Gerald Daly's article in this issue goes over much of the key scholarship relating to courts and transitions that focuses on post-authoritarian governments and the role of courts as democratisers. I suggest that a distinctive set of peace agreement constitutions exist and that when we examine cases arising post transition from conflict rather than authoritarianism, peace is the foundation of the constitution and so becomes the concern of courts in ways that produce distinct jurisprudential needs and responses.

Legal and political constitutionalists disagree on the authority of constitutional courts to practise strong-form judicial review[18] and on the democratic legitimacy of courts to rule on political questions. I suggest that the disagreement between the two camps is unable to address the particular concerns of judicial review of peace agreement constitutions, as courts in these contexts are often required to rule on 'first-order questions about the structure of government'[19] and on questions of peace. Peace agreement constitutions attempt to achieve elite pacts that may be more inclusive than before, but risk becoming limited deals. Courts often must both acknowledge and protect the elite pact while recognising its limited nature and the need to ultimately move beyond it. This involves a difficult type of balancing act which arises directly at the political interface between opposing elites with opposing constitutional preferences.

In his article in this issue, Daly is sceptical of the excessive faith placed in courts in new democracies and suggests that the view of courts as central engines of successful democratisation rests on rather slim evidence. However, regardless of any academic hesitations as to the expected task of a constitutional court, courts with strong-form judicial review are commonplace in new constitutions, including those drafted as a part of a peace process.[20] In negotiating a political settlement, elite actors bargain

[18] I borrow M Tushnet's definition of strong-form judicial review: 'the courts have general authority to determine what the Constitution means … [w]hatever limits there are on that authority, such as those imposed by the political question doctrine or interpretive approaches counselling deference to the policy judgments of the other branches, originate from the courts themselves'. M Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2782, 2784.

[19] I use S Issacharoff's phrase to draw attention to his argument that while 'it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence [there are] difficulties in confronting an area without clear markers in either legal or political theory' (S Issacharoff, 'Democracy and Collective Decision Making' (2008) 6 *International Journal of Constitutional Law* 231, 266). Issacharoff is sceptical of courts engaging with such first-order question, reserving the situations in which courts should 'override local political arrangements' (263).

[20] T Ginsburg, 'The Global Spread of Constitutional Review' in K Whittington and D Keleman, *Oxford Handbook of Law and Politics* (OUP, Oxford, 2008). This trend is also present in constitutions written as part of democratic transitions, for more see Tom Gerald Daly in this issue, who takes a more sceptical approach to judicial review.

intensely to protect their political positions, and in agreeing to the inclusion of strong constitutional courts may be motivated by self-interest. Ran Hirschl[21] and Tom Ginsburg[22] argue that parties contending for power make pragmatic decisions in the course of negotiating the constitutional settlement. It may also be that the internationalisation of many peace and constitution-making processes has led to the 'constitutional migration'[23] of strong judiciaries. International actors may also push for robust courts with judicial review of rights, as a rule of law 'safeguard' that is particularly necessary in cases where the power-arrangements constitute a tightly scripted 'elite pact'.

No matter what the motivation for the adoption of strong courts into peace agreement constitutions, the current discourse on the legitimacy of judicial review is measured against democratic values, and is unable to assess the place of courts in balancing the demands of peace in holding together the political settlement. Political constitutionalists see democracy as being facilitated primarily through representative, elected legislatures and governments, and so are cautious about the authority and oversight of courts.[24] Legal constitutionalists, in contrast, have understood rule of law and rights-based judicial review as central to democracy.[25] The argument between political and legal constitutionalists is concerned with the sense and functions of democracy. Political constitutionalists ground their position in a majoritarian model of democracy, holding that legislatures are the more legitimate institution to protect and interpret the constitution and are sceptical that judges can, or should, hold strong interpretive powers. Legal constitutionalists, on the other hand, look to courts to secure the constitution as a legal document that ascribes authority to other political institutions. Political and legal constitutionalists also disagree on the equality of citizens. Where political constitutionalists look to the democratic process and the will of the majority to provide equality through the electoral system, legal constitutionalists believe that constitutionalism, through judicial review, protects the equality of all citizens by preventing the tyranny of the majority.[26]

[21] R Hirschl, 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' (2000) 25 *Law and Society* 95.

[22] T Ginsburg, *Judicial Review in New Democracies* (CUP, Cambridge, 2000) 21–34.

[23] See S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2006).

[24] See, for example, J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346; M Tushnet, *Taking the Constitution Away from the Court* (Princeton University Press, Princeton, NJ, 2000); and R Bellamy, *Political Constitutionalism* (CUP, Cambridge, 2007).

[25] See, for example, R Dworkin, *Law's Empire* (Hart Publishing, Oxford, 1998 [1988]) and J Ely Hart, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980).

[26] Bellamy (n 24) 5.

Advocates and opponents of judicial review look to the American and British constitutional systems, respectively, in support of their arguments. Both positions, however, assume a 'reasonably well-functioning' liberal democracy.[27] As Daly argues, these arguments may need to be evaluated differently in post-authoritarian periods of democratic consolidation. I go further to suggest that the political and legal constitutionalism literature arguments on judicial review are unable to assess constitutional courts and peace agreement constitutions, as the demands of peace may be different from (and, possibly, opposite to) the demands of democracy. That is not to say, however, that the demands of both may not also be the same in many ways.

In post-conflict cases, such as Northern Ireland, Bosnia-Herzegovina and Colombia, peace is at much at stake as democracy. A constitution drafted as part of the peace process is intended to end violence (both the actual occurrence of violence and the possibility of renewed violence). Peace agreement constitutions, in fact, intend to move contestation out of violence into politics. However, the threat of violence remains throughout the peace process and constitution drafting phases, and often continues into the implementation and post-transition periods. The requirements for peace are vague, and the potential for renewed violence lingers beyond the enactment of the peace agreement constitution. Moreover, the demands of peace and the demands of democracy may be in tension, as much as they can be mutually dependent. Democracy is hard to achieve without peace, but the ending of conflict can require limits to be placed on democracy in the interest of finding a resolution. The tensions between peace and democracy and the higher order difficulty of maintaining both, means that traditional approaches of both political and legal constitutionalists are incomplete.

As a case in point, arguments relating to the authority of the constitution are grounded in the traditional understanding of constituent power: that the legitimacy and authority of the constitution is found in 'the people' who act in unison and are in agreement with the constitution. Yet the very concept of 'the people' is often under dispute in post-conflict transitions, because, firstly, 'constituent power' appears to be imposed from above

[27] I borrow M Tushnet's definition of 'reasonably well-functioning': 'Reasonably well-functioning institutions are imperfect but not systematically so, nor to a large degree. Such institutions will make mistakes identifying and protecting rights, but those mistakes will be ransom (with respect to both subject-matter and the beneficiates of rights) and they will not be of a type that leads to a downwards spiral of rights-protection.' M Tushnet, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review' (2010) 30 *Oxford Journal of Legal Studies* 49, fn 10.

and outside[28] and, secondly, divided societies include multiple sources of 'constituent power'.[29] A peace agreement constitution requires comprise between two (or more) 'constituent powers' with the intent of establishing a unified polity, rather than the constitution emerging out of a clear commitment to act as a unified 'people' or 'polity'. The concept of 'constituent power' is complicated and there can be no automatic assumption that the peace agreement constitution is a straightforward manifestation of a common commitment to a common political community, with common values, residing inside a united territory. The commitment to any common concept of the state often remains contingent on continuing political events. In such an uneasy setting, peace agreement constitutions potentially hold authority because they are part of the political settlement. If this source of authority is accepted, courts can claim legitimacy to preserve that settlement, even if they are acting in an activist or political way. A court becomes the instrument to continue the political settlement and to balance the elite pact needed to uphold the peace, against the broader demands of the constitution. In this setting, peace is both the necessary precondition for constitutionalism and the purpose for which the constitution exists.

Conventional discourses on constitutionalism and judicial review often understand democracy as the justification and grounds against which the political and legal constitutionalism debate is set. The reasoning of political and legal constitutionalism takes democracy as the normatively appropriate end goal of constitutionalism and so disagrees solely on the means to best support that goal. However, if peace is taken as the principal normative aim of a peace agreement constitution, the grounding and reasoning of the discourse on judicial review is unable to capture the place courts hold in the political settlement. This article aims to outline an alternative perspective though which to read the case law of courts interpreting peace agreement constitutions. In so doing, this article brings together the study of constitutional law and political settlements.

III. Constitutional interpretation and 'peace' jurisprudence

The aim of this section, first, is to provide evidence across constitutional jurisdictions concerning the fundamental meaning of a constitutional

[28] P Dann and Z al-Ali, 'The Internationalized *Pouvoir Constituent* – Constitution-Making under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck United Nations Yearbook* 1.

[29] See S Tierney, 'We the Peoples: Balancing Constituent Power and Constitutionalism in Plurinational States' in N Walker and M Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP, Oxford, 2007).

order, and second, to highlight the impact certain judicial decisions may have on the legal and political order of a state. First, I locate that discussion in a wider understanding of the importance of 'foundational cases' which articulate the constitution's core purpose and values.

Foundational cases

A part of the constitutional canon that goes beyond the text of the constitution and which includes the peace agreement, is the judicial decisions that go to the heart of the relationship between the constitutional text and what might be understood as the political settlement. Such cases are understood as foundational, examples of which can be located in the jurisprudence of courts interpreting non-peace agreement constitutions.[30] The German Federal Constitutional Court, for example, in its first case decided after the enactment of the Basic Law, reasoned that:

> A constitution has an inner unity and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles to which individual provisions are subordinate.[31]

The Court found that by using this concept of unity, there were certain fundamental principles in the Basic Law that were superior to other political acts and to lesser constitutional principles, and that the federal government was bound by the decisions and reasoning of the Court. These included, for example, the federal nature of the state itself. Further, in this decision, the Court asserted its authority to respond to constitutional questions at issue in the case, including questions not directly raised in the petition. In so doing, it articulated what it understood to be the essential aspects of the constitution that encapsulated the fundamental political settlement within Germany, and on which the constitution's continued existence in that form depended.

The Indian Supreme Court used similar reasoning in its 1967 decision *Golaknath v State of Punjab*,[32] in which it found that constitutional

[30] One leading example is *Marbury v Madison* from the American Supreme Court (5 US (1 Cranch) (1803) 137). That decision altered the interpretation of the US Constitution by allowing courts, once petitioned, to review if legislation complied with the US Constitution. *Marbury*, like the cases considered foundational in this article, established the legitimacy of courts to conduct judicial review, but, unlike the other decisions considered here, did not go beyond that to articulate the basic meaning of the constitution.

[31] *Southwest State Case* 1 BVerGE 14 (1951) in DP Kommers and RA Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press, Durham NC, 2012) 82.

[32] *Golaknath v. State of Punjab*, Supreme Court of India (1967) AIR 164, 1967 SCR (2) 762.

amendments could not abridge or take away Fundamental Rights enshrined in Part III of the Indian Constitution. In a second landmark ruling that overturned the decision in *Golaknath*, the Court in *Kesavananda Bharati v State of Kerala*[33] protected the constitution from the proposed constitutional amendments of Indira Gandhi, finding that the basic structure of the constitution was outside the political amendment process, and in so doing, the Court established the Basic Structure Doctrine. The doctrine was subsequently applied by the Court to invalidate amendments. It has also been used to uphold the public interest litigation of the Court, which has made the Indian Supreme Court one of the most activist constitutional courts. Again, this case can and has been read as creating an understanding of the political settlement that must be preserved for the constitution to continue to exist in any meaningful form. If these decisions are not to be dismissed (and all these cases remain controversial), they have to be justified in terms of an implicit hierarchy in the constitutional order that involves understanding the core conditions and values that enable the constitution.

Similarly, the French Conseil Constitutionnel struck down a law for breaching fundamental rights found in the Preamble of the 1958 Constitution and the principles of the Republic, in a case concerning the constitutionality of restrictions placed on freedom of association.[34] In its first decision, in 1971, the Conseil struck down a piece of ordinary legislation, and in so doing placed constraints on Parliament. The effect of the decision was to read into the Constitution the Declaration of 1789, the preamble of 1946, and the fundamental principles of the law of the Republic.[35] The Supreme Court of Israel is another example of a court that has ruled on cases that are considered as 'foundational'. Here, most of these decisions were issued in the first few decades of the Court's existence and, despite the absence of a written constitution in Israel, involved limiting government power on quasi-constitutional grounds.[36]

Vicki Jackson and Mark Tushnet question the usefulness of categorising foundational cases;[37] however, I suggest that the concept remains helpful in demonstrating a distinctive form of judicial review that is focused on articulating the basic meanings of the pre-constitutional political settlement that provided authority to the constitution and which remains grounded in

[33] *Kesavananda Bharati v State of Kerala*, Supreme Court of India (1973) 4 SCC 225.

[34] French Conseil Constitutionnel, Decision no 77-44 DC (16 July 1971).

[35] VC Jackson and M Tushnet, *Comparative Constitutional Law* (2nd edn, Foundation Press, New York, NY, 2006) 586.

[36] See, for example, the Supreme Court of Israel, Kol Ha-am case (1953); the Bergman case (1969); the Elon Moreh case (1979).

[37] Jackson and Tushnet (n 35).

the constitutional text. In many of the examples given above, most notably that of the Indian Supreme Court in *Kesavananda*, the decisions have had a lasting and profound impact on the direction of the court and on its subsequent rulings.

There are two additional principles which have been borrowed by courts in decisions on peace agreement constitutions which have an element of similarity of approach between the peace agreement cases discussed in this article and traditional constitutional cases, albeit operationalised in a different way in 'peace jurisprudence'. These are purposive interpretation and the principle of proportionality.

Purposive interpretation

'Foundational cases' find justification in concepts of purposive interpretation linked to the authority of the constitution. Joseph Raz, reflecting on constitutional authority and interpretation, reasons that 'the grounds for the authority of the law help to determine how it ought to be interpreted'.[38] The authority of a peace agreement constitution is found in the authority of the peace agreement and in the promise of peace. In intention and principle peace agreement constitutions hold up peace, in its broadest sense, as their purpose. In the domestic cases cited below, the courts determined, implicitly and explicitly, that peace was the main purpose of the constitutional drafters. Locating the authority of the constitution, at least in part, in peace and following the link made by Raz, the interpretation of these constitutions rests on the same grounding.

Aharon Barak proposes that purposive interpretation can be objective and subjective.[39] The objective purpose being found in the 'interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize' and understood through the language of the constitution.[40] The subjective purpose of the constitution is in the principles 'that the founders of the constitution sought to actualize'.[41] The subjective purpose can be located in the history of the constitution, 'including its pre-enactment history – the social and legal background that gave birth to the constitution, [including] the history of the procedures by which the constitution was founded'.[42] In the case of a peace agreement constitution, its 'history' is located in the peace process and agreement. Peace agreements, however, tend to be elite-driven processes, that may not be representative of the

[38] J Raz, *Between Authority and Interpretation* (OUP, Oxford, 2009) 322.
[39] Barak (n 6).
[40] Ibid 377.
[41] Ibid 375.
[42] Ibid 376.

broader population. Peace agreements are also political compromises that are far from the ideal-type. Again, the peace agreement constitution, unlike the ideal constitutional document, is unlikely to find a source of authority in a collective agency or a united constitution maker. Subjective purpose constitutional interpretation, in this context, cannot be settled, as the purpose of the constitution is not settled and is a matter of ongoing contestation. The use of historical intent is therefore not particularly useful or applicable to peace agreement constitutions (and, in fact, also remains contested in more settled contexts).

In both settled and peace agreement constitutions, the trouble with according significance to subjective purposive and authorial intent is that the constitution may become stuck in time. This is perhaps best conveyed by Justice Lamer of the Canadian Supreme Court in his judgment on the meaning of the phrase 'fundamental justice' in section 7 of the Canadian *Charter of Rights and Freedoms*:

> [A] danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing social needs … If the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials … do not stunt its growth.[43]

The danger of a peace agreement constitution being held in time may be greater than it is for constitutions written at other points in history. Peace agreements are compromise deals that, in many cases, have required concessions from both sides (and international actors) in order for agreement to be reached. However, when incorporated into the constitution, there is a risk that these tensions will freeze the social divisions of the conflict in time.

Barak lists six internal and external sources to determine objective purpose.[44] The most relevant being the fundamental values of the constitution, 'embodied in the words of the constitution … as well as the objective purpose guiding the interpretation'.[45] Fundamental values can also be found in documents 'external to the constitution [which] encompass

[43] *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 504. The Australian and German constitutional courts have made similar pronouncements. The United States Supreme Court has, on the other hand, engaged with original intent doctrine.

[44] Barak (n 6) 377–84.

[45] Ibid 381.

the constitution and form part of its objective purpose'.[46] For a peace agreement constitution, peace is without doubt a fundamental value of the constitution, and the peace agreement is an example of a further source of fundamental values that are external to the constitution but which must be considered as part of its objective purpose. Peace has no clear meaning, and although the word 'peace' is included in the Colombian and Bosnian constitutions[47] there is no definition attached. It is therefore at the discretion of the constitutional court, when referencing peace, to determine its meaning and scope, which in part explains the differences between domestic and international courts, as discussed below.

Proportionality

Proportionality has become a common tool in constitutional interpretation[48] and, again, finds a different form in the context of a peace agreement constitution. Limitation clauses, which provide a means for courts to access principles of proportionality, are sometimes included in constitutional texts. Broadly, there are four elements of proportionality: (1) proper purpose; (2) rational connection; (3) necessity; and (4) proportionality *stricto sensu*, or balancing.[49] In a case before the Canadian Supreme Court concerning the use of section 1 of the *Charter of Rights and Freedoms*,[50] the so-called 'limitations clause', the Court reasoned that '[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance'. The Court held that section 1 had to be interpreted 'contextually' as a result of the qualification that the government could limit otherwise constitutionally protected rights if such limitations could be justified in a 'free and democratic society'. In so doing, the Court relied on the phrase 'free and democratic society' contained in section 1 as evidencing both the

[46] Ibid.

[47] See the preambles of the Bosnian and Colombian constitutions; and art 22 of the Colombian Constitution.

[48] See above (n 7) for a list of recent publications.

[49] A Barak, 'Proportionality (2)' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012).

[50] The most notable example of a limitations clause is section 1 of the Canadian Charter of Rights and Freedoms which reads as follows: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' South Africa (art 36, of 1996 Constitution), Israel, New Zealand (art 5, Bill of Rights) and Australia (section 28, 2004 Human Rights Act of the Australian Capital Territory and section 7, 2006 Charter of Human Rights and Responsibilities Act of the State of Victoria) have also included limitations clauses in their constitutional documents. The European Convention on Human Rights allows limitations that are 'necessary in a democratic society' (arts 8(2), 9(2), 10(2), 11(2)).

justification for limiting a constitutional right and the purpose for which the Charter was enacted, such that 'the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit of a right or freedom must be shown … to be reasonable and justified'.[51] In coming to this decision, the Court articulated the grounds on which a limitation would be found reasonable and justified, namely, that the means chosen must (1) be rationally connected to the objective served by the limitation; (2) impair 'as little as possible' the right or freedom in question and, most importantly; (3) there must be 'a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"'.[52] The Canadian Supreme Court and the German Constitutional Court have been influential in developing the principle of proportionality,[53] which has been 'borrowed' by other constitutional courts and adjusted in meaning to be contextual and contingent.[54]

It has even been suggested, although not without criticism, that proportionality has 'provided a common grammar for global constitutionalism',[55] with some going so far as to argue that it is the 'ultimate rule of law'.[56] I am cautious that the claim being made in this article of an emerging global 'peace jurisprudence' based on the principle of proportionality is not evidence of a 'globalising' legal trend, rather, it has been taken up by a number of domestic courts – in ways that address, in whole or in part, the four elements, without fully engaging in a proportionality test as the Canadian Supreme Court did in *Oakes* – to allow for the demands of peace to be balanced gently against the activity of a continuously (re)negotiated political settlement.

For peace agreement constitutions with strong-form judicial review, the court is given the authority to (re)negotiate the constitution. Grégoire Webber provides a particularly useful understanding of the constitution, not as articulating an end state, but as an ongoing activity. Webber reasons that limitation clauses are a 'promising avenue' to allow for democratic (re)negotiating.[57] The principle of proportionality is one way for courts

[51] *R. v Oakes*, Supreme Court of Canada (1986) 1 S.C.R.103.

[52] Ibid paras 69–71.

[53] See D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.

[54] See D Beatty, *The Ultimate Rule of Law* (OUP, Oxford, 2004).

[55] M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 263.

[56] Beatty (n 54).

[57] GCN Webber, *The Negotiable Constitution* (CUP, Cambridge, 2009) 13.

to navigate between conflicting constitutional rights. Constitutional limitations clauses often refer to democracy as a justifiable means to limit other constitutionally protected rights. As with the political and legal constitutionalism discussion, democracy is used as the benchmark against which limitations are measured. In a post-conflict transition, however, peace and democracy may have different requirements, and so, may require different sequencings. For this reason, democracy may not be the most suitable value against which to determine if the proportional limitation of a right is allowed under a peace agreement constitution. Rather, it may be peace that is the more relevant and critical value, since peace is the prerequisite to democracy and not vice versa.

Courts seeking grounds on which to limit constitutional rights recognise that putting an end to conflict is a proper and paramount purpose of any constitution. The constitutional courts in Bosnia-Herzegovina and Colombia, as the cases below will make clear, upheld limitations on constitutionally recognised rights and, in doing so, accepted the need for certain rights to be understood as proportional to peace. Implicit in these decisions is a view that peace is an appropriate constitutional purpose. This is the same conclusion arrived at in the Northern Irish decision (although in that case, they did not use proportionality). However, upholding a limitation using the principle of proportionality also allows space for the court to maintain discretion on which rights can be limited and the extent and time to which such limitations are valid. The use of the principle of proportionality is a mechanism for courts to continuously (re)negotiate the constitution in order to reflect the changing needs and customs of society. Nowhere are the needs and customs of society changing more suddenly and dramatically than in the transition from a state of conflict to a state of peace. In such cases, the principle of proportionality empowers the courts to reinterpret the political settlement between the elite-driven compromise and the ongoing transition.

IV. A new 'peace' jurisprudence

Cases from jurisdictions considered in this section serve to illustrate what I suggest is an emerging global 'peace jurisprudence'. The conflict and peace process in Colombia is ongoing,[58] and while the direct conflicts in Bosnia-Herzegovina and Northern Ireland ended, both continue to be

[58] Currently, the peace process between the government and the FARC has been closer to settlement than any time previously. On 23 June 2016, the parties signed a ceasefire that came into effect on 29 August 2016, which was signed amid great ceremony in September. However, the agreement was rejected in a 'special plebiscite' on 2 October 2016. This has not impacted on how this article has considered this case study.

constrained by their pasts. The constitutions of Bosnia-Herzegovina and Colombia were both drafted as part of their peace processes, while the Northern Ireland Act (1998), that forms the basis for the Northern Irish judicial decision, operates as the implementing 'basic law' or 'devolved constitution' for that jurisdiction. In principle and fact the Belfast (or Good Friday) Agreement acts as a constitution for Northern Ireland, as the Judicial Committee of the House of Lords accepted in the case discussed below. It is this continued association to the peace process that make Bosnia-Herzegovina and Colombia interesting examples. The first case involving the Belfast Agreement and the case of Northern Ireland is also a noteworthy case, as it involves a sub-state government and constitutional arrangement within a more settled national constitutional setting.

Northern Ireland

The Northern Irish case involved a challenge to a failure by the Northern Irish Assembly to appoint a First Minister and Deputy First Minister by the deadline specified in the Northern Ireland Act. The Belfast Agreement, signed by the major political parties,[59] the British and the Irish governments, was a power-sharing agreement for Northern Ireland.[60] The Agreement was accepted by referendum in both the Republic of Ireland and Northern Ireland in May 1998. The British Parliament subsequently passed the Northern Ireland Act implementing the power-sharing arrangement in a devolved assembly for Northern Ireland. The Act outlined the procedure by which the First Minister and the Deputy First Minister were to be elected, stipulating that: 'Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the Deputy First Minister.'[61] Section 16 left open what would happen if the six-week deadline was overreached, only suggesting in section 32(3) that: 'If the period mentioned in section 16 ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly.'[62] By the time of the facts in question in the case, the 1998-elected devolved government had been suspended and restored three times. When the devolved government was restored on 23 September 2001

[59] The Democratic Unionist Party (DUP) was the only major party to oppose the Agreement.

[60] For more on the Belfast Agreement and the conflict in Northern Ireland see B O'Leary and J McGarry, *The Northern Ireland Conflict: Consociational Engagements* (OUP, Oxford, 2004).

[61] *Northern Ireland Act 1998*, section 16(1); reproduced in full in *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 3.

[62] Reproduced in full, alongside section 31, in *Northern Ireland Act 1998*, section 16(1); reproduced in full in *Robinson* (n 61) para 16.

the positions of First Minister and Deputy First Minister had become vacant. A vote was held on 2 November 2001, which was unable to gain the necessary agreement between the then main Unionist and Nationalist parties. Undesignated members of the Assembly redesignated as Unionists in order to get the required cross-party support needed to elect the First Minister and Deputy First Minister on 6 November, by which time the six-week deadline had expired.

Mr Peter Robinson, a Democratic Unionist Party (DUP) Assembly member, brought a case on the grounds the elections were unlawful and that new elections should be held in accordance with section 32(3). The DUP, one of the then-potential 'spoilers' of the peace agreement which they opposed, were on the cusp of becoming the main Unionist party in Northern Ireland.[63] Having not been party to the Belfast Agreement, the DUP were at that time hopeful of dismantling it as they were making electoral gains vis-à-vis the then larger pro-Agreement Ulster Unionist Party on the back of their opposition to the Agreement. Their challenge therefore was more than technical – had elections had been called, the DUP stood a good chance of becoming the dominant Unionist party and of refusing to enter the power-sharing executive, effectively collapsing the central political mechanism and the Agreement.[64]

The question before the Judicial Committee of the House of Lords was whether the holding of a vote for the First Minister and Deputy First Minister after the deadline of 5 November 2001 violated the Northern Ireland Act. In what appeared to be an activist, highly purposive reading of a text that was arguably ambiguous, the House of Lords, in essence read the time limit and requirement to hold elections as not applicable.[65] They did so on the basis of the relationship of the Northern Ireland Act to the Belfast Agreement. Lord Bingham, giving the leading speech in the majority, held that:

[63] Unionists (loyalists) support the political union between Northern Ireland and the United Kingdom (and are mostly Protestant). Nationalists (republicans) favour union with the Republic of Ireland (and are mostly Catholic).

[64] Sinn Féin was also likely to become the dominant Nationalist party in the Assembly had a new election been called. There were concerns that the DUP and Sinn Féin would replace the more moderate Ulster Unionists and the Social Democratic and Labour Party (a nationalist party).

[65] C Turpin and A Tomkins agree that the 'majority of the House of Lords interpreted the legislation purposively, the purpose being to maintain devolved government in Northern Ireland'. And that '*Robinson* suggests that, when it comes to the interpretation of what the courts deem to be "constitutional statutes" (whatever that may mean in our unwritten constitution), different rules may apply from those which govern the interpretation of ordinary (i.e. nonconstitutional) legislation.' C Turpin and A Tompkins, *British Government and the Constitution Text and Materials* (6th edn, CUP, Cambridge, 2007) 70–1.

> [T]he 1998 Act … was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions … If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.
>
> The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. Mr Larkin [on behalf of the appellant] submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct … [However, while] elections may produce solutions they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody … this constitution is also seeking to promote the values referred to in the preceding paragraph, [namely the values set out in the Belfast Agreement].[66]

The language in this decision reinforces the idea that the 1998 Act, implementing the Belfast Agreement, is in effect a constitution for Northern Ireland, and that as a constitutional document it embodies and protects the values and purposes of the peace agreement. The decision also makes note of the tensions between democratic values, such as electoral and parliamentary procedure and strict compliance with the constitutional text (in this case the Northern Ireland Act), and values of peace and reconciliation, which may possibly be worsened by enforcing such democratic processes even when the effect would be to end the possibilities for democratic self-government. The House of Lords does not use the language of proportionality explicitly (which would not immediately have had the same connotation in British constitutional practice in any case), however, they rejected the petition of the appellant on the grounds that the provision

[66] *Robinson* (n 61) paras 10–11. It is also worth repeating here an extract from the opinion of Lord Hoffmann (in the majority): 'According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States' (para 33).

of the Act requiring elections should a First Minister and Deputy First Minister not be elected was not intended to constrain the Assembly from acting, and that the provision 'must be read in context'.[67] The House of Lords sought to preserve the arrangements in the original agreement in its spirit, even at the expense of the strict literal meaning of the implementing Northern Ireland Act. This case was brought shortly after the passing of the Act, making the decision in this case relevant to the success of the peace accord. The position taken in this case is an example in which the underlying political settlement was endorsed and protected by the judiciary, at the expense almost of the wording of the Northern Ireland Act, demonstrating the essential role of this 'least dangerous branch'[68] of government in managing the ongoing political settlement process.

Bosnia-Herzegovina

The Constitution of Bosnia-Herzegovina was drafted as an annex to The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the final peace agreement to resolve the war in the former Yugoslavia.[69] The Agreement was drafted in November 1995 under the supervision of the European Union special negotiator and delegates from France, Germany, Russia, the United Kingdom and the United States. The Agreement recognised the new state of Bosnia-Herzegovina as a decentralised federation composed of two entities, the Republic of Srpska and the Federation of Bosnia-Herzegovina. A power-sharing arrangement was agreed at the state federal level recognising Bosniacs, Croats and Serbs as 'constituent peoples', thereby limiting election to the presidency and upper house to members of these groups.[70] The power-sharing arrangement was a necessary compromise needed to allow the Dayton Agreement and in particular its commitment

[67] *Robinson* (n 61) para 17.

[68] Alexander Hamilton contended that the US Supreme Court would be the 'least dangerous to the political rights of the Constitution' (A Hamilton, Federalist No. 78 in A Hamilton *et al*., *The Federalist Papers* [1788] (ed MA Genovese) (Palgrave Macmillan, London, 2009).

[69] For a complete history of the peace process and a more considered evaluation of the Dayton Agreement and the constitution see PC Szasz, 'The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia' (1995) 19 *Fordham International Law Journal* 363.

[70] The Constitution of Bosnia-Herzegovina sets out in the preamble that the constitution is 'dedicated to peace, justice, tolerance and reconciliation' and is determined by the 'Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina'.

to a central Bosnian state to go forward.[71] The Constitution also incorporated the European Convention on Human Rights (ECHR) to 'apply directly in Bosnia and Herzegovina'.[72]

Over time the foundation of the power-sharing arrangement, the provision that Serbs, Croats, and Bosniacs only were 'constituent peoples', was challenged. In a case concerning the constitutionality of the electoral law the Constitutional Court of Bosnia-Herzegovina – comprised of a careful balance of Bosniak, Croat, Serbian and international judges found that:

> the provision of Article 8 of the Election Law of Bosnia and Herzegovina [on the election of the Presidency], including Article V of the Constitution of Bosnia and Herzegovina, 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. The said restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties … [The articles] serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights are proportional to the objectives of general community in terms of preservation of the established peace.[73]

Justice Feldman, one of the three international judges on the Court, wrote, in his concurring opinion, that he regarded 'the justification as being temporary rather than permanent', concluding, however, that 'the time [had] not yet arrived when the State [had] completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina'.[74] Justice Feldman's reasoning hints that the political process will eventually hit a stage at which time a justification on the grounds accepted in this case would not be constitutional.

[71] PW Galbraith, United States ambassador to Croatia between 1993 and 1998, in an interview with B O'Leary in August 2012, suggests that 'absent explicitly ethnic power-sharing assurances to the three main groups the negotiations would neither have begun or concluded' (C McCrudden and B O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (OUP, Oxford, 2013) 24).

[72] Constitution of Bosnia-Herzegovina, art II(2).

[73] Constitutional Court of Bosnia-Herzegovina, *Admissibility & Merits*, Case No AP-2678/06, 29 Sept 2006, paras 21–22.

[74] Constitutional Court of BiH (n 73) Separate Concurring Opinion of Judge David Feldman, para 3.

In a second case on a similar matter, the Court found that:

> The … restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties given that the said provision was intentionally incorporated into the Constitution … [and that such restrictions] are proportional to the objective of general community in terms of preservation of the established peace [and] continuation of dialogue.[75]

The decisions of the Bosnian Constitutional Court reflect the theories of Richard Pildes[76] and Samuel Issacharoff,[77] who agree that constitutional courts tend to be restrained when power-sharing arrangements are in tension with human rights provisions. This article goes further than the conclusions made by Pildes and Issacharoff, in suggesting that the Court is picking up the principal of proportionality to safeguard the power-sharing arrangement, although the Court did exercise caution in these cases. Further, as Justice Feldman points out, the Court does not hold the constitutional authority to go beyond the Constitution in determining legal and constitutional issues to bring the state law or Constitution in line with Bosnia's international obligations under the Convention.[78] However, as I discuss below, the European Court of Human Rights (ECtHR) came to the opposite decision in its judgment on the power-sharing arrangement, raising the question of whether and how regional or international courts apply a 'peace jurisprudence'.[79] In the case being considered, the ECtHR rejected the reasoning of the Constitutional Court, upholding the individual rights of the applicants over the power-sharing arrangement, in effect, finding the Constitution to be in violation of the Convention and Protocol.

Colombia

The 1991 Constitution of Colombia replaced the 1886 Constitution[80] and formed the culmination of a peace process with a wide range of

[75] Constitutional Court of Bosnia and Herzegovina, *Decision on Admissibility and Merits*, U-5/09, 25 Sept 2009 cited in C McCrudden and B O'Leary (n 71) 89.

[76] RH Pildes, 'Forward: The Constitutionalization of Democratic Politics' (2004) 118 *Harvard Law Review* 25.

[77] Issacharoff (n 19).

[78] Constitutional Court of Bosnia-Herzegovina, *Decision on Admissibility*, Case No U13/05, Separate Concurring Opinion of Judge David Feldman, 26 May 2006, para 4.

[79] This case will be discussed below.

[80] Amended in 1910, 1936 and 1945.

armed groups,[81] and reflects this relationship to the peace process in its design.[82] The Constitutional Court of Colombia, in accordance with Article 24, is entrusted to '[safeguard] the integrity and supremacy of the Constitution'.[83] In an early decision, the Court listed some of the constitutional values and principles that inform the constitution and constitutional interpretation, including peace as 'captured in the preamble to the constitution'.[84] The Court has been judicially active and progressive,[85] rulings on laws that have bearing on the continuing peace process and in a way that supports the idea of an emerging 'peace jurisprudence'.

In an initiative of the Uribe government from 2003 onwards, the government passed the Justice and Peace Law in 2005 (Law 975)[86] as part of a 'peace process' with the United Self-Defense Forces of Colombia (AUC). These were right-wing paramilitary groups who sought to uphold a 'pro-state' agenda and were often alleged to be acting in collusion with elements of the government, meaning that the concept of a 'peace process' between these groups and the government was contentious. However, both the AUC and the government signed the Santa Fe de Ralito Agreement in July 2003, setting out the terms for the demobilisation and reintegration of AUC members. The Agreement included provisions limiting the prosecution of demobilised members. As a part of this process, in the

[81] The constituent assembly that was convened to draft the new constitution did not include representatives of the FARC or ELN, although the ELN had signed past peace agreements.

[82] Justice MJ Cepeda-Espinosa wrote of the Court: 'Some people think that the Constitution is best suited for Switzerland. Needless to say, that is not my opinion. Nevertheless, one of the first objections raised against the 1991 Constitution by those who defended the previous 1886 Constitution was that it promised too much for a country like Colombia, and that it seemed to have been conceived for a society that was living in peace. Hence these critics revisited the common phrase with which Víctor Hugo disqualified the 1863 Colombian Constitution, which also contained a generous bill of rights and followed the federal model: "it is a constitution fit for angels."' (MJ Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529, 532).

[83] The institution of constitutional review, however, was not unique to the 1991 Constitution. Under the previous 1886 Constitution, the Supreme Court of Justice (CSJ) was called on to rule on the constitutionality of a national law where there was a disagreement concerning its constitutionality between the President and Congress.

[84] T-406, 1992(2) G.C.C. at 198, in D Landau, 'Two Discourses in Colombian Jurisprudence' (2005) 37 *The George Washington International Law Review* 687, 727.

[85] Landau suggests that the Colombian Constitutional Court has adopted a 'new constitutionalism' approach to judicial review which considers constitutions as extraordinary documents 'that should be read broadly and with the document's hierarchy of ideals in mind'; Landau (n 84) 709.

[86] Enacted by Congress on 22 June 2005, signed into law by President Uribe on 22 July 2005. This was followed by Decree No 4760, 30 December 2005, which regulated aspects of the law.

period between November 2003 and April 2006, more than 30,000 members from 35 armed groups under the AUC, participated in the demobilisation process.[87] The law established a 'transitional justice' mechanism for paramilitaries to demobilise and confess in exchange for reduced penal sentences of five to eight years.[88]

A coalition of human rights organisations brought a case before the Constitutional Court under Article 241(4) of the Constitution,[89] challenging the content of 33 of the 72 articles of the Law on the grounds that there were irregularities in the legislative process in some of the rules; that the bill allowed for judicial pardons to members of illegal armed groups without procedural requirements; and that the measures were inadequate to the protections of victims' rights. In its ruling, the Court,

> named the pursuit of peace as a complex legal entity, as a collective right, an essential purpose of the Colombian state and a constitutional value. Therefore, the State had the authority to provide reasonable transitional instruments, justified and proportionate, even limiting other constitutional guarantees, in order to achieve peace. However, such limitations could not be based on the understanding of peace as an 'absolute value'. Instead, the peace achievement should be compatible with the main aspects of the Rule of Law, in particular the rights of victims.[90]

The Court determined that the alternative punishment mechanism was aimed at achieving peace, and so, found the law to be constitutional in general. However, the Court issued guidelines on victims' participation[91] and access to reparations,[92] the meaning of 'paramilitarism' as a crime under the law, and introduced legal consequences to those participating in the mechanism who concealed information[93] removing some of the more

[87] This is according to official data, cited by the Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, OEA/Ser/LV/II.125, Doc 15, 1 Aug 2006, para 7.

[88] For a fuller account of the Justice and Peace Law, see LJ Laplante and K Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley De Justiciay Paz' (2006) 28 *Michigan Journal of International Law* 49.

[89] Under art 214(4), the Court may '[d]ecide on the petitions of unconstitutionality brought by citizens against statutes, both for their substantive content as well as for errors of procedure in their formation'.

[90] *Gustavo Gallón Giraldo y otros v Colombia*, Constitutional Court of Colombia Judgement, C-370/06 (Dossier D-6032); English language abstract available at <http://english.corteconstitucional.gov.co/sentences/C-370-2006.pdf>.

[91] Ibid para 6.2.3.2.2.1–6.2.3.2.2.10.

[92] Ibid para 6.2.4.1–6.2.4.1.24.

[93] Ibid para 6.2.2.1.1–6.2.2.1.7.30.

contentious aspects of the law. The Court 'found that the settlement of the claim depended on the balance between the pursuit of peace and the rights of victims'.[94] The law remains controversial both in its passing and its implementation.

In keeping with a strict reading of the Constitution, the Court may review the procedural constitutionality of an amendment, not the content.[95] However, in a series of decisions from 2003,[96] the Court has introduced the constitutional replacement doctrine as a doctrine on 'unconstitutional constitutional amendments', similar to the Indian Supreme Court's basic structures doctrine. The doctrine sanctions the Court to review the content of amendments on the grounds that it modifies or replaces the essential element of the Constitution.[97]

The Santos government, elected in 2010, pushed forward the peace process with the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). As part of these efforts, the 'Legal Framework for Peace'[98] was passed as a constitutional amendment, introducing Transitional Articles 66 and 67 as an 'exceptional' transitional justice framework to facilitate the peace negotiations and achieve 'a stable and lasting peace'.[99] The amendment has been criticised for contravening certain human rights provisions of the 1991 Constitution and international human rights law.[100] However, the Court, exercising the constitutional replacement doctrine, ruled on the content of the Legal Framework for Peace amendment, accepting its constitutionality on the grounds that the essential principles of the constitution were not undermined by the amendment so long as it was proportional to the intended objective of

[94] Constitutional Court, Press Release on the legal challenge to the Justice and Peace Law, Law 975 of 2005, Dossier D-6032 – Decision C-370/06, 18 May 2006.

[95] See arts 241 and 379.

[96] C-551/2003, C-1200/2003, C-970/2004, C-153/2007, C-588/2009, C-141/2010, C-1056/2012 and C-10/2013. See C Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 11 *International Journal of Constitutional Law* 339.

[97] Bernal (n 96).

[98] Legislative Act 1/2012.

[99] Although the transitional justice mechanisms established under this amendment are to be 'exceptional' there is no clear timeline given.

[100] For more on the tensions between (temporary) transitional justice mechanisms and (more permanent) constitutions, see JM Méndez, 'Constitutionalism and Transitional Justice' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) and C Bernal, 'Transitional Justice within the Framework of a Permanent Constitution: The Case Study of the Legal Framework for Peace in Colombia' (2014) 3 *Cambridge Journal of International and Comparative Law* 1136.

facilitating peace.[101] Again, as in all the cases reviewed in this section, the Court was able to find a way to both honour the agreement so as to shield the political settlement and future peace negotiations, while tweaking it to better protect human rights, so as not to backtrack too far on the constitution's protection of human rights and international law.

The most recent peace agreement reached between the Colombian government and the FARC must first be approved in a referendum. The law on the referendum was, by process, referred to the Constitutional Court (both sides having agreed to commit to its ruling), which was upheld, with some condition. For example, the decision of the referendum would be binding only on the executive and not on other branches of government, and the agreement, if approved, would not automatically be incorporated into the constitution or law. The peace agreement, however, was rejected in the referendum on 2 October 2016. Although, at the time of writing, the outcome of the peace process is unclear, it is likely that the Court will continue to play a role in the process, reinforcing this function that the Court has already taken on itself.

All three jurisdictions therefore, illustrate how courts often balance the requirements of the letter of the constitution, with its underlying purpose as being to bring about peace. They show the ways in which courts will adopt flexible approaches to ensuring the constitution is not used to defeat the underlying political agreement that enabled it.

V. International Human Rights Courts: Supporting or undoing the 'peace jurisprudence'?

While so far I have focused on domestic jurisprudence, often these same cases and fact patterns are subject to subsequent international human rights court rulings. These have the capacity to take quite different decisions, posing the question of whether international or regional human rights courts understand the relationships of rights to peace differently than domestic courts.

[101] Judgment C-579/2013 (in which the Court accepted that prosecutions of members of illegal armed groups could be selected and prioritised as part of the transitional justice mechanism) and Judgment C-577/2014 (in which the Court ruled that former members of illegal groups could participate in politics after serving their sentence for 'political crimes'). The details of these cases go beyond the scope of this article. For a fuller account of the cases see Bernal (n 100).

The European Court of Human Rights

A claim was brought before the ECtHR concerning a challenge by two applicants, both citizens of Bosnia-Herzegovina, on the grounds that their Jewish and Roma origins made them ineligible to stand for election to the House of Peoples and the Presidency, both governed by the power-sharing arrangement. The applicants, Dervo Sejdić and Jakob Finci, did not have a declared affiliation with the three 'constituent peoples' barring them from standing for election, which, they argued, amounted to racial discrimination under the Convention and Protocols.[102]

The ECtHR came to the opposite view from the Constitutional Court, finding, by fourteen votes to three, a violation of Article 14 (prohibition of discrimination) of the ECHR, together with Article 3 of Protocol No 1 (right to free elections) and Article 1 of Protocol No 12 (general prohibition of discrimination) to the Convention.[103] The Court concluded that Bosnia-Herzegovina had moved on sufficiently from the conflict settled by the Dayton Agreement, and, therefore the objective of peace articulated by the Bosnian Constitutional Court was not a sufficient reason for overriding the individual equality rights of the challengers. In spite of accepting that '[t]he nature of the conflict was such that the approval of the "constituent peoples" … was necessary to ensure peace …. [there have been] significant positive developments in Bosnia and Herzegovina since the Dayton Agreement'.[104] The Court, quite dramatically found that the Constitution which comprised part of the Peace Agreement violated the ECHR. The contradictory decisions from the Constitutional Court and the ECtHR on similar facts illustrate the quite different balancing acts possible when applying the doctrine of proportionality and the ways in which differently positioned courts will evaluate the imperatives of peace differently.

The decision of the ECtHR has been criticised by Christopher McCrudden and Brendan O'Leary,[105] who are concerned that the approach adopted by the Court in this case may reveal a new precedent of court's being sceptical

[102] The claim was based on art 14 of the Convention, art of Protocol No 1 and art 1 of Protocol No 12.

[103] *Sejdić and Finci v Bosnia and Herzegovina*, European Court of Human Rights (ECtHR), 27996/06 and 34836/06, 22 Dec 2009. Two separate applications were submitted to the Court in summer 2006, which were joined and heard before the Grand Chamber in 2009, three years after the Constitutional Court decision. The decision has not yet been fully implemented.

[104] Ibid, paras 45, 47. On the issue of proportionality, as the Court was competent *ratione temporis* to consider the period after the ratification and the Protocol No 1, it did 'not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a "legitimate aim" since … the maintenance of the system in any event does not satisfy the requirement of proportionality' (para 46).

[105] McCrudden and O'Leary (n 71).

to consociational (power-sharing) arrangements. I agree with McCrudden and O'Leary's argument that 'the historical and political contexts in which the provisions of constitutions and peace agreements are drafted – especially peace agreements that are constitutional texts – need to be properly understood, especially by courts' and that '[a]pparently repugnant provision may have defensible political origins'.[106] I also agree with their assessment of the ECtHR decision as being problematic, although it is necessary to note that there were strong dissenting opinions.[107]

This case of *Sejdić and Finci* reveals how the international court came to its decision in contrast to the Bosnia Constitutional Court's approach of proportionality. The imperative of peace had passed for the ECtHR, which in essence called 'time' on the transition during which a 'peace jurisprudence' could apply. In his dissenting opinion, Justice Bonnello is critical of the Court for ignoring the realities of the peace in Bosnia and is sceptical that the Court should 'behave as the uninvited guest in peacekeeping multilateral exercises and treaties that have already been signed, ratified and executed'.[108] He also questions the Court's reasoning that the situation in Bosnia had changed sufficiently making the power-sharing arrangement no longer necessary. The case may seem a clear violation of human rights, as Justice Bonnello concedes, however, the reasoning of the majority opinion can also be criticised for going too far in preserving the electoral rights of the two applicants over the imperatives of the peace agreement in the first place. In the case before the Constitutional Court, Justice Feldman (cited above) had signalled that time will move the political settlement on so that compromises such as that in Dayton may no longer be necessary, but that time had not yet arrived. There is also a serious question, as Justice Bonnello indicates, as to whether the ECtHR (or any international court) is the appropriate institution to determine when that time has come and peace has been achieved sufficiently to enable the dismantling of the power-sharing arrangements.

Inter-American Court of Human Rights

A more flexible approach to a 'peace jurisprudence' seems to be operating in the Inter-American Court of Human Rights. In a case before the Court concerning Colombia's response to the murder of judicial officials, the Court held that the punishment for serious violations of the law must be proportionate to the crime and that '[e]very element which determines the

[106] Ibid xv.

[107] Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev, and Dissenting opinion of Judge Bonello in *Sejdić* (n 103).

[108] Dissenting opinion of Judge Bonello in *Sejdić* (n 103).

severity of the punishment should correspond to a clearly identifiable objective and be compatible with the [American Convention on Human Rights]'.[109] The Court interpreted the Justice and Peace Law (Law 975), and in so doing, signalled, *obiter dicta*, that it accepted the Colombian Constitutional Court's reasoning on the principle of proportionality:[110] 'the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognised by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events'.[111] However, the Court stopped short of declaring the act of reducing sentences in consideration for demilitarisation and confessions as being consistent with the Convention:

> Given that uncertainty exists with regard to the content and scope of Law 975, and the fact that the initial special criminal proceedings are underway which could provide juridical benefits to individuals who have been identified as having some relationship to the events of the Rochela Massacre, and taking into account that no judicial decisions have yet been issued in these proceedings … the Court deems it important to indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the juridical framework of the demobilization process.[112]

In this case, the Court appeared sympathetic to the need for a contextual application of human rights law that was understanding of the imperatives for peace and appeared to view its role as one of sketching out the parameters that the law should stay within, in terms of 'principles, guarantees and duties', rather than give a black and white answer to the question of compliance with human rights law.

A second Inter-American Court judgment on the issue of amnesties after non-international armed conflict is worth mentioning briefly because it signals a reinforcing of this approach perhaps with a forward glance to Colombia's peace process with the FARC, although this case concerns the situation in El Salvador. The Court again considered the human rights implications of El Salvador's transitional justice mechanisms.

[109] *La Rochela Massacre v Colombia*, Inter-American Court of Human Rights, 11 May 2007, para 192.

[110] Proportionality is also a principle in international law, under which full amnesties are prohibited, however, while '[i]nternational law may require that punishment be proportionate to the seriousness of the crimes committed … neither international law not judicial practice has yet determined with any certainty what quantum of penalty is proportionate' (see Méndez (n 100) 1278).

[111] *La Rochela Massacre* (n 109) para 196.

[112] *La Rochela Massacre* (n 109) para 192.

The Inter-American Commission of Human Rights found that '[i]n approving and enforcing the [General Amnesty for the Consolidation of Peace Law (1993)], the Salvadoran State violated the right to judicial guarantees [Art 8(1)] … and the right to judicial protection [Art 25]'.[113] Having failed to comply with the recommendations of the Commission Report on Merits No 177/10 concerning the application of the Amnesty Law to the investigation of the alleged massacre of approximately 1,000 civilians between 11 and 13 December 1981 by the Salvadoran army, the Commission submitted the case to the jurisdiction of the Court. Justice Garcia-Sayán, in his concurring opinion, held that:

> States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.
>
> Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately.[114]

The opinion of Justice Garcia-Sayán gives perhaps the best articulation of the concept of balancing of rights, which cannot be achieved all at once, and the principle of proportionality. Unlike the ECtHR, which went quite far in pushing for constitutional reworking in *Sejdić*,[115] the Inter-American Court, in *La Rochela* and *The Massacres of El Mozote*, has been more sympathetic to the fragile balance that is demanded for peace.

International courts are perhaps less well placed to make balanced judgments as to how the demands of justice should be weighed against the

[113] *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez and Carlos Antonio Martínez*, Inter-American Commission of Human Rights, Report N° 1/99, Case 10.480, El Salvador, 27 January 1999, para 123, 129.

[114] Concurring opinion of Judge Diego Garcia-Sayán, Judgment of *The Massacres of El Mozote and Nearby Places v El Salvador*, The Inter-American Court of Human Rights, 25 October 2012, paras 37–38.

[115] See C Bell, 'What We Talk About When We Talk About International Criminal Law' (2014) 5 *Transnational Legal Theory* 241, 273–4 on the 'mutually referencing' positions of European institutions.

demands of peace as they may be less alive to the local requirements of the compromise and, in any case, may not be seen as the legitimate authority to navigate between these tensions. In such circumstances, it is perhaps best to follow the reasoning of the Inter-American Court in *La Rochela*, which set out broad parameters for what makes the compromise more acceptable in human rights terms. International courts that do not adopt a 'peace jurisprudence' risk intervening directly to 'destroy' the political settlement, with little capacity to assist in the reconstruction of a new alternative one. This was the risk taken by the ECtHR in *Sejdić* which, by prioritising individual rights over groups rights and failing to sufficiently understand the difficulty of constitutional change, put in jeopardy the foundations of the political settlement without providing an alternative solution. The Court failed to understand that 'the philosophy and practice of contemporary constitutionalism offers a mediated peace' and while in 'theory and practice this is seen as second best to a just peace',[116] it is overreaching to make a determination on what that ideal peace should look like if it is at the expense of undoing the compromise arrangement that was necessary for a state of peace in the first place.

VI. Conclusion

A peace process does not end with the implementation of a new (or revised) constitutional arrangement, and constitutional courts should be considered an instrumental actor in this ongoing process, and through judicial review engage as one of many actors in a continuing (re)negotiation. No matter what the original intentions of political actors to allow for a strong constitutional court, the peace agreement constitution cases considered in this article indicate that domestic courts often uphold the core tenets of peace, even when those clash with literal interpretations of the constitutional text or more absolutist notions of how human rights apply.

How then are we to understand the legitimacy or otherwise of these decisions? I suggest that courts seeking grounds on which to limit constitutional rights are recognising the ending of conflict as a proper purpose of the constitution. However, introducing a requirement of proportionality also allows space for the court to maintain discretion as regards those rights that can be limited and the extent and time to which such limitations are valid. The use of the doctrine of proportionality is a mechanism for courts to continuously (re)negotiate the constitution, which

[116] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP, Cambridge, 2005) 211 cited in Hart (n 1) 168.

will shift as the state transitions from conflict. The courts in such cases are in a position to reinterpret the political settlement between the elite-driven compromise and the ongoing demands of transition.

Courts are relevant actors in considering how a state transitions throughout the political settlement. They are not neutral arbitrators of the constitution but may play a vital role as peacebuilders or spoilers of the peace agreement. They are less visible than other institutions and may uphold or unwind the political settlement more gently. Both domestic and international courts play this role. While domestic courts often are highly aware of the political context of their decisions and can produce a nuanced 'peace jurisprudence', international human rights courts, however, have often made different rulings and a review of how the same or similar cases have been dealt with illustrates examples where courts have adopted different approaches and become 'unwinders of ethnic political bargains'.[117]

The interpretation of 'peace agreement constitutions' demands that constitutional courts navigate between an elite pact and a more open constitutional way of doing business, where both remain important to any emerging constitutionalism. In the cases considered, the domestic courts were asked to mediate between the tensions inside the political settlement, and in all examples, interpreted peace to be the most important constitutional value, or the primary purpose of the constitution. As these examples make clear, judicial institutions are as important as political institutions in guaranteeing a stable political settlement. The judiciary has, in some ways,

[117] RH Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective' in S Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP, Oxford, 2008) 195. Pildes, as an example, uses the *Constituent Peoples Case* (Constitutional Court of Bosnia and Herzegovina, *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, Case U 5/98, Partial Decision (30 Jan 2000), Partial Decision (19 Feb 2000), Partial Decision (1 July 2000), Partial Decision (19 Aug 2000)), in which the Bosnian Constitutional Court declared unconstitutional provisions of the entities constitutions that limited citizenship in the entity on the basis of ethnicity. The Court found that all ethnic groups were 'constituent peoples' under the constitution. While Pildes argues that this decision dismantled part of the 'accommodationist' political settlement, the decision also entrenched the ethnic divide in the constitution, recognising collective ethnic rights of the 'constituent peoples', and in so doing found a balance between democratic principles and international law, on the one hand, and peace, on the other. For more on this case see AM Mansfield, 'Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina' (2003) 103 *Columbia Law Review* 2052. McCrudden and O'Leary take this phrase from Pildes, suggesting that courts can determine the success or failure of consociational arrangement, however, they admit that there has been very little research done on this question; see (n 71) 43. Pildes also suggests that there is a temporal element to courts acting as 'unwinders' – the idea of time as an important factor in political settlements is also reflected in the ideal of the 'constitutional moment', which is elusive in a peace agreement constitution; see (n 76).

limited the pace at which development of the political settlement has taken place, maintaining the constitutional link to the peace agreement, while acknowledging that the link should not preserve elite pacts against challenge permanently or without limits. The constitutional courts in all cases used similar reasoning that has impact on the meaning of post-conflict peace and the future of the *post bellum* state. In so doing, the courts have understood the constitution as an activity rather than an end state, preventing the constitution from being frozen in time.