The Constitutionalism of Emergency: The Case of Bosnia and Herzegovina and Beyond: Multinationalism Behind Asymmetrical Constitutional Arrangements

Maja Sahadžić

Abstract This paper explores the difficulties with multinationalism that lead to crises and conflicts; and the variation in effects and responses between traditional types of crises and the crises caused by multinationalism. To overcome impediments associated with the traditional concept, the paper emphasizes the role of constitutional asymmetries in addressing extraordinary circumstances. This is further assessed by examining the effects of multinationalism on constitutional systems. While Bosnia and Herzegovina serves as the starting point and a clear case in support of the theoretical discourse, other constitutional systems are also shown to support the key points.

1 Introduction

It has previously been observed that the majority of states define some form of constitutional emergency regime. This suggests that constitutions around the world are designed in such a way as to provide a basis for a response to potentially extraordinary circumstances.1 Two remarks can be made in this respect. Firstly, scholars researching constitutional emergency provisions have long debated the traditional types of crises, such as armed conflict, insurgency, economic crisis and terrorism,2

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1 Bjørnskov, C., & Voigt, S. (2016) ‘The Architecture of Emergency Constitutions’. 16/03/2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558.

2 Rossiter, C. (2009). Constitutional Dictatorship, Crisis Government in the Modern Democracies. New Brunswick, London: Transaction Publishers. Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar. Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. International Journal of Constitutional Law, 2(2). In general, see: Gross, O., & Aoláin, F. N. (2006). Law in Times of Crisis: Emergency Powers in Theory and Practice. Cambridge: Cambridge University Press.

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M. Sahadžić (✉)
Government and Law Research Group, University of Antwerp, Antwerp, Belgium
e-mail: maja.sahadzic@uantwerpen.be

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neglecting other contemporary potentials for exceptional circumstances. Secondly, one of the main obstacles linked to constitutional emergency regimes is that an emergency itself points to the limits of constitutionalism.  

This is mainly apparent in mechanisms designed to respond to the effect of emergencies, such as emergency powers, while other potentially versatile mechanisms identified by other fields of research have been overlooked.

One significant aspect of contemporary observations is that they emphasize, among other aspects, the critical role of identity markers in generating crises and conflicts. This is because multinationalism is recognized as a significant contributory factor in the occurrence of intense relationships within systems that incorporate various identities. There are at least two reasons why differences in identity may become salient in producing extraordinary circumstances. Firstly, the groups with distinctive identity markers may have the potential for political mobilization, as they may inspire members of the group to pursue changes within the system based on a difference in identity. Secondly, and not unconnected to the first, when and where this occurs, such groups induce constitutional asymmetry relating to their particular identity. Indeed, recent studies confirm close correlations between multinationalism and constitutional asymmetry. In other words, this implies that the systems will employ permanent or transitional asymmetrical solutions, in an attempt to accommodate multinationalism. This often occurs in response to an emergency, with the aim of disabling the ‘secession potential’ and holding the system together. Ultimately, these considerations are confirmed by many examples of new constitutional designs around the world that exhibit elements common to multinationalism and constitutional asymmetry established under extraordinary circumstances. One obvious example is Bosnia and Herzegovina, where the constitution prescribes a range of asymmetrical provisions with regard to the ethnic-national communities making up

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3Dyzenhaus, D. (2012). States of Emergency. In M. Rosenfeld, & A. S. Sajo (Eds.), *The Oxford Handbook of Comparative Constitutional Law* Oxford: Oxford University Press.
4Burgess, M. (2006a). Comparative federalism, Theory and practice. London: Routledge.
5Watts, R. L., Relations, Q. s. U. I. o. I., & Studies, Q. s. U. S. o. P. (2008). Comparing Federal Systems. School of Policy Studies, Queen’s University.
6Ibid.
7Stepan, A. (2004). Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism. In E. L. Gibson (Ed.), *Federalism and Democracy in Latin America* Baltimore, Md: Johns Hopkins University Press. Burgess, M. (2006a). Comparative federalism, Theory and practice. London: Routledge.
8Watts, R. (1999a). The Theoretical and Practical Implications of Asymmetrical Federalism. In R. Agranoff (Ed.), *Accommodating Diversity: Asymmetry in Federal States* Baden-Baden: Nomos Verlagsgesellschaft.
9Tarlton, C. D. (1965). Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation (research article). *The Journal of Politics*, 27(4), 861. See in this volume: Nikos Skoutaris and Elias Dinas, The Paradox of Territorial Autonomy: How Subnational Representation Leads to Secessionist Preferences.
the constituent peoples. Similar solutions can be found, for example, in Belgium, Canada, China, India, Indonesia, Iraq, Italy, Malaysia, Myanmar, Pakistan, Russia, Spain and the United Kingdom.

Thus, multinationalism and constitutional asymmetries have the potential to challenge the concept of constitutional emergency regimes. However, as the topic is essentially unexplored, there is a need for an elementary debate that addresses specific types of crises and conflicts generated by multinationalism, government responses to extraordinary circumstances, and the effects on the constitutional system caused by multinationalism. Certainly, a comprehensive discussion about the topic lies beyond the scope of this paper. However, it is hoped that this research will contribute to a deeper, perhaps altered, understanding of constitutional emergencies through the concepts of multinationalism and constitutional asymmetry.

2 Exceptional Circumstances: Traditional and Multinational

Traditionally, research investigating constitutional emergency regimes has mainly focused on three types of crises: war, rebellion and economic depression. (Rossiter 2009) These previous studies attempt to evaluate the interaction between the impact of armed conflicts, natural disasters, riots or economic crises on the constitutional system and the government’s response to these exceptional circumstances. Equally important, in recent years, there has been an increasing interest in emergency provisions that include responses to (domestic) terrorist threats. A considerable amount of literature has been published on how terrorism challenges the constitutional integrity of states and leads to specific responses from governments under exceptional circumstances. Although a search of the literature shows that there is no unique pattern in classifying the exceptional nature of circumstances, the most common phrasing

10Sahadžić, M. (2011). Priroda političkog sistema u Bosni i Hercegovini. In D. Banović, & S. Gavrić (Eds.), Država, politika i društvo u Bosni i Hercegovini – Analiza postdejtonske političkog sistema Sarajevo: University Press, Magistrat izdanja.

11For practical reasons, this article mainly refers to several states on the European continent, excluding multi-tiered multi-national systems with only one asymmetrical region within the state or with overseas territories, due to their peculiar status.

12Rossiter, C. (2009). Constitutional Dictatorship, Crisis Government in the Modern Democracies. New Brunswick, London: Transaction Publishers.

13Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar. Rossiter, C. (2009). Constitutional Dictatorship, Crisis Government in the Modern Democracies. New Brunswick, London: Transaction Publishers. Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. International Journal of Constitutional Law, 2(2).

14Finn, J. E. (1990). Constitutions in Crisis; Political Violence and the Rule of Law. New York, Oxford: Oxford University Press. Ackerman, B. (2004). The Emergency Constitution. The Yale Law Journal, 113. Dyzenhaus, D. (2012). States of Emergency. In M. Rosenfeld, & A. s. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law Oxford: Oxford University Press. See in this
includes ‘state of emergency’ and ‘state of exception’. In the light of this, one of the most frequently explored concepts in the traditional approach to exceptional circumstances has been the concept of emergency powers. In particular, it is now well established from a variety of studies that two issues linked to emergency powers have been well considered: the scope of expansion of emergency powers and the potential abuse and misuse of emergency powers.

Regarding the contemporary potential for exceptional circumstances, it has been argued that the traditional function of constitutional emergency regimes is challenged by multinationalism. This argument is based on two factors. Firstly, at present, a large proportion of the world’s population lives in a constitutional system with some form of federal arrangement. Secondly, the majority of these systems are

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15 Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), *Comparative constitutional law* Cheltenham and Northampton: Edward Elgar.

16 Bjørnskov, C., & Voigt, S. (2016) ‘The Architecture of Emergency Constitutions’. 16/03/2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558. Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), *Comparative constitutional law* Cheltenham and Northampton: Edward Elgar.

17 Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. *International Journal of Constitutional Law*, 2(2).

18 For the purpose of this paper, multinationalism is understood as territorially based differences built on linguistic, religious, cultural, ethnic, and other identities where significant groups with one or more distinct identities claim important political autonomy around these differences. Stepan, A. (2004). Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism. In E. L. Gibson (Ed.), *Federalism and Democracy in Latin America* Baltimore, Md: Johns Hopkins University Press.

19 Hueglin, T. O. (2013). Comparing federalism: Variations or distinct models? In A. Benz, & J. Broschek (Eds.), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* Oxford: Oxford University Press. Also: Elazar, D. J. (2006). Exploring federalism. Tuscaloosa, Ala, University of Alabama Press. However, in reality, the numbers are even higher because contemporary federal arrangements are identifiable in quasi-federal states, regionalized unitary states, and transnational settings. Delmartino, F. (2009). New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union. In F. Palermo, C. Zwilling, & K. Kössler (Eds.), *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems* Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano. Also: Palermo, F. Ibid. Asymmetries in Constitutional Law – An Introduction. Bozen/Bolzan. Sahadžić, M. (2017). Constitutional asymmetry vs. sovereignty and self-determination. *sui-generis.*
considered 'multinational'.\textsuperscript{20} In the literature, it is suggested that these two factors imply that these systems have the potential for fragmentation\textsuperscript{21} but may also develop bonds which hold the system together.\textsuperscript{22} On the one hand, the systems attempt to respond to emerging fragmentation through the accommodation of multinationalism, namely by introducing intermediary tiers of government between the central and municipal levels, thus creating multi-tiered systems. On the other hand, these systems respond to multinationalism through a variety of federal arrangements, in particular, constitutional asymmetry.\textsuperscript{23}

The argument that multinationalism puts traditional constitutional emergency regimes on trial is reinforced by the fact that the constitutional system may come under siege by multinational concerns in numerous unanticipated ways. In general, these concerns fall under concepts such as self-governance and autonomy, or other more hardened notions such as self-determination claims, secession, independence and separatism, accompanied by violence. One clear example is the violent conflict which occurred in the former Yugoslavia, and more specifically, Bosnia and Herzegovina, from 1992 to 1995. The most recent case is the Catalan referendum in 2017.

\textsuperscript{20}Frenkel, M. (1986/2007). Federal Theory. Zuchwil/Switzerland: Centre for Research on Federal Financial Relations and The Australian National University, Canberra. Popel, P. (2014). Subnational multi-level constitutionalism. Perspectives on federalism, 6(2), 1–23. Also: Blindenbacher, R., & Watts, R. (2002). Federalism in a Changing World – A Conceptual Framework for the Conference. In R. Blindenbacher, & A. Koller (Eds.), Federalism in a Changing World, Learning from Each Other, Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism Montreal & Kingston, London, Ithaca: McGill’s Queen’s University Press.

\textsuperscript{21}Obinger, H., Leibfried, S., & Castles, F. G. (2005). Federalism and the Welfare State: New World and European Experiences. Cambridge University Press.

\textsuperscript{22}Stepan, A. (2004). Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism. In E. L. Gibson (Ed.), Federalism and Democracy in Latin America Baltimore, Md: Johns Hopkins University Press.

\textsuperscript{23}The literature on comparative federalism makes use of the term ‘asymmetry’ to indicate differences in the status between and among different tiers in the system. De facto or political asymmetry is defined as practices and relationships based on linguistic, religious, cultural, ethnic, social, economic, political, and other differences between the subnational entities, and between subnational entities and the central level. More specifically, these differences correlate with the size of the population, the size of the territory, and the economic character, resources and wealth, fiscal power and autonomy, electoral system, and party system of the subnational entity. They are the basis for de iure asymmetry. De iure, constitutional, or formal asymmetries are differences embedded in constitutional and legal processes, producing an unequal positioning of subnational entities under the law. More specifically, they correlate with differences in constitutional design and distribution of competences. De iure asymmetries emerge as a result of pressure from a subnational entity that is strong enough to extort the constitutionally entrenched accommodation of differences. Swenden, W. (2006). Federalism and regionalism in Western Europe, A comparative and thematic analysis. Basingstoke: Palgrave Macmillan. McGarry, J. (2011). Asymmetric Autonomy in the United Kingdom. In M. Weller, & K. Nobs (Eds.), Asymmetric Autonomy and the Settlement of Ethnic Conflicts Philadelphia, Oxford: University of Pennsylvania Press. Watts, R. L. (1999b). Comparing federal systems. Montreal: McGill-Queen’s University Press 2 ed. Burgess, M. (2006a). Comparative federalism, Theory and practice. London: Routledge. Burgess, M. (2009). The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective. In F. Palermo, C. Zwilling, & K. Kössler (Eds.), Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems Bozen/Bolzan: Europäische Akademie Bozen/Accademia Europea.
while other examples include Belgium, Canada, Ethiopia, India, Iraq, Italy, Myanmar, Pakistan, South Sudan and the Sudan. These examples suggest that the importance of this subject has been continuously confirmed. 24

Nevertheless, for the most part, this subject suffers from the lack of proper theoretical debate about the connection between emergency constitutionalism and multinationalism and their mutual effects. With this in mind, it is important to further specify the reasons for unfolding the debate. To begin with, multinationalism generates specific difficulties connected to constitutional asymmetry. 25 As mentioned above, this can imply two mutually connected issues. Firstly, multinationalism may provoke specific types of crises and conflicts with regard to a constitutional system. These include crises and conflicts that question the actual existence of the system. Secondly, government responses to exceptional circumstances provoked by multinational causes may go far beyond the issues linked to the concept of emergency powers, including the option to change the blueprint of the state by introducing constitutional asymmetry. In particular, 26 this might include the introduction of additional tiers of government. In addition, the effects of traditional exceptional circumstances largely differ from the exceptional nature of circumstances stimulated by multinationalism. In particular, unlike the effects induced by war, natural disasters, riots or economic crises, the effects of multinationalism do not have the force of abrupt events demanding temporary solutions, such as the suspension of the constitution, restoring the previous state of affairs, questioning the expansion of powers, or decision-making pertinent to emergency regimes. 27

Consequently, further study is suggested, with more focus on how multinationalism and constitutional asymmetries interact with the concept of constitutional emergency regimes. A reasonable approach to tackle this issue could take two directions. One direction would be to explore the difficulties with multinationalism that lead to crises and conflicts, where constitutional asymmetry is seen as a relevant response. A second direction would be to elucidate the differences in effects among the traditional types of crises and the crises caused by multinationalism.

Bolzano. Popelier, P., & Lemmens, K. (2015a). The Constitution of Belgium, A Contextual Analysis. Oxford: Hart Publishing. Requejo, F. (2011). Decentralization and Federal and Regional Asymmetries in Comparative Politics. In F. Requejo, & K. J. Nagel (Eds.), Federalism Beyond Federations, Asymmetry and Processes of Resymmetrisation in Europe Farnham and Burlington: Ashgate.

24 See in this volume: Nikos Skoutaris and Elias Dinas, The Paradox of Territorial Autonomy: How Subnational Representation Leads to Secessionist Preferences.

25 Weller, M. (2011). Introduction. In M. Weller, & K. Nobbs (Eds.), Asymmetric Autonomy and the Settlement of Ethnic Conflicts Philadelphia and Oxford: University of Pennsylvania Press. McGarry, J. Ibid. Asymmetric Autonomy in the United Kingdom. In M. Weller, & K. Nobs (Eds.) Philadelphia, Oxford.

26 Málz, R. (2004). Nation and deliberation. In R. Málz, & F. Requejo (Eds.), Democracy, Nationalism and Multiculturalism London and New York: Frank Cass.

27 Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar.
3 Multinationalism: Generating Difficulties

3.1 Multinationalism and the Potential for Crises and Conflicts

The first key point in this paper is that multinationalism appears to be an important factor in generating crises and conflicts. Despite the reported ramifications, reflected in the fact that diversity in national composition has played a key role in processes of fragmentation, sometimes even violently, multinationalism has not been recognized as a factor that may generate a state of emergency within a constitutional system. One possible explanation for this might be that most contemporary states are uncomfortable with the idea of national diversity within their territory and therefore refuse to acknowledge it by attempting to impose the identity of the majority group. A second possible explanation might be that multinationalism generates ‘the paradox of diversity’. This paradox emphasizes two forces, centripetal and centrifugal, meaning that multinationalism produces conditions for both the successful and unsuccessful accommodation of differences. As the outcomes are evenly matched, it may be that the odds in favour of success have been considered good enough not to need action to improve them.

Nevertheless, two factors that are responsible for multinationalism entailing a potential for crises and conflicts have been revealed. Firstly, ‘the challenge of multinational democracies is “one polity, several demoi”’. This means that various groups need to be institutionalized to accomplish unity, while preserving their identities. Secondly, as a consequence, multinationalism poses challenges that are considerably different from those in mono-national systems. These factors can be best treated under two headings.

To begin with, in the literature, the above-mentioned factors have been associated with the status of different groups within a constitutional system. Understood

28Friedrich, C. J. (1968). Trends of federalism in theory and practice. New York, Washington, London: Praeger.
29Requejo, F. (2001c). National pluralism and federalism. Four potential scenarios for Spanish plurinational democracy. Perspectives on European Politics and Society, 2(2), 305–327.
30Burgess, M. (2009). The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective. In F. Palermo, C. Zwilling, & K. Kößler (Eds.), Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano.
31Ibid.
32Requejo, F. (2004). Federalism and the quality of democracy in multinational contexts: present shortcomings and possible improvements. In U. M. Amoretti, & N. G. Bermeo (Eds.), Federalism and Territorial Cleavages Baltimore: Johns Hopkins University Press.
33Requejo, F. (2001b). Federalism and the Quality of Democracy in Plurinational Contexts: Present Shortcomings and Possible Improvements. Paper prepared for the ECPR Joint Sessions of Workshops 2001 Workshop: Centres and Peripheries in a Changing World, 26. Requejo, F. (2001a). Federalism and national groups. International Social Science Journal, 53(167), 41–49.
as a reflection of individual yardsticks, various groups appear to manifest a singularity by belonging to a distinct group, along with specific sentiments of territorial belonging. In other words, groups tend to preserve their individuality within layers of different belongings (including linguistic, religious, cultural and ethnic), especially within contemporary state structures. In systems such as that in Bosnia and Herzegovina, this is even more complicated due to dual and/or multiple identifications. In general, each of three constituent peoples in Bosnia and Herzegovina identifies differently. While the Serbs identify with the Republic of Srpska and neighbouring Serbia, the Croats in Bosnia and Herzegovina mainly identify with neighbouring Croatia. The Bosniaks choose to be regarded as Bosnians and/or Herzegovinians. Another, supporting example, are the inhabitants of Catalonia and Scotland, who choose to be regarded as such, but also as Spanish and British respectively, due to the need to accentuate flexibility of these groups within a system comprised of several groups and tiers of government.

Equally important, different groups demand the accommodation of their identities, thereby producing intense relationships between tiers of government, both vertically and horizontally. One process seems to have influenced this. Various groups tirelessly challenge the mono-national notion of the system with their own constitutional agendas. In other words, sub-state nationalisms have surfaced with the intention of voicing their political representation based on distinct identity, continuously and even coercively. By way of illustration, after many unsuccessful attempts to (re-)establish an acceptable constitutional structure in Bosnia and Herzegovina

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34See, for instance: Gellner, E. (1993). Nations and nationalism. Oxford, Blackwell. In addition, see the number of terms Tierney uses to refer to groups in: Tierney, S. (2006). Constitutional law and national pluralism. Oxford, Oxford University Press.

35Livingston, W. S. (1952). A Note on the Nature of Federalism. Political Science Quarterly, 67(1), 81.

36For instance, Requejo states that members of these groups recognize themselves based on cultural patterns, the sense of historical distinctiveness, and their willingness to maintain their diverse positions within the political framework. Requejo, F. (2001a). Federalism and national groups. International Social Science Journal, 53(167), 41–49. https://doi.org/10.1111/1468-2451.00291. Also, the nationality of these groups may be expressed singularly where groups identify with the central-level nationality; others may identify with both the central-level nationality and their own designated group (whether this overlaps with an internal territorial division or not); and some may only identify with their own designated group (whether this overlaps with an internal territorial division or not, and regardless of their citizenship or central-level nationality). Keating, M. (2002) ‘Plurinational Democracy in a Post-Sovereign Order’. p. 351.

37To that end, these groups “position themselves in a relational way to the state not as internal ‘minorities’, but rather as polities which are in fact comparable to the state”. Tierney, S. (2006). Constitutional law and national pluralism. Oxford, Oxford University Press. Also: Requejo, F. (2001a). Federalism and national groups. International Social Science Journal, 53(167), 41–49.

38Watts, R. L., Relations, Q. s. U. I. o. I., & Studies, Q. s. U. S. o. P. (2008). Comparing Federal Systems. School of Policy Studies, Queen’s University.

39Requejo, F. (2004). Federalism and the quality of democracy in multinational contexts: present shortcomings and possible improvements. In U. M. Amoretti, & N. G. Bermeo (Eds.), Federalism and Territorial Cleavages Baltimore: Johns Hopkins University Press.
during the 1992–1995 period, the Dayton Proximity Talks took place at Wright-Peterson Air Force Base in Ohio, between 1 and 12 November 1995. In an effort to bring the extreme conditions – in the form of armed conflict between different ethnic groups – to an end, the General Framework Agreement for Peace in Bosnia and Herzegovina was negotiated. The Accords put an end to conflict in Bosnia and Herzegovina and provided Annex IV – the Constitution of Bosnia and Herzegovina, which laid down federal foundations in the state-building process.

However, Bosnia and Herzegovina is not the only example. In Spain, the fear of violence posed by the Basque Homeland and Freedom organization (Euskadi Ta Askatasuna-ETA) positioned it as an important actor at the time that the new Spanish Constitution was being drawn up. In addition, in 1977, more than one million people marched in the streets of Barcelona, demanding autonomous status for the region. This pressure resulted in the creation of ‘pre-autonomies’ for the Basque Country and Catalonia and inevitably led to the regionalization of Spain being embedded in the Spanish Constitution. A similar parallel can be drawn in relation to the role of the Irish Republican Army in Northern Ireland. Moreover, past referendums in Catalonia and Scotland, based on their diverse national character, have repeatedly revealed that there is a threat to the integrity and cohesion of the system. Actors who strived for renegotiation of the original balance in these two states provoked extreme tensions over an extended period of time.

Belgium has also been in a permanent state of constitutional reform since 1970, attempting to find agreement for the peaceful coexistence of distinct groups, while Italy succumbed to pressures founded in social aspects of historical, ethnic and

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40It is also known as the Dayton Accords, Dayton Agreement, Dayton-Paris Agreement, etc. UN Doc. A/50/790 (1995) and S/1995/999 (1995) from 30/10/1995.
41It was initialled in Ohio on 21 November and signed in Paris, France on 14 December 1995 in English and French by (at the time) the Republic of Bosnia & Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and witnessed by the United States of America, the United Kingdom, the Federal Republic of Germany, the French Republic, the Russian Federations, and the European Union special negotiator.
42It contains 11 annexes, Annex IV being the Constitution of Bosnia and Herzegovina.
43Conversi, D. (2002). The Smooth Transition: Spain’s 1978, Constitution and the Nationalities Question. National Identities, 4(3).
44McGarry, J. (2012a). The United Kingdom’s Experiment in Asymmetric Autonomy and Lessons Learned. In M. Seymour, & A.-G. Gagnon (Eds.), Multinational Federalism: Problems and Prospects Basingstoke and New York: Palgrave Macmillan.
45Benz, A., & Broschek, J. (2013). Federal Dynamics: Introduction. In A. Benz, & J. Broschek (eds.), Federal Dynamics: Continuity, Change, & the Varieties of Federalism Oxford: Oxford University Press.
46Popelier, P., & Lemmens, K. (2015a). The Constitution of Belgium, A Contextual Analysis. Oxford: Hart Publishing.
47Ibid.
linguistic differences\textsuperscript{48} and enabled a process of regionalization.\textsuperscript{49} One common feature of all these systems is the bringing of constitutional asymmetry into play in response to difficulties created by facets of multinationalism. In this regard, Cyprus proves to be a unique case. After ceasing to be a British colony in 1960, it was declared sovereign and independent. However, the Constitution of Cyprus was negotiated and drafted by Greece, Turkey and the United Kingdom for the purpose of accommodating the interests of different groups in the population by introducing bi-communalism.\textsuperscript{50}

Given these points, it is apparent that the influence of multinationalism on constitutional systems raises two significant points. On the one hand, the examples above indicate that multinationalism triggers crises and/or produces specific types of emergencies that may threaten the survival of the system. On the other hand, multinationalism provides sustenance for constitutional asymmetries, meaning that it instigates asymmetrical constitutional solutions for the purpose of accommodating diversity.\textsuperscript{51}

3.2 A Reply to Multinationalism: Constitutional Asymmetry

The second key point in this paper is that government responses to multinationalism involve a whole set of instruments and mechanisms that go beyond emergency powers. Moreover, it seems that the emergency powers envisaged in the expansion of executive powers have little purpose in this relationship. Certainly, one could argue that some aspects of crises and conflicts connected to multinationalism may be addressed through emergency powers. Nevertheless, it is more likely that governments will take recourse to the accommodation of multinationalism by using constitutional asymmetry.\textsuperscript{52}

Contemporary federal theory provides a basis for this claim through three points: firstly, an overwhelming number of cases show that the predicaments giving rise to a crisis in the constitutional system usually originate in multinational systems\textsuperscript{53};

\textsuperscript{48}Bartole, S. (2012). Internal Ordering in the Unitary State. In M. Rosenfeld, & A. s. Sajó (Eds.), \textit{The Oxford handbook of comparative constitutional law} Oxford: Oxford University Press.
\textsuperscript{49}Rolla, G. The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems: A comparative approach. \url{http://www.crdc.unige.it/docs/articles/rolla6.pdf}. Accessed 28/09/2016 2016. Also: Palermo, F. (2015). Autonomy and Asymmetry in the Italian Legal System: The Case of the Autonomous Province of Bolzano/Bolzen. In G. Pola (Ed.), \textit{Principles and Practices of Fiscal Autonomy, Experiences, Debates and Prospects}: Ashgate.
\textsuperscript{50}See in this volume: Nasia Hadjigeorgiou and Nikolas Kyriakou, Entrenching hegemony in Cyprus: The doctrine of necessity and the principle of bicomunality.
\textsuperscript{51}Piattoni, S. (2010). The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges: Conceptual, Empirical, and Normative Challenges. OUP Oxford.
\textsuperscript{52}Tierney, S. (2006). Constitutional law and national pluralism. Oxford, Oxford University Press.
\textsuperscript{53}McGarry, J., & O’Leary, B. (2012). Territorial pluralism: its forms, flaws, and virtues. In F. Requejo, & M. C. Badia (Eds.), \textit{Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases} Abingdon and New York: Routledge.
secondly, multinationalism often features asymmetrical forms of decentralization; and thirdly, multinationalism triggers fragmentation. Over time, differences produce either a divergent constitutional position or at least the will for a divergent constitutional position of the specific subnational entities. As discussed above, when various groups have sufficient space to wrap their specificity within one particular polity, they necessarily do it through federal principles. This implies that their endeavours involve linking multinationalism to multiple tiers of government. In other words, as various groups focus on a subnational entity to express their identity, new tiers of government emerge. This obviously leads to alterations in the structure of the state. At the same time, it involves constitutional changes which reflect the impact of multinationalism on a state system. Consequently, when tiers of government are based on distinctive identities, we can consider the system to be prone to asymmetrical constitutional arrangements. This is the case in systems in which at least one part has the benefit of autonomy, but another part or parts have less, or have no autonomy at all. Finally, studies in constitutional asymmetries confirm that such asymmetry results from the challenges of diversity, as multinationalism may demand constitutional design beyond the equal distribution of governing capacities. This relationship may be explained by the fact that multinational systems rely on asymmetric solutions to preserve the unity of the system, while addressing diversity. This potentially produces diverse effects for the constitutional system.

The evidence for this can be clearly seen in several constitutional systems that have reshaped their internal structure in response to multinationalism. In Bosnia and Herzegovina, the Dayton Constitution settled territorial claims on the basis of

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54 Swenden, W. (2006). Federalism and regionalism in Western Europe, A comparative and thematic analysis. Basingstoke: Palgrave Macmillan.
55 Burgess, M. (2009). The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective. In F. Palermo, C. Zwilling, & K. Kössler (Eds.), Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems Bozen/Bolzan: Europäische Akademie Bozen/Accademia Europea Bolzano.
56 Basta Fleiner, L. R., & Gaudreault-DesBiens, J.-F. (2013). Federalism and autonomy. In M. Tushnet, T. Fleiner, & C. Saunders (Eds.), Routledge Handbook of Constitutional Law London and New York: Routledge.
57 Requejo, F. (2001c). National pluralism and federalism. Four potential scenarios for Spanish plurinational democracy. Perspectives on European Politics and Society, 2(2), 305–327. https://doi.org/10.1080/1570585018458764.
58 Fossas, E. (2001). National Plurality and Equality. In F. Requejo (Ed.), Democracy and National Plurinationalism London and New York: Routledge.
59 McGarry, J. (2007). Asymmetry in Federations, Federacies and Unitary States. Ethnopolitics, 6(1), 105–116. https://doi.org/10.1080/17449050701232983.
60 Agranoff, R. (1999). Accommodating diversity: asymmetry in federal states. Baden-Baden: Nomos.
61 McGarry, J., & O’Leary, B. (2012). Territorial pluralism: its forms, flaws, and virtues. In F. Requejo, & M. C. Badia (Eds.), Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases Abingdon and New York: Routledge.
The transformation into a federal state meant a split of the unitary state into a multitiored territorial structure that overlapped with three ethnic-national communities, of Bosniaks, Croats and Serbs, all with distinctive historical, national, ethnic and religious backgrounds. In particular, constitutional provisions in Bosnia and Herzegovina delineate the system into two entities and one district. One subnational entity, the Federation of Bosnia and Herzegovina, is itself a federation of ten cantons, with each populated predominantly by either Bosniaks or Croats, and some ‘mixed cantons’. The other, the Republic of Srpska, is a unitary entity. At the same time, three ethnic-national communities intervene in the territorial design. A linguistic split is recognized in the Constitution of Bosnia and Herzegovina, but it is highly disputed by linguists, who claim that Bosnian, Croatian and Serbian are the same languages. Asymmetry can be traced not only through the specific status of the subnational entities but also in the distribution of competences and the fiscal autonomy of particular entities. For example, although the central-level constitution in Bosnia and Herzegovina enumerates competences assigned to the central-level and subnational entities, the territorial and institutional structure embedded in the constitutions of the subnational entity means the distribution of competences has been prescribed and exercised differently. More specifically, the local competences differ between the Federation of Bosnia and Herzegovina and the Republic of Srpska, and even among the cantons in the Federation in relation to aspects such as communal services and material costs of schools. Similarly, it is apparent that there are differences among two entities in setting rates or/and bases for specific types of major taxation powers.

As the previous sections suggest, Bosnia and Herzegovina is not the only example. In Belgium, as a response to disagreements between the communities, a sequence of state reforms introduced dyadic federalism based on two large but separate linguistic communities, the Flemish and the French, and the small German-speaking community. The usual point of reference here is the mid-twentieth century, when the onset
of economic development in Flanders initiated friction between the communities and regions, which made more autonomy claims. The Constitutionalism of Emergency 

Italy has also enabled regionalization, approving asymmetrical status for some of its regions for the purpose of accommodating cultural diversity on a territorial basis. This meant the establishment of five ‘special regions’. In addition to Sardinia and Sicily, the Aosta Valley, Friuli-Venezia Giulia and South Tyrol were all established based on recognition of differences closely tied to territorial claims. These differences originated from economic and social aspects tied to the historical, ethnic and linguistic distinctions in these subnational entities.

In Spain, where the use of the term ‘nation’ refers to four main identities, Spanish, Basque, Catalan and Galician, the later three identities constantly compete with the Spanish national identity. Their special status and autonomy claims are based on their historical status as nationalities and are grounded in special provisions, mainly with regards to language and formal civil rights.

In the United Kingdom, the three parts, Northern Ireland, Scotland and Wales, have based their autonomy claims around their historical status and a national distinction. Since 1998, they have been granted different degrees of autonomy. They have also

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67Popelier, P., & Lemmens, K. (2015b). The Constitution of Belgium. a contextual analysis. Oxford, Hart Publishing.
68Basta Fleiner, L. R., & Gaudreault-DesBiens, J.-F. (2013). Federalism and autonomy. In M. Tushnet, T. Fleiner, & C. Saunders (Eds.), Routledge Handbook of Constitutional Law London and New York: Routledge.
69Rolla, G. The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems: A comparative approach. http://www.crdc.unige.it/docs/articles/rolla6.pdf. Accessed 28/09/2016 2016. Also: Palermo, F. (2015). Autonomy and Asymmetry in the Italian Legal System: The Case of the Autonomous Province of Bolzano/Bolzen. In G. Pola (Ed.), Principles and Practices of Fiscal Autonomy, Debates and Prospects: Ashgate.
70Bartole, S. (2012). Internal Ordering in the Unitary State. In M. Rosenfeld, & A. s. Sajó (Eds.), The Oxford handbook of comparative constitutional law Oxford: Oxford University Press.
71Requejo, F. (2001d). Political liberalism in multinational states: the legitimacy of plural and asymmetrical federalism. In A.-G. Gagnon, & J. Tully (Eds.), Multinational Democracies New York: Cambridge University Press. See also: Moreno, L. (1999). Asymmetry in Spain: Federalism in Making? In R. Agnanoff (Ed.), Accommodating Diversity: Asymmetry in Federal States Baden-Baden: Nomos Verlagsgesellschaft. Agranoff, R. (1994). Asymmetrical and Symmetrical Federalism in Spain, An Examination of Intergovernmental Policy. In B. de Villiers (Ed.), Evaluating Federal Systems Dordrecht, Boston and London: Juta & Company. Moreno, L. Ibid. Ethnoterritorial Concurrence and Imperfect Federalism in Spain. In B. De Villiers (Ed.).
72Keating, M. (2001). So many nations, so few states: territory and nationalism in the global era. In A.-G. Gagnon, & J. Tully (Eds.), Multinational Democracies Cambridge: Cambridge University Press.
73McGarry, J. (2007). Asymmetry in Federations, Federacies and Unitary States. Ethnopolitics, 6(1), 105–116.
74McGarry, J. (2012b). The United Kingdom’s Experiment in Asymmetric Autonomy and the Lessons Learned. In M. Seymore, & A.-G. Gagnon (Eds.), Multinational Federalism: Problems and Prospects: Palgrave Macmillan.
been recognized as historical nationalities, with their own languages, separate Church and even different legal systems.\textsuperscript{75}

This combination of examples provides support for the conceptual premise that it is usually pressure from multinationalism that requires an emergent response in which states reshape their constitutional system\textsuperscript{76} by introducing asymmetrical constitutional solutions. Correspondingly, these pressures sometimes take the form of armed conflict, brisk but continuous autonomy claims, or more forceful coercion and violent demands.

With these points in mind, there are two key aspects to confirm here. Firstly, what both types of exceptional circumstances, whether traditional or multinational, have in common, is an element of necessity.\textsuperscript{77} Secondly, although some aspects of crises and conflicts originating from multinationalism bear resemblance to traditional constitutional emergencies, they do not provoke the traditional emergency responses. Given this, it is of particular concern to address the effects of multinationalism with regard to the traditional responses of constitutional emergency regimes.

4 Wrangling Over the Effects of Multinationalism

Thus far, the paper has argued that multinationalism provokes new types of crises for constitutional systems and that government responses need not invoke emergency powers but foster constitutional asymmetries. This position challenges the traditional discussion about emergency powers.\textsuperscript{78} To develop a full picture of the key issues, additional exploration will be needed to tackle the effects on multinationalism when it comes to the exceptional nature of circumstances.

To begin with, the scholarship addressing constitutional emergency regimes indicates that exceptional circumstances usually occur abruptly.\textsuperscript{79} Moreover, the exceptional nature of circumstances stands in opposition to the concept of normalcy, assuming that emergency is the exception and normalcy the rule.\textsuperscript{80} In contrast,
The Constitutionalism of Emergency … 261

as the discussion above has suggested, the general pattern of crises and conflicts originating from multinationalism does not necessarily take the same form. The evidence presented thus far supports the idea that multinationalism provokes exceptional circumstances incrementally, slowly bringing the system to the point at which a government response is necessary. At the same time, government responses to multinationalism through the creation of constitutional asymmetries exhibits different dynamics. Notably, the entire process may be perceived as a transition from bargaining about changes within the constitutional system to establishing a new type of normalcy.

The discussion above is closely related to a second type of effect. The scholarship suggests that traditional emergency regimes aim to resolve the threat and return the constitutional system to its previous state. However, as we have seen, constitutional asymmetry generated by multinationalism can be used to resolve a crisis or emergency, but in the process it limits the possibility of restoring the previous state of affairs in the constitutional system. This is because the use of constitutional asymmetries presupposes the accommodation of differences. In turn, the accommodation of differences implies lasting changes to the constitutional system. This means that once they are established, constitutional asymmetries will need to be renegotiated in order to be eliminated. In other words, returning the constitutional system to its previous state actually means transforming the system into a new type of normalcy, as the previous normalcy no longer exists.

In a similar vein, a third effect is connected to the previous two. The theory of constitutional emergency regimes points out that one of the characteristics of the provisions adopted during the time of exceptional circumstances is their temporal application. This is because the government is not allowed to make any permanent changes to the constitutional system by using emergency powers. In contrast, constitutional asymmetries originating from multinationalism will act as lasting solutions. This is because a crisis or conflict based on multinationalism will culminate in an inevitable redesign of the state in favour of the asymmetrical model. From experience, these are mainly long-term solutions. Certainly, they may entail transitional solutions, but they gravitate towards durability.

A fourth effect of emergency powers is the partial or complete suspension of the constitution. In this respect, exceptional circumstances arising from multinationalism have a different type of effect. In such circumstances, there is an insistence that the constitutional provisions accommodate or match the demands, causing an emergency and constitutional asymmetry. In addition, the circumstances have no effect

81Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. International Journal of Constitutional Law, 2(2).
82Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar.
83Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. International Journal of Constitutional Law, 2(2).
84Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar.
on individual rights and freedoms as they revolve around group rights. Moreover, the protection of group rights is abundantly complex in multinational systems.  

Furthermore, in response to exceptional circumstances, traditional constitutional emergency regimes emphasize the importance of the expansion of executive powers. In other words, an emergency usually implies the concentration of powers in the hands of the executive branch. In contrast, in multinational systems that trigger the application of asymmetrical features, there is no effect on the separation of powers. Instead, the effect occurs in the splitting of powers between various tiers of government, whether between the central-level and subnational entity or among several subnational entities themselves. If different national communities claim political autonomy on territorially based differences, constitutional asymmetries presume changes in the territorial formation based on differences in identity, dividing powers territorially to allow the expression of their distinct identity.

Finally, in traditional emergency regimes, it is important to determine who has the power to declare the beginning and the end of the emergency, who decides on the limits of permissible responses, and who exercises the emergency powers, among other issues. By the same token, this is closely linked to the potential abuse and misuse of emergency powers. For the most part, these aspects seem to be closely linked to Carl Schmitt’s definition of sovereignty, which states that the sovereign is the one who decides on the state of exception. Nevertheless, in terms of multinationalism as a potential basis for constitutional crises and emergencies, two key points arise. Firstly, contemporary multinational states reveal vibrant processes, resulting in a constant search for autonomy and the existence of counterbalancing tendencies. Linked with territorially based differences, particular political groups are increasingly likely to establish their own political authority in a given territory, which competes with the traditional notion of sovereignty. This can be observed, for example, in the various states mentioned in this paper. Secondly, in emergencies

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85 Bermeo, N. G. (2004). Conclusion: The Merits of Federalism. In U. M. Amoretti, & N. G. Bermeo (Eds.), Federalism and Territorial Cleavages: Johns Hopkins University Press.
86 Gross, O. (2011). Constitutions and emergency regimes. In T. Ginsburg, & R. Dixon (Eds.), Comparative constitutional law Cheltenham and Northampton: Edward Elgar.
87 Similar in: Burgess, M. (2006b). Comparative federalism. theory and practice. London, Routledge.
88 Frankenberg, G. (2012). Democracy. In M. Rosenfeld, & A. s. Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law Oxford: Oxford University Press. Bjørnskov, C., & Voigt, S. (2016) ‘The Architecture of Emergency Constitutions’. 16/03/2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558.
89 Schmitt, C. (2005). Political Theology, Four Chapters on the Concept of Sovereignty. Chicago: University of Chicago Press.
90 Hooghe, L., & Marks, G. (2012). Types of Multi-level Governance In H. Enderlein, S. Wälti, & M. Zürn (Eds.), Handbook on Multi-Level Governance: Edward Elgar Publishing.
91 Stepan, A. (2004). Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism. In E. L. Gibson (Ed.), Federalism and Democracy in Latin America Baltimore, Md: Johns Hopkins University Press.
92 Sahadžič, M. (2017). Constitutional asymmetry vs. sovereignty and self-determination. sui-generis (50).

caused by multinationalism, all sides will have the leverage to decide and/or influence decision-making.93

In summary, the previous sections have reviewed several key effects generated by the exceptional nature of circumstances. The effects of extraordinary circumstances arising due to multinationalism were discussed and compared to the effects of traditional constitutional emergency regimes. It has been shown that the former diverges from the latter. Ultimately, this implies a need to respond to these new theoretical challenges by readdressing the complex dynamics behind exceptional circumstances and adjusting the theoretical framework to better fit contemporary practice.

5 Conclusions

This paper set out to explore the difficulties with multinationalism that lead to crises and conflicts; and the variation in effects and responses between traditional types of crises and the crises caused by multinationalism. To overcome impediments associated with the traditional concept, the paper emphasized the role of constitutional asymmetries in addressing extraordinary circumstances. This was further assessed by examining the effects of multinationalism constitutional systems. In addition, while Bosnia and Herzegovina served as the starting point and a clear case in support of the theoretical discourse, other constitutional systems were also shown to support the key points.

The most important finding to emerge from this paper is that a shift in the understanding of constitutional emergency regimes is required. The principal theoretical implication of this paper is that contemporary constitutional emergencies are not only bound to armed conflict, rebellion, economic crisis and terrorism. Another implication of this paper is that the emergency response, in the light of multinationalism and constitutional asymmetry, should emphasize processes of incremental accommodation and not instantaneous or ad interim strike. Finally, the generalizability of the debate may be subject to certain limitations and objections. However, these are mainly due to insufficient elaboration of the issues to date. Under these circumstances, further study, with more focus on the issues raised, would be worthwhile.

93 Keating, M. (2002) ‘Plurinational Democracy in a Post-Sovereign Order’. p. 351.
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