CONSTITUTIONAL COURTS AS ARBITERS OF POST-CONFLICT TERRITORIAL SELF-GOVERNMENT: BOSNIA AND MACEDONIA

INTRODUCTION

Territorial self-government (TSG) regimes are increasingly used, in combination with other mechanisms such as central power-sharing or bills of rights, as a conflict management tool in ethnic and ethnonational conflicts. The three general theories of conflict resolution in current literature: consociationalism, centripetalism, and power-dividing, all advocate for the creation of multi-level government. Yet none of the theories provide clear guidance as to how to resolve disputes arising when power is transferred to different layers of government. All three theories generally emphasize the importance of a law-based system, thus implying a potential role for independent judicial institutions (Van Houten & Wolff, 2008: 10). In practise, constitutional courts are frequently charged with adjudicating disputes between central government and sub-state governance units, both in cases where the sub-state units are the result of a peace agreement and where they have alternative origins.

However, in certain cases such courts have been found to have centralising tendencies. Where TSG is a conflict management tool centralisation can undermine the peace agreement by negating the conflict management potential of its TSG provisions. Furthermore, such tendencies are likely to undermine the perceived independence of the judiciary, showing it to favour conflict parties which support maintaining or strengthening the central state and to oppose groups which are in favour of strong powers for the TSG units. Such apparent bias not only undermines to sociological legitimacy of decisions on disputes around TSG but will likely create a wider perception that the judiciary favours or discriminates against a particular groups or groups undercutting its authority across all cases.

This analysis highlights that in the Former Yugoslav Republic of Macedonia and Bosnia and Herzegovina[i] where territorial self-government is used as a conflict management mechanism judicial review *can* have centralizing tendencies similar to those which have been found where judicial review is used in traditional federal arrangements. This is particularly true where the stability of the state appears to be at issue, though the interpretation of which cases pose such a threat is highly context specific. When such tendencies do arise, they can largely be attributed to the processes used to select judges. The use of different types of TSG and the attitudes of different groups towards the TSG arrangements complicates the relationship between the selection of judges and centralization. Furthermore, where TSG has resulted from downward transfer of powers from the central state to sub-state units, dominated by single ethnic or national groups, this also plays a role in these centralizing judgements.[ii]

TERRITORIAL SELF-GOVERNMENT AS A CONFLICT MANAGEMENT TOOL

TSG involves the allocation of an independent public policy role to a sub-state geographic unit. It can involve different forms of institutionally allocated powers. These have been defined and delineated in various ways, both empirically and in theoretical scholarship, with varying distinctions drawn between different forms. These include confederation, federation, federacy, autonomy, devolution, and decentralization. For the purpose of this research, TSG is divided into three main types: federation, autonomy, and decentralization. TSG has been divided into these main types because they provide important distinctions based on the very meaningful dimensions of the extent of the powers enjoyed by the different levels of government and the legal entrenchment of these powers.

Federation implies a constitutionally entrenched structure in which the entire territory of a given state is divided into separate political units, all of which enjoy certain exclusive executive, legislative and judicial powers independent of the central government. Autonomy usually enjoys similar powers and constitutional protection as federal entities, but is distinct in that it does not necessitate territorial subdivisions across the entire state territory. Autonomy is normally a feature of otherwise unitary states. Decentralization means the delegation of executive and administrative powers to local levels of government. It is not typically constitutionally entrenched and does not normally include legislative competences (Wolff, 2010).

The use of such institutional designs is widespread, and they are used in many cases where there has not been identity conflict. Even when it is used as a conflict management mechanism it can be designed to produce diverse regions rather than 'multinational-TSG'. However, this article focuses on these cases of 'multinational-TSG', where TSG is used to provide the level of political autonomy necessary to contain ethnic nationalism and to allow for 'heterogeneous policy tastes' (Brown, 2009). It is in these cases that the greatest demands are placed on the role of judicial review. Traditionally, judicial review is a key element of the institutionalized relationship between different levels of government. It provides a process through which disputes can be resolved and ensures that confusion or competition is successfully managed.

A THEORY OF JUDICIAL REVIEW IN CASES OF ETHNO-TERRITORIAL SELF-GOVERNMENT

Where there are multiple layers of government it is important to ensure that there are clear

mechanisms to resolve disputes as to where specific powers reside. Scholars have recognized that federal arrangements are fragile, that participants have incentives to cheat, and that competitive cheating risks undermining the Union itself. There is essentially a 'federal commitment problem' (Eskridge & Bednar, 1995). Choudhry highlighted that this commitment problem is more intense in what he calls 'post-conflict federalism' as

> the multiplication of national identities…transforms the character of political conflict between the centre and the regions. Moments of high constitutional politics that raise constitutive questions regarding the status and the powers of the national minority and the relationship between the two nation-building projects crowd out ordinary policy disputes; the latter are reframed as raising fundamental questions regarding the right to self-determination... As a consequence, political debate runs the constant risk of escalating from the demand for greater powers toward the existential constitutional question of secession. (Choudhry, 2014: 179).

Similarly, where TSG more broadly is used as a conflict management mechanism, the arrangements provided for in the peace agreement represent an uneasy compromise. Some conflict parties, usually the minorities, seek high-levels of autonomy, up to independence or union with a neighbouring kin-state, and other groups, often the majority, seek to limit this autonomy to protect against state disintegration. Given that peace agreements are usually an unhappy bargain between these positions it is likely that parties will seek to interpret any ambiguity to support their desired position, raising the likelihood of disputes between groups.

Where different levels of government act in ways which negate the activities of others, government may be ineffective or even paralysed. In post-conflict environments it is critical

that these failures are avoided. As Cammett and Malesky (2012) argued, effective government and improved public service delivery can increase citizen satisfaction with the state and undercut motivations for dissent or conflict. Such improvements can be particularly positive where they negate real or imagined inequalities between different groups. Improved governance can also undermine the ability of groups to monopolize resources, preventing them from increasing their power and challenging the state. Thus, where TSG is used as a conflict management tool, dispute resolution between the different levels of authority is vital to prevent the re-emergence of violent conflict.

Courts can have a key role to play, as Horowitz noted

> Judicial review initially developed in the United States of America as a way of enforcing the constitutionally mandated separation of powers among branches of the federal government and division of authority between the federal government and the states, more than the individual liberties guaranteed in the Bill of Rights. Most federal systems require judicial review to apportion authority between the centre and the component units, but they do not necessarily require judicial review beyond that function (Horowitz, 2006: 127).

Ginsburg (2003) argued that judicial review is put in place after a constitutional pact is reached. To provide insurance for all parties as to the stability of the pact, no individual party will make changes that alter the initial constitutional order. It has also been noted that the distinctive role of 'umpire' usually assigned to courts in federal systems has led to a situation where federalism and judicial review have mutually influenced each other in their development (Popelier, 2016;

Hueglin and Fenna, 2006).

Yet whether the central judiciary play a useful role in federalism is hotly contested. Madison advised that "[s]ome . . . tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact, and [that] . . . it ought to be established under the general rather than under the local Governments" (Madison, 1787: 256). However, some scholars find courts acting as arbiters of federalism to be ineffective or even harmful (Wechsler 1954; Tushnet 1999, 123; Dahl 1957; Thayer 1893). Primarily, claims that courts can act as independent arbiters of technical legal issues are hotly debated.

Writing on the establishment of a Supreme Court in the UK, former Justice of the Australian High Court Michael Kirby argued that 'judging in such a court is not, and should not be, a purely mechanical or technical task' (Kirby, 2011). In post-conflict contexts judicial review often involves *interpreting* the provisions of a peace agreement. The space for interpretation may be significant, due to both to the role of 'constructive ambiguity' in reaching agreement and the fact that the depth and breadth of reforms needed in a post-conflict society mean that it is difficult if not impossible to specify every element in a formal agreement (Walsh, 2017).[iii]

A survey of the decisions of the US Supreme Court, clearly shows that judges differ as to what framework they use in their interpretations; with a clear distinction between 'originalist' and 'living-constitutionalists'. A very similar logic is present in post-conflict contexts where there are disputes between those who argue that the courts should merely preserve the post-conflict constitutional settlements and those who feel they should contribute to reforming it. The application of different interpretive regimes in federal or TSG systems will impact on whether the division of competencies between the distinct levels of government is maintained or altered.

CENTRALIZATION

Current literature on judicial review strongly argues that constitutional and supreme courts are not independent and cannot be viewed as neutral arbiters when ruling in disputes between the centre and sub-national levels of government. Based on comparative political study of several federal high courts in democratic federations and the high courts of two governmental structures similar to those of classic federations, Bzdera found that judicial review had a strong centralizing bent. He noted that 'federal high courts…do not hinder the centralist legislative initiatives of the central government and at times they actively encourage and invite such federal initiatives', and 'that the centralist tendency of federal high courts logically leads them to abandon effective judicial review of federal legislation while at the same time they continue to review and often invalidate legislation of the member states' (Bzdera, 1993: 19). Chalmers observed similar patterns and argued that 'Central judicial institutions almost invariably have centralizing rather than particularist tendencies' (Chalmers, 2004: 63).

These patterns appear to be the result of courts which either consciously or unconsciously adopt interpretative regimes which favour the expansion of central powers at the expenses of the constituent units or states. In a study of the Supreme Court of Canada, Leclair (2003) found that the court favoured *functional effectiveness* as a value when interpreting whether the central parliament should have greater latitude in exercising its legislative powers; centralizing powers contrary to the regionalism fundamental to Canadian federalism. In traditional federal systems centralization raises serious concerns that the interests of the regions, which federalism was often adopted to protect, are not sufficiently safeguarded.

There have also been suggestions that courts in contexts where TSG is a conflict management tool will also have centralizing tendencies (Rothchild and Roeder, 2005: 60). In such cases these tendencies represent a real threat to the nascent peace. TSG can only act as an institutional mechanism to manage conflict in divided societies if the arrangements are expected to be stable, respected by all actors, and only changed through agreed procedures. Such arrangements represent a 'knife edge equilibrium' between national government and self-governing communities (Roeder, 2005: 59). Regional groups may aspire to greater autonomy; conversely, central government may have hoped to retain greater powers at the centre. Both sides are likely to fear that the other will perversely seek to move the arrangements in their desired direction. Such delicate compromises can easily be undermined by a lack of trust, which inhibits conflict parties from having confidence in the stability of the agreed arrangements.

Effective judicial review is crucial to preclude the rescindment of transferred competencies and the disturbance of this balance. Any centralizing tendencies would preclude the court from playing a positive role in reassuring the subnational groups that powers will not be arbitrarily recentralized. Where TSG is a conflict management tool, centralizing tendencies are likely to be perceived as favouring any conflict party which supports maintaining or strengthening the central state and disadvantaging groups which are in favour of strong powers for the TSG units.

As a result of 'constructive ambiguity' and the need to make further decisions during the implementation phase, mentioned above, effective judicial review is particularly key in the period directly after the establishment of TSG. New institutions and associated norms become embedded over time and are initially vulnerable. Unfortunately, existing research has suggested that the centralizing tendencies of supreme or constitutional courts are significant in the early years of federations, as they engage in what Halberstam deemed 'infant system protection'

(Halberstam, 2008, 8). This suggests that in the delicate post-agreement period judicial review will permit or engage in centralization, which will in turn undermine the ability of the TSG to act as a conflict management device. This article examines whether these centralizing tendencies are present in cases where courts arbitrate disputes related to the division of competencies between different levels of government, in instances where TSG is being used as a conflict management mechanism. Finally, it assesses what factors facilitate any such centralization.

Reasons for centralization

The reasons why state-level constitutional or supreme courts engage in centralization in federal systems without a history of violent conflict has been the subject of much research and analysis. Explanations have included analysis of the process for appointing judges and the independence/dependence of the court, and the wider design of the federal system; for example the level of input which the constituent units have into central policy-making (Halberstam, 2008; Vauble, 2009; Popelier, 2016). Specifically, current single-case studies which examine the role of constitutional courts where TSG has been used as a conflict management mechanism have focused on the effect of the selection of judges and the independence of the courts (See for example, Kulenović, 2016).

Popelier (2016: 44) argued that 'low levels of representation of the states in selection of judges or composition of the courts may be associated with a more centralist stance'. Two related but distinct explanations have been forwarded to account for this relationship. Firstly, the dependency hypothesis posits that as judges depend on those who appoint them they make decisions in line with the preferences of these actors. So where central or state-level institutions

are dominant in the appointment procedure courts will make centralizing decisions. This dependency can relate to judges desires to be re-appointed but also to the court's dependency on central institutions for financial and administrative support (Vauble, 2009).

Alternatively, courts may reach centralizing decisions because the selection process results in the appointment on judges who genuinely favour the establishment of strong central institutions. This is the shared-preference hypothesis (Vauble, 2009). This hypothesis differs substantially from the dependency hypothesis as the logic suggests that even where efforts are made to ensure the independence of the constitutional court it will still make centralizing judgements. In such cases, even if judges have long and unrenewable terms and the courts have guaranteed financial and administrative support, decisions will still be centralizing.

The use of different forms of TSG, rather than just federalism, as conflict management tools – and the different preferences conflict groups hold regarding the relative strength of central and TSG institutions – complicates the relationship between the selection process for judges and centralizing decisions. Where autonomy or decentralization, rather than federalism, is used as a conflict management mechanism it is less likely that the TSG units will have strongly institutionalized roles in the selection of judges. However, in peace agreements TSG is often combined with central power-sharing. This may mean that even though central institutions play a key role in appointing judges, groups enjoying self-government may be able to influence the choice of judges. The selection of judges in political systems where power-sharing has been applied to executive or legislative institutions may also lead to formal or informal rules which determine that the composition of certain courts should consider the 'identitarian representativeness' of these courts creating power-sharing courts (Graziadei, 2016).

Alternatively, where post-conflict federalism is employed, and constituent units are given a strong voice in appointing judges, it is important to remember that not all constituent units may be in favour of protecting the competencies of TSG units. Some units may be populated by groups who favour a stronger central state and only agreed to TSG as part of a compromise settlement. As such these groups may favour the appointment of centralizing judges.

Focusing more broadly on the structure of the state, Popelier (2016) found that courts are more inclined to take a centralist stance when representation of subnational governments at the federal level is strong. Courts do not view their role as protecting substate units where they already have strong protection or even veto rights through representation in a second chamber and thus seem more comfortable making centralising decisions. The participation of states in federal law-making through the second chamber is used as a proxy for the political safeguards theory as first developed by Wechsler. Wechsler pointed specifically to the Senate's function as a forum of the states, preventing intrusion by the central government on state interests (Popelier, 2016; Wechsler 1954: 546–48). The weaker the input of the TSG units into central policy-making, either due to an ineffective link between the states and the second chamber or the second chamber having inadequate powers, the less effective the political safeguards against centralization. In these particular circumstances the court may be more hesitant in allowing centralization.

The different types of TSG used as conflict management tools and variations in the support for TSG among different groups will complicate the relationships between the input of the TSG units into central policy-making and centralizing court decisions. Where post-conflict federalism is employed, strong input into the state policy-making through a clear link between

the second chamber and a powerful second chamber may not act as a political protection against centralization. Units that dislike TSG and only agree to it to secure a peace settlement may themselves support centralization.

Where autonomy or decentralization is used to manage conflict, it is less likely that TSG units will have strong input into central decision-making. There may not even be a second chamber. However, in these cases central-level power-sharing provisions may provide an alternative route for groups who favour TSG to have a voice, providing an alternative source of political safeguard. These dynamics need to be considered in assessing the process behind any centralization by the constitutional or supreme court in these contexts.

Finally, courts are less inclined to take a centralist stance in devolutionary multinational states, *unless there is a risk to the stability of the country* (Popelier, 2016 – emphasis added). The second half of this hypothesis is particularly relevant for this analysis, as TSG is typically used as a conflict management tool in multinational states and is often aimed at preventing the potential secession of national groups. As Popelier (2016: 43) argued 'If a devolutionary process providing autonomy to multinational entities is deemed vital to the stability of a State, we can expect that courts will be more likely to be open to regionalist claims'. However where such devolution is viewed as encouraging further centrifugal demand this may encourage courts to counter such momentum. This article will assess whether these hypothesized relationships explain any centralizing tendencies observed in the behaviour of constitutional or supreme courts where TSG is a conflict management tool.

RESEARCH DESIGN AND BACKGROUND

In order to assess whether, in cases where TSG is used as a conflict management mechanism, judicial review is centralizing, and if so what factors explain this tendency, this research will examine two existing cases, Macedonia and Bosnia. A comprehensive overview of the TSG arrangements put in place in each case by the respective peace agreements is beyond the scope of this article, but a very brief overview of the post-agreement TSG is arrangements is provided here. Under the Dayton Agreement, Bosnia was internally divided into two entities, the Federation of Bosnia-Herzegovina, mainly populated by Bosniaks and Bosnian Croats, and the Republika Srpska (RS) mainly populated by Bosnian Serbs. The Federation is also divided into ten cantons the majority of which are highly ethnically homogeneous with clear Bosniak or Bosnian Croat majorities. The new state is highly decentralised, with most powers resting at entity level though the central government retains some important functions such as foreign affairs. The 2001 Ohrid Framework Agreement explicitly rejected the idea that there was a territorial solution to the conflict between the majority Macedonian community and the minority Albanian community in the country. However, it did provide for decentralization which stipulated that municipalities should have greater powers in certain policy areas such as education and culture. Given the geographic dispersion of the minority Albanian community this provided them a degree of TSG in municipalities where they were a majority. There were initially 123 municipalities though this was reduced to 84 in a controversial re-districting process in 2004.

Case selection reflected the concerns and recommendations made by Gerring (2004) in relation to 'diverse cases'. It ensured that cases studied represented different types of TSG (Macedonia – decentralization and Bosnia – federalism), different selection processes for judges, and differing levels and process for constituent units or identity groups to input into central decision-making. Both cases are examples of devolutionary multinational states, but they differ

in terms of how great a threat to the unity of the state their multi-national nature is perceived to be, and how likely it is to result in unilateral secession.

In order to ascertain whether the Constitutional Courts in Macedonia and Bosnia have centralizing tendencies relevant decisions from the Constitutional Courts in these countries were examined. The analysis covered the period from after the conclusion of the peace agreement which created the TSG arrangements, 2001 in Macedonia and 1995 in Bosnia, and the end of 2016. It identified three cases in Macedonia where there were disputes regarding whether powers awarded to sub-state units were consistent with the Constitution or whether new laws were consistent with the TSG provisions included in 2001 Ohrid Framework Peace Agreement (OFA).[iv] In Bosnia there were eleven cases[v] where the central issue at dispute was whether an entity could undertake certain activities or pass certain laws given the division of powers between the entities and central state and the provisions of the state-level constitution.[vi]

All fourteen cases were analysed to ascertain whether the decisions indicated that the relevant courts were centralizing. This article takes centralization to mean that a court uses its zone of discretion to apply an interpretative regime which results in the transfer of powers from a sub-state unit to the central government or the restriction or elimination of a sub-state units powers to act in an area where it previously enjoyed competency. During the analysis centralization could not simply be assessed by determining whether a court's decision increased the powers of the centre or decreased the powers of the TSG unit. The nature of the reasoning provided for the decisions, and any dissenting opinions, were also scrutinized. This was necessary to establish that the court was choosing to apply one interpretive framework over another, leading to centralization. This process protected against categorising a court decision as centralizing

where the court's zone of discretion was eliminated by the facts of the case. This was in keeping with the approach advocated by Sadurski (Sadurski, 2008: 96-97).

The analysis then examined what factors contributed to any centralizing tendencies. Blatter and Blume argued that there are three ways of approaching comparative case study research: covariance, process tracing, and congruence (Blatter and Blume, 2008).[vii] This analysis combined covariance and process tracing. It analysed whether courts which demonstrated centralizing tendencies were linked to specific processes of selecting judges, the court's independence, the sub-state groups' input into central decision-making, and/or the devolutionary multinational nature of the state. Covariance corresponds to the prevailing outlook on case studies research in Political Science. Gerring (2004: 342) coherently outlines this approach: 'A purported cause and effect must be found to covary.' This is supplemented with process tracing, specifically by incorporating causal process observations (CPOs) as described by Brady and Collier. A causal-process observation (CPO) is 'an insight or piece of data that provides information about context, process, or mechanism, and that contributes distinctive leverage in causal inference' (Brady and Collier, 2004: 277). An examination of the different sources was carried out in order to assess the different explanatory power of different citations due to their source. Combining these two different methodologies strengthened the causal inferences which could be made.

FINDINGS

This section examines the decisions made by the Courts in the above cases, determining whether the decisions were centralizing. It then assesses whether the processes for the selection of judges, the independence of the courts, the strength of sub-state groups input into central

decision-making, and the devolutionary multinational nature of the states accounted for any centralizing tendencies.

In Macedonia, one decision was clearly centralizing when compared to the language of the OFA while the two others did not show the Court to have centralizing tendencies. The Constitutional Court's decision in *U.No.133/2005* determined that certain provisions of the Law on the Use of the Flags of the Communities in the Republic of Macedonia were unconstitutional. This decision was centralizing because it withdrew from the municipalities powers which had been provided for in both the peace agreement and the specific law. It limited the capacity of decentralized administrations to display flags which represented the identity of the majority within that municipality. The Court tacitly accepted that the flying of the flag outside municipal buildings was affording the local majority [Albanian] communities a specific group right but it dismissed the desirability of this, arguing that it undermined the rights of other groups (Macedonian Constitutional Court, 2007a).

This interpretation of the Law's constitutionality was in opposition to the relevant provisions in the OFA, which very clearly provided that 'local authorities will be free to place on front of local public buildings emblems marking the identity of the community in the majority in the municipality' (Ohrid Framework Agreement, 2001: Article 7.1). Had the Court chosen to use the OFA as an interpretive framework, which was clearly possible, it could easily have declared the specific elements of the Law to be constitutional. The Albanian community was particularly angered by the ruling, as it echoed a court decision from 1997 indicating an unwillingness of the Court to recognize the increased autonomy which it had obtained in the OFA. Furthermore, it was part of a pattern of behaviour where the Court failed to act in accordance with the OFA. It also refused a bilingual complaint lodged by the former Mayor of Tetovo, arguing that the

Court only accepted correspondence in the Macedonian language. While this action was not directly centralizing, it was in contravention of the Peace Agreement more broadly. It clearly failed to acknowledge the Agreement's guarantee that 'any other language spoken by at least 20 percent of the population is also an official language' (Ohrid Framework Agreement, 2001: Article 6.5). These decisions and actions were illustrative of a centralizing Court which fails to protect the autonomy provided to the Albanian community in Macedonia, limiting the powers which had been devolved to local municipalities largely for this purpose.

In *U.No.42/2007* the Court found that the procedure used to adopt the Law on Police was not unconstitutional as had been alleged. It had been claimed that such a law must be adopted using the double majority 'Badinter principle',, where it is voted for by a majority of all deputies in parliament and by a majority of deputies from the non-majority community, i.e. not ethnic Macedonians. The Court argued that the Law did not require such a procedure to pass as it did not address any of the issues which the Constitution specifies require such a majority, 'culture, use of language, education, personal documentation, and use of symbols' (Macedonian Constitutional Court, 2007b). The Court also argued that according to Article 110 of the Constitution it was not competent to assess whether the Law on Police was consistent with the Law on Local Self-Government as it was not empowered to evaluate the mutual consent of the laws as a whole, as well as the mutual consent of the provisions of the laws (Macedonian Constitutional Court, 2007b). This decision was not indicative of a centralizing tendency. In finding that the Law did not require a double majority to be adopted, it may be argued that the Court undermined the minority veto provisions included in the OFA but this related to the working of the central parliament, not de-centralization.

In *U.No.104/2007* the Court also did not display centralizing tendencies rejecting a claim that the Law for Property Taxes was unconstitutional. Its decision actually ensured that municipalities continued to enjoy competencies around setting tax rates which were established in this new Law. In its reasoning the Court directly referred to constitutional right to local self-government and the Law on Local Self-Government underlining a commitment to respecting the principle of decentralization (Macedonian Constitutional Court, 2007c)

In Bosnia six of the decisions found against one or both entities and four found in favour of one or both entities and one was balanced.[viii] This presented a very mixed initial picture as to whether the Bosnian Constitutional Court (BCC) had centralizing tendencies. As mentioned above further study is required to ascertain whether the decisions in favour of the central state are centralizing or simply reaffirm the pre-existing delineation of powers. Given the limitations of this article the analysis will focus on two cases where the Court found in favour of the central state to examine the role of judicial interpretation, though other cases are also briefly referred to in order to further illustrate the analysis.

These cases were chosen for two reasons. Firstly, they were split decisions. This allowed for a clearer examination of the whether the selection procedure for judges effected their position regarding centralization, testing one of the key hypothesis is the existing literature, and providing more data for examination of the interpretative frameworks used as they included dissents. Secondly, these cases covered a substantial chronological period (1998 to 2015) to allow an assessment of whether any centralizing tendencies were continuous or occur during a specific time period.

In part 3 of *U-5/98* The BCC ruled that a number of articles in the Constitutions of both entities were unconstitutional and argued that the three constituent peoples of Bosnia must be viewed as such in both entities (rather than Serbs only being a constituent people in the RS and Croats and Bosniaks only being constituent peoples in the Federation). The different opinions highlighted that a majority of judges choose to prioritize the Dayton Agreement's aims of creating a multi-ethnic state, including through encouraging refugee return. Conversely, the dissenting judges argued that the very strong autonomy provided to the two entities enabled them to develop an exclusive ethnic identity.

In explaining the decision, Judge Begic, argued that the 'the constitutional principle of collective equality of constituent peoples following from the designation of Bosniaks, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples' (BCC, 2000). The Court also drew on the agreement's provisions regarding refugee return to invalidate provisions of the entity constitutions. Judge Danelius, in a concurring opinion ruling that article 1 of the RS constitution was unconstitutional, argued that an 'important aim of the Dayton Peace Agreement…is the return of these refugees and displaced persons to their homes' and that provisions which could limit this, including around the constituent people's roles as provide for the constitutions of the entities, were thus unconstitutional (BCC, 2000).

However, in a strongly worded dissent Judge Savic argued that the decision undermined the TSG provisions of the Dayton state structure, arguing that if the agreement had intended 'Bosniaks, Croats and Serbs were to be constituent peoples individually in both Entities, Bosnia and Herzegovina would not be a complex state union as stipulated by the Dayton Peace Agreement (and under the Constitution of BiH), i.e. the *raison d'être* for the Entities would cease to exist' (BCC, 2000). This clearly indicates that the Court chose to centralize powers by

limiting the entities space for action, as the result of a choice to apply one interpretive framework over another.

Similarly, in *U-3/13* the Court found that the designation, by the RS, of the 9th of January as a public holiday was unconstitutional and stated that it 'does not symbolize collective, shared remembrance contributing to strengthening the collective identity as values of particular significance in a multi-ethnic society based on the respect for diversity as the basic values of a modern democratic society' (BCC, 2015). In this case, the dissenting opinions did not argue that the entity had the right to favour the constituent people who were in a majority in the entity, or that the entities were in fact designed to facilitate such differential treatment. Rather, they argued that the date was politically significant to all Bosnians and that differentiated approaches were acceptable where a majority of citizens were of a specific religion. As those citizens who were not Christian were also entitled to two days paid leave, all citizens were being treated fairly (BCC, 2015). Again, the disparities between the main and dissenting opinions showed that the Court had discretion and chose to adopt a particular view of how multi-ethnic communities should deal with their diversity. The view adopted by the majority limited the entity's ability to choose the date for the national holiday, and so was centralizing.

Reasons for centralization

Both Courts examined above demonstrated some centralizing tendencies. The evidence is clearly insufficient to make grand generalisations that constitutional or supreme courts are centralizing where TSG has been used as a conflict management tool, as the evidence is mixed in both cases. However, these Courts, where they have been centralizing offer strong support for 1) the shared-preference hypothesis and 2) the hypothesis that in multinational states constitutional courts tend to be less centralizing unless the stability of the state is in question.

In Macedonia the municipalities do not have a role in appointing judges to the Constitutional Court. The central assembly plays the key role in selecting judges. However, the Badinter principle ensures that the Albanian community – which favours decentralization – has an effective veto over the selection of two of the judges. This principle stipulates that two of the judges must be elected with the support of the majority of members of the assembly from communities other than the majority community. Given the relative size of Macedonia's communities this gives the Albanian community an effective veto. This provision led to the selection of two Judges who opposed the centralization observed in *U.No.133/2005,* appearing to share the preferences of the Albanian MPs who supported their selection.[ix]

The two Judges who had been selected through the Badinter system resigned in protest at the Court's decision. One of those who resigned was the Court Chairman Jusufi, who outlined that he could not 'sign such a decision', and this disagreement led to his resignation (BBC Monitoring, 2007). However, it is worth noting that the Judges were subjected to extensive political pressure from the Albanian community. It is never possible to determine the internal motivations individuals have for taking an action, so it is not possible to ascertain whether they bowed to this pressure or simply shared the preferences of the Albanian community, though unsurprisingly they maintained that their positions were genuine.

Six of the judges for Macedonia's Constitutional Court are simply selected by a majority vote in the central assembly, ensuring they can overcome any opposition to centralization from the 'Badinter' judges. The six judges may share the preferences of the MPs who elected them. Given that the majority Macedonian community is generally very wary of decentralization; fearing that the Albanian community will use such increased autonomy to pursue increasing

self-government and threatening the territorial integrity of the state, judges elected by this group are likely to have centralizing tendencies. This issue of threat to the state will be returned to below. The case examined in this analysis was initiated by Macedonian community MPs, including one from the largest Macedonian party, and by upholding the complaint of the majority of judges were indicating that they shared the preference of the community which was responsible for their selection.

In Bosnia the entity-level legislatures are the key domestic actors in selecting judges for the Constitutional Court. The Constitution states that 'The Constitutional Court of Bosnia and Herzegovina shall have nine members… Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska' (Bosnian Constitution, 1995: Article 6a). In keeping with the argument on centralization in traditional federations, this would suggest that the court would not have centralizing tendencies. Yet as was observed above it has been centralizing at times. This deviation does not disprove the shared- preference hypothesis, rather it supports it.

This is because the two Bosniak judges selected by the House of Representatives of the Federation consistently make centralizing decisions in line with the general political disposition of the Bosniak community. Furthermore, three additional judges are international judges appointed by 'the President of the European Court of Human Rights after consultation with the Presidency' (Bosnian Constitution, 1995: Article 6a). These judges are likely to share the preferences of the ECHR. Given the ECHR's infamous decision in the case of Sejdić and Finci v. Bosnia and Herzegovina, it is reasonable to extrapolate that the Court would not favour highly autonomous and ethnically exclusive entities. Rather, it would support the development of greater integration and more ethnically neutral institutions. In the cases analysed in this

article as well as others, the judges selected by the President of the ECHR have supported centralizing decisions which are aimed at developing a more integrated and less ethnically exclusive Bosnia. This clearly shows that they share the general preferences of the ECHR. Voting together, the international and Bosniak judges have been able to outvote any opposition from the Serb and Croat judges. This ensures that the BCC can make centralizing decisions, in keeping with the views held by those who selected the majority of judges, despite the strong role of entity legislatures in the selection process.[x]

These voting patterns may seem to equally support the dependency hypothesis. However, the general independence of the courts, both in terms of long and non-renewable terms of appointments for the judges and protected administrative and financial support, weakens this argument. In Bosnia the Judges are appointed until the age of 70, ensuring that they are not dependent on politicians for reappointment. They can only be removed by a consensus decision of the other Constitutional Court Judges. The court also has almost full control of how to manage its own affairs and the salaries of judges cannot be reduced during their term without constitutional amendment. This further secures the independence of the court (Æeman, 2014: Articles 2 & 99, Bosnian Constitution, 1995: Article IX). These provisions do not suggest that dependence of the central state institutions explain its centralizing tendencies. Furthermore, if the Court's dependency was leading to centralizing decisions, all judges should support the centralizing tendencies to ensure their institution secures the necessary support. This was not the case, with clear divisions among the judges based on how they were selected lending further support to the shared-preference hypothesis.

In Macedonia there is some support for the dependency hypothesis. The Macedonian Constitution includes several provisions aimed at ensuring the Court is not dependent on

political institutions. The Judges are elected for a term of nine years (Art. 109) and cannot be re-elected, the latter removes any incentive to make decisions based on the preference of the political branch to secure re-election. The Constitutional Court Judges also have immunity and the right to continue receiving salary for one year after the expiry of their term if it is not possible for them to return to their previous positions or secure other appropriate appointment. However, one year is a relatively short-period of time and judges may need political assistance in securing new employment. Furthermore, Judge Spirovski argued that there are insufficient protections to ensure the Court's financial independence. In the face of decisions it does not support, the government has tried to withhold part of the judges' remuneration and delay payment of the court's electricity and water bills (Spirovski, 2011).

Yet this explanation does not account for the divisions on the Court in relation to centralization. Again, if dependency was a driving factor leading to the Court making a centralizing decision one would expect to observe all judges supporting these decisions to secure the necessary support for the Court. Just as in Bosnia, in Macedonia a sharp division was observed in the attitudes of different judges to centralization based on their selection process. Given that in these cases the selection process for a Judge strongly predicts their position on centralization there is strong support for the shared-preferences hypothesis. Furthermore, it undermines the dependency explanation. If dependency was guiding the decisions on centralization, one would expect them to affect all judges; so the divisions observed would not occur.

There is also clear evidence that the devolutionary multinational nature of the state contributes to the centralizing decisions in these cases. Post-Dayton Bosnia was an extremely decentralized federation. There were, and are, fears that the RS will attempt to unilaterally secede from Bosnia, either to establish a new state or to unify with Serbia. Milorad Dodik, who has served

as Prime Minister and President in the RS, openly states that he believes that RS will eventually emerge as an independent state and has threatened to take actual steps towards secession, his party, the Alliance of Independent Social Democrats (SNSD), issued a declaration stating that RS intends to hold a referendum on independence in 2018 (Balkan Insight, 2012). In light of such threats Constitutional Courts may make centralizing decisions to counter centrifugal momentum.

This hypothesis is further support by the nature of the cases where the BCC found in favour of the centre in comparison to the cases where it found in favour of the entities. In both the cases discussed above the centralizing judgements were made in cases where the entities were attempting to create ethnically exclusive regions. Particularly in the case of the RS this could easily be interpreted as a threat the stability of the state as the creation of such could easily be interpreted as preparation for unilateral secession. Furthermore, this can be compared to cases where the BCC found in favour of the entities, specifically the RS. Two of these cases related more to economic issues than the fundamental shape of the state, though there was an ethnic element.

In the two other cases the Court found the RS activities abroad to be constitutional. This was clearly not centralizing and interpreted the activities in such a way as to not be in breach of the constitutional division of powers regarding foreign policy. While in some cases such activities may certainly appear to be destabilising, positioning a region for secession by establishing it as an actor on the international stage. However, the Court viewed the RS' international lobbying and representations in 2008/9 were targeted at furthering its interests as an entity rather than positioning itself as an independent state (BCC, 2009). This interpretation is likely to be highly context dependent. In many cases engagement in such activities may be viewed as

a sub-state entity trying to take on an international character and thus as a threat to the state, but international opposition to RS independence was so strong that it may have been felt that the RS' lobbying could not possible be a step towards secession and rather was an attempt to counter real or perceived negative international perceptions of and attitudes towards the RS.

Similarly, in Macedonia continuing demands by some Albanian leaders – including secessionist rhetoric and low-level violence – have sustained the majority Macedonian community's fears that Albanians want to break up the state to create a Greater Albania, unifying with kin in Albania and Kosovo. In 2008 and again in 2014 the founding leader of the first ethnic Albanian political party PDP (Party for Democratic Prosperity), Nevzat Halili, proclaimed the Republic of Ilirida arguing that Macedonia should function as a federation of two equal republics (BBC Monitoring Europe, 2014). In 2001 the chairman of Albanian party DPA, Menduh Thaçi, threatened a new war of separation from Macedonia (Rosůlek, 2011). While these positions did not necessarily receive widespread support from ordinary members of the Albanian community, such statements and actions raised fears of secession and encouraged the Constitutional Court to limit the power of municipalities. That is, to centralize.

The arguments presented by the Courts in their centralizing decisions suggest that there is a link between the multinational nature of the state, the threat posed by this, and centralization. In Bosnia, by refusing to allow the entities to become ethnically exclusive the Constitutional Court was guarding against arguments that, as a 'Serb' entity, it is natural that the RS should be independent or unify with Serbia.

Likewise in Macedonia, by arguing that displaying the flag of the majority community in a municipality undermined the rights of other communities the Constitutional Court was

preventing the state from becoming de facto bi-national, which would have created a greater danger of secession. If municipalities are limited in adopting an Albanian character it is less likely they will unify with each other – and other neighbouring countries which have Albanian majorities – to create a Greater Albania. Furthermore, the initiation of the case analysed in this article coincided with a very controversial re-organization of municipal boundaries in 2004. While the revision was officially aimed at creating more sustainable municipalities, in terms of population and resources, the relative size of the ethnic groups rapidly became the most significant issue. It became evident that Albanian politicians were using it to increase the number of municipalities in which Albanians were a majority or breached the 20 percent boundary necessary to facilitate the use of Albanian in that municipality (International Crisis Group, 2003). Such manipulations, contrary to the stated aim of the re-organization, further raised fears that the Albanian community was seeking to create more 'Albanian' municipalities as part of a plan to increase their autonomy and even secede.

However importantly the Macedonian Constitutional Court did not engage in centralization in relation to ability to set tax rates. Arguably strengthening the fiscal capacity of the sub-state units could have better prepared them for independence and thus increased the threat to the stability of the state. Yet, in this case the measures were not interpreted in this way and were framed as part of agreed fiscal decentralisation which was necessary due to the diversity of municipalities in relation to size and level of urbanisation (Macedonian Constitutional Court, 2007c).

While fears about the future unity of both states and the arguments forwarded by the Courts both offer some support for the idea that the multinational nature of the state can encourage centralization where there is a threat to the integrity of the state, it is difficult to disentangle

this explanation from the shared-preferences hypothesis. It is most useful to view the perceived threats to the state as a key driver in determining preferences of both politicians and the judges they select. This is in keeping with the division observed on the two Courts studied. Certain actors see multinationalism as a threat to unity and want to centralize powers to protect against any possible disintegration. Other actors either do not see multinationalism as centrifugal or they are aware of its centrifugal momentum but view this as desirable.

The centralizing tendencies of the BCC may offer some initial support for the hypothesis that courts are more likely to centralize where the sub-state units have more input into central or federal decision-making, as the two entities have a strong input into state level decision-making. Undoubtedly the entities are in a strong position vis-à-vis the central state. They arguably do not need the protection of the Constitutional Court, leaving it freer to engage in centralization. In fact, the Court needs to protect the central state against the entities, especially the secessionist goals of the RS. However, it is important to recall that in the Bosnian case the Constitutional Court's support for centralization varies dramatically between Judges. Depending on whether they are selected by the ECHR, Bosniak community, Croat community, or Serb community. This does not suggest that the whole Court feels that the entities have sufficient protection through input in federal level decision-making and again draws attention to the strength of the shared-preferences hypothesis.

In Macedonia the municipalities do not have strong input into central decision-making. But the Albanian community does have an effective veto on specific decisions through the Badinter voting procedures. Importantly this procedure is used in relation to laws on symbols and emblems, and so applied to one of the cases analysed in this article. As such, the Court's decision invalidated certain provisions of a law which had been agreed by a majority of MPs

and a majority of MPs from communities other than the majority Macedonian community. The centralization through simple-majority voting undermined the political protection which had been provided in the OFA. This may appear to be a case where the Constitutional Court is centralizing to correct errors in a law which result from a political bargain which does not sufficiently consider the Constitution. Though again it is vital to remember that the Court was divided on the decision. Not all members of the central institution wanted to limit the municipalities' powers. The two Judges who resigned over the decision had been selected using the Badinter principle, again providing strong support for the shared-preference hypothesis.

CONCLUSION

This article's analysis provides strong support for the shared-preference hypothesis. The divisions which appeared on the two Courts directly mirrored the preferences of the different actors who selected these judges. These divisions also indicate that in these cases alternative explanations which focus on the independence of courts and the input of sub-state units in central decision-making do not adequately explain the centralizing tendencies of the Courts. They do not satisfactorily account for the different attitudes which different judges take towards centralization. The devolutionary multinational nature of the states also played a key role, though this is perhaps best understood not as a separate explanation but rather as a determining factor of the shared-preferences of the judges and those whose who select them.

The support which this article finds for the shared-preference hypothesis has implications for those designing TSG as part of a peace settlement. Careful consideration must be given to ensuring that judges selected for the Constitutional Court will not engage in centralization or decentralization imposing the will of some political actors on others and bypassing political

power-sharing. Both centralization and decentralization can upset delicate compromises which have been negotiated during peace processes. In the cases analysed the selection processes have been designed to ensure that the different units or communities have input into selecting judges. But this has only served to promote divisions on the Courts. This can be used to undermine the legitimacy of the Courts, especially within minority communities. The majoritarian internal voting procedures on the Courts means that the Courts can be used to circumvent minority vetoes which have been built into executive or legislative political institutions.

The establishment of political arbitration committees as part of peace agreements can provide an alternative arena for settling what are essentially political rather than legal questions. Using such fora could also increase the likelihood of the swift implementation of decisions. This could help to avoid situations where courts rule that a certain law is unconstitutional but politicians cannot agree how to rectify the situation. However, arbitration committees may have short to medium term mandates to protect the infant TSG system. In the long-term, political normalization may allow constitutional courts to take on the traditional role as the ultimate protectors of the constitution. Yet in these situations, where a court takes on a role deciding more politically controversial cases after a period of time, there will have been greater opportunity for the judges to develop a collegial spirit of discursive decision-making. Such decision-making could avoid public divisions. This would increase the sociological legitimacy of the Courts. Appointment processes should also include stipulations which focus on ensuring that judges have extensive education and experience. Such judges are more likely to be capable of, and open to, deliberative debate.

Finally, while the findings of this article suggest that in some instances Constitutional Courts make centralizing decisions where TSG is used as a conflict management tool – and that this centralization can be explained by the shared-preference hypothesis – future research is needed to test their generalizability. Both countries studied are from the same geographic area, the cases analysed were all initiated by central politicians, and all are examples of a posteriori review. Analysis of cases which vary along these dimensions would help to assess the generalizability of this article's findings.

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[i] While the state joined the UN under the compromise name the Former Yugoslav Republic of Macedonia due to its dispute with Greece over the name 'Macedonia' and efforts to resolve this issue are ongoing at time of writing this article uses Macedonia as shorthand. Similarly, the article uses Bosnia as shorthand for Bosnia and Herzegovina).

[ii] The term 'devolutionary multinational state' is used to describe this circumstance in this article. This is not intended to denote a particular type of TSG, devolution, but rather the direction of the delegation of powers and how this interacts with the ethnic/national composition of the state.

[iii] 'Constructive ambiguity' refers to the way in which certain actors may selectively interpret a peace agreement in order to make its provisions more attractive to its constituents. In some cases the source of ambiguity is deliberate ambiguity in the text in other cases the text may be clearer but actors may still engage in a degree of interpretation.

[iv] U.No. 133/2005, U.No. 42/2007, U.No. 104/27.

[v] U-5/98 – 1, U-5/98 – 2, U-5/98 – 3, U-5/98 – 4, U-19/01, U-44/01, U-4/04, U-15/08, U-15/09, U-3/13, U-10/16. In counting of these cases this article takes the case U/58 as four separate cases in keeping with the Court's own approach, it issued four separate decisions and in recognition of the large number of issues raised.

[vi] Given space limitations a full explanation of all cases is not possible.

[vii] This author rejects the idea that the lines between these methodologies are clear or distinct but sees Blatter and Blume's contribution as very useful in that it lays out different approaches which one may use when engaging in qualitative case study research.

[viii] Where a decision speaks to the constitutionality of more than one law or article the decision is categorised based on what position it took on the majority of the laws/articles.

[ix] These judges also need to secure the support of the majority of all MPs which may suggest they will hold moderate positions on municipal-centre relations. But given that the central Macedonian government is always a coalition between a Macedonian and a Albanian political party, it may also be the case that the Macedonian party delivers the necessary support for candidates supported by their coalition partner as part of the cooperative coalition government dynamic; knowing that the other judges share their preferences.

[x] Notably in two centralising decisions (U-44/01 and U-4/04) the Court reached its decision unanimously. Feldman (2005) provided further information on one of these cases U-44/01.