Ethnic Conflict Regulation as Institutional Design:

The Case of the Western Balkans

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ABSTRACT

This article develops a classification of institutions for the regulation of ethnic conflict by focusing on three sets of challenges for institutional design in ethnically divided societies: state construction, the institutions of governments, and the rights and identities of groups and individuals. It examines existing prescriptions in three main schools of ethnic conflict regulation (centripetalism, consociationalism, and power dividing) in light of these institutional design challenges and contextualises them empirically with reference to ethnic conflict regulation practice in the Western Balkans over the past fifteen years. Finding a significant mix of institutions from across the three theories of ethnic conflict regulation, the article proposes to conceptualise this practice as 'complex power sharing' and proposes a research agenda to develop and test a more comprehensive theory of complex power sharing.

I. INTRODUCTION

Relatively broad agreement exists within the literature on ethnic conflict regulation on the utility of an approach that emphasises the design of (primarily political) institutions as a means of accommodating competing claims of different conflict parties.[1] Yet, this literature at the same time is deeply divided: there is little agreement on what kinds of institutions are best suited to regulating ethnic conflict. This division has its foundations in different conceptions of the role and nature of ethnic identity, and especially its malleability (or not), and consequently betrays a deep difference of opinion as to whether institutions should recognise and accept what might appear as hardened and politically salient ethnic identities or whether they should aim to transform the way in which identities matter in politics and beyond. See from this perspective, the existing literature on the subject offers both normative accounts of the desirability, and empirical evidence of the feasibility, of designing institutional frameworks within which disputes between different conflict parties can be accommodated, to such an extent that political compromise becomes preferable to violent struggle, at least for the majority of parties involved in the conflict in question. This debate about how to design institutions to achieve sustainable peace in divided societies has engulfed the theory and practice of ethnic conflict regulation for more than four decades, and has mainly been fought between advocates of consociationalism and their opponents. The disagreements between them have not subsided over the years and remain as divisive

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[1] Cf., for example, the contributions in Reynolds (2002), Choudhry (2008), Cordell and Wolff (2010), and Guelke and Tournon (2010). This agreement also extends to a rejection of partition as a means of regulating ethnic conflict: see O'Leary (2010), Sambanis (2000) and Sambanis and Schullhofer-Wohl (2009), but cf. Chapman and Roeder (2007) for evidence that partition fosters democracy in successor states. We exclude a discussion of partition here as it does not fall into the category of institutional approaches to ethnic conflict regulation.

as ever (cf., for example, Noel 2005; O'Flynn and Russell 2005; Taylor 2009). As a consequence, the three main schools of thought on institutional design for ethnic conflict regulation—centripetalism, consociationalism, and power dividing[2]—offer a range of distinct prescriptions on how to ensure that differences of identity do not translate into violence. In this sense, they are both realistic about the fact that differences of identity exist and can create politically relevant and salient cleavages, and optimistic about the possibility that such cleavages can be managed by accommodating distinct identities and the demands they give rise to (cf. Horowitz 2002:19; McGarry and O'Leary 2004b:8–12).

Disagreements between centripetalists, consociationalists, and power dividers, while they have consequences for the *prescription* of institutional designs for ethnic conflict regulation, do not, in fact, reflect the *practice* of conflict regulation very well. In other words, power-sharing institutions remain the predominant feature of negotiated agreements to end ethnic conflicts and are part of parcel of many constitutional reform projects for the regulation of ethnic conflict before it erupts in to full-scale violence.[3] This empirical reality is accepted by advocates of power dividing and centripetalism, who do, however, add an immediate caveat as to whether power-sharing institutions contribute to long-term peace and democracy. Thus, Rothchild and Roeder's (2005) main finding is that power sharing is a useful short-term mechanism to overcome

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[2] Using the labels centripetalism, consociationalism, and power dividing and concentrating on what we believe are the main proponents of particular approaches is but convenient shorthand for analytical purposes that glosses over the diversity of approaches within each school.

[3] Hartzell and Hoddie (2008) make this point quite forcefully in their analysis of agreements negotiated to end civil wars. Wolff (2009) focuses more narrowly on ethnic conflicts, but includes cases short of civil war.

commitment problems[4] that may prevent conflict parties in the immediate aftermath of civil wars from agreeing to and sticking with a peace settlement, but that it is detrimental in the long term, arguing that "[p]ower-sharing institutions […] in ethnically divided societies after intense conflicts […] typically have a set of unintended but perverse consequences" (Rothchild and Roeder 2005: 29). This is similar to Horowitz's (2007:1220) observation that "[c]ivil wars […] can sometimes be brought to an end with consociational arrangements, but the desirability and durability of such agreements are often in doubt."

This raises two challenging theoretical as well as empirical questions for ethnic conflict regulation: why do particular settlements (i.e., institutional designs) emerge, and why do they succeed (or fail) in regulating ethnic conflict (in the sense of providing a stable institutional framework in which conflict parties can address their differences without recourse to violence)? Rather than attempting to answer these questions within the limited space of a journal article, we take a step back and offer more detailed reflection on the three distinct theories of conflict regulation in order to arrive at a nuanced classification of institutional designs that is not confined within the existing, and at times narrow and normatively pre-determined, theories of ethnic conflict regulation. Starting with a discussion of the main challenges to institutional design for ethnic conflict regulation, we examine centripetalism, power sharing, and power dividing separately, summarizing the main tenets of each and paying particular attention to their prescriptions for divided societies. Liberal consociationalism, centripetalism, and

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[4] On commitment problems, see Fearon (1995, 1998), Lake and Rothchild (1998), and Walter (2001).

power dividing thus serve as the theoretical framework for an empirical analysis of ethnic conflict regulation qua institutional design in three countries in the Western Balkans—Bosnia and Herzegovina, Macedonia, and Kosovo. Focusing on the distinct dimensions of institutional design applied in each of the countries we rely methodologically on a systematic comparison of relevant constitutional and other legal acts that implement the relevant agreements in each of our cases.[5] This enables us to establish empirically the degree to which current ethnic conflict regulation theory and practice overlap. The purpose of this exercise is not to demonstrate the inadequacy of these theories individually or collectively, but to show that the reality of conflict regulation points towards a high degree of complexity in providing a mixture of recommendations from all three main theories. We conclude with some brief observations on the failures and successes of conflict settlement in the Western Balkans to date and suggest several avenues for further research into ethnic conflict regulation theory.

II. ETHNIC CONFLICT REGULATION AND INSTITUTIONAL DESIGN

Advocating ethnic conflict regulation through institutional design assumes that such conflicts can be resolved through an institutional bargain that establishes macro-level

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[5] The analysis is based on the following documents: "General Framework Agreement for Peace in Bosnia and Herzegovina" (www.intstudies.cam.ac.uk/centre/cps/documents_bosnia_dayton.html); "Brčko Final Award" (http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5362; http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5360); "Framework Agreement" http://www.intstudies.cam.ac.uk/centre/cps/documents_macedonia_frame.html) and "Law on Local Self-government of the Republic of Macedonia" (www.urban.org/PDF/mcd_locgov.pdf), The Comprehensive proposal for Kosovo Status Settlement, (http://www.unosek.org/unosek/en/statusproposal.html), Constitution of Kosovo, (http://www.kosovoconstitution.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf).

structures through which disputes among the conflict parties can be addressed politically and without recourse to violence. This, however, is only element of a much broader conflict regulation *process*, albeit a very central one. Focused essentially on the *outcome* of negotiations, the institutional design approach is about finding the right 'formula' acceptable to the conflict parties (cf. Zartman 1989). The institutional bargain achieved in negotiations is determined by a wide range of factors and in turn influences the likelihood of the success of the conflict regulation process as a whole. This relationship, however, is not linear, and questions of the quality of leadership of the immediate conflict parties and of external diplomatic efforts to assist local leaders throughout the negotiation, implementation, and operation phases of the conflict regulation process co-determine eventual success or failure. With this caveat in mind, we now turn to the challenges that institutional design faces in crafting macro-level structures that regulate three contested areas in ethnic conflicts. An examination and synthesis of the existing literature on ethnic conflict regulation[6] suggests three different dimensions of state construction:

(1) State construction, related particularly to questions of territorial structure;
(2) The institutions of government, concerning among others the composition and powers of the executive, legislative and judicial branches of government and the relationship between them; and
(3) Rights and identities of individual citizens and groups, i.e., the question if, and to what extent, individuals or groups are privileged.

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[6] Apart from the principal works and authors covered below, see also Bastian and Luckham (2003), Benedikter (2007), Choudhry (2008), Darby and McGinty (2003), Ghai (2000), Hechter (2000), Henrard (2000), Jarstadt and Sisk (2008), Lapidoth (1996), Noel (2005), Norris (2008), O'Flynn and Russell (2005), O'Leary, McGarry, and Salih (2005), Reynolds (2002), Schneckener and Wolff (2004), Taylor (2009), Weller and Metzger (2008), Weller and Wolff (2005), Wilford (2001), Woelk, Palermo and Marko (2008), and Wolff (2003). The synthesis of these and other sources is presented in the discussion in Sections II.1-3.

These three dimensions are inter-related and inter-dependent, but it is useful for analytical purposes to keep them separate when exploring their specific aspects in some degree of abstraction in the remainder of this section and in their practical manifestations in Section IV.

II. 1. State Construction

The most important institutional design challenge in this area has to do with the territorial organisation of the state. While the principal choice is generally between unitary and federal systems, there is a great deal of variation within these two main categories, and there are a number of hybrid forms as well. The most important institutional design decision is about the number of levels of government with substantive decision-making competences and the extent of these competences. Several further decisions follow from this. The first one relates to the structural and functional symmetry of the political-territorial organisation of the overall state. On the one end of the spectrum, a state may be organised territorially in a completely symmetric fashion with all territorial entities enjoying the exact same degree of functional competences, exercising them through an identical set of local political institutions. However, the nature of institutional design in divided societies may necessitate a different approach. Thus, even where there is structural symmetry, functionally speaking the competences enjoyed by different self-governing entities may differ, and/or they may exercise them through different sets of political institutions. For example, where territorial sub-state entities comprise ethnic groups distinct from that of the majority population, they may

be granted additional competences to address the particular needs of their communities. In cases in which these sub-state entities are ethnically heterogeneous, executive power sharing, reflecting local ethnic and political demographies, might be an additional necessary feature of conflict resolution.

II. 2. The Composition and Powers of the Executive, Legislative and Judicial Branches of Government and the Relationship between Them

The key aspects of institutional design in this area relate, first, to the nature of the government system, i.e., whether it is a parliamentary, presidential or semi-presidential system. A second dimension is the issue of whether executive and/or legislative power sharing are mandatory, and if so, what the extent of prescribed inclusiveness is. Inclusiveness, at the same time, is also an important feature of legislative design and is primarily realised through the choice of an electoral system. Power sharing features and inclusiveness may also extend into the judicial branch, primarily in relation to provisions for the appointment of judges and prosecutors. A final issue in this regard is the overall relationship between the three institutions of government, that is, the degree of separation of powers between them. While this partially relates to the choice of government system, it is also about the degree of independence of the judicial branch. Institutional design thus not only prescribes certain outcomes in relation to the composition of the executive, legislative and judicial branches of government but also entrenches them in different ways from hard international law to domestic legislation.

II.3. The Relationship between Individual Citizens, Identity Groups and the State

Institutional design in this area is about the recognition and protection of different identities by the state. On the one hand, this relates to human and minority rights legislation, that is, the degree to which every citizen's individual human rights are protected, including civil and political rights, as well as the extent to which the rights of different identity groups are recognised and protected. While there may be a certain degree of tension between them, such as between a human rights prerogative of equality and non-discrimination and a minority rights approach emphasising differential treatment and affirmative action, the two are not contradictory but need to complement each other in ways that reflect the diversity of divided societies and contribute to its peaceful accommodation.

Moreover, the relationship between individuals, groups and the state is about the degree to which institutional design favours particular groups and excludes others. This is related to whether different groups are given different status (e.g., constituent nations vs. minorities) and the political, economic and resource implications of this (e.g., mandatory inclusion in government, participation in proportional public sector job allocation, reception of public funding, etc.). In other words, the question here is about the degree to which specific group identities are recognised and protected and how this manifests itself in the way in which the boundaries of authority are shaped by territory or population groups.

III. Institutional Design in Existing Theories of Conflict Resolution[7]

Existing theories of conflict resolution generally acknowledge the importance and usefulness of institutional design in conflict resolution, but offer rather different prescriptions about what the most appropriate models are to achieve stable conflict settlements. The three dominant theories in this respect are liberal consociational power sharing, centripetalism, and power dividing. We discuss the main tenets of these three schools of thought now in turn, focussing on their recommendations in each of the three areas.

III.1. Liberal Consociationalism

Consociational power sharing is most closely associated with the work of Arend Lijphart, who identified four structural features shared by consociational systems—a grand coalition government (between parties from different segments of society), segmental autonomy (in the cultural sector), proportionality (in the voting system and in public sector employment) and minority veto (Lijphart 1977: 25-52). Consociationalism has been developed further in the context of its use as a mechanism of interethnic accommodation in Lijphart's own later writings on the subject (e.g., Lijphart 1995, 2002), but more especially by John McGarry and Brendan O'Leary (McGarry 2006, McGarry and O'Leary 2004a and b, O'Leary 2005a and b; see also Weller and Wolff 2005, and Wolff 2003, 2004). The most important modification of Lijphart's original theory is O'Leary's contention that 'grand coalition' (in the sense of an executive

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[7] The following section draws on Co-author (2010).

encompassing all leaders of all significant parties of all significant communities) is not a necessary criterion. Rather, O'Leary demonstrates that what matters for a democratic consociation 'is meaningful cross-community executive power sharing in which each significant segment is represented in the government with at least plurality levels of support within its segment' (O'Leary 2005a: 13).[8]

The scholarly literature on consociationalism distinguishes between corporate and liberal consociational power sharing, the latter now the more common policy prescription among consociationalists.[9] The main difference between the two is that a 'corporate consociation accommodates groups according to ascriptive criteria, and rests on the assumption that group identities are fixed, and that groups are both internally homogeneous and externally bounded', while 'liberal … consociation … rewards whatever salient political identities emerge in democratic elections, whether these are based on ethnic groups, or on sub-group or trans-group identities' (McGarry 2006: 3, see also Lijphart 1995 and O'Leary 2005a).

Territorial self-governance is a significant feature within the liberal consociational approach which, in this context, emphasises that the self-governing territory should define itself from the bottom up, rather than be prescribed top-down.[10]

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[8] On this basis, O'Leary (2005a: 12-13) distinguishes between three sub-types of democratic (i.e., competitively elected) consociation: complete (executive composed of all leaders of all significant segments), concurrent (all significant segments represented, and executive has at least majority support in all of them), and weak (all significant segments represented, and executive has at least one segmental leadership with only plurality support).

[9] Corporate consociationalism, however, is still evident to some extent in political practice: for example, Bosnia and Herzegovina, under the original Dayton Accords, Northern Ireland under the 1998 Agreement, Lebanon under the National Pact and under the 1989 Ta'if Accord, Cyprus under the 1960 constitution and proposed (but rejected) Annan Plan display features of pre-determined arrangements based on ascriptive identities.

[10] In the context of Iraq, McGarry (2006: 6-7) explains how this process has been enshrined in the Iraqi constitution: "Kirkuk can choose to join Kurdistan if its people want. Governorates in other parts of the country are permitted to amalgamate, forming regions, if there is democratic support in each governorate. In this case, a twin democratic

Liberal consociationalists consider arrangements in which there are more than two, and ideally even more than three, self-governing entities within a given state, as conducive to the chances of state survival. Liberal consociationalists equally support the principle of asymmetric devolution of powers, i.e., the possibility for some self-governing entities to enjoy more (or fewer) competences than others, depending on the preferences of their populations (cf. McGarry 2007).

Naturally, self-governance is complemented with what liberal consociationalists term 'shared rule', i.e., the exercise of power at and by the centre across the state as a whole. While the other three key features of Lijphartian consociationalism (apart from 'segmental autonomy') continue to be favoured by liberal consociationalists, such as grand coalitions, proportionality and minority veto rights, the emphasis is on cooperation and consensus among democratically legitimised elites, regardless whether they emerge on the basis of group identities, ideology or other common interest. Liberal consociationalists thus favour parliamentary systems,[11] proportional (PR list) or proportional preferential (STV) electoral systems, decision-making procedures that require qualified and/or concurrent majorities, and have also advocated, at times, the application of the d'Hondt rule for the formation of executives[12] (cf. Lijphart 2004, O'Leary 2005a, see also Wolff 2003).

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threshold is proposed: a vote within a governorate's assembly and a referendum. … It is also possible for Shi'a dominated governorates that do not accept SCIRI's vision to remain separate, and, indeed for any governorate that may be, or may become, dominated by secularists to avoid inclusion in a sharia-ruled Shiastan or Sunnistan."

[11] Note, however, that, empirically, collective presidential systems are as widespread in existing functioning consociations than parliamentary ones. Personal communication from Brendan O'Leary.

[12] For details on the d'Hondt rule, see O'Leary, Grofman and Elklit (2005).

This means, liberal consociationalists prefer what O'Leary refers to as 'pluralist federations' in which co-sovereign sub-state and central governments have clearly defined exclusive competences (albeit with the possibility of some concurrent competences) whose assignment to either level of authority is constitutionally and, ideally, internationally, protected, in which decision-making at the centre is consensual (between self-governing entities and the centre, and among elites representing different interest groups), and which recognise, and protect the presence of different identities (O'Leary 2005b).

In order to protect individuals against the abuse of powers by majorities at the state level or the level of self-governing entities, liberal consociationalism offers two remedies—the replication of its core institutional prescriptions within the self-governing entity,[13] and the establishment and enforcement of strong human and minority rights regimes both at the state and sub-state levels. In addition, the rights of communities—minorities and majorities alike—are best protected in a liberal consociational system if its key provisions are enshrined in the constitution and if the interpretation and upholding of the constitution is left to an independent and representative constitutional court whose decisions are binding on executive and legislature (cf. O'Leary 2005b: 55-8).

III.2. Centripetalism

Centripetalism emphasizes that rather than designing rigid institutions in which elected representatives have to work together *after* elections, "intergroup political

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[13] On regional consociations see Wolff (2004).

accommodation" is achieved by "electoral systems that provide incentives for parties to form coalitions across group lines or in other ways moderate their ethnocentric political behaviour" (Horowitz 2004:507–8). This school of thought is most prominently associated with the work of Donald Horowitz (1985; 1990; 1991; 2002), as well as with that of Timothy D. Sisk (1996), who uses the terms "integrative" and "integration" when referring to centripetalism (as do Rothchild and Roeder 2005b: 35), Matthijs Bogaards (1998; 2000; 2003), who initially criticized consociationalism on conceptual and methodological grounds (Bogaards 1998; 2000), before offering a strongly centripetal alternative (Bogaards 2003), Benjamin Reilly (1997; 2001; 2006), and Andreas Wimmer (2003). Reilly, for example, advocates, among others, '(i) *electoral incentives* for campaigning politicians to reach out to and attract votes from a range of ethnic groups other than their own…; (ii) *arenas of bargaining*, under which political actors from different groups have an incentive to come together to negotiate and bargain in the search for cross-partisan and cross-ethnic vote-pooling deals…; and (iii) *centrist, aggregative political parties* or coalitions which seek multi-ethnic support…' (Reilly 2001, p. 11; emphasis in original). This is partially echoed by Wimmer in his proposals for the first post-Saddam Iraqi constitution to introduce 'an electoral system that fosters moderation and accommodation across the ethnic divides', including a requirement for the 'most powerful elected official … to be the choice not only of a majority of the population, but of states or provinces of the country, too', the use of the alternative vote procedure, and a political party law demanding that 'all parties contesting elections … be organised in a minimum number of provinces' (Wimmer 2003). In addition,

Wimmer advocates non-ethnic federalism (ibid.: 123-5), at least in the sense that there should be more federal entities than ethnic groups, even if a majority of those entities would be more or less ethnically homogeneous or be dominated by one ethnic group. Furthermore, "a strong minority rights regime at the central level, a powerful independent judiciary system and effective enforcement mechanisms are needed", according to Wimmer (2003: 125).

In what remains a classic work in the field of ethnic conflict and conflict resolution theories, Donald L. Horowitz (1985 [2000]) discusses a range of structural techniques and preferential policies to reduce ethnic conflict. Among them, he emphasises that 'the most potent way to assure that federalism or autonomy will not become just a step to secession is to reinforce those specific interests that groups have in the undivided state' (Horowitz 1985 [2000]: 628). Horowitz also makes an explicit case for territorial self-governance (i.e., federalism) in his proposals for constitutional design in post-apartheid South Africa (Horowitz 1991: 214-226) and argues, not dissimilar to power dividing advocates, for federalism based on ethnically heterogeneous entities. In a later study, more explicitly focused on federation as a mechanism for conflict reduction, Horowitz (2007) accepts that homogeneous provinces, too, can prove useful for this purpose, but argues that rather than the aim being to facilitate group autonomy (the consociational rationale), homogeneous provinces offer the possibility to foster intra-group competition (2007:960–1; see also Horowitz 2008:1218). In an earlier contribution to the debate, Horowitz had recognized the need for federal or autonomy provisions, but cautioned that they could only

contribute to mitigating secessionist demands if "[c]ombined with policies that give regionally concentrated groups a strong stake in the center" (1993:36). Interestingly, however, this need for centripetal elements in territorial designs for conflict resolution is also echoed in some corners of the consociational school (cf. Weller and Wolff 2005). Similar to Wimmer (2003; see above), Horowitz, citing the Nigerian experience, sees utility in splitting large ethnic groups into several provinces as this potentially encourages the proliferation of political parties within one ethnic group, resulting in intra-group competition and a lessened impact of relative numerical superiority of one group over others (Horowitz 2000:602–4; 2007:960–1; see also 2008:1218).

While centripetalism is thus open to engaging with, among others, territorial approaches to conflict settlement, "its principal tool is […] the provision of incentives, usually *electoral incentives*, that accord an advantage to ethnically based parties that are willing to appeal, at the margin and usually through coalition partners of other ethnic groups, to voters other than their own (Horowitz 2008:1217, our emphasis). In particular, Horowitz emphasizes the utility of electoral systems that are most likely to produce a Condorcet winner, i.e. a candidate who would have been victorious in a two-way contest with every other candidate in a given constituency. The most prominent such electoral system is the alternative vote (AV), a preferential majoritarian electoral system, that is said to induce moderation among parties and their candidates as they require electoral support from beyond their own ethnic group in heterogeneous, single-seat constituencies (Horowitz 2003:122–5).

III. 3. Power Dividing

In the context of conflict resolution, the theory of power dividing has been put forward most comprehensively by Philip G. Roeder and the late Donald Rothchild in their co-edited volume *Sustainable Peace: Power and Democracy after Civil Wars* (Roeder and Rothchild 2005). Power dividing is seen as "an overlooked alternative to majoritarian democracy and power sharing" as institutional options in ethnically divided societies (Rothchild and Roeder 2005: 6). Three strategies that are said to be central to power dividing—civil liberties, multiple majorities, and checks and balances—in practice result in an allocation of power between government and civil society such that "strong, enforceable civil liberties … take many responsibilities out of the hands of government", while those that are left there are distributed "among separate, independent organs that represent alternative, cross-cutting majorities", thus "balanc[ing] one decisionmaking centre against another so as to check each majority … [f]or the most important issues that divide ethnic groups, but must be decided by a government common to all ethnic groups" (Rothchild and Roeder 2005: 15).

The key institutional instruments by which power dividing is meant to be realised are, first of all, extensive human rights bills that are meant to leave "key decisions to the private sphere and civil society" (Rothchild and Roeder 2005: 15). Second, separation of powers between the branches of government and a range of specialised agencies dealing with specific, and clearly delimited, policy areas are to create multiple and changing majorities, thus "increas[ing] the likelihood that members of ethnic minorities will be parts of political majorities on some issues and members of any ethnic majority

will be members of political minorities on some issues" (Rothchild and Roeder 2005: 17).

Third, checks and balances are needed "to keep each of these decisionmaking centres that represents a specific majority from overreaching its authority" (ibid.). Thus, the power dividing approach favours presidential over parliamentary systems, bicameral over unicameral legislatures, and independent judiciaries with powers of judicial review extending to acts of both legislative and executive branches. As a general rule, power dividing as a strategy to keep the peace in ethnically divided societies requires "decisions [that] can threaten the stability of the constitutional order, such as amendments to peace settlements" be made by "concurrent approval by multiple organs empowering different majorities" (Rothchild and Roeder 2005: 17).

III. 4. The Different Theories Compared

The preceding overview of three main theories of conflict resolution illustrates two important aspects of current academic and policy debates about how to establish sustainable institutional settlements in cases of self-determination conflicts: while there are fundamental differences in the underlying assumptions about how such settlements can succeed, certain institutional arrangements that complement the basic prescriptions of each approach are largely similar, if not identical (see Table 1).

<<Table 1 about here>>

IV. Institutional Design in Practice: An Empirical Analysis of Bosnia and Herzegovina, Macedonia, and Kosovo

The selection of Bosnia and Herzegovina, Macedonia and Kosovo as our cases for empirical illustration of ethnic conflict regulation qua institutional design has several reasons. Individually the cases have received considerable attention, even though the amount of coverage has differed from case to case with Bosnia and Herzegovina the most widely covered, followed by Macedonia, and Kosovo. The analysis of Bosnia and Herzegovina is quite comprehensive in terms of all aspects of the conflict regulation process, this is less the case for Macedonia and certainly for Kosovo where more attention has been focused on the *process* of negotiating than on the specific institutional settlement adopted as a *result*. Our analysis will thus fill a gap in the existing literature by offering a systematic comparison of the institutional design features of the settlements currently in place. Moreover, while an examination of the origins or consequences of the three institutional designs in place is not the primary purpose of our analysis, the comparison is more relevant as the broader context in which institutions were adopted is broadly similar in all cases in several crucial dimensions, including the fact that settlements were arrived at after violent conflict (albeit at different scales) and with significant international involvement before, during, and after settlement conclusion (albeit by different actors). On the other hand, as we will demonstrate below, the nature of each settlement is quite different, thus collectively offering a wider range of available options of institutional design. The three cases thus serve as a test of our broader framework of classifying institutional designs

for ethnic conflict regulation along the three dimensions of state construction, institutions of government, and rights and identities.

The dimensions of the comparative analysis flow directly from the discussion of institutional design and the examination of the three approaches to conflict resolution above. Specifically, the comparative analysis of state construction will focus on two aspects:

- symmetry and asymmetry in institutional design; and
- the distribution of powers between different levels of government.

As far as the institutions of government are concerned, we will consider five separate issues:

- the nature of the government system;
- the choice of the electoral system;
- power sharing in executive and/or legislature;
- the degree of independence of the judiciary; and
- legal entrenchment.

Finally, when examining rights and identities, two dimensions are of particular importance:

- human and minority rights provisions; and
- recognition and protection of identities.

IV.1. State Construction

Symmetry and Asymmetry in Institutional Design[14]

The first element to consider in the context of questions about symmetry and symmetry of institutional design is the number of levels of government that actually exist across our three case studies (Table 2).

<<Table 2 about here>>

In the case of Bosnia and Herzegovina more than three levels of government exist. This is a result of the interplay of domestic (i.e., state and sub-state), regional and international factors in the process of state creation at Dayton, leading to a complex federal-confederal structure of the state. Yet, Dayton proved inconclusive in relation to one territorial aspect that required subsequent arbitration between Republika Srpska and the the Federation of Bosnia and Herzegovina: the District of Brčko has a special status as a territory held in condominium and belonging simultaneously to the two Entities (Republika Srpska and Federation of Bosnia and Herzegovina) but self-governing as a unitary territory in which neither Entity exercises any authority.

In Macedonia and Kosovo, structural state construction is far less complicated than in the case of Bosnia and Herzegovina and only two levels of government exist—central government and local governments. Both are prescribed in the relevant constitutions, and their functions and powers are detailed there and in relevant legislation. In Macedonia, a legally guaranteed opportunity for citizens exists to develop a further level of government at the level of neighbourhoods, but this is regulated by by-

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[14] For a discussion of the utility of asymmetric designs for conflict resolution, see McGarry (2007).

laws of the individual local governments and thus a matter of local decision-making rather than of state construction. In Kosovo, too, an additional provision is of interest, namely the opportunity of local government entities to cooperate on matters of common concern. This is (potentially) particularly relevant for Serb-majority communities in the north, and we discuss it in greater detail in section III.3.

Another way of looking at different levels of government is to examine the degree to which they represent structurally and/or functionally symmetric or asymmetric institutional designs (Table 3),[15] as this perspective provides a more comprehensive picture of state construction.

<<Table 3 about here>>

Given the small number of cases involved, there is little point here in attempting to detect a general pattern of symmetry or asymmetry. What is noteworthy, however, is that while symmetric structures and symmetric functions may be correlated (Macedonia), symmetric structures do not preclude asymmetric functional capacities (Kosovo). From a theoretical point of view, it is worth pointing out that both liberal consociational power sharing and centripetalism, albeit to differing degrees, allow for asymmetric structures and functions. While liberal consociational power sharing is principally in favour of territorial configurations reflecting the expressed wishes of self-defined communities (whatever the basis of such self-definition), centripetalism is not opposed to the use of territorial self-governance arrangements in either symmetric

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[15] Structural asymmetry is meant to signify the existence of territorial entities that do not 'fit' the overall construction of the state, e.g., an autonomous territory in an otherwise unitary state, or, as in the case of Bosnia and Herzegovina, the existence of a special-status district within a confederation. Functional asymmetry is meant to signify that some territorial entities enjoy a different measure of competences, e.g., have wider legislative powers than others.

(federalism) or asymmetric (autonomy) forms, but crucially in this respect, centripetalists and advocates of power dividing prefer territorial self-governance to be based on 'administrative' rather than 'ethnic' criteria, in an effort to prevent the institutionalisation of group identities and enable coalitions of interest based on policy rather than identity (centripetalists) or multiple and changing majorities (power dividers). Having said that, it is evident that in the cases that form the basis of this empirical comparison the entities of territorial self-governance are exclusively those in which group identities form the basis of boundaries. Having said that, the territorial organisation of Kosovo and Macedonia with its unitary state structure and devolution of powers to local governments rather than to an intermediary 'regional' level is more in line with one recommendation of centripetalists, namely to split up compact ethnic communities into several territorial entities rather than creating a single self-governing entity for them. While liberal consociationalists do not specifically recommend this, they are nonetheless aware of the poor track record of two- or three-entity federations and caution against such designs where they can be avoided. Regarding Kosovo, it is also noteworthy that the allocation of enhanced competences to municipalities with local Serb majorities is a novel feature in institutional design: while avoiding formal regional autonomy for these areas, it nonetheless sets them aside from 'ordinary' municipalities and accommodates ethnic differences flexibly at the local level.

Distribution of Powers

One of the key questions to ask of governance regime is where powers rest; i.e., how different competences are allocated to different levels of government and whether they are their exclusive domain or have to be shared between different levels of government. As with other dimensions in this analysis, there is a certain degree of context-dependent variation across the cases under examination. To begin with the allocation of powers to different levels of government, in Bosnia and Herzegovina the state level has retained very few powers which are specifically mentioned in the Dayton constitution, including foreign and foreign trade policy, customs policy, monetary policy, immigration, criminal law enforcement, international communications facilities, inter-Entity transportation, and air traffic control. All other powers, by default, fall to the Entities and the District of Brčko, respectively. In other words, residual authority is, unusually, not held by the centre but by sub-state entities. This is further complicated by the fact that power is further devolved within the Federation to the cantons in a similar manner, limiting the powers of the Federation to a few specifically mentioned in the Federation constitution (including military and defence matters, citizenship, economic and fiscal policy, inter-cantonal crime, and energy policy), and assigning all further competences either to a joint list (including human rights, health, environment, infrastructure, social welfare, tourism, and use of natural resources) or by default exclusively to the cantons. This replicates the State-level principle of assigning residual authority to the lower level of government.

The situation in Bosnia and Herzegovina stands in clear contrast to both Kosovo and Macedonia. Here, the centre holds residual authority and competences are specifically assigned to local governments, including in the areas of urban planning, communal activities, culture, sport, social security and child care, pre-school and primary education, and basic health care.

In Kosovo, powers devolved to the local level are wide-ranging and include local economic development; urban and rural planning, provision and maintenance of public services and utilities, public pre-primary, primary and secondary education, promotion and protection of human rights, public health and health care, social welfare services, public housing, naming of roads, streets and other public places. Specifically, the law on local government also gives municipalities power on any matter which is not explicitly excluded from their competence nor assigned to any other authority. From this perspective, municipalities in Kosovo hold residual authority.

Despite its character as a unitary state, some municipal governments in Kosovo, principally those with an ethnic Serb majority, can exercise so-called enhanced municipal competences in the areas of health, education and cultural affairs. Moreover, they are given participatory rights in selecting local station police commanders.[16] The state, however, retains the right to monitor the exercise of these powers along clearly specified criteria, including equal access to public services, quality and quantity standards, and minimum standards for accreditation of public service providers.

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[16] Whereas in the rest of Kosovo, the General Director of the Kosovo Police Service presents three candidates for the post to the municipal assembly for ranking and subsequent appointment by the General Director, in communities where the largest ethnic community is Serb, the municipal assembly initiates the process by proposing two candidates for selection and appointment by the Ministry of Internal Affairs.

Moreover, as noted earlier, these municipalities may also cooperate with any other municipality in providing services. Specifically, the municipalities of Mitrovicë/Mitrovica North, Graçanicë/Gracanica, Shtërpcë/Štrpce also have powers in secondary health care and Mitrovicë/Mitrovica North has enhanced competences in relation to university education, including registration and licensing, recruitment, payment of salaries and training of education instructors and administrators. Kosovo Serb majority municipalities anywhere in Kosovo furthermore enjoy a range of enhanced competences in the area of culture, including religious and cultural heritage.

As already indicated, variation also exists primarily with regard to the way in which powers are allocated and the degree of flexibility concerning new fields of policy-making not relevant or not included at the time a specific agreement was concluded. The principal mechanism to handle the distribution of powers is the drawing up of lists that enumerate precisely which powers are allocated to which levels of government and/or which are to be shared between different such levels. These lists can be very specific for each level of government, they can be specific for one or more levels and 'open-ended' for others, or they can be mixed in the sense that certain powers are exercised jointly or concurrently by different levels of government. The key issue in any of these arrangements is which level of government retains residual authority for any partly devolved power or any other policy area not explicitly allocated elsewhere (see Table 4).

<<Table 4 about here>>

None of the three theories of conflict resolution discussed above offers much specific guidance on this issue of power allocation to different vertical levels of government. Some inferences can nevertheless be made. Power-dividers, who express a certain preference for the American model of federalism, favour strong central governments and are thus likely to opt for residual authority to remain with the central government. A similar tendency can be observed for advocates of centripetalism (cf., for example, Wimmer 2003). For the liberal consociational school of power sharing, it is important that power sharing is a more attractive option to conflict parties than recourse to violence, hence its advocates should be interested in substantive powers assigned to territorial self-government entities, which is best done either by way of assigning residual authority to these entities or by drawing up specific lists which clearly distribute powers between central and sub-state governments.

IV.2. The Composition and Powers of the Executive, Legislative and Judicial Branches of Government and the Relationship between Them

The Nature of the Government System and the Choice of Electoral Systems

All three approaches to conflict resolution strongly advocate the separation of powers between executive, legislature and judiciary, and this has been achieved in the institutional designs of all cases discussed here. In particular, across all three country cases independent judicial systems exist, including also at the level of the Entities and the District of Brčko in Bosnia and Herzegovina. Beyond this general point, significant variation remains (see Tables 5.1-2).

At the State level, Bosnia and Herzegovina is a semi-presidential system with a collective presidency with rotating chairmanship. The Presidency consists of three members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska. The electoral system for this is a simple majority vote with a second-round run-off between the two candidates topping the first-round ballot if no candidate achieves 50%+1 of the vote in the first round. At the sub-state level, the Entities and the District of Brčko are parliamentary systems, electing their executives in parliament. The Republika Srpska also has a directly elected, collective presidency with a president and two vice presidents, each elected from a different constituent people, but with only symbolic powers. While the State and the Federation have bicameral parliaments, legislatures in the Republika Srpska and the District of Brčko are unicameral.

In the same way in which the variation of government systems in Bosnia and Herzegovina derives from the complex multilevel structure of its institutions, the comparative simplicity of the respective systems in Macedonia and Kosovo—unicameral and parliamentary—is by virtue of the unitary structure of their states. The only difference between the two is that the Macedonian president is elected directly (using the same two-round run-off system as in Republika Srpska) while the president of Kosovo is elected by parliament. Both have all but symbolic powers.

In all three cases, the central legislature is elected by List PR systems. In Bosnia and Herzegovina, the lower chamber of parliament has 42 members which are elected by a PR-List system, albeit one that uses separate electoral roles for the Federation of

Bosnia and Herzegovina (28 seats) and the Republika Srpska (14 seats). Kosovo also uses a PR-List system, but one that is qualified in two important dimensions. Since the November 2008 elections, an open list system is used allowing voters to choose up to ten candidates from different lists. Moreover, for the first two electoral terms under the new constitution 20 seats in the 120-member parliament are reserved for Serbs (10) and other ethnic groups (10). The 120 members of the Macedonian parliament are elected through PR-List system in 6 electoral districts, each electing 20 members.

<<Tables 5.1-2 about here>>

Thus, as far as the nature of the government system and the choice of electoral systems are concerned, we see a clear dominance of (liberal) consociational views: in all but one case, the system of government is parliamentary, and in the one case where it is semi-presidential instead, the presidency is a collective one with a rotating chairmanship. Moreover, the predominant electoral system is List-PR, a system preferred by Lijphart and shown by Norris (2008) to lead to sustainable power sharing arrangements.

Power Sharing

One element of the complexity of the institutional designs in the three country cases discussed here stems from the fact that constitutional engineers have developed innovative ways to combine traditional structures of horizontal power sharing and vertical power dividing; in other words, power is often shared at different levels of government, according to different rules, and using various arrangements. Table 6.1 presents an overview of where power is shared in our cases, while Table 6.2 gives an

indication of how it is shared—qua mandatory representation in executive and/or legislature or through ensuring cross-community consensus by requiring qualified majorities for the adoption of decisions in legislatures.

<<Tables 6.1-2 about here>>

As can be expected, Bosnia and Herzegovina has the most extensive power sharing arrangements in terms of where power is shared (State, Entities, Cantons, and District of Brčko) and how (mandatory representation of relevant constituent peoples in legislatures, executives, and presidencies, qualified majority voting on specific 'vital interest' issues in State, Federation, and District of Brčko legislatures).[17] This reflects not merely ethnic diversity across different levels of government throughout the country but also the recognition that mere devolution of powers to a lower level of government without ensuring proper safeguards against majoritarian abuse of such power would simply replicate the conflict between different groups at the state level where power sharing has provided some sort of a solution, albeit an imperfect one.

In principle, this state of affairs is replicated in Kosovo. The 2008 constitution foresees the mandatory representation of non-Albanian communities in the state-level executive and legislature and in municipal assemblies and executives and requires parallel consent in the Kosovo assembly (i.e., from a majority overall and from a majority of representatives from non-majority communities) on vital-interest legislation. According to the Constitution, power sharing at the central level, as well as in municipalities where at least 10 % of the population is non-Albanian is required.

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[17] Moreover, specific arrangements also exist in many other ethnically heterogeneous localities across the Federation.

According to Art. 96 of the Constitution of Kosovo, the Serb community, as well as other Kosovo non-majority communities are entitled to a minister and two deputy ministers in the Government of Kosovo. Guaranteed seats are available for the Serbs and other non-Albanian communities in the Assembly, the Judicial Council and in the procedure of electing judges in the minority populated areas.[18] At the municipality level, there are positions of vice presidents foreseen in each of municipality where at least 10 % of the population is non-Albanian.[19] However, in practice the entire power sharing system in Kosovo is of limited effectiveness at the moment as Serbs from the northern Mitrovica region boycott the Kosovo political institutions at the moment and have, with the support and encouragement of Belgrade, established comprehensive parallel structures.[20]

In contrast, there are no provisions for mandatory representation in executive or legislative bodies in Macedonia either at the centre or at lower levels of government. Yet, the absence of formal structures of power sharing at the centre does not preclude power nevertheless being shared to some extent as the country's demographic balances, structure of the party system and electoral formula combine in a way that have made the formation of government coalitions between ethnic Macedonian and ethnic Albanian parties the norm, and ethnic Albanian parties have been present in all coalition governments since Macedonia's independence. Even the 1990-1992 "government of experts", which was not structured around political parties, included

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[18] Articles 64, 103 and 108 of the Constitution of Kosovo.

[19] Article 62 of the Constitution of Kosovo.

[20] For a comprehensive overview see: *OSCE Report, Parallel Structures in Kosovo 2006-2007*, <http://www.osce.org/documents/mik/2007/04/23925_en.pdf >

three ethnic Albanians. Moreover, the 2001 Ohrid Agreement specified several vital-interest areas in which parallel consent applies for the legislature to pass any laws thus further ensuring meaningful participation of Albanians at the centre. The "Badinter principle", i.e., parallel consent, is also enshrined in the Law on Local Self-government (2002), establishing a form of legislative power sharing in the areas of culture, language and symbols at the municipality level Municipalities with over 20% minority population also have Committees on Inter-ethnic Relations. In addition, the numerical strength and concentration of ethnic Albanians in western Macedonia allows them to benefit fully from the implementation of local autonomy as foreseen in the Ohrid Agreement, while the geographical concentration and size of the minority make a solution based on substantive regional autonomy less attractive for ethnic Macedonians, as it could be construed as a first step to the partition of the country.

In all three countries, and across different levels of government, we find power sharing arrangements in place, manifesting themselves in the representation of members of different communities in executive and legislative bodies and in their meaningful participation in decision making qua qualified majority voting procedures (super majorities or parallel consent). While the voluntary emergence of power sharing governments at the central level in Macedonia could be interpreted as in line with the centripetal approach, neither the electoral system used nor the application of qualified majority voting procedures in parliament and in the local self-government is in a strict sense. However, the principle of qualified majority voting does not give a strict veto right to every community *per se*, but rather enables individual members of different

minorities sitting in legislatures, as well as different parties representing the same minority in a legislative body to form different coalitions depending on the decisions in question. In this sense, we also find a mechanism in this principle that creates a centripetalist 'arena for bargaining' and enables the kind of issue-based changing majorities that power dividers recommend (albeit within one rather than many decision-making bodies). Equally importantly, power sharing arrangements in Kosovo, and even more so in Bosnia and Herzegovina, display many features of corporate rather than liberal consociationalism. Principles of power dividing, where they have been applied, are only relevant to the extent that they are more generally embraced as principles of state construction, such as in terms of the separation of powers.

Legal Entrenchment

Guarantees of institutional structures of horizontal and vertical power sharing and power dividing are essential to prevent the arbitrary abrogation of devolved powers and thus to ensure conflict parties of the relative permanence of the institutions they agreed upon. Guarantees are particularly important for the relatively weaker party in a self-determination dispute, i.e., a specific minority, to protect it from a state reneging on earlier concessions. However, such guarantees are also valuable for states in that they commit all parties to an agreed structure and, in most cases, imply that there can be no unilateral change of recognised international boundaries outside pre-determined procedures.

In principle, guarantees can be either international or domestic, and in the latter case they can be part of a country's constitution or other legislation (see Table 7). Given the complexity of many of today's self-determination conflicts, guarantees often exist at more than one level. In addition, international guarantees can take the form of hard guarantees (international treaties) or of 'soft' guarantees (non-binding standards and norms, declarations of intent, etc.).

<<Table 7 about here>>

Table 7 illustrates that there is variance across the cases considered here. In terms of the strength of the protection that they afford established horizontal and vertical power sharing and power dividing structures, hard international guarantees are preferable over other forms of guarantees, provided there is significant commitment of the international community to uphold its guarantees. In Bosnia and Herzegovina this commitment is unquestionable with the presence of peacekeeping forces in both territories and with the investment that has been made over the past years by the international community in order to foster economic development, and institution-building and reform.

In Bosnia and Herzegovina, international bodies with a clear mandate exist: the multi-national Peace Implementation Council and the UN Security Council, respectively. As discussed above, the Office of the High Representative is invested with significant powers to intervene into the political process in Bosnia and Herzegovina at all levels. Specifically for the District of Brčko, an International Supervisor with similar powers exists.

Regarding international guarantees in Kosovo, the Ahtisaari plan was accepted by the Assembly of Kosovo in spring 2008 (in the absence of a Security Council resolution). The Constitutional Provisions required by the Ahtisaari package were included in the Kosovo Constitution. In addition, besides the laws that were brought before the proclamation of independence in February 2008, in which special rights for Kosovo communities are guaranteed, after the proclamation of independence almost forty so called "Ahtisaari-required laws" (Annex 12 of the Ahtisaari package) were approved by the Kosovo Assembly. As in Bosnia and Herzegovina, a heavy international presence remains in Kosovo. The UN still plays a role based on Security Council resolution 1244(1999), although its role is continuously decreasing in favour of the International Civilian Office (ICO), which is now responsible for monitoring the implementation of the Ahtisaari plan. The International Civilian Representative (ICR) in Kosovo is the final authority for the interpretation of the Ahtisaari Plan and its implementation. As well as approving all judges and prosecutors selected, and appointing and approving key positions in Kosovo's institutions, the ICR has executive corrective powers. These powers include the annulment of laws or decisions taken by the Kosovo Assembly if he decides they breach or are inconsistent with the Ahtisaari Settlement, or undermine the rule of law. The ICR can also sanction or remove from office any public official if these officials have opposed the letter or spirit of the Settlement, and/or if they have obstructed the work of the ICR or EULEX.

In contrast to these hard international guarantees in place in Kosovo and Bosnia and Herzegovina, soft international guarantees primarily manifest themselves in the

form of the involvement of international organisations in the negotiation, implementation, and (potentially) operation of a particular peace agreement. While not of the same legally binding and thus potentially enforceable status as hard international guarantees, a significant presence of international agents is often instrumental in shaping preference and opportunity structures for the conflict parties. In the cases studies, this has taken different forms. In all three cases, an international military and civilian presence, as well as the involvement of various international governmental and non-governmental organisations on an unprecedented scale, have, for better or worse, been instrumental in the implementation and operation of the respective agreements thus far.

At the level of domestic guarantees, constitutional guarantees are more entrenched than those which have their source in normal legislation. Incorporation of specific provisions of peace agreements into constitutions is a common way of realising constitutional guarantees and has occurred in Bosnia and Herzegovina, Macedonia, and Kosovo.

All three theories of conflict resolution emphasise the importance of judicial institutions and enforcement mechanisms to uphold the letter and spirit of conflict settlements. They also recognise the role of external actors and guarantees, but are divided on the usefulness of international intervention: power-dividers see a limited, transitional role for them; advocates of both liberal consociationalism and centripetalism embrace them more readily as facilitators and guarantors of settlements. However, it is worth noting that a key difference remains between the two approaches.

Centripetalists consider that their institutions will be self-sustaining after they are set up with outsiders' help, and that consociational institutions will need to be constantly propped up by external third parties. Liberal consociationalists, by contrast, take their preferred arrangements to be much more likely to be acceptable to local elites and therefore less dependent on external imposition than centripetalist or power dividing institutional designs.

IV.4. The Relationship between Individual Citizens, Identity Groups and the State

Human and Minority Rights Provisions

Relevant human and minority rights provisions exist in all cases included in this analysis, albeit to differing degrees. Applicable law includes international and regional standards and more specific state-wide, and in some cases local, human and minority rights legislation, as summarised in Tables 8-10.

Regarding Kosovo, since 1999 all international agreements on behalf of Kosovo were signed by UNMIK. In certain cases Kosovo simply adopted the provisions of an international instrument into the local legislation. All these conventions are applicable and valid under Art. 145 of the Kosovo Constitution.

<<Tables 8-10 about here>>

The general trend in legal provisions for human and minority rights that is obvious from these data is that constitutional human rights provisions are universally present and that all countries are states parties to the key international conventions. There seems to be significantly greater reluctance to include minority rights provisions in constitutions or

even provide for separate minority rights legislation either at the state or local level. Moreover, the mere fact of ratifying international instruments and/or adopting domestic human and/or minority rights legislation says relatively little about the extent to which any of this translates into measurable improvements in reality. Thus, another common denominator across the three countries examined here is that of, at times serious, deficiencies in implementation of existing legislation. Discrimination, and in some cases even violence, against members of minorities are still widespread, state funding of minority protection measures remains inadequate, and states often appear satisfied with token gestures in the form of adopting certain laws, not least to satisfy international demands, but show little if any enthusiasm for their proper implementation. Although these problems and challenges apply to most minorities in the region, the situation of the Roma minorities is particularly problematic.[21]

The emphasis on individual human rights over (group-specific) minority rights is consistent with recommendations of power dividers and centripetalists. Liberal consociationalists, too, appreciate the value of individual human rights provisions, but their recommendations do not caution against the parallel use of minority rights provisions, which is consistent with their generally more pronounced emphasis on the recognition and protection of (self-determined) group identities.

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[21] For a detailed analysis of existing legislation and implementation see Wolff et al. (2008).

Recognition and Protection of Identities: Territory and Population as Boundaries of Authority

Authority as the legitimate exercise of political power has two boundaries – it is normally limited to a specific territory and/or a defined group of people. The degree to which both of these categories shape the boundaries of authority of specific institutions of government contributes to an assessment of the degree to which group identities are institutionally recognised and protected.

A central government has the authority to exercise its power within the territorial confines of the state it is governing and over the residents of this territory (with the exception of foreign diplomats for example). Some elements of a central government's authority may also extend beyond the territorial boundaries of its state, but then they will normally be limited to that particular state's citizens, for example in the field of tax collection. In terms of self-governance regimes, the extent of these two limitations placed on the exercise of authority is similar. Territorial self-governance regimes are spatially confined. The powers devolved to them only apply within the territorial boundaries of the region and, by extension, only to (permanent) residents of the region. An analogue to authority extending beyond territorial boundaries are instances of personal autonomy in which the autonomous body has authority over all individuals belonging to it no matter where they live in the territory of the state or region concerned.[22]

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[22] In reverse, this means that all members of the ethnic group concerned can enjoy the rights accorded to them in the autonomy arrangement anywhere in the territory of the relevant state. This form of autonomy is particularly useful in instances where groups are more dispersed. It is also used to complement territorial forms of autonomy in

In Kosovo, the focus is placed on personal autonomy. Based on Art.1 of the Constitution, Kosovo is defined as a "state of its citizens". However, Art. 3 states that Kosovo "is a multi-ethnic society consisting of Albanian and other Communities." As in the case of Macedonia, it is a hot political issue whether the majority is also a member of a community, equally as the others, or is a nation. Nevertheless, communities are entitled to special rights according to the third chapter of the constitution. A light asymmetry applies in Kosovo in terms of the local government level. New municipalities are to be established (mainly in Serb populated areas) which will have more powers than the other municipalities in areas such as education, health care and culture and the ability to cooperate on the matters amongst themselves in Kosovo and across borders. All these municipalities, however, at least in theory, are directly monitored by, and accountable to, the central government. Therefore, a regional level cannot be established. However, when analysing the institutional and normative structure of the new Kosovo state, we have to keep in mind the huge gap between theory and practice in Kosovo, due to the ongoing boycott of all Kosovo state institutions by Serbs from northern Kosovo and the establishment and functioning of parallel structures, supported financially and politically by Belgrade, that govern and regulate almost every aspect of Serbian parallel society.

In Macedonia, devolution of significant powers to the level of local government was accompanied by boundary revisions so as to create local self-government units with over 20% non-majority population, and thus use the special provisions of the post-OFA

specific policy areas (culture, religious affairs, education, etc.) when autonomous territories are ethnically heterogeneous. For a recent theoretical and empirical elaboration of this, see Cordell and Smith (2008).

Constitution. In BiH, the recognition and protection of group identities went beyond the application of mere territorial principles. This is evident in the landmark judgment by the Constitutional Court of Bosnia and Herzegovina that all constituent nations defined in the Constitution—Bosniaks, Croats and Serbs (along with Others)—must be recognized as constituent nations and enjoy equal status as groups, not only at the level of the state, but also at the level of both entities.

This issue of privileging group identities is one in which liberal consociationalist views dominate in conflict resolution practice—territorial boundaries of self-governing entities are self-defined by their populations. The resultant 'ethnic' entities run counter to recommendations made by either centripetalists or power-dividers both of whom generally prefer administrative, heterogeneous entities to ethnically self-defined ones with particular group majorities or pluralities.

V. Conclusion

If we were to revisit the theoretical debate on different models of conflict resolution in the light of our three case studies, it would be difficult to assign them clearly to any one of the three main schools of thought. On the surface, Bosnia and Herzegovina could be defined as a corporate consociational (con-) federation, Macedonia as a unitary liberal consociational regime, and Kosovo as a mixed liberal/corporate consociation within a unitary state. Yet, below this surface, a more complex reality lurks, one that has significant theoretical implications (see Table 11). What our three case studies demonstrate in principle, albeit on an empirically yet too narrow basis for broader

generalisation, is that the practice of contemporary international conflict regulation efforts and outcomes does not overlap neatly with any of the three main schools of thought. Breaking the analysis further down into the three dimensions of institutional design we can offer a more nuanced assessment on the degree to which specific prescriptions by advocates of centripetalist, consociational and power-dividing approaches are reflected in the institutional designs adopted for the regulation of ethnic conflicts in Bosnia and Herzegovina, Macedonia, and Kosovo.

Thus, we find, first, in terms of state construction that territorial self-governance is a core feature of institutional design in all three cases. While there is significant variation in terms of the number and size of self-governing entities, they are predominantly demarcated on the basis of ethnic homogeneity (municipalities in Macedonia and Kosovo, Republika Srpska and majority of Federation cantons in Bosnia and Herzegovina). This is clearly in line with consociational recommendations in the case of Republika Srpska, while centripetalists would find homogeneity of cantons in the Federation of Bosnia and Herzegovina, and of municipalities in Kosovo and Macedonia reflecting their recommendation that relatively compact groups should be divided across different entities.

Second, as far as the institutions of government are concerned, the findings are more mixed. In Macedonia and Kosovo, the system is parliamentary, in Bosnia and Herzegovina it is semi-presidential but with few powers retained at the State level. Executive power sharing is mandatory in Kosovo and Bosnia and Herzegovina, and has so far always emerged voluntarily in Macedonia. Legislative power sharing is guaranteed

qua qualified voting procedures on issues of 'vital interest' in all three countries. The electoral system for each country's legislature is a PR-List system, but with some important modifications. Kosovo uses open lists and has reserved seats for minority communities for the duration of its first two parliaments under the new constitution. The limited term under which this corporate consociational feature of reserved seats is operational is in line with recommendations made by power dividers: to build a 'sunset clause' into consociational arrangements. In Bosnia and Herzegovina, for the time being at least, separate electoral roles exist for the two Entities, entrenching further the corporate nature of the consociational arrangements there. In all three cases, these various dimensions of institutional design are legally entrenched and there is a clear separation of powers with an independent judicial system. In Bosnia and Herzegovina regulations are in place that provide for group representation and international judges in the court system. Similarly, in Kosovo international judges are to be appointed to the constitutional court for the duration of the mandate of the ICR.

<<Table 11 about here>>

Third, in all three cases, individual and group rights are guaranteed in the constitution and distinct group identities are recognised across the entire political system of each state and accorded specific privileges—strongly in line with consociational recommendations.

Where does this leave us in terms of conflict regulation theory? A first conclusion that we can draw from the exploration of our three Western Balkan cases is that they all represent a complex package of power sharing and territorial self-governance. The

negotiation of such deals, within a context of international mediation, indicates an assumption that such complex regimes can contribute to sub-state, state, regional and international security and stability. In divided societies in which corresponding group identities have formed and become salient, the degree of self-governance enjoyed by the different segments of society is often seen as more or less directly proportional to the level of acceptance of an overall institutional framework within which these different segments come together and simultaneously need to resolve a range of policy issues jointly. Self-governance regimes are thus also meant to provide institutional solutions that allow the different segments of diverse societies to realise their aspirations for self-determination while simultaneously preserving the overall social and territorial integrity of existing states, which can only be achieved in a sustainable way if self-governing communities, and their elites, can meaningfully participate in the political process at the centre, something which is achieved through power sharing. Thus, the combination of power sharing and self-governance above all offers institutional arrangements for conflict parties to settle their disputes by peaceful means.[23]

Bosnia and Herzegovina, Kosovo and Macedonia, thus, represent three examples of the notion of complex power sharing,[24] which, in the way it is understood here, refers

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[23] Gurr (1993), even though he did not conceptualize the notion of complex power sharing as such, offered the initial empirical evidence that "some combination of […] autonomy and power sharing" offers reasonable prospects to accommodate minority demands (1993:292), a conclusion that is also supported in later work by Weller (2008:xvii), Wolff (1997, 2004; 2008a) and Wolff and Weller (2005). For two empirically broader studies of the complex power sharing phenomenon, see Wolff (2008, 2009a, b), and for a range of single and comparative case studies, Weller and Metzger (2008).

[24] We borrow the term 'complex power-sharing' from a research project funded by "Project Funder" ("Project Title"). In this project, complex power-sharing regimes are distinguished "in that they no longer depend solely on consociational theory, or solely upon integrative theory", involve international actors that "are often key in designing, or bringing experience to bear upon, the structure of the eventual agreement, or its implementation" and "consider a far broader range of issues … and … address structural issues as diverse as economic management, civil-military

to a practice of conflict settlement that has a form of self-governance regime at its heart, but whose overall institutional design includes a range of further mechanisms for the accommodation of ethnic diversity in divided societies, including those recommended by advocates of liberal consociationalism, centripetalism, and power dividing. Complex power sharing is thus the result of the implementation of a self-governance regime whose success as a conflict regulation arrangement requires a relatively complex institutional structure that cannot be reduced to autonomy/(ethno-)federalism, (traditional) models of power sharing or power dividing. As we have demonstrated empirically above, this principle of institutional design has been applied in all of our Western Balkan case studies, albeit in different concrete manifestations.

Among the three theories of ethnic conflict regulation, (liberal) consociational features form the core of institutional design in each of our cases, but to different degrees and complemented by elements of institutional design more in line with prescriptions emerging from centripetalist and power-dividing theories. Within a liberal consociational framework, there is room (and a recognized need) for a range of power dividing strategies, including a strong role for judicial entrenchment and enforcement mechanisms, and universally applicable and enforceable human rights legislation. Liberal consociationalism is also open to a vertical division of power on the basis of non-ascriptive, i.e., non-ethnic criteria but, in contrast to power dividing and centripetalism, does not rule it out either should self-determined entities on that basis emerge and

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relations and human and minority rights, and … do so at many different levels of government", thus recognising "that at different levels of government, different strategies may be more, or less, applicable, and consequently more, or less, successful, in engendering peace and stability" (Kettley, Sullivan, Fyfe 2001: 4-5). O'Leary (2005a: 34-5) uses the term 'complex consociation' in a similar manner.

desire territorial self-governance. Similarly, the liberal consociational turn away from strict group veto powers towards qualified majority voting procedures indicates new avenues to establish the 'arenas of bargaining' recommended by centripetalists to incentivise political actors from different groups to find sustainable compromises.

Yet, liberal consociationalism is not synonymous with complex power sharing, even though it offers a promising point of departure for a new research agenda on conflict regulation theory. Thus, finally, and perhaps most importantly for further conceptual and theoretical development of the notion of 'complex power sharing', the evidence presented here does not amount to a full-fledged and validated theory of conflict regulation. For complex power sharing to develop into a theory of its own, further research is necessary. While we have demonstrated that it describes a particular phenomenon of conflict regulation practice in adequate detail, more work needs to be done to increase its predictive capabilities (i.e., when are complex power sharing regimes likely to emerge) and its explanatory value (i.e., when and why does it succeed). Only then will it be possible to make sure that complex power sharing does not emerge accidentally as a patchwork of different conflict regulation mechanisms cobbled together to accommodate a wide range of diverse (and most likely, incompatible) interests, but to provide a framework within which stable, lasting and ultimately successful institutions for ethnic conflict regulation can be designed.

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Table 1: Main Institutional Arrangements Recommended by Different Theories of Conflict Regulation

		Centripetalism	Liberal Consociational Power sharing	Power dividing
Principal recommendation		Interethnic cooperation and moderation induced by electoral system design encouraging vote pooling	Interethnic cooperation at elite level induced by institutional structure requiring jointness of executive decision making	Cooperation between different, changing coalitions of interest induced by separation of powers
State Construction	**Heterogeneity vs. homogeneity of federal units (if any)**	Preference for heterogeneous units[25]	Preference for units based on self-determining communities	Preference for heterogeneous units
	Number of units relative to number of groups	Preference for more units than groups	Preference for units equal to numbers of groups	No explicit connection between number of groups and units
The Institutions of Government	**Government system**	Presidential[26]	Parliamentary or Collective/Rotating Presidential system[27]	Presidential
	Executive power sharing	Yes: voluntary	Yes: guaranteed	No, except transition phase after civil wars
	Legislative power sharing	Yes: voluntary	Yes: guaranteed	No, except transition phase after civil wars
	Electoral system (for parliament)	Plurality preferential	PR-List or PR preferential	Plurality
	Judicial branch	Independent	Independent and representative[28]	Independent
	Legal entrenchment	Yes	Yes	Yes
Rights and Identities	**Individual vs. group rights**	Emphasis on individual rights	Emphasis on combination of individual and group rights	Emphasis on individual rights
	Recognition of distinct identities	Yes, but primarily as private matter	Yes, but as private and public matter	Yes, but primarily as private matter

Table 2: Levels of government

Two levels	Multiple levels
Macedonia Kosovo	BiH

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[25] Horowitz is more flexible here than other centripetalists and accepts that sometimes homogeneous units are as useful as heterogeneous units. Personal communication from Donald Horowitz. Cf. also above.

[26] Horowitz does not insist that presidential systems are always best and argues that for his recommendations to work it is not essential that governments be presidential. Personal communication from Donald Horowitz.

[27] Lijphart is a strong advocate of parliamentary systems, while McGarry and O'Leary are open to other arrangements, insisting that what is crucial for consociation is not whether powers are fused or divided, but whether the different communities are represented in core institutions of the state. This view is supported empirically by the cases of Bosnia and Herzegovina and Switzerland which are both presidential and consociational (personal communication from John McGarry).

[28] Liberal consociationalists recognise that it is more difficult to make the judiciary representative than an elected body, but nonetheless note the importance of its representativeness. Personal communication from John McGarry.

Table 3: Structural and Functional Symmetry and Asymmetry of Institutions

	Structures		Functions	
	Symmetric	Asymmetric	Symmetric	Asymmetric
BiH		X		X
Macedonia	X		X	
Kosovo	x			X

Table 4: Distribution of powers between different levels of government

Open-ended list at centre	Specific list at centre	Mixed list
Macedonia	BiH: State vis-à-vis Entities/Brčko BiH: Federation vis-à-vis Cantons Kosovo	BiH: Federation—Cantons

Table 5.1: Parliamentary vs. Presidential Systems

Parliamentary system of government	Semi-presidential system of government
Macedonia Kosovo District of Brčko Federation of BiH Republika Srpska	BiH

Table 5.2: Unicameral vs. Bicameral Systems

Unicameral Legislature	Bicameral Legislature
Macedonia Kosovo District of Brčko Republika Srpska	BiH Federation of BiH

Table 6.1: Horizontal Executive Power Sharing at Central and Sub-state Levels of Authority

Power sharing at the centre	Power sharing at sub-state level
Macedonia BiH: State Kosovo	BiH: Federation of BiH/Cantons BiH: District of Brčko Kosovo Macedonia

Table 6.2: Representation vs. Participation in Power Sharing Arrangements

Mandatory representation in executive and/or legislature	Qualified majority voting procedures
BiH: State BiH: Federation of BiH/Cantons BiH: District of Brčko BiH: Repubika Srpska Kosovo: State/Municipalities	BiH: State BiH: Federation of BiH/Cantons BiH: District of Brčko Kosovo: State Macedonia

Table 7: Guarantees of Self-governance Institutions

International Guarantees		Domestic Guarantees	
'Hard'	'Soft'	Constitutional Guarantees	Guarantees in Specific Laws
BiH: all levels Kosovo	Macedonia	BiH: all levels Macedonia Kosovo	Macedonia Kosovo

Table 8: International Human and Minority Rights Instruments

	UN Membership	Convention on the Prevention and Punishment of the Crime of Genocide	International Convention on the Elimination of All Forms of Racial Discrimination	International Covenant on Economic, Social, and Cultural Rights	International Covenant on Civil and Political Rights	Optional Protocol to the International Covenant on Civil and Political Rights	UNESCO Membership	UNESCO Convention against Discrimination in Education
BiH	Yes	1992	1993	1993	1993	1995	Yes	1993
Macedonia	Yes	1994	1994	1994	1994	1994	Yes	1997
Kosovo	No	No	2001	No	2001	2001	No	No

Table 9: Regional Human and Minority Rights Instruments: Europe

	Council of Europe Membership	(European) Convention for the Protection of Human Rights and Fundamental Freedoms	(European) Framework Convention for the Protection of National Minorities	European Charter for Regional or Minority Languages
BiH	Yes	2002	2000	(2005)[29]
Macedonia	Yes	1997	1998	(1996)[30]
Kosovo	No	2001	2001	2001

Table 10: Domestic and Local Human and Minority Rights Provisions

	Constitutional Human Rights Provisions	Constitutional Minority Rights Provisions	State-wide Minority Rights Legislation	Local Human Rights Legislation	Local Minority Rights Legislation
BiH	Yes	Yes	Yes	Yes	Yes
Macedonia	Yes	Yes	Yes	N.A.	N.A.
Kosovo	Yes	Yes	Yes	Yes	Yes

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[29] Not yet ratified.

[30] Not yet ratified.

Table 11: Institutional Arrangements in Bosnia and Herzegovina, Macedonia, and Kosovo

		Bosnia and Herzegovina	Macedonia	Kosovo
Principal design		Corporate consociational con-federation	Liberal consociational unitary state	Mixed liberal-corporate consociational unitary state
State Construction	**Heterogeneity vs. homogeneity of federal units (if any)**	Federation: heterogeneous, but with more homogeneous cantons RS: homogeneous Brčko: heterogeneous, but highly segregated	Unitary state, with highly homogeneous local municipalities	Unitary state, with highly homogeneous local municipalities
	Number of units relative to number of groups	One principal unit for Serbs, multiple for Croats and Bosniaks	More units than groups	More units than groups
The Institutions of Government	**Government system**	Semi-presidential with rotating collective presidency	Parliamentary	Parliamentary
	Executive power sharing	Yes: guaranteed	Yes: voluntary	Yes: guaranteed
	Legislative power sharing	Yes: guaranteed for 'vital-interest' legislation	Yes: guaranteed for 'vital-interest' legislation	Yes: guaranteed for 'vital-interest' legislation
	Electoral system (for parliament)	Closed PR-List, separate electoral roles for Entities	Closed PR-List	Open PR-List with reserved seats for 'communities'
	Judicial branch	Independent and representative (with international judges in constitutional court)	Independent	Independent (with international judges in constitutional court)
	Legal entrenchment	Yes	Yes	Yes
Rights and Identities	**Individual vs. group rights**	Individual and group rights guaranteed in constitution	Individual and group rights guaranteed in constitution	Individual and group rights guaranteed in constitution
	Recognition of distinct identities	Yes	Yes	Yes