

Conclusions: local variations of minority representation in South-eastern Europe

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Taking a look at the different case studies in this volume, there seems to emerge an interesting pattern: EU member states like Hungary and Croatia, despite the significant differences in their recent history and despite the characteristic differences in their ethno-demographic composition, both address minority issues from a strictly legal point of view within the framework of minority rights protection. Inter-ethnic relations and the situation of minority rights are more problematic in states where international intervention had direct effects on the constitutional structure, as in Bosnia and Herzegovina (BiH), Kosovo, or Macedonia (FYROM). In these conclusions we focus on these latter cases, trying to identify some common characteristics.

Still, there are certain common characteristics in South-Eastern European countries that this volume analysed. Firstly, unlike in other regions of Europe, there is a legislative framework of minority protection usually underpinned by the constitution in the majority of the States analysed. This region of Europe is highly diverse in terms of ethnicity, and due to the hardships of history and the pressure and interests of its neighbours, including the requirements of European integration, these States had to address the heterogeneity of their societies and develop disparate ethno-political strategies. It follows, their legislation relevant to minority rights is a product of a long-lasting journey to improving the quality of domestic laws and regulations usually taking into account the international community's expectations.

The historical context is also necessary for our understanding of contemporary institutions and practices. Post-war institutions in BiH, Kosovo, and Macedonia, as Florian Bieber reminds us, “may have been drawn up by international mediators, but the institutions they set up often resemble

the Yugoslav ones,” therefore power-sharing practices “have to be seen not just in terms of ruptures, but also in terms of continuities.”¹

After WWII the ruling elites sought devolution as a tool to secure legitimacy and mitigate social (occasionally inter-ethnic and inter-republic) tensions – instead of extending democratic rights and ensuring effective political participation – and later started to gravitate towards power-sharing with strong effective veto rights for the republics. The Yugoslav Constitution of 1974 was a milestone in the decentralization process that made inter-republic borders more real rather than having only administrative functions. Actually, the republics started to function as sovereign states within the federal Yugoslavia due to the extension of their powers.² As the majorities within the republics constituted ‘titular nations’ – with the exception of BiH – strengthening the republics also helped institutionalize the ethnic or national frames of group solidarity instead of a civic or pan-Yugoslav identification.³ The federal centre devolved power to the party leaderships of the 6 republics and the 2 autonomous provinces that could exercise control over ‘their territories’ (administrative units) and make decisions in economic and financial affairs, the function of police, military defence, courts and media.⁴

Paying attention to interethnic balance was one aspect of building socialism the Yugoslav way.⁵ Nevertheless, it would be misleading to identi-

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- 1 Florian Bieber, “Reconceptualizing the Study of Power-Sharing,” *Südosteuropa* 60, no. 4 (2012): 528.
 - 2 Keith Brown, “Sovereignty after Socialism at Europe’s New Borders,” in *The State of Sovereignty: Territories, Laws, Populations* (Bloomington: Indiana University Press, 2009): 199.
 - 3 However, building national institutions within republican borders and elite efforts to mobilize upon them may have limited effect on collective sentiments of national identity, as the case of Montenegro illustrates. Erin K. Jenne and Florian Bieber: Situational nationalism: nation-building in the Balkans, subversive institutions and the Montenegrin paradox. in *Ethnopolitics*, 2014, 13 (5), 431–460.
 - 4 Audrey Helfant Budding, “Nation/People/Republic: Self-Determination in Socialist Yugoslavia,” in *State Collapse in South-Eastern Europe. New perspective on Yugoslavia’s Disintegration*, eds. Lenard J. Cohen and Jasna Dragović-Soso (West Lafayette, Indiana: Purdue University Press, 2008): 91–129. ; Siniša Malešević, *Ideology, Legitimacy and the New State: Yugoslavia, Serbia and Croatia* (London: Routledge, 2016).
 - 5 Hannes Grandits, “Dynamics of socialist nation-building: the short lived programme of promoting a Yugoslav national identity and some comparative perspectives.” In *Dve domovini/Two Homelands*, 2008, Vol. 27, 15–28.

fy the so-called ‘national key’ concept as an ethnic quota system that is relevant in post-war BiH, Kosovo, and Macedonia. The national key system was designed to neutralize ethnic differences as a source of political division, organization, mobilization or discrimination and demonstrate the multi-ethnic legitimacy of the communist party and the commitment to the greater equality (*ravnopravnost*) between nations and nationalities. The individuals placed in their official positions were not ethnic representatives – they were first of all representatives of their party and it was party membership and ideological commitment that were key to their holding a governmental post. In comparison, the ethnic quota system in post-Dayton BiH is meant to ensure the ‘vital interests’ of the ‘constituent peoples.’⁶

Finally, it is also of utmost importance that sovereignty had a dual nature in the Yugoslav context, where the bearers of sovereignty were the working people on the one hand, and the nations and nationalities on the other. This duality was reflected for instance in employment policy where both national and social quota (the latter refers to the representativeness of workers, peasants, women, young people, intellectuals et cetera) mattered. The post-Yugoslav amendment of constitutions terminated the dual sovereignty of nations and working class by removing the references to the latter, subordinating the questions of economic security and social rights to questions of ethnic difference. Other amendments and changes were instrumental in putting in place an ethnic quota system in a way that we think about it today.⁷

Political concerns influencing minority rights legislations

Interestingly, constitutional courts play a pivotal role in shaping the relevant laws and regulations, though they often use quite different methods. In Croatia, for instance, the constitutional court usually defends minority rights and interests vis-à-vis the majority and even State organs them-

6 Neven Andelić, *Bosnia-Herzegovina: The End of a Legacy* (London: Frank Cass, 2003). ; Andrew Gilbert, “The past in parenthesis. (Non)post-socialism in post-war Bosnia-Herzegovina,” *Anthropology Today* 22, no. 4 (2006): 14-18. ; Sevan Pearson, “The ‘national key’ in Bosnia and Herzegovina: A Historical Perspective,” *Nationalities Papers* 43, no. 2 (2015): 213–232.

7 Andrew Gilbert, *Foreign Authority and the Politics of Impartiality in Postwar Bosnia-Herzegovina* (Ph.D. diss., University of Chicago, 2008).

selves. A couple of years ago, the Croatian constitutional court did not allow to hold a referendum on the restriction of using minority languages. Thus, it protected minority groups against the sentiments of the majority population. Yet in a previous case, the Constitutional Court of Croatia repealed certain provisions of an Act on the Amendment to the Election of the Representatives to the Croatian Parliament together with the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities that intended to guarantee wider representation to minorities – including first and foremost the Serbian community of Croatia – when stipulated minorities under 1.5 % of the population had been entitled to 5 MPs, while minorities over this threshold would have earned 3 MPs from the total of 150 mandates.⁸ The latter rule in fact would have affected the Serbian community for being the only legally recognized minority group in Croatia above that percentage. The Croatian Constitutional Court found this rule unproportional⁹ and declared the ‘overrepresentation’ of the Serbian minority vis-à-vis the others as ‘impermissible favouritism.’¹⁰ Quite similarly, in Serbia or in Montenegro, the constitutional courts substantially restricted the effectiveness of local minority rights related legal regimes. The Croatian and the Serbian constitutional courts, at least partially, used international legal arguments – with special reference to the Framework Convention for the Protection of National Minorities (FCNM) – in doing so. It shows the international community can only put substantial pressure on the executive and legislative branches of States when highlighting the necessity of minority protection and adoption of minority rights related legislation, but in some cases, independent state authorities like constitutional courts or other bodies may think and act contrarily. Presumably important elements of checks and balances, such as constitutional courts in ‘new’ democracies, need to take a long journey until they can reach a more human rightist approach instead of pro-state views when re-

8 “Co-operation of Constitutional Courts in Europe Current Situation and Perspectives,” Working Document for the XVIth Congress of the Conference of European Constitutional Courts. CDL-JU(2014)003. 70.

9 It is true the Croatian electoral system is based on a proportional system and for the effective participation of minorities this model can be considered as optimal. See Francesco Palermo and Solomon Dersso, “Minority Rights,” in *Routledge Handbook of Constitutional Law*, eds. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (New York: Routledge, 2013): 165. Preferring a given minority vis-à-vis some others is unproportional, but not necessarily unjust if reasoned properly.

10 Ibid.

viewing decisions of the legislators. In this sense the Constitutional Court of Bosnia and Herzegovina is an exception: both its composition (international judges play an important role) and its practice reflect a special approach to ethnic identity issues. The BiH constitutional court's decisions reveal a human rightist approach and pro-state views that are on the same platform in opposition to the overemphasis on collective ethnic rights and the rigid combination of the principles of ethnicity and territoriality.¹¹

Another feature of the legal approach used by legislators of this region is that only so-called traditional national minorities are being recognized as beneficiaries of minority rights whilst 'newcomers' such as immigrants that came most recently or during the 20th century are not entitled to claim special minority rights. One of the possible reasons of this more or less traditionalist approach might be pure reality, since social conflicts among traditional national majorities and minorities were frequent in the recent past of the countries in question. Unlike in Western European countries for instance, the majority of these states codify legal definitions of "minority" in their relevant acts. These definitions show some similar conditions for qualifying as a "minority", such as the requirement of spending some amount of continuous time on the territory of the country or requiring the citizenship of the territorial state, demonstrating close ties and loyalty to that State, and perhaps to the majority population as well. This concept however is not exceptional – a similar position is taken by the Council of

11 The neutrality of the Constitutional Court of Bosnia and Herzegovina has been challenged by some Bosnia Serb and Croat politicians. The critics argue that the three international judges and the two Bosniak judges can form a coalition and make decisions against the will of the two Serb and the two Croat judges. Therefore they would like to reform its composition and remove its foreign members. David Feldman, "The Independence of International Judges in National Courts: Lessons from Bosnia and Herzegovina," in *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, ed. Shimon Shetreet and Christopher Forsyth (Leiden: Martinus Nijhoff – Brill, 2012): 215–229. ; Joseph Marko, "Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation," in *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour of Rainer Hofmann*, ed. Tove H. Malloy and Ugo Caruso (Leiden and Boston: Martinus Nijhoff Publishers, 2013): 97–120. ; Stefan Graziadei, "Democracy v human rights? The Strasbourg Court and the challenge of power sharing," *European Constitutional Law Review* 12, no. 1 (2016): 54–84.

Europe European Charter for Regional or Minority Languages (ECRML), signed in 1992. The ECRML expressly puts that “regional or minority languages means languages that are: *traditionally* used within a given territory of a State by *nationals* of that State who form a group numerically smaller than the rest of the State's population; (...)”¹² furthermore, „(...) it does not include either dialects of the official language(s) of the State or the languages of *migrants*.”¹³ Thus, relevant international legal instruments can underpin this traditionalist or conservative method.

Furthermore, there is a tendency to increase the number of legally recognized minority groups in some South-East European States that results in a huge number of beneficiary communities. The effects of this process can be manifold. On the one hand a gap emerges between the larger and the smaller minorities since the former have more efficient tools at hand to represent themselves effectively than the latter. As the cases of Macedonia and Kosovo illustrate, beside the power asymmetry between minority and majority communities that characterize modern nation-states (or, more precisely, nationalizing state), there is also a hierarchy among the minority communities.¹⁴ The existing minority rights regime of Macedonia and Kosovo is beneficial first of all to the ‘big’ (in a statistical or quantitative sense) *and* territorially concentrated minorities – Albanians and Serbs respectively – compared to the smaller and territorially more dispersed minorities.¹⁵ While modern nation-states have created new mechanisms of social exclusion – namely, they have systematically privileged the titular ethnic groups – minority rights design can also be beneficial for certain minorities and not for others. In addition, usually there is one significant minority group and the ‘others’ within these societies, and by increasing

12 Emphasis added.

13 Emphasis added.

14 On asymmetrical power relations between minority and majority communities in Transylvanian contexts, see Rogers Brubaker, Margit Feischmidt, Jon Fox and Liana Grancea, *Nationalist Politics and Everyday Ethnicity in a Transylvanian Town* (New Jersey: Princeton University Press, 2006). ; Tamás Kiss, “Increasing marginality, ethnic parallelism and asymmetric accommodation. Social and political processes concerning the Hungarian community of Transylvania,”¹⁸ *Minority Studies* (2015): 33–69.

15 Aisling Lyon, *Decentralisation and the Management of Ethnic Conflict: Lessons from the Republic of Macedonia* (Oxford: Routledge, 2016). ; Marko Prelec and Naim Rashiti, *Serb Integration in Kosovo after the Brussels Agreement*, Balkans Policy Research Group, 19 March 2015.

the number of legally recognized minorities, the largest minority group becomes less relevant. By increasing the number of recognized minorities, the overall level of effective representation of minorities decreases, though from the aspect of some groups that are ‘hardly visible to the naked eye,’ it can be the best possible achievement imaginable. Besides, some of the largest contemporary minority groups were formerly admitted, legally speaking, as being equal with the majority group of the society (for instance they were recognized as nations or co-nations) but due to the change of the legal status of their territorial States they became ‘simple’ minorities instead of equal partners of the dominant group. The fear of status change is related to the question of ‘Who owns the state?’ (in ethnic terms) highlighted by Andreas Wimmer.¹⁶ It can be observed, for instance, in the case of Bosnian Serbs, the majority of whom did not want to be separated from their ethnic ‘kins’ by new state borders at the beginning of the 1990s or during the campaign before the census of 2013 in BiH when certain Bosnian Croat leaders suggested that the rate of the Bosnian Croats decrease under 10 percent (from 17.38 percent according to the last Yugoslav census of 1991) so that their status as a constituent nation may be degraded to that of a national minority.¹⁷ Preferred nations of Yugoslavia such as Slovenes, Croats, Serbs, Muslims (in a national sense), Montenegrins, and Macedonians were recognized as ‘constituent nations’ under the constitutions of Yugoslavia.¹⁸ Constituent nations and federal republics potentially had the right to secede from Yugoslavia under internal rules.¹⁹ By taking into consideration these legal possibilities, newly

16 Andreas Wimmer, “Who owns the state? Understanding ethnic conflict in post-colonial societies,” *Nations and Nationalism* 3, no. 4 (1997): 631–666.

17 According to the 2013 census data these fears proved to be unjustified since Croats compose 15.43 per cent of the whole population. Tijana Cvjetičanin, “Having an EU neighbour: How does it affect human rights in Bosnia and Herzegovina?” *Novi pogledi*, ljetno 2014, 19–38. ; Robert Donia, *Radovan Karadžić: Architect of the Bosnian Genocide*. 2015 ; Sead Fetahagić and Nebojša Šavija-Valha, “Between cooperation and antagonism. The dynamics between religion and politics in sensitive political contexts. Case: Bosnia and Herzegovina,” Sarajevo: Nansen Dijalog Centar, 2015. On the results of the census of 2013, see Agencija za statistiku Bosne i Hercegovine: *Popis stanovništva, domaćinstava i stanova u Bosni i Hercegovini, 2013*. Sarajevo, juni 2016.

18 David A Dyker and Ivan Vejvoda, eds., *Yugoslavia and After. A Study in Fragmentation, Despair and Rebirth* (Routledge, London – New York, 1996): 18.

19 Although we have to bear in mind, that the question who (nations v. republics) had the right to secession has been much debated. The constitutions of 1963 and 1974

emerged seceded States fuelled by the new titular nations suddenly changed the legal denomination of the former constituent nations to minorities in order to weaken their position of rightfully claiming the right to self-determination. Ethnic Serbian aspirations, particularly in Croatia or in Bosnia-Herzegovina, or ethnic Croatian claims in Bosnia-Herzegovina, were often based on their former constituent nation status from a legal point of view. The legal architecture of post-Dayton BiH preserved this legal thinking by recognizing three separate constituent nations, namely Bosniaks, Serbs and Croats without any titular nations. Though, Bosniaks might have certain ambitions to become the titular nation of the state both *de iure* and *de facto*. It was interesting to see that both in Sarajevo as well as in Novi Pazar, Serbia, civil society actors referred to an emerging demand under the ashes to build up a sort of kin-state policy of Bosnia vis-à-vis Bosniak minorities living in Serbia.²⁰ However, this attempt cannot be successful within the current framework of Bosnian statehood due to its unique political-legal structure. Providing effective representation to these once constituent nations might be perceived as risky from the aspect of titular nations since it may remind them of pre-independence times, at least legally speaking.

On the other hand, they are under a double pressure: on one side facing the international community's demands concerning equality and respect for minority rights, while on the other, former Yugoslav member states and countries of the region (like Hungary or Romania) want to secure the position of their kin-minorities living outside their borders. Kin-state policies of these states might be perceived as atavistic and premodern, and

guaranteed every nations the right to self-determination, including the right to secession, while simultaneously granted greater authority to the republics. The ambiguous conceptualisation of self-determination and the inherent tension between the rights of nations and of republics did not help resolve the conflict between competing claims in the context of Yugoslavia's disintegration. Robert Hayden, "Imagined communities and real victims: self-determination and ethnic cleansing in Yugoslavia," *American Ethnologist* 23, no. 4 (1996): 783–801.; Ana S. Trbovich, *The Legal Geography of Yugoslavia's Disintegration*. (Oxford: Oxford University Press, 2008). 154. See also Brown; Budding. 154.

- 20 Interviews made by the Editors, with representatives of the Bosniak National Minority Council in Serbia, Novi Pazar on 10 June 2015 and at Nansen Dijalog Centar, Sarajevo on 11 June 2015. See also Dunja Larise, "The Islamic Community in Bosnia and Herzegovina and nation building by Muslims/Bosniaks in the Western Balkans," *Nationalities Papers* 43, no. 2 (2015): 195–212.

sometimes even nationalistic, though they can contribute significantly to the fragile peace and equilibrium of the Balkans. Firstly, elaborating and operating a complicated and complex network of bilateral international treaties aiming to secure the rights and overall situation of kin-minorities in the countries of the region may help diminish the chance of both inter- and intrastate military conflicts. However kin-states might not think their compatriots are endangered by territorial states and by doing so they give up their territorial claims or counterclaims. Still, institutionalised dispute settlements could potentially lead to the exclusion of radicalisation of kin-minorities. To put it even more simply, if the right to effective participation of (persons belonging to) minorities is respected by territorial states, kin-states may come to the conclusion that the principal aims of their kin-state policies are fulfilled and thus the chance of ethnic-based tensions can be effectively reduced.

External influences: international standards and European integration

Another common characteristic is the important role that the international community played throughout the past few decades in improving minority rights related legislation. Albeit, it is also true international minority rights law – if one speaks of codifications at least – lived in a golden age in the 1990s and the international norms and standards have not really improved significantly since then. The European Union, which could be one of the most important actors in this field, has no significant norms that could guide, and more importantly, could be a permanent framework of reference both to the EU and its candidates/new member States. That is why in some cases, a setback occurs in some sense regarding the quality of minority protection under law when a country of this region becomes a member in the European Union. Finally, it would also be useful if other European countries – particularly including Western European States – would show good example in addition to speaking about minority protection.²¹ Unfortunately, a significant number of them have not even joined the relevant international treaties.

21 See also Kristin Henrard, ed., *Double Standards Pertaining to Minority Protection* (The Hague: Martinus Nijhoff, 2010).

Additionally, the minority protection legislative framework, as the chapters of this volume prove, looks good on paper, but there are serious problems regarding the implementation of existing legal provisions. This shows the necessity of explaining *thoroughly* what and *why* the international community requests from the countries of this region. Moreover, it is also crucial to involve local authorities from the very beginning of the process since implementation partially but crucially depends on local politicians and civil servants instead of central authorities. As this book also shows, minority communities are often faced with challenges when they intend to represent their interests in lower level public administration. Minority rights protection, including the implementation of the right to effective participation, is a significant part of the process of democratization of a given state and as such, certain bottom up efforts are also needed in addition to the top down approach, if the international community seeks a more or less functional and lasting solution for accommodating inter-ethnic relations.

Perhaps ‘imposed’ and ‘non-conforming’ institutions after some time can almost ‘automatically’ and significantly transform the societies affected, but there is a doubt that some States like BiH or Macedonia will have enough time to walk along this path without any troubles. Quite a few of the case studies in this volume suggest the commitment of leaders of these countries to transform their societies into “civic” instead of ethnic nations. Civic nationalism can be attractive since it proposes the neutrality of the state in terms of ethnicity. Though, in multi-ethnic societies with strong intercommunity divisions, the concept of the civic nation can indirectly serve the interests of majority group. It follows, civic nationalism and the issue of effective participation of minorities might not be compatible, at least in the beginning of the democratization process of these countries, if it becomes an indirect tool of assimilation.

Special case – Bosnia and Herzegovina

Although important similarities can be identified among the states of this region, BiH is still often seen as a unique case. First of all it is clear that the constitutional structure of the state, as it emerged after Dayton, counts as an anomaly within the European order of nation-states. Bosnia and Herzegovina institutionalizes the privileged position of three ‘constituent

peoples' (Bosniaks, Croats and Serbs) instead of one titular nation.²² Instead we can speak about three parallel nation-building and state-formation programmes and a kind of ethno-political no man's land where 'others' (*Ostali*) find themselves.²³

The visions and practices of international interveners, state-builders, and local political actors have been instrumental in transforming Bosnia-Herzegovina into a state that conceptualizes multiethnicity as a tripartite mosaic and transfers authority to sub-state levels while maintaining ethno-territorial sources of discrimination.²⁴ Instead of being a 'nationalising state,' BiH is thus a state where power asymmetry between minority and majority communities characterizing modern nation-states is realized within sub-state level administrative units. (the Republika Srpska entity with Serb and cantons with Bosniak or Croat majorities, et cetera). The question is how Bosnian minorities (both national and 'constituent' minorities) in each federal unit navigate in an ethnopolitical field that does not tolerate 'mixed' life situations, multiple belongings and loyalties.²⁵

22 According to the results of the 2013 census that were published in 2016 without a final agreement between the state- and the entity-level statistical agencies, Bosniaks form 50.6 per cent of the whole population. However, the statistical agency of the RS is debating the applied methodology concerning the definition of 'resident,' therefore it is also challenging the numbers that unravel the absolute majority of the Bosniaks.

23 Nenad Stojanović, "When non-nationalist voters support ethno-nationalist parties: the 1990 elections in Bosnia and Herzegovina as a prisoner's dilemma game," *Southeast European and Black Sea Studies* 14, no. 4 (2014): 619.

24 Bosnia and Herzegovina consists of 2 entities and Brčko District, including 143 municipalities [*opština/općina*]. While one of the entities, the Republika Srpska (RS) is more or less centralised, the other entity, the Bosniak-Croat Federation (FBiH) is highly decentralised into 10 cantons. Those governmental levels and units lacking a clear ethnic majority suffers from 'dysfunctionality' – the blocking of efficient decision-making: BiH as a state, FBiH entity, 'mixed' Bosniak-Croat cantons, Mostar municipality, et cetera.

25 In Bosnia and Herzegovina – similarly to many border regions and ethnic contact zones in Europe – modern settlements, migrations and assimilation processes have resulted in the formation of groups and communities with a mixed cultural repertoire, often with multiple or ambivalent national loyalties. These local life-worlds (*mezsgyevilágok* or 'ethnoscapes') that are subjected to loyalty pressures and homogenisation efforts from the part of the nationalising states are indicators of both top-down nation-building mechanisms and local communities' practices of self-identification and separation. Zoltán Ilyés, *Mezsgyevilágok. Etnikus interferenciák és nemzeti affinitások térbeli mintázatai a Kárpát-medencében* (Budapest: Lucidus Kiadó, 2008): 7.

The international peace plans and the negotiation process in the case of BiH reflect the ethnic stratifying effect of international diplomacy and its actors. Seeing Bosnian society through ethnic lens has helped dismiss intra-ethnic fragmentation and alternatives as well as non-constituent and non-ethnic social groups. The simplification of complex and contested events and processes to the ethnic conflict of ‘three warring parties’ resulted in the reduction of the number of relevant actors (e.g. reduction of talks to a few parties) and searching for explanation and solutions along ethnic lines. While these dynamics make foreign policy analysis and decision-making more effective, they also shaped the form of international intervention and the creation of new ethno-territorial realities (‘ethnic unmixing’).²⁶ As James O’Brian reminds us, the identification of centers of power among the warring parties and the limitation of the negotiations to a small group of participants is ‘a simple matter of power politics’: “Once the United States took a more active role in the diplomacy, one of its major objectives [...] was to reduce the number of voices at the table.” The result was then that the “mediators dealt only with those leaders or individuals authorized by them. Bosnian Croats played little role in negotiations, and Bosnian Serbs were ignored.”²⁷ This meant that other groups were excluded entirely – the voice of ‘Yugoslavs’ or ‘Bosnians’ of mixed marriages and local Roma and Jewish communities was not represented.²⁸ Moreover, the Dayton Agreement secured a weak commitment of the Bosnian Serb and Croat elite to the joint state.²⁹

Even if there are special mechanisms built in the Dayton Agreement on the basis of which people (Bosnians) can change it, this option remains

26 Edgár Dobos, *Nemzetközi beavatkozás, az etnikai megosztás politikája és az állam működési zavarai Bosznia-Hercegovinában [International intervention, the politics of ethnic division and dysfunctionalities of the state in Bosnia-Herzegovina]*. Ph.D. diss. (in manuscript). Corvinus University of Budapest, 2017.

27 James C. O’Brian, “The Dayton Agreement in Bosnia: Durable Ceasefire, Permanent Negotiation,” in *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes*, ed. I. William Zartman and Viktor Aleksandrovich Kremenyuk (Lanham, MD: Rowman and Littlefield, 2005): 96, 101. James O’Brian was one of the US lead negotiators during the Bosnian war. See also James Kennedy and Liliana Riga, “A Liberal Route from Homogeneity?: US Policymakers and the Liberalization of Ethnic Nationalists in Bosnia’s Dayton Accords,” *Nationalism and Ethnic Politics* 19 (2013): 163–186.

28 Christopher McCrudden and Brendan O’Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford: Oxford University Press, 2013): 23.

29 Bieber.

politically unfeasible. Moreover, while the Dayton Agreement requires supremacy of international human right standards over domestic law, even in one specific and decisive issue regarding the equality of the members of non-titular minorities (ECtHR decision in the Sejdić-Finci case) as a result of political blockage, for 14 years there has not been any improvement.

The European Court of Human Rights stated in its judgement that

while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission [...] clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere.³⁰

In the Zornić case the ECtHR declared,

The nature of the conflict was such that the approval of the ‘constituent peoples’ was necessary to ensure peace. However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. [...] In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.³¹

Indeed, while there is little chance to change the special political structure of BiH, there remain serious doubts about the long-term effects of the Dayton Agreement on inter-ethnic relations in the country.

30 European Court of Human Rights, *Sejdić and Finci v. Bosnia and Herzegovina*, 2009, Applications nos 27996/06 and 34836/06, 22 December 2009, par. 48.

31 European Court of Human Rights, *Azra Zornić v. Bosnia and Herzegovina*, Application no. 3681/06, Judgment, Strasbourg, 15 July 2014, par. 43.

Bosnia, Kosovo and Macedonia – territorial power-sharing and federalism

It is worth comparing the cases of BiH, Kosovo, and Macedonia as power-sharing institutions and practices in these post-Yugoslav states are the result of international diplomatic mediation, external state-building efforts, and local power relations. Different forms of territorial power-sharing arrangements have been established in these three countries along ethnic lines, however none of the three constitutional solutions could be effective in creating a lasting and functioning cohabitation for the different major ethnic groups.

As it was seen in BiH, the Dayton Peace Agreement institutionalised the privileged position of three constituent nations and this political arrangement has not changed ever since.³² Persons belonging to the 17 recognised national minorities as well as people who identify as Bosnians and refuse ethnic identification for various reasons ('mixed' marriage, political or ideological conviction et cetera) are categorised as 'others' (*Ostali*). For analytical purposes, it is worth making a distinction between the officially recognized 'national minorities' (Roma, Jews, Czechs, Hungarians etc.) and the so-called 'constituent minorities', i.e. those Bosniaks, Croats and Serbs who live in a *de facto* minority position at local level that is reflected in their access to education and employment opportunities, healthcare, pension, public services and various social benefits. The Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM AC) has admitted in its opinions that Bosniaks, Croats and Serbs can be regarded and should be recognised as *de facto* minorities facing everyday discrimination in certain contexts at various sub-state administrative levels. Therefore the FCNM AC has recommended the scope of the application of the Framework Convention should be extended to constituent peoples in a minority situation – a new category reflecting postwar realities – without weakening their constituent status.³³ The case of BiH is not entirely unique: as the European Commission for

³² See above note 20.

³³ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Opinion on Bosnia and Herzegovina*. ACFC/INF/OP/I(2005)003, par. 28. Strasbourg, 27 May 2004. ; Advisory Committee on the Framework Convention for the Protection of National Minorities: *Third Opinion on Bosnia and Herzegovina*. ACFC/OP/III(2013)003, para. 35-36. Strasbourg, 7 March 2013.

Democracy through Law (the 'Venice Commission') has stated in the case of Belgium, international minority protection norms and tools can be also applied to those communities that are dominant at state level but are in a minority situation within a given territory.³⁴

In the Macedonia and Kosovo cases, one can observe a hierarchy among minority communities. Both the Ohrid Framework Agreement (2001) and the Ahtisaari proposal (2007) aimed to solve the question of their largest minorities – the 'Albanian question' in Macedonia and the 'Serb question' in Kosovo. Their power-sharing systems are beneficial for the Albanians and the Serbs as the biggest and territorially concentrated minorities in Macedonia and Kosovo respectively, who are in a privileged position compared to smaller and more territorially dispersed minorities. Although Macedonia is officially a unitary state containing a titular nation with nation-state building ambitions, Albanians compose 20-30 per cent of the population. Meanwhile Kosovo is a 'multiethnic society' in which, in fact, approximately 92 per cent of the population is Albanian.

In principle, BiH is based on a federal arrangement of power-sharing. BiH is composed of ethno-territorial administrative units and Brčko district. It cannot be regarded as a real federation, for instance the entity of Republika Srpska (RS) does not automatically implement the decisions and laws made in the federal center. There is an important asymmetry between the centralized RS entity and the decentralized FBiH entity with 10 cantons as sites of decision-making. The idea of 'multinational federalism' was realised with a rigid combination of the principles of territoriality and ethnicity and a contradictory relationship between privileged collective rights of the constituent nations and individual human rights.³⁵ A constant source of tension and dysfunctionality can be derived from the parallel dynamics of the international efforts to stabilize through the institutionaliza-

34 European Commission for Democracy through Law (Council of Europe's Venice Commission): *Opinion on possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium*. CDL-AD(2002)1. Strasbourg, 12 March 2002.

35 European Commission for Democracy through Law (Council of Europe's Venice Commission): *Opinion on the Constitutional Situation in Bosnia and Herzegovina*. CDL-AD (2005) 004. Venice, 2005 ; Jens Wölk and Sören Keil, "The territorial dimension of the 'Croat question' in Bosnia and Herzegovina," in *The Constitutional, Legal and Factual Position of the Croat Constituent People: An Analysis of the Implementation of the Constitutional and Legal Framework on the ground* (Sarajevo: Fondacija Konrad Adenauer, 2014): 27–46.

tion of ethno-territoriality and reconstruct the multinational society in BiH. The political economy embedded in wartime structures and client-building strategies of the parties undermines the functioning of BiH as a state and the reversal of the effects of violent ethnic homogenisation ('ethnic unmixing').³⁶

In Macedonia, decentralization contains mixed elements of territorial autonomy and power-sharing. Due to the municipal reform of 2004, the number of municipalities was reduced from 123 to 84 and boundaries of municipalities were redrawn in a way that is beneficial for Albanian communities. Although officially planned as an 'ethnically blind' process based on economic and geographic factors, in practice decentralization was used as a tool of ethnic gerrymandering in which political and ethnic concerns were taken into account. Special attention was paid to inter-ethnic balancing in Macedonian-Albanian relations, making a counterweight to the integrationist approach of a unitary state.³⁷ Indeed, the decentralization reform in 2004, which formed municipalities with Albanian majority, remained rather problematic.³⁸

In Kosovo, following the adoption of a Constitution in 2008 that gave significant powers to municipalities, a new decentralization process was launched. New municipalities have been established and in other cases municipal borders were redrawn to the benefit of Serbs as a tool of 'ethnic self-determination.' (It was a highly contested process: some Serbs were complaining about staying in a municipality with an Albanian majority and others about being separated from the usual services of the former municipality with Albanian majority.)³⁹ In practice we could see an ethnic-based territorial autonomy for the Serbs living in Northern Kosovo. Though the legal regulation does not use this term, in fact this is the real

36 Gerard Toal and Carl T. Dahlman, *Bosnia Remade: Ethnic Cleansing and its Reversal* (Oxford: Oxford University Press, 2011). ; Denisa Kostovicova and Vesna Bojičić-Dželilović, "Ethnicity pays: The political economy of post-conflict nationalism in Bosnia-Herzegovina," in *After Civil War: Division, Reconstruction and Reconciliation on Contemporary Europe*, ed. Bill Kissane (Philadelphia: University of Pennsylvania Press, 2014): 188.

37 Lyon.

38 Ibid.

39 *The Decentralisation Process in Kosovo and the Creation of the New Municipalities*. European Parliament, Policy Department DG External Policies, July 2010. EXPO/B/AFET/FWC/2009-01Lot1/22-23- consolidated.

situation. Concerning Southern Kosovo (South of the Ibar river), already the Ahtisaari plan of 2007 named six districts with a Serb majority. Beside the Serb-majority municipalities, only one municipality with a Turkish majority (Mamuša/Mamusha) was created within the decentralization project. Today, out of 37 municipalities there are 28 Albanian, 8 Serb, and 1 Turkish majority. The special interest on Serb majority municipalities was reflected in the Brussels Agreement as well, which offers the possibility to create an Association/Community of Serb Municipalities with extended competences without qualifying as an autonomous governing structure.

Redrawing municipal boundaries has served to empower local Albanian and Serb communities (forming local majorities) in both Macedonia and Kosovo respectively. Another commonality exists between both states: though municipalities gained more power from decentralization, decision-making competences between the national and municipal levels are sometimes blurred, and the dominant influence of central government financing on municipalities has not been really challenged.

International intervention did not produce the same results in these countries. Even if specific territorial arrangements are partly rooted in international agreements, significant differences remain. There is one important element: there are no territorial solutions to ethnic issues.

In Macedonia, the Ohrid Framework Agreement declared that the unitary character of the state is inviolable and has to be preserved. Decentralization, the creation of municipalities with an Albanian majority population, opened debates about the fear of Albanian secession and territorial disintegration. In Kosovo, Serb municipalities, and especially the direct influence of Serbia via the parallel institutions, keeps fears of Northern Kosovo secession alive. Decentralisation in both countries delegated political, administrative and fiscal competences to municipalities. Nevertheless, municipalities are subjugated to the central government. They do not have genuine legislation competences and are not represented at the state level. The association of municipalities is the only mechanism through which municipalities can influence the central government's policies – but the government is able to marginalize this effect through informal party deals.

Regional or territorial autonomy has not been realized. The ethnic character of municipalities is not recognized; while local municipalities can cooperate, they cannot merge and form a regional entity; they cannot get direct financial support from the neighbouring 'kin-state.' Albanians in

Macedonia do not have their Republika Srpska (territorial autonomy in the form of an entity where they compose the majority, as well as special relations with the neighbouring 'kin-state'). Neither do they enjoy a similar special asymmetrical status that Serbs living in Kosovo, in terms of the official Serbian language status and Kosovo Serbs' special relations with Serbia, that has helped build and maintain a parallel Serb society within Kosovo (financial support to schools, healthcare, postal service, pensioners and veterans).

In BiH, Bosniak fears of a Serb secession are rooted in the special autonomous status of Republika Srpska granted by the Dayton Agreement. The strong position of the Serb entity in BiH is cemented by the international peace agreement, granting its own budget, own police, and most importantly, its veto right. Indeed Bosniaks are not able to fragment Bosnian Serbs into more administrative units and the national government in Sarajevo is not able to politically control them either. Indeed, BiH is not a true federation since Republika Srpska (as a 'federal unit') does not only implement laws adopted at the federal center (decisions made by the Sarajevo government), but also adopts laws and pursues its own policies.

The role of kin-states and their citizenship policies is also important in the region: Serbs and Croats may enjoy the citizenship of their kin-states, thus benefitting from Croatia's EU membership or Serbia's progress towards accession to the EU. Bosniaks do not have such an opportunity, which necessarily creates a social unbalance within BiH.

Final remarks

International minority rights standards as they developed in the 1990s offered important guidelines on creating "conditions necessary for the effective participation of persons belonging to national minorities in (...) public affairs" (Art. 15. FCNM). Nevertheless international actors and national political elites that had a say in the evolution of domestic legislations relevant for the participation of minorities in South-eastern Europe focused on the solid codification of actual political compromises. Such political deals, cemented in international agreements can hardly respond to changing social realities on the ground. What was seen as appropriate solution for ending a conflict, may later become a structural obstacle for overcoming interethnic divisions. In many cases there remains a need for

legal mechanisms providing opportunities for structural changes and helping confidence-building between minority and majority communities.

References

- Advisory Committee on the Framework Convention for the Protection of National Minorities: *Opinion on Bosnia and Herzegovina*. ACFC/INF/OP/I(2005)003, par. 28. Strasbourg, 27 May 2004.
- Advisory Committee on the Framework Convention for the Protection of National Minorities: *Third Opinion on Bosnia and Herzegovina*. ACFC/OP/III(2013)003, para. 35-36. Strasbourg, 7 March 2013.
- Agencija za statistiku Bosne i Hercegovine: *Popis stanovništva, domaćinstava i stanova u Bosni i Hercegovini, 2013*. Sarajevo, juni 2016.
- Andelić, Neven. *Bosnia-Herzegovina: The End of a Legacy*. London: Frank Cass, 2003.
- Bieber, Florian. "Reconceptualizing the Study of Power-Sharing." *Stidosteuroopa* 60, no. 4 (2012): 526–535.
- Brown, Keith. "Sovereignty after Socialism at Europe's New Borders." In *The State of Sovereignty: Territories, Laws, Populations*, 196–221. Bloomington: Indiana University Press, 2009.
- Budding, Audrey Helfant. "Nation/People/Republic: Self-Determination in Socialist Yugoslavia." In *State Collapse in South-Eastern Europe. New perspective on Yugoslavia's Disintegration*, edited by Lenard J. Cohen and Jasna Dragović-Soso, 91–129. West Lafayette, Indiana: Purdue University Press, 2008.
- "Co-operation of Constitutional Courts in Europe Current Situation and Perspectives." Working Document for the XVIth Congress of the Conference of European Constitutional Courts. CDL-JU(2014)003.
- Cvjetičanin, Tijana. "Having an EU neighbour: How does it affect human rights in Bosnia and Herzegovina?" *Novi pogledi*, ljeto 2014, 19–38.
- Dobos, Edgár. *Nemzetközi beavatkozás, az etnikai megosztás politikája és az állam működési zavarai Bosznia-Hercegovinában [International intervention, the politics of ethnic division and dysfunctionalities of the state in Bosnia-Herzegovina]*. Ph.D. dissertation (in manuscript). Corvinus University of Budapest, 2017.
- Donia, Robert. *Radovan Karadžić: Architect of the Bosnian Genocide*. Cambridge, Cambridge University Press, 2015.
- Dyker, David A. and Ivan Vejvoda, editors. *Yugoslavia and After. A Study in Fragmentation, Despair and Rebirth*. Routledge, London – New York, 1996.
- European Commission for Democracy through Law (Council of Europe's Venice Commission): *Opinion on possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium*. CDL-AD(2002)1. Strasbourg, 12 March 2002.

- European Commission for Democracy through Law (Council of Europe's Venice Commission): *Opinion on the Constitutional Situation in Bosnia and Herzegovina*. CDL-AD (2005) 004. Venice, 2005.
- European Court of Human Rights, Sejdić and Finci v. Bosnia and Herzegovina, 2009, Applications nos 27996/06 and 34836/06, 22 December 2009.
- European Court of Human Rights, Azra Zornić v. Bosnia and Herzegovina, Application no. 3681/06, Judgment, Strasbourg, 15 July 2014.
- Feldman, David. "The Independence of International Judges in National Courts: Lessons from Bosnia and Herzegovina." In *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, edited by Shimon Shetreet and Christopher Forsyth, 215–229. Leiden: Martinus Nijhoff – Brill, 2012.
- Fetahagić, Sead and Nebojša Šavija-Valha. "Between cooperation and antagonism. The dynamics between religion and politics in sensitive political contexts. Case: Bosnia and Herzegovina." Sarajevo: Nansen Dijalog Centar, 2015.
- Gilbert, Andrew. "The past in parenthesis. (Non)post-socialism in post-war Bosnia-Herzegovina." *Anthropology Today* 22, no. 4 (2006): 14–18.
- Grandits, Hannes. "Dynamics of socialist nation-building: the short lived programme of promoting a Yugoslav national identity and some comparative perspectives." In *Dve domovini/Two Homelands*, 2008, Vol. 27, 15–28.
- Graziadei, Stefan. "Democracy v human rights? The Strasbourg Court and the challenge of power sharing," *European Constitutional Law Review* 12, no. 1 (2016): 54–84.
- Hayden, Robert. "Imagined communities and real victims: self-determination and ethnic cleansing in Yugoslavia," *American Ethnologist* 23, no. 4 (1996): 783–801.
- Henrard, Kristin, editor. *Double Standards Pertaining to Minority Protection*. The Hague: Martinus Nijhoff, 2010.
- Interviews made by the Editors, with representatives of the Bosniak National Minority Council in Serbia. Novi Pazar on 10 June 2015 and at Nansen Dijalog Centar, Sarajevo on 11 June 2015.
- Ilyés, Zoltán. *Mezsgyevilágok. Etnikus interferenciák és nemzeti affinitások térbeli mintázatai a Kárpát-medencében*. Budapest: Lucidus Kiadó, 2008.
- Jenne, Erin K. and Florian Bieber. Situational nationalism: nation-building in the Balkans, subversive institutions and the Montenegrin paradox. in *Ethnopolitics*, 2014, 13 (5), 431–460.
- Kennedy, James and Liliana Riga. "A Liberal Route from Homogeneity?: US Policymakers and the Liberalization of Ethnic Nationalists in Bosnia's Dayton Accords." *Nationalism and Ethnic Politics* 19 (2013): 163–186.
- Kostovicova, Denisa and Vesna Bojčić-Dželilović. "Ethnicity pays: The political economy of post-conflict nationalism in Bosnia-Herzegovina." In *After Civil War: Division, Reconstruction and Reconciliation on Contemporary Europe*, edited by Bill Kissane, 187–213. Philadelphia: University of Pennsylvania Press, 2014.
- Larise, Dunja. "The Islamic Community in Bosnia and Herzegovina and nation building by Muslims/Bosniaks in the Western Balkans." *Nationalities Papers* 43, no. 2 (2015): 195–212.

- Lyon, Aisling. *Decentralisation and the Management of Ethnic Conflict: Lessons from the Republic of Macedonia*. Oxford: Routledge, 2016.
- Malešević, Siniša. *Ideology, Legitimacy and the New State: Yugoslavia, Serbia and Croatia*. London: Routledge, 2016.
- Marko, Joseph. "Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation." In *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour of Rainer Hofmann*, edited by Tove H. Malloy and Ugo Caruso, 97–120. Leiden and Boston: Martinus Nijhoff Publishers, 2013.
- McCrudden, Christopher and Brendan O'Leary. *Courts and Consociations: Human Rights versus Power-Sharing*. Oxford: Oxford University Press, 2013.
- O'Brian, James C. "The Dayton Agreement in Bosnia: Durable Ceasefire, Permanent Negotiation." In *Peace Versus Justice: Negotiating Forward- and Backward-Looking Outcomes*, edited by I. William Zartman and Viktor Aleksandrovich Kremenyuk. Lanham, MD: Rowman and Littlefield, 2005.
- Palermo, Francesco and Solomon Dersso. "Minority Rights." In *Routledge Handbook of Constitutional Law*, edited by Mark Tushnet, Thomas Fleiner, and Cheryl Saunders. New York: Routledge, 2013.
- Pearson, Sevan. "The 'national key' in Bosnia and Herzegovina: A Historical Perspective." *Nationalities Papers* 43, no. 2 (2015): 213–232.
- Prelec, Marko and Naim Rashiti. *Serb Integration in Kosovo after the Brussels Agreement*. Balkans Policy Research Group, 19 March 2015.
- Stojanović, Nenad. "When non-nationalist voters support ethno-nationalist parties: the 1990 elections in Bosnia and Herzegovina as a prisoner's dilemma game." *Southeast European and Black Sea Studies* 14, no. 4 (2014): 607–625.
- The Decentralisation Process in Kosovo and the Creation of the New Municipalities*. European Parliament, Policy Department DG External Policies, July 2010. EXPO/B/AFET/FWC/2009-01Lot1/22-23- consolidated.
- Toal, Gerard and Carl T. Dahlman. *Bosnia Remade: Ethnic Cleansing and its Reversal*. Oxford: Oxford University Press, 2011.
- Trbovich, Ana S. *The Legal Geography of Yugoslavia's Disintegration*. Oxford: Oxford University Press, 2008.
- Wimmer, Andreas. "Who owns the state? Understanding ethnic conflict in post-colonial societies." *Nations and Nationalism* 3, no. 4 (1997): 631–666.
- Wölk, Jens and Sören Keil. "The territorial dimension of the 'Croat question' in Bosnia and Herzegovina." In *The Constitutional, Legal and Factual Position of the Croat Constituent People: An Analysis of the Implementation of the Constitutional and Legal Framework on the Ground*. Sarajevo: Fondacija Konrad Adenauer, 2014.

