

## The framework convention for the protection of national minorities and internalisation: lessons from the Western Balkans

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# The Framework Convention for the Protection of National Minorities and Internalisation: Lessons from the Western Balkans<sup>1</sup>

## 1. Introduction

This article considers a key element in ensuring successful implementation of the European minority rights project, the internalisation of provisions of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM)<sup>2</sup> in domestic law. The particular context for the development of new European minority rights standards in the early 1990s was of course the developing situation in what is often referred to as the Western Balkans,<sup>3</sup> as well as in other parts of Central and Eastern Europe.<sup>4</sup> The article therefore uses three case-studies from the region, focusing on the internalisation processes in Bosnia and Herzegovina (BiH), Kosovo and the Republic of North Macedonia (hereafter referred to as North Macedonia)<sup>5</sup> to highlight key themes and limitations that have emerged. Despite the premise of universality, the article demonstrates that the 'nation-cum-state paradigm'<sup>6</sup> remains prevalent in legal internalisation processes. The article argues that the adoption of minority (or community) rights legislation can provide a positive opportunity for particularisation, with the required 'specificity' for local circumstances to be taken into account in the application of these standards.<sup>7</sup> Whilst the adoption of such legislation has an important symbolic and practical role, the article asserts that legal internalisation needs to be seen as an ongoing process, with further evolution of the legislative framework required over time to address its limitations. This is crucial also in light of ongoing debates over EU accession and the inclusion of the protection of minorities within the Copenhagen criteria.<sup>8</sup>

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<sup>1</sup> It is recognised that this term has particular political connotations and is the term preferred in this article as the term used in the context of EU enlargement discussions – see further Helvetas Albania 'Labelling the [Balkans]' (27 September 2018) <https://www.helvetas.org/en/albania/how-you-can-help/follow-us/multimedia-stories/Helvetas-Mosaic/Labeling-the-Balkans>

<sup>2</sup> Treaty No 157 adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and entering into force on 1 February 1998.

<sup>3</sup> This term is understood for the purposes of this article to cover Croatia (although the EU stopped including Croatia when it became a member) plus Montenegro, Serbia, the Republic of North Macedonia and Albania as official candidates plus Bosnia and Herzegovina and Kosovo as potential candidate countries. (European Parliament, Fact Sheets on the European Union – The Western Balkans (April 2019) <http://www.europarl.europa.eu/factsheets/en/sheet/168/the-western-balkans>)

<sup>4</sup> Heinrich Klebes, "Introduction, Draft Protocol on Minority Rights to the ECHR" 14 *Human Rights Law Journal* (1993) 140-144

<sup>5</sup> Whilst the name dispute between the Republic of North Macedonia and Greece has now been resolved, the status of Kosovo remains contested. This article refers to the Republic of Kosovo when quoting from relevant domestic law.

<sup>6</sup> This is the term used by Marko et al in an important contribution exploring multiple diversity governance and human and minority rights protection and used to frame their main arguments (Joseph Marko and Sergiu Constantin (eds), *Human and Minority Rights Protection by Multiple Diversity Governance: History, Law, Ideology and Politics in European Perspective* (Routledge, London, New York, 2019).

<sup>7</sup> On the meaning of particularism and its relationship to the universal, see Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, Cambridge 2006) at 177.

<sup>8</sup> European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, 7Aiii. For the latest developments and the stalling of the process in October 2019, see 'European Western Balkans' <https://europeanwesternbalkans.com> (16 May 2020).

There has been much recent discussion about the extension of European minority rights standards to 'new' minority groups,<sup>9</sup> as well as the publication of several commentaries on different ways of giving effect to the rights in the FCNM<sup>10</sup> and individual case-studies.<sup>11</sup> In focusing on minority (or community) rights legislation as a particularly important aspect of internalisation, the article also develops and builds on more policy-oriented work that identifies trends in the drafting of domestic legislation on the rights of national minorities in Council of Europe member states.<sup>12</sup> The article examines what such laws and processes reveal about ongoing debates over minority rights and challenges to their realisation more generally. These are discussed by Marko and others in a recent publication focused on minority rights, minority protection and diversity governance.<sup>13</sup> This argues that that under the traditional 'nation-cum-state paradigm' "[m]inorities are and will always be seen as a *problem*", with minority rights and minority protection seen as "a generous toleration of others and their alleged difference".<sup>14</sup>

A key tension considered by Marko and his co-authors is between 'monist-identitarianism', associated with the 'nation-cum-state paradigm', and 'cosmopolitan-pluralist' approaches to minority protection.<sup>15</sup> This is played out in debates over the identification of minorities and the right to self-identify, as well as debates over the content of substantive rights.<sup>16</sup> When the FCNM was adopted, criticisms focused on the lack of a definition of the term 'national minority' and the qualified nature and vague formulations of many of the substantive rights, as well as the associated monitoring system.<sup>17</sup> It might be argued that the evolution of the FCNM and its monitoring system has demonstrated that these perceived weaknesses should instead be seen as an advantage, allowing 'states with different constitutional traditions to engage in

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<sup>9</sup> An early and important contribution in this regard was Perry Keller, "Re-thinking Ethnic and Cultural Rights in Europe" 18 *Oxford Journal of Legal Studies* (1998) 29-59. For a more up-to-date discussion, see Roberta Medda-Windischer, "New minorities, Old instruments? Diversity Governance from the Perspective of Minority Rights" 13 *Migration Letters* (2016) 178-192. See also Roberta Medda-Windischer, Caitlin Boulter, and Tove H Malloy, eds., *Extending Protection to Migrant Populations in Europe: Old and New Minorities* (Routledge, London, New York, 2019).

<sup>10</sup> E.g. Marc Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP, Oxford, 2005), Rainer Hoffmann et al (eds) *Rahmenübereinkommen zum Schutz nationaler Minderheiten* (Nomos, Baden-Baden, 2015) and Rainer Hoffman, Tove M Malloy and Detlev Rein, *The Framework Convention for the Protection of National Minorities: A Commentary* (Brill Publishers, Leiden, 2018).

<sup>11</sup> There has, for example, been a considerable work on particular country situations and on the bigger picture done by the European Centre on Minority Issues (ECMI) in Flensburg – e.g. Ljubica Djordjević, *The FCNM at 20: Is there a Crisis?* (ECMI Working Brief #42, December 2018, 2018). See also coverage of German, Austria, Switzerland and Italy in Hoffman et al, *op cit* note 10.

<sup>12</sup> Ljubica Djordjević, Tove H Malloy and Stanislav With Černega, *Drafting Domestic Legislation Provisioning National Minority Rights: The Dos and Don'ts according to the Council of Europe* (ECMI Working Paper #104, December 2017)

<sup>13</sup> Marko and Constantin (eds), *op cit* note 6

<sup>14</sup> Joseph Marko, 'Introduction' in Marko and Constantin (eds), *ibid.* 3-4

<sup>15</sup> *Ibid.* On the development of a more cosmopolitan approach under the FCNM see Elizabeth Craig, "Who Are the Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework" 15(2) *Journal on Ethnopolitics and Minority Issues in Europe* (2016) 6-30.

<sup>16</sup> *Ibid.*

<sup>17</sup> E.g. Gudmundur Alfredsson, "A Frame for an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures" 7 *International Journal on Minority and Group Rights* 291-304

minority protection under its umbrella'.<sup>18</sup> This article explores further the practical implications of this, as well as ongoing contestations and further legislative amendments over time, which help keep 'the norm cycle in perpetual motion'.<sup>19</sup>

The article starts by explaining the approach to the research, before considering the wider contexts within which debates over internalisation have taken place. Legislation in BiH, Kosovo and North Macedonia is then examined to provide a more in-depth analysis of key similarities and differences in their respective approaches. The focus is on the approach and the ongoing application of the FCNM in 'deeply divided societies',<sup>20</sup> which are all post-conflict and where minority rights play a significant role in debates about the past, present and future. The analysis reveals a surprising divergence of approaches to internalisation in the region, ranging from form and terminological differences to the approach to substantive rights. The article demonstrates that the 'nation-cum-state paradigm' remains strong in legal internalisation processes. It concludes that attention needs to be given to ensuring the continued particularisation and adaptation of such legislation in light of both the limitations and changing circumstances, providing a key lesson also for other divided societies.<sup>21</sup>

## 2. Approach

In making the case for the ongoing particularisation of minority (or community) rights legislation and the development of legal norms, this article draws upon the distinction that Koh has drawn between social, political and legal internalisation of norms within a domestic context.<sup>22</sup> A key factor in the drive towards the adoption of such legislation has been the pivotal role played by European and international actors in Central and Eastern Europe following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) and of the former Union of Soviet Socialist Republics.<sup>23</sup> This is particularly evident in the Opinions of the Advisory Committee under the FCNM (ACFC), which regularly advocates either for the adoption of such legislation or for its further reform.<sup>24</sup> It is also seen to a lesser extent in the

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<sup>18</sup> Joseph Marko et al 'The Historical-Sociological Foundations: State Formation and Nation Building in Europe and the Construction of the Identarian Nation-Cum-State Paradigm' in Marko and Constantin (eds), *op cit* note 6, chapter 3, at 91

<sup>19</sup> *Ibid.*, 94

<sup>20</sup> This term is defined by Adrian Guelke, *Politics in Deeply Divided Societies* (Polity Press, Cambridge, Malden 2012) 30 as a society where 'conflict exists along a well-entrenched fault line that is recurrent and endemic and that contains the potential for violence between the segments.'

<sup>21</sup> See, for example, debates over the approach to minority and group rights in any future Bill of Rights for Northern Ireland – e.g. Colin Harvey and Alex Schwartz, "Designing a Bill of Rights for Northern Ireland" 60 *Northern Ireland Legal Quarterly* (2009) 181-199 and Elizabeth Craig, "The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process" 60 *Northern Ireland Legal Quarterly* (2009) 201-211

<sup>22</sup> Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home" 35 *Houston Law Review* (1998) 623-681, at 643

<sup>23</sup> In relation to the latter, see e.g. Timofey Agarin and Malte Brosig (eds), *Minority Integration in Central Eastern Europe: Between Ethnic Diversity and Equality* (Rodopi, Amsterdam, New York, 2009).

<sup>24</sup> E.g. ACFC 'Third Opinion on Ukraine adopted on 22 March 2012' ACFC/OP/III(2012)002 p 2 and ACFC 'Fourth Opinion on Romania – adopted on 22 June 2017' ACFC/OP/IV(2017)005 p 2 (both for immediate action). 'See also ACFC 'Third Opinion on Albania' adopted on 23 November 2011' ACFC/OP/III(2011)009 p 2; 'Fourth Opinion on Albania – adopted on 11 October 2018' ACFC/OP/IV(2018)006 p 2 focused on the need for the introduction of the relevant secondary legislation and 'Fourth Opinion on Armenia adopted on 26 May 2016'

work of the OSCE High Commissioner on National Minorities and other human rights monitoring bodies.<sup>25</sup> Koh himself places particular emphasis on the role of ‘transnational norm entrepreneurs’<sup>26</sup> in legal internalisation processes. This has proved particularly important in the context of debates on EU accession and the Copenhagen criteria explicitly require commitment to minority protection as a condition of future EU membership. European Commission reports on candidate countries therefore provide annual updates on progress made. However, adoption of minority rights legislation is not in itself a requirement under EU law. Indeed, beyond the ratification of the FCNM, the recommendations have sometimes been vague and inconsistent.<sup>27</sup> The next section of this article explores further the chronological link between the adoption of such legislation and EU accession when considering the overall context. Where there is a strong link, Commission reports are considered. This reveals that the adoption of minority (or community) rights legislation is often used as a way of further formalising a commitment to minority protection beyond the initial step of ratification.

The legal concept of internalisation is closely related to the idea of ‘vernacularisation,’ and the adaption of human rights norms to local social settings.<sup>28</sup> The focus of vernacularisation is on social processes and implementation. However, there appears to be a similar continuum at work also in legal processes, from “replication” to “hybridity”, with a merging of “symbols, ideologies and organizational form”<sup>29</sup> reflecting a thicker form of adaptation.<sup>30</sup> It is clear that both concepts require mobilisation and advocacy, which involves dialogue around particular categories of rights and their framing.<sup>31</sup> However, there is also a paradox that works to hinder

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ACFC/OP/IV(2016)006 p 2 focused on need for wide consultation during the drafting of the Law on National Minorities.

<sup>25</sup> The internalisation of norms was more a focus of the work of the first High Commissioner on National Minorities, Mr Max van Der Stoel, and before the coming into force of the FCNM - see Steven R. Ratner, “Does International Law Matter in Preventing Ethnic Conflict?” 32 *New York University Journal of International Law and Politics* (2000) 591-680. Although the UN treaty monitoring bodies do not consistently focus on this issue, they have done so on occasion. A recent example is from the Committee on the Elimination of Racial Discrimination (2019) ‘Concluding Observations on the Combined Ninth to Twelfth Periodic Reports of Albania’ CERD/C/ALB/CO/9-12, 2<sup>nd</sup> Jan 2019 welcoming the adoption of a new Law on the Protection of National Minorities in 2017 and recommending prompt adoption of the necessary secondary legislation (paras 11-12).

<sup>26</sup> Koh, *op cit* note 22, 647

<sup>27</sup> For a detailed assessment of the impact of the EU on minority rights in the States that joined the EU between 2004 and 2007, see Bernd Rechel, *Minority Rights in Central and Eastern Europe* (Routledge, London, New York, 2008). For a more recent example, see Ridvan Peshkopia et al., “EU Membership Conditionality in Promoting Acceptance of Peremptory Human Rights Norms: A Case Study in Albania Considering Public Opinion” 22 *The International Journal of Human Rights* (2018) 1355-1376, 1362-1363.

<sup>28</sup> Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle” 108 *American Anthropologist* (2006) 38-51. See also the related concept of socialisation, which is more focused on the role of the State (e.g. Ryan Goodman, *Socializing States : Promoting Human Rights through International Law* (Oxford University Press, Oxford, 2013)) and the idea of the spiral model of human rights change from repression through to rule-consistent behaviour (Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, Cambridge, 2013)).

<sup>29</sup> Merry, *op cit* note 28, 46

<sup>30</sup> *Ibid.*, 44-48

<sup>31</sup> Amanda Cahill-Ripley, “Exploring the local: vernacularizing economic and social rights for peacebuilding within the Protestant/Unionist borderland community in Northern Ireland” *The International Journal of Human Rights* [2019] 1-28

the development of truly local approaches to implementation. As Sally Engle Merry has argued:

“This is the paradox of making human rights in the vernacular: To be accepted, they have to be tailored to the local context and resonant with the local cultural framework. However, to be part of the human rights system, they must emphasize individualism, autonomy, choice, bodily integrity and equality – ideas embedded in the legal documents that constitute human rights law”.<sup>32</sup>

There are also particular challenges that arise in post-conflict societies. It is submitted that minority rights claims in such societies, along with many other human rights claims, are “inherently *political* or *politicized* – that is, they concern power and privilege, domination and oppression” and are therefore subject to the “politics of contestation”.<sup>33</sup> It is not therefore surprising that political elites will often use human rights language to pursue their own agendas, adding to their own “cultural tool-kit”.<sup>34</sup> It is argued in this article that minority (or community) rights legislation has an important symbolic and practical role to play in societies that are deeply divided along ethnic lines. This is considered to be part of a process of legal transposition,<sup>35</sup> and associated ‘tuning’,<sup>36</sup> of minority rights standards, which has a more positive connotation than the concept of foreign influences as ‘legal irritants’.<sup>37</sup> This article further argues that this process demonstrates the continued strength of the ‘nation-cum-state paradigm’.

This article considers various attempts that have been made to ‘internalise’ or ‘codify’ European minority rights standards through minority (or community)<sup>38</sup> rights legislation in the Western Balkans, often under the close watch of the international community. It argues that what we have tended to see so far are replications of “the basic structure of the imported institution” overlaid with “local symbols” rather than more extensive reflections of “local institutions, knowledge, idioms and practices”.<sup>39</sup> We have also seen the inclusion of many of the features associated with the nation-state paradigm, which often sees post-conflict societies as areas of competing nationalisms. This is explored first of all through the consideration of approaches to identifying the primary beneficiaries of such rights in the wider context of the Western Balkans, before a more in-depth examination is undertaken of the legislation in place in BiH, Kosovo and North Macedonia.

These jurisdictions have been selected because they share a number of key features which reflect the limitations of the ‘nation-cum-state paradigm’. Most notably all are post-conflict

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<sup>32</sup> Merry, *op cit* note 28, 49

<sup>33</sup> Michael Goodhart, “Human Rights and the Politics of Contestation” in Mark Goodale (ed), *Human Rights at the Crossroads* (Oxford University Press, Oxford, 2014) 32

<sup>34</sup> Michele Lamb, “Loyalty and Human Rights: Liminality and Social Action in a Divided Society” 14 *The International Journal of Human Rights* (2010) 994-1012, 997

<sup>35</sup> See Esin Örüçü, “Law as Transposition” 51 *International & Comparative Law Quarterly* (2002) 205-233.

<sup>36</sup> *Ibid.*

<sup>37</sup> Gunther Teubner, “Legal Irritants: Good Faith in British law or How Unifying Law Ends up in New Divergencies” 61 *The Modern Law Review* (1998) 11-32

<sup>38</sup> As will be seen, the term ‘community’ is often used as a more politically acceptable alternative to the term ‘minority’ in the region.

<sup>39</sup> Merry, *op cit* note 28, 48

and ‘deeply divided’ societies, with various arrangements in place to protect certain groups. These include power-sharing governance arrangements, tools to prevent imposition of the majority’s will such as double-majority voting or vetoes, proportionality in public administration and some form of autonomy at sub-state level.<sup>40</sup> Different approaches to constitutional design in such societies have been explored extensively from within the fields of comparative politics and comparative constitutional law, with attempts also made to bridge the two fields.<sup>41</sup> Meanwhile the inclusion of minority rights in peace agreements has also been the subject of academic study.<sup>42</sup> This article builds on this literature by focusing more specifically on the role of minority (or community) rights legislation aimed at providing protection for a range of different ethno-national and ethno-cultural groups as a particularly high profile way of internalising minority rights protections within domestic law.

Adopting a comparative textual analysis, the article highlights key similarities and differences in the respective approaches<sup>43</sup> based upon an examination of national laws as well as reports from relevant European organisations. According to Fredman:

“The field of human rights law seems to be particularly ripe for a comparative approach...and when analogous issues arise we would expect to see equivalent answers....On the other hand, human rights are inevitably formulated in open-textured terms, requiring interpretation and application in specific contexts. The differences in text, culture, history and institutions might be more important than the similarities”.<sup>44</sup>

The article demonstrates that, despite a common goal of promoting and protecting the rights of minority groups, at least on the surface and at the behest of international and European elites, very different approaches have been adopted in each jurisdiction. This is surprising both given their close proximity (geographic and historical) and the role of international actors. It is also surprising given the use of the FCNM as a baseline. It is submitted that in the context of minority rights the differences are as important as the similarities between them. A key question is what this comparison reveals about ongoing prevalence of the ‘nation-state paradigm’ versus the development of a more cosmopolitan approach. Given that the Macedonian law is much shorter than the laws in BiH and Kosovo, more detail is inevitably provided on these two laws. However, North Macedonia is still included in the comparative analysis because it provides a further example of the prevalence of the nation-state (majority-minority) paradigms and the need for further (and ongoing) legislative reform.

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<sup>40</sup> Florian Bieber, “The Balkans: The Promotion of Power Sharing by Outsiders” in Joanne McEvoy and Brendan O’Leary (eds), *Power Sharing in Deeply Divided Places* (University of Pennsylvania Press, Pennsylvania, 2013), at 317

<sup>41</sup> Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, Oxford, 2008)

<sup>42</sup> Tina Kempin Reuter, “Including Minority Rights in Peace Agreements: A Benefit or Obstacle to Peace Processes after Ethnic Conflicts?” 19 *International Journal on Minority and Group Rights* (2012) 359-397 and Laura Wise, “Setting Aside the ‘Others’: Exclusion amid Inclusion of Non-dominant Minorities in Peace Agreements” 24 *Nationalism and Ethnic Politics* (2018) 311-323

<sup>43</sup> Jan M Smits, “Redefining Normative Legal Science Towards an Argumentative Discipline” in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia, Antwerp, Oxford, Portland, 2009)

<sup>44</sup> Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press, Oxford, 2018) 3-4



### 3. Minorities or Communities? Setting the Context

A key area of divergence in the internalisation of minority rights in the jurisdictions considered here relates to terminology. This is demonstrated in this section through consideration of the minority (or community) rights legislation adopted in the wider context of the Western Balkans. Such legislation provides a useful way for States Parties “to respect and implement the principles enshrined” in the FCNM (Article 19) and is a specific form of legal internalisation promoted by the ACFC. The table below provides an overview of the specific minority (or community rights) legislation adopted in each jurisdiction. Whilst in some of these States the adoption of such legislation closely followed on from ratification of the FCNM, in others there was a considerable lapse of time between the two events. For example, the FCNM came into force in Albania in 2000, but it was only after it acquired EU candidate status in 2014 that progress was made on the adoption of such a law. In comparison it was only four years between the coming into force of the FCNM in 1998 and the adoption of the Croatian Law in 2002. This was followed closely thereafter by its application for EU membership in 2003 and being given candidate status in 2004. A similar pattern can be witnessed in Montenegro, with the new law coming into force the same year as the FCNM (2006) and followed by its application for EU membership in 2008 and the acquisition of candidate status in 2010. It appears therefore that in some jurisdictions EU accession has played a key role. However, in BiH, Kosovo and North Macedonia, there is an added layer of complexity given the post-conflict situation.

Jurisdiction	FCNM into force <sup>45</sup>	Domestic Law	Candidacy for EU <sup>46</sup>
Albania	2000	Law on the Protection of National Minorities 2017	Applied 2009, candidate status 2014
B-H	2000	Law of the Rights of National Minorities 2003	Applied Feb 2016
Croatia	1998	The Constitutional Act on the Rights of National Minorities 2002 (amended 2010)	Applied 2003, candidate status 2004, joined 2013
Montenegro	2006	Law on Rights and Freedoms of Minorities 2006 (replaced previous federal law, last amended 2017)	Applied 2008, candidate status 2010
North Macedonia	1998	Law on Promoting and Protecting the Rights of Persons Belonging to Communities which represent less than 20% population 2008	Applied 2004, Candidate status 2005

<sup>45</sup> Council of Europe Treaty Office ‘Chart of Signatures and Ratifications of Treaty 157’ (16 May 2020) [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p\\_auth=o3eFfCps](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=o3eFfCps).

<sup>46</sup> European Commission ‘Enlargement: Candidate Countries and Potential Candidates’ (16 May 2020) <http://ec.europa.eu/environment/enlarg/candidates.htm>

Serbia	2001	Law on the Protection of Rights and Freedoms of National Minorities 2002	Applied 2009, candidate country status March 2012
Kosovo	Special status	Law on the Promotion and Protection of the Rights of Communities and Persons belonging to Communities in Kosovo 2008	EU has noted declaration of independence

The term 'national minority' itself has not been consistently replicated in the context of the Western Balkans. Whilst the terminology used in the FCNM ('national minority' or *nacionalne/a manjine/a*) has prevailed in Albania, BiH, Croatia and Serbia, a different approach has been taken Kosovo, Montenegro and North Macedonia. This can be linked to a wider scepticism about the liberal minority rights discourse, but it also has historical roots.<sup>47</sup> During the time of the SFRY, both *narod* (the constituent nations) and *narodnosti* (other national groups or nationalities) were given constitutional protection, in line with the overall trend in the region toward the institutionalisation of both 'titular and minority nations'.<sup>48</sup> Meanwhile the term *etnička zajednica* was used to refer to ethnic groups (or 'communities') with no titular country or kin-state, such as the Roma, Jews and Vlachs.<sup>49</sup> Whilst the recognition of collective rights continued following the dissolution of the SFRY,<sup>50</sup> there has been some resistance to the use of the term minority as an umbrella term covering both *narod* and *narodosti*, as this was considered by some to downgrade the status of 'nations' who were considered to have the right to self-determination.<sup>51</sup> This has led to the use of the term 'communities' as a more neutral alternative, a term which could also be said to reflect a more cosmopolitan approach. However, the second half of this article reveals that the 'nation-cum-state paradigm' remains strong also in these jurisdictions. This is explored further in the rest of this section, which highlights the importance of the approach taken in earlier peace agreements and founding constitutional documents in BiH, North Macedonia and Kosovo.

### 3.1 Bosnia and Herzegovina

It is well known that the Dayton Peace Agreement, and thereby also the BiH Constitution of 1995 (Annex 4), significantly marginalised those who did not identify as belonging to one of the three constituent peoples.<sup>52</sup> The Preamble of the Constitution refers to Bosniacs, Croats

<sup>47</sup> Elie Kedourie, "Minorities and Majorities in the Middle East" 25 *European Journal of Sociology/Archives Européennes de Sociologie* (1984) 276-282

<sup>48</sup> Stephen Deets, "Reimagining the Boundaries of the Nation: Politics and the Development of Ideas on Minority Rights" 20 *East European Politics and Societies* (2006) 419-446, 427

<sup>49</sup> Eran Fraenkel, "Geographical Overview Western Balkans Macedonia: Prospects for a European Future" *IE Med: Mediterranean Yearbook* [2016] 186-190, 186

<sup>50</sup> Tibor Várady, "Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav case" 19 *Hum Rts Q* (1997) 9-54, at 35-37 on positions adopted in other post-socialist countries and 37-39 on the case for the importance of such rights in the context of the dissolution of the SFRY.

<sup>51</sup> *Ibid.* 10-14

<sup>52</sup> General Framework for Peace in Bosnia and Herzegovina, initialled in Dayton, Ohio, 21 November 1995 and signed by the Republic of B-H, the Republic of Croatia and the Federal Republic of Yugoslavia in Paris 14

and Serbs ‘as constituent peoples (along with Others)’<sup>53</sup> and complex institutional arrangements were introduced to protect their respective interests with the notable exclusion of ‘Others’ from certain political posts.<sup>54</sup> This has led to various cases as well as finding of violations by the European Court of Human Rights and condemnations by other human rights monitoring bodies.<sup>55</sup> There is also the added complication of the status of Republika Srpska and claims for secession, with members of the constituent peoples finding themselves in a de facto ‘minority situation’ within either Republika Srpska or the Federation of Bosnia and Herzegovina.<sup>56</sup>

The Law of the Rights of National Minorities in BiH came into force in April 2003,<sup>57</sup> following BiH’s accession to the FCNM on 24 February 2000. Its aim was to address a notable gap in rights protection at the national level and the use of the term ‘national minority’ in the title is significant. An alternative draft had referred to the “rights of ethnic and national communities and minorities in Bosnia and Herzegovina” but it was the terminology of the FCNM that ultimately prevailed.<sup>58</sup> This has the advantage of consistency with the European minority rights framework, and suggested the possible development of a consistent approach at the domestic level. As explored further below, the constituent peoples are notably excluded, even when they find themselves in a minority situation. This reflects the continued prevalence of the ‘nation-cum-state paradigm’ given the reality of territorial separation. This serves to reinforce the idea that minorities are seen as problem and fails to challenge the prevalence of this approach.

### 3.2 North Macedonia

Developments have been less linear in the context of North Macedonia, and there is arguably a greater link to EU accession. The coming into force of the FCNM in 1998 in North Macedonia

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December 1995. The full text can be found on the OSCE’s website <https://www.osce.org/bih/126173?download=true> (16 May 2020).

<sup>53</sup> This article uses the text found at *Constitute* ‘Bosnia and Herzegovina’s Constitution of 1995 with Amendments through 2009’

[https://www.constituteproject.org/constitution/Bosnia\\_Herzegovina\\_2009.pdf?lang=en](https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en) (16 May 2020).

<sup>54</sup> E.g. Articles IV(1) and V of the Constitution on elections to the House of Peoples and the tri-partite Presidency. This was found to be contrary to the individual rights provisions of the ECHR by the European Court of Human Rights in *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR Judgment (22 January 2009) Appl. Nos. 27996/06 and 34836/06.

<sup>55</sup> As well as *Sejdić and Finci*, more recent cases include *Zorić v Bosnia and Herzegovina*, ECtHR judgment (15 July 2014) Appl No. 3681/06 and *Pilav v Bosnia and Herzegovina*, ECtHR judgment (9 June 2016) Appl No. 41939/07. See also UN Committee on the Elimination of Racial Discrimination ‘Concluding observations on the combined twelfth and thirteenth periodic reports of Bosnia and Herzegovina’ CERD/C/BIH/CO/12-13, 10 September 2018, para 12 and UN Human Rights Committee ‘Concluding observations on the third periodic report of Bosnia and Herzegovina’ CCPR/C/BIH/CO/3, 13 April 2017, para 12.

<sup>56</sup> ACFC ‘Fourth Opinion on Bosnia and Herzegovina adopted on 9 November 2017’ ACFC/OP/IV(2017)007 paras 24-25

<sup>57</sup> Published in the BiH Official Gazette, No 12/03 on 12 April 2003 and entered into force after 8 days. This article uses the unofficial translation on Refworld ‘Bosnia and Herzegovina: Law of 2003 of Rights of National Minorities’ <https://www.refworld.org/docid/4d2f22532.html> (16 May 2020)

<sup>58</sup> See European Commission for Democracy through Law (ECDL) ‘Draft Law on the Rights of Ethnic and National Communities and Minorities in Bosnia and Herzegovina’ CDL(2001)070 and ‘Draft Opinion on the Draft Law on the Rights of Ethnic and National Communities and Minorities in Bosnia and Herzegovina’ CDL(2001)072 (19 June 2001).

occurred before the 2001 conflict between ethnic Albanians and the security forces. The subsequent peace process led to a number of significant constitutional amendments, introduced as a result of the Ohrid Framework Agreement (OFA) of 2001.<sup>59</sup> The EU certainly had a much greater involvement in discussions on OFA than on Dayton, with implementation made a condition of EU accession.<sup>60</sup> This remains a challenging process, despite significant progress in meeting the Copenhagen criteria in recent years.<sup>61</sup> There were a number of attempts made during the OFA negotiations to push for a more multi-ethnic approach, some of which were more successful than others. One example of this is the replacement of the term 'nationality'<sup>62</sup> with the more neutral term 'communities'.<sup>63</sup> However, amendments were made before Parliamentary approval to the Preamble of the Constitution to include a reference to ethnicity.<sup>64</sup> As a result the Preamble now refers to:

“The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romany people, the Bosniak people and others taking responsibility for the present and future of their fatherland”.<sup>65</sup>

The overall approach therefore retains ethnicity as a key marker of identity and one which accords rights on the basis of membership of a particular national group.<sup>66</sup>

The declaration made upon ratification of the FCNM stated that the term “national minority” used in that instrument was “considered to be identical” to the terminology used under Macedonian law. Its provisions would therefore be applied “to the Albanian, Turkish, Vlach, Roma and Serbian national minorities living on the territory of the Republic of Macedonia”.<sup>67</sup> The inclusion of Serbs was significant, indicating that the old distinction between *narod* and *narodnosti* was redundant in that context. A subsequent declaration on 1 June 2004 meanwhile also extended protection to Bosniacs. According to this new Declaration, the provisions of the Framework Convention would only be applied “to the citizens of the Republic of Macedonia [emphasis added] ... who are part of the Albanian people, Turkish people, Vlach

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<sup>59</sup> Concluded at Ohrid and signed at Skopje on 13 August 2001. The translation used in this paper is available at OSCE ‘Framework Agreement’ <https://www.osce.org/skopje/100622?download=true> (16 May 2020)

<sup>60</sup> Laurence Cooley, *The European Union’s Approach to Conflict Resolution: Transformation or Regulation in the Western Balkans?* (Routledge, Abingdon, New York, 2018) ch. 3

<sup>61</sup> See the latest European Commission assessment ‘North Macedonia 2019 Report’ SWD(2019)218 (29 May 2019) and the endorsement of the European Council on the opening of accession negotiations with both Albania and North Macedonia on 26 May 2020 (Council of the European Union ‘Republic of North Macedonia’ <https://www.consilium.europa.eu/en/policies/enlargement/republic-north-macedonia/> (16 May 2020).

<sup>62</sup> This was the term used in the Constitution of 17 Nov 1991 (e.g. in the Preamble and Art. 48) ‘Constitution of the Republic of Macedonia’ <https://www.wipo.int/edocs/lexdocs/laws/en/mk/mk014en.pdf> (16 May 2020)

<sup>63</sup> See also S. 1 Basic Principles, *op cit* note 59

<sup>64</sup> For the original text of the Constitution of 17 November 1991 with subsequent amendments, see ‘Constitution of the Republic of Macedonia’ Amendment XII, *op cit* note 62. See also Zhidias Daskalovski, “Language and Identity: The Ohrid Framework Agreement and Liberal Notions of Citizenship and Nationality in Macedonia” *Journal on Ethnopolitics and Minority Issues in Europe* [2002] 1-32, 24

<sup>65</sup> Amendment IV, *op cit* note 62

<sup>66</sup> Daskalovski, *op cit* note 64

<sup>67</sup> Declaration contained in the instrument of ratification, deposited on 10 April 1997 (subsequently withdrawn)

people, Serbian people, Roma people and Bosniac people”.<sup>68</sup> The emphasis here is on groups that identify as national groups, as well as the Roma and the Vlach people. The term ‘minority’ (or ‘*malcinstvo*’), considered particularly problematic by some Albanians, is avoided.<sup>69</sup>

Despite the rhetoric (including the change in terminology), it has been argued that the ‘ethnic conflict’ paradigm still prevailed in this period<sup>70</sup> and that the main consequence of the OFA was the strengthening of the position of Albanians with a de facto bi-national rather than multi-ethnic State the end result.<sup>71</sup> This resulted in an increase in rights protections for ethnic Albanians, as well the consolidation of the existing power-sharing structures.<sup>72</sup> The adoption of a Law on Promoting and Protecting the Rights of Persons Belonging to Communities which represent less than 20% population 2008 was therefore more focused on the extension of rights protections for smaller minority groups. This is important because it reinforces the prevalence of the ‘nation-cum-state paradigm’ even in ‘deeply divided societies’ in which groups other than the majority might be dominant in a particular area or region.<sup>73</sup>

### 3.3 Kosovo

The situation in Kosovo is of course in many ways rather different from North Macedonia and BiH given ongoing negotiations over its future status and the continued involvement of international actors, which to date has been extensive.<sup>74</sup> Although not a State party or a member of the Council of Europe,<sup>75</sup> Kosovo has been subject to a special monitoring arrangements in relation to the FCNM since 2004.<sup>76</sup> The Constitutional Framework for Provisional Self-Government (CFSG) adopted on 15 May 2001 had already included an extensive range of group-differentiated rights.<sup>77</sup> Many of these rights were later included both in the Constitution and in the Law on the Promotion and Protection of the Rights of Communities and Persons belonging to Communities in Kosovo 2008.<sup>78</sup> The Communities

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<sup>68</sup> Declaration contained in a letter from the Minister of Foreign Affairs, dated 16 April 2004, registered at the Secretariat General on 2 June 2004

<sup>69</sup> K S Brown, “In the Realm of the Double-Headed Eagle: Parapolitics in Macedonia 1994-9” in Jane K Cowan (ed), *Macedonia: The Politics of Identity and Difference* (Pluto Press, London, 2000) at 128-9.

<sup>70</sup> Cooley, *op cit* note 60, 419

<sup>71</sup> Jenny Engstrom, “Multi-Ethnicity Or Bi-Nationalism-the Framework Agreement and the Future of the Macedonian State” *Journal on Ethnopolitics and Minority Issues in Europe* [2002] 1-21

<sup>72</sup> Joanne McEvoy, “Managing Culture in Post-Conflict Societies” 6 *Contemporary Social Science* (2011) 55-71, 66

<sup>73</sup> This is particularly the case in North Macedonia with Albanians having a strong geographical concentration in the North West.

<sup>74</sup> For a detailed overview of the involvement of European actors in particular, see Cooley, *op cit* note 60, ch. 4

<sup>75</sup> Group for Legal and Political Studies ‘Kosovo’s Bid to the Council of Europe’ (2 May 2018)

<http://www.legalpoliticalstudies.org/kosovos-bid-council-europe/> (16 May 2020)

<sup>76</sup> See Agreement signed between the Council of Europe and United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements relating to the Framework Convention for the Protection of National Minorities, 23 August 2004

<sup>77</sup> CFSG <https://www.esiweb.org/pdf/bridges/kosovo/12/1.pdf> (16 May 2020)

<sup>78</sup> Law No 03/L-047, adopted on 13 March 2008, available at

[https://www.ecoi.net/en/file/local/1008121/1504\\_1220511796\\_law-on-the-protection-and-promotion-of-the-rights-of-communities-and-their-members-in-kosovo.pdf](https://www.ecoi.net/en/file/local/1008121/1504_1220511796_law-on-the-protection-and-promotion-of-the-rights-of-communities-and-their-members-in-kosovo.pdf) (16 May 2020)

Law itself was adopted less than a month after the declaration of independence by the Assembly of Kosovo.

In relation to terminology, the Rambouillet Accords<sup>79</sup> had used the term 'national communities'.<sup>80</sup> However, the term 'communities' appeared on its own in the CFSG and was considered to have the advantage of leaving open the question of the final status of Kosovo.<sup>81</sup> It has been argued that the Serb strategy had been to avoid becoming a minority,<sup>82</sup> as evident in subsequent negotiations and developments.<sup>83</sup> The term 'community' is therefore regarded as a more neutral, and therefore politically acceptable. However, the process of 'de-nationalising' has not been without controversy, and the legitimacy of the branding of Kosovo as a 'state of communities' has been questioned from within the majority Albanian population.<sup>84</sup> This reinforces the continued predominance of the 'nation-sum-state paradigm'.

There are various references to the multi-ethnic character of the State in the 2008 Constitution.<sup>85</sup> The multi-ethnic approach is also evident in the provisions on power-sharing, with 20 of the 120 seats in the Assembly of Kosovo reserved for "the additional representation of non-Albanian Kosovo Communities".<sup>86</sup> This includes ten seats for those having declared themselves as representing the Kosovo Serb Community, with four seats provisionally allocated to the Roma, Ashkali and Egyptian Communities, three to the Bosniak Community, two to the Turkish Community and one to the Gorani Community.<sup>87</sup> It is significant that these reserved seats are not just for the largest non-majority community with a powerful kin-State or communities with 'an external national homeland', although the groups in question do have long-standing ties and links to the region. However, it has been argued that this plan for a "multi-ethnic and even post-national state" was "naïve", with local ownership clearly lacking.<sup>88</sup> This has impacted the approach taken to identifying the beneficiaries of minority or community rights protection in the region.

#### 4 Who are the Beneficiaries?

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<sup>79</sup> Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, France, 23 February 1999

<sup>80</sup> Art. VII: National Communities, *ibid.*

<sup>81</sup> Emma Lantschner, "Protection of Minority Communities in Kosovo: Legally Ahead of European Standards - Practically Still a Long Way to Go" 33 *Review of Central and East European Law* (2008) 451-490, at 452

<sup>82</sup> Robert C Austin, 'A Word on Kosovo's First Ten Years' 66 *Sudosteuroopa* (2018) 272-281, 276. On resistance to this agenda also from the Albanian community, see Emilie Fort, "From Power-Sharing Arrangements to Identity Building: The Case of Kosovo Serbs in Kosovo" 17 *Ethnopolitics* (2018) 503-518.

<sup>83</sup> See in particular the Brussels Agreement between Serbia and Kosovo (19 April 2013) and Agreement on main principles of establishing the Association of Municipalities with Serb majority in Kosovo (25 August 2015).

<sup>84</sup> Dana M. Landau, "The Quest for Legitimacy in Independent Kosovo: the Unfulfilled Promise of Diversity and Minority Rights" 45 *Nationalities Papers* (2017) 442-463, 442

<sup>85</sup> E.g. Art 3(1) (Equality before the Law), Constitution of the Republic of Kosovo and Art 6.1, adopted by the National Assembly on 9 April 2008, entering into force 15 June 2008, official translation available at <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf> (16 May 2020)

<sup>86</sup> Art. 64(2) of the Constitution.

<sup>87</sup> *Ibid.*

<sup>88</sup> Austin, *op cit* note 82, at 276. See also Kushtrim Istrefi, "Kosovo's Quest for Council of Europe Membership" 43 *Review of Central and East European Law* (2018) 255-273, at 255.

A closer examination of the legislation adopted in the context of the Western Balkans reveals that, despite the differences in terminology, there is some consistency in their approaches to identifying the primary beneficiaries. The most influential definition to date of the term 'national minority' was that adopted by the Parliamentary Assembly of the Council of Europe in Recommendation 1201 (1992), which defined a national minority as follows:

“group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language”.<sup>89</sup>

It is notable that various aspects of this definition have been adopted by States in the Western Balkans and that the requirement of longstanding ties with the territory was introduced a key component in most of these jurisdictions.<sup>90</sup> This is despite attempts by the ACFC to advocate a more inclusive approach to include 'new' minorities and recently arrived immigrants.<sup>91</sup> The most recent example is the Albanian Law of 2017, which uses the term 'national minority' and restricts its application in Article 3 to citizens and groups having “early and lasting links” with the State.<sup>92</sup>

The approach in the North Macedonian Law has in practice turned out to be the most restrictive, with no definition in the Act itself. During the latest reporting cycle under the FCNM, the ACFC expressed concern that the legislation only protected the six minorities referred to specifically in the constitution and that smaller groups had been excluded from the OFA review process.<sup>93</sup> Particular mention was made in the report of the Egyptian and Croat minorities, as well as the Torbesh community.<sup>94</sup> The argument made in this article is that the question of beneficiaries needs to be seen as part of an ongoing and flexible process of internalisation. The rest of this section demonstrates that the primary concern of both the BiH and the Kosovan law has also been with national groups in the more traditional sense, despite the adoption of an open-ended approach in defining key terms. In all three jurisdictions we can observe a 'quadratic relational nexus' linking national minorities, external

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<sup>89</sup> 'Additional Protocol on the Rights of Minorities to the European Convention on Human Rights' (1 February 1993), Art. 1

<sup>90</sup> E.g. Art. 5 of the 2002 Croatian Law, Article 2 of the 2002 Federal Republic of Yugoslavia Law (applicable in Serbia) and Art. 2 of the 2006 Montenegrin Law. However, see also discussion of the BiH Law below.

<sup>91</sup> ACFC, 'Commentary No. 4, The Scope of Application of the Framework Convention for the Protection of National Minorities' (24 May 2012)

<sup>92</sup> Law Nr. 96/2017 on the Protection of National Minorities in the Republic of Albania. For a detailed critique of this law, see Ljubica Djordjević and Zenajda Zaimi, "Commentary: The Law on Protection of National Minorities in the Republic of Albania" 18 *Journal on Ethnopolitics and Minority Issues in Europe* (2019) 53-69

<sup>93</sup> ACFC 'Fourth Opinion on the former 'Yugoslav Republic of Macedonia' adopted 24 February 2016' ACFC/OP/IV(2016)001 para. 4

<sup>94</sup> *Ibid.*, para 10

national homelands (or kin-states), nationalising states and international actors.<sup>95</sup> This has impacted the claims made and the way in which contestations have developed, resulting in a number of unresolved tensions in the balancing of universal, or generic, and particular approaches in the process of internalisation.

#### 4.1 Bosnia

Article 3 of the BiH Law defines a national minority as:

“a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics.”

There is no specific requirement here of longstanding ties with the state or the inclusion of a subjective element.<sup>96</sup> Indeed, most controversial for the Council of Europe was the requirement of citizenship.<sup>97</sup> As a result both ‘old’ and ‘new’ minorities are included in the list of 17 named groups, with Montenegrins, Macedonians and Slovenians (former *narodi*) considered to fall within the latter category due to changing patterns of migration.<sup>98</sup> Article 3 is technically open-ended, referring also to others who meet the criteria in line with recommendations made by the Venice Commission.<sup>99</sup> However, it is significant that all the named groups are groups who were protected either as nations or nationalities under the previous regime, and that those belonging to the three constituent peoples are excluded.

The ACFC has from the outset advised considering extending the scope of application in a number of different ways, e.g. by including non-citizens, a particular issue given past migration patterns and displacement,<sup>100</sup> other groups not specifically named<sup>101</sup> as well as constituent peoples in a minority situation at canton and/or entity level.<sup>102</sup> This initially led to a sceptical response from the Government, which questioned whether the proposal was to extend minority rights also to those only in BiH temporarily such as the Chinese, Romanians, Moldavians and citizens of Arab States.<sup>103</sup> It was later noted that Austrians, Bulgarians, Palestinians and Syrians had requested the consideration of amendments to the

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<sup>95</sup> This is the term used by David J. Smith, “Framing the National Question in Central and Eastern Europe: A Quadratic Nexus” 2 *The Global Review of Ethnopolitics* [2002] 3-16, building on Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge University Press, Cambridge, 1996)

<sup>96</sup> Cf the PACE definition endorsed more recently by the European Parliament in its resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)), 13 November 2018 para 7.

<sup>97</sup> ECDL ‘Opinion on the Draft Law on Rights of National Minorities of Bosnia and Herzegovina’ CDL-INF(2001)12 (12 July 2001) 2-3

<sup>98</sup> Report submitted by Bosnia and Herzegovina pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (received on 20 February 2004) ACFC/SR(2004)001, at 34

<sup>99</sup> ECDL, *op cit* note 97, 3

<sup>100</sup> ACFC ‘Opinion on Bosnia and Herzegovina adopted on 27 May 2004’ ACFC/INF/OP/I(2005)003 para. 24

<sup>101</sup> *Ibid.* para. 25

<sup>102</sup> *Ibid.* para. 28

<sup>103</sup> ‘Comments of the Government of Bosnia and Herzegovina on the Opinion of the Advisory Committee for the Implementation of the Framework Convention for the Protection of National Minorities in Bosnia and Herzegovina (received 25 October 2004)’ GVT/COM/INF/OP/I(003) para. 3



State Law.<sup>104</sup> It is clear therefore that the Bosnian law is still a work in progress in addressing what has been referred to as the “Exclusion-Amid-Inclusion dilemma” in deeply divided societies, whereby special arrangements for some groups (in particular those party to the conflict) lead to the exclusion and disadvantage of others.<sup>105</sup> Here it is significant that there is the possibility of subsequent recognition for groups under the current legal framework, although there is no procedure established in the Law itself.<sup>106</sup> The ACFC has, for example, welcomed the later extension to the Austrian minority in the Council of National Minorities of BiH and the flexibility shown in the application of the State law.<sup>107</sup> This again reinforces the overall impression that extension to other groups remains a possibility and that the current law as it stands is sufficiently flexible in this regard. The point has also been made by the UN Independent Expert on Minority Issues, who has stressed that “more newly settled national, ethnic, religious and linguistic groups must not be excluded from minority rights protection”.<sup>108</sup>

The exclusion of Serbs, Bosniacs and Croats, even when they find themselves in a minority situation at local or entity level, was initially justified with reference to the ruling of the Constitutional Court of BiH that the three constituent peoples enjoyed equality as groups under the arrangements established under Dayton and could not therefore be considered as minorities.<sup>109</sup> However, this appears to go against developing European understandings of the role of minority rights protection.<sup>110</sup> It also has the effect of reintroducing the old divide between ‘constituent nations’, or ‘peoples’, and nationalities. By the time the fourth State report under the FCNM was submitted in December 2016, both of the Entities, and three cantons in the Federation, as well as one in the Brcko District, also had laws on national minorities.<sup>111</sup> There were only minor differences in content and neither entity used the opportunity of introducing such legislation to provide “further concretization, adaptation and adequacy according to historical conditions and [their] legal-political existence”.<sup>112</sup> For example, a similar approach is taken in both entity laws to the State Law in relation to the requirement of citizenship and possible extension to other groups.<sup>113</sup> The latter is to be welcomed if internalisation is to be seen as an ongoing process rather than a fixing of the

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<sup>104</sup> Fourth Report submitted by Bosnia and Herzegovina pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities (received on 22 December 2016) ACFC/SR/IV(2016)007, at 10

<sup>105</sup> Timofey Agarin, Allison McCulloch and Cera Murtagh, “Others in Deeply Divided Societies: A Research Agenda” 24 *Nationalism and Ethnic Politics* (2018) 299-310

<sup>106</sup> Cf. Art. 4 Albanian Law, *op cit* note 92

<sup>107</sup> See ACFC ‘Fourth Opinion on Bosnia and Herzegovina – adopted on 9 November 2017’ ACFC/OP/IV(2017)007, para. 19

<sup>108</sup> Report of the Independent Expert on Minority Issues, Rita Izsák: Addendum - Mission to Bosnia and Herzegovina A/HRC/22/49/Add.1 (31 September 2012), para. 80

<sup>109</sup> ECDL, *op cit* note 97, at 2

<sup>110</sup> E.g. ECDL ‘Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium’ CDL-D(2002)1 (12 March 2002), which concludes that it is necessary to determine whether a group constitutes a minority at all levels and that excluding the applicability of the FCNM at sub-state level would “be contrary to the object and aim of the Convention itself”. (para. 15)

<sup>111</sup> Fourth Report, *op cit* note 104, at 10

<sup>112</sup> Slobodan Nagradić, “National Minorities in Legislation of Bosnia and Herzegovina” 5 *Politeia* (2015) 181-207, 201

<sup>113</sup> ACFC ‘Second Opinion on Bosnia and Herzegovina adopted on 9 October 2008 ACFC/OP/II(2008)005 para. 34. The Law of the Federation of Bosnia and Herzegovina (FBiH) did, however, clarify that national minorities were those who did not declare as members of one of the three constituent peoples (*ibid.* 201).

groups considered to be most deserving or in need of such protection at a particular point in time.

## 4.2 Kosovo

The need for flexibility is also demonstrated in the Kosovan context. Here the significant input from European and international experts explains the comprehensiveness of the provisions of the Kosovan law, as well as the inclusive approach to the scope of application.<sup>114</sup> Section 1.4 of the Communities Law provides that:

“For the purposes of this law, communities are defined as national, ethnic, cultural, linguistic or religious groups traditionally present in the Republic of Kosovo that are not in the majority. These groups are Serb, Turkish, Bosnian, Roma, Ashkali, Egyptian, Gorani and other communities. Members of the community in the majority in the Republic of Kosovo as a whole who are not in the majority in a given municipality shall also be entitled to enjoy the rights listed in this law”.

There is notably no requirement of citizenship, although there is a reference to traditional presence in the territory.

One commentator has observed that “[i]n concrete terms, independent Kosovo was from the start a *de jure* multi-ethnic society with a *de facto* largely homogenous society”, with Albanians making up about 93% of the population.<sup>115</sup> The potential for the majority Albanian community when in a minority situation to enjoy such rights is therefore important, as is the number of groups specifically recognised as meeting the criteria. The same list was kept as in the Constitutional Framework, against the advice of international experts. The inclusion of Croats had been discussed during the drafting and the reference to ‘other communities’ and therefore keeping it open was clearly a compromise.<sup>116</sup> Indeed the legislation was subsequently amended in 2011 to include both the Montenegrin and Croatian communities, although though there are still issues with representation in the Assembly.<sup>117</sup> This again highlights the need for flexibility and for internalisation to be seen as an ongoing process. This is further reinforced by the fact that the potential for misrecognition remains an ongoing problem.<sup>118</sup> For example, the ACFC noted in the first monitoring cycle that members of the Egyptian community were often being treated as part of the Roma and/or Ashkali

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<sup>114</sup> See Marc Weller, “The Kosovo Constitution and Provisions for the Protection of Minorities in Kosovo” 6 *European Yearbook of Minority Issues Online* (2008) 483-527 and also Lantschner, *op cit* note 81.

<sup>115</sup> Marius-Ionut Calu, “Unintended Consequences of State-Building and the Management of Diversity in Post-Conflict Kosovo” 46 *Nationalities Papers* (2018) 86-104, at 92

<sup>116</sup> Lantschner, *op cit* note 81, 456

<sup>117</sup> Law No. 04/L-020 on amending and supplementing the Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their members in Kosovo, 21 Dec 2011. See ACFC ‘Third Opinion on Kosovo adopted on 6 March 2013’ ACFC/OP/III(2013)002 paras 23, 133-4; ACFC ‘Fourth Opinion on Kosovo adopted on 8 March 2017’ ACFC/OP/IV(2017)001 para 98 and Calu, *op cit* note 115, 93.

<sup>118</sup> Craig, *op cit* note 15.

communities and recommended that the umbrella term ‘RAE’ for all three communities be avoided.<sup>119</sup>

Despite attempts to ‘de-nationalise’ and the shift away from the use of the term ‘national minority’, it is clear from the evidence presented here that the types of groups that are prioritised under the various legal frameworks are those that continue to define themselves very much in terms of a shared national identity, often with links to a kin-State. However, this section has also demonstrated that there is some flexibility and that the identification of beneficiaries has evolved over time. The next section builds on this by focusing in more depth the different approaches that have been taken to internalisation in all three jurisdictions and what this reveals about internalisation as an ongoing process.

## **5 Internalisation as an Ongoing Process: Comparisons between BiH, North Macedonia and Kosovo**

*“While detailed rules and various forms of self-representation (or autonomy) can reduce the impact of ethnic biases, they cannot replace civilisation, a culture that accepts the fact that minorities cannot be equal without the right to be different. The enactment of legal rules grounded on empathy is, however the local first step to take”.*<sup>120</sup>

Each of the jurisdictions under consideration have adopted very different approaches not just on terminology and on the question of beneficiaries, but also in relation to the content of substantive rights. It might have been expected that a uniform approach would have emerged, given the role of the FCNM in setting minimum standards. However, the provisions of the FCNM were not drafted so as to be ‘directly applicable’, leaving States considerable discretion in relation to the implementation of the objectives and “thus enabling them to take particular circumstances into account.”<sup>121</sup> Whilst the ACFC regularly calls for States in Central and Eastern Europe to adopt minority rights legislation,<sup>122</sup> the EU itself has not paid much attention to positive minority rights, even in European Commission country progress reports.<sup>123</sup> This means that there is considerable discretion left to States to decide on the scope and content of such legislation.

The most obvious finding of the comparative analysis undertaken for this article is that the commonality is fairly superficial. It is submitted that many of the substantive differences are linked to the different roles of the various Acts in filling gaps and in supplementing existing legal protections. The FCNM, for all its limitations, was intended to provide a set of minimal standards and therefore provides a key point of comparison. The table overleaf provides a brief overview of what rights are included, with comparisons also with the FCNM, highlighting

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<sup>119</sup> ACFC ‘Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo adopted on 25 November 2005’ para. 27

<sup>120</sup> Tibor Várady, “Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav case” 19 *Human Rights Quarterly* (1997) 9-54, 54

<sup>121</sup> Explanatory Report, para. 11

<sup>122</sup> This is evident from consideration of ACFC Opinions on States that have joined the Council of Europe since 1990 – see ‘Country-specific Monitoring of Implementation of the Framework Convention for the Protection of National Minorities’ <https://www.coe.int/en/web/minorities/country-specific-monitoring> (16 May 2020)

<sup>123</sup> Rechel, *op cit* note 27, at 11 and Peshkopia et al, *op cit* note 27, 1362-1363

only those provisions linked specifically to rights conferred on those belonging to members of national minorities or communities, rather than to more generally applicable rights. As the Macedonian Law is more focused on procedure, the substantive rights protections are fairly limited and so references are made in the table also to relevant constitutional provisions outlining the rights of those belonging to communities. The table reveals a number of overlaps and synergies between the three Acts. However, a closer examination of each Act also reveals considerable divergence when it comes to the wording of specific provisions and the content of the rights guaranteed.

Key Rights/Provisions	FCNM	Bosnian Law	Macedonian Law	Kosovan Law
<b>General Principles</b>				
Scope/definition	N/A	Art. 3	Art. 1(2)	Art. 1.4
Right to self-identify	Art. 3(1)	Art. 4	Art. 8 of the Constitution (freedom of national affiliation and expression as fundamental value)	Art. 1.5
Equality for members of minorities/groups	Art. 4	Arts. 3 and 4		Arts. 1.1-1.2, Art 3.3, 3.4
Tolerance, intercultural dialogue etc.	Art. 6			Art. 3.1
Protection against forced assimilation	Art. 5(2)	Art. 4		Art. 2.3
<b>Civil and Political Rights</b>				
Right to organise/establish associations, institutions etc	Art. 7 (based on Arts 9-11 ECHR)	Art. 5	Art. 7 Art. Of the 48 Constitution	Art. 5.2-5.4, Art. 7.7
Freedom of movement, safety and security	N/A			Art. 3.5
Religious Freedom	Art. 8 (based on Art 9 ECHR)		Art. 19 of the Constitution (equality for religious communities and groups and right to establish schools and	Art. 7

			other institutions)	
Cross-border contacts	Art. 17(1)	Art. 6		Art. 5.7
NGO activity/participation	Art. 17(2)			Art. 5.9
<b>Culture, Religion, Heritage, Symbols, Use of Languages</b>				
Culture and identity rights (general)	Art. 5	Art. 17 (cultural expression)	Art. 48 of the Constitution	Art. 2.1-2.2 Art. 5.1, Art. 5.5
Cultural (and religious) heritage	Art. 5	Art. 17	Art 56(2) of the Constitution (historical and artistic heritage of Macedonia and all communities in Macedonia)	Art. 5.10-5.12, Art. 7.4-7.6 (religious)
Insignia/symbols	N/A	Art. 10	Art. 8  Art. 48 of the Constitution (right to use community symbols)	Art. 5.6
Use of languages	Arts. 10-11	Arts 11-12	Art. 6  Art. 7 of the Constitution (languages spoken by at least 20% of population to be recognised as official languages)	Art. 2.4, Art. 4
<b>Other Key Areas/Issues</b>				
Education	Arts. 12-14	Arts. 13-14	Art. 5  Art. 48 of the Constitution	Art. 8
Information/Media	Art 9.	Arts. 15-16	Art. 6	Art. 6.1-6.8
Economic and social rights/opportunities/participation	Art. 15	Art. 18		Art. 9, Art. 10

Political participation	Art. 15	Arts. 19-23	Arts. 8 and 115 of the Constitution	Art. 11, Art. 12 (Community Consultative Council)
Public sector employment (specific mention)	N/A		Art. 4	Art. 9.2-9.6
Penal provisions	Art. 6(2)	Art. 25		Art. 3.2
<b>Other Provisions</b>				
Minorities to respect rights of others	Art. 20	Art. 9		Art. 1.6
Domestic implementation	N/A	Arts. 7-8, Art. 24	Arts. 9-22	Art. 13.1-13.6

What became clear during the course of the research was that each of the three jurisdictions had a very different starting point when it came to the adoption of minority or community rights legislation. BiH had already acceded to the FCNM before it even joined the Council of Europe,<sup>124</sup> and almost immediately set about drafting a new domestic law focused specifically on the rights of ‘national minorities’, so groups other than the three constituent peoples. It is clear therefore that the specific aim was to legislate for the rights of groups coming within the scope of the FCNM and excluded from Dayton. Whilst constitutional protection for minority groups was a significant feature of the OFA, it will be recalled that the application of relevant thresholds (20% in most instances), meant that in practice many of the language rights protections were applicable only to Albanians. Meanwhile the Communities Law in Kosovo build on rights provisions already included in the Constitutional Framework for Provisional Self-Government (CFSG)<sup>125</sup> adopted on 15 May 2001, with many of the provisions also featuring in the Kosovan Constitution of 9 April 2008.<sup>126</sup>

### 5.1 The Macedonian Act

The Macedonian Act, as shown in the table, adopts a fairly minimalist approach. It is not therefore included in the more detailed analysis in the next section of the article. One reason for the adoption of a minimalist approach is its role as legislation that is supplementary to other protections already in place. Initial progress reports from the European Commission suggested that existing legal protection for minority rights was for a time sufficient.<sup>127</sup> Examples of legislative acts that addressed minority issues in some way included a Law on

<sup>124</sup> BiH joined the CoE on 24 April 2002 (CoE ‘Bosnia and Herzegovina’ <https://www.coe.int/en/web/portal/bosnia-and-herzegovina> (16 May 2020))

<sup>125</sup> *Op cit* note 77.

<sup>126</sup> This Constitution was adopted by the National Assembly on 9 April 2008, entering into force 15 June 2008. ([https://www.constituteproject.org/constitution/Kosovo\\_2016.pdf?lang=en](https://www.constituteproject.org/constitution/Kosovo_2016.pdf?lang=en) (16 May 2020)) and Law No 03/L-047 was adopted on 13 March 2008 (*op cit* note 78).

<sup>127</sup> Commission of the EU ‘The former Yugoslav Republic of Macedonia 2006 Progress Report’ COM(2006)649, at 47 and ‘The former Yugoslav Republic of Macedonia 2007 Progress Report’ COM(2007)663, at 53

Culture,<sup>128</sup> a Law on the Protection of Monuments of Culture<sup>129</sup> a Law on Religious Communities and Religious Groups<sup>130</sup> and a Law on the Use of Flags.<sup>131</sup> However, in 2007 the ACFC noted progress in relation to the Albanian language and expressed concern about the lack of information on languages spoken by smaller minorities.<sup>132</sup> It stated that it considered “on-going discussions on the possible adoption of a law on the use of languages to be of utmost importance”.<sup>133</sup> Following on from this, in 2008 the European Commission expressed its concern that the ‘new’ Law on the Use of Languages Spoken by 20% of Citizens only really benefitted Albanians and did not “sufficiently address the languages of the smaller ethnic communities”.<sup>134</sup> It also noted little progress in relation to the equitable representation of ethnic Turks and the Roma communities.<sup>135</sup> The rights of smaller groups therefore still needed to be addressed.

Whilst the adoption of an act specifically aimed at smaller communities seems like a positive initiative, a closer look reveals a minimalist approach, with over half of the provisions focused on technicalities relating to the Agency for Fulfilment of Rights of the Communities.<sup>136</sup> It will be recalled that the Constitution, as amended in 2001 in light of OFA, already contains a number of rights protections for communities, and their members, and that are covered by the FCNM. The failure to expand on, or to particularise, these rights seems a missed opportunity. The formulation of rights starts in Article 5 and ends at Article 8, but most are rights already recognised in Article 48 of the Constitution, all with the added proviso “according to law”.<sup>137</sup> The Act does not therefore expand on existing rights protection in any meaningful way. Meanwhile high levels of politicisation around language have continued, with contestation around the further extension of language rights for Albanians though a new Language Law in 2018.<sup>138</sup> It is therefore the Albanian language that gets most attention, and around which there is most contestation. This supports the argument made here about the continued prevalence of the ‘nation-cum-state’ and ethnic conflict paradigms. The next section focuses in more detail on the content of the Bosnian and Kosovan laws and whether

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<sup>128</sup> Report submitted by the Former Yugoslav Republic of Macedonia pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (23 September 2003) ACFC/SR(2003)002 30 and Second Report submitted by the Former Yugoslav Republic of Macedonia pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (16 June 2006) ACFC/SR/II(2006)004 13

<sup>129</sup> *Ibid.* 33

<sup>130</sup> *Ibid.* 42

<sup>131</sup> Second Report submitted by the Former Yugoslav Republic of Macedonia pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities (16 June 2006) ACFC/SR/II(2006)004 7-8

<sup>132</sup> ACFC ‘Second Opinion on the former Yugoslav Republic of Macedonia adopted on 23 February 2007’ ACFC/OP/II(2007)002 paras 20-21.

<sup>133</sup> *Ibid.* para 21

<sup>134</sup> EU Commission ‘The Former Yugoslav Republic of Macedonia 2008 Progress Report’ COM(2008)674 19

<sup>135</sup> *Ibid.* 20

<sup>136</sup> Art. 13-18

<sup>137</sup> The exception is Art. 6, which explicitly recognises “the right to information in their own language through the electronic and printed media”.

<sup>138</sup> Sinsia Jakov Marusix ‘Macedonia Passes Albanian Language Law’

<http://www.balkaninsight.com/en/article/macedonia-passes-albanian-language-law-01-11-2018> and Sinisa Jakov Marusic, ‘Macedonia: PM’s ‘One Society for All’ Promise Tested’

<http://www.balkaninsight.com/en/article/macedonia-pm-s-one-society-for-all-promise-tested-12-19-2018> (20 May 2020)

or not they reveal a different approach. These are more substantive in their focus and provide a closer mapping of the requirements of the FCNM, but also go further in filling in key gaps and particularising to the local context.

## 6 BiH and Kosovo: Mapping of the FCNM and Beyond

Although both contain a number of substantive rights provisions, there are still significant differences in approach between the Kosovan and Bosnian laws. Of the three jurisdictions considered here, it is the law in BiH that most clearly maps the requirements of the FCNM. However, even this Act does not constitute a straightforward transposition. Meanwhile the overall consensus within the literature is that it is the Kosovan law that is most impressive in terms of both scope and content.<sup>139</sup> This is reflected also in the opinion of the ACFC that the legislative framework for minority rights protection in Kosovo is “in some aspects one of the most advanced in Europe”.<sup>140</sup> As well as substantive rights, the Kosovan law includes a number of different procedural mechanisms for communities and members to defend their rights and to raise issues in Article 13. The rest of this section focuses on key differences between the wording used in the FCNM and the BiH and Kosovan Acts in relation to substantive rights. This includes the transposition of key provisions (including the use of thresholds) and the filling of gaps through the extension of positive rights, as well as the role of symbolic rights. It argues that this latter category of rights reflects more of the local context, institutions and practices. It is therefore key in considering the ongoing prevalence of the old paradigms.

### 6.1 Transposition of Key Provisions and the Filling of Gaps

Transposition of key provisions rarely results in direct replication, a notable exception being the principle of self-identification in Article 3 of the FCNM, which is reproduced almost verbatim in all three jurisdictions considered here. However, it is clear that some of the textual differences are more significant than others. One example is Article 1(1) of the Kosovan law, which starts with a clear embracing in Article 1(1) of its “*national, ethnic, linguistic and religious diversity*” (emphasis added) as well as a reference to ‘full and effective equality for all people of Kosovo’. The additional inclusion of national identity in Article 1 of the Kosovan law is interesting as there are no specific references to national identity in the FCNM itself. In comparison Article 1 of the BiH law adopts a rather different approach, reflecting more of the traditional ‘nation-cum-state paradigm’. It states that the aim of the law is to “regulate the rights *and obligations* of members of national minorities” (emphasis added), as well as “duties of the authorities in BiH to respect and protect, preserve and develop the ethnic, cultural, linguistic and religious identity of each member of national minorities in BiH, who is a citizen of BiH.”<sup>141</sup> The obligations of individuals include respecting the rights of other national minorities and the constituent peoples.<sup>142</sup> This approach again tends to suggest minorities are a problem and to be tolerated, with respect for their rights subject to limits and even conditions.

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<sup>139</sup> E.g. Weller, *op cit* note 114, and Lantschner, *op cit* note 81.

<sup>140</sup> Third Opinion, *op cit* note 117, para. 9

<sup>141</sup> Cf Art 1 of the Albanian law.

<sup>142</sup> Art. 9 of the BiH Law



Article 5 is the key provision on identity in the FCNM. This is formulated as a State undertaking “to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage”. This is transposed through Article 2.1 of the Kosovan law into a right that both communities and their members have “to freely maintain, express and develop their culture and identity” plus the right to “enhance” as well as to preserve the essential elements (i.e. religion, language, traditions and cultural heritage). Meanwhile the Republic is required under Article 2.2. to “create appropriate conditions that enable communities and their members to freely maintain, express and develop their identities”. There is therefore a clear link between the core right and positive obligations on the State, although these do not appear to extend to preservation and enhancement of the essential elements. This is supplemented by a number of more specific provisions on culture (Art. 5.1-5.12), which sit alongside detailed provisions on language (Art. 4), media (Art. 6) and religion (Art. 7). However, the main focus of the rest of this section is on particularisation to local circumstances, including those provisions that refer to sufficient demand/thresholds in relation to language rights<sup>143</sup> and the addressing of some of the gaps in the FCNM through the extension of positive rights.

#### 6.1.1 Thresholds

The identification of appropriate thresholds has proved challenging in both BiH and Kosovo. This reinforces the overall argument that particularisation needs to be seen as a process that is on-going rather than the adoption of legislation seen as an end in itself. A particularly notable feature of the BiH Law is the imposition of relatively high thresholds for the exercise of positive rights. These require the use of minority languages in inscriptions in public institutions and topographical indications and in relations with the authorities only in “cities, municipalities and local communities (or inhabited places) in which the members of national minorities represent an absolute or relative majority”.<sup>144</sup> Such use is optional when members constitute more than a third of the population in a particular area, subject to determination by local statutes.<sup>145</sup> The same threshold applies in relation to education in the minority language under Article 14 of the BiH Law. There is also a requirement for entities and cantons to ensure instruction “on their language, literature, history and culture in the language of the minority they belong to as additional classes” where it is requested. These thresholds have been identified as “prohibitively high”<sup>146</sup> by the ACFC, which has noted that even cumulatively those identified as falling in the ‘Other’ category would not meet such thresholds.<sup>147</sup> For example, the ACFC recently found that no public schools in Bosnia and Herzegovina made provision for teaching in the language of a national minority<sup>148</sup> and that little had been done

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<sup>143</sup> E.g. Arts. 11(3) and 14(2) FCNM

<sup>144</sup> Art. 12 of the BiH Law

<sup>145</sup> *Ibid.* Cf Art. 15 of the Albanian law where the rights apply if those belonging to national minorities account for more than 20% of the total population of a local self-government unit or, in the case of use of languages with public authorities, traditional residence by the group in the territory in question.

<sup>146</sup> Fourth Opinion, *op cit* note 107, para. 9

<sup>147</sup> *Ibid.* para. 95

<sup>148</sup> *Ibid.* paras. 117-118

to provide for teaching of such languages as elective subjects.<sup>149</sup> It is clear therefore that further revisions are needed.

In relation to language rights, most of the detail in the Kosovan context is set out in the Language Law, which sets incredibly ambitious thresholds of 3 to 5% of inhabitants of a municipality being members of a particular community.<sup>150</sup> The Law on the Use of Languages was identified in the third monitoring cycle under the FCNM as “one of the most ambitious in Europe in terms of low thresholds”.<sup>151</sup> However, in practice the trend appears to be towards deterioration rather than progressive implementation with a growing gap between the law and what happens in practice.<sup>152</sup> Here too it appears that more work still needs to be done in identifying appropriate thresholds. It demonstrates that the issue of thresholds that are too low is just as problematic as those that are too high, causing frustration and tensions in relation to the realisation of minority rights in practice.

### 6.1.2 Extension of Positive Rights

The extension of positive rights as a means of filling some of the gaps in the coverage of the FCNM is much more in evidence in the Kosovan law than in the BiH law. Article 15 of the FCNM refers to ‘effective participation...in cultural, social and economic life and in public affairs, in particular those affecting them.’ However, socio-economic rights are not addressed in any detail. It is therefore worth noting that, in areas where minorities constitute an absolute or relative majority, the authorities are also required under Article 18 of the BiH law to ensure the use of minority language is facilitated in various economic and social institutions such as banks and hospitals. Meanwhile Article 19 of the Law in BiH gives an entitlement to employment with administrative authorities and public services in proportion to their percentage of the population as a whole, with temporary quotas for such employment permitted in order to achieve ‘comprehensive equality’. The latter provision was not initially addressed but was achieved through a later amendment.<sup>153</sup>

Articles 9 (economic and social opportunities) and 10 (health) are additional provisions in the Kosovan law that are not included in the FCNM. These are particularly relevant to addressing the ‘EAI dilemma’ and exclusion given the structural nature of such disadvantages faced by smaller groups. They include very specific requirements in relation to the development of public education programmes and include special consideration to be given to the Roma, Ashkali and Egyptian communities in Article 9.2. Other provisions focus on the need for special measures for vulnerable and marginalised groups, but are more generic in their approach and do not mention specific groups.<sup>154</sup> Similar observations can be applied to Article 10 of the Kosovan law, which avoids the use of rights language but requires necessary measures to ensure equal access to healthcare in Article 10.1 and special measures for those belonging to socially and economically vulnerable communities in Article 10.2.

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<sup>149</sup> *Ibid.* para. 119

<sup>150</sup> Art 2. of the Law No. 02/L-37 on the Use of Languages in Kosovo, 27 July 2006

<sup>151</sup> Third Opinion, *op cit* note 117, para. 99

<sup>152</sup> *Ibid.*

<sup>153</sup> Second Opinion, *op cit* note 113, para 10

<sup>154</sup> Art 9.3-9.7

It could be argued, as it has been in the context of discussions over a future Bill of Rights for Northern Ireland, that socio-economic rights are key to the ‘particular circumstances’ prevailing in Kosovo given the link to patterns of disadvantage that developed as a result of the conflict.<sup>155</sup> However, such provisions might be appropriate in any jurisdiction.<sup>156</sup> It is argued here therefore that the best examples of particularisation come in the provisions dealing with symbolic rights such as the question of official language status, the display of flags, heritage sites and monuments. According to Levy, such claims are

“claims to recognition – recognition as a (or ‘the’) founding people of the polity, recognition as a group which has made important contributions, recognition as a group which exists with a distinct and worthwhile identity”.<sup>157</sup>

Symbolic rights are therefore understood as “symbolic claims to acknowledge the worth, status or existence of various groups”.<sup>158</sup>

## 6.2 Particularisation and the Role of Symbolic Rights

There is certainly stronger recognition in the BiH law of symbolic rights than under the FCNM. There is, for example, explicit recognition of a right to “freely display and bear insignia and symbols of a national minority....as well as their organisations, associations and institutions” in Article 10 of the BiH Law. There is also a specific mention of the right to establish libraries, museums, and other cultural institutions and associations and to preserve monuments of culture and cultural heritage in Article 17 of the BiH Law. These are important symbolic rights, although the details are left to be regulated in other laws. The Kosovan law is more impressive in this regard, with a number of provisions in the FCNM tweaked to reflect the particular circumstances prevailing in Kosovo. For example, Article 3 of the Kosovan Law brings together and expands aspects of Articles 4 (on non-discrimination and equality) and Article 6 (on tolerance, intercultural dialogue, mutual respect and understanding and co-operation) of the FCNM. However, Article 3.1 of the Kosovan Law requires the promotion of “a spirit of peace, tolerance, inter-cultural and *inter-religious* dialogue” (emphasis added) and “support for reconciliation between communities”, which is not a concept referred to specifically in the FCNM. It further requires the taking of “all necessary measures” (the FCNM requires only ‘appropriate measures’) to protect those subject to threats or intimidation, hostility or violence as a result of their “*national*”,<sup>159</sup> ethnic, cultural, linguistic or religious identity” (again emphasis added) and adds a requirement of prosecution. These minor adaptations acknowledge the importance of a diversity of national identities in the Kosovan context, as well as the role of religious dialogue and reconciliation. There is also particularisation in the provisions dealing more specifically with language, culture, heritage

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<sup>155</sup> See Northern Ireland Human Rights Commission (2009) ‘Summary: A Bill of Rights for Northern Ireland Advice to the Secretary of State for Northern Ireland’ <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-summary-2009.pdf> (16 May 2020)

<sup>156</sup> See also Andreea Cârstocea for the European Centre for Minority Issues (2018) “National Minorities and Socioeconomic Equality: Still a Work in Progress” Issue Brief #41 arguing for the monitoring of the socio-economic situation of all national minorities and improved data collection [https://www.ecmi.de/fileadmin/redakteure/publications/pdf/Issue\\_Brief\\_\\_41.pdf](https://www.ecmi.de/fileadmin/redakteure/publications/pdf/Issue_Brief__41.pdf) (16 May 2020)

<sup>157</sup> Jacob T Levy, *The Multiculturalism of Fear* (Oxford University Press, Oxford, 2000), 154

<sup>158</sup> *Ibid.*, 127

<sup>159</sup> This adjective does not appear in Art. 6(2) of the FCNM.

and religion that fall within the category of ‘symbolic rights’. These go beyond the more generic rights in Article 5 of the Kosovan Law, which includes the rights of communities and their members in relation to traditional and religious holidays (Art. 5.5) and of communities and their representative organizations “to use and display symbols of their community” (Art. 5.6), both in accordance with law.

### 6.2.1 Language

As well as omitting to address national identity and national rights explicitly, the FCNM does not address the question of official languages. These rights are particularly important for groups that see themselves as ‘co-nations’.<sup>160</sup> It is therefore significant that this is explicitly addressed in the Kosovan law. Similar to the Constitution, Article 4.1 of the Kosovan law states that the Albanian and Serbian languages (and their alphabets) are official languages that have equal institutional status, with the Turkish, Bosnian and Roma languages having official language status at municipal level or used officially in accordance with the Law on the Use of Languages. The possibility of official recognition is significant and compares with the Albanian Law, which provides for use of minority languages by public authorities and in public spaces in Article 15 but does not refer specifically to official language status. It is submitted that the granting of official language status to other groups is one way of challenging the ‘nation-cum-state paradigm’.

As a further example of particularisation, the right to use personal names and have them officially recognised as provided for in the relevant legal system in Article 11(1) FCNM is transposed into a right of persons belonging to communities:

“to have personal names recognized in their original form and in the script of their language as well as to revert to their original names if they have been changed. This includes the right to freely choose their given and family names and the names of their children, and the right to enter such names into public registries, personal identification and other official documents in their own language and script in accordance with the law.”<sup>161</sup>

The reference to scripts as well as language is important given the different scripts in use in the region. There have, however, been other problems reported, such as the misspelling of names of those belonging to the Bosnian and Turkish communities in personal identity documents.<sup>162</sup>

Another area of particularisation relates to topographical displays, which again fall within the category of symbolic rights. Under Article 11(3) FCNM states are obliged to “endeavour” to display such indications in minority languages “as appropriate” only in “areas traditionally inhabited by substantial numbers of persons belonging to a national minority” and “where there is sufficient demand”. Article 4.7 of the Kosovan Law is less qualified and therefore more generous, only requiring that such persons “represent a sufficient share of the population”. However, again there have been problems in relation to implementation with

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<sup>160</sup> Tove H. Malloy, *National Minority Rights in Europe* (Oxford University Press, Oxford, 2005) ch. 2

<sup>161</sup> Art. 2.4

<sup>162</sup> Third Opinion, *op cit* note 117, para. 107

the lack of progress made in relation to topographical indications in more than one official language noted by the ACFC.<sup>163</sup>

### 6.2.2 Religious and Cultural Heritage

Although Article 5 of the FCNM identifies ‘religion, language, traditions and cultural heritage’ as the essential elements of group identity to be protected, the convention as a whole is relatively minimalist in its approach to religious and cultural traditions and heritage. This contrasts strongly with the emphasis on language and associated rights, although heritage and traditions are often strongly contested in deeply divided societies. It is therefore significant that the Kosovan law contains quite detailed provisions dealing with these issues. A key is whether these reflect an overplaying with “local symbols” or more extensive reflection of “local institutions, knowledge, idioms and practices”.<sup>164</sup> There remains a close link between religion and national identity in the region, with religion playing a key role historically “in shaping and reshaping ethno-national identities”.<sup>165</sup> How such identities are addressed is therefore key.

There is certainly a lot more detail included in Article 7 on religion than the minimal references to religion and religious freedom in the FCNM,<sup>166</sup> or for that matter in the Albanian law.<sup>167</sup> It is the provisions in Article 7.4-7.7 of the Kosovan Law that are the most particularised. For example, Article 7.4 provides for the protection of “[t]he practice of religious rites, traditional forms of religious life, including monastic life”, religious education and church property. Article 7.5 further provides that the Republic of Kosovo “shall promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo”. The Serbian Orthodox Church in Kosovo is meanwhile given special mention in Article 7.6, which states that it “shall be afforded the protection and enjoyment of its rights, privileges and immunities according to the Law on the Establishment of Special Protective Zones”. However, attempts at further legislation have met with opposition. This includes amendments to the 2006 Law on Freedom of Religion to address the legal status of religious communities providing automatic registration for the ‘traditional’ religious communities (Muslim, Catholic, Protestant, Jewish, Serbian Orthodox) but also introducing a clearer mechanism for other communities to obtain legal status.<sup>168</sup> This reinforces the argument that internalisation remains a work in progress and subject to further development (and contestation) over time.

Culture and religious heritage are also addressed in Article 5.10-5.12. Article 5.10 requires the Republic to “preserve the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo” and to ensure “the effective protection of sites and monuments of cultural and religious significance to communities according to the law”. Article 5.11 and Article 5.12 then provide more detail on how this can be achieved. Here

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<sup>163</sup> *Ibid.* para. 106

<sup>164</sup> Merry, *op cit* note 28, 48

<sup>165</sup> Ivan Iveković, “Nationalism and the Political Use and Abuse of Religion: The Politicization of Orthodoxy, Catholicism and Islam in Yugoslav Successor States” 49 *Social Compass* (2002) 523-536, 524

<sup>166</sup> Art. 8 recognises the right only to manifest their religion and to establish religious institutions, organisations etc.

<sup>167</sup> Art. 10 much more closely maps Art. 8 of the FCNM.

<sup>168</sup> Fourth Opinion, *op cit* note 117, para. 61

again the generic approach is adopted, although accompanying legislation has focused more specifically on Serbian Orthodox sites. This too has led to contestation. For example, legislative developments noted in the third monitoring cycle under the FCNM included the drafting of laws “with the purpose of protecting the traditional characteristics of Velika Hoa/Hoçë e Madhe village and the historic centre of Prizren as foreseen in Art. 8 and 9 of the Law No. 03/L-039 on Special Protective Zones, 15 June 2008”.<sup>169</sup> Although drafted by the government, there was strong opposition from local officials and civil society organisations who considered they gave “too much influence to the Kosovo Serb community and the Serbian Orthodox Church”.<sup>170</sup> It has further been reported the establishment of special protection zones has resulted in some members of the Roma, Ashkali and Egyptian communities being unable to return to their homes.<sup>171</sup> This again reflects the tendency to focus on the needs of the more dominant ‘minority’ groups or co-nations, with the needs of smaller communities often marginalised. The Kosovan law demonstrates the potential for a law which goes beyond the requirements of the FCNM, is adapted to local circumstances and that attempts to adopt a more generic approach to rights protection. However, in practice the primary focus still remains on the dominant groups.

### **6.3 Ongoing Challenges**

In practical terms the legislative approaches that have been adopted in each of the jurisdictions considered here could be seen as a failure given ongoing problems with implementation. The ACFC has been particularly critical of poor implementation in BiH.<sup>172</sup> Although the ACFC’s overall assessment of the legislative framework in Kosovo has generally been more positive,<sup>173</sup> it has also found “a considerable gap between the legislative basis pertaining to minority protection and the reality when it comes to its implementation”.<sup>174</sup> This includes a lack of resources<sup>175</sup> and the problem of “excessive fragmentation and an overlap of competences in this field”.<sup>176</sup> The latest assessments on the Republic of North Macedonia meanwhile have also highlighted ongoing problems, particularly with the exclusion of smaller minority groups.<sup>177</sup> It is clear therefore that here too more work still needs to be done here in strengthening the legal framework.<sup>178</sup> What this highlights is the limits of what can be achieved through the adoption of legislation without wider societal change. This is reflected in the quote that started off this final section, which supports the argument that the adoption of such legislation plays an important role (both practical and symbolic) but needs to be seen as part of an ongoing process of (local) internalisation.

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<sup>169</sup> UNMIK/OSCE Mission in Kosovo ‘Community Rights Assessment Report, Third Edition’ July 2012, at 15 (footnote 46)

<sup>170</sup> *Ibid.* 15-16

<sup>171</sup> *Ibid.* 20-21

<sup>172</sup> Fourth Opinion, *op cit* note 107, paras 7-10, 88, 94, 98, 117-119

<sup>173</sup> ACFC ‘Second Opinion on Kosovo adopted on 5 November 2009’ ACFC/OP/II(2009)004 para 117

<sup>174</sup> *Ibid.* para. 12

<sup>175</sup> *Ibid.* para. 117

<sup>176</sup> *Ibid.* para. 13

<sup>177</sup> ACFC ‘Fourth Opinion on the Former Yugoslav Republic of Macedonia adopted on 24 February 2016’ ACFC/OP/IV(2016)001 para. 4

<sup>178</sup> European Commission (2019), *op cit* note 61.

Whilst the assessment of the Kosovan law has been fairly positive in this article, it is clear that there remain significant problems with implementation attributed to a lack of political will and of local buy-in.<sup>179</sup> This is in no small part due to questions of legitimacy given the extensive involvement of the international community in its development, as well as local realities.<sup>180</sup> Elbasani has referred to local actors' "rule reception and rule resistance strategies" as "part and parcel of all stages of the rule transfer process".<sup>181</sup> Certainly these are not problems unique to Kosovo, although they have been particularly exacerbated in that context. Whilst an in-depth consideration of the reasons for poor implementation are not within the scope of this article, it is submitted that such failures illustrate further the importance of internalisation being seen as an ongoing process.<sup>182</sup> The leadership of local actors moving forward to ensure further changes resonate with the local cultural framework is key.

## 7 Conclusion

This article has highlighted key lessons that can be learnt from the experiences of the Western Balkans about both the limits and adaptability of the European minority rights framework. It has demonstrated that in practice there tends to be a separating out of specific issues raised by 'national' groups separately to those raised by other types of diversity. It has also shown how such legislation can provide a way of addressing gaps in the FCNM. For example, both the BiH and Kosovan laws extend protection in the area of socio-economic rights and in relation to symbolic rights. Despite initial expectations, the evidence presented in this article demonstrates that there is no 'uniform' approach to the internalisation of European minority rights standards in the context of the Western Balkans. The view of the ACFC is that the "applicability of the Framework Convention does not necessarily mean that the term 'national minority' should be used in the relevant legislation, policies or practices to designate the groups concerned".<sup>183</sup> However, the analysis revealed not just significant differences in terminology and on the identification of beneficiaries, but also very different legal frameworks with very different aims. It is clear therefore that the role played by such legislation varies according to what has gone before and to ongoing political processes and debates.

The analysis has also revealed the continued strength of the 'nation-cum-state paradigm' in the internalisation of European minority rights standards. The different legislative frameworks considered could be seen to reinforce the perceived weaknesses of the FCNM as a model of rights protection – the decision to use, but then not define, the term 'national

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<sup>179</sup> Adem Beha, "Minority Rights: An Opportunity for Adjustment of Ethnic Relations in Kosovo?" 13 *Journal on Ethnopolitics and Minority Issues in Europe* (2014) 85-110

<sup>180</sup> Calu, *op cit* note 115. These include tense relations between the Serb community and Kosovan authorities and continued discussions over the future of the norther municipalities.

<sup>181</sup> Arolda Elbasani, "State-building or State-Capture? Institutional Exports, Local Reception and Hybridity of Reforms in Post-War Kosovo" 18 *Southeast European and Black Sea Studies* (2018) 149-164, 156. See also discussion of similar manifestations in the area of education by Ervjola Selenica, "Education for whom? Engineering Multiculturalism and Liberal Peace in Post-Conflict Kosovo" 18 *Southeast European and Black Sea Studies* (2018) 239-259.

<sup>182</sup> For an earlier assessment by the article in the context of education in the Western Balkans, see Elizabeth Craig, "Minority Rights, Integration and Education in the Western Balkans" 67 *Northern Ireland Legal Quarterly* 453-71.

<sup>183</sup> Opinion on Kosovo, *op cit* note 119, para. 26

minority', the highly qualified nature of many of the obligations and the notable gaps in relation to symbolic rights, as well as assistance rights and rights to representation. Or they could be seen as illustrating ongoing challenges to the development of a more cosmopolitan approach, with a greater emphasis on 'national rights' and on minorities with a kin-State. It has certainly demonstrated the limits of the FCNM as a technical legal instrument. However, it has also shown that it can be used as a source of empowerment and as a starting point for discussions on the codification of minority rights.

The article has demonstrated that the adoption of specific minority (or community) rights legislation is a highly significant moment in the process of internalisation, providing important opportunities both for particularisation of European minority rights standards and for the adoption of a more inclusive approach. The drafters make a number of important choices at the outset, which have an impact on the protections developed and the overall approach. However, it is also clear that adoption of such legislation should only be seen as a starting point and that greater attention needs to be given to the ensuring continued adaptation of key texts in light of changing political and legal circumstances. Minority rights legislation should not be seen as fixed, but rather should be considered as part of an ongoing process for the further development and realisation of human rights in deeply divided societies.<sup>184</sup> This requires not only respect for different identities, but also the creation of appropriate conditions enabling their expression, preservation and further development in accordance with the overall purpose of the FCNM.<sup>185</sup> The aspiration of the drafters of that instrument was that cultural diversity should be 'a source and a factor, not of division, but of enrichment for society'<sup>186</sup> with minority protection considered 'essential to stability, democratic security and peace'.<sup>187</sup> Over thirty years after the coming into force of the FCNM, these goals remain as important as ever and should remain a key marker of its success.

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<sup>184</sup>This can be linked to the idea that political settlements should not be seen as an "end point", but rather as "ongoing processes of bargaining" (Christine Bell, 'What We Talk About When We Talk About Political Settlements. Towards Inclusive and Open Political Settlements in an Era of Disillusionment' (2015) 1 Political Settlements Research Programme, Working Paper). See also Tully's views of constitutions as "chains of continual intercultural negotiations and agreements" (James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge 1995) ch. 6).

<sup>185</sup> Preamble, para 6

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*