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ETHNO-NATIONALIZED STATES OF EASTERN EUROPE: IS
THERE A CONSTITUTIONAL ALTERNATIVE?

INTRODUCTION: THE MULTI-NATIONAL STATES

This paper discusses a set of issues which are all focused on the following question: what needs to be done in order to promote democratic stability in multi-national states¹ of post-communist South-East Europe? I believe that in most of these countries² democratic stability has not yet been achieved. I also believe that this is to an important extent due to the inappropriately formulated and developed relationship between majority nation and national minorities. Claiming ‘inappropriateness’ suggests a breach in the standard that we could provisionally name a democratically appropriate relationship between national majority and minorities. I will argue that this standard is normative and that it should be read as a set of universally acceptable principles. For the purpose of this paper, principles will be understood as “normative standards at the porous borderlines between morals and law, between universalistic morals and situated ethics, which gain their validity in moral and ethical discourses in which we take various levels of situated givens . . . into account”.³ Reliance on principles is supposed to enable us to reflect upon our chosen real-life subject, without either committing the mistake of model-thinking, or of taking circumstances as absolute givens which would allegedly render all normative considerations superfluous. This is a reflective strategy, in which circumstances are taken into account and explored against the background of universally acceptable values.

In the first step, principles should be identified and explored in abstract terms, *as a theory*, to serve as a general test for the assessment of the proper relationship between majorities and minorities in plural societies. If primacy of principles is taken seriously, then



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demand for a theoretical approach should not be read in terms of distinction between theory and practice, where practice would be expected to harmonize with ‘true insights’ of an abstract argument. The need for theory stems rather from a trivial argument that in ‘real life’ all issues at stake – rights, equality, individual vs. group identity, proper institutional arrangements, constitutional definition and citizens’ perception of the state – are highly controversial and indistinguishable from normative considerations. In the final outcome, any exploration of the empirical reality of majority-minority relationships in post-communist Europe will have to take a normative stance on the identity of the state, minorities’ demands for recognition, the scope and reach of universal rights, legitimacy of demands for special minority rights, or limitations of formal equality before the law in the condition of pluralism. If we hope to escape the methodical extremes of model-thinking absolutism and ‘anything goes’ relativism, we ought to content ourselves with a modest reflective theory, with help of which we would be able to tell right from wrong in the realities we explore.

Before elaborating on this position, let me add a caveat: the ‘generality’ of the approach offered below is contextual rather than absolute. This text will not deal with the problem of the status of illiberal groups within a liberal polity. Neither will it be claimed that all countries in the world should – as a matter of normative difference between right and wrong – resort to liberal constitutionalist universalism. In other words, I do not want to deny that in some polities a specific situated concept of the *good* can override the demand for universal *right*. I simply argue that in such cases the use of the category of constitutionalism would not make much sense. My argument is restricted to the following scenario, typical for (but not exclusive to) post-communist plural societies: when two or more national groups are living together in a state, each claiming the adherence of its members to liberal principles, while at the same time asserting the primacy of the group-specific good in relationship to ‘others’, we have the case of an attitude which is controversial within itself, and the consequences of which directly challenge the very possibility of life together. The claim offered below is simple: in such cases we need an operational concept and arrangement of liberal constitutionalism which would be able to

reconcile the competing group identities, by offering a minimum common denominator acceptable to all particular ethics *as their own*, without challenging self-perceptions of group identities. What does this mean?

All post-communist states of the region claim adherence to liberal constitutionalism, and no national minority (or majority, for that matter) would question main liberal tenets. The talk here is of political units and citizens who – regardless of whether they belong to the majority or to minorities – supposedly recognize the relevance of constitutionally defined rights and of liberal legal and institutional arrangements. Hence the problem can be explored within the liberal discourse of constitutional government and fundamental rights. In this perspective, we can expect the analysis to inform us that the aforementioned ‘inappropriateness’ in the majority-minority relationship can be ascribed either to 1) failure of liberal constitutionalism to handle decently issues of freedom and equality in plural societies, or to 2) failure of post-communist plural societies to create liberal constitutional governments. If the first option proves accurate, then we would need to conclude that liberalism should be abandoned as a strategy for plural societies: when confronted with the specific status of issues like rights, identities, proper institutional structure (separation of powers, division of powers) in plural societies, liberalism cannot offer just and right answers. If the second possible conclusion is true, it would mean that in the post-communist plural societies the problem lies not in liberalism, but rather in distortions of it, or maybe even in its abandonment. I will try to demonstrate that only this second statement is accurate. It will be argued that liberal constitutionalism is the right strategy for managing plural societies, first, because it is inclusive and, second, because it is capable of being context-sensitive. In the first part of the paper I will attempt to describe the basic features of constitutional pictures of the post-communist South-East European states, claiming their essentially illiberal character. In the second part of the paper I will offer an alternative, and outline a theory of liberal constitutionalism for plural societies.

ETHNICALLY PLURAL SOCIETIES OF SOUTH-EAST EUROPE:
CONSTITUTIONAL DEFINITION OF THE STATE AND
MINORITY RIGHTS

Ethnic relations present one of the most important features of the social and political dynamics in post-communist South-East Europe. Political identity, institutional structure, political-territorial decentralization and the division of powers, political actors, as well as social and political processes in these countries, are to an important extent marked and shaped by relationships among their nations (majorities and minorities). In this part of the paper I will first try to sketch an abbreviated reference to circumstances that might help us to understand the character of nationalism in the region. I will proceed with a short comparative presentation of constitutional definitions of the political unit and of minority rights. Finally, an attempt will be made to state if policies and practices of accommodation of majority-minority relationships are capable of counter-balancing predominant majoritarian frameworks constructed by the highest acts.⁴

Post-communist states of the region are most often characterized by a high degree of pre-political complexity, in the first place by the multi-ethnic compositions of their populations. The Western path of establishment of the nation-state, which enabled the gradual (though sometimes expensive) pacification of ethnicity into the republican concept of citizenship, never took hold here. Nations of the region met the dawn of modernity in 'alien' absolutist states. Mixed with 'others', dispersed in territories of larger empires which had nothing in common with the Western model of the nation state, they most often developed specific regressive nationalisms, burdened with romantic myths and dreams of a state that would stretch as far as the sound of the mother tongue could travel. The Versailles experiment, based on the possibly noble idea of the right to self-determination of national groups which till then had been oppressed, ended up in a miserable attempt to deny the reality of complex and overlapping national, linguistic, cultural, territorial identities, by simply deciding which among ethnic groups would become titular nations of the new states.

After 1945 the region had to accept destiny assigned to it at Yalta, implying the submission of citizens and nations to a new type of

autocratic rule. Communism was based on an imposed ideological leveling which delegitimized differences, that is, on the dogma of a predestined general will established as a paradigm of thinking and living. In this context, the status of national identity was somewhat special, however. In an effort to compensate for its own inability to thematize reality in a manner justifiable to subjects, the regime turned toward the past, i.e. to the romantic myths of nationhood. The communist regimes in Albania, Bulgaria, Romania and Yugoslavia all offer examples of how communist elites manipulated national identity in order to stabilize their power – nationalism was the only form of ideological communication that used to offer some common ground for the regime and its subjects (at least those belonging to the majority group).⁵

The fall of the Berlin Wall marked the beginning of a new era, which for many countries that used to belong to the communist empire can safely be summarized as the era of the establishment and stabilization of constitutional democracy. Judging by the speed with which the new legal and political framework was shaped (democratic constitution based on the primacy of human rights and the rule of law, political pluralism, responsible government, independent public, etc.), these countries have covered relatively painlessly the road from authoritarianism to democracy. Still, a closer scrutiny of particular fields of societal and political life reveals the high level of complexity of the democratic transformation process. In the specific post-communist condition democratic transition is not reducible to the problem of an adequate institutionalization of 'normal politics'. What is at stake are first and foremost problems of identity – not only individual identity, but the identity of the political community and national groups have been undergoing substantial changes as well. Only in their interplay can we look for the mode of managing plural societies which would not threaten but rather advance rights universalism, while at the same time remaining sensitive to group-generated differences.⁶

No historical reconstruction, even one more serious than the above descriptive hint, would suffice to explain the complex identity problem in these countries. The past is not the cause of the present. It is however a structural constraint that has to be taken into account:⁷ the history of inter-ethnic relations in different countries outlines the

character of the involved nations' common 'evaluative horizon'. It is easy to observe that in countries of the region the past has contributed to sometimes highly conflictual relationship among nations. But no common past is exclusively conflictual; and, to repeat, it is even more important to observe that the past does influence, but cannot determine the character of choice for today. After a change of regimes, constitution-makers are in position to reflect upon the past in the process of creating the legal and political framework for future life together. When it comes to inter-ethnic relations, reflection amounts to a normative re-interpretation of the common evaluative horizon. Within the structural constraints of the past there is always room for constitution-makers to translate the fundamental co-ordinates of life together into the highest legal norms in the manner which would give evaluative preference to inclusive and egalitarian features of our evaluative horizon over an exclusionary interpretation which would impose dominant (majoritarian) identity at the expense of the right of others (minorities) to be different.⁸

I will try to show that post-communist constitution-makers have opted for an exclusionary approach aimed at the petrification of the domination of the majority nation. Before attempting an explanation, it is useful to quote several constitutional definitions of the state (all italics are mine – N.D.):

We the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and other universal values . . . *with the centuries-long aspiration of the Albanian people for national identity and unity* . . . establish this Constitution. (The Constitution of Albania, 1998)

Bosniacs, Croats, and Serbs, as *constituent peoples (along with Others)*, citizens of Bosnia and Herzegovina, hereby determine the Constitution . . . (The Constitution of Bosnia and Herzegovina, 1995).

We, the members of the Seventh Grand National Assembly, guided by our desire to express the will of the people of Bulgaria, by pledging our loyalty to the universal human values of liberty, peace, humanism, equality, justice and tolerance . . . hereby promulgate our resolve to create a democratic, law governed and social state . . . (The Constitution of Bulgaria, 1991)

Proceeding from . . . the inalienable, indivisible, nontransferable and inalienable right of the Croatian nation to self-determination and state sovereignty . . . the Republic of *Croatia is hereby established as the national state of the Croatian people* and a state of members of other nations and minorities who are its citizens. (The Constitution of Croatia, 1990)

Taking as starting points the historical, cultural, spiritual and statehood heritage of the Macedonian people and their struggle over centuries for national and social

freedom as well as the creation of their own state . . . *Macedonia is established as a national state of the Macedonian people*, in which full equality as citizens and permanent co-existence with the Macedonian people is provided . . . (The Constitution of Macedonia, 1991)

On the basis of the historical *right of the Montenegrin nation to its own state*, established in centuries of struggle for freedom . . . the Parliament of Montenegro . . . enacts and proclaims the Constitution of the Republic of Montenegro. (The Constitution of Montenegro, 1992)

Proceeding from the centuries-long struggle of the Serbian nation for independence . . . determined to establish a democratic *state of the Serbian nation* . . . the citizens of Serbia enact this Constitution of the Republic of Serbia. (The Constitution of Serbia, 1990)

Acknowledging that *we Slovenians created our own national identity and attained our statehood* based on the protection of human rights and freedoms, on the fundamental and permanent right of the Slovenian people to self-determination and as a result of our historical and centuries-long struggle for the liberation of our people . . . (The Constitution of the Republic of Slovenia, 1991)

It is interesting to note that, in terms of the definition and symbolic justification of the state, the only republican-civic preamble is that of the Constitution of Bulgaria. However, articles 13 (religion), 36 (language), as well as the explicit ban on territorial autonomy (article 2) seem to bring the constitutional identification of Bulgaria rather close to the ethnically based concept of statehood. In the light of the proclaimed principle of equality of all religions, it might be difficult to understand the provision which claims Orthodox Christianity to be the 'traditional religion of the Republic of Bulgaria'. The language provision is more serious, however, for it does not only seriously limit the right of non-ethnic Bulgarians to education in their mother tongue, but it witnesses the refusal to use the term minority at all. The reference is only to "citizens whose mother tongue is not Bulgarian".

There is no preamble to the Constitution of Romania. In the first part of the Constitution we read that "Romania is a sovereign, independent, unitary and indivisible nation state" (article 1). "National sovereignty resides with the Romanian people" (article 2), meaning that "the state's foundation is based on the unity of the Romanian people" (article 4). The state "recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and cultural identity" (article 6, sec. 1). This is however immediately

followed by the stipulation of the special concern for equality of members of the titular nation: “The protective measures taken by the Romanian state . . . shall confirm to the principles of equality and non-discrimination in relation to other Romanian citizens” (6/2). This provision can be representative of what any empirical analysis of inter-ethnic relations in the region would point to: titular majorities fear minorities inhabiting ‘their’ states. Below I will try to explain that this ‘existential fear’ is not fake: it is rather a systemic consequence of the way the state is identified and of the correspondent status of minorities in such a state.

From the above quotes it might be clear that the constitutions of the analyzed countries offer a rather unambiguous answer to the question of the state identity. The state is ultimately justified as the ‘home’ for the majority ethnic group. In the second part I will criticize the legal and political arrangement of the nation state for its lack of capacity to deal properly with the issue of particular group identities, since this deficit in the final outcome leads to the denial of equality before the law for all citizens of the state. However, the above presented definition of the political unit does not even reach this disputable nation state concept. These *ethno-nationalist exclusionary states* are not even formally built as ethically, politically, and legally neutral polities. They are expressly centered around an illiberal ethical preference for the particular collective good of a particular (majority) group, which in consequence divides people along the lines of their ethnic affiliation. Or, at least, it could be claimed that these states are built around two competing and in principle mutually exclusive postulates. On the one hand, liberal democratic legal and political institutions, actors and procedures are all in place. On the other hand, their value and working capacity is from the start put in doubt by the partial ethnic identification of the state. These states, being defined in ethnic terms, are in principle incapable of meeting demands of legitimacy, equality, and minority protection. Their capacity to preserve the universal rights offered in their constitutions is severely limited by the initial identification of state belonging. Equal citizenship holds only on the premise of state neutrality, while state partiality creates room for the condition of *exclusionary inequality*.

Restating the above insight, it could also be argued that the post-communist constitution-makers opted for the concept of the *privatized ethnic state*, i.e. the state *owned* by the majority nation (or, in the case of Bosnia, the state co-owned by ‘constituent peoples’).⁹ The familiar legal argument of the non-binding, merely symbolic nature of the constitutional preamble is not decisive for the purpose of this discussion, because the possible declaratory nature of preambles does not tame the relevance of the symbolic message. There are, constitutionally speaking, two types of citizens in these states: members of titular nations and ‘others’. Or, we could say that these two types are, in terms of membership/citizenship, dual states: the states of titular nations *and* the states of ‘others’. This duality is not the ownership duality: the state belongs to the ethnic majority only, but this claim is softened in the next step by recognizing that there are citizens of different ethnic affiliations. These are the states of majority nations which still recognize that some of their citizens do not belong to the majority nation. Being citizens, ‘others’ are guaranteed equal individual rights. But the meaning and reach of rights for citizens who belong to minorities are pre-empted by the foundational constitutional choice of exclusion: rights designed as equal for all are confronted with original constitutionally sanctioned inequality. The very basic liberal requirement has been abandoned here: rights universalism and equality before the law work only within the frame of the civic concept of citizenship, while these constitutions provide for an essentially illiberal ethnic concept of citizenship. Individual, seemingly liberal, rights are guaranteed not to abstract citizens, but rather to members of groups who are specified by their national affiliation. This does not amount to anything like group-specific, or minority rights, however. Rights are formally designated to individuals, but the problem lies in the fact that abstract individual identity in constitutional terms does not exist. Citizens are constitutionally divided into members of the majority, who are publicly recognized as members of the titular nation, and members of minorities, who are identified by exclusion, i.e. by their non-belonging to the titular nation: they are ‘others’. In consequence, charters of rights contain group rights designed primarily for the titular nation. This statement probably looks like an exaggeration, but the quoted explicit constraints on minority rights,

and the way they are justified with reference to the concern for the majority good and the good of the state, may add some weight to it.

In such a political context the majority tends to understand loyalty to the state as loyalty to their own nation: we are loyal to the state because it is our home. It follows that minorities are deprived of the focal point of loyalty within the state citizens of which they are: if the state belongs to 'them', it cannot possibly belong to 'us'. More often than not, this will force the minority to look across the border to find its own *locus* of loyalty in the 'mother-country'. The next chain in this bad causality will then probably be the accusation that the minorities are separatist or irredentist, as well as the deterioration of relations between two states.¹⁰ This is the condition of distrust which bears potential for developing into group or even inter-state conflicts. If such conflicts take place, they are likely to be developed, 'managed', and 'resolved' outside the institutional structures.

What are the possible alternatives that could lead to improvement in the position of the minorities and to a more tolerant climate in the relationship between the majority and the minority nations? Relevance of policies of gradual confidence-building cannot be exaggerated: such policies should contribute to overcoming the condition of exclusion and parallelism of closed sub-communities which look at each other with suspicion. In most cases these policies have to be based on realistic strategies of small, carefully measured and organized steps, in order not to produce a possible new spiral of distrust.¹¹ However, I believe it to be necessary to add the following observation: no policy measures can in themselves decisively contribute to mutual recognition of groups, inclusiveness of polity, or equality in rights. As long as ethnically perceived statehood stands, policy-framed privileges for minorities will remain at the mercy of sheer majoritarian preferences, which in countries of the region are too often and too easily quasi-legitimized by claiming the allegedly foundational democratic principles of majority rule. Even if the foundational ethno-nationalist definition of the state does not lead to practical deterioration in the status of minorities, and even if all policy acts and measures that follow adoption of the constitution are inclusive and favorable for minorities, the fact that the majoritarian preference is written down in the constitution

retains its relevance. A constitution is the highest law of a country, and as long as it contains a nationalist definition of the political unit, there can be no legally and politically guaranteed effective protection for members of minorities.¹² This exclusionary condition can be overcome only by consensually agreed constitutional revision which would change the *titulus* of the state from today's ethnic definition to its denomination as a universalist civic-based political unit.

To sum up: the ethno-nationalist states take the good of the majority nation as the ultimate foundation of the state. This particular good appears to members of minority nations as an arbitrary choice. And with good reason. A democratic polity cannot possibly rest on the combination of democratic institutions and the primacy of the ethnically perceived good. A non-arbitrary common denominator is needed as the foundation of the state identity and its legitimacy, and it can be found only in the principle of the universalism of rights, which would have to include special minority rights as well. In ethnically partial states rights cannot be universal: from the minoritarian perspective, they rather tend to be reduced to instruments of the majority domination. At best, minorities in such states will view rights as incomplete, as a catalogue that lacks exactly what minorities see as the most important: special group-specific rights that would be institutionalized with the goal of protection of their identity. In consequence, the initial preference for the ethnic good destroys or at least severely limits room for the basic consensus on the question why – regardless of all ethnic, linguistic, religious, cultural differences – we are together.

LIBERAL CONSTITUTIONALISM FOR ETHNICALLY PLURAL SOCIETIES

In rest of this paper I want to argue that liberal constitutionalism is both a desirable and feasible arrangement for plural societies. I will start from a conventional comprehension of the meaning of constitutionalism. Liberal constitutionalism is a political arrangement based upon a body of fundamental laws that define basic rights, establish governmental authority, and identify limits to its operation. Constitutionalism deals with the question of normative

justification of state authority: demand for equal freedom for all members of the community presents a normative standard which constrains the state authority as the ultimate criterion of legitimacy of its 'program for coercion'.¹³ Protection of individual freedom from the arbitrary use of power is usually identified as a disabling, or 'negative' function of constitutionalism.¹⁴ We are here confronted with the basic liberal predicament: a liberal polity has to live with the continuous tension between individual liberty and unquestionable commonality. Liberty, formalized in constitutional catalogues of fundamental rights, sets the framework of individual identity. Since individuals are many, and since liberty and rights are based on the idea of autonomy, it follows that liberally perceived individual identity implies the right to be different. This multitude of differences under the heading of abstract equality in rights should be reconciled with – the in principle unquestionable – identity of the political community. At this point the integrative function of constitutionalism comes into the limelight. Relationships between individuals and the state cannot be constrained by the separation of legitimate spheres of their respective action defined and guaranteed by legal rules. There should also be a point, or points, at which these identities will be overlapping. The abstract legal identification of individuals, and the limiting legal identification of authority ('government of laws and not of men'), are supposed not merely to restrain the rulers, but also to create a common framework for an open communicative relationship between the rulers and the ruled, a framework which will guard and direct both the 'horizontal' and 'vertical' relations within society and the community. I hold that points at which individual and communal identities overlap are universal constitutional principles of limited government, the rule of law, and the normative primacy of fundamental rights.¹⁵

Rights are here of primary conceptual importance. First, both the analytical meaning and the normative justification of the rule of law and limited government can be made only with recourse to rights. Second, rights, in liberal perspective at least, define individual identity. Liberal ('negative') rights are often too easily criticized for their purported atomistic character: rights are said to promote the identity and interests of fictional monadic individuals, since they merely frame and protect the sphere of individual autonomy, to

which nobody else can have a legitimate access. Individuals are not autonomous in this autarchic sense, so goes the criticism, simply because every human being lives in community with others, and identity in the context of life together demands recognition. Still, let it be recalled in view of a preliminary answer, that rights, taken in their very basic legal sense, are actually relationships which presuppose mutual recognition. A typical negative right is a legal relationship in which one side (the right-bearer) has entitlement, while the other side (the right-addressee) has certain obligations towards the right-bearer.¹⁶ We have to recognize each other in these fundamental capacities. I want to argue that consequences of this recognition are far-reaching, going far beyond both legalistic 'formalism' and individualistic 'atomism'. Namely, the remaining fundamental traits of rights follow from this recognitional quality. First, the meaning and reach of rights are defined in abstract terms, excluding any implication of distinction among persons, or any relevance of group affiliations: what we recognize *in* each other and *for* each other, and what the state authority recognizes when it approaches us, is our legal mask made of rights. Thanks to this abstract legal recognition we are in principle able to communicate one with another, and with the state. Second, rights are general, i.e. they are valid for every member of political community simply on the grounds of her belonging defined in terms of citizenship.¹⁷ Abstract character and generality of rights add up to another fundamental quality of individual status in a liberal constitutional state: equality before the law. Equality before the law means that we are all recognized as bearers of an identical basket of rights.

Human rights preserve the equality of those who are – as human beings – different. Liberal equality in rights does not prevent us who are different from being who we are. This is all well known, of course. Liberal constitutionalism does the most it can for individuals recognized as autonomous persons. Human beings who are different can be made equal without violating their uniqueness only if their relationship of equality is identified at a level of abstraction which will not threaten their unique identities, but will instead act as their promoter and protector. Preliminary identification of communal identity also follows from here. By resorting to the symbolic notion of individuals “who come together to form a

legal community of free and equal consociates,”¹⁸ liberal constitutionalism concedes to derive communal identity from the legally (in the form of rights) mediated intersubjective recognition that individuals grant one another. Liberal community is then “the totality of persons who live together in a territory and are bound by the constitution ... /that/ puts into effect precisely those rights that those individuals must grant one another if they want to order their life together legitimately by means of positive law.”¹⁹ In this interplay between individual identity, mutual recognition of differences, and the level of communal identity, the state as guardian of rights becomes more than a ‘necessary evil’, and the relationship between citizens and political authority goes beyond a mere ‘marriage of convenience’. Political authority is guardian of both the individual right to difference and of necessary common identity.²⁰

But we know that this picture is incomplete. Some may call it idealistic. Some may call it conceptually blind to issues which are of key significance for individual and communal identities. Differences guaranteed by principles and arrangements of liberal constitutionalism are said to be insufficient for the proper recognition of our true selves. In other words, liberalism is incapable of affirming our true identities in all their real-life multitudes. Neither is liberalism capable of grasping true communal identity, primarily because it fails to recognize the otherwise readily observable intrinsic fundamental interplay between our socially situated unique selves, on the one hand, and the true ‘cement of society’, on the other hand. In communitarian perspective, the fact of the matter is simple: our individual identity is decisively framed by our social and cultural belonging, i.e. by our affiliation to a historically-intergenerationally shaped group, called the nation. Consequently, a good polity can only be envisioned as the embodiment, or medium of political recognition and advancement of that particular, unrepeatable good we share as members of the nation.

In short, a strong communitarian reproach to liberalism has it, that one cannot possibly solve the issues of difference and identity by abstracting from real differences and real identities. This is a serious objection, even if we disregard the core of the communitarian argument. But the problem with liberalism is even worse, claim communitarians, for it advances a mere myth when it argues

that individual identities and differences are framed by universal rights and abstract equality, with the state being ethically and politically neutral. The thing is that liberal constitutionalism does not actually promote the universal right: it rather promotes the particular good of the majority nation. This is yet another serious challenge. Its intuitive strength comes from the simple fact that it is historically accurate. We are here confronted with the summarized picture of liberal nationalism, i.e. of “nationalism constrained by citizen’s rights, equality and the rule of law”.²¹ In its effort to balance particular identities with universal values and arrangements, liberal nationalism, embodied in the image of the nation state, does not question anyone’s right to be different. It only relegates all group identities, including national pluralism, into the private realm. This, however, factually creates advantages for members of the majority nation, since the language of communication in the public sphere is that of the majority only – national minorities are denied official recognition, which fact can be experienced at levels as different as symbolic identity of the state (the state insignia, holidays), education, information, language use before the state organs.²²

Any realistic liberal strategy for plural societies has to be capable of meeting these two challenges. First, can an abstract identification of individual and communal identities be a proper medium for expression, and a proper shield for protection, of socially and culturally embedded differences? Second, is liberalism possible beyond the fake universalism of the nation state?

Let me proceed with an attempt to answer the first objection, that of the alleged incapacity of abstract liberal universalism to thematize real identities, especially in plural societies. The problem can be identified in terms of the conflict between cultural particularism and universal rights: since no identity can be legitimately eliminated or subordinated, the real question is if liberalism is capable of reconciling and accommodating confrontational demands for recognition.²³ In still other words, at issue is whether rights – what kind of rights? – can play the role of a universally acceptable mediator among individual, as well as among situated group identities in a polity.²⁴ Some recognition of my genuine identity presents a necessary background for making sense of my autonomy. I can make and try to realize choices I perceive as valuable for me only

if others let me go my way. Two related questions are implied here: the first pertains to the context in which my autonomy can become operational; the second has to do with legitimate constraints on my autonomy.

It is obvious that identity ‘produced’ by liberal rights is under-determined: the answer to the question who I am as a real human being is of no relevance for social and political construction of reality. What counts is only that in pursuing our autonomous and completely privatized views of the good life we observe abstract legal constraints. Equality in rights can be attained only at the price of substantial abstraction from our individual histories and our social embeddedness.²⁵ But we know that identities are never so simple and unambiguously open. Qualities which are of the paramount importance for answering the ‘who am I?’ question come normally as pre-determinate. For most individuals national identity works almost as a ‘natural’ framework of their autonomy. It may follow that autonomy cannot be fully perceived in terms of the outlined formal mutual recognition. Universalism of formally equal rights cannot entirely abstract from those factual, socially coded differences that are indispensable for one’s capacity to act as an autonomous person. This becomes especially clear in plural societies, for differences in our group-related identities are here so deep that they cannot be successfully handled in terms of formal equal treatment. While liberal constitutions typically frame an abstract (and, therefore, to an extent always counterfactual) perception of the relationship between the individual and the community, a proper approach to identity, rights, and equality in plural societies has to deal with a more complex interplay. First, in contrast with the ideal liberal perception of the majority-minority relationship as open and changeable, the relationship between national majority and minorities is fixed.²⁶ Second, from the fact that individual identity is typically perceived by members of the minority through the mediation of group identity, it follows that a minority group should in some way and to some extent be legally and politically recognized. This complex interplay of relevant identities can be described in terms of a square, the four sides of which would be individual identities, identity of the majority nation, identity of the minority nation(s), and communal identity.

Minority members are ‘destined’ to be embedded into a set of properties which comprise group identity. If this social fact is not recognized, they would – in spite of formal equality in rights – remain caught in the position of factual inequality. Andras Bragyova summarizes this in terms of factual differences in rights-conditions: “A norm becomes operative only if the factual conditions for its operation do actually exist ... Rights become actual only upon certain conditions of fact being fulfilled. Rights-conditions, then, denote those societal (factual) conditions which are necessary for the use of rights-norms in the given social context.”²⁷ The question is then what ought to be done in order to overcome the factual inequality that prevents minority members from reaching the social position where they could enjoy a meaningful autonomous choice. The answer should be unambiguous: minority members ought to be granted special rights. And minority rights can be presented and justified within the liberal discourse as instruments to overcome the factual gap in rights-conditions. In this context, two general justificatory reasons for the liberal endorsement of minority rights can be identified: first, minority rights are necessary in order to preserve and freely develop the individual identities of minority members; second, minority rights are necessary to preserve (liberally understood) equality of the minority members with other members of the polity.²⁸ Still, it is well known that legitimacy of minority rights is sometimes routinely questioned for their assumed illiberal properties: their existence amounts to a surplus of rights on the part of citizens who are minority members; hence minority rights violate formal equality and rights universalism; besides, minority rights promote a group to the level of the ‘self of rights’, which is a homogenizing enterprise that directly undermines individual identity of group members.

However, let it be recalled that universal human rights comprise qualities of inclusiveness and anti-majoritarianism. Inclusiveness means that citizens, irrespective of all their differences, should recognize each other as legitimately belonging to the political community. Anti-majoritarianism means that individual autonomy cannot be legitimately revoked by any reference to interests or ‘better insights’ of a bigger number of individuals, or to some advantage of the society as a whole: as an autonomous person, with

life-plans which are mine and only mine, I am by definition always in the minority and rights protect me against all those who might intend to question my autonomy or to supply it with a 'socially preferable' meaning.

Does introduction of minority rights challenge these two fundamental features of rights? It does not. Minority rights, properly understood, do not protect exclusive group ethics, in the form of particular collective good. They are rather to be seen as anti-majoritarian instruments that protect members of 'born' minorities from the majority which does not share with them particular features of their identity. From here there also follows a liberal answer to the objection that minority rights, as group rights, promote the tyranny of the majority on behalf of the group against its own members. Minority rights do not primarily protect a group as such. Let me re-emphasize that they rather protect the liberally perceived identity and interests of those individuals who belong to a disadvantaged group. The difference between these two interpretations is huge, and it is a watershed between liberalism and communitarianism: "If the collective rights protect the individual's equal freedom and worth, then their existence is only justifiable, and their content and scope are only acceptable in such a case when they rest on the same moral principles which give a justification to individual civil rights."²⁹ This is the ultimate basis of legitimacy of minority rights: they are justifiable only within the constraints of constitutional rights universalism, as "means to secure additional opportunities to individuals suffering additional disadvantages – within the confines of a uniform legal system, not by breaking through its unity."³⁰ Understood in this sense, minority rights are legally guaranteed subsidiary claims that are supposed to correct the historically-socially postulated unjust distribution of rights-conditions. And this general insight cannot be questioned by reference to the fact that in some cases a group, and not its members, appears as the bearer of a specific right (e.g. language use, local public administration, education). This is merely an acknowledgment of the fact that in order for minority members to be capable of making use of rights, the state has to recognize the legal subjectivity of their respective group.³¹ Such identification of the rights-bearer does not imply that a group is recognized as an independent agent of particular moral subjectivity, with its own

legally protected conception of the good. Finally, if these insights hold good, it follows that minority rights share with 'standard' individual rights the quality of inclusiveness: they are meant to make it possible for minority members to be included in society, and recognized by society, as its equal members.

I will now briefly turn to the issue of the character of the political unit appropriate for a plural society. I have already stated that the concept of the nation state should be abandoned. We are familiar with the classical motivational argument for the nation state. A choice of fundamental, or dominant identity has to be made first, and it can never go with the mere option of liberal polity, simply because the question of reasons why we are together always points to a preexisting shared core identity. An underlying, pre-political level of commonality has to be identified first. This is why the constitution-making process for a new (say a post-regime change) polity is crucially important: it amounts to a legal and political fundamental choice, i.e. the naming and legal embodiment of the dominant communal identity.³² I agree that a preliminary dominant identity is relevant as the basis of the political unit. Still, I want to demonstrate that this does not – and, indeed, should not – presuppose recourse to the dominant good of the majority nation as an, implicit or explicit, basis of constitutionally outlined identity.

It is true that 'we' who live within borders of a particular political unit are different from 'them' who live in other states. It is also true that today many liberal democracies are nation states. Historically, political neutrality of the nation state was based on the premise of the identity of the majority nation transformed into the liberally unproblematic republican identity – this had typically been done through 'privatization' of particular group identities (or even sometimes, in case of minorities, their exclusion). In this way classical liberalism endorses equal formal rights for all, while pointing to the private sphere as the field of legitimate concern for particular identities. However, in this allegedly neutral political environment, public communication relies on politically recognized substantive features of the majority nation identity, and this ranges from state symbols to the language used before the state organs. This obviously can create problems and tensions in plural societies, where national affiliation of members of the majority nation is just one of at least

two national affiliations. The fact that the majority is numerically predominant does not nullify another fact: that belonging to the national majority is exclusive to members of the majority, while at the same time belonging to the nation state which carries the name of the majority is shared by members of the minority (or minorities) as well. This demands that the difficult question of the fundamental choice of communal identity to be re-visited. What creates our sense of belonging to a political community composed of two or more national groups? The sense of belonging is supposed to be accompanied by the sense of mutual solidarity. Taken together, they would need to point us beyond a mere legally forced uniform obedience to common authority and beyond a merely utilitarian attitude to our fellow human beings. In other words, a good community is the one in which we all, regardless of whether we belong to the majority or the minority, are able to develop a non-exclusively hierarchical relation to the state, as well as a non-exclusively instrumental attitude to our co-citizens.

In order for this to be achieved, we have to abandon the concept and arrangements of the nation state. And the first step might consist in abandoning prejudices. It is not accurate that national belonging is the only possible, or even the most attractive (in terms of political homogeneity and stability) substantive baseline for building the common political home. I believe it to be trivially true that a plural society defined and organized as the nation state is exposed to many threats which come from its lack of motivational capacity to create the sense of belonging and mutual solidarity, as well from its lack of capacity to meet the legitimacy question.³³ In motivational terms, the nation state cannot hope to attain equal respect from those citizens who share the *titulus* of the state as their own (members of the titular nation), and from those who do not share it. Neither can the nation state claim normative legitimacy, for it is not capable of demonstrating equal respect for all its citizens: consequent to its title and basic politically recognized communicative practices, the nation state distinguishes between individuals who belong to the majority nation and those who do not.

So, in plural societies dominant national identity is neither 'natural' nor feasible as the foundation of polity. Populated by citizens who belong to at least two nations, plural societies offer an

intuitive image of a mosaic composed of closed group identities: this seems to be a strong case for communitarianism. However, things might be more complex. Both liberal nationalist and communitarian claims are based on the poorly reflected assumption that national cultures are homogenous and that they are exclusive providers of the necessary background to our legally and politically recognizable individual identities. Culture is here seen as an internally harmonious and closed set of properties that can be produced and maintained exclusively by the nation. To claim the wrongfulness of such an approach does not mean to deny that nations have cultures worthy of preservation. But national identity and political homogeneity are two different things. Any attempt to blend them together in plural societies equals the imposition on minorities of the political arrangement derived from, and especially designed to suit the interests of the majority culture.

Our question is whether it is possible to set up the formative political decision (to make the fundamental choice as to state identity) in a manner that would not favor the majority nation. It is true that our life together is the result of many historical contingencies. But these contingencies, including the fact that we belong to different nations, cannot question the fact that *we have been living together*. In the first step of the reflection on the possible meaning of our life together we need simply to take this fact seriously. And we may be able to observe that life together cannot possibly be interpreted as a mere fact of living side by side within historically contingent political borders. The fact of belonging to the common political unit through time creates “common tradition, common activities, common interpretation, and common remembrance (and forgetting)”.³⁴ In this sense we can talk of the common culture which is produced in the course of life together. This culture is not necessarily of a non-conflictual nature. But even if we are confronted with less than favorable history of the inter-group relations, we can safely claim that our common life has at least created points, or a common denominator for evaluation of our relationships. This common denominator (or, to use the expression of Jürgen Habermas, the ‘evaluative horizon’³⁵) is common to *all of us* as citizens of this particular state, but it is at the same time exclusive *only to us* as citizens. What we as members of the minority nation

share with members of the majority nation within a state, is exclusively common to ‘us’ and ‘them’, and cannot be shared with e.g. our co-nationals in our ‘kin-state’. Thus the constitution-making process for a good plural polity should embrace an inclusionary approach which would clearly state that *we who live within the same political borders are the people* – no good constitution should fail to make this fundamental choice explicit. In other words, a good constitution for a plural polity should be formulated in the manner acceptable to all its citizens. The baseline of this common acceptability is the (consensually arrived at) constitutional arrangement that is capable of balancing universal recognition of citizenship and universalism of equal rights, on the one hand, with mutual public recognition of particular identities (in the form of minority rights, cultural and/or territorial autonomies, proportional political representation, etc.), on the other hand.

A provisional conclusion of this theoretical sketch might be as follows: the constitution that offers a balanced interplay between universal principles of constitutionalism and ‘situated ethics’ of group identities is supposed to become the foundation of political community, excluding in this way any recourse to the primacy of ethnicist perception of the popular sovereignty.³⁶

NOTES

¹ Hereafter I will use the term ‘plural societies’ when referring to nationally heterogeneous states. The term is supposed to point merely to the ‘pluralism in fact’, and should not be read as a normative preference for the so-called pluralist theories.

² This analysis will consider only the post-communist states of the region: Albania, Bulgaria, Romania, and countries of former Yugoslavia.

³ A. Arato, “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review* 2 (1995), p. 219, fn. 57.

⁴ I am aware that countries of the region differ one from another to the extent that demands: 1) a clear justification of the very possibility of common approach to them; 2) a carefully constructed and balanced comparative method to be used for the analysis of their ethnic relations. Serious analysis of such kind is missing from this paper. However, I hold that the common (or at least comparable) features of these countries’ pre-communist and communist past, as well as comparable challenges of democratic transition and consolidation, allow for a comparative glance at the constitutional definitions of the state identities and minority rights, and for a modest set of normative conclusions.

⁵ Ž. Puhovski, *Socijalistička konstrukcija zbilje* [Socialist Construction of Reality] Školska knjiga, Zagreb, 1993, pp. 55–56. It should be noted, however, that in the Soviet Union and Yugoslavia minorities (or at least some of them) were sometimes granted privileges in the form of federal, regional or local quasi-autonomies, which included language use provisions.

⁶ K.L. Scheppele, 'Rethinking Group Rights' (manuscript, 1994, *in file* with the author), p. 7.

⁷ Here I follow A. Sajo and V. Losonci, "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straitjacket?," in D. Greenberg et al. (eds.) *Constitutionalism and Democracy*, Oxford University Press, Oxford, 1993, p. 327.

⁸ M. Rosenfeld, "Modern Constitutionalism . . .," *op. cit.*, p. 6.

⁹ See also R. Hayden, "Constitutional Nationalism and the Logic of the Wars in Yugoslavia," in S. Bianchini and D. Janjic (eds.) *Ethnicity in Post-Communism*, Institute of Social Sciences, Belgrade, 1996, p. 82.

¹⁰ N. Papanikolatos, "Minorities and Minority Rights in the Balkans," Workshop Paper, Montpellier, 1998, p. 3

(<http://www.greekhelsinki.gr/english/articles/montpellier-papan.html>).

¹¹ A. Eide, "Minorities in a Decentralized Environment," Background Paper, Yalta, 1998, p. 10 (<http://www.riga.lv/minelres/publicat/Eide-Yalta.98>).

¹² St. J. Roth, "The Effect of Ethno-Nationalism on Citizens' Rights in the Former Communist Regimes," in A. Sajo (ed.) *Western Rights? Post-Communist Application*, Kluwer, The Hague, 1996, p. 287.

¹³ F. Michelman, "Constitutional Authorship," in L. Alexander (ed.) *Constitutionalism. Philosophical Foundations*, Cambridge University Press, Cambridge, 1998, p. 82.

¹⁴ For a powerful argument against reduction of the notion of constitutionalism to its negative aspect, see S. Holmes, *Passions and Constraint*, Chicago University Press, Chicago, 1995, p. 7.

¹⁵ M. Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity," in M. Rosenfeld (ed.) *Constitutionalism, Identity, Difference and Legitimacy*, Duke University Press, Durham and London, 1994, pp. 5–6. Of course, it could easily be remarked that in this interpretation the leading principles of 'negative' and of 'integrative' constitutionalism are actually the same. This would be an accurate insight: constitutional principles are here understood as values accounting for both difference and identity.

¹⁶ A. Sajo, "Rights in Post-Communism," in A. Sajo (ed.) *Western Rights . . .*, *op. cit.*, pp. 139–140.

¹⁷ A. Bragyova, "Are There Any Minority Rights," *Archiv für Rechts- und Sozial Philosophie* 4 (1994), pp. 491–495.

¹⁸ J. Habermas, "Struggles for Recognition in the Democratic Constitutional State," in A. Gutmann (ed.) *Multiculturalism. Examining the Politics of Recognition*, Princeton University Press, Princeton, 1994, p. 107.

¹⁹ *Ibid.*, pp. 126, 107. It deserves to be noted that in Habermas' reading reference to the formative capacity of rights does not point to their normative primacy: he claims that functional explanation suffices, because in complex societies there is

no functional equivalent to the integrative capacity of positive law. – J. Habermas, “Zur Legitimation durch Menschenrechte,” in *Die postnationale Konstellation*, Surkhamp, Frankfurt/Main, 1998, pp. 182–183.

²⁰ See e.g. U. Preuß, “Democracy and Constitutionalism,” in I. Grudzinska Gross (ed.) *Constitutionalism and Politics*, Slovak Committee of the European Cultural Foundation, Bratislava, 1993, p. 76.

²¹ J. Kis, “Beyond the Nation State,” *Social Research*, Spring (1995), p. 202.

²² “Liberal nationalists did not take seriously enough the fact that what is true for a member of their own nations is also true for the members of the other ethno-linguistic communities. The minority ethnic group is just as much ‘us’ for those who speak its own language, who have grown up in its customs, as the majority is ‘us’ for its members. The minority citizen is not an isolated being,” J. Kis, *op. cit.*, p. 209.

²³ S. Lukes, “Five Fables About Human Rights,” in S. Shute and S. Hurley (eds.) *On Human Rights*, BasicBooks, New York, 1993, p. 37.

²⁴ M. Rosenfeld, “Comment: Human Rights, Nationalism and Multiculturalism in Rhetoric, Ethics and Politics. A Pluralist Critique,” *Cardozo Law Review* 1 (2000), p. 1235.

²⁵ M. Rosenfeld, “Modern Constitutionalism . . .,” *op. cit.*, pp. 5–7.

²⁶ For the purpose of this text, minority is understood as a group of citizens within a community who dispose of certain properties that distinguish them from other members of the community, those properties being perceived by them as vital for their individual identities. Although national minorities are in plural societies in numerical minority, the criterion here is neither exclusively nor primarily that of lesser number. Relevant is also socially disadvantageous, or factually inferior position of minority members, seen in terms of their capacity to freely develop their identities. This ‘badge of inferiority’ (Rosenfeld), presented above as the difference in rights-conditions, should be – together with the nature of identity – seen as the primary criterion of identification, because on its account only can we understand the structural character of these minorities’ position. See e.g. A. Bragyova, *op. cit.*, p. 501.

²⁷ A. Bragyova, *op. cit.*, p. 506.

²⁸ W. Kymlicka, *Multicultural Citizenship*, Clarendon Press, Oxford, 1995, p. 75.

²⁹ J. Kis, *op. cit.*, pp. 229–230.

³⁰ *Ibid.*

³¹ “Collective rights are distinguished from the joint rights of associated individuals by two criteria. First, their subjects do not come into being by way of association but are simply given, and, second, in order for them to be capable of bearing rights, they need to be officially recognized by the state . . . [These rights are] enjoyed by given ethno-linguistic communities on the basis that the state recognizes them as the collective bearers of the privileges in question,” J. Kis, *op. cit.*, pp. 221, 223.

³² For a critical analysis of the formative political decision at the constitution-making stage, see U. Preuß, “Constitutional Power-Making of the New Polity:

Some Deliberations on the Relations Between Constituent Power and Constitution,” in M. Rosenfeld (ed.), *op. cit.*, p. 147 *et passim*.

³³ For a more detailed exploration of the way the nation state deals with motivational and justificational questions, see J. Kis, *op. cit.*, p. 202.

³⁴ J. Kis, *op. cit.*, pp. 236–237.

³⁵ J. Habermas, “The Nation, the Rule of Law, and Democracy,” in *The Inclusion of the Other*, Polity Press, Cambridge, 1998, p. 145.

³⁶ Here I come close to Habermas’ concept of *Verfassungspatriotismus*. The scope of this paper does not allow me to further elaborate on the meaning of constitutional patriotism. I tried to deal with this concept in a previous text: “In Praise of Utopian Thinking: Civil Society and Constitutional Patriotism for Serbia,” in N. Skenderović-Ćuk and M. Podunavac (eds.) *Civil Society in Countries in Transition*, Open University, Subotica, 1999.

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