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Reconstituting Paradise Lost: the temporal dimension of postcommunist constitution-making

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Introduction

The processes by which constitutions have been created in the postcommunist countries of Central Europe have been subjected to extensive legal and political scientific analysis. This analysis often associates the concept of civil society with democracy and liberal values and contrast it to the authoritarian and populist nature of ethnic nationalism. This distinction of the civil and ethnic foundations of political societies is undoubtedly theoretically insufficient, yet it has been the main ground of criticism of the constitutional and political developments in Central Europe since 1989.

In this article, I shall pursue a different, socio-legal analysis of these constitutional developments using various social theories of time, collective identity and their codification. Instead of ideological critique contrasting the civil society and ethnic nationalism, I shall analyse these two phenomena as part of the more general social process of constituting and codifying new identities in postcommunist period of discontinuity. An indispensable part of this process is re-entry of ideologies, traditions

and identities repressed by the communist regime in the emerging public domain and new constitutional documents.

In the course of an analysis of the different ways in which constitutions operate in postcommunist political society, I will argue that the conflict between *demos* and *ethnos* in postcommunist Central Europe cannot be addressed as simply a conflict between the liberal democratic imperatives of the present and the politically dangerous, ethnic concerns of the past. The difference between civility and ethnicity has to be perceived as the difference between two distinct traditions of the modern political history of Central Europe which are manipulated by political agents and codified by means of constitutional law. The first part of this article will outline the theoretical background of the problem of collective identities, focusing on their temporal self-reflections and codifications. The second part shall critically analyse the ideology and tradition of civil society and its different uses during the political and constitutional transformations in postcommunist Central Europe. The third part will critically assess the distinction of ethnic and civil identity and its manifestations in post-1989 Central Europe. The final part shall discuss the responses made to the civic/ethnic distinction in Central European constitution-making and governmental policies since 1989.

Constituting political time: the synthesis and selective codification of collective identity

The legal system, especially constitutional law, has been essential to the emerging public sphere and discourse of the 'political societies in transformation' that pursued the establishment of a new collective identity based on the liberal democratic rule of

law. It provided constitutive social values and principles shared by all members of such society as its collective conscience (Durkheim 1997), and thus guaranteed social unity, coherence and solidarity. Societies turn to the substantive rationality of principles and values at moments of discontinuity. The purposive rationality of legal regulation is of less significance than the constitutional and legal codification of substantive moral and political principles (Přibáň 2002: 110-4).[1] The moment of political discontinuity calls for a new 'social beginning'. It is a time of condemnation of the past and invocation of the future hopes. Society needs a new consensus in the domains of politics and morality and explores possible ways of achieving it, including the system of positive law.

Every moral, legal and political dealing with the past, which is so important in postcommunist societies, is eventually always determined by present political forces and agents. Michel Foucault (and George Orwell) put it: 'the control of people's memory is the control of their present' (Foucault 1975: 24-5). At the constitutional level, the politics of transformation proceeds by the selection of those past beliefs, events and related virtues, which are thought useful for the present transformation, and the suppression of the ones discarded by the revolution. Present political forces control the process of dealing with the past and its possible moral therapeutic effect (Markovits 2001). Post-revolutionary constitution-making is always a process of imposed forgetting and the codification of new, constitutive collective memories and

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[1]Nevertheless, this symbolic power of law is coeval with its power to formulate an independent and socially autonomous 'legal' version of political and social transformations. In the period of complex transformations and discontinuities, law must be therefore analysed from *two different perspectives*: as an autonomous social system constructing its own legal concept of political transformations; and as part of moral and political discourse which has strong symbolic power to formulate politically and morally the most persuasive version of revolutionary changes. The legal system continues to operate as a distinct and functionally differentiated system (Teubner 1993: 21ff) of revolutionary societies. It would be therefore wrong and grossly simplifying to perceive the postcommunist or any other liberal democratic legal transformations and constitution-making only as politics by legal means. The complexity of the legal system cannot fully accommodate and address the complexity of moral and political problems and vice versa.

identities (Halbwachs 1980). The emerging constitutional system and its institutions are politically and ethically urged to condemn the abandoned past, codify future aims and principles, and commit the nation and constitutional institutions to those aims and principles.

Analysing the temporal aspect of constitution-making and the role of civil and ethnic traditions in postcommunist Central Europe, three different phenomena related to time, history and codification need to be distinguished: tradition, its code and its interpretation. *Tradition* means all the objects, patterns and practices of the past that have some meaning and impact on the social present (Shils 1981). Traditions are 'transferred' in time and must be enacted and re-enacted by living human beings. They spontaneously exert historical influence on current social patterns, their duration representing a link across a span of social time. In modernity, this influence is controlled and regulated by the present because modern societies so often use history and historical knowledge in order to construct their own identity. Practices of the past are reflected, yet disentangled from social reality of the present (Giddens 1990: 42ff). The modern use of history reduces traditions to an instrument of legitimation of the present. The process of dealing with the past in fact means 'undealing with the past' (Blumenberg 1983: 117).

Traditions must be distinguished from social codes and codifications. Unlike the spontaneous normativity of tradition, *codes and codifications* are the outcomes of a rational 'legislative' attempt by authorities to construct the future. Codes are not, therefore, only a matter of the legal system of a particular society. They emerge wherever social control and power are at stake. They are purposive acts intended to produce a collective dogma which will integrate a society. In this respect,

constitutions are just one of many social codes produced by the power structures of modern societies.

The *interpretation* of a code or dogma is, however, an active process of applying a normative framework to everyday social reality and as such it establishes the code's meaning in the present social condition. It reacts to social changes and therefore has to be inventive. It is also affected by the spontaneous normativity of traditions. Consequently, different traditions are rediscovered and codified by political agents of the present. Codifications establish new traditions and change the social meaning of the old ones. From the perspective of temporality, tradition operates paradoxically because 'it prompts us to believe that the past *binds* our present; it augurs, however (and triggers), our present and future efforts to *construe* a 'past' by which we need or wish to be bound' (Bauman 1999: 132). In this light, rebuilding the political identities of Central European postcommunist societies emerges as a complex, reflexive interplay of the establishment of new political codes (constitutions), of pre-communist and communist civil and ethnic traditions, and of their present interpretations in the public domain (ideologies and policies).

From this perspective, constitution-making in postcommunist Central Europe was a political mechanism of the establishment of a new political community by the constitutional codification of collective memory. Constitutional codification, which is just one of many different modes of the process of social codification, always involves both the selection and synthesis of the past and present (Elias 1992: 96). It is therefore very important to analyse how the collective memory, this mode of internal perspective and self-perception of a group, is used for prospective political goals. What is conceived as the past, present and future depends on the living generations of the present and their integrative manipulation of social and political time. History is

carried forward by its reproduction through the collective practices of the present reality (Bourdieu 1990: 54). The constitution-making processes in Central Europe had to accommodate the selection of the past traditions fundamental for the codification of new collective identity. What certain political thinkers had in mind when they warned against the future being shaped by the past in post-1989 Central Europe (Habermas 1994: 66), were ethnic nationalist traditions. It was to combat these that they called for reinvention of the political tradition of constitutionalism, republicanism and civil society.

The collective memory has both 'structural' and 'experiential' dimensions (Elias 1992: 80-1). The former refers to the sequence of moments and change-continuum (in which 'earlier' and 'later' are synthesised into one continuum) and the latter refers to the social experience of this continuum. Codes become a community's framework of reference, establishing the authoritative interpretation of the community's history and thereby constituting collective memory and identity (Assmann 1997: 102-10). The social need for the codification of collective memories grows with the gradual loss of the direct experience of commonly shared historical events. Codes substitute historical experience by a structural dogma. Collective memory consequently operates as the interpretation and hermeneutics of the codified history and thus synthesises the structural and experiential dimension of time.

It is typical of constitution-making in postcommunist Central Europe that it incorporated both the structural and experiential dimensions of time. The 1989 revolutions represented a clear structural element which differentiated 'earlier' and 'later' moments in the continuum of political time. Politics was divided into pre-revolutionary and post-revolutionary events and this division was accepted as common experience by all members of society, including those opposed to the

revolutionary changes. Although the formal principle of legal continuity was accepted by all countries, post-1989 constitutional acts symbolically codified the moment of revolutionary discontinuity, and the constitutional system thus became an important social reflection of time. Furthermore, these constitutions drew on both the civil and the ethnic traditions which were to legitimate the postcommunist democracies. Different governmental policies in Central European countries then transformed this code into its experiential dimension. Different and often contradictory implementations of the constitutional codifications of political time by governmental policies and doctrines facilitated the re-establishment of modern democratic politics with its ideological conflicts.

In the postcommunist societies of Central Europe, national collective memories have been constituted by two distinct legal methods: first, retributive justice seeking to prosecute the political crimes of the communist regime and compensate some of the harms this regime had done to its citizens; and second, the constitutional codification of moral and political principles of a new community. The first method is primarily negative because it symbolically condemns the political past. The second method consists of the positive codification of the new symbolic political universe. In this analysis, I will focus on this second method, largely leaving aside the widely discussed issues raised by dealing with the political past by seeking retributive justice through the criminal law.

Constitutionalism and political identity: on civil society

Dealing with the past in constitution-making is part of the general problem of *rebuilding political identity.* Legality reconstituted its symbolic function as the ultimate language of modern politics both in the sense of marking continuity and legislating discontinuity. The rule of law was re-established as the primary commitment of democratic and liberal politics. The formulation of the new political identities of the Central European nations was phrased in the legal language procedures and principles.

In this context, constitutionalism played an important role in legislating the limits of government and the boundaries of civil society. Associations, civil organisations and pressure groups were not allowed under communism, yet the concept of civil society was very popular among dissidents living under the communist regimes and constituted the important strategy of the political opposition (Olivo 2001; Skapska 1999: 205-14). The dissident concept of civil society heavily romanticised the spontaneous order of liberal societies and contrasted it to totalitarian surveillance, planning and political control. The difference between civil society and totalitarianism was the focus of one of the most prominent criticisms of the communist system based on the difference between moral and immoral politics.

After the collapse of immoral totalitarianism, this re-entry of morality into the political and legal systems was one of the first post-revolutionary goals (Szacki 1995). The building of civil society was not perceived as a mere technical matter of providing the institutional framework for a new liberal democratic society, stabilising the sphere of social interaction between the emerging market economy and state (Arato and Cohen 1992: ix). It was also perceived as the symbolic recurrence of the morally superior concept of politics based on civil society which had been destroyed by the communist regimes and defended by many dissidents in all Central European

countries.[2] In postcommunist Central Europe, civil society was irreducible to the prospective goal of constructing the non-existing social structures by constitutional laws. It was also perceived as a specific tradition which had strong symbolic value during the early phases of postcommunist constitution-making. Civil society represented values and virtues such as individual freedom, cooperation, spontaneity, solidarity, public initiative, protest, intellectual critique, recognised political dissent, and many other aspects of communal life destroyed by communists (Buchowski 1996; for links between the left wing politics and political dissent in communist countries see Hájek 1995). In the Polish context,

'... [E]ver since the early 1980s, a majority of scholars and observers agreed that a crucial agent of change in Poland would be the emerging "civil society". The civil society was a growing network of underground organizations outside of communist control. In fact, it was the civil society that Solidarity represented at the Round Table in Poland. A logical conclusion was that, with the end of communism, the civil society would evolve into pluralistic and democratic political structures.' (Osiatynski 1991: 855).

This use of civil society had two temporal themes. The first was linked to the dissident concept of civil society brought from the oppressed past to the victorious present. The second contrasted the pre-communist modern era with the establishment of the communist regimes. Although the civil society and democratic traditions were different in each country, and both Hungary and Poland experienced the illiberal authoritarian rule between the two world wars in the last century, civil society always

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[2]Nevertheless, this temporal position of the civil society discourse is not limited only to the post-revolutionary societies. In established liberal democracies, various political strategies and critiques also resort to the calls for 'civil renewal' as if the virtues of spontaneous order of community had been lost in the course of everyday democratic politics. These virtues are to be retrieved and reincorporated into the democratic political system in order to combat its current corruption (see, for instance, Constable 2002: 213).

retained the strong symbolic value of being a suppressed social structure in which human dignity and autonomy used to be guaranteed. The constitutional transformations in Central Europe then both promoted the institutional re-building of civil society and derived their legitimacy from the civil society tradition and virtues. The Hegelian distinction between civil society and state in which the latter had supremacy as an institution preceding and protecting the former (Hegel 1942: 122-3, 266-7) was thus represented in one of its most dialectic forms in the postcommunist transformations.

The prominent Hungarian dissident and writer Györg Konrad sought to transform the dissident experience of resistance into a more general argument for government limited and controlled by the activism of civil society. He called for an 'antipolitics' which would permanently challenge existing governmental actions, ideology and control:

'... [A] society does not become politically conscious when it shares some political philosophy, but rather when it refuses to be fooled by any of them. The apolitical person is only the dupe of the professional politician, whose real adversary is the antipolitician. It is the antipolitician who wants to keep the scope of government policy (especially that of its military apparatus) under the control of civil society. ...' (Konrad 1984: 227).

Konrad's antipolitics had a broad appeal because it criticised both the communist regimes and the political engineering and ideological control carried out in Western liberal democratic states. Comparing the concept of antipolitics with the concept of non-political politics popular in the Czech dissident movement, it is possible to detect striking similarities of intellectual élitism, the romantic critique of bureaucratic power-making processes, and a strong belief in the value of parallel activism driven

by a sense of communal solidarity instead of by a struggle over power (Havel 1985: 27; see also Kavan 1999). The dissident concept of community was often very close to a notion of the natural state based on complete harmony and the ultimate unity of different wills. As in Tönnies' social theory (2001: 22), the dissident community contrasted civic virtues to society dominated by communist power and ideology. Václav Havel and other former dissidents who became the new political leaders therefore considered the rejuvenation of the institutions and virtues of civil society to be the greatest problem confronting postcommunist countries (Klingsberg 1992: 866-7). Their attention was directed to the past and their task was to revitalise what was suppressed by communists. *The lost paradise was to be rediscovered* (Havel 1992a: 6).

An important reason why the civil society argument was credible was the peaceful character of the revolutionary events, which did not end up in violence and civil war (Preuss 1990; for a similar argument related to the political transition and democratisation in Spain see Pérez Díaz 1993). 'Civil disobedience' and 'civilised negotiations' were the main revolutionary tools. As it was dissident elements committed to civil society which were principally responsible for the institutionalisation of the liberal democratic rule of law (Arato 2000: 70-80), they were able to exercise great influence over postcommunist constitution-making.

The constitutional transformations were supposed to promote and protect the political virtues of civil society by the force of law. Constitutional rules were to impose limits on government and facilitate the development of the institutions of civil society by ensuring the civil and political rights of citizens (Gellner 1995). The human rights based jurisprudence of the constitutional courts was perceived to be an important tool of shaping this new, civil society based political identity (Klingsberg

1992: 894). In the Central European nations searching for their political identity after the 1989 revolutions, constitutional laws were perceived as a vehicle for rebuilding the civil society and as the guardians of civil virtue. Due to this close symbolic link between the concept of civil society and the constitutional legislation, constitutionalism achieved an almost heroic status because it secured a differentiated, spontaneous and well ordered civil society. Constitutional symbolism designed by state and the spontaneity of civil society supplemented each other.

The values of civil society influenced postcommunist constitution-making, yet the need to institutionalise a market economy and a political society which would secure democratic control of the new power structures was even more crucial. The establishment of democratic procedures, political parties, ideologies, and power techniques and loyalties was essential for the emerging political systems. Without the establishment of a market economy and democratic political society, the virtues of civil society would evaporate very soon after the fall of communism. Even the most convinced advocates of civil society admit that the maximum it can do is to operate as

'the key to the possibility of innovation in the East Central European transitions and ... [the concept of civil society] ... also points to the possible locus of reconciliation between economic liberalism and political democracy, both evidently necessary and yet in conflict in the difficult processes of transition ...' (Arato 2000: 36).

Because of its absence during the communist period, civil society could re-enter only as a specific tradition which had to be codified, promoted and protected by the post-1989 constitution-making processes.

Constituting a nation: ethnic and civil traditions

In postcommunist constitution-making, the liberal model of democracy as a system of constitutionally protected political procedures and civil liberties prevailed over the progressive model of democracy as a system of decisions leading to substantive moral and economic improvement of humankind. Constitutions played an enormous role as *political stabilizers* protecting the *civil identity* of the new political community. However, the liberal procedural model of democracy proved to be an insufficient stabilizer and the political community therefore looked for a more substantive supplement. As had happened previously in many other European political societies, the Central European countries rebuilt their popular sovereignty and statehood on historically and culturally shared sentiments of national identity and ethnic unity (Offe 1996: 256-7). *Democracy rediscovered nations in the course of postcommunist constitution-making.* The constitution-making processes consequently had to deal with the problem of national identity based on the notion of a culturally and ethnically defined community.

The prospective job of constitution-making was strongly determined by national traditions. Rebuilding *national,* in the sense of ethnic and cultural, *identity* was an important part of rebuilding political identity. The revolution involved not just dismantling the communist system and incorporating civil society values and principles into the new democratic constitutional system. It also re-established cultural and political traditions either suppressed, or manipulated by the communist power. Codifications of the new political identity had to refer to national history and tradition. While the tradition of pre-communist civil society was rather weak in some Central European countries, the ethnic national traditions, which had always played a

central role in the modern political history of Central European nations, were 'strong' traditions.

Analysing the social function of traditions, Edward Shils said:

'... [T]he connection which binds a society to its past can never die out completely; it is inherent in the nature of society, it cannot be created by governmental fiat or by a 'movement' of citizens that aims at specific legislation. A society would not be a society if this bond were not there in some minimal degree. The strength or efficacy of the link can vary considerably, just as can the state of integration of a society at any point in time. ...' (Shils 1981: 328).

It is necessary to acknowledge the significance of ethnic and cultural traditions and their ideological and integrative role in the constitutional and political transformations of the different postcommunist national societies. The present can never fully abandon the past. Nevertheless, the role of the past in modern society is very different from its role in traditional societies. The past *is* the present in traditional societies. It is not questioned, contested, or manipulated by present political actions. But in modern societies, tradition and the past are always subject to challenge by the present: they must be presented. Tradition is a starting point for and constituent of new beliefs and actions (Shils 1981: 44), yet this point is determined by the present pragmatics. The past is present in modern society, but no longer as its unquestionable and undisputable social foundation.

The different histories, traditions, nationalities and political cultures existing within the seemingly monolithic bloc of East European communist countries gained new dynamism after 1989. The very concept of Eastern Europe became dubious and subsequently useless for constitutional, political and social analysis (Garton Ash 1989). After the revolutionary changes of 1989, postcommunist nations sought to

revitalise their national heritage. Ernest Renan pointed to the mutual dependence of a nation's past and present in his *Qu'est -ce qu'une nation* when he said:

'... [A] nation is a soul, a spiritual principle. Only two things, actually, constitute this soul, this spiritual principle. One is in the past, the other is in the present. One is the possession in common of a rich legacy of remembrances; the other is the actual consent, the desire to live together, the will to continue to value the heritage which all hold in common.' (Renan 1882: 26).

Memory establishes a nation's identity by reviving the common ground and mystery of historical unity. But the unity based on this common historical existence must be confirmed by the present will. According to Renan, a nation is a unity of the collective memory and the forgetting necessary for constituting the present identity. It is also a unity of the present codification of past tradition and its different interpretations.

The substitution of 'nation' for 'state' as the basic administrative, territorial and legal unit is typical of modern political discourse of constitutionalism and nationalism. The doctrine of popular sovereignty, which dates back at least as far as Locke, identifies 'the people' as the political sovereign holding state power. The people were equated with the state and its sovereignty. During the 19th century, nation and the people or citizenry became two distinct categories and nations were gradually referred to more often as ethnicities. The concept of popular sovereignty became burdened by the political and constitutional question of 'Who are the people?'

The constitutional concept of a sovereign nation in modern European political theory has always been trapped between *demos* and *ethnos*. The concept of the nation may be subsumed under the concept the state. In this way the nation is regarded as a collectivity living in the state's territory and administered by the means of state's

violence (Giddens 1987: 103-21). Nations are people under the control of modern state administration. This definition is always haunted by the ethnic concept of the nation, which reflects the tensions and differences among different collectivities living in the same state territory, their customs and history. The ethnic definition of a nation emphasises a sense of belonging and the homogeneity of a particular group which is not restricted to the artificial borders and institutions of modern politics. It is rather common history, language, customs, traditions and other shared social facts which constitute nations (Connor 1978: 379-88).

This difference, which is demonstrated in the modern histories of more or less all European nations, was one of the major features of the new democratic liberal discourse of Central European political societies in the first half of the 1990s. The common understanding of this revival of national traditions and nationalism in postcommunist countries contrasts the ethnic and civil concepts of the nation and blames the emerging liberal democracies for the revival of ethnic hatred and national tribalism in Central and Eastern Europe. This is, however, gross simplification of the postcommunist developments and a misunderstanding of the historical role of nationalism, partly based on the widely accepted difference between the 'well established' democratic West and the 'unstable' autocratic East (Greenfeld 1992; Pfaff 1993).

Ethnically oriented politics have the communitarian promise of being a safe haven in the unsettled modern world of permanent change. All Central European countries faced the possibility of a regression into the ethnocentric fantasies and racism of their nationalist past, which could be challenged only by the establishment of liberal democratic constitutionalism and the civil society tradition. The liberal democratic state's first imperative is to be neutral between all the ethnic groups and nations living

on its territory. This neutrality can be most effectively achieved through a common civil tradition and a politics which can contain and neutralise tensions and conflicts arising between different ethnic communities. Liberal principles achieve their most persuasive force when they are transformed into common political practices and traditions (MacIntyre 1988: 346).

However, civil liberal and ethnic communitarian traditions are not as opposed as they may seem. In fact, modern nation states drew on ethnicity and particular national cultures and liberal principles were often implemented in the form of ethnically distinct policies. Civil and ethnic traditions are often inseparable in the process of modern nation-building (Calhoun 1997; Gellner 1983; Schöpflin 2000). The nation-building process is determined by a dialectic of civil institutional demands (centralizing state power, citizenship policy, language laws, education, civil service etc.) and national ethnic claims (Kymlicka 2001: 21-53).

The spontaneous order of civil society can generate ethnic communitarian and nationalist ideologies, which may prove fatal to its existence, but it can also often draw strength from ethnic and national collective identity. The civil and ethnic traditions often supplement each other, the politics of liberty being supplemented by politics of identity (Taylor 1992: 54-56). These close links between the civil and ethnic politics are extraordinarily strong in Central Europe. For instance, Solidarnosc, the civil society platform and opposition forum in the communist Poland, always involved traditionalist and nationalist factions (Wesolowski 1995: 113-4). Hungarian nationalists emerged from the dissident groups and civil campaigns of the 1980s when they rediscovered a new nationalist populism and moved in the direction of the Hungarian iredentism. They even successfully mastered the human rights discourse and voiced their traditionalist ethnic demands in the language of minority collective

rights (Kis 2001: 234-6). In Slovakia, the nationalist tradition emerged from the civic revolutionary structures of the Public Against Violence movement, and was institutionalised either in traditionalist ideological form, in the political programme of the Christian Democratic Movement, or in the populist form of the programme of Mečiar's Movement for Democratic Slovakia (Mesežnikov and Ivantyšyn 1998).

The ethnic self-understanding of the nation as an entity organically rooted and united in common history is indeed politically very dangerous. The organic and metaphysical perception of the nation as one sovereign body of people of the same racial and historical origin undoubtedly led to the establishment and legitimation of fascism and fascist state (Connor 1978). Ethnicity certainly involves a high level of exclusive tribalism but it was the collision of this organic and socially conservative entity with the modern state, with its monopoly of violence and bureaucratic administration, which established fascist totalitarianism (Kohn 1945: 20). Although ethnicity contributes to the identity of the most 'explosive communities' (Bauman 2000: ch. 5), it cannot be blamed for all modern political wrongs and catastrophes.

Ethnicity is an intrinsic part of modern liberal democratic reality. It is necessary to emphasise the historical fact that the ethnic concepts of nationhood and popular sovereignty were not always necessarily anti-democratic and illiberal. As Will Kymlicka rightly comments: 'All real-world nationalisms are a complex mixture of liberal and illiberal elements, although the forms and depth of illiberalism vary enormously' (Kymlicka 2001: 54). Nationalisms in Central Europe varied a lot, from the Polish aristocratic resistant nationalism and the Hungarian aristocratic loyalist nationalism to the Czech competitive nationalism of the small bourgeoisie (Sugar and Lederer 1969). Moreover, these nationalisms often were a revolutionary force challenging autocratic, illiberal regimes and aiming at the democratisation of politics,

constitutional rights and popular parliamentary sovereignty. A historically and ethnically shared national identity often supported the establishment of civil society and parliamentary democracy in modern Europe (Keane 1998: 86). Liberalism and nationalism often complemented each other in the modern history of Central Europe (Sugar and Lederer 1969: 46-9). This shows that ethnic nationalism could both serve the struggle for democracy and provide the legitimacy for state violence and ethnic repression.

The multicultural and liberal nationalist theories of Charles Taylor, Will Kymlicka, Michael Walzer and others are hard to dispute in respect of the historical development of the liberal nation state and its use of ethnicity. Nevertheless, their normative conclusions regarding the collective rights and legal protection of ethnic and national minority identities are questionable. The identification of human rights discourse and constitutional democracy with the ethical and political process of collective self-understanding is wrong because it would require the realm of law to regulate the cohabitation of communities and become 'an aggregate of community-oriented privileges' (Bauman 1999: 199). Liberal democratic and civil ethics must not be equated with the politics of ethnic and national collective recognition and self-understanding. The civil tradition of constitutional patriotism should always have priority over ethnic and national traditions, and the political goal of collective recognition must not be enforced by the legal system (Habermas 1998: 216-9). Constitutional patriotism's role is to contain and channel distinct national identities, prides and histories. Many advocates of the civil society tradition treat it as remedy for ethnic national animosities and tensions.

Postcommunist politics certainly experienced the anti-democratic and illiberal effects of conservative and aggressive nationalism.[3] Due to this, it became a priority to make ethnic national identity constitutionally and ideologically subject to the principles of civil society based on the legal concept of citizenship and not on a mythical community of blood and race. The patriotism of citizens established on the ideologies of civil liberties and democratic political rights was then expected to play an essential role in overcoming national hostilities and historical resentments, both inside national states (between a majority nation and ethnic minorities) and in new developing international relations (between sovereign nations).

This struggle was very much complicated by the legacy of communist nationalism, though this is hardly recognised by many western scholars. The late 1950s and 1960s are sometimes regarded as a period of 'nationalist communism' (Osiatynski 1991: 847). After the decline of the centralising ideology of Stalinism, national communist parties in the Soviet bloc countries adopted nationalist rhetoric in order to win more popular support. National and ethnic intolerance were not, therefore, reinvented or reborn after the 1989 revolutions. They rather represented a continuation of communist policies mixed with pre-communist nationalist ideologies.

Constitutionalism, the concept of a nation and popular sovereignty in Central Europe

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[3]See, for instance, anti-semitic nationalist pamphlets distributed by the Saint-Crown organisation in Hungary in early 1990s, nationalist populism within the Solidarnosc movement, or racist rhetoric of the extreme right wing Republican Party in Czechoslovakia at the beginning of 1990s (for further details on constitutionalism and nationalism see Czarnota 1995: 83).

I shall now turn to the different constitutional strategies and governmental policies of the individual countries of Central Europe, reflecting differing civil and ethnic aspects of the postcommunist nationhood. Different constitutional codifications of national identity will be examined as well as their interpretations and pragmatic use by different governmental policies and political forces.

The preamble of the Polish constitution is an interesting mixture of civil and national patriotism. Unlike Hungary, Slovakia or the Czech Republic, Poland is hardly challenged by the coexistence of a majority nation and ethnic minorities. The constitution, therefore, re-establishes Polish national heritage and history as a source of common political pride by stating that:

'Having regards for the existence and future of our Homeland,

Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,

We, the Polish Nation – all citizens of the Republic,

Both those who believe in God as the source of truth, justice, good and beauty,

As well as those not sharing such faith but respecting those universal values as arising from other sources,

Equal in rights and obligations towards the common good – Poland,

Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice,

for our culture rooted in the Christian heritage of the Nation and in universal human values,

Recalling the best tradition of the First and the Second Republic,

Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage,

Bound in community with our compatriots dispersed throughout the world, ...'

This is a clear example of the mixture of the civil and ethnic concepts of the nation, full of references to history, traditions, religion, culture and national territory. The

reference to universal human values and civility makes these intrinsic parts of national identity and history as formulated by the Polish constitution-maker. National patriotism is worth of being preserved because it aspires to universal humanity and civil culture, and therefore is protected by the Constitution.

Nevertheless, the post-1989 constitutional history of Poland was turbulent and affected by political divisions between the postcommunist socialist ideology of the left and right-wing politics split between traditionalist nationalism and economic liberalism. Poland's current constitution is the result of parliamentary disputes, power struggles, negotiations and compromises between 1989 and 1997. The interim constitution of 1992 significantly strengthened presidential powers and echoed both the French semi-presidential constitutional system and the pre-war Polish tradition of strong political authority and leadership. After Lech Walesa's loss of the presidential election of 1995, these powers were weakened and the constitutional system made to incorporate more elements of parliamentarism. The new Constitution of 1997, which was approved by the national referendum, was constructed as a civil normative and republican project (Kurczewski 1999: 181).

In this political context, the preamble reads as a synthesizing political compromise, the core of which is constituted by the commonly shared national and cultural tradition, which covers over the political and ideological divisions between the left and right-wing parties. Recent political developments in Poland, particularly the shake-up after the parliamentary elections in 2001, indicate that exclusive ethnic nationalism remains a propaganda tool for new populist parties on the right, while the new centrist party, Civic Platform, built its electoral success mainly on the liberal

programme and an appeal to civic and democratic principles.[4] The divide between ethnic and civil interpretations of politics thus operates as the element of differentiation of the political system which, nevertheless, does not have any significant impact on the constitutional framework of the country.

Hungary provides a very different example of rebuilding the national identity through constitutionalism. Unlike in the other Central European constitutions, the preamble of the Constitution of the Republic of Hungary is entirely prospective and surprisingly makes no references to history, culture, tradition or religion. It was also enacted under unique political circumstances, being negotiated during the round table talks between the opposition and government and adopted by the communist Parliament in October 1989. The original democratic deficit was eliminated only indirectly by the acceptance of the constitutional framework by democratically elected Parliament.

Regarding the matters of national identity and ethnicity, the Constitution contains a highly controversial and disputed Article 6/3 which reads:

'[T]he Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary'.

This constitutional commitment to ethnic Hungarians living abroad reflects the fact that almost one third of people of Hungarian ethnicity live outside the territory of the Hungarian state and constitute ethnic minorities in neighbouring states (Mediansky 1995: 108). At the same time, Article 6/3 stretched constitutional sovereignty beyond the state borders and understandably caused negative reactions from the neighbouring

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[4] The Civic Platform won 65 seats (13 per cent of votes) in Sejm, the lower chamber of Parliament, in the election in 2001. The right-wing populist League of Polish Families won 38 seats, the Law and

states with large Hungarian minorities such as Romania and Slovakia. Using the ethnic logic of Art. 6/3, in 1993, the postcommunist Parliament also adopted a new citizenship law legislating the principle of *ius sanguinis,* which meant that Hungarian descent became the main criterion of citizenship. This law was accompanied by the Act on the Rights of National and Ethnic Minorities which guaranteed political and other rights of minorities living in Hungary.

Article 6/3 became a cornerstone of Hungarian nationalist politics when the first postcommunist Prime Minister, the late Jozsef Antall, stated that he regarded himself as the Prime Minister of 15 million Hungarians, including the ethnic Hungarian minorities living abroad. After the victory of the postcommunist left-wing opposition in subsequent parliamentary elections, the new Prime Minister, Guyla Horn, distanced himself from this right-wing nationalism by commenting that he was only the Prime Minister of the 10 million citizens of Hungary (see for instance Roth 1996: 282). The ideological and political struggles in Hungarian political life symbolised by Article 6/3 were further exacerbated by the ethno-nationalist policy of the Hungarian Government of 1998-2002 under Prime Minister Viktor Orbán. This government enacted legislation granting special access to the social welfare provided by the state of Hungary to ethnic Hungarians living outside its territory. This legislation caused international tensions between Hungary and its neighbouring states once again and was criticised by the Council of Europe (East European Constitutional Review 2001, n. 2/3: 20).

Apart from other rights and entitlements, this legislation provides ethnic Hungarians from abroad with permission to work in Hungary for three months of each year. They also receive the Hungarian state's welfare benefits for that period. This

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Justice party 44 seats, and the Self-Defence 53 seats.

legislation also provides financial assistance for ethnic Hungarian students in higher-education institutions while they are in Hungary and extends this assistance to ethnic Hungarians in their home countries. Foreign citizens who want to apply for any of these entitlements must obtain identity cards on the basis of a recommendation from foreign organisations of ethnic Hungarians recognised by the Hungarian government. This legislation was originally drafted even more widely and was to create an 'out-of-state-citizenship' based entirely on the blood and race principle. It was supposed to be a symbolic legal and political symbolisation of the cohesion of ethnic Hungarians and their identification with the Hungarian state. It is then no surprise that the legislation was criticised even by moderate democratic leaders in Romania and Slovakia, and the Romanian delegation to the Parliamentary Assembly of the Council of Europe submitted a resolution calling on Hungary to suspend implementation of the legislation. This resolution was supported by 26 other delegates and the legislation was described as discriminatory and as violating the territorial integrity of other countries. Nevertheless, the legislation came into force on January 1, 2002 and shows how much the Hungarian constitutional and political transformation remains heavily determined by the divide between the civil and ethnic concepts of a nation.

The difference between the ethnic and civil tradition profoundly affected ideologies of both the Hungarian political left and right and consequently had a significant impact on governmental policies during the 1990s. In general, the nationalist conservative governments of Prime Ministers Antall (1990-94) and Orbán (1998-2002) promoted the principle of ethnic identity, while the postcommunist socialist governments of Prime Ministers Horn (1994-98) and Medgyessy (since 2002) do not give ethnic policies such priority. Although the ethnic politics of protecting both the Hungarian minorities living abroad and different minorities living

in Hungary forms an important part of the policies of all postcommunist Hungarian governments, its content is heavily influenced by the ideological differences between the liberal left and the conservative right. Interpretation of the ethnic tradition by different governments and political parties continues to play a formative role in the political system and, therefore, is subject of controversial legal regulations which frequently change.

The Czech and Slovak process of rebuilding national identity by constitutionalism is as fascinating as it is in Poland and Hungary. In the final part of this section, I shall therefore focus on the historical developments of ethnic relations between Czechs and Slovaks. The Czechoslovak constitution of 1920 purported to establish one Czechoslovak nation, but this was a constitutional, political and cultural fiction partly reflecting the common history of Czechs and Slovaks and partly expressing a hope for political integration held by Czech and Slovak politicians of that time. The constitutional fiction of a Czechoslovak nation symbolised political unity and enhanced the chances of political homogeneity in the ethnically fragmented territory of Czechoslovakia. The project of multiethnic liberal democracy in Czechoslovakia was, of course, brought to an end by the Munich agreement of 1938 and the subsequent dismantling of the state.

The problem of the coexistence of the different ethnic nations living in Czechoslovakia continued to preoccupy constitution-makers and politicians even during the communist era. After the removal of ethnic Germans from the territory of Czechoslovakia in 1945, the matter was reduced to the relationship between the Czech and Slovak nations and the constitutional protection of ethnic and national minorities (Stein 1997: 23-32). The Constitution of 1960 limited the constitutional autonomy of the Slovak administration and shifted more power to central

constitutional and political bodies. The Prague Spring democratisation movement of 1968 resulted in the introduction of a federal system in Czechoslovakia. However, this system had no real impact on the lives of citizens because it lacked any capacity to express the truly democratic political will of Czechs and Slovaks, and this continued to be the case over the next two decades (for further details about the federal system of 1968 and constitutional history of Czechoslovakia see Cutler and Schwartz 1991: 519).

After the fall of communism, constitutional transformation quickly became predicated upon building an 'authentic federation' and securing the rights of self-determination of the Slovak and Czech nations and of the other national minorities within the framework of the common state (Havel 1992b). The complicated process of redrafting the constitutional division of power and a system of checks and balances failed and both nations subsequently drafted constitutions for the new, independent states of the Czech Republic and Slovakia. Tensions between civil and ethnic traditions had led to the splitting of the country. This failure is an example of the deadlock between ethnically established political entities living in the territory of a common state, leading to the state peacefully being split.[5]

The constitutions of the Czech Republic and Slovakia manifest fundamentally different understandings of nationhood. The Slovak constitution was criticised for marginalizing the ethnic and national minorities because its preamble referred primarily to the ethnically specified Slovak nation, its cultural heritage and political history (Malová 2001: 355-6). This constitutional expression of ethnic domination was exploited by the 1994-8 government of Prime Minister Vladimír Mečiar. The Prime Minister and his Government used historical resentment of and recent fears

about Hungarian nationalism of some of the ethnic Slovak population to isolate the Hungarian ethnic minority living in Slovakia from politics and public life. However, the Slovak constitution contains a special section on ethnic and minority rights, part IV, Art. 33-4, which always enjoyed the protection of the Constitutional Court of Slovakia during its confrontations with Mečiar's ethno-nationalist policy. After the fall of Mečiar's Government in 1998, this section was used as the basis of a more balanced policy and legislation protecting ethnic and national minorities. As in Hungary, the difference between ethnic and civil ideologies and policies played a fundamental role in the Slovak political and legal system (Ishiyama and Breuning 1998: 51-78). However, until the parliamentary election in 2002, the system was affected by the division between the populist nationalist Movement for Democratic Slovakia led by former Prime Minister Mečiar and the wide coalition of the socialist, conservative, liberal and Hungarian minority parties which was first in opposition (1994-98) and then, in 1998, formed the government seeking to renew institutional stability of the country. The ethnic policy was therefore part of much larger political agenda and power struggles in Slovakia in the 1990s.

In 1992, Czech constitution-makers merely reacted to political developments, and their lack of constitutional enthusiasm (which was so typical of constitution-making in Slovakia) even led to the suggestion that the constitution-making process could wait until after the independent Czech Republic came into existence on January 1, 1993. This opinion eventually did not prevail and the Constitution of the Czech Republic was adopted in December 1992, just two weeks before it came into effect. The merely reactive attitude of the Czech constitution-makers is well illustrated by their definition of a nation. After the adoption of the Slovak constitution and

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[5]Former Yugoslavia would be an example of the violent dissolution of a common state, while Belgium

subsequent criticism of its definition of nationhood in terms of ethnocentrism, the Czech constitution-makers enacted a document which begins:

We, the citizens of the Czech Republic in Bohemia, in Moravia, and in Silesia,

At the time of the restoration of an independent Czech state,

Faithful to all good traditions of the long-existing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood,

Resolved to build, safeguard, and develop the Czech Republic in the spirit of the sanctity of human dignity and liberty,

As the homeland of free citizens enjoying equal rights, conscious of their duties towards others and their responsibility towards the community,

As a free and democratic state founded on respect for human rights and on the principles of civil society,

As a part of the family of democracies in Europe and around the world,

Resolved to guard and develop together the natural and cultural, material and spiritual wealth handed down to us,

Resolved to abide by all proven principles of a state governed by the rule of law,

Through our freely-elected representatives, do adopt this Constitution of the Czech Republic. (The Preamble of the Constitution of the Czech Republic of 1992).

Nationhood was exclusively defined in terms of citizenship, territoriality, state (not national) history and the universal values of human dignity, liberty, democracy and human rights. Like the Polish and Slovak constitutions, the Czech Constitution retreats to a historical legitimating discourse but it entirely ignores the ethnic diversity of Czech society. Constitutional protection of ethnic and minority rights was secured by the *Charter of Fundamental Rights and Freedoms* which was incorporated into the newly established Czech constitutional order (Article 24 and 25 of the Charter).

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may be used as an example of a crippled unity and continuing tensions between different nations under

Unlike Hungary and Slovakia, the Czech Republic is not haunted by the inter-national ethnic minority conflicts and the problems of minority rights and discrimination of the Roma community (app. 2-3 per cent of the population) are not directly reflected in the collective memory of the nation. The civil liberal codification of that memory rather contributed to the neglect of policies and of the actions required in the field of the Roma minority rights in the first half of the 1990s (Vachudová 2001: 353-60). Governmental policies recognising the scale of economic, social and cultural problems of the Roma community started to emerge only gradually, and as in Hungary and Slovakia in the second half of the 1990s, after the series of racist attacks and interventions from the European Union.

Concluding remarks

I have argued that the process of constitution-making in postcommunist Central Europe went far beyond a mere technical building of liberal democratic institutions and procedures. It involved the codification of the new political identities which were being constructed by re-entry of the different civil and ethnic traditions of each nation. The temporal self-reflections and interplay between the past and present which this involved both synthesised the new collective memory of individual nations and selected the traditions which were to play the constitutive role in Central European political societies after 1989. The processes both of synthesis and of selection were heavily influenced by the difference between the civil and the ethnic traditions, their

one federal rule.

codification in legal systems, and their interpretation in different governmental policies.

The choice between the civil and the ethnic traditions has been ideologically perceived as mutually exclusive and subject to the 'either-or' logic. However, the socio-legal analysis shows that the complete selection of either tradition is impossible and that nation-state democracy is often based on political compromise between ethnicity and civil principles. Modern nation-states are 'cocktails' mixed from the civil and ethnic traditions (Beck 1997: 73), and the postcommunist reality is further evidence of this.

Analysing the constitutions put in place in Central Europe during the 1990s, it is possible to construct a spectrum of the constitutional codifications of a nation: entirely civil (Czechia); a patriotic mixture of civil and ethnic (Poland); internally civil combined with externally ethnic (Hungary); and entirely ethnic, defining popular sovereignty as participation and cooperation between an ethnic majority and minorities (Slovakia). Nevertheless, legal and political consequences of this constitutional symbolism are not simple cause-effect matters. These codifications of collective identity often involved very different interpretations emerging from the system of government and administration. The problems posed by the ethnic and civil concepts of a nation for popular sovereignty go beyond the level of constitutionalism, pervade practical legal policies, and do not necessarily keep the same form and standards when translated from the constitutional level to ordinary legislation. A state established on the civil definition of popular sovereignty could thus have a discriminatory ethnic policy, such as Czech local authorities' policies towards the Roma/Gypsies in the mid 1990s. At the same time, the ethnic definition of a nation

did not automatically rule out the adoption of a cooperative and inclusive ethnic policy by a state, as in Hungary in the 1990s.

The 1989 revolutionary changes in Central Europe and subsequent constitutional and legal developments prove that the problem of collective identity is not merely an issue of social and political integration. It also involves a process of differentiating between *us* and *them*. The temporal dynamics of the complex constitution-making processes in different Central European countries were governed by the logic of the difference between the communist past, referring to them, and the democratic present, referring to us. While one past, the communist one, was condemned and abandoned, the other past and its civil and ethnic traditions re-entered the public domain, was codified in law, and established new codes, structures and experiences of national identity. The example of postcommunist constitution-making in Central Europe shows that democratic public discourse necessarily involves manipulation of past traditions and therefore goes far beyond the Kantian model of the public domain as emancipatory rational discussion challenging the tradition.

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