
Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making

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This article focuses on constitutional developments and legal policies in Central Europe since 1989 and elaborates on their temporal analysis with special emphasis on the distinction between *demos* and *ethnos* in the political and legal discourse. Using various social theories of time, identity, and codification of social traditions, I argue that the difference between civility and ethnicity does not involve simply a conflict between liberal democratic aspirations and ethno-nationalist myths of authoritarian politics, but rather represents two distinct traditions manipulated by political agents and codified in the process of recent constitution-making. The process of selecting different traditions and political manipulations of the past is reflected at the level of both constitutional symbolism and specific governmental policies in post-Communist Hungary, Slovakia, Poland, and the Czech Republic. The final part of the text analyzes relations between the abstract symbolic language of constitutional documents and concrete, “ethnos-” based legal policies implemented in these countries of Central Europe.

Introduction

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

In this article, I pursue a different, sociolegal analysis of these constitutional developments using various social theories of time and collective identity and their codification. Instead of pursuing

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an ideological critique contrasting civil society and ethnic nationalism, I analyze these two phenomena as part of the more general social process of constituting and codifying new identities in the post-Communist period of discontinuity. An indispensable part of this process is the 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 analyzing the different ways in which constitutions operate in post-Communist political society, I argue that the conflict between *demos* and *ethnos* in post-Communist 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 that are manipulated by political agents and codified by means of constitutional law. The first part of this article outlines the theoretical background of the problem of collective identities, focusing on their temporal self-reflections and codifications. The second part critically analyzes the ideology and tradition of civil society and its different uses during the political and constitutional transformations in post-Communist Central Europe. The third part critically assesses the distinction between ethnic and civil identity and its manifestations in post-1989 Central Europe. The final part discusses the responses made to the civil/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 have pursued the establishment of a new collective identity based on the liberal democratic rule of law in Central Europe. It has provided constitutive social values and principles shared by all members of such societies as their collective conscience (Durkheim 1997) and has 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 (Příbáň 2002:110–14).¹ The moment of political

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 a period of complex transformations and discontinuities, law must therefore be

discontinuity calls for a new “social beginning.” It is a time of condemnation of the past and invocation of future hopes. Societies need a new consensus in the domains of politics and morality and explore 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 post-Communist societies, is eventually always determined by current political forces and agents. Michel Foucault (and George Orwell) put it as such: “[t]he control of people’s memory is the control of their present” (Foucault 1975:24–25). 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 by the suppression of the ones discarded by a revolution. Current political forces control the process of dealing with the past and its possible moral therapeutic effect (Markovits 2001). Postrevolutionary constitution-making is always a process of imposed forgetting and the codification of new, constitutive collective memories and 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.

In analyzing the temporal aspect of constitution-making and the role of civil and ethnic traditions in post-Communist 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 reenacted 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 1990:42). The modern use of history reduces traditions to an instrument of legitimation of the present. The process of

analyzed 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 that has strong symbolic power to formulate the most persuasive version of revolutionary changes both politically and morally. The legal system continues to operate as a distinct and functionally differentiated system (Teubner 1993:21) in revolutionary societies. It would be therefore wrong and grossly simplifying to perceive post-Communist 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.

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 normativeness 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 that 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 normativeness of traditions. Consequently, different traditions are rediscovered and codified by current political agents. 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, emphasis in original). In this light, rebuilding the political identities of post-Communist Central European societies emerges as a complex, reflexive interplay of the establishment of new political codes (constitutions), pre-Communist and Communist civil and ethnic traditions, and their present interpretations in the public domain (ideologies and policies).

From this perspective, constitution-making in post-Communist Central Europe has been 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 analyze how 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 current reality (Bourdieu 1990:54). The constitution-making processes in Central Europe have had to accommodate the selection of past traditions as 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 the reinvention of the political tradition of constitutionalism, republicanism, and civil society.

The collective memory has both “structural” and “experiential” dimensions (Elias 1992:80–81). The former refers to the sequence of moments and the change continuum (in which “earlier” and “later” are synthesized 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 synthesizes the structural and experiential dimension of time.

It is typical of constitution-making in post-Communist Central Europe that it has incorporated both the structural and experiential dimensions of time. The 1989 revolutions represented a clear structural element that differentiated between “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 that were to legitimate the post-Communist 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 reestablishment of modern democratic politics with its ideological conflicts.

In the post-Communist 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 for some of the harms this regime had done to its citizens; and second, the constitutional codification of the 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 focus on this second method, largely leaving aside the widely discussed issues raised in 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 in Central Europe has reconstituted its symbolic function as the ultimate language of modern politics in the sense of marking continuity and legislating discontinuity. The rule of law has been reestablished as the primary commitment of democratic and liberal politics. The formulation of the new political identities of the Central European nations has been phrased in legal language procedures and principles.

In this context, constitutionalism has played an important role in legislating the limits of government and the boundaries of civil society. Associations, civil organizations, and pressure groups were not allowed under Communism, yet the concept of civil society was very popular among dissidents living under Communist regimes and constituted an important strategy of the political opposition (Olivo 2001; Skapska 1999:205–14). The dissident concept of civil society heavily romanticized 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 reentry of morality into 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, stabilizing the sphere of social interaction between the emerging market economy and state (Arato & 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 post-Communist Central Europe, civil

² Nevertheless, this temporal position of the civil society discourse is not limited only to 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 the spontaneous order of community had been lost in the course of everyday democratic politics. These virtues must be retrieved and reincorporated into a democratic political system to combat its current corruption (see, for instance, Constable 2002:213).

society was irreducible to the prospective goal of constructing nonexistent social structures by constitutional laws. Civil society was also perceived as a specific tradition that had strong symbolic value during the early phases of post-Communist constitution-making. Civil society represented values and virtues such as individual freedom, cooperation, spontaneity, solidarity, public initiative, protest, intellectual critique, recognized political dissent, and many other aspects of communal life destroyed by the Communists (Buchowski 1996; for links between the left-wing politics and political dissent in Communist countries, see Hájek 1995). For example, 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 illiberal authoritarian rule between the two world wars in the last century, “civil society” always 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 rebuilding 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 1942:122–23, 266–67) was thus represented in one of its most dialectic forms in the post-Communist 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” that 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 criticized both the Communist regimes and the political engineering and ideological control carried out in Western liberal democratic states. In comparing the concept of antipolitics with the concept of nonpolitical politics popular in the Czech dissident movement, it is possible to detect striking similarities of intellectual elitism, 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's social theory (2001:22), the dissident community contrasted civic virtues to a 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 post-Communist countries (Klingsberg 1992:866–67). Their attention was directed to the past, and their task was to revitalize 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 political transition and democratization in Spain, see Pérez Díaz 1993). Civil disobedience and "civilized negotiations" were the main revolutionary tools. As it was dissident elements committed to civil society that were principally responsible for the institutionalization of the liberal democratic rule of law (Arato 2000:70–80), they were able to exercise great influence over post-Communist 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 constitutional legislation, constitutionalism achieved an almost heroic status because it secured a differentiated, spontaneous, and well-ordered civil society. Constitutional symbolism designed by the state and the spontaneity of civil society supplemented each other.

The values of civil society influenced post-Communist constitution-making, yet the need to institutionalize a market economy and a political society that 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 function 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 reenter only as a specific tradition that had to be codified, promoted, and protected by the post-1989 constitution-making processes.

Constituting a Nation: Ethnic and Civil Traditions

In post-Communist 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, a brief textual analysis of post-1989 constitutional documents shows that the liberal procedural model of democracy turned out to be an insufficient stabilizer, and the political community looked for its 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 1996:256–57).

Democracy rediscovered nations in the course of post-Communist constitution-making. 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* identity, 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 reestablished cultural and political traditions either suppressed or manipulated by 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.

In analyzing 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. . . . (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 post-Communist 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’s 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, post-Communist

nations sought to revitalize 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 in 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 nineteenth 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 *demós* and *ethnós*. The concept of the nation may be subsumed under the concept of the state. In this way, the nation is regarded as a collectivity living in the state's territory and administered by 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 emphasizes 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 that 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 post-Communist countries contrasts the ethnic and civil concepts of “the nation” and blames emerging liberal democracies for the revival of ethnic hatred and national tribalism in Central and Eastern Europe. This is, however, a gross simplification of post-Communist 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 face 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 a civil society tradition. The liberal democratic state’s first imperative is to be neutral among 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 that can contain and neutralize 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 draw on ethnicity and particular national cultures, and liberal principles are 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 the politics of identity (Taylor 1992:54–56). These close links between civil and ethnic politics are extraordinarily strong in Central Europe. For instance, *Solidarnosc*, the civil society platform and opposition forum in Communist Poland, always involved traditionalist and nationalist factions (Wesolowski 1995:113–14). 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 Hungarian irredentism. They even successfully mastered the human rights discourse and voiced their traditionalist ethnic demands in the language of minority collective rights (Kis 2001:234–36). In Slovakia, the nationalist tradition emerged from the civic revolutionary structures of the Public Against Violence movement and was institutionalized either in traditionalist ideological form, in the political platform of the Christian Democratic Movement, or in the populist form of the platform of Prime Minister Vladimir Mečiar's Movement for Democratic Slovakia (Mesežnikov & 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 states (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 emphasize the historical fact that the ethnic concepts of nationhood and popular sovereignty were not always necessarily anti-democratic and illiberal. As 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 great deal, from the Polish aristocratic resistant nationalism and the Hungarian aristocratic loyalist nationalism to the Czech competitive nationalism of the small bourgeoisie (Sugar & Lederer 1969). Moreover, these nationalisms were often a revolutionary force challenging autocratic, illiberal regimes and aiming at the democratization 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 1969:46–49). 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 dis-

pute with respect to 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 a remedy for ethnic national animosities and tensions.

Post-Communist politics have 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 nation-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 recognized 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 centralizing 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.

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

Constitutionalism, the Concept of a Nation, and Popular Sovereignty in Central Europe

I now turn to the different constitutional strategies and governmental policies of the individual countries of Central Europe, reflecting differing civil and ethnic aspects of post-Communist nationhood. I examine different constitutional codifications of national identity 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, reestablishes Polish national heritage and history as a source of common political pride by stating:

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 uni-
versal 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 . . . (Preamble, The Constitution of the Republic of
Poland 1997)

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 makers. National patriotism is worthy of being preserved because it aspires to universal humanity and civil culture and is therefore protected by the constitution.

Nevertheless, the post-1989 constitutional history of Poland is turbulent and was affected by political divisions between the post-Communist 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 prewar 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 efforts to incorporate more elements of a parliamentary system. The new constitution of 1997, which was approved by 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, has built its electoral success mainly on the liberal platform 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 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 Parliament, democratically elected later in 1990 (for further details, see, for example, Örkény & Scheppele 1999).

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

⁴ The Civic Platform won 65 seats (13% 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 Justice party 44 seats, and the Self-Defence party 53 seats.

[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. (The Constitution of the Republic of Hungary 1949)

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 neighboring states (Mediansky 1995:108). At the same time, Article 6/3 stretched constitutional sovereignty beyond state borders and understandably caused negative reactions from the neighboring states with large Hungarian minorities, such as Romania and Slovakia. Using the ethnic logic of Article 6/3, in 1993, the post-Communist parliament also adopted a new citizenship law legislating the principle of *ius sanguinis*, which meant that Hungarian descent became the main criterion for 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 post-Communist 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 post-Communist 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 symbolized 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 neighboring states once again and was criticized by the Council of Europe (East European Constitutional Review 2001:20).

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 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 organizations of ethnic Hungarians recognized 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 symbolization of the cohesion of ethnic Hungarians and their identification with the Hungarian state. It is then no surprise that the legislation was criticized 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 post-Communist 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 Hungarian minorities living abroad and different minorities living in Hungary has formed an important part of the policies of all post-Communist Hungarian governments, its content has been 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 the subject of controversial legal regulations that 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 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 symbolized 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 democratization 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 the constitutional history of Czechoslovakia, see Cutler & 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 being peacefully split.⁵

The constitutions of the Czech Republic and Slovakia manifest fundamentally different understandings of nationhood. The Slovak constitution was criticized for marginalizing ethnic and national minorities because its preamble refers primarily to the ethnically specified Slovak nation, its cultural heritage and political history (Malová 2001:355–56). This constitutional expression of ethnic domination was exploited by the 1994–98 government of Prime Minister Vladimír Mečiar. The prime minister and his

⁵ The former Yugoslavia would be an example of the violent dissolution of a common state, while Belgium can be used as an example of a crippled unity and continuing tensions between different nations under one federal rule.

government used historical resentment of and recent fears about the 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 has played a fundamental role in the Slovak political and legal system (Ishiyama & 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 that was first in opposition (1994-98) and then, in 1998, formed the government seeking to renew institutional stability of the country. Ethnic policy was therefore part of a 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 subsequent criticism of its definition of nationhood in terms of ethnocentrism, the Czech constitution makers enacted a document that 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 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 (Articles 24 and 25 of the Charter). Unlike Hungary and Slovakia, the Czech Republic is not haunted by international ethnic minority conflicts, and the problems of minority rights and discrimination toward the Roma community (app. 2–3% 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 actions required in the field of the Roma minority rights in the first half of the 1990s (Vachudová 2001:353–60). Governmental policies recognizing the scale of the 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 a series of racist attacks and interventions from the European Union.

Concluding Remarks

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

and the ethnic traditions, their codification in legal systems, and their interpretation regarding different governmental policies.

The choice between the civil and the ethnic traditions has been ideologically perceived as mutually exclusive and subject to “either-or” logic. However, a sociolegal 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 both civil and ethnic traditions (Beck 1997:73), and post-Communist reality is further evidence of this.

In analyzing 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 (Czech Republic); 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, the legal and political consequences of this constitutional symbolism are not simple cause–effect matters. These codifications of collective identity have 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 have gone beyond the level of constitutionalism, pervaded practical legal policies, and did 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 local Czech authorities’ policies toward 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 reentered the public domain, were codified in law, and established new codes, structures, and experiences of national identity. The example of post-Communist constitution-making in Central Europe shows that democratic public discourse necessarily involves the

manipulation of past traditions and therefore goes far beyond the Kantian model of the public domain as an emancipatory rational discussion challenging tradition.

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