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NATIONAL IDENTITY AND CONSTITUTIONS IN MODERN EUROPE: INTO THE FIFTH ZONE.

Bill Kissane and Nick Sitter

The source of sovereignty is one of the central constitutional questions: in whose name is a constitution adopted, and whom does the government represent? This chapter explores how modern European constitutions have addressed issues of national identity. Many of the older constitutions were written – in what we call the first two 'time zones' of European nationalism - before nationalism became a dominant political ideology. They rarely addressed territory or citizenship in national terms. Many later constitutions – in time zones three and four – resulted from the establishment of nation states and addressed such issues more explicitly.[1] More recently, challenges to European integration and to globalisation have created a fifth time zone.

There is a fundamental difference between the idea of a constitution as a contract that lays down rules about the distribution of power, and as a covenant between a people and a state. We adapt Gellner's (1997) 'time zones' of European nationalism in order to show the impact of nationalism on constitutional politics across time and space. Gellner used the time zones idea to show the diffusion across Europe of the nationalist principle that state and nation be congruent. It provides an account – sensitive to both chronology and geography – of the transition from a non-national world of Empires and tiny polities to one of homogenous nation-states. It begins in a world of Empires and micro-polities -where ethnicity had little relevance to politics - and ends with states based on nationalist ideas. We adapt the approach in order to show different approaches to the nationalist principle in constitutions. Where there were 'customary marriages' between existing states and nations when constitutions were written, we expect nationalism to play a smaller role in constitutions than in cases where new nation-states were recently founded. The prominence of national identity in constitutions has increased over time, from east to west. It is low or non-existent in the first and second zones, whereas the tension between liberal and nationalist norms becomes far clearer in the third fourth and fifth zones.

Most historical analyses that divide the continent into zones, such as Rokkan (1970) and Tilly (1975), use similar criteria and comparable zones. These include the long-standing monarchies on the Atlantic seaboard, the territories that made up the Holy Roman Empire, and the European lands of the Russian and Ottoman empires. More recently Gellner (1997) added states that went through communism as a fourth zone. We take Gellner as our starting-point because he explicitly focuses on the relationship between state and nation. He uses the time zones to show how different historical and structural legacies gave rise to varied responses to the 'one state, one culture' formula across Europe. Gellner saw a general transition to industrial modernity, but used the time zones approach to capture the varieties of experience within this transition: 'it was all, in a systematic way, rather different in different places', he wrote (1994: 28). What matters most is the nature of the polity at the start of each zone. Where it was national (time zone one) a state-based nationalism followed, and constitutions remained monarchical. Where the political units were sub-national (time zones two, e.g. Germany, Italy and Romania) unification nationalism

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[1] We first set out the analysis of only four time zones in Kissane and Sitter (2010). Adding a fifth zone, here we draw on but elaborate on this work when it comes to the first four zones.

emerged and liberalism was its core constitutional doctrine. And where the state was multi-national (time zones three and four) separatist nationalism was the response. We also add a fifth time zone in order to compare nationalist responses to a supra-national polity, the European Union. While the diffusion of the nationalist idea across the first three zones was from west to east, this is not true of the fifth zone; today all Europe's regions are equally agitated by global developments. One difference is that the constitutional nationalism of the fifth zone is not driven by the rise and fall of nation-states. Yet it may lead to the break-up of some states. Three of Europe's oldest constitutional orders, all along the western seaboard – Belgium, Spain and the United Kingdom – come to mind.

Time Zone One: The Atlantic Seaboard Monarchies

Most Atlantic seaboard monarchies went through the transformation from the monarchical state to the nation-state without major territorial adjustments. Limited government in the name of the nation was developed in well-established political territorial units. Constitutional politics focussed on lowering what Rokkan (1970) called the 'thresholds of democratisation': recognition that the opposition was legitimate, and expanded access to political institutions. The notion of representative government was given a dramatic boost by the American and French revolutions, and this ideal was present even in the constitutions of the legitimist restorations that followed the Congress of Vienna (Hawgood 1964). In Gellner's terms the British, Swedish, French, Spanish, Portuguese, Dutch, Danish, and even Norwegian constitutional arrangements were *customary* marriages of old states to well-established nations, where cultural homogenization predated 1789. There was no need to make this connection explicit. The term 'nation' was barely used in these constitutions. Where the nation was conceptualised, it implied membership of a political community defined primarily by territory or royal allegiance (Hobsbawm 1990). Because constitutions did not constitute new states, national identity played at best a limited role.

The first constitutions of the Atlantic seaboard monarchies conform to the pattern suggested by Gellner. They invoked the monarch and/or the territorial state as the source of legitimacy, rather than the nation. If the king did not actually grant the constitution (Sweden 1772, 1810; Denmark 1849), it was enacted by the representatives of the kingdom (Norway 1814, Portugal 1822) or in the name of the kingdom and its inhabitants (Netherlands 1815). In revolutionary France (1791), the constitution was granted by the national assembly; in 1814 and 1830 it was granted by the king. The Spanish constitution of 1812 was unique in stipulating that sovereignty resided in the nation. This reflected an aspiration for full male citizenship in the context of a popular war against France. It is noteworthy that even the Norwegian constitution of 1814, which represented a bid to establish national independence, makes no reference to the nation. The Swedish and British constitutions are paradigm cases. They consist of a series of documents and norms that regulate the relationship between a long-established monarchy and its parliament. Yet national identity later came to play a role in both Swedish and UK politics. Demands for national autonomy culminated in Norwegian independence in 1905 and the Irish Free State in 1921. Devolution of power to Scotland, Wales and Northern Ireland now makes for considerable asymmetry in the UK constitution. For Sweden the main question after Norwegian independence was the right of Swedish-speakers in independent Finland, but the victory of the Whites in the civil war and the Aaland treaty of 1921 settled this question.

A second, radical, set of constitutions grew out of the French revolution, the Napoleonic wars and the revolutions of 1848-49. These documents reflected a context where popular representation was a central concern. The French constitutions of the 1790s, the Portuguese constitution of 1822 and the Dutch and Danish constitutions of 1848/49 involved challenges to royal authority in the name of popular sovereignty. The same goes for the constitutions of several German states in the 1830s (Saxony, Brunswick and Hanover), Piedmont in 1848, and Prussia in 1850. In practice, however, these radical constitutions represented compromises between liberal demands and the old order, and entailed narrower franchises than the 1832 Reform Act would introduce in Britain (Hawgood 1964: 191). In almost all these cases the liberal forces represented a relatively homogeneous cultural group, so the identity questions were not pivotal.

The third set of constitutions in the first zone includes the legitimist constitutions established after the defeat of the radical republics and kingdoms of Napoleonic Europe. Here the context was explicitly anti-nationalist, because the key political fault-lines had been between radical forces and the 'legitimist' monarchical regimes. For this reason the source of legitimacy and constitutional authority remained monarchical. National identity played even less of a role in constitutional politics than in the more liberal states. In France, Spain and Portugal the political contests were between the liberal state-building forces and conservative Catholic forces, each of which would dominate certain periods of the Nineteenth Century.

Time Zone Two: Liberal Nationalism

As liberal constitutionalism spread across Central Europe, constitutions were increasingly written in the name of peoples that lacked a long-standing territory. Constitution-making was identified with state-building, even if the projects were by and large viewed through the prism of liberalism: a stronger state would enhance individual freedom and provide for economic development. 'The nation' was employed rhetorically, as an argument against despotism, but not in the sense of establishing a state on the basis of cultural distinctiveness. By the close of the Nineteenth Century the map of Central Europe was dominated by states that had barely existed in the Eighteenth: Belgium, Italy, Germany, Switzerland, Austria and Hungary. In Gellner's terms the nation existed in most of them as a high culture, but its marriage with the state required new political entities. National identity was imbued with more significance than in zone one. It was a 'thicker' concept, which implied a political community with a common culture and history (Brubaker 1992). Nevertheless, the connection between state and nation was rarely made explicit in constitutions. Further south and east, a range of new states emerged as the Ottoman Empire declined: Greece, Romania, Bulgaria and Serbia were in a zone where even the existence of the nation in Gellner's sense was questionable. Here the need to upgrade the nation to fulfil the criteria of statehood was more pressing.

Belgium's secession from the Netherlands in 1830 and the Swiss settlement after the 1847 *Soderbund* war are classic cases where the 'nation' was invoked by liberals against conservatives. The imperative of democratization was as important as that of state- or nation-building. Belgian and Swiss constitutional politics centred on the demand for liberal

and representative government, rather than for government in the name of the nation. The Belgian constitution was the most liberal document of its kind in Europe at the time. This liberal imperative involved vesting sovereignty in the nation, and the constitution included strict citizenship laws based on parentage. The highly liberal Swiss 1848 constitution invoked both the cantons and the Swiss nation, but in later revisions 'the people' replaced the 'nation'.

Italian and German unification led to a second se dot zone two constitutions. Existing constitutional monarchies took the lead in the unification process, and built new nation-states in the name of the people. However, they started from different points. The Piedmont constitution was far more radical than that of Prussia. Italy saw a successful and enduring alliance between the liberal and the national projects, united in opposition to the Catholic Church. The 1848 Piedmont constitution was written with a view to Italian unification, and it left the source of sovereignty: the king held his position by both the grace of God and the *nation* (Hawgood 1964: 200). It went on to become the constitution of liberal Italy in 1861, and survived the Mussolini period as well. By contrast autocratic Prussia triumphed over its liberal opponents in 1848/49 and the pan-German nationalists in the next decades. The 1871 constitution of the Reich did not invoke the nation.

A third set of constitutions are part of zone two in terms of timing, but in terms of state-building after imperial collapse they are closer to zone three. Even if great power intervention ensured a degree of protection for minority rights, these constitutions were based on national identity. The tension between these two principles proved enduring. In Greece (the 1820s and 1844), Serbia (1835) and the Romanian Principalities of Wallachia and Moravia (1848/49) new constitutions were modelled on the US and Belgian constitutions, but as a rule they were either a compromises with the Ottoman regime's Organic Statutes (e.g. Serbia 1838) or shaped by bilateral Russian – Ottoman agreements (the Principalities after the Crimean War). The conservative 1878 constitution for autonomous Bulgaria had been vetted by St. Petersburg. In Austria-Hungary absolutism held sway until the 1867 *Ausgleigh* – the constitutional compromise that governed relations between the two parts of the now dual monarchy and made the emperor the constitutional king of Hungary. Although this opened the way for 'Magyarisation' of the Hungarian half of the empire, the remaining constitutional arrangements have been hailed by Lieven (2000: 184-185) as an abandonment of German domination in favour of an exemplary attempt at multinational administration: 'the Habsburg regime developed a number of laws and practices which were later taken up by other civilized societies facing the challenges of multi-ethnicity and conflict between races and nationalities.' However, even Austria saw increasing tension between nationalist aspirations for autonomy and the imperial centre. These tensions would play out across the area of the three collapsed land empires after the First World War, in zone three.

Time Zone Three: After Empire
Constitutional politics in the third zone, after the First World War, reflected nationalist state-building projects more explicitly. They were truly foundational documents: whereas German and Italian unification drew on the Prussian and Piedmont constitutional experience, almost all the states in the third zone were *new* states. In this time zone constitution-makers forged a   more explicit link between constitutions and national

identity. One reason for this was that most were 'new' states with no previous experience of statehood. For Brueilly (2007) 'time zone' is really a label for 'structural differences' based on whether there is an already-existing high culture in a territory (time zone two), and whether there is an established state (time zone one). These structural differences made the approach to constitutions in time zones three and four very different. The cultures the post-imperial states considered their own were either peasant folk cultures or long suppressed minority cultures, and the task of nationalism was much greater. Constitution-making came to reflect considerable political and social engineering.

The collapse of the European land empires during the First World War led to the creation of more than fifteen new states, based on the nationality principle. Of these, only Hungary did not adopt a new constitution. The Allies' war aim had been an international order based on the principle of self-determination. This raised the question of how this principle was compatible with minority rights. Once the Versailles settlements crumbled, the constitutions proved an inadequate framework for minority protection. In some states new constitutions were later adopted that were far more explicit about the connection between state and nation. These reflected the prevailing currents of European politics in zone three far more than the civic republican documents which preceded them.

Although the dependence of the new states on majority nations (e.g. Czechoslovakia on the Czechs) was obvious, the first constitutions did not make this explicit. Identifying the state with a titular nation was avoided by a reliance on an essentially civic and French conception of nationhood. The republican principle substituted for that of constitutional monarchy, and 'popular government' was associated with strong unicameralism, institutions that allow for popular control of the executive (such as the referendum), and individual and minority rights (McBain and Rogers 1923). The preambles usually avoided reference to a pre-existing national self, and committed the state to act in accordance with universal principles. The first articles vested sovereignty in the people, not the nation. These constitutions were adopted by constituent assembles, and gave to the democratic principle 'its most complete and logical expression' (Headlam-Morley 1928: 2). They were largely secular. Only Poland's (1921: Article 114) accorded the Catholic Church a special position, as 'the religion of the preponderant majority of the nation'.

In many respects the democratic imperative meant that the nationalist content of these constitutions was low. Most did contain provisions on language, territory and symbolism specifically intended to bestow on new states the prestige of the past. The Yugoslav constitution of 1921 declared a multi-ethnic kingdom and thus placated Serb fears that the name of the state would not mention them (McBain and Rogers 1923: 349). Yet the absence of territorial claims was remarkable, especially in Austria, Finland, and the Irish Free State, which had recently lost territory. Equally remarkable were the provisions on minority rights, which fell far short of naming minorities and bestowing on the state the duty to allow for the development of minority cultures. Article 113 of the Weimar constitution (1919) *did* stipulate that the state should not interfere with the free national development of those who spoke foreign languages. Hoverer, laws putting these provisions into effect were not enacted. The League of Nations had a broad remit in this area, and treaties concerning minority protection had been agreed in advance of independence. Poland, Romania,

Yugoslavia, Czechoslovakia, and Greece did not enter into these freely. Albania, the Baltic States, Austria, and Hungary were also bound by such treaties.

The treaties were recognised as fundamental laws that could not be contravened by domestic legislation, which meant that the domestic constitutions had less importance in this area than in zone four. Finland (in 1919) was exceptional in naming Finnish and Swedish as equal national languages and allowing for extensive provisions for Swedish Finns' autonomy. As the League of Nations had special procedures for the redress of grievances, most constitutions provided only vague and aspirational clauses. The central principles were non-discrimination, equal civil rights and free use of one's mother tongue. They proved ineffective, and too rudimentary to meet the needs of minorities. In general, the tendency was to renege on the initial promises: Poland, Greece, Yugoslavia, Hungary and Czechoslovakia acquired bad reputations in this regard. By 1934 'almost every state has committed, and every minority suffered under, flagrant violation of the minority treaties' (MacCartney 1934: 390). Where, as in Schleswig-Holstein, the situation of the German minority was 'comparatively favourable', this had nothing to do with treaties or constitutional provisions (Junghann 1932: 69).

If the ambition of constitution-makers had been to give constitutional form to the most advanced principles of democracy and to ground national existence in this form, their failure reflected the wider failure to secure international order between the wars. Constitutions may have been silent on territorial irredentism, but such claims were forcibly articulated in practice. Minority rights may have been enshrined in constitutions, but they were usually overridden. The later, more authoritarian constitutions better reflected the logic of the marriage of state and nation Gellner saw in zone three. The preamble to the 1935 Polish constitution defined the state as a 'bequest: a historic heritage from generation to generation'. The shift from liberalism was predictable in states like Greece, Ireland and Poland where rival nationalist conceptions of the state shaped party politics. This was most pronounced in Catholic countries (Austria, Ireland, Lithuania, Poland), but was not confined to them. The basis for the state ceased to be the democratic public, and became the unified nation. The Mextaxas dictatorship in Greece (1936) was inspired by Salazar's Portugal; Austria became a 'Christian state' in 1934; and the preamble to the Irish 1937 constitution drew on the Polish model (it began: 'in the Name of the most holy Trinity').

Many of these new nation-states did not survive; almost all their initial constitutions failed. Indeed it was only in those European states whose constitutional traditions were rooted in zones one and two (which includes Finland and Ireland) that the inter-war era did not prove fatal. The initial democratic consensus was deceptive. Austria was divided over unification with Germany. In Finland the issue of a republic divided the victors in the 1918 civil war. In Ireland the issue of dominion versus republic led to a civil war in 1922. In Germany nationalists regarded the republic as a sell-out. Greece was a 'stillborn republic' where the question of constitutional form remained profoundly divisive. Hungary settled for a kingdom without a king. In Yugoslavia the question of whether the new state was a continuation of the pre-war monarchy was fudged in the 1921 constitution. Consensus on constitutional forms thus concealed a range of nationalist conflicts, which external imposition exacerbated. In Czechoslovakia (1918 and 1920), where the Allies virtually imposed a federal constitution and prescribed local autonomy for Ruthenia, the very form of the state was an

external imposition (Mair 1928: 27). Constitutionalism could not survive. However, these constitutions sometimes contained clauses pointing to a more nationalist conception of the state, and thus a more explicit marriage between state and nation.

Time Zone Four: The Post-Communist States

The collapse of communism brought about a triple transition: to democracy, free markets and to national sovereignty. In earlier waves of democratisation new constitutions; for Italy and Germany (in 1947 and 1949) , and for Greece, Portugal and Spain(in 1975, 1976 and 1978), were about the transitions to liberal democracy. Admittedly, the Italian and Spanish constitutions addressed questions of regional autonomy, and the German constitution was named the Basic Law with a view to eventual unification. But otherwise these constitutions conformed to a strong liberal norm; they did not represent a distinct time zone of European nationalism. In much of Central and Eastern Europe however, Soviet rule had suppressed nationalism and also obliterated civil society. In the eventual transition from communism, nationalism re-emerged as the most important ideological rival to western liberalism, and became a key component of state-building.

An aspect of the East and Central European experience remarked upon by Gellner (1997: 37) is that one begins with an almost pure non-national political system and ends with an ideally pure national system. This holds for constitutions too. In zone four, after the collapse of communism, they symbolised the regaining of sovereign status. The distinction between new and old states is important, since many post-communist preambles claim a link to a past, and are explicit about the marriage of state and nation. In zone three the democratic republic had supplanted empires and monarchies, but in zone four the nation assumed that role. Both represented 'new beginnings' in repudiating authoritarian rule, but those in zone four were less sanguine about integrating minorities. The constitutions contained more detailed provisions for minority rights, and usually incorporated international legal norms in that area. The three categories of states in zone four are (1) old states: Poland, Albania, Bulgaria, Hungary and Romania; (2) restored states: the three Baltic States; and (3) states which emerged through the dissolution of supra-national federal states. The restored states were the more ethno-nationalist, passing laws reflecting the pre-eminence of the titular nationality (Rich 1996: 277). Among the rest, despite their 'thick' nationalist content, the situation on the ground was often better than the texts suggested (ibid: 288).

Constitutions may express hopes for the future, but a more powerful motivation is 'fear originating in, and related to the previous regime' (Zajo 1999: 2). One example is the prominence given to self-determination in some constitutions, such as Estonia's (1992), and in the distinction made between sovereignty and independence. The former refers to the states' competences, while the latter denotes independent statehood (Albi 1995: 25). After 1945 the USSR controlled communist states' internal sovereignty in practice, although they formally retained independent statehood (Albi 1995: 29). Accordingly, nine out of ten CEE constitutions made this distinction. Sovereignty provisions are protected by special safeguards, and at the outset there were no provisions for the transfer of powers to international organisations (Albi 1995: 25). In Estonia the requirement for referendums reflected the historical fact that the President permitted the invasion of Soviet troops in

1940 (Albi 1995: 30). That the requirement exists in all the Baltic states is linked both to the fear of Russia and the preference for the referendum inherited from zone three.

In the preambles liberal proceduralism was deemed an insufficient source of unity, so the political community looked for its 'substantive supplement' in history (Priban 2004: 415). One past (the communist past) was condemned, and another restored (Priban 2004: 428). The Czech preamble (1992, as Czechoslovakia as dissolved) expresses a purely civic conception of nationhood, proclaiming loyalty to 'all the good traditions of the ancient statehood of Czech Crown Lands' and invoking the 'renewal' of the pre-war state, which had included Slovakia. The Slovak preamble (of the same year) is more ethnic, beginning with 'We, the Slovak nation' and invoking the 'spiritual heritage' of Cyril and Methodius and the legacy of the Great Moravian Empire. The Polish 1997 preamble uses the phrase 'We the Polish Nation' and pays homage to their ancestors' struggle for independence, while trying to synthesize Catholic and secular values. The Baltic states' preambles claim continuity with the pre-war states, one using the phrase the 'reborn state of Lithuania' (1992). In the Balkans, the 1992 Yugoslav preamble mentioned the 'nation-building traditions' and the strong historical ties between Serbia and Montenegro, while the Croat 1990 constitution speaks of the 'millennial' identity of the Croat nation and the continuity of its statehood.

Pruess (1995: 8) links the process of carrying out a revolution within an existing constitution in Central Europe to the primacy given to the rule of law. He rejects (ibid: 16) the concept of a pre-constitutional potential as the driving force in constitution-making. Yet these constitutions either located sovereignty exclusively in the people, or the nation rivalled the people as the constitutional subject. Article 4 of the 1997 Polish constitution states that supreme power shall be vested in the nation (Article 2 in the 1992 'little constitution' had the same wording). The Lithuanian preamble begins by saying that the Lithuanian 'nation' had established the state many centuries ago. The Estonian preamble refers to the exercise of 'national self-determination' which established the state in 1918. Article 3 of the 1991 Slovene constitution declared that Slovenia is founded on the permanent and inalienable right of the Slovene 'nation' to self-determination. The Croat 1990 constitution defined Croatia as a 'national state', as was true for Macedonia. Romania was defined as an 'indivisible nation state' in its 1991 constitution. The preamble to the Bulgarian constitution refers to the duty to defend the 'national and state integrity' of Bulgaria.

Drawing on precedents established by their communist constitutions, some countries (Slovenia, Croatia, Macedonia – all 1991) name 'national minorities', while others (Slovakia, Poland, Hungary) refer to 'national or ethnic minorities'. The Hungarian constitution (article 68, after total re-write of the 1949 communist constitution in 1989-90) referred to minorities which 'represent a constituent part of the state'. The same term was written into the preamble of the new, more nationalist, constitution in 2011. Poland's constitution mentions 'the Polish nation – every citizen of the Republic' as the source of constitutional power. In these constitutions, the bearer of sovereignty is implicitly a multi-cultural people and minorities have special rights. In Slovakia however minorities are not part of this people, since the sovereign nation is culturally defined. The Baltic constitutions do not mention Russian-speakers or use the term national minorities; many Russians were denied automatic citizenship. Bulgaria forbids ethnic parties (1991, article 11). Despite this wide diversity, there is no longer a presumption in favour of assimilation. Minority rights usually

include non-discrimination, the right to use one's own language, fair representation, autonomy and the right to develop one's culture. Crucially, responsibility for the development of minority cultures is now usually vested in the state (in zone three this applied only in Finland).

The constitutional basis of citizenship laws have posed the question of how respect for persons was possible when the ideals of national identity and political community were foundational constitutional principles (MacCormick 1994: 79). The initial Czech laws, based on *ius soli* citizenship rights, had allowed them to deport Slovakians after the separation (Kellas 2004: 152). The Baltic language and citizenship laws reflected the dominance of the titular nationality, and denied automatic citizenship to those not born or descended from those born in the independence period. The preamble to the Croat constitution distinguishes between the Croat nation and the rest, who are citizens (Rich 1996: 277-81). The Polish constitution of 1921 had stated that sovereignty belonged to the nation, and referred to Polish citizens 'belonging to national minorities', implying that citizenship was not equivalent to membership of the Polish nation. The 1997 constitution says 'We the Polish nation, all citizens of the Republic …'. Hungary allows all Hungarians resident outside of its borders the right of return, and the constitution recognizes the responsibilities of the country for their welfare (1989-90, article 6; 2011, article D). Only the Bulgarian constitution explicitly states *ius sanguinis* as the primary basis for acquiring nationality, and Bulgarians not resident in Bulgaria have all the rights and obligations of citizenship, including the requirement to do military service (Elster, Offe and Preuss 1998: 89).

If time and space are the two fundamental variables in Gellner's framework, the thick nationalist content and the rejection of the civic model of constructing new political communities in zone four confirm its relevance. The collapse of the Soviet order led to the creation of a multi-polar system, and nationalism provided the building blocks of the system and the mechanism of integration at both the symbolic and sociological levels. The institutional and economic discontinuity these societies experienced during the transition led them to turn to 'the substantive rationality of principles and values', which allowed the constitutions anchor people in the new reality (Priban, 2004: 409). Yet the contrast between zones is not between an authentic and a sociologically naive conception of political community, since the constitutions of zone four might not survive a decade like the 1930s. Moreover, the current degree of ethnic homogeneity compared to the inter-war era is significant. None of the constitutions, however, mention Roma minorities. Where, as in the Baltics and the Balkans, more diversity exists, the marriage of state and nation is problematic. The tension between nationalism and liberalism endures, and the wider European context provides the crucial arena in which it will play out.

Time Zone Five: Globalization and the European Union

There is no fifth zone in Gellner apart from an Islamic one. This implies that the age of nationalism in Europe reached its apogee after the end of communism. Yet the existence of a fifth zone suggests that the role nationalist ideas play in constitutional life extends beyond that of marking transitions from Empire or from 'non-national' to nation-states. A central insight into why this is not the case can be gleaned from *Language and Solitude* where Gellner (1989) thought that, apart from affluence, a devolution of power to the sub-

national level could be accompanied by a shift to bodies that dealt with issues like the environment and terrorism at the supra-national level. This shift has produced a fifth zone shaped by the twin pressure put on the nation state by sub-state nationalism and the process of European integration.

This zone thus represents a clear crisis of internationalism. In this crisis the liberal argument for constitutional reform is often presented as coming 'from above', while populist challenges are presented as coming 'from below'. These distinctions only make sense in the context of European integration and globalisation. After 1989 the 'Washington consensus' had extended to the benefits of liberal democracy, free markets and international trade. Because these ideas were tied to European and also global institutions, populism was one way of breaking the elite consensus in favour of more internationalism. Beginning in the 1990s populist parties began to challenge this consensus. The financial crises, widespread Islamist terrorism and the refugee crisis of 2015 presented them with new grievances and new opportunities. Just as the broken economics exposed in 2008 spilled over into the electoral realm – bringing turbulence if not chaos to several countries – it also spilled over into the constitutional realm. The tension between constitutionalism, liberalism and nationalism now plays out in three different ways.

First, minority nationalist parties challenged existing political settlements in the UK, Spain and Belgium. These parties work within the limits of constitutional orders that were specifically designed to regulate long-standing conflicts, but with the EU crises some have begun to argue for more radical alternatives. A series of amendments to the 1830 Belgian constitution, including one that makes is 'a federal state composed of Communities and Regions', reflect increasing polarization between French-speaking Walloons and Dutch-speaking Flemish citizens. The Scottish Nationalist Party used the constitutional powers devolved to the Scottish parliament in order to demand a referendum on full independence in 2013. But the UK vote in 2016 to leave the EU turned constitutional politics into such a zero sum game, since both Scotland and Northern Ireland voted by large majorities to remain in the EU. In Spain a successful constitutional order came under threat as the Catalans demanded a Scottish-style referendum on independence. Article two of the 1978 constitution states that 'The Constitution is based on the indissoluble unity of the Spanish nation, while at the same time guarantees 'the right to self-government of the nationalities and regions of which it is composed'. While the Catalans want a referendum on full independence, Madrid argues that the constitution prohibits secession. In all three cases we see confirmation of an old truism of politics: successful resolution of one problem leads to the creation in its place, by an essentially dialectical process, of new problems, or indeed to the re-emergence of the original problem in a new guise' (Clapham 2017: 106).Obviously nationalists hoped that autonomy would provide a platform for the growth of nationalist consciousness, and for eventual separation. The Belgian, Brtish and Spanish states wagered in contrast that by allowing for the expression of identity, there would be no need for further separation. The jury is still out on the final outcomes: no state has broken up, but the challenges to the integrity of the states have escalated during the current economic crisis.

Second, the early 2000s have seen the growth of national populism in Western Europe, and various forms of 'blowback constitutionalism': constitutions which were intended to settle

issues linked to nationhood – including EU membership – have invited further constitutional challenges. In Denmark and the Netherlands populist parties that based their appeal on immigration have mobilised the losers of globalization and European integration, and called for referendums on EU membership. In Italy, Austria, Greece and the UK populists quickly extended protest politics to constitutional conflict. In Greece and the UK, nationalist populism shook the entire political system. David Cameron lost the UK referendum on EU membership by a 52 – 48 % margin in June 2016, and this 'Brexit' vote will have implications for devolved government in Scotland, the Northern Irish peace process, and even perhaps for the prerogative of the Crown. In Greece, the once-dominant PASOK and New Democracy were seriously weakened by the financial crisis, and lost the January 2015 election to populist and nationalist parties. The left wing Syriza-Anel coalition won on an anti-austerity ticket, and has since proposed a raft of constitutional changes, including much greater use of direct democracy and direct election of the President.

Third, in post-communist Europe, the 2000s have also seen a new challenges to liberal constitutional settlements – backsliding (Platner and Diamond 2007). In some cases this involves authoritarian practices hollowing out democracy, resulting in considerable differences between formal institutions and the informal exercise of power (Sedelmeier 2014). Examples include limits on media freedom, restrictions on the power of independent regulators, and the politicisation of the judiciary and central banks. The EU's tools for suspending wayward members is very limited. Consequently, the tension between liberalism and nationalism plays out within the parameters of EU membership. Gati (2007) identified 'backsliding' in the early 2000s in Hungary Poland, Slovakia and the Czech Republic: all four Central European cases. Hungary acquired a new constitution in 2011, and three years later the prime minister advocated a new model of 'illiberal democracy'. In Romania, too, the government's failure to comply with the judgments of the constitutional court in the conflict between president Traian Băsescu and prime minister Victor Ponta in 2012, attracted criticism from the EU (Reding 2013). In Poland in 2015, the new national populist Law and Justice government swiftly replaced its predecessor's constitutional court appointees and restricted court's power, earning criticism from the European Commission and the European Parliament (2016) for failing to uphold the rule of law. All three cases involved an open clash between liberal and nationalist values.

Five Patterns
Our conclusion is that the constitutional relationship between state and nation differs systematically across the zones, and that the importance of national identity has increased over time. The first constitutions emerged in states where a degree of constitutionalism and limited government had been introduced by codification of laws and rights, and in states which boundaries were comparatively well-established. No great constitutional changes were necessary during the age of nationalism. The constitutions of zone two were written in a context where liberalism and nationalism joined forces, but were not explicitly nationalist in content. After 1918, the Versailles settlements were followed by a republican approach to the nationalities question. Since both the states and the nations were new, nationalist ideas took on more of a role in marking a break with the past. Despite the supposed 'end of history' in 1989, constitutional politics in zone four and five have involved much more explicit conflicts about national identity. National identity and citizenship became debated

in 'thick' national terms. European integration first provided liberal parameters for this debate, but now the EU itself has become a new target for those with nationalist agendas.

Unsurprisingly, the most enduring constitutions have been those that are most flexible, both in matters of institutional arrangements and sources of sovereignty. In zone one, the Nordic states and the UK have been the most stable, but even here constitutional politics has involved questions of national identity at some point, and the compatibility of national sovereignty with European integration became challenged in most of these states. In zone two, most of the alliances between national and liberalist projects proved unsustainable, whether because of conflict with non-nationalist monarchs or because they came up against 'thicker' nationalist projects later on. In zone three 'blowback' politics soon trumped liberal arrangements, but not in a uniform pattern. In zone four the contest between liberal cosmopolitan parties and Christian nationals has been a significant element of party politics in almost every state, but the result have been very different in such states. The very existence of a fifth zone suggests that the constitutional outcomes of zone four remain to be seen.

Yet if Gellner's zones capture these patterns, the question is whether his theory of nationalism explains them. For Gellner the marriage of state and nation has been produced by the necessary marriage of state and culture, and the fate of the polities determined by the congruence, or lack of it, between the two. Yet the international context and domestic political contests determine the constitutional outcomes. We have therefore added two factors to Gellner's; first, the domestic political contests that shaped constitutions; and second the extent to which their content was shaped by foreign constitutions, the need for Great Power approval, or the requirements of international treaties and organisations. In zone one the role that the Great Powers played in vetting regime-change helped ensure a degree of predictability. In zone two the 'marriage' required only the states to be built. In zone three, the Versailles settlement provides a better guide to constitutional content than domestic politics, but party political contests between 'thick' and 'thin' nationalists later undermined many of the constitutions. Likewise, the triple transitions mark a fourth time zone, where the broad outlines of potential conflicts are comparable, but the main source of common content was what is required by the Council of Europe and the European Union. As these institutions became less authoritative, constitutional orders became less liberal in zone five. Although some national constitutions, such as that of the US, remain influential, the degree to which constitutions reflect such international influences has increased since zone one.

One issue that complicates Gellner's approach is the role organised religion has played in the politics of homogeneity. This issue would require its own chapter, but the role played by religion does not conform to the patterns of his time zones. Contemporary European states had, as potential sources of inspiration, three older constitutions that had provided for religious freedom: Belgium (1931), Switzerland (1874) and the United States (1787). Some European countries followed suit by advancing the concept of religious freedom in their constitutions. Examples were Czechoslovakia (1920), the Kingdom of Serbs Croats and Slovenes (1921), the Soviet Union (1918) and the Weimar Republic (1919). Notably these states were multi-confessional at the time of their inception. In contrast, the constitutions of Denmark (1915), Norway (1814), and Sweden (1809) provided for a state religion in

societies that were very homogenous. A later trend, begun by Poland in 1921 was for constitutions to explicitly identify the nation with the majority (Catholic) religion, and to reflect Catholic social teaching. Austria (1934), Ireland (1937) Portugal (1933) and Spain (1938-1978) are also examples. Gellner's time zones do not capture this aspect of the marriage of state and nation. It ignores religious divisions, and no one approach to religious homogeneity predominates in each of the first three zones. Gellner's schema was inspired by the Central European experience, in which the gradual dominance of the nationalist principle emerged through specific eras. A different approach to Europe's political geography would highlight the importance of inherited religious differences - older critical junctures - to the politics of homogeneity, especially in the more peripheral parts of Europe.

In terms of spatial patterns nationalism originated in western Europe, travelled east and south, but now challenges the territorial integrity of Belgium, Spain and the UK, states largely formed before the age of nationalism. We see no diminution in the importance of nationalism in any part of Europe; the old tension between liberalism and nationalism has just found a new Europe-wide context. Nonetheless the relationship between liberalism and nationalism continues to vary across states. Some democracies saw nationalist politics increase in times of plenty, even if support for new populist parties of the right (e.g. the Sweden Democrats, France's national Front and the Party of Freedom in the Netherlands) and the left (the Socialist Party in the Netherlands and Italy's Five Star Movement) have grown with the financial crisis. But, mostly, they did so without new thinking about constitutions. In contrast, 'democratic backsliding' involves not only a rebellion against liberal elites, but opposition to the international regime that the new democratic elites and constitutions were part of. The Hungarian changes began in 2010, when Viktor Orbán's Fidesz won the election and achieved the parliamentary seats required s to change the constitution. His government quickly proved highly critical of the EU, of international capitalism, of the supposed prevalence of the former communist elite, and of independent media, agencies and the court system – all in the name of the Christian Hungarian nation and its rights to self-determination. A new constitution was adopted a year later

Hall (2003) reflected that Gellner's theory does not account for the role of the state and the international factors which determine when homogenisation policies of various kinds are pursued. There is a fundamental difference between the sociology of the state before the nation, and the state-building projects that run into the problem of mass nationalism. This difference is manifest in the constitutions. In the first two zones liberalism was in the ascendant, and those written in zone one generally survived the clash between liberalism and nationalism. In zone two liberal constitutions triumphed in Belgium, Italy, and Switzerland but failed elsewhere. In zone three most new constitutions did not survive the clash with nationalism. The jury is still out on the post-communist cases, but in zone five liberalism has increasingly been identified with European integration. The dominance of the nation-state formula has emerged gradually. The crucial break with the pre-nationalist world was with the establishment of constitutional monarchies, where the sovereign, unlike an Emperor, is made the object of contestation on behalf of non-state actors. Whether conceived in terms of parliament, opposition groups or social strata, the language of rights and liberties can only develop in a system where the state is separable from the ruler, and will inevitably concern claims on behalf of the people. Then in the late Nineteenth Century, democratization comes to denote inclusion and recognition rather than rights and

guarantees of autonomy. This differentiates the liberal from the republican and nationalist approaches in zones three and four. Finally, the nationalist constitutional formula becomes predominant in zone four, after both the liberal and civic republican constitutions had failed to create a basis for political community in earlier zones.

Time zone five is the product of a new polarity. All the constitutions drafted during the tenure of the Council of Europe assumed that integration at the international and domestic levels would complement each other. Now it seems to many a case of either or, and the comparative advantage of nationalists in this argument is that the case for more integration globally is seen as coming from 'above' and being technocratic. The Portuguese case exemplifies the pressures European integration and globalisation are now placing on national constitutions. Portugal went through a prolonged transition to democracy between 1974 and the dissolution of the Council of the Revolution in 1982, the legacy of which was consistent support for moderate parties, a strong aversion against radicalism and support for EU policies. Yet in October 2015, when the ruling conservatives lost their majority, the prospect of a leftist government – of the radical Left Bloc and the Communists - led President Cavaco Silva to use his constitutional powers to try to block their coming to power. Silva spoke of the need to block 'radical change' (in effect a departure from the Commission's fiscal austerity) by 'anti-European forces'. This resulted in the country's biggest constitutional crisis since 1982.

Gellner did not see the potential for conflict produced by the emergence of globalization and the pressure put on the nation state by sub-state nationalism and European integration. In *Conditions of Liberty* (1994: 125-128) he argued that, after communism, nationalism would be strongest in the east because of the absence of civil society. Yet in both eastern and western Europe, the constitution is the arena in which these two pressures intersect. Yet Gellner was not wrong to foresee this as a period of peace. The return of nationalist constitutionalism has not needed *ethnic* conflict - or problems of *ethnic* coexistence - to flourish. It seems that there is a marriage between nation and state in constitutional terms, because these documents exists at the intersection point between pressures for regional integration and those for devolution: in this conflict no one is arguing for the homogenization policies of the third time zone. So while we do not see *horizontal* conflict between ethnic groups, there is a *vertical* axis to nationalist challenges that is about protecting a space for values associated with the nation state against elites and institutions that are situated above the nation state. The rise of radical right and populist parties also raises the spectre of homogenisation policies aimed at immigrants, rather than against 'national minorities'. When the EU responded to the refugee crisis of 2015 by establishing a quota system, the Hungarian and Polish governments justified their non-compliance as a defence of national identity in the face of misguided liberalism and EU imperialism. It may be that, because of the effectivenesss of past homogenization policies, there is actually less - in terms of *ethnic* differences - to tolerate on the ground. Yet the absence of ethnic conflict may be due to the very constitutional systems that have invited so many challenges. The Spanish system of *autonomía* may frustrate Catalan nationalists, but has largely pacified the Basque country. The UK's recognition of a rough equality between its constituent nations and the state in respect of constitutional issues is one reason for the absence of polarisation (Keating 2015). Belgium's system of language rights and federalism can be read as a source of polarisation, or as a system of checks and balances that explains the absence of ethnic

riots and violence (Adams 2014: 301). Survey evidence shows that European minorities do not see independence in absolutist terms (as being fully in or out of the existing state), an outlook encouraged by the EU constitutional framework (Keating 2015). The European tradition of recognising ethnic and linguistic differences preceded the EEC, and forms part of a repertoire of institutional responses to cultural pluralism that may be responsible for diminishing the amount of ethnic conflict worldwide (Cederman et al, forthcoming).

Conclusion

Constitution-making is usually generic, reflecting modular forms and common international pressures. This allows the European experience to be analysed in terms of zones, and can highlight exceptional cases: the long lasting Finnish constitution (replaced only in 2000), or the survival of the republican model in France. Viewing individual constitutions in their zones also allows consideration of the impact of liberalism. The Greek constitutional order has been unstable, but the liberal legacy from their struggles with the Ottoman Empire in zone two is still important. Ultimately, a large part of modern European constitutionalism is about liberalism and no democratic constitution can depart fully from its values. On the one hand, liberalism provided the central impetus for constitutional challenges to the state in zones one and two. On the other, the nationalist dimension to European constitutional history inevitably emerges with the rise of the people as the source of sovereignty , which makes the tension with liberalism pivotal. One cannot see this conflict going away; the tension between liberalism and nationalism has just found a new political context. The original (1983) Gellner clung to his view that it was the earliest stages of industrialism - with people at the gate of the new world, 'but not yet inside it' - that will have produced the worst excesses of nationalism (1983: 113). His forecast was that affluence, a narrower gap between rich and poor, and a convergence in life styles across borders, would deprive nationalist conflicts of their sharpness (ibid: 119-121). Nationalism would persist, 'in a milder, less virulent form' (ibid). However, in *Language and Solitude* he saw things differently. The anthropologist Bronislaw Malinowski was praised in that book for his combination of 'cultural pluralist nationalism' with 'political internationalism' (1998: 188). Malinowski's own origins in Hapsburg Galicia, where the empire allowed the flourishing of Polish culture while not allowing separatism, are no doubt significant (Kumar 2015: 79). This later Gellner (1998: 76, 188) also wanted 'culture to be protected, but politics to be restrained by higher authority' (ibid 188)). And this combination was now desirable because of the need to protect the world from environmental disaster, nuclear arms, and global terrorism. The agencies dealing with such issues will be supra-national; those dealing with schooling or social welfare may become sub-ethnic. In short, effective political units 'will be either larger or smaller than national units based on similarities of high culture'. Gellner expressed doubts about whether such a programme could be enforced on 'warring ethnic factions: he believed nonetheless, that 'this is our only hope' (1998: 144). Yet we have shown that it is the very attempt 'to deprive political systems of sovereignty – 'while allowing their absolute freedom of culture' (1998: 144) – that has put European constitutional orders under such strain, and guaranteed a future role for nationalism in the constitutional history of modern Europe.

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