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# Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe

*Andras Sajo*<sup>†</sup>

The greatest adversary of the rights of nationality is the modern theory of nationality. By making the State and the nation commensurate with each other in theory, it reduces practically to a subject condition all other nationalities that may be within the boundary. It cannot admit them to an equality with the ruling nation which constitutes the State, because the State would then cease to be national . . . <sup>1</sup>

## I. INTRODUCTION: THE EMERGENCE AND IMPORTANCE OF NATIONALISM IN EASTERN EUROPE<sup>2</sup>

This paper examines some of the problems of constitutional protection for national minorities in post-communist Eastern Europe. It argues that nationalism is an inevitable factor in the creation of the post-communist state. Post-communist states cannot escape becoming nation-states because the community and homogeneity necessary for the functioning of a state will be based on ethnic community. This paper will show that such developments are inevitable, and that nationalist elements must be considered when shaping constitutional arrangements and democracy in these countries. Only through recognition can nation-

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<sup>1</sup> Lord Acton, *Essays in the Liberal Interpretation of History: Selected Papers* 157 (Chicago, 1967).

<sup>2</sup> Except as otherwise stated, "Eastern Europe" includes most of the former European part of the Soviet Union (Russia, the Baltic states, Ukraine, Byelorussia, Moldova) and the European satellites of the Soviet Union (Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria) as well as Albania and the republics of the former Yugoslavia (Croatia, Slovenia, Serbia and Montenegro, Bosnia-Herzegovina, Macedonia).

alism be domesticated. However, in most post-communist states the presence of national minorities is still significant. Except in Poland, the Czech Republic, Hungary and Albania, the presence of national minorities varies between 10 and 55 per cent.<sup>3</sup> Thus, recognizing the needs and sensitivities of nationalism leads to a more reflexive and more realistic system for the protection of national minorities.

#### A. Functions of Nationalism in Nation-state Building

Reading the Western press, one gets the impression that Westerners view East European nation-state building with contempt. They believe that history dominated by nationalism is illustrated in the best case scenario by the 1870 German-French War and in the worst case scenario by the gas chambers of Auschwitz. Western critics must remember that nationalists are only beginning to make history in Eastern Europe. The undeniable irrationality and bloody xenophobia of nationalist politicians obscure the positive functions nationalism can and does play in the region.<sup>4</sup> For example, nationalism builds nation-states even while it excludes minorities. West Europeans, accustomed to assimilationist nationalism, reject the virulent strains of East European nationalism.<sup>5</sup> Assimilationist nationalism allows non-

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<sup>3</sup> Hungary and Albania have no sizeable minorities (although Gypsies present serious social problems). Hungarians (in Slovakia and Romania) and Albanian minorities (in Kosovo-Serbia and in Macedonia) make the nationalities issue extremely important for these countries.

<sup>4</sup> Nationalism and nation-building cannot be discussed simply in metaphoric terms such as "virus" or *idola tribum*. For a criticism of similar approaches see Paula Franklin Lytle, *U.S. Policy Toward the Demise of Yugoslavia: The "Virus of Nationalism"*, 6 E Eur Pol & Societies 303 (1992). Lytle aptly describes the terrible consequences of the metaphoric approach of the contemptuous Western foreign policies toward Yugoslavia and her successor states.

<sup>5</sup> European nationalism seems irrational to Americans because assimilation by direct state intervention and initiative runs contrary to the American values of tolerance and minimal government. The difference between American constitutional nationalism and European romantic ("blood and soil") nationalism is evidenced by comparing their contrasting oaths of allegiance. In America, citizens pledge allegiance to the Constitution whereas in Eastern Europe, citizens pledge allegiance to the Nation, to territorial integrity and to the Constitution, in varying order depending upon the country. For example, "[t]o obtain naturalization, an alien does not pledge allegiance to the American people or to the land mass of the United States. Rather, she must promise to "support and defend the Constitution." T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const Comm 9, 13 (1990). The Polish President, on the other hand, solemnly swears in his oath of office not only to remain faithful to the Constitution, but also "to firmly guard the dignity of the Nation, the independence and security of the State. . . ." Polish Small Const, Art 31. Similar allegiance to the people and to territorial integrity is

national citizens to share the national community under the condition that they give up their own national culture, language, and customs. Virulent nationalism, on the other hand, fears assimilation because the 'aliens' will corrupt the virtue of the nation. Therefore they are inclined to expel the aliens (commonly known as "ethnic cleansing").

Nation-state building is still necessary even in today's world, which is allegedly moving toward supranational formations. Western Europe is not yet ready to assimilate East Central Europe.<sup>6</sup> Constitution-making and constitutionalism in Eastern Europe should be understood as part of nation-state building. A constitution, after all, is vital to the modern state: a nation must have a constitution to control and limit the state's power. Historically, constitutions do not curtail the state's sovereign nature; on the contrary, they affirm and protect the state's sovereignty. The problem with nationalism is that certain virulent strains pose a threat to modern constitutionalism because they do not respect any restraints on sovereignty.

Most research on East European politics and constitutional development ignores nationalism as a modernizing element in history. The French nationalism of 1789 and the liberalism of the first half of the 19th century advocated "universal" rights at a time when countries often brutally repressed or denied the individuality of national minorities.<sup>7</sup> Although conditions today are fundamentally different from those of the 19th century, this new nationalism may become increasingly mild if Western Europe would willingly admit and integrate East European countries.

By excluding East European countries, Western Europe isolates the entire region, not just the ardent nationalists. The forces of nationalism may prevail while Eastern Europe waits for admission into Europe. By constitutionalizing their "narrative,"

found in the oath of office taken by the Romanian President. Romanian Const, Art 82. Similarly, the French President "shall be the protector of the independence of the nation, of the integrity of its territory." French Const, Art 5.

<sup>6</sup> "Whatever they now say, the architects and advocates of a unified Europe at the Maastricht never wanted to include a whole group of have-not nations from the East. . . ." Tony Judt, *The Past is Another Country: Myth and Memory in Postwar Europe*, 121 Daedalus 4, 83, 110 (Fall 1992).

<sup>7</sup> "It was in France, . . . with these gestures and none other that universal principles were proclaimed, principles on which the Nation—a particular nation—was based. What was abstract in those principles gave them a new lease on life: 'Here begins the country of liberty.' The French nation with one effort amassed capital for two purposes: abstraction and exportation." Pierre Nora, *Nation*, in Francois Furet and Mona Ozouf, eds, *A Critical Dictionary of the French Revolution* 748 (Harvard, 1989).

or vision, of nation, nationalists may affect society in the long term by creating a xenophobic official sphere, which will in turn create a xenophobic society.<sup>8</sup>

## B. Nationalism in Eastern Europe

Nationalism has existed in Eastern Europe as an established and influential ideology. Tradition played a major role in these societies which were and to some extent still are "traditional," in the sense that they are not fully governed by impersonal market forces. In a society guided by tradition, economic and other transactions are guided by inherited patterns. "Silent" nationalism expressed in the form of customs such as the singing of forbidden irredentist songs in private settings was the least risky way of defying the oppressors. Nationalism also offered the simplest escape for communist leaders at all levels and in all countries. Those leaders emerged as "heroes" of post-last minute resistance to Soviet oppression. For example, President Kravchouk of the Ukraine originally ran against the nationalist candidates in the first relatively free elections. He changed his views on Ukrainian independence to some extent during the campaign. Presently, he encourages the use of Ukrainian language in all official communications.

Nationalism is already a prominent presence in Eastern Europe. Democracy and constitutionalism, on the other hand, lag far behind in modern development and a market economy simply does not exist. Nevertheless, all conditions being equal, the reliance on nationalism in the transition to democracy is inevitable because there is no other organizing idea. Under specific conditions, nationalism may allow further democratization. After all, nationalism played an important role in the collapse of communism. Helene Carrere D'Encausse argued that

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<sup>8</sup> The views of virulent nationalists are quite contrary to those of assimilationist nationalists. Virulent nationalists consider assimilation a predominantly Jewish "trick" used to obtain political control and to corrupt the moral values and genetic "purity" of the nation. Virulent nationalists reject assimilation, although they frequently propose "segregated identity" as a possibility. Gypsies, for example, would be entitled to fully develop their minority identity and culture as long as they stay within their ghettos, which the state euphemistically refers to as "settlements." Virulent nationalists often deny citizenship based upon an individual's ethnic origins. See, for example, Vladimir Tismaneanu and Mircea Mihaies, *Infamy Restored: Nationalism in Romania*, *Eur Rptr* 1, 25 (Jan 1992); Cynthia Kaplan, *Estonia: A plural society on the road to independence* in Ian Bremmer and Ray Taras, eds, *Nations & Politics in the Soviet Successor States* 214-15 (Cambridge, 1993).

The Nation, which Lenin thought he had exorcised, has returned; it is wreaking vengeance for being ignored. It has proved this by destroying communism, for its collapse came about through the rebellion of the nations.<sup>9</sup>

The collapse of communism followed divergent paths in the various East European countries. There are few ways to build socialism, but there are many ways to dismantle it. Even if one views nationalism as the principal political force that emerged to fill the vacuum created by the communist collapse, or that nationalism represents the survival of core elements of the previous regime (statism, authoritarianism, and privilege), its importance is undeniable.

Specific historical circumstances illustrate the power of nationalism. Nationalism was deeply ingrained in the region's culture and was an easily available resource. Jan Urban gives the following psychological explanation:

[After communism] we are left with atomized societies which do not believe in anything and which have no enemy to fear. Generations of the past lived on hatred toward a great, unknown enemy, but this enemy has vanished, along with the fear. What has remained is the memory of the big hatred. What has remained is the inability to search for and find positive connections with those outside ourselves. There is a disease called suspicion, xenophobia/nationalism."<sup>10</sup>

On the other hand, nationalism seemed to be the only legitimation for the new leaders, both former communists and anti-communists, because resistance to communism (i.e. to Soviet rule) was primarily under the flag of nationalism. However, this resistance was limited and in many countries only occasionally visible.

Nevertheless, nationalism was the most useful mobilizing ideology because it automatically guaranteed majority support and therefore legitimated power in the first democratic electoral processes.<sup>11</sup> After the initial period of enthusiasm wears off, more fundamental issues will play a crucial role in determining

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<sup>9</sup> Helene Carrere d'Encausse, *The End of the Soviet Empire* 270 (Basic Books, 1993).

<sup>10</sup> Jan Urban, *Nationalism as a Totalitarian Ideology*, 58 *Social Research* 775, 776 (1991).

<sup>11</sup> As John Breuilly argued, one cannot have nationalist politics if all players are simply nationalists. If all parties promise the same thing, there can be no competition. John Breuilly, *Nationalism and the State* 380-84 (Chicago, 1985).

people's choices. Full employment will become more attractive than 24 hours of folk music on the radio or the reintroduction of "traditional values" in education. But for the time being, nationalism may become the predominant ideology because of its long history, the lack of self confidence of post-communist "citizens," and its natural attractiveness as a popular political ideology due to its simple, repetitive and concrete nature.<sup>12</sup> As Jadwiga Staniskis affirmed: "As long as the economic foundations for a genuine civil society do not exist, the massive political mobilization of the population is only possible along nationalist or fundamentalist lines."<sup>13</sup>

Of course, once a political elite gains control over the state, the elite can control social institutions without acting and thereby diminish the need for nationalism. The elite will then turn to constitutionalism. On the other hand, the many actors who are dissatisfied with the emerging arrangement will not hesitate to rely on nationalist terms to mobilize against those in power. For example, the opposition will insist that the genuine uncorrupted masses carry out a new revolution against those in power who betrayed the nation.

To summarize, post-communist societies face a most uncomfortable situation. East European countries are required to simultaneously accomplish tasks that other Western societies dealt with one at a time. According to Claus Offe, these countries must solve the territorial issue (i.e., create undisputed and economically feasible borders), design a working economic and property order, and create a democracy.<sup>14</sup> The first task is to build a nation-state. Next, Eastern Europe must create a new economic order through implementation of a market economy because it is the most efficient model of economic organization, especially under present world economic conditions. Finally, democracy requires a "constitutionally tamed exercise of authority."<sup>15</sup>

The specific nationalist element present in the solution to the territorial problem fundamentally impacts democracy and the economy. It particularly affects constitutionalism, including the

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<sup>12</sup> Id at 344. Simple and repetitive ideologies are easier to accept for the politically uneducated.

<sup>13</sup> Claus Offe, *Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe*, 58 *Social Research* 865, 876 (1991) (quoting Jadwiga Staniskis, *Dilemmata der Demokratie in Osteuropa* in R. Deppe et al, *Demokratischer Umbruch in Osteuropa* 326 (Suhrkamp, 1991)).

<sup>14</sup> Offe, 58 *Social Research* at 872 (cited in note 13).

<sup>15</sup> Id.

protection of national minorities.<sup>16</sup> Social transformation cannot be understood without looking at the ongoing state-building by nationalist forces.

Under communism, the state was the strongest social organization and the exclusive provider of social services. The state also employed an incredible army of bureaucrats. Because of the legacy of communist etatism, East European constitutions are currently being written for states that possess tremendous power resulting from their control over property and services and the lack of institutional or individual initiatives to limit such power. The nationalist desires a strong state because only a strong state can protect the new country against its imaginary enemies, and only in a strong state will his power match that of his communist predecessors.

Drafting a constitution in nationalist terms could lead to denial of separation of powers and limitations on fundamental civil and political rights.<sup>17</sup> These limitations stem from the belief held by most nationalists that the Nation is in danger and that the state savior needs emergency powers to preserve it. Elster hypothesizes that a major obstacle to constitutionalism is that "[t]he future of so many Eastern European countries may prove to be a succession of such emergencies, in which constitutional self-binding might be disastrous."<sup>18</sup> If declaring various states of emergencies becomes a routine matter, then the limits on power that emerge in the constitutional system will be dysfunctional. Complicated mechanisms of a political system based on self-constraint may delay decision-making and therefore emergencies will be handled inefficiently.

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<sup>16</sup> The nation-state seems to be a historical and logical necessity for new democracies. Breuilly, *Nationalism and the State* at 349 (cited in note 11). The fact that constitutions are often written at the climax of nationalist influence may seriously impact constitutionalism. See notes 27-28 and accompanying text.

<sup>17</sup> The nationalist exaltation of sovereignty as a necessary means against the "enemy" inevitably recalls the ideas of Carl Schmitt. See generally, Joseph W. Beudersky, *Carl Schmitt: Theorist for the Reich* (Princeton, 1983). Schmitt's advocacy of unlimited power concentrated in the hands of the Führer may well become the future point of orientation for East European theoreticians and practitioners of despotism. Paul Edward Gottfried, *Carl Schmitt: Politics and Theory* 1-5 (Greenwood, 1990) (discussing renewed popularity of Schmitt's ideas among European intellectuals).

<sup>18</sup> Jon Elster, *Constitutionalism in Eastern Europe*, 58 U Chi L Rev 447, 482 (1991).



## II. POSTCOLONIAL STATES IN EASTERN EUROPE

In many respects, emerging East European countries are post-colonial states in the process of nation-building. To some extent, all communist countries existed in a colonial system. The Soviet Union was a colonial power, the only one to turn its own heartland, Russia, into its colony. Russians were denied their national culture and identity just like other peoples.<sup>19</sup> The satellite states maintained their formal independence, sometimes within “unnatural” boundaries. Although people in a satellite state may have felt as though they were living in an occupied country, it is more proper to describe the situation as a “colony.” The system was not based on daily intimidation by a foreign military presence. Instead, order was maintained by local police and by the understandable opportunism of the “natives” who avoided open resistance and tried to make use of the system as it existed.

Whatever future attends the post-communist state,

. . . let us also remember that the nation-state is, for better or worse, the political institution which has most efficacy and legitimacy in the world as it is. Modernity reproduces itself in nation-states, there are few signs of it happening otherwise. To reject nationalism absolutely or to refuse to discriminate between nationalisms is to accede to a way of thought by which intellectuals—especially postcolonial intellectuals—cut themselves off from effective political action.<sup>20</sup>

The key term in this quotation is “post-colonial.”<sup>21</sup> The post-colonial nature of the East European nationalists and state-builders is evidenced in their constitutions and constitutional politics.

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<sup>19</sup> See Carrere d'Encausse, *The End of the Soviet Empire* at 177 (cited in note 9).

<sup>20</sup> Simon During, *Literature—Nationalism's Other? The case for Revision*, in Homi K. Bhabha, ed, *Nation and Narration* 139 (Routledge, 1990).

<sup>21</sup> Analysts of post-communist states are often inclined to look at transitions to democracy in Spain, Portugal and sometimes Latin America. See, for example, Bruce Ackerman, *The Future of Liberal Revolution* 38, 47, 119 (Yale, 1992). Spain has historically been a constant point of reference for Hungary, although not for nationalists who voted against the Monument of Conciliation. The closest parallel to Eastern Europe, however, is not Spain but post-colonial Africa. Spain has been a model for Eastern Europe partly because the Spanish transition took place peacefully after a long dictatorship in a less developed country and resulted in successful economic integration into Western Europe. The post-colonial African experience is a more accurate parallel for Eastern Europe (especially the former Soviet Union), because in Africa as well as in Eastern Europe there was no homogeneous nation state and no national bourgeois class. For both countries, the chances of integration in the first world economy are dim.

Contrary to the thinking in Eastern Europe, the process of drafting a Constitution in countries converting to democracy is not a form of nation-state building. For example, the Spanish constitution, which was considered at the Hungarian Round-Table Talks of 1989 and in the daily press to be a model of transition to democracy in Europe, denied autonomy to Catalonians, Basques, and many smaller minorities. The integration of Spain into Western Europe and the diminishing importance of nationalism for the Spanish majority under stable socio-economic conditions allowed the national minority situation to "normalize"; that is, to create a system of rights which enables the minorities to maintain a sufficient level of autonomy.<sup>22</sup>

In addition to the problems of converting to democracy<sup>23</sup> and ordinary nationalism, these countries face the burden of emerging from the diffuse empire of the Soviet Union. This diffuse empire created a special problem for national identity building. In the Soviet Union, Stalin deliberately mixed ethnic groups by forced mass relocation (e.g. Tartars and Volga Germans), resettlement by Russians (in the Baltics and in Kazakhstan) and the addition of new territories to previously ethnically homogeneous republics which were populated by other ethnic groups.<sup>24</sup> The possible consequences of such mixture were known already in the 19th century:

Nothing seems more obviously opposed to the purposes of government than the unnatural enlargement of states, the wild mixing together of different human species and nations under one scepter.<sup>25</sup>

Unfortunately this "wild mixing" still persists. Stalin's nationality policy is the oldest of his surviving achievements.

In other countries, "wild mixing" took place much earlier in history. Serbs were settled in the Krajina by the Habsburgs in the 18th century. Hungarian szeklers were sent to defend the

<sup>22</sup> See Davydd J. Greenwood, *Castilians, Basques, and Andalusians: An Historical Comparison of Nationalism, "True" Ethnicity, and "False" Ethnicity*, in Paul Brass, ed, *Ethnic Groups and the State* 204, 214-15 (Barnes and Noble, 1985).

<sup>23</sup> See Samuel P. Huntington, *How Countries Democratize*, 106 *Pol Science Q* 579 (1992).

<sup>24</sup> Victor Zaslavsky, *Success and Collapse: Traditional Soviet Nationality Policy* in Bremmer and Taras, eds, *Nations and Politics in the Soviet Successor States* at 33 (cited in 8).

<sup>25</sup> Breuille, *Nationalism and the State* at 339 (quoting Johann Gottfried Herder) (cited in note 11).

medieval Hungarian borders several hundred years ago. Germans and Jews periodically relocated—sometimes forcefully, sometimes voluntarily—to all areas in the region during the last eight hundred years.

Nationalists asserted their independence in nationalist terms. Nationalism in this respect was neither a pure denial of pragmatism nor a pure rebirth of ethnocentrism. According to John Breuilly, this kind of nationalism is a form of politics, a way of mobilizing to achieve control over state power.<sup>26</sup> Nationalism in Eastern Europe is both state-creating and state-controlling because it uses politics to obtain and maintain control over the state. Examples of this include the political development of Slovakia, the post-Yugoslav state, Byelorussia, Georgia, and the Ukraine.

Secession as dictated by nationalism may lead the way out of the irrationality institutionalized by the Soviet Empire. Communist domination was based on irrationality since only individual initiative and economic efficiency could guarantee the maintenance of power of the Communist Party leaders. However, the existence of a national minority or a “different” group can arouse suspicion in people whose identity is based on a history of suffering. Minorities and even the majority may reasonably choose to opt out of this nightmare. Breaking the old “unions” and creating a new nation-state is the rational choice when no nation, republic or country can tell whether it is a loser or a winner in the complicated and arbitrary system of exchanges. The Soviet Empire destroyed the trust among nations such that it was perhaps easier to build new relations between new autonomous nations from the ground up.

Nationalism as a means of state building and achieving political power impacts the constitutional politics regarding minorities. For example, some of the new East European states declared the majority language as the official language without granting clear language-use rights to minorities.<sup>27</sup> Also, during the period of constitution-making, the Baltic states denied or restricted citizenship to “alien residents.”<sup>28</sup>

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<sup>26</sup> Id at 300-01.

<sup>27</sup> Language-use rights include the right to use one's native language in public communications, including education, and the right to petition the authorities in that language. Sometimes authorities are expected to answer such requests in the language of the minority. See Note, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights* 32 Va J Intl L 515, 516, 563 (1992).

<sup>28</sup> Estonia granted citizenship to domiciled non-Estonian residents. Those who were

Although they may be inevitable in the early stages of state-building, all these developments may result in or at least perpetuate traditionalism based on state-dictated communal values and denial of individuality. Exclusion of certain ethnic groups or at least denial of their autonomous identity may follow such a concept of statehood. A nation-state is a combination of a kind of nationalist exclusion algorithm (a set of rules which automatically determine who is to be excluded) and a state. However, integration into or increased dependence on Europe (a movement which is not yet widely accepted in constitutional interpretation and everyday politics) may change the course of nationalism. The strongly nationalist nation-state, which insists on the sanctity of a nationally homogeneous state, is a functional though unfortunate necessity in this part of the world. However, nationalism may simply be indispensable when creating homogeneity, a social characteristic which is considered essential to a modern constitutional state.<sup>29</sup>

### III. PROBLEMS AND POSSIBILITIES OF PROTECTING NATIONAL MINORITIES IN A NATIONALIST STATE

Understanding the emerging East European constitutions as acts of post-colonial nation-state building does not mean that the process justifies the denial of fundamental rights or the mistreatment or neglect of minorities. Although no emerging constitution accepts the idea of discrimination among citizens, some East European states have denied citizenship to their minorities. In Estonia and Latvia, the legal status of Russians is particularly delicate. Granting citizenship to Russians is often considered a concession to former oppressors and a recognition of communist-Russian ethnic imperialism.

In a number of cases, states simultaneously deny residence rights along with citizenship, and in the most extreme cases ethnic cleansing occurs. If their citizenship is recognized, national minorities are legally equal to their fellow citizens. However, national minorities do not desire total assimilation.

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residents at the time of the promulgation of the law received privileged treatment. Two years residence from the entry into force is enough to qualify for citizenship. Practically, however, the Russian residents were excluded from the decisive first elections and from participation in constitution-making. Tammu Tammerk, *Shaking off the Soviet Legacy*, E Eur Rptr 40, 41 (Jan 1992).

<sup>29</sup> Ulrich K. Preuss, *The Politics of Constitution Making: Transforming Politics into Constitutions*, 13 L & Policy 107, 119 (1991).

## A. National Identity—The Nationalist Concept Extended to Minority Nations

In many respects equality for national minorities implies the right to be different.<sup>30</sup> This notion was recognized in international law in the Paris peace treaties following World War I. In an advisory opinion, the Permanent Court of International Justice recognized that the treaties were designed to preserve the characteristics of national and other minorities.<sup>31</sup> In order to attain this objective the Court found it necessary

[t]o ensure that nationals belonging to racial, religious or linguistic minorities . . . be placed in every respect on a footing of perfect equality with the other nationals of the State. . . . to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.<sup>32</sup>

Protection of national minority identities presents specific problems in the current transition to democracy from communism. The national composition of East European countries and of different territories within the countries is particularly difficult to handle. Members of the national minorities often do not live in discrete communities, rendering territorial autonomy impossible. To further complicate matters, there are minorities within minorities.<sup>33</sup> Some East European national minorities have national identity problems themselves.<sup>34</sup>

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<sup>30</sup> Tibor Varady, *Collective Minority Rights and Problems in Their Legal Protection: The Example of Yugoslavia*, 6 E Eur Pol & Societies 260, 273 (1992).

<sup>31</sup> *Minority Schools in Albania*, Advisory Opinion of Apr 6, 1935, Series A/B n 64.

<sup>32</sup> *Id* at 17.

<sup>33</sup> National "identity" is changing in the process of defining the positions of the various national groups under the constitution. For an interesting analysis of the impact of political conflict and negotiation on national identity, see Paul R. Brass, ed, *Ethnic Groups and the State* (cited in note 22). For example, before the partition of India in 1947, Hindus were a majority in the Punjab. However, the creation of a Punjabi Suba state in Punjab pushed the Hindus into the minority position. Post-civil war Yugoslavia presents a similar situation. See Varady, 6 E Eur Pol & Societies at 266 (cited in note 30).

<sup>34</sup> There is no common or standard language for the Gypsies. Similarly, the Germans in Poland and Hungary have a serious identity crisis because most of them no longer speak German. Conversely, despite their common heritage, Jews in Hungary disagree on the desirability of assimilation and whether there is a need for protection as a national or religious minority, or whether no special protection is the best way to achieve social peace.

## B. East European Limits on Minority Identity

National minorities as social groups in many cases have survived by maintaining their primordial, kinship-based structures (for example, Gypsies, and to a lesser extent, Tartars). In these cases, allowing the national minority groups to develop their cultural diversity may challenge the universal constitutional and human rights values embodied in the emerging constitutions. In other cases, the possibility of multiculturalism is perceived by the majority as a menace to its own core values. Some cultural and social homogeneity is necessary for social order within the state.<sup>35</sup> Multiculturalism may endanger such a homogeneity, especially where society is rapidly disintegrating. Although similar problems exist outside post-communist Eastern Europe, three particularly important and unique features exist in this region which make minority protection especially difficult:

- 1) The battles among the national groups are actually a power struggle among the various former communist leaders.<sup>36</sup>
- 2) The State plays a prominent role in society because maintaining the identity of the national minorities is nearly impossible without financial and other governmental support.
- 3) Most nationalist traditions in the region are strongly xenophobic, a fact which has repeatedly resulted in attempts to exterminate "other" national groups. Consequently, most national groups have been threatened, including groups which have held a majority position.

Although both majority and minority nationalism endanger constitutionalism and even democracy, it would be wrong to equate the two. Minority identity protection is not based on xenophobic nationalism, while the opposite is true of majority nation-

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<sup>35</sup> The antagonism between multiculturalism and universalism as represented by the liberal individualism of Western constitutionalism is not limited to Eastern Europe. See generally, Charles Taylor, *The politics of recognition* in Amy Guttmann, ed, *Multiculturalism and "The politics of recognition"* 54-55 (Princeton, 1992).

<sup>36</sup> The federal republics of Russia are still under the leadership of former local party bosses who seek greater autonomy from Moscow, which is ruled by their former communist bosses. In many respects the collapse of the Soviet Union is best understood as the revolt of the local party leaders against the center. The Tatarstan Republic's attempt to achieve independence through a local referendum later declared unconstitutional by the Russian Constitutional Court is the best known case on this point. See Herman Schwartz, *The Newest Players in the Russian Power Game*, LA Times M2 (May 2, 1993). Ironically, the leaders of Tatarstan sought national identity by reference to the Tartar national minority, deported to the region by Stalin.

alism. However, unconditional support for minority rights may be the equivalent of writing a blank check for visibly antidemocratic forces and may equally endanger constitutionalism.

In addition to the dangers of nationalism and authoritarianism, more general or theoretical caveats to be applied in granting constitutional protection to national minorities exist. For example, majority leaders fear that the national minority will do one of two things: either capture the majority position, or secede in order to create a new state by itself or to unite with another state where its group is the national majority. These fears are often shared by individual nationalists and political elites who claim to represent the interests of the majority.

The first fear is rooted in the notion that the majority may create a new national minority problem by granting autonomy to a national minority. The minority identity will dominate in specific circumstances of minority self-government: the language of the minority will become the "official language" and the minority will control the decision-making body in which it holds the majority.<sup>37</sup> Consequently, members of the majority may themselves become minorities and will require protection against the local majority.<sup>38</sup>

The second fear concerning minority secession often motivates the denial of special rights for national minorities under the pretext of formal equality among all citizens. However, this concern does not form the basis for all denials of special rights to minorities. Sometimes such denials are rooted in the lack of a clear consensus that minorities (either collectively or individually) deserve special protection.

In many cases, even ostensibly "neutral" nation-states that enforce human rights policies engage in practices which endanger

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<sup>37</sup> The situation in Quebec is perhaps the most commonly cited example of this premise. See Michael R. Hudson, *Multiculturalism, Government Policy and Constitutional Enshrinement—A Comparative Study* in Canadian Human Rights Foundation, ed., *Multiculturalism and the Charter 82* (Carswell, 1987).

<sup>38</sup> For example, The typical Russian nationalist criticizes Gorbachev and Yeltsin for sacrificing the Russians living in the Baltic states when they allowed the region to become independent. See John Dunlop, *Russia: Confronting loss of empire* in Bremmer and Taras, eds, *Nations & Politics in the Soviet Successor States* at 47-48, 66 (cited in note 8). Similarly, in 1868, the Hungarian political elite denied autonomy to the national minorities in the Austro-Hungarian Empire out of fear that Hungarians would become minorities in any new autonomous regions. Ironically, after the Romanian territories joined Romania after World War I, the Hungarian minority in those territories did in fact become victims of the Romanian majority. See Hugh Seton-Watson, *Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism* 162-63, 169 (Westview, 1977).

the national minority's identity. Constitutionally protected "universal" values shared by the majority may contradict the practices and values that shape the national minority's identity. The practice of female circumcision by certain minorities is a dramatic illustration of this point.<sup>39</sup> In other cases, the interests of national minorities may clash, making minority protection difficult. Of course, it is exactly in these situations that constitutionalism may play a crucial role by limiting the power of majority rule.

### C. Special Protection for National Minorities?

From a universalist-Kantian perspective, both national majority and national minority identities are constitutionally protected as long as they do not limit the other group's identity or interfere with individual autonomy. On the other hand, efforts by national minorities to protect their unique identities and traditions are not attempts to garner special treatment and should be respected.

National minorities may deserve special treatment as potential and actual victims of majority oppression, but considerations of equality do not always transform easily into rights. National minority leaders prefer to use the absolutist language of minority and human rights in order to establish a position within the state that cannot be negotiated away. The absolutist language requires that rights be conceived as unconditionally given precepts, binding on all states. This preference for rights language is shared by like-minded post-Enlightenment nationalist ideologists.<sup>40</sup>

Construing national minority rights, or, rights to a national identity, as human rights instead of as a derivative of individual rights, forces the State to balance the practice of protecting minority rights with protecting other equally important human

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<sup>39</sup> England has banned the practice and specifically excludes national minority custom from a list of exemptions. This treatment was criticized for suppressing minority particularity. Sebastian M. Poulter, *English Law and Ethnic Minority Customs* 154-59 (Butterworths, 1986). For views supporting the acceptance of ethnic (national) minority customs in a different legal culture, see *id.* at 40, 258-59, 278-81 (discussing the customs of dowry, dress, and slaughtering of animals).

<sup>40</sup> Accepting the rights language of nationalists would be a strange concession to the *Zeitgeist* which is dominated by human rights ideology. On the other hand, the universal nature of human rights may have a tranquilizing effect on nationalism. However, the strong emphasis on the collective or group nature of national minority rights reflects the nationalist tradition's resistance to modernism which may counter this tranquilizing effect. The universalist right to a national identity may create a "special zone" where universal human rights do not apply.



rights. State constitutions could then limit minority rights, if at all, only for the same reasons that other rights are limited, like for reasons of public order.

The human rights-based approach discusses minority interests and needs in terms of absolute rights. Once national minority rights become protected as human rights, justifications for claims of minority protection are no longer necessary. However, this may pose political and intellectual disadvantages. The nation-state may view unconditional claims of minorities as a menace to its integrity. The intellectual disadvantage<sup>41</sup> is that most, if not all, the rights claimed as national minority rights are already granted as "universal" human rights, which are not group rights.

Human beings have the right to associate, to travel, to receive an education, and to not be subject to discrimination.<sup>42</sup> Whenever national minority protection is taken seriously, the granting of otherwise existing rights to minorities may go well beyond the simple "equal enjoyment" of these rights. The right to national minority identity, however, requires additional protection of the fundamental rights of minorities or minority members. For example, a national minority's claim to the right to use its own language is certainly not satisfied by being required to use the official language, even if this is not the language of the majority (as is the case with English in India).

The use of "discrimination" or differentiation to equalize differences may still fit into the Aristotelian concept of "equality as justice." Justice demands that only identical or similar groups receive similar, or equal, treatment, while different groups may be entitled to different treatment. National majorities and politicians concerned about the unity of the state deny the relevance of such differences.

If minority needs are expressed in terms of rights, inequality rapidly develops, especially when minority needs have budgetary consequences. Granting these rights may require related services, elevating the per capita expenditure for minorities to a level

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<sup>41</sup> Further problems, such as defining minority and collective or group rights, are not discussed in this paper. For further references, see Patrick Thornberry, *International Law and the Rights of Minorities* 57, 141, 257 (Clarendon, 1991); Malcolm N. Shaw, *The Definition of Minorities in International Law*, 20 *Israel Yearbook on Human Rights* 13 (1990).

<sup>42</sup> Non-democratic, repressive regimes viewed minority rights, including the right to receive and host conational foreign visitors at home and the right to travel to maintain an ethnic identity, as privileges. See Vernon Van Dyke, *Human Rights, Ethnicity, and Discrimination* 174 (Greenwood, 1985) (discussing the example of South Africa).

above the national average. The "difference" in treatment amounts to preferential treatment. Furthermore, some protections of minority identity clearly discriminate in favor of the minority.<sup>43</sup>

In Europe, most Parliaments establish universities by granting the privilege to award university degrees generally only to state institutions. The protection of a national minority's right to special education, a subset of the right to preserve its national language and identity, may further entitle minorities to establish their own private universities without Parliamentary authorization.

National minority rights that maintain and enrich the group's identity represent positive discrimination against the majority through the use of constitutionally protected human rights. A strict scrutiny test should be applied to minority rights because these rights are viewed as breaches of equality, although generally only in the formal sense. The only inequalities that should pass the test are those necessary to develop minority identity. Also, such discrimination should not infringe upon the constitutional rights of individuals not in the privileged minority. This test is less burdensome than that of non-infringement of majority rights, which can be easily interpreted as protection of the state.

The problem of unequal distribution of financial and other resources remains an open question, but no constitutional or human rights principle exists which would guarantee equal distribution of resources. The granting of special subsidies remains a matter of government discretion although the State should not discriminate among members within the same class of beneficiaries. To the extent minority identity is constitutionally protected, distributional inequality in favor of the protected group(s) remains acceptable, within limits. Unfortunately, these limits are unclear, and where the existence of all groups depends on state redistribution, it is politically difficult to accept minority protection.

On the other hand, entitlements are different from claims to resources based on minority rights which appear to be unac-

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<sup>43</sup> The law often prohibits political party financing by foreign citizens and even governments, or at least requires that foreign financing be subject to special disclosure rule. See, for example, the Hungarian Act XXXIII of 1989, Art 4 § 3, which states that a party cannot accept money from a foreign state; The Law on Political Parties of Lithuania, No. I-606 Art 11 (Sep 25, 1990)(stating "political parties may not receive finances or any other funds given by governmental institutions of other countries . . .").

ceptable as a constitutional principle, except under a federalist formula. This is because entitlements are granted through a parliamentary system which, as a constitutional principle and practice, was created to limit the power to tax. Although taxation in a parliamentary system depends on participation, it does not include a right to special revenue distribution; consequently, minorities have no right to a return of their tax contributions to the members of their group. Even under a federalist formula, such a right to "return" of contributions is limited.<sup>44</sup> In this respect, the nation-state is an outgrowth of the constant struggle among pressure groups, including national minorities, to obtain a privileged position in the revenue allocation game. To a large extent, the budget allocation is controlled by the executive branch. However, this constitutionally granted privilege of the executive<sup>45</sup> is shared with the Parliament, which is, by definition, majority rule and not sympathetic to national minorities. Economically depressed regions may receive preferential treatment under the pretext of "national solidarity," but this is more often a result of political considerations (for example, re-election concerns or avoidance of disorder).<sup>46</sup>

Protecting members of a national minority does not require special minority rights if one accepts the fundamental principles of human rights and constitutionalism. However, infringement of minorities' rights in the form of ethnic cleansing is frequently carried out in the name of historical "rights" of specific groups. Such infringement is also justified by claims of rendering historical justice by restricting rights of nationals of the "nation which caused us suffering."<sup>47</sup>

The real intellectual problem goes beyond simple non-discrimination. The most common grievances and claims related to identity include language use and special political protection of the minority through special representation and autonomy. Autonomy here refers to the process by which decisions on matters

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<sup>44</sup> German Const, Art 106.

<sup>45</sup> Under most constitutions, the executive power shapes and presents the budget to Parliament which then has only limited power to make changes. See, for example, French Const of 1958, Art 39, 40, 47; German Const, Art 110, 113.

<sup>46</sup> German Const, Art 107, § 2. This section states that Federal legislation shall ensure a reasonable equalization between financially strong and financially weak Laender.

<sup>47</sup> See the Estonian citizenship case in Shlomo Avineri, *The Issue of Citizenship in Estonia* (on file with the Archive of the Constitutionalism in Eastern Europe Project, Budapest).

affecting only a minority are made by that minority, or in a system where the minority's political majority is guaranteed. However, given the state's dominance in Eastern Europe, these claims compete with other claims of less contested rights, such as the right of parental choice in education and equal franchise rights.

Certain rights require the State to provide services, including health, justice, and education. The use of an official or the majority language in the performance of those services creates an inequality of treatment and service for minority groups.<sup>48</sup> To what extent are public service recipients entitled to receive such services in their mother tongue, or in a manner which takes their religious or national identity into consideration? National minority status should entitle minorities to the preferential allocation of governmental services because they lack sufficient self-support and identity development.<sup>49</sup> However, entitlements based upon weakness are not "rights" as minority rights advocates would have us believe. They depend on the clemency of the strong and cease as soon as the minority is in a better position.

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<sup>48</sup> Bruno De Witte discusses the problem in terms of "distribution of language commodities" in the Belgian context. Bruno De Witte, *Le principe d'egalite et la pluralite linguistique*, in Henri Giordan, ed, *Les minorities en Europe: Droits linguistiques et Droits de l'Homme* 55 (Editions Kime, 1992).

<sup>49</sup> The interplay among nationalist government politics, nation-state building, and electoral politics with respect to national minorities is evident in the case of "public service electronic media." Although there is some privatization of mass media in Eastern Europe, public television represents the single most important force of national cultural homogenization in almost every post-socialist country. Cable networks, satellite and local broadcasts may compete in terms of audience, but not in terms of political image formation. The news broadcasts are extremely limited and therefore few, if any, are broadcast in a foreign language. National minorities constantly demand access to media and desire their own stations. In a number of countries some of these demands are met by law and/or practice. Nevertheless, the national minorities generally lack the financial resources to own and operate independent systems. Thus, minority language broadcasting often only exists as part of the national broadcast system. An independent minority language broadcast would be financially viable only if the operators commercialized their generally local broadcasts. This, however, would jeopardize their goal of maintaining their national minority identity. Other forms of national culture share the same financial difficulties, such as funding for local minority theater which is currently subsidized by the state.

The State's reluctance to allow more minority independence in the realm of public media should be interpreted in two contexts. First, television is the primary agent of homogeneity and nation-state building. To the extent that nationalist mobilization is needed, the political elite is forced to rely on television. Second, since public service broadcasting is considered a means of protection against the "American dream factory" and Music Television, it must be oriented to national culture. Nation-building and imperial solidarity have been primary goals of public service broadcasting since the earliest days of the BBC. See Thomas Gibbons, *Regulating the Media* 32-34 (Sweet & Maxwell, 1991).

Another right which protects national minority identity is the right to education in the national minority culture. Even if identity protection generates specific minority protections, limited resources and other group interests will severely restrict the protection of national minority rights. Even if constitutionally protected, national minority rights will nonetheless be weak because they lack a corresponding state obligation to provide specific minority services. On the other hand, such rights will be strong enough to prevent the state from limiting those rights in the private sphere.<sup>50</sup>

However, as long as the state may limit the private sphere, minority self-protection will likewise be limited and will remain a matter of fairness or political opportunity as opposed to constitutionally protected rights. Genuine minority protection can be developed only through enhancement of the private sphere. The state will not interfere so long as protection of minority identity only requires self-initiated action or "self-teaching" by the minorities themselves. Unfortunately, this approach is unrealistic so long as the state possesses monopoly control over services, and retains a messianic view of its role in providing those services. This is not a post-socialist phenomenon; in France, the constitutional mandate of state education<sup>51</sup> resulted in the denial of private national minority education in Corsica and in Brittany. However, unlimited reliance on minority decision-making in minority-related matters may backfire, especially under post-communist circumstances which distort national identities.

Minority leaders may claim that minority rights are properly group and not individual rights and therefore the group as such should make the decisions. However, this approach would take decisions away from the community of concerned individuals, those citizens who are directly affected by the decision. For example, either the "National Gypsy Council" or perhaps a "European Confederation of Romani" would decide whether gypsies in a given community should request separate but equal status in education or city government, rather than the individuals themselves.

Notwithstanding the above difficulties, the theoretical solution lies in granting participatory rights to the minority in deci-

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<sup>50</sup> The distinction between protective rights which do not allow the state to interfere in the private sphere, and strong rights which require the state to act goes back to von Wright. He speaks of "weak permission" as permission given through the lack of prohibition or regulation. George Henrik von Wright, *Norm and Action* 86 (Routledge, 1963).

<sup>51</sup> French Const of 1946, Preamble.

sions concerning its identity. National minority protection is a problem of democracy in the sense that the answer depends upon the extent to which the political structure allows direct participation and local decisions.

After decades of painful rearrangements, the Belgian constitution was amended to grant special autonomies to the major ethnic communities. The major language groups have veto power in the Parliament, too. Belgium remained a unitary (non-federal) state by constitutionally delegating many legislative powers to the constitutive groups of Belgium.<sup>52</sup>

The decentralist restructuring of Belgium is evidence that under specific conditions, democracy within segregated communities adequately resolves the national minority protection question. Minorities need democratic and participatory decision-making powers in matters directly affecting them. A certain degree of segregation is the inevitable price. But all this is easier said than done; neither the etatistic tradition nor the nationalist majority's short term interest will accommodate the "Belgian" approach, particularly where the national minority is small and scattered.<sup>53</sup> Furthermore, concepts which were developed under conditions of relative equilibrium are of little use in a culture which lacks both fundamental democratic traditions and a history of conflict management through negotiation and compromise.<sup>54</sup> The supporter of a liberal-nationalist State may correctly fear that the conferral of such decision-making authority to the minority will create new forms of conflict and ultimately endanger the democratic principle itself.

### CONCLUSION

Nationalism is the only political force in Eastern Europe powerful enough to combat the anomie left in the wake of com-

<sup>52</sup> See Maureen Covell, *Ethnic Conflict, Representation and the State in Belgium* in Brass, *Ethnic Groups and the State* at 230, 252-54 (cited in note 33).

<sup>53</sup> Various constitutional arrangements use quotas to protect scattered national groups. See, Van Dyke, *Human Rights, Ethnicity, and Discrimination* at 100, 124 (cited in note 42) (referring to the provisions of the Fiji and Malaysian Constitutions).

<sup>54</sup> For example, a numerical equilibrium exists in Kazakhstan and Estonia. It has helped so far in the former case, but not in the latter. See Cynthia Kaplan, *Estonia* at 206-08 (cited in note 8); Martha Brill Olcott, *Kazakhstan: A republic of minorities* in Bremmer and Taras, eds, *Nations & Politics in the Soviet Successor States* at 313, 327 (cited in note 8); *Constitution Watch: Estonia*, E Eur Const Rev 5 (Winter 1993). There is no equilibrium in the post-Yugoslav states. Zeljko Ivankovic, *Il Faudra L'Inventer*, E Eur Rptr 3, 4 (May-Jun 1992) (Bosnia-Herzegovina, Croatia); "Third Yugoslavia," E Eur Rptr 11 (May-Jun 1992) (pie chart of the Federal Republic of Yugoslavia).

munism. The collapse of communism resulted in the dissolution of the Soviet Empire and in the creation of more homogeneous states. The processes of constitution-making are taking place as part of nation-building. Therefore, nationalism has its modest beginning in the region and constitutional analysis should take it into consideration as more than a negative factor.

It may be that after initially excluding some people, the nation-state will have a domesticating, civilizing effect on minority nationalism. For example, the political nations of the Baltic States may incorporate their Russian ethnic minorities. Thus, while the political nation is growing, the ethnic nation will be deteriorating.<sup>55</sup> The forging of a political nation not only involves destruction of "alien" or minority identities but it also destroys certain characteristics of the national majority identity.

The nation-state must resist official and popular xenophobia. Otherwise, the state may lose its power to influence all spheres of social life. If the state has control over the public sphere, there may be a sufficient private sphere to encourage ethnicity and tolerance. If the state has no constitutional obligation or right to provide education, it will not be in a position to impose nationalist curricula. Presently, there is little hope that the post-communist state will be significantly less pervasive than its predecessor; however, current trends in financial and civil institutions, churches, trade unions, and the press may change this pattern. If the inevitable nationalistic tendencies are not carefully controlled, they can destroy the very states and constitutions they seek to construct. To strike the proper balance, the burning issue is that national minority protection must be addressed to basic democratic values, fairly and without compromise. Without adequate minority protection, nationalism will not be successful in its effort to build modern nations.

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<sup>55</sup> Walker Connor, *Nation-Building or Nation-Destroying?* 24 *World Politics* 319, 322 (1972).