Marko Kmezic, Edith Marko-Stöckl, Joseph Marko

Elements of Successful Diversity Management in Conflict Regions
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Marko Kmezic
Edith Marko-Stöckl
Joseph Marko
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1. Challenges for Post-Conflict Reconstruction and EU-Integration: The Western Balkans - Failed States and Divided Societies

It seems that after the wars in the Balkans and the genocide in Srebrenica, the wars in Africa and the genocide in Rwanda, the ongoing violent post-intervention conflicts in Afghanistan and Iraq, not least between Shia and Sunni Muslims, conflict in Georgia, and the non-intervention in Darfur and ongoing crimes against humanity, Samuel Huntington’s essay on the possible “clash of civilizations?”\(^1\) has become almost a self-fulfilling prophecy. But has the ideological conflict-line of the Cold War between collectivist communism and liberal democracy simply been replaced now in the new “world disorder” by a conflict line between democratic liberalism and ethnonational and/or religious fundamentalisms? Has the ideological dividing line simply shifted from the focus on socio-economic status, i.e., ‘class’ lines, to cultural differences, which must serve as a focal point for the mobilization of peoples and the legitimation of power politics?

Thus, any discussion of a political theory of ‘diversity management’, which tries to explain how political unity can be reconciled with cultural diversity, must first address the legacy of the ideologies which have dominated the history of the nineteenth and twentieth centuries—namely, liberalism and nationalism—and try to understand how these ideologies ‘work’. In trying to deconstruct these ideologies, this paper will not provide so much interest in the historic processes of state formation and nation-building in Europe\(^2\) and the ‘classification’ of different ‘forms’, such as ‘romantic-collectivist’, ‘liberal-individualist’ or ‘civic’ and ‘ethnic’

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\(^2\) See, in particular, Theodor Schieder, Otto Dann and Hans-Ulrich Wehler (eds.), Nationalismus und Nationalstaat. Studien zum nationalen Problem in Europa (Vandenhoeck and Ruprecht, Göttingen, 1991), who differentiated three phases and areas of nation-building: the ‘civic’ state-nations in Western Europe established before 1789; the ‘ethnic’ nation-states based on seemingly ‘natural’ cultural prerequisites such as language in Central Europe in the nineteenth century; and the spreading of these two ‘models’ to Eastern Europe before and after World War I. The almost identical typology is created by Ernest Gellner, Nationalism (New York University Press, New York, 1997), 50-58, through the metaphor of the “marriage of state and culture”, with zone 1 at the Atlantic coast where both a “high culture” and a “state” started to co-exist side by side since the late middle ages through strong dynastic power bases; zone 2 encompasses again Central Europe with “high cultures”, but no “state”, so that Italian and German nationalisms were concerned with unification. Finally, in zone 3, i.e., Eastern Europe, there were neither national states nor national cultures due to the existence of multiethnic empires.
nationalisms, based on these processes. It will be more focused on identifying the ‘structural’ core elements of ethnonationalism and try to identify how these elements contributed to the development of ethnic conflicts in the Balkans and what are the lessons to be learned for conflict management as diversity management.

1.1. The legacy of the national state ideology in the Western Balkan countries

This report will not re-assess the „recent history“ of the Western Balkans, i.e. actors and processes which had led to the four wars in the 1990ies in order to determine the historic „truth“. With regard to the interpretation whether this wars have been „ethnic conflicts“ and what are the needs to overcome the effects of these conflicts in terms of post-conflict re-construction and reconciliation through state- and nation-building, the overwhelming majority of social scientists does no longer follow primordial theories going hand in hand with historic theses of „ancient hatreds“, but follow the constructivist-instrumental approach. Ethnic conflicts do not come into being because of biological or cultural differences as such, but they are made by ethnic entrepreneurs. Seen from this perspective, the wars in the Balkans were not „natural“ consequences of the dissolution of the former Socialist Federal Republic of Yugoslavia which could not have been prevented.

Nevertheless, demography in terms of group formation and political claims based on these processes do play an important role. Inter-ethnic relations in all of the countries of concern are sharply divided between those social groups which consider themselves to be a „nation“ and all the other - because of their different language, religion, or historic or cultural characteristics - ethnically perceived groups. The former claim an alleged historic or ethnic right to form their own state and will therefore never accept to be called a „minority“. To offer them the „best“ instruments of minority protection according to the standards of

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3 See Margaret Canovan, Nationhood and Political Theory (Edward Elgar, Cheltenham, 1996), 50-67, who deconstructs the various historic approaches to explain nationalism based on the question what a nation ‘is’.
5 See my classification of different authors along these lines in Joseph Marko, Autonomie und Integration. Instrumente des Nationalitätenrechts im funktionalen Vergleich, Wien-Graz-Köln 1995.
international law⁶ or even beyond, does not make sense at all. They will never be fully satisfied, but feel discriminated against and simply wait for the next opportunity to raise the claim for self-determination. Therefore, although neither Bosniacs, nor Serbs or Croats in BiH⁷ make the absolute majority of the population on the entire territory, their political leaders do not understand them as a „minority“, but as a „constituent people“ or state-forming nation with a right to „institutional equality“, i.e. a right to decide equally on all political decisions not only concerning their own group, but the entire state and society as such. The same holds true for all leaders of political parties from both Slav speaking Macedonians and Albanian speaking Macedonians. In terms of self-perception, Slav-speaking Macedonians mostly „identify“ themselves with the Republic of Macedonia as „their“ national state, so that people with another mother tongue are „others“. Quite contrary, Albanian speaking Macedonians and their political party leaders claim that they are a „constituent nation“ as well with a right to full and effective participation in all affairs of state and society and not simply a „minority.“ In this respect, numbers do not really matter. Whereas Kosovo-Albanians made and make 90 % of the population in Kosovo, Albanian Macedonians had to fight for a fair census in the beginning of the nineties which finally established a 25% share. But also Serbs in Croatia, who made 12% of the population in 1991, never accepted to be seen as a „minority“, but considered themselves to be part of the most important state forming nations in the former Yugoslavia and therefore never accepted or adopted the legal-institutional mechanisms foreseen for them in the Croat constitutional law.

Going hand in hand with these problems of self-perception and ascription in the processes of state formation and nation-building in the Balkans - which have resurfaced during the the referendum for independence of Montenegro in April 2006 and the status talks on Kosovo show - is the total „ethnification“ of all identity formation.

The „identification“ of territory with ethnic belonging is one of the most problematic legacies in the tradition of the classic Central European ideology of

the nation state or the “dark side of democracy” as it has been called recently. All „ethnic conflicts“ in the past were violent conflicts for political domination of territory by ethnic entrepreneurs and through mobilising the ethnic feelings of such groups which consider themselves to be nations, not minorities. However, as all difficulties in state reconstruction reveal, as will be shown in the next chapter, the identification of identity with territory is still on-going thereby effectively preventing the application of the citizenship concept to create ethnically neutral and multiple identities or, even worse, is even re-inforced by the international community by compromising to the threats of territorial separation by ethno-national leaders thereby rewarding and allowing them to hold the grip on their ethnically conceived constituencies.

1.2. The problems of post-conflict state reconstruction in severely divided societies

The Dayton Peace Agreement in BiH set the pace for conflict settlement in the Balkan wars. A closer look into the institutional arrangements foreseen in the Annexes reveals that the drafters of the Dayton constitution followed the model of consociational democracy for post-conflict reconstruction. Dayton was therefore based, firstly, on a territorial separation into Entities and cantons mostly following ethnic lines, thereby also cementing the ethnic pillarisation of the population stemming from massive ethnic cleansing throughout the wars. On state level, secondly, all institutions were formed after the rule of proportional ethnic representation connected with mutual veto power in order to create the necessary trust for elite consensus through power-sharing.

As all political discussions for the necessity of constitutional reform reveal, this model has basically failed in the task of state re-construction and reconciliation: trust was never achieved between the former warring parties of the violent conflict who had been allowed to stay in power. Power-sharing did not provide for co-operation on the elite level as theoretically foreseen, but led to a politics of „divide et impera“ which was even democratically legitimised by too early and constantly repeated elections on all levels since the OSCE wanted - through election-engineering - transform the monoethnic party system into a multiethnic

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9 For the following description see Marko, at Fn 7.
one. This effort, however, totally failed. The more the High Representatives intervened with their so-called “Bonn powers” into daily politics by decreeing laws and sacking obstructionist politicians, leaders of the ethno-nationalist parties had no incentive for negotiating compromises - the „essence“ of democracy - and could convince thus their electorate that they are the only staunch defenders of their respective „national interests.“ Thereby they could re-inforce - even with the help of the internationals - their ethno-nationalist power-grip and prevent any inter-ethnic co-operation either on the elite or mass level.

This political process between 1995 and 2008 had serious repercussions on state formation and nation-building in BiH. Due to the fixation on elections, the necessity of a functioning judiciary and rule of law for state reconstruction was seen only from 2000 onwards. A land-mark judgement of the Constitutional Court had to be transposed into institutional reform again by the High Representative in 2002. But, instead of following the message of the judgement to abolish the closed, exclusive institutional mechanisms of ethnocracy, the elements of consociational democracy were even re-inforced by imposing them onto all territorial levels through the amendments of the Entities’ constitutions. Judicial reform, again imposed by the High Representative, did not take care of even the most elementary requirements of rule of law. In effect, nothing was done to effectively tackle ethno-nationalist parties and their cartel of power and to enforce the creation of multiple identities through education and the media, thereby increasing state loyalty. This had also tremendous consequences for the economy which is deteriorating again since 2002 and still aid-dependent instead of investment driven. As far as minority protection is concerned, nobody is aware of the fact that there are 23 minorities in BiH as every aspect of life is taken hostage by the rivalry between the three „constituent peoples“.\footnote{See Slobodanka Milikic, Bosnia and Herzegovina, in Emma Lantschner/Joseph Marko/Antonija Petricusic (eds.), European Integration and its Effects on Minority Protection in South Eastern Europe, Baden-Baden, 2008, pp 297 - 340.}

A very similar result stems from the analysis of reconstruction efforts of UNMIK in Kosovo following Security Council Resolution 1244.\footnote{See Helmut Kramer/Vedran Dzihic, Die Kosovo Bilanz. Scheitert die internationale Gemeinschaft, Wien 2005; Arben Hajrullahu, Langfristiger Frieden am Westbalkan durch EU-Integration, Wien (PhD) 2005 and Joseph Marko, Independen without Standards? Kosovo’s Interethnic Relations since 1999, European Yearbook of Minority Issues, Vol 5, 2005/06, 2007, pp 219 - 241.} Based on the ambiguous political compromise of “territorial integrity for FRY and substantial autonomy for Kosovo”, the UNMIK administration created a de-facto independent state under international protectorate with serious deficiencies as far as security, political
stability, effective state administration and democratic governance is concerned. The March 2004 riots with killings, lootings and ethnic cleansing of the Serb and other minorities revealed that not even basic physical security could effectively be secured by KFOR and UNMIK. The absolute power of the Special Representative of the UN Secretary General (SRSG) as head of the UNMIK institutional pyramid without any idea or instruments to entrench separation of powers - the basic prerequisite for any modern state based on rule of law and democracy - made the transfer of powers foreseen in the so-called “Constitutional Framework” of 2001 to the Provisional Institutions of Self-Government (PISG) a grace instead of creating a feeling of local ownership. By using neither sticks nor carrots to dissolve so-called “parallel institutions”, in particular in the part of Kosovo north of the river Ibar with the divided town North Mitrovica and the other municipalities with Serb majority population after having been ethnically cleansed also from Roma communities, UNMIK kept the strict ethnic divide at life and thereby effectively rewarded obstruction to create inclusive institutions based on the model of consociational democracy as in BiH. With the exception of the Kosovo Police Force, the institutional segregation and therefore exclusive decision-making could never be overcome. Neither UNMIK nor PISG could re-construct effective public services and the economy is constantly on the brink of collapse with the theoretical need to employ 30.000 newcomers on the formal labor market only to preserve (!) the 70% unemployment rate. With the breakdown of the constitutional ambiguity of the “standard before status” mantra of the international community in 2004, it became quite obvious that a stable constitutional framework was not possible without clarification of the statehood question and thereby the redefinition of the “demos.” The declaration of independence in February 2008 is therefore only a new beginning, but certainly not an end to this problem.

The third conflict settlement agreement, which has to be taken into account here, is the Ohrid Agreement of 2001. In this case, the legal-institutional and political background was different: The Macedonian constitution 1991 followed the model of “ethnic indifference“ based on the concept of equal citizenship with some rights for members of minority groups. Due to the fact that the awareness of the international community was fixed on the wars in Croatia, BiH and Kosovo, it went unnoticed that inter-ethnic relations in Macedonia nevertheless constantly deteriorated before, finally in 2001, there was a real danger of massive violent

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13 For the following description see in detail Joseph Marko, Referendum on Decentralization in Macedonia in 2004; A Litmus Test for Macedonia’s Interethnic Relations, European Yearbook of Minority Issues, Vol. 4, 2004-05, 695-721.
conflict also in Macedonia. The citizenship model of the Macedonian constitution could thus not prevent the escalation of ethnic conflict due to the „identification“ and „exclusion“ mechanisms referred to above. The Ohrid Agreement, brokered by the EU and US, did however not introduce the model of consociational democracy and thereby recognise the Macedonian Albanian aspirations for Macedonia to become a „bi-national“ state. The main elements of the compromise are the “fair” representation and participation of “ethnic communities” - as they are called now in order to avoid the distinction of majority/minority - through a double majority requirement in parliament and not equal, but “equitable” representation in the civil service, without, however, full veto powers and thereby the possibility to block the entire decision-making process; secondly, a strong emphasis on language rights by declaring Albanian a second official language in those municipalities where they have a share of 20% and more, and, finally, a concept of decentralisation for the devolution of powers to the municipal level and by re-adjusting the borders of municipalities so as to give Albanians more municipalities with a 20% share instead of granting a form of regional territorial autonomy to the Albanian settled territories. The failure of the opponents of Ohrid to stop the implementation process through mobilising a boycott of the referendum on decentralisation in 2004 shows that political stability has been achieved through integration without institutional segregation. Despite ongoing criticisms of Slav-Macedonian intellectuals that Ohrid had introduced an ethnocracy along the lines of BiH, the consequences for state- and nationbuilding and the improvement of inter-ethnic relations between Slav and Albanian Macedonians are remarkably different from BiH and Kosovo and can be called a success story. Macedonia does not seem to be a victim of possible spill over effects threatening its very existence as a state, and she is neither a failed nor weak state any longer: the economy is much better off than in BiH, there is a much more effective judiciary and administration not blocked along ethnic lines, and with regard to the SAP, Macedonia is much more advanced than all of the other countries with the exception of Croatia. Nevertheless, the consequences for „real“ minorities are again less convincing since they remain marginalised as in the other cases.14

Finally, the situation in Croatia and Serbia has to be critically assessed. Croatia had „solved“ its problem with the largest “minority”, the Serbs in 1995, when most of them were driven out of the country in the course of the military re-integration of

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14 See the detailed analysis by Zoran Ilijevski, Macedonia, in Lantschner/ Marko/ Petricusic (eds.), European Integration, pp 189 - 210 (Fn 11)
the occupied Srpska Krajina in the summer of 1995. All constitutional guarantees from 1991 which had been suspended meanwhile were finally even abolished and a new Constitutional Law on Minority Protection adopted in 2003. This law provides for a minimum representation of minorities in Parliament and other rights in the areas of language and culture. In practice, however, only the “second” democratic revolution through the general elections 2000, when the former opposition parties came into power, and the transformation of the former dominant HDZ after the death of President Tudjman provided the path for democratic consolidation and economic reform based on a strong commitment of all political parties for EU-integration. Despite of the fact that it is remarkable that the reformed HDZ who had come back to power in the elections in 2004 and also won the elections in 2008 could base its government on a coalition with all of the minority representatives in Parliament, including the Serb representatives, Serb refugees who have returned are obviously discriminated against on the local level when they look for jobs in the local government administration. Italians mostly concentrated in Istria complain about Croat centralism, others are marginalised, but there is no “ethnic“ divide any longer with parts of the population challenging the legitimate government and the state as such due to the fact of the expulsion of two thirds of the Serb population in 1995. With no unstable statehood question any longer, democratic consolidation and economic development since 2000, Croatia could leave the other Western Balkan countries behind in her effort to approach the EU despite of ongoing problems with rule of law and co-operation with ICTY.

Ever since the Federal Republic of Yugoslavia, comprised of the Republic of Serbia and the Republic of Montenegro, was established in 1992 on the ruins of the Socialist Federal Republic of Yugoslavia, the concept of an independent Montenegro steadily gained popular support. The independence of Montenegro gradually became a priority dominating the domestic political agenda, and the key platform of the ruling coalition. In 2002 the European Union attempted to break the deadlock by participating in the negotiation of the Belgrade Agreement on the creation of a state union between Serbia and Montenegro. The situation in the State Union of Serbia and Montenegro based on the Belgrade Agreement brokered in 2003 by the EU in order to keep these two countries, the former „Federal Republic of Yugoslavia“ (FRY), together, could best be described as a Potemkin village for the federal level with all effective power concentrated on the level of

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15 See the detailed analysis by Antonija Petricusic, Croatia, in Lantschner/ Marko/ Petricusic (eds.), European Integration, pp 166 -187 (Fn 11).
the member Republics of Serbia and Montenegro. The latter had effectively split from FRY and thereby from Serbia already in 1997 by introducing customs barriers and a different currency. The legal-constitutional situation before and after 2003 was therefore simply a chaos\textsuperscript{16}: the Belgrade Agreement and the constitutional documents were never implemented. The entire institutional system on Union level remained a fake, the constitutions of the Republics were never adjusted effectively contributing to the delay of any meaningful reform both in Serbia and Montenegro after Milosevic had been ousted from power in 2000. Following the expiration of the agreed three years moratorium on the referendum on independence, the authorities and the opposition in Montenegro, assisted by the European Union’s Special Envoy, Ambassador Miroslav Lajcak, reached a consensus on the conditions for the holding of a referendum. The referendum was held on 21 May 2006, with a single question: “Do you want the Republic of Montenegro to be an independent state with a full international and legal personality?”\textsuperscript{17} With a high turnout of 86.5\% of registered voters, 55.5\% voted in favour of and 44.5\% were against breaking the state union with Serbia, thus meeting the threshold requirement of 55\% approval.\textsuperscript{18} After having clarified the statehood question in the referendum, Montenegro faced serious problems of nation-building and international recognition, but has still not undergone the serious task of political reform. Through the new legislative and constitutional framework Montenegro will have to solidify its new non-Serb ethnic identity and accommodate it internally with the multi-ethnic environment. New efforts must be taken in order to achieve externally and regional stability by getting rid also of her mafia like structures through serious institutional reform to entrench rule of law.

In Serbia, after Milosevic’s decline from power in 2000, instead of democratic consolidation based on a broad consensus of a all parties like in Croatia, the power struggle between pragmatic liberal reformers, originally led by the assassinated Prime Minister Zoran Djindjic, and the more conservative and/or Serb ethno-nationalist parties, headed by former Prime Minister Kostunica and the accused war criminal Vojislav Seselj, democratic reform remained an unresolved matter of principle for the entire future development of Serbia: either as a central state based on strong exclusivist ethno-nationalist sentiments fuelled and mobilised in

\textsuperscript{16} See the detailed analysis by Marko Kmezic, Montenegro, in Lantschner/ Marko/ Petricusic (eds.), European Integration, pp 252 - 273 (Fn 11).

\textsuperscript{17} As translated into English by the OSCE/ODIHR Needs Assessment Mission Report on the referendum in Montenegro, 9 March 2006.

elections, or as a regionalised state devolving powers to regions and municipalities and thereby allowing also effective minority protection. After the breakaway of Montenegro in 2006 and the independence of Kosovo in 2008, parliamentary elections held in May 2008 were observed as a new „contrat social“ concluded in Serbian society on the question of necessity of EU integration. The ruling political elite has a new chance, after the missed opportunity in 2000, for radical break up with the violent past and to create a functioning state based on European standards which include minority protection. However, two crucial questions remain on Serbia’s path toward catharsis: full co-operation with the ICTY, and finalization of the Kosovo issue which includes normalization of the neighbourhood relations having been shaken after countries from the region expressed their recognition of Kosovo’s independence.

1.3. New challenges - old concepts: How to overcome the problems of weak states and divided societies?

Contrary to the trend of post-modernism and neo-liberalism with their fixation on private actors and markets to resolve the problems of order and justice for living together at various territorial levels, the problems of state re-construction in the Western Balkan countries make clear that there is not too much „state“ as such, but the absence of effective exercise of state power where necessary:

This was the case with the disappearance of the legitimate monopoly of state power in the course of all of the violent conflicts in Croatia, BiH, Kosovo, or Macedonia through the creation of armed militias which started fighting government forces. After the conflict, not even basic physical security could be re-established by KFOR and UNMIK in Kosovo. As the case studies of BiH and Kosovo have illustrated, the „state“ is paralyzed, if necessary laws cannot be adopted and societal cohesion is not enhanced, but territorial separation and institutional segregation along ethnic lines cemented. And as far as the interdependence of law, politics and the economy is concerned, a substantial amount of money coming from taxes and/or international donations is spent on wages and salaries, the military, transfers and subsidies without resolving the problem of how to downsize government involvement while improving bureaucratic capacity. In many cases one gets more the impression that there are politically dominant „predatory elites“ which - based on a closed and exclusive, because ethnically divided paternalistic
system - blame the international community and their internal collaborators for failures of political and economic reform due to or despite of their „foreign intervention“ so that they can successfully claim to be the only staunch defenders of the „national interests“ of the respective ethnic community which they allege to represent and not their own advantage in terms of political power and economic interest. This seems to explain the mostly mono-ethnic parties in Western Balkan countries despite a formal multi-party system and the recurring failure of voters to vote for a policy change.

The problem therefore does not lay in deregulation and liberalisation, but is rather how to bring the state back in order to provide for „good governance“ as a prerequisite for re-construction and reconciliation of weak states and divided societies?

These new challenges of creating a stable political and constitutional framework for sustainable economic growth and the management of cultural diversity cannot be met with old concepts or by simply transferring Western European „development“ trends to South East Europe. The legacies of the Western and Central European ideologies of the nation state with their non-recognition of ethnic difference on an equal footing and therefore ending up in either assimilation or segregation, ethnic cleansing or genocide have been and are exactly the problem, not the cure. The same holds true for the „conundrums of liberalism“: in severely ethnically divided societies, the strict focus on individual rights, non-discrimination and the majority principle have never been and will not be accepted as „legitimate“ form of government. It is no coincidence therefore that the „model“ of consociational democracy, with power-sharing by elites through proportional representation and mutual vetos, originally developed by Gerhard Lehmbruch and Arend Lijphart after the historic cases of Switzerland, Austria and the Netherlands, was adopted for BiH and for Kosovo. However, the application of this „model“ of consensus government basically failed in BiH and Kosovo since there is no positive consensus for elite co-operation above a „pillarised“, i.e. divided society, but a negative elite consensus of „divide et impera“ and a lack of commitment to a „common“ state. To replace this „ethnic“ model simply through the concept of the „civic“ state-nation concept did, however, not work in Macedonia as outlined above, nor will it ever work in a multi-cultural environment. Moreover, to replace cultural diversity by „unifying“ states and society against the concept of multi-national „ethno-federalism“ is not only the best way to trigger renewed conflict in
practice, but also to fall into the trap of primordial theories which claim that cultural difference as such is the root cause of conflict.

In analysing the problems of post-conflict reconstruction and reconciliation, so far binary codes have been applied for the “understanding” of causes and consequences: the dichotomy of “civic” versus “ethnic”, “unitary” versus “federal”, “majority” versus “consensus” government, national versus “multi-national”, or individual versus group rights. However, these are wrong dichotomies based on ideological presumptions either of one particular strand of liberalism and/or ethno-nationalism. The following chapter will therefore try to de-construct the epistemological and legal traps of both ideologues.

2. The Conundrumus of Democratic Liberalism

2.1. The Majority Principle and the ‘Myth’ of Ethnic Neutrality

In the eighteenth century, when the ‘bourgeoisie’ tried to get rid of the power mechanisms of feudalism in Western Europe and North America, the call for freedom of the abstract ‘individual citizen’, no longer to be trapped in obligatory membership of feudal corporations, and the call for nation-building under the auspices of the ‘equality’ principle had the same political function: to establish the necessary separation of state and society for a market economy, the separation of state and church or even religion to prevent the re-emergence of religious civil wars, and to create political unity and democratic state organization based on these premises. Constitutionally guaranteed ‘fundamental’ freedoms and rights, including equality before the law, and the majority principle for political decision-making, in particular in the legislative process, thus comprise the ‘essence’ of democracy. Seen from this perspective only, the democratic state would indeed be ‘ethnically neutral’.

However, both under the French model as well as under the German model of the nation-state, the exercise of state power is not ethnically neutral in its effects. Even if the language of the majority of the population is not legally declared to be the ‘official language’ of the state, due to the normative power of the actual overwhelming ‘numbers’ of individuals being part of the majority population and its culture, individuals with the ‘wrong’ mother-tongue and/or other cultural practices will be put under pressure to use the majority language if they do not want to risk rejection, exclusion and/or marginalization in almost all spheres of
life. Hence, the problem of liberal nationalism “in a nutshell”, as Ronald Beiner defines it, is: “[h]ow to privilege the majority cultural identity in defining civic membership without consigning cultural minorities to second-class citizenship?”.

In the actual practice of both ‘models’ of nation-states, we can observe an additional phenomenon, which I call the ‘identity fiction’, when the culture of the majority population is taken for the ‘whole’ culture of the state and/or taken into ‘possession’ of the, in reality, particular group. This can most frequently be observed on the symbolic level. French is not only a language of communication, but her ‘civilization’ is name-giving for the state, as is also the case, for instance, in the newly independent Republic of Macedonia, where Macedonian-speaking people call themselves ‘Macedonians’, whereas Albanian-speaking Macedonian citizens are never called ‘Macedonians’, but simply ‘Albanians’. To make the situation even more complex, Greece successfully prevented the membership of Macedonia under her constitutional name in the UN, but forced on her the name of ‘Former Yugoslav Republic of Macedonia’, claiming the symbol ‘Macedonia’ for herself. Hence, the ‘nation-building’ efforts of the majority population through the instruments of state and law end up in discrimination and/or exclusion for minority groups and will trigger mostly the resort to ethnonationalist claims of minority groups themselves, not seldom ending up in a spiral of competing claims and—even—violent conflict.

In any case, the ‘myth’ of ethnic neutrality cannot be upheld any longer. Even under perfectly democratic auspices, the majority principle can always turn out to

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19 Against Charles Taylor’s proposition, however, this does not necessarily require assimilation “to get on an equal footing with speakers of the official language”, as I will demonstrate below. See Charles Taylor, “Nationalism and Modernity”, in Ronald Beiner (ed.), Theorizing Nationalism (State University of New York Press, New York, 1999), 222. Nothing but absurd is the argument developed by Brian Barry, “Self-government Revisited”, in ibid., 267-269, that only assimilation is true antiracism since “the idea that each culturally distinct group has a legitimate interest in maintaining the integrity of its culture” would not explain—despite the fact that “as a matter of biological necessity an individual, to flourish, must grow up and live in some culture”—why it should be worth trying to protect one’s own culture, if not because “in practice cultural mixing is almost always for the worse”. And it is even unbelievable when he then refers almost in the next sentence to the “success of American culture”, that “it is itself the product of generations of assimilation”.


be conceived as the “tyranny of the majority”\textsuperscript{23} when ‘structural’ minorities, due to their demographic situation or power relations, never have a chance to effectively participate in decision-making processes and thereby at least ‘influence’ or contribute to the official and/or dominant culture.

2.2. Equality: From Formal via Substantive to ‘Institutional’ Equality

To cut a long ideological story short, there are again two ideal-types in the perception of the principle of equality. These are ‘formal’ equality of individuals before the law, one of the cornerstones of political liberalism, and ‘substantive’ equality through law, which is—in the European context—much more a part of various forms of socialist thinking. In terms of minority protection, both concepts make a stark difference. The concept of individual equality before the law can protect members of minority groups against discrimination by public authorities, be it \textit{de jure} or \textit{de facto}, intentionally or unintentionally. But it will not protect against discrimination by individuals or other societal groups in the private or public sphere, since this concept is limited according to constitutional doctrine in most democratic countries to the requirement of ‘state action’ and does not have ‘horizontal effect’ thus. Moreover, this concept does not help against factual, societal inequalities in the political, economic, social or cultural sphere when members of minority groups, due to their belonging to a minority group, are not in a position to have ‘equal opportunities’,\textsuperscript{24} for instance, in education, the labour market or in political decision-making processes, as already indicated above. Therefore, the concept of ‘substantive’ equality requires the state not only to refrain from discriminatory acts, but to interfere through ‘affirmative action’ measures in the economic and social systems with the goal of either removing the factual barriers to ‘equal opportunities’ or even guaranteeing “full and effective equality” as this is prescribed by Article 4 of the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM). A broad range of legal instruments from ‘special rights’—i.e., ‘privileges’ or ‘exemptions’—to quota systems for members of minority groups can be adopted to achieve the goals mentioned and can be ‘justified’ even by liberal nationalists.\textsuperscript{25}

\textsuperscript{23} See Lani Guinier, \textit{The Tyranny of the Majority. Fundamental Fairness in Representative Democracy} (Free Press, New York, 1994).

\textsuperscript{24} See also Iris M. Young, “Structural Injustice and the Politics of Difference”, in Laden and Owen, op.cit. note 20, 60-88.

However, depending on the respective ideological position, both ‘formal’ and ‘substantial’ equality are highly contested. Critics of a strict individual liberalism will always—rightly from their perspective—claim that the principle of non-discrimination is a necessary, but by no means sufficient legal instrument for the protection of members of minorities against the assimilative forces stemming from the processes of industrialization, urbanization and nation-building—in short, ‘modernity’. 26 Thus, only ‘affirmative action’ measures and ‘special rights’ in the form of group rights can remedy in their view the factual, societal disadvantages. Quite to the contrary, for advocates of strict individual liberalism, ‘affirmative action’ measures or ‘special rights’ for members of minority groups are unjustified ‘privileges’ and thus by definition ‘reverse’ discrimination, as well as an aberration into collectivism. ‘Collective rights’ or ‘group rights’ are thus strictly denied.27 However, the creation of this ‘dichotomy’ of formal versus substantive equality is a result of the ideological debate for centuries that liberalism and socialism are ‘opposing’ concepts. Even the reconceptualization of liberalism in the debates over liberal ‘communitarianism’28 is still trapped in this structural dichotomy. Also, a closer look into the case law of supreme or constitutional courts of democratic states will reveal that—based on the underlying meritocratic presumption of individualistic liberalism—affirmative action measures under judicial review always require ‘justification’, at least as an ‘exemption’ from the rule. This ideological structure of the problem thus leads to two possible solutions in high court decisions:

— Either the individual right or the public interest is given priority based on predetermined ideological assumptions: strict individualism will always give preference to the right of the individual as we can see from the case law of the American Supreme Court on quota mechanisms or voting rights;29 in contrast, the older case law of the Austrian Constitutional Court, based on

26 The most important thesis as to why “modern society is nationalism-prone” was developed by Ernest Gellner, Nations and Nationalism (Cornell University Press, New York, 1983); and id., Nationalism (New York University Press, New York, 1999). In a nutshell, his argument runs as follows: through industrialization and the following anonymity, mobility and atomization of ‘society’, communication can no longer be based on the traditional contexts used in the determination of meaning. Thus, the capacity to comprehend context-free messages is a precondition for employability and social participation. This, in turn, requires a ‘high code’ of language, literature, education—in short, the ‘homogeneity of culture’ as a prerequisite for the creation of political bonds.
28 See Kymlicka, op.cit. note 28, 338-343.
the doctrine not to interfere in legislative discretion, struck down statutes 
only when the legislator arbitrarily or intentionally violated individual rights 
with the consequence that almost each and everything was accepted as a 
‘legitimate’ public interest overriding individual rights;\textsuperscript{30} 
— Neither individual rights nor public interests get priority as such, but 
decision-making in the legislature or judiciary requires balancing of rights 
and public interests. This can be achieved again in two ways: 
— On a temporary basis by allowing for ‘affirmative action’ measures 
only as long as the goal of providing for ‘equal opportunities’ has not 
been achieved. This doctrine of time limitation has been developed 
both by the American Supreme Court for ethnic minority problems,\textsuperscript{31} 
as well as by the European Court of Justice for gender equality;\textsuperscript{32} 
— Through sectoral differentiation: freedom of speech, assembly, 
association and voting rights are indispensable requirements and 
instrumets for the democratic process so that their limitation can 
hardly be justified; affirmative action that interferes in economic 
and social policies in order to compensate for disadvantages will be 
much more easily justified as “necessary in a democratic society”, 
to take up here the language of the European Convention for the 
Protection of Human Rights and Fundamental Freedoms (ECHR). 
Charles Taylor, for instance, refers thus to the following distinction: 
“[o]ne has to distinguish the fundamental liberties, those that should 
never be infringed and therefore ought to be unassailably 
entrenched, on one hand, from privileges and immunities that are 
important, but that can be revoked or restricted for reasons of 
public policy—although one would need a strong reason to do this—

reviewed were declared unconstitutional; since 1990, it is more than 50%.

\textsuperscript{31} See Steven L. Emanuel, Constitutional Law (Wolters Kluwer, Austin, 2007), 275-323.

\textsuperscript{32} Cf. ECJ, Case No. C-450/93, Kalanke v. Freie Hansestadt Bremen, judgment of 17 October 1995; and id., Case No. C-408/95, Marschall v. Land Nordrhein-Westfalen, 
judgment of 11 November 1997; as well as the Art. 13 Directives allowing explicitly now for 
Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000/43/EC, adopted 29 
Employment and Occupation, 2000/78/EC, adopted 11 November 2000; and Council 
Directive Implementing the Principle of Equal Treatment between Men and Women in 
on the other”. And he demonstrates that, with reference to Quebec, the claim for French-only commercial signs might be justified for the preservation of French culture, but a law allowing for the publication of newspapers in French only would violate such a fundamental liberty.

Hence, formal and substantive equality are seen as ‘opposing’ principles, which have, at best, to be carefully balanced against each other in light of the legislative history of the respective country and the factual context of the case concerned. However, how can we establish beyond dispute what ‘fundamental liberties’ are in contrast to mere ‘privileges’? Will this distinction not be contested again in particular communities of democratic, i.e., plural societies? Neither can a ‘communitarian’ approach to the moral, political and legal justification of minority protection based on group preferences thus resolve the structural dichotomy of formal and substantive equality as a response to the challenges of cultural diversity.

Martha Minow has clearly emphasized this by elaborating the “dilemma of difference”:

The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation. Governmental neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of difference [...].

Hence, is there no way out of this dilemma, since, due to the structural dichotomy of formal and substantive equality, a communitarian approach does not help either? Martha Minow herself points in the direction of the need for ‘institutional equality’, as I would like to call it. She states that:

We typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. [...] Unstated points of reference may express the experience of a majority or may

express the perspective of those who have had greater access to the
power used in naming and assessing others.\textsuperscript{35}

At this point, we can thus incorporate the observations and arguments developed
above under the subsection on various forms of nationalism into the debate
regarding the topic of this paper: it is exactly the ‘identity fiction’ that makes the
‘state-forming’ population and its culture, i.e., values, the very often “unstated”
norm based on power relations and/or the ‘magic of the greater number’ when
only Slav-speaking Macedonians are called ‘Macedonians’, whereas Albanian-
speaking Macedonians are never called Macedonians, giving them the feeling of
being only guests in their own home. Moreover, whenever minority claims and
rights are discussed, we almost never find a reference to a ‘right of the majority’!
But even when ‘the majority’ is made visible as a point of legal reference, as can
be seen in Article 20, FCNM the need for ‘justification’ remains on the side of the
minority: “[i]n the exercise of the rights and freedoms flowing from the principles
enshrined in the present Framework Convention, any person belonging to a national
minority shall respect the national legislation and the rights of others, in particular
those of persons belonging to the majority or to other national minorities”. By
constructing such a ‘general limitation’ of the exercise of minority rights on behalf
of persons belonging to the majority, it seems—regardless of the position
concerning formal or substantive equality—simply not necessary to ‘justify’ the
claims of a majority, since the ‘majority’ is—by definition—always right? Such a
legal construction thus is—in light of the problem of how to reconcile political unity
with cultural diversity—not a solution, but part of the problem itself\textsuperscript{36} when
legitimizing the majority principle without taking into account the asymmetric
power relations of both forms of the nation-state. As long as members of minorities
cannot participate in those political decision-making processes where ‘difference’
is constructed, neither formal nor substantive equality concepts can make a
difference, but only institutional arrangements providing for “institutional

\textsuperscript{35} \textit{Ibid.}, 50-51.

\textsuperscript{36} To demonstrate this with an example: bilingual public education is quite often
understood as the ‘right’ of the minority not only to study their own language, but in
particular the language of the majority in order to be able to ‘integrate’ into society at
large. If, by contrast, the learning of the minority language is made obligatory—even if only
in the settlement area of the respective minority—bilingual public education is often
resisted as impermissible ‘linguistic pressure’ that would violate the right of ‘the’ majority,
as the history of minority education in the Habsburg Empire and the Carinthian Minority
Education Law of 1945 have clearly shown.
equality” based on group rights, which will be elaborated in detail in the next subsection.

2.3. Sovereignty or Autonomy? Two Forms of Self-determination

The principles of sovereign equality of states according to Article 2(1) of the UN Charter, on the one hand, and the self-determination of peoples according to Articles 1 of the UN Covenants on Civil and Political Rights, as well as on Economic, Social and Cultural Rights, on the other, form the structural dichotomy of international law and international relations to this very day. The sovereignty of states—in the tradition of Jean Bodin’s conceptualization as “prima potestas”—therefore confers on them the ‘rights’ to territorial integrity and non-intervention in their internal affairs, claims made only recently by Serbia with regard to the declaration of independence of Kosovo or by China with regard to Tibet. It is therefore a rather recent development that the protection of human rights is seen as ‘ius cogens’ on the same level as territorial integrity and non-intervention, so that human rights protection could justify different forms of intervention, even military intervention as ‘humanitarian intervention’, though only as an exception to the rule. The same holds true for the possible legal justification of so-called ‘remedial’ secession. If it can be justified, then only as an exception to the rule that requires the seceding actors to keep in line with the following criteria:

a) There must be a gross violation of human rights of parts of the population so that the government is no longer representative of the entire population;

b) Secession must be exercised democratically, usually by a referendum; and

37 Exactly this problem of how to institutionally arrange ‘equality’ is missing in Taylor’s conception of ‘deliberative democracy’ in Taylor, op.cit. note 25, 231: “[T]he model of democratic legitimacy requires that the laws we live under in some sense result from our collective decisions. The ‘people’ for these purposes is thought to form a collective unit of decision. But we do more than decide on issues that are already clear-cut […] We also have to deliberate, clarify things, make up our minds. So ‘the people’ also has to be conceived as a collective unit of deliberation […] If we put these two together, we have the idea of a process of deliberation and decision in which everybody can be heard.”


c) It must be exercised in a peaceful way. In case of ‘humanitarian intervention’ and/or violent secession, only crimes against humanity or the attempt to genocide could justify the use of violence against what is then usually called ‘state terrorism’ in the political arena. It goes without saying that the ‘justification’ of secession or humanitarian intervention is in any case highly contested in the legal discourse of public international law, as well as in political debate.

However, the structural dichotomy of sovereignty of states versus self-determination of peoples is again trapped in the logic of the nationality principle and therefore the “dilemma of difference” elaborated in the subsection above. Since, according to the overwhelming majority of public international lawyers, national minorities have no right to external self-determination, what makes the ‘essential’ difference between a ‘people’ and a ‘national minority’ to be determined as the bearer of the right in the respective case as could be seen from the dispute over Kosovo? Have Albanians in Kosovo been a national minority or a people? Is it numbers, ethnicity, minority position in terms of power relations or what should decide this question?

In order to avoid the trap of the normative-ontological approach and the “dilemma of difference” in how to determine people versus minority, we must be aware which ‘entity’ we use as the normative tool of reference for exclusion or inclusion when we construct social, political and legal categories of ‘unity’ based on the epistemological code of identity/difference. On the basis of ideal types we can therefore use either the individual—the group—or ‘the whole’ (people) as a possible ‘entity’ and functional point of reference for the construction of ‘unity’ based on diversity.

This different possibility was already envisaged by the philosophers of German idealism in the eighteenth and the beginning of the nineteenth centuries. Despite the fact that Herder was a ‘realist’ in seeing that there is a “pluriverse” of peoples living on earth, he—in stark contrast to Huntington—did not deny the universalist “regulative idea” of one humankind, so that the functional point of reference—also for his denial of the existence of races!—remained “humankind” as “the whole”.40

In opposition to Herder, Fichte used—based on the naturalization of the allegedly ‘common’ language—the term ‘nation’ as a functional point of reference for the creation of the ‘unity’ to represent ‘the whole’.\footnote{See Johann Gottlieb Fichte, “13th Speech to the German Nation”, quoted in Wilhelm Heinrich Riehl (ed.), Fichte, Schriften, 445-446: “[w]as dieselbe Sprache redet, das ist schon vor aller menschlichen Kunst vorher durch die bloße Natur mit einer Menge von unsichtbaren Banden miteinander geknüpft; es versteht sich untereinander, und ist fähig, sich immerfort klarer zu verständigen, es gehört zusammen, und ist natürlich Eins und ein unzertrennliches Ganzes.”} In conclusion, thus, it is the ‘exclusivity’ of the nation, i.e., the exclusion of ‘others’, which makes it this “natural and inseparable whole”, as the quotation in the footnote demonstrates. Based on such an essentialized or even ‘naturalized’ exclusivity of the nation, the ‘differentialist’ concept of \textit{national} self-determination, like the concept of sovereignty,\footnote{It is, of course, no wonder that the Jacobin revolutionaries developed the concept of national sovereignty in contrast to, but at the same time complementing, popular sovereignty. National self-determination and national sovereignty are only two sides of the same coin.} is then understood as a ‘natural right’ to be and to remain ‘different’ in isolation. ‘Differentialist’ national self-determination based on this ‘naturalist fallacy’ remains thus irreconcilable with equality and a ‘right’ \textit{per se}, which—due to its ‘nature’—seems to need no further justification.

Hence, as long as the ‘exclusive’ sovereignty of states and the ‘exclusivity’ of nations/peoples remain identified through the nationality principle, the structural dichotomy in public international law of either the sovereignty of states or the self-determination of peoples cannot be overcome for the purpose of effective diversity management. Only when we replace sovereignty by autonomy—so that sovereignty and autonomy are mutually exclusive concepts—can we construct a concept of \textit{political} self-determination that allows for the construction of unity based on diversity and the inclusion of equality.

As we can observe in practice, the relationship between individuals, groups and nation-states is characterized not by ‘autarky’ but by interdependence. Hence, the construction of ‘unity’ as a necessary functional point of reference can no longer be the exclusive ‘nation’ as the ‘whole’, which is defined through the absence of any ‘relationship’ with ‘others’, but—in conformity with Herder—the ideal of ‘humankind’, which allows then the understanding of interdependence and a concept of politically ‘inclusive self-determination’ as the functioning of a triadic structure of unity, diversity and equality.
The first step away from ‘absolute’ sovereignty to autonomy was already made in public international law through the concept of ‘sovereign equality’ of states according to Article 2 of the UN Charter of 1945. Consequently, the prohibition of the use of force in ‘international’ relations restricts absolute sovereignty—which would include a *ius ad bellum*—and makes them interdependent, not only in their mutual relations, but also vis-à-vis a system of collective security, so that states are only relatively independent, i.e., ‘autonomous’. However, as long as we conceive of the restriction of sovereignty solely on the basis of the equal sovereignty of other states, we will not be able to overcome the structural dichotomy of the sovereignty of states and the self-determination of peoples with the need of ‘justification’ of the latter when it collides with the former. We need, therefore, the ‘relativization’ of sovereignty also from another perspective, which finds its normative expression in the American Declaration of Independence and the Tenth Amendment: based on the universalist conception that “all men are created equal” and “that they are endowed by their Creator with certain unalienable rights”, individuals are no longer conceived of as independent, i.e., ‘sovereign’, but ‘autonomous’ through this interdependence based on the equality principle, so that—in the Kantian tradition of autonomy—all human rights find their ‘immanent’ limitation in the equal freedoms of others. Secondly, however, if “governments are instituted among men” in order “to secure these rights”, the power exercised by state authorities is again limited by respect for fundamental rights, which must not be violated against. Seen from this universalist human rights perspective, the notion of a ‘people’ to whom powers are ‘reserved’ according to the Tenth Amendment of the US Constitution bears a fundamentally different meaning: this legal category is nothing other than a legal fiction in the form of a ‘personification’ in order to prohibit the violation of fundamental rights. In the end of this story of the transformation of sovereignty into autonomy, it is Article 1, in conjunction with Article 79, of the German Basic Law that finally transcends the concept of the nation-state with its human rights approach: ‘human dignity’ as a fundamental human right cannot be abolished by the people itself so that human rights’ guarantees gain priority even over the principle of popular sovereignty. Self-determination can thus no longer be based on a ‘right’ of an ‘exclusive’ entity or even the ‘right’ of a majority that identifies itself with the whole, but can only be meaningful on the basis of the concept of political autonomy. There is thus no ‘right’ to be different, to exclude ‘others’ or to separate oneself with reference to ‘self-determination’. Hence, as long as equal treatment based on the autonomy
guaranteed by human rights is assured, there is no right to any form of institutional or territorial separation, since autonomy and integration remain balanced. If, however, the human rights of individuals and groups are grossly violated, ‘differentialist’ national self-determination as a ‘subsidiary’ remedy will be justified, as can be seen also from the ‘Friendly Relations’ declaration of the UN General Assembly.  

National self-determination in the English language has no cultural-ethnic connotation, and is there constantly confused with the meaning in German and Slavic languages, where ‘national’ is, by definition, a culturally defined group. This makes also the doctrinal distinction that only peoples—but not minorities—have a right to external self-determination blurred: every democratic state, by definition, has to be politically representative of its population; if it is no longer representative of part of this population, whether this part forms an ethnic group in the sense of national minority or not, this will trigger the right to determine their political status. Only in a specific context might this part be at the same time a ‘people’ in the sense of a culturally defined ‘nation’, and since ‘minority’ is not a minority due to numbers but only to power relations, there is no justifiable reason why a national minority should not have the right to external self-determination under the conditions specified above. The *uti possidetis* principle is thus an ‘intervening variable’ that is (mis)used in legal interpretation to justify sovereignty, i.e., territorial integrity, under the false presumption that this would prevent ‘tribal’ civil wars from following self-determination claims. 

Based on the universalist human rights approach, the burden of proof for the justification would thus be turned upside down. It is no longer the secessionist party that has to provide evidence of human rights violations to justify actions as an ‘exception’ from the rule, but the state authorities who would have to prove their ‘representativeness’ on the same basis of equality of principles in order to be guaranteed territorial integrity.

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3. From Fictions to Functions: A Neo-Institutional Approach to Diversity Management

3.1. Homogenity, Neutrality and Diversity Reconsidered

When reassessing the ideologies of nationalism and liberalism and the legal discourses on sovereignty, self-determination, equality, discrimination and individual or group rights, we have to see that there are ideological presumptions based on value judgements with regard to societal ‘homogeneity’, ‘ethnic neutrality’ and ‘cultural diversity’.

Societal homogeneity in the form of a claim to ‘ethnic purity’ is a value per se for all of the twin-ideologies of racism and ethnonationalism, with the consequence of genocide, ethnic cleansing or institutional segregation in order to annihilate or exclude the ‘Other’. However, cultural uniformity is also seen as instrumental for ‘governability’ by liberals in the tradition of John Stuart Mill’s dictum that “free institutions are next to impossible in a country made up of different nationalities”.45 It is thus no wonder that so-called ‘realists’ to this very day see territorial partition as the only viable solution after ethnic violence, rather than—what they regard as unrealistic—‘dreams’ about multicultural cohabitation.46

The allegation of ‘ethnic neutrality’ has already been deconstructed as a ‘myth’ by Will Kymlicka.47 Again, individual freedom and equality before the law are seen as a liberal value per se, based on the notion of an ‘abstract’ citizenship in all liberal theories of justice, with the consequence that the alleged ‘neutrality’ of the state and ‘benign neglect’ of ethnic diversity seem to be instrumental for governability, social emancipation or upward mobility. However, the process of nation-building, either after the French model of ‘ethnic indifference’ or after the German model

46 See, recently, Jerry Z. Muller, “Us and Them. The Enduring Power of Ethnic Nationalism”, Foreign Affairs (March/April 2008), who argues that “ethnic disaggregation or partition is often the least bad answer” once “ethnic nationalism has captured the imagination of groups in a multiethnic society”. His conclusion, however, is quite contrary to his description of historic events over 300 years—namely, that population transfer and territorial separation are not a consequence of ethnic diversity as such, but “happened” only after violence and war. A much more careful analysis is provided by Radha Kumar, Divide and Fall? Bosnia in the Annals of Partition (Verso, London, 1999), XVI, who ends with the conclusion that “partition as a solution to ethnic conflict will be seen as doing more harm than good, whether in the short or long term”.
47 See Kymlicka, op.cit. note 28, 343-347.
of ‘institutionalization of ethnic diversity’, has never been ethnically neutral: too often in history, ethnic groups did not form voluntary federal associations, but were forcefully included in a newly formed state; ethnic groups, often with a rural background, became too often marginalized in the processes of industrialization and urbanization so that ‘structural disadvantages’ were created. For many groups, even cultural assimilation is no way out if ethnic origin has become the marker of social disadvantage structured by the division of labour or the hierarchization of decision-making processes, since national majorities tend too often to consider minority cultures to be inferior and prefer their own members in the social, economic and political domains.\(^{48}\) The question raised by liberals then, as to why we should preserve the cultural identities of minorities, given that this would only support dominant, conservative elites of minorities in suppressing their own ‘reformers’, when social change is ‘natural’ anyhow, can only be called cynical.

In the end, cultural diversity too can be seen as a value and instrumental for both individuals and communities. Individuals are not so free and equal in a culturally homogenous but closed society as the notion of abstract *citoyenneté* assumes. Not exclusivist difference, but diversity, both internally and through openness, allows a more general accessibility of other cultures and more intercultural exchange, which can be mutually enriching in terms of ideas, values and practices. This argument is thus no longer constrained to a ‘paternalistic’ view of a need to ‘preserve’ the cultural identities of minorities for the sake of these minorities, but “about the external value a culture has for those who are not its members”.\(^{49}\)

Against Mill’s dictum thus already Lord Acton had claimed that “liberty provokes diversity, and diversity preserves liberty”.\(^{50}\) Experiencing other cultures will thus make one aware also of the relativity of one’s own values, practices and lifestyles, and thus prepare not only for ‘tolerance’, but for political and legal recognition of the ‘Other’ and the contribution of ‘diversity’ to a common public culture.

### 3.2. The Construction of Social, Political and Legal Categories

All the ideologies of ethnonationalism are based on the very same process, which can be called the ‘naturalization of difference’. Hence, against all of the attempts


\(^{49}\) Bauböck, op.cit. note 31, 14.

\(^{50}\) See John Acton, “Nationality”, in id., The History of Freedom and other Essays (Macmillan, London, 1907), 270-300.
to differentiate various ‘forms’ of nationalism based on a normative-ontological approach that tries to identify the ‘essence’ of the phenomenon in historic processes but ends up both in infinite regress and manichaistic value judgements, as elaborated above, there is a basic underlying ‘structural similarity’ of all these ideologies.

In contrast to the process of ‘naturalization of differences’, we must be aware that we construct social, political or legal categories through three analytically distinct though, in practice, intimately linked steps:

— First, on the epistemological level, we have to make a choice based on the binary code of identity/difference;
— Second, on the normative level, we have again to make a choice based on the binary code of equality/inequality; and
— Finally, on the empirical level, we make a choice based on the binary code of inclusion/exclusion.

In defining a ‘people’ or ‘nation’ by so-called objective markers such as language or religious denomination, one has again to make a decision that a particular cultural marker out of a possible plurality of such markers shall be the ‘common’ characteristic to be found in a certain number of people, thereby constructing a ‘category’ and not a ‘group’ in the sociological sense. Again, it is a normative decision and not an empirical fact that characteristics that people have ‘in common’ should constitute the particular people or nation. The alleged identity of ‘common’ characteristics is nothing else, therefore, but the normative concept of equality with the demand to treat individuals with those ‘common’ characteristics equally. ‘Ethnicity’ is thus not an inherent, ‘natural’ trait or ‘essential property’ of people(s) or territories, but a structural code with the political function of exclusion or inclusion. And it is the political function of ‘nationalism’ as an ideology, be it ethnic or civic, to ‘camouflage’ these normative decisions in the social construction of political ‘unity’. By pretending to ‘natural’ characteristics, power relations are concealed, legitimized and, at the same time, immunized against critique.

Seen from this perspective, all forms of nationalism are based on the same structural code, which is characterized by a unilinear equation of either:

— Identity = equality = inclusion; or
— Difference = inequality = exclusion.

Hence, as long as these ideologically constructed oppositions of equality and difference are not transformed into a triadic structure of identity, equality and
diversity without the alleged predetermination for conflict or cooperation, institutional diversity management will not be possible. Only when we no longer ‘believe’ in the essentialized ‘nature’ of social and political behaviour do we approach, at least at the theoretical level, the possibility of looking for institutional arrangements of equality on the basis of diversity as the new ‘essential’ task of constructive institution engineering for diversity management.

3.3. Autonomy plus Integration: The Model of ‘Participatory Integration’

3.3.1. Four Ideal Types of Group Relations

These considerations provide the basis for a typology of group relations that is based on the empirical code of unity/diversity and the normative binary code of equality/inequality in order to explain different forms of relations between ethnic groups:

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Separation is legally institutionalized in two forms:
First, there is institutional segregation within a given state or society by exclusion from the institutions of the ‘nation-forming’ majority community. Although the American Supreme Court had established the doctrine of “separate, but equal” in Plessy v. Ferguson in 1895 as a legitimizing formula, equality as a value cannot be separated from open social structures and institutions. Segregation, as the Supreme Court ruled out in the Brown v. Board of Education decisions in 1955, implies a value judgement stating that others are unequal and therefore need not be included. Segregation based on power relations, however, is not only a problem of dominant majorities. If the quest for autonomy is based on some sort of ‘opposition nationalism’, it leads quite probably to a tendency to ghettoization and segregation by minorities themselves, with all the problems of the protection of minorities within minorities, as can be seen, for instance, with the First Nations and third language groups in Quebec or the Roma in Eastern Europe.
Second, separation is also related to forms of territorial separation: the Lausanne Treaty of 1923 was mentioned above as an example of more or less forced population transfer from one territory to another, i.e., ‘ethnic cleansing’ as it is
called nowadays with an obvious racist undertone. This is not a social ‘invention’ of the twentieth century. Pogroms against Jews or the forcible transfer of Protestants as well as Catholics in accordance with the principle ‘cuius regio, eius religio’ have a long historical record. Territorial secession from a given state or the dissolution of a state with the formation of new states, in both cases according to the right of political, external self-determination under public international law, was also discussed above.

Assimilation is just another way to negate the ‘Other’, as ethnic groups have to give up their different cultural and/or political behaviour in order to be treated equally. Very often, the cultural norms of the dominant majority are declared to be ‘neutral’ and ‘universal’ standards, as was elaborated above with regard to the ‘myth’ of ethnic neutrality and ‘identity fictions’. Thus, the price for political and legal equality is the loss of cultural identity. The separate existence of an ethnic group in terms of a specific collective identity is dissolved. And the boundary of racism may even be transgressed when even voluntary assimilation is refused by the dominant majority.

Hence, only autonomy plus integration allows for the institutional organization of equality based on the recognition of difference and, thus, for a ‘real’ pluralist approach. As Martha Minow has pointed out, different cultures and different behaviours need not be perceived any longer to be ‘deviant’ from an unstated norm51 as a rule of the ethnic majority, but do constitute legitimate aims. The recognition of diversity, therefore, is a necessary precondition for group formation and requires, at the same time, the institutionalization of some autonomy. The politics of autonomy and integration, however, have to be kept in a careful ‘dynamic equilibrium’,52 as there is a constant danger of assimilation or ghettoization of ethnic groups.

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51 See Minow, op.cit. note 40, 50-51: “[s]econd, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student—yet the hearing student differs from the hearing-impaired student as much as she differs from him [...] Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.”

52 I borrow this term from Piet Mondrian’s reflections on the development of his abstract paintings.
Thus, as can be seen from the graphic representation above, autonomy and integration are functional prerequisites for the maintenance of different ethnic groups, as well as a culturally pluralist social and political system as such, since they are based on the moral and legal recognition of diversity.

This approach has to be differentiated from liberal melting-pot theories, as well as from hegemonistic and/or imperialist theories. It cannot be said in theory which of these models best serves the function of conflict resolution. The painful experience of the renaissance of ethnonationalism throughout Eastern Europe and in the Celtic fringe of Western Europe provides striking evidence that the oppression of national feelings, either in the name of proletarian internationalism or of majority rule, produced the opposite results. What is left, therefore, on the one hand, is the American way of forging immigrants into the WASP pattern on the national level and in the political sphere, whereas they are able to maintain their folk-cultures and group behaviour at the communal level. Thus, little Italy and Chinatown are deemed no contradiction for the “first new nation” (S. M. Lipset). However, benign or reverse gerrymandering, or positive discrimination in other fields of life in order to foster minority groups by state and law, are perceived to pose a threat to American society that might result in the “balkanization” of the country, as Justice O’Connor put it in Shaw v. Reno.

Thus, the institutionalization of ‘ethnicity’ by law, linked with the concept of consociational democracy, is a ‘different’ model for conflict resolution. With autonomy and integration being functional prerequisites for the maintenance of diversity and equality, this model is based on the underlying assumption that the implementation of these functions will best help to manage the accommodation of ethnic conflicts in societies with severe cleavages. What kind of legal instruments then perform the function of autonomy and integration? There are various forms of individual and ‘collective’ or group rights between the opposite ideal types of basic individual human rights, such as the freedom to use one’s language, on the one hand, and equal representation and participation of groups in the political process, on the other.

3.3.2. Autonomy and Integration in Comparative Constitutional Law

The alternative political concepts of ‘identity versus difference’, on the one hand, and ‘autonomy plus integration’, on the other, also provide the functional framework for the comparative analysis of various legal instruments to be found in the constitutions of Europe and Northern America.55

(a) Individual or Group Rights? A Wrong Dichotomy

First of all, however, one has to deal with the dichotomy of individual versus collective rights and to reveal its underlying ideological assumptions:

— The rejection of so-called ‘collective rights’ is very often founded on the equation of individual rights with liberal democracy and collective rights with authoritarian rule when comparing ‘Western’ with communist constitutions. However, legal technique must not be confused with political teleology. The notion of the ‘inevitable’ precedence of a ‘collectivity’ over the individual, when using group rights as a legal technique, is wrong, therefore, as will be outlined in more detail below. These two forms of rights not only can, but even must, be used cumulatively when organizing equality on the basis of difference.

— There is an underlying or outspoken assumption that ‘special rights’ would be granting privileges to members of certain groups that ‘normal’ citizens won’t have. But do language rights—i.e., legal guarantees for members of


55 See, in particular, Marko, op.cit. note 42, 195-515.
minority groups to use their mother tongue, for instance, in administrative procedure—really constitute a ‘privilege’ that members of the majority do not have, insofar as they have to use the ‘official language’, which is their mother tongue anyway? Such an obviously absurd assertion\(^56\) again takes the unstated norm of the nation-state for granted by ‘identifying’ the language of the majority population with the state in creating an ‘official language’. Such special rights are thus rather necessary in order to maintain the possibility of ethnic pluralism by autonomy, because of various elements of the nation-state concept to be found in various constitutions of the East Central European ‘Volksnation’ type. In Slovenia, Croatia and Serbia, for instance, the respective language is proclaimed the official language. Article 61 of the Slovene Constitution,\(^57\) however, also guarantees to all persons the right to express an affiliation to his or her nationality or national community, to nurture and express his/her culture and to use his/her language and script. This latter right is expanded by Article 62, which guarantees the right to use one’s own language and script also in procedures before state and other bodies performing public services. Such ‘special’ rights are nothing else, therefore, than a necessary legal instrument to counteract the assimilative consequences of the nation-state concept.

Whether expressly stated or not, there is also a particular fear that the recognition of collective rights is nothing else but the first step into secession.\(^58\) This assessment, however, is based on the again unstated nationality principle of one people = one state. Those who believe in the national state to be the ultimate “end of history” insinuate that all the others, in particular national minorities, follow pretty much the same obsession—namely, to form their ‘own’ national state. Insofar, collective rights, in particular in the form of territorial autonomy, might indeed become a first step to secession as a self-fulfilling prophecy.

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\(^{56}\) This was ‘seriously’ asserted by Fritz Münch, “Volksgruppenrecht und Menschenrecht”, in Theodor Veiter (ed.), System eines internationalen Volksgruppenrechts, Bd. 3/II. Teil (Bramueller, Wien, 1972), 98.

\(^{57}\) Cf. infra note 55 and 56.

\(^{58}\) See, for instance, Constance Grewe, “Le nouveau statut de la Corse devant le Conseil constitutionnel”, Revue universelle des Droits de l’homme (1991), 381-389, at 382; and the decision of the Conseil constitutionnel itself: “[s]i l’existence d’un peuple corse était reconnue par la loi, il serait lui-même souverain, comme tous les peuples de la terre, sans que qiconque puisse imposer une limite à sa souveraineté et par voie de conséquence il disposerait du droit à l’autodétermination sans aucune restriction”. Conseil constitutionnel, op.cit. note 9, 6365.
In contrast to the ideological dichotomy of individual versus collective rights, however, a more communitarian approach reveals a different understanding of normative structures: if one is ready to recognize that all social behaviour makes sense only in a group-related context, then at least three levels of group reference can be revealed in normative structures:

— First, in order to perform the function of autonomy, various freedoms and human rights must be recognized as the fundamental legal instruments that enable members of ethnic groups to express freely their ethnic affiliation in society and vis-à-vis the state. Meanwhile, the freedoms from Articles 8 through 11 of the ECHR were interpreted by the European Court of Human Rights in a comprehensive way so as to guarantee an individual right to ‘ethnic identity’. Individual rights, however, are quite often drafted having in mind the existence of groups in order to form a prerequisite for the guarantee of these rights, as the jurisdictions on language rights by the Canadian, Swiss and Austrian Supreme Courts prove. The Canadian Supreme Court, for instance, pointed out in Société des Acadiens v. Association of Parents: “[t]hough couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social”. In analogy, the equal protection by the law has no longer to be interpreted by the intermediating principle of non-discrimination, prohibiting any differentiation of citizens, but quite to the contrary—in paraphrasing Ronald Dworkin—ethnic ‘difference’ has to be ‘taken seriously’ and thus be treated differently in order to avoid assimilation. Any state action, therefore, whether direct or indirect, has to refrain from perpetuating past discrimination by segregation or assimilation.

— The second level of group reference can be seen in constitutional norms that recognize the protection of groups as a legal value per se, as has been elaborated above with reference to Article 8(2) of the Austrian Constitution. Groups—according to the dogmatic doctrine that such norms

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60 See Swiss Supreme Court, Case No. BGE 91 I, Association de l’Ecole française, judgment of 31 March 1965, 486; and Austrian Supreme Court, Case No. I Ob 528/79, judgment of 14 March 1979.
are only ‘constitutional proclamations’ (*Staatsziele*)—are thus an object of legal protection, with the responsibility of the state authorities to take these proclamations into consideration in their dealings. However, neither members of the groups nor the groups themselves get legal standing before courts or administrative authorities in order to contest decisions or general rules of state authorities or when they remain simply inactive with regard to these proclamations.

The last step of ‘collectivization’ of rights is achieved when ethnic groups are no longer treated as if they were an ‘object’ of protection, but when they become subjects of constitutional norms, i.e., bearers of particular rights. For instance, though the right to found organizations is usually guaranteed as an individual right, Article 64 of the Slovene Constitution also provides for a ‘group right’. Thus, the autochthonous Italian and Hungarian communities, as such, and not only their individual members, are guaranteed the right to found organizations for the preservation of their national identity and to develop activities in the field of public information and publishing. The right to found organizations is further specified by the right to found self-governing bodies and the state’s duty to decentralize respective administrative competences of special concern to these minorities as well as to finance their activities. The establishment of a school system, as well as a press and information system on such a self-governing basis, working bilingually or in the language of the minority, is called cultural or personal autonomy, in contrast to territorial autonomy. The advantage of the concept of personal autonomy lies in working not only under the condition of a “discrete insular minority”, to use the words of the famous Carolene Products footnote of Justice Stone, but also when a minority is dispersed throughout the country, as is the case very often in East Central Europe.

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64 These constitutionally guaranteed rights are specified now by a statute, the Law on Self-governing National Communities, No. 65/94, signed 5 October 1994. Generally, see Joseph Marko, Der Minderheitenschutz in den jugoslawischen Nachfolgestaaten: Slowenien, Kroatien und Mazedonien sowie die Bundesrepublik Jugoslawien mit Serbien und Montenegro (Kulturstiftung der Deutschen Vertriebenen, Bonn, 1996).

As can be seen from this structural analysis that reveals three levels of group-relatedness, the dichotomy of individual versus collective rights is simply wrong, based on more or less unstated ideological assumptions. Group-related rights as ‘special rights’ for minorities or their members do not by definition restrict individual rights, but can—and in most cases must—complement each other for ‘effective’ diversity management in order to overcome structural inequalities or to guarantee ‘institutional equality’. Much more important for the effectiveness of human and minority rights is thus a country-, culture- and context-specific mix of individual and group-related rights.

(b) Institutional Equality by Territorial Autonomy

The concept of territorial autonomy was realized, for instance, in Serbia under communist rule by establishing the autonomous provinces of Kosovo and Vojvodina after 1945. Under the Yugoslav Federal Constitution of 1974, these provinces could participate equally in the federal structure. As far as legislative, executive and judicial powers are concerned, their internal organizational structure was formed after the model of the republics. This institutionalization of territorial autonomy, however, was severely restricted by the new Serbian constitution, adopted in September 1990. The provinces lost all their constitutional, legislative as well as judicial competences, whereas the executive power was transformed from self-government to a form of decentralization. Even these limited forms of what was left of autonomy in Kosovo were put out of order when the Serbian government established a military regime in 1990, legitimized ‘formally’ by some sort of ‘special legislation’.

Much more interesting for our analysis of the effects of territorial autonomy under democratic auspices is, however, the case of South Tyrol after 1948. The creation of the necessary ‘tolerance through law’ in ethnically divided societies needs constitutionally institutionalized ‘political fora’ against the ‘magic of the greater number’. The example of South Tyrol demonstrates the effective functioning of the relativization of the majority/minority distinction underlying the principle of ‘institutional equality’: with the participation of representatives of the German-speaking minority in the drafting of the Autonomy Statute of 1972 and with so-

66 On the following, see Marko, op.cit. note 70.
68 See, above all, Jens Woelk et al. (eds.), Tolerance through Law. Self Governance and Group Rights in South Tyrol (Martinus Nijhoff, Leiden, Boston, 2008).
called Commissions of Nineteen, Twelve and Six, the German-speaking minority representatives could properly participate in decision-making processes on the basis of being recognized as ‘equal partners’. Furthermore, additional integrative effects based on the idea of procedural legitimation were built into the Autonomy Statute of 1972: the division of powers between central state, region and province creates the necessity of mutual information and communication between autonomous bodies and state authorities, under the ‘threat’ of judicial review by the Italian Constitutional Court as final arbiter. At the same time, all groups within the autonomy system, i.e., also members belonging to the majority population at the state level, are bound together in the decision-making processes. As a result, through permanent negotiations on the interpretation of the Autonomy Statute in the 30-year-long implementation process, the numerical quantitative majority/minority relationship was transformed into a feeling of qualitative and permanent institutional equality that not only fulfilled the defensive and protective functions but also made realizable the goal of interethnic cooperation as a means of social learning at both the levels of political elites and ethnic communities. Hence, the example of South Tyrol demonstrates what advocates of ‘complex power-sharing’ or ‘power-dividing’ exclude _ab ovo_—namely, the possibility to achieve more than negative peace in the form of coexistence of groups through power-sharing based on territorial separation and/or institutional segregation. South Tyrol is thus an example of how the claim to external self-determination can successfully be overcome by a complex territorial autonomy regime based on the concept of ‘institutional equality’.

(c) Integration through Group Representation and Effective Participation

In general, the function of integration of ethnic groups is performed by legal instruments that provide for the representation of ethnic groups in state bodies and the possibility of their representatives to participate in the decision-making process. As can be clearly seen from the American Supreme Court’s ruling on ‘vote dilution’, the ideal types forming the alternative in terms of individual and collective rights are legal provisions that guarantee an individual right to vote, on the one hand, and equal representation of groups on the other.69 The prohibition of poll taxes and literacy tests, which effectively curtailed Afro-Americans’ right to vote, was, therefore, a necessary prerequisite for any form of representation. But is there also a right to group representation? This question cannot be avoided when

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the problem of equality is to be resolved in the context of voting rights. How can an individual voter’s equality be guaranteed if he/she is never able to vote for a “candidate of his choice”?70 Again, this problem can only be interpreted in terms of group relations. Thus, ‘vote dilution’ and the swing of the pendulum between ‘fair’ and ‘equal representation’ was one of the major claims and concerns in the voting rights decisions of the Supreme Court until the recent decision of Shaw v. Reno, which was a major setback for the claim of benign gerrymandering with Justice O’Connor and the majority of the court even denying vote dilution to be a proper legal category.71

Next to be found on a normative scale, which spans from the individual’s right to cast his/her vote towards equal representation of groups in order to serve the function of integration, are electoral provisions granting so-called exemptions from thresholds, such as that of Schleswig-Holstein with its exemption from a 5% threshold in favour of the party representing the Danish minority. Two rulings of the German Constitutional Court, decided in 1952 and 1954,72 dealt with such thresholds, thus laying the ground for the notion that, with regard to the specific equal protection clause of the Basic Law of Germany, the so-called ‘Bonner Grundgesetz’, such ‘exemptions’ from thresholds are constitutionally valid, but not mandatory. In the final analysis, however, under the terms of a proportional vote system, such exemptions are not ‘really’ exemptions but a necessary condition to meet the demands of equal protection. Why? At first glance, from the perspective of the principle of equality, a threshold requirement has to be met by all parties, i.e., an ‘exemption’ from such a threshold prima facie seems to be also an ‘exemption’ from the equality principle, thus granting parties of national minorities a ‘privilege’. However, such an assertion simply sets the wrong starting point for analysis and comparison, insofar as any proportional vote system requires strict proportionality according to the votes cast. Thus, first of all, the introduction of a ‘threshold’ in itself represents an ‘exemption’ from the strict proportionality principle, functionally legitimized then by the need for strong governance, which might be threatened by party fragmentation because of a proportional vote system. Thus, the logic of ‘thresholds’ is to prevent so-called ‘splinter-parties’, because of their sheer size, from parliamentary representation in order to secure government stability. This logic, however, does not legitimize the exclusion of

71 Cf. supra note 38.
72 See German Constitutional Court, judgment of 5 April 1952, BVerfGE (1952) No. 1, 208-209; and id., judgment of 11 August 1954, BVerfGE (1954) No.4, 31-32.
parties representing national minorities by a threshold requirement. Hence, comparing the teleology of rules, the exemption from the alleged ‘exemption’ is not a ‘privilege’, but a constitutional must under a proportional vote system. Nonetheless, effective representation is in no way guaranteed by such clauses, insofar as parties must get a certain number of votes to meet the requirement of strict proportionality. If they are too small and do not get enough votes, then they will still not be represented.

The next step in our normative scale is thus attained with provisions that guarantee ‘effective’ representation and participation of ethnic groups without taking the relative number of votes cast into account. Again, it is the new Slovene Constitution of 1991 and the Croatian Constitutional Law on the Rights of National Minorities73 that contain such institutional safeguards: Article 80 of the Slovene Constitution provides for a minimum representation of the Italian and Hungarian minorities by guaranteeing at least one seat each in the Državni zbor, the house of representatives of the Slovene parliament. The respective electoral laws create specific electoral districts where members of the Italian and Hungarian communities cast their votes for candidates according to the ‘first past the post’ system. Hence, the candidate who gained the most votes is proclaimed to be elected.

As far as participation in the decision-making process is concerned, again the Slovene Constitution provides for most influence on legislative decision-making. As far as the affairs of the Italian and Hungarian minorities are concerned, Article 64 provides for an absolute veto. Laws, regulations and other general acts that concern the realization of rights defined in the constitution, or the situation of the national communities, must not be adopted without the consent of the representatives of these communities. In addition to parliamentary representation there are also many advisory bodies to be found in European constitutions composed of minority members for parliaments and the executive.

4. Conclusion

All the legal instruments and their institutional arrangements elaborated above under the heading of autonomy and integration do not ‘resolve’ nationality problems per se. The functioning of institutional arrangements will depend on an adequate political culture as well. We always have to consider both aspects of the issue—political culture and adequate institutions. But the analysis and engineering of institutional mechanisms composed of and through a ‘dynamic equilibrium’ in balancing individual and group-related rights—in short, ‘effective diversity management’—will remain an ‘essential’ and permanent task for constitutional lawyers and political scientists.

Moreover, what is equally important in the context of this report, is the question how these principles and institutional settings can be adapted for the needs of post-conflict reconstruction in a pluri-ethnic environment and how it is possible to overcome the ideological dichotomies of civic versus ethnic nationalism, majority versus consensus government, or unitary versus federal state concepts.

Against the conundrums of liberal political and legal theory, i.e. majority rule and individual as well as formal equality against the recognition of groups and substantive equality, we have to learn first from empirical evidence that a concept of strict individual and formal equality before the law is not sufficient to effectively prevent societal discrimination in all spheres of life. It is particularly insufficient in the fields of housing, education and the labour market, which, in fixed parallel societies, end up endangering social cohesion, rule of law, and political stability. Hence, in order to paraphrase Ronald Dworkin, equal protection has to take ethnic differences “seriously” by taking the group perspective into account and recognising group rights as an effective instrument. Secondly, if cultural pluralism is taken seriously as an “added value” instead of being conceived as conflict-prone, identity-formation cannot be left to the respective ethnic group and their leaders. They will always try to monopolise it. It is therefore an obligation of the state through public education to keep identity-formation relative and situational, inclusive and multiple against any absolute loyalty claims which is the “essence” of ethno-nationalism. This requires also a new perception of “minority protection” or the protection of “vital national interests” which need not be defensive any longer. If cultural diversity and bilingualism are perceived as

positive values, there is no longer a need for territorial and/or institutional exclusion. Accordingly, territorial and institutional arrangements could be redesigned so that ethnic representation is guaranteed, but does no longer allow for ethnic domination and discrimination.

In conclusion, against the old - from Western European history inspired - concept of the multi-national state, a new concept of multi-ethnic democracy requires, on the one hand, institution-engineering with the effect of fostering multi-ethnic cooperation on all territorial levels. Mono-ethnic regions - the pillars of the multi-national states in Western Europe - can therefore be de-homogenized through the concept of cultural autonomy in a first step.\textsuperscript{75} Moreover, multi-ethnic encounters and learning processes must then be enforced through desegregation of housing, the labour market, and the educational system, however, not by introducing rigid ethnic quotas which tend to become permanent, but through temporary “special” measures of affirmative action to achieve “effective equality”, i.e. equal opportunities for those not in a majority position. This requires, of course, not only a top-down approach through institutional engineering, but also a bottom-up approach by supporting respective NGOs and civil society, and by triggering inter-cultural learning processes in secondary socialisation and the media through the development of narratives of successful inter-cultural cooperation. In addition, within the frame-work of EU policies of regional cohesion and the conditionality of regional co-operation, cross-border and trans-regional co-operation also beyond the borders of the EU must be fostered in order to overcome the historic legacies of the ethnic nation-state in Europe. But not only in the region itself, but also in the application of EU-programs must the EU itself co-ordinate its activities instead of re-inventing the wheel in each and every country.

Finally, only through a complex set of cultural autonomy and social, economic, and political integration through effective representation and participation on the various municipal, regional, national, and supra-national levels can the functions of every political system - stability, efficiency, and democracy - be achieved. In addition, the traps of ideological dichotomies and their either - or logic have to be avoided by balancing different concepts and competing interests. Hence, instead of territorial and institutional separation based on the belief in ethnic homogeneity and the identification of ethnicity and territory, only pluri-ethnic autonomy and

\textsuperscript{75} The concept of cultural autonomy as an alternative to territorial autonomy was invented by the Austro-Marxist thinkers Karl Renner and Otto Bauer under the conditions of the Habsburg Monarchy. However, this concept was not widely used in Europe after WWI. See Erich Fröschl et al. (Eds.), Staat und Nation in multiethnischen Gesellschaften [State and Nation in Multi-ethnic Societies], Wien: Passagen, 1991.
integration based on multiple identities and loyalties and the de-coupling of territory and ethnicity can serve as guidelines for state- and nation building in post-conflict societies. And probably not only those in Europe.