Ethnic diversity, plural democracy and Human Rights in Europe

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Abstract of the Special Workshop

The problem is to what extent – and at what cost and benefit for human dignity – can European countries, given their ethnic diversity, adopt and adapt plural democracy and protect human dignity. The problem is connected with the constitutional arrangements, the regulation of relations between European countries as well with the protection of the minority rights.

The problem is prompted by two developments. The first is the constant tension between ethnicity and statehood in Europe. The attempted land swap between Serbia and Kosovo -to include within each entity its ethnic adherents who are inhabitants of the other entity – is merely an instance of the tension. Other instances in Southeast Europe: Bosniaks, Serbs and Croats in Bosnia and Herzegovina; Albanians in Montenegro, Serbia, Macedonia, Greece. Western European states are on the verge of a break-up largely on ethnic grounds, too: Spain, UK. Several formerly socialist republics are coping with sizable Russian minorities: Moldova, Ukraine, as well as in Estonia and Latvia.

The tension between ethnicity and statehood might perhaps be ignored if it did not coincide with the second development. It is the growing populist isolationism ("America First", Brexit, anti-liberalism, etc.), which coincides with, and looks like a reaction to, the rapid transfer of the economic, political and even military might from the West to the East. Hence the refined problem.

The problem is primarily conceptual but with a due regard to historical experience. Contributions to the special panel are expected to clarify, within legal scholarship and/or a related discipline (politics, sociology, psychology, philosophy, art etc.) the

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[2] Mario Krešić (University of Zagreb), Jānis Pleps (University of Latvia), Damir Banović (University of Sarajevo), Alberto Carrio Sampedro (Universitat Pompeu Fabra, Barcelona)

key concepts, such as the following (non-obligatory hypotheses are added for orientation):

a) Democracy is a rule by the people, consisting of individuals. Democracy consists of individuals, each with the right to inhabit - and leave – the state territory. The function of the right is a market society, which requires a nation-state as its regulator. In a plural democracy individual form also groups with different political cultures: ethnic, religious, class, etc.

b) An ethnic community is rarely territorial. Hence it has less potential than a people and its individuals in both public law (regulating politics), and private law (regulating market exchange).

c) Adjustment of state borders to ethnic boundaries, if doable, is likely to provoke ethnic cleansing, i.e. grave violations of human dignity.

d) If one feature of social life, e.g. ethnicity, is dominant, diversity in it is an insurmountable obstacle to democracy. Legal regulation can succeed only if it is recognized that such features are dangerous because they are discriminatory against the others. Hence legal regulation both presupposes and imposes differentiation of social life into features that unite (esp. a land, a territorial unit; a people, a nation; a single market, a fiscal and monetary system; nationality, citizenship, constitutional loyalty; etc.) as well as divide individuals and groups.

e) Legal regulation of ethnic diversity includes, inter alia:

(1) national law institutions that (1.1) strengthen the rule of law to the benefit of individuals as well as groups (e.g.: laws on political parties; the review of administrative action by administration, prosecution and judiciary); (1.2) protect interests of ethnic communities by constitutionally guaranteed rights and the division of powers (territorial: symmetric and asymmetric federalism, federalization of foreign affairs, representation in local executives, etc.; personal: recognized ethnic communities, double nationality, affirmative action, etc.; procedural: consensus, veto, etc.); (2) international law institutions, multilateral and bilateral: peace and security v. self-determination; compulsory adjudication; borders; protection of minority rights; etc.

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Participants of the Special Workshop

1. Bruce Anderson, Saint Mary's University, Department of Accounting and Law bruce.anderson@smu.ca
2. Damir Banović, University of Sarajevo, Faculty of Law, damir.banovic20@gmail.com
3. Pau Bossacoma, Pompeu Fabra University (Barcelona), pau.bossacoma@upf.edu
4. Alberto Carrio Sampedro, Pompeu Fabra University (Barcelona), Departament de Dret, alberto.carrio@upf.edu
5. Ander Errasti Lopez, Pompeu Fabra University (Barcelona), ander.errasti.lopez@gmail.com
6. Mario Krešić, University of Zagreb, Faculty of Law, mario.kresic@pravo.hr , mariokresic3@gmail.com
7. Jernej Letnar Černič, Nova univerza, Slovenia, jernej.letnar@gmail.com
8. Kim Morgan, Nova Scotia College of Art & Design University, Department of Fine Arts, morgankcs@gmail.com
9. Jānis Pleps, Faculty of Law, University of Latvia, janis.pleps@lu.lv
10. Maja Sahadžić, Faculty of Law, University of Antwerp, maja.sahadzic@uantwerpen.be
11. Snježana Vasiljević, University of Zagreb, Faculty of Law, snjezana.vasiljevic@gmail.com

Abstracts

Counter-Monuments: The Expulsion of the Acadians

Bruce Anderson, Kim Morgan

From 1755 to1758 approximately 11,500 French speaking Catholics – the Acadians – out of a total of 14,000 - were forcibly removed from their land (or died) in Nova Scotia by the British military government. They were taken by ships to the United States, England, and France. In 1760 their lands were given to settlers from New England (today north-east USA) known as Planters. Today, their descendants farm the fertile lands once populated by the Acadians.

We will begin our presentation by identifying the British political-legal justification for deporting the Acadians. However, our primary focus will be the importance of remembering and commemorating such tragic events in the light of contemporary public art works: the Memorial to the Murdered Jews in Europe in Berlin, the Monument Against Fascism in Hamburg-Harburg, the Aschrott Fountain in Kassel, the Abraham Lincoln War Veteran Projection in New York City, and The National Memorial for Peace & Justice, Montgomery, USA. A key part of this analysis will include showing, and explaining the rationale for creating, three counter-monuments we installed near existing stone monuments in the Grand Pre area where the Acadians once lived. Within twenty-four hours of installing them our three counter-monuments were pulled out of the ground. Today 250 years after the expulsion of the Acadians history and memory are still colliding.

Individualism vs. Collectivism: What are the best models to accommodate different collective and individual identities?

Damir Banović

Paper deals with the theoretical questions of individualism/abstract citizenship and collectivism/substantial citizenship and corresponding individual and collective identities. This debate has still been a major theoretical and practical issue especially in the countries with more than one national or ethnic group. Communitarianism

tries to reaffirm and to acknowledge different societal, cultural and traditional contexts and to give "the essence" to the theory of justice. According to this approach, the theory of justice and consequently law should mirror specific cultural values and norms. Liberalism, on the other hand, reaffirms abstract individuals where different particular contexts should be appreciated within the private sphere. Comparing to communitarianism, liberal approach emphasizes formal norms/procedures granting individuals equal position (at least, theoretically). Moreover, this paper deals with different constitutional arrangements that give priority either to individuals or to collectives and their experiences with multiculturalism. South East and Central Europe, after the fall of communism, face a revival of the particular ethnic and national identities, which are publically recognized and reaffirmed. Some countries position specific majority as "the owner of the state" granting different rights and freedoms to the national minorities, whereas others (e.g. Bosnia and Herzegovina) have constitutionalized elements of consensus democracy granting equal collective rights to the three national groups and limited scope of collective rights to the seventeen national minorities. Human dignity as individual value takes a prominent place in modern constitutions and it has been understood and interpreted as an important legal principle by the constitutional courts challenging the idea of prioritizing collective over the individual (especially within East and Central European region) This paper aims to combine different approaches: (1) human dignity as an individual value and an important legal principle; (2) networks of identities/multilevel identities, as a foundation for some new constitutional arrangements and new political and legal theories. keywords: communitarianism, liberalism, ethnic and national identities, human dignity, a network of identities.

Justice as Multinational Fairness: A Contract Theory of Secession

Pau Bossacoma

A moral theory of secession based on a hypothetical multinational contract will be presented. Under a conception of justice as multinational fairness, a primary right to secede will be defended, with no previous injustice needed in order to have and exercise it. Nevertheless, this primary right is neither absolute nor unqualified, but subject to several procedural, substantive and material requisites. In addition, injustices are relevant under justice as multinational fairness, for the more unjust the State treatment of minority nations is, the lower the requirements to secede ought

to be. This moral approach to secession may therefore be more gradual, nuanced and adaptable than others.

Let us advance some considerations regarding the substance of this contract theory of secession. On the one hand, unlike remedial-right-only theories, under justice as multinational fairness secession is not only morally permitted when serious and persistent injustices are present. This could imply making secession almost impossible in liberal democracy. But making secession difficult in these contexts is more reasonable than making it impossible. Since just treatment of individuals and minorities matters, the right to secede should be more qualified if there are no flagrant injustices. On the other hand, unlike many primary right theories, secession, especially if unilateral, ought to be difficult in territories where individuals and minorities do not suffer patent injustices. This eclectic approach to secession should be capable of adaptation to different contexts (in particular, to liberal-democratic ones).

The method of justice as multinational fairness is based on a hypothetical multinational contract of Rawlsian inspiration. This multinational contract is conceived as a third hypothetical contract compatible in parallel with the Rawlsian contract between citizens – formulated in A Theory of Justice – and the Rawlsian contract between peoples – articulated in The Law of Peoples.
The Catalan process of secession may have given an exceptional opportunity to build theory from experience and to contrast it with reality. This might have created an environment for a reflective equilibrium. Hence, this contract theory is not a product from and for the heaven of ideas but from and for earthly (liberal-democratic) institutions. The shades of the Catalan journey may animate the owl of Minerva to take its flight.
Key words: national pluralism, multinational justice, contractualism, secession, Catalonia, Spain

Democratic principle and nationalistic aspirations in plurinational states. A republicanism approach.

Alberto Carrio Sampedro

There is a wide consensus that democracy is the basic principle for any legitimate politic organisation. Accordingly, only democratic states have legitimacy to rule and ask for compliance. However democratic states are currently facing important challenges that come from both, outside and inside the state.

External challenge are the functional, posed by globalisation, and the moral challenge, posed by cosmopolitanism (Bellamy, 2019). The functional challenge affects the capacity of states to face security problems, transnational migration, environmental problems and so on. The cosmopolitan challenge address a different problem, namely the moral right to any person to be treated equal and have the same basic human rights that other people regardless where they have born or they come from (Christiano, 2012) .

Internal challenges are posed by nationalistic aspirations inside plurinational states, that claim the right to decide what kind of relation they want to have with the state. This is an endemic problem in some state members of the European Union (France, Italy, Spain and United Kingdom before and after Brexit) that may erode its credibility as a legitimate actor on international stage.

Even if external challenges are the most urgent and critical that face current democratic states, the aim of this paper is to analyse Internal challenges since they may hamper a join action of the European Union to the external ones. In this sense, internal challenges address recurring issues as the territorial integrity and the identification of the demos that has the right to decide on an equal basis with others. Both issues are related but they claim for a different solution. Territorial integrity has been understood as the necessary framework within which the demos is identified. However this framework prevents nationalistic aspirations inside plurinational state from be expressed and considered on an equal basis. In other words, since the state demos is by definition much larger than the national one, there is not chance for the second to promote its interest by a democratic process.

A suitable way to overcome this challenge is considering both issues, the territorial integrity and the democratic process and balance among them regarding the circumstances in which they emerge. This solution is based in both political and legal reasons. Among the former is specially important to retain the conception of freedom as non domination elaborated by Pettit. According to Pettit (2012) autonomous agents

are those who act on their autonomous reasons rather for reasons arbitrarily imposed to them by other agent or body without considering their interest. According to that, nationalistic aspiration could be engaged in a deliberative process with others that can lead to modify their preferences.

Legal reasons emerge from democratic constitutions. Since democratic Constitutions are strongly committed with the democratic principle, this principle should be promoted allowing a deliberative process that can lead to the disruption of territorial integrity (Vilajosana 2017). This way is not without problems. Most important are the legitimacy of nationalistic claims, that must be based in reasons that emerge from a deliberative process rather that based in historical aspirations and must accept that the same way is open to other demos even inside the same territory.

Key words: democracy, plurinational state, nationalistic claims, republicanism

A Dêmoicratic Account of the Catalan Case

Ander Errasti Lopez

In a time when democracy in Europe is in crisis, the Catalan case could represent an opportunity to explore the dêmoicratic alternative further after the failed outcomes of both the Greco-German and Brexit affairs. The dêmoicratic theory provides a complementary perspective to the traditional federal vs sovereigntist dichotomy. Its republican focus on non-domination, cosmopolitan approach to transnational cooperation and plurinational understanding of recognition avoid any aprioristic conception of the institutional domain, both regarding the intra- and inter- demos interactions. Moreover, the dêmoicratic proposal's empirical realism combined with its normative aspiration sets a solid ground to rethink democracy in Europe in terms of a realistic utopia. However, the proponents of the dêmoicratic account have rarely applied this view to a living conflict, such as the Catalan case. They instead use it as a viewpoint to reflect on past conflicts where the traditional perspectives have failed. The Catalan case and its connection with the broader evolution of the Spanish democracy offers a unique scenario to test the dêmoicratic account. First to present alternative schemes that might help to overcome the current blockade. Second to prove the potential of the dêmoicratic approach to reflect on innovative ways of facing the crisis of the European democracy.

Based on this ethos, the article first identifies some of the controversial elements of the Catalan case within the Spanish democracy (e.g., a clash of recognitions, democratic disconnect and disputed distribution of power). However, it does not argue in favour of considering any of them as fundamental but in favour of a complex democratic understanding of the case: i.e., arguing that none of these elements is enough to provide a complete explanation of the situation. The second section introduces an overview of the theory of dêmoicracy, introducing a nuance that has often been absent from its proponents: the idea that the moral requirement of avoiding any dynamic of intra- and inter- domination referred to the plurality of demos or demoi (and their citizens), not only applies between nation-states but, also, within nation-states. Particularly in fragmented, plural or compound states such as Spain. The third section gives a brief overview of three different scenarios that, based on a dêmoicratic account, could contribute to building alternative paths to move forward from the current situation: de facto plurinational dêmoicracy, dêmoicratic international mediation and European dêmoicratic clarity act. The article concludes that while context-dependent factors may condition the success of any of these paths (particularly the political evolution of the case and the subsequent transformation of incentive schemes of the stakeholders), they show how a dêmoicratic approach to the case opens a more nuanced view and potentially productive path to develop consensual and cooperative
arrangements.

Keywords: Dêmoicracy, cosmopolitanism, sovereignty, European democracy, federalism.

Compulsory adjudication: an emerging principle of European Law and the Western Balkan' s accession to the European Union?

Mario Krešić

The basic problem of this paper is primarily conceptual. It is a concept of sources of international law which has been formulated by Alf Ross and is being reformulated by this paper. What is at stake is not merely the concept as such but its usefulness. Hence the basic problem is divided into two parts. The primary problem is to what extent is the concept useful in determining whether compulsory adjudication is an emerging principle of European law. If the answer is positive, the secondary problem

is whether the implementation of the principle by the Western Balkan states negotiating for EU membership may be a prerequisite of their accession to the EU.

The problem has been brought about by the following practical considerations. The principle of the compulsory adjudication appears in the middle ground between the development of law among the states that are members of the EU, on the one hand, and the conflicting views within the EU on the accession of the Western Balkan states (Albania, Bosnia and Herzegovina, Kosovo, Macedonia Montenegro, Serbia,) to the EU, on the other. Although the principle of the compulsory adjudication contributes to the peace-keeping function of European law, the legal character of the principle seems to be neglected when the political discourse overtakes the primacy in an evaluation of the inter-state relations. The problem of the recognition of the compulsory adjudication principle appears to be of great importance in the context of the fact that the Western Balkan countries have unresolved disputes with neighbouring states, including the ones that are already EU member-states.

In the theoretical framework, Ross's theory of sources will be presented and reformulated in a way that serves as a conceptual tool for analysing the occurrence of norms in European law. The conceptual tool will be then applied to the analysis of the normative, customary and cultural elements of the emergence of the principle of compulsory adjudication in European law and in the relationship between the EU and Western Balkans according to this principle. Finally, in conclusion, we will show the extent to which the reformulated Ross' concept of the sources of law is applicable to the investigation of compulsory adjudication principle in European law and relations between the Western Balkan states and the EU.

Key words: compulsory adjudication, European Union, Western Balkan, Alf Ross, sources of law

Measuring social dimension of judicial ideology at the Constitutional Court of Slovenia

Jernej Letnar Černič

The Constitutional Court of Slovenia has in the past decaded delivered several seminal decisions relating to the values of pluralism, tolerance and broadmindness. However, not much if anything has been published as to the reasons and judicial

ideology that triggered such judgements. What triggers constitutional judges to protect in some cases the rights of minority and in other the interests of majority?

This paper stems from the research project on »Ideology in the Courts: the Influence of Judges' Worldview on their Decisions« (Slovenian Research Agency, 2017-2020), where project group has been empirically measuring the presence of three-fold judicial ideology at the Constitutional Court of Slovenia. The research group has in the course of the project developed three-fold methodological and theoretical model aimed at measuring judicial ideology, which has been measured within its economic, social and authoritorian dimensions. In doing so, the research group has empirically measured decisions and seperate opinions from selected periods of the Constitutional Court based on the results of the model.

The objective of this paper is to present result of measuring ideological profiles of the Court and its individual judges relating to the social dimension of judicial ideology. In this way, three-fold judicial ideology model has assisted explains how judges to decide in the horizontal relationships and disputes between minority and majority. The empirical results will help the research group to develop guidelines for improving judicial-making at the Constitutional Court based on the values of pluralism, tolerance and broadmindedness in order to ensure impartial and independent functioning of the judicial system and individual judges.

The citizenship and the state continuity: example of Latvia

Jānis Pleps

1. The Republic of Latvia restored national independence on the basis of the principle of state continuity. In 1990-1991 was restored independence *de facto* of the *de iure* existing the Republic of Latvia, not created new state as a new subject of international law.

2. That means that the Republic of Latvia that was founded on November 18, 1918, despite the aggression and occupation by the USSR that took place in 1940, has continued its uninterrupted existence. After the aggression and occupation by the USSR that took place in 1940 the Republic of Latvia continue existed as an independent state and a recognized subject of international law.

3. The state continuity of the Republic of Latvia means also the continuity of the citizenship of Latvia. The continuity of the citizenship of Latvia is a fundamental basis of the citizenship policy of the Republic of Latvia. These issues are analyzed in the decisions of the Constitutional Court (for example, 7th March, 2005 Case No.2004-15-0106 and 13th May, 2010 Case No.2009-94-01) and Supreme Court (for example, 22nd June, 2018 Case No.SKA-237/2018).

4. The citizenship of Latvia existed all the period of the occupation. Latvian foreign service abroad issued Latvian passports and granted Latvian citizenship for Latvian citizens in exile. According to the principle of state continuity Latvia should recognized this action of Latvian diplomats as legally binding.

5. After restoration of independence Latvia restored *de facto* rights of *de iure* existing Latvian citizens, which was regulated by the 23rd August, 1919 Law of Citizenship. Latvia made registration of the existing citizens, not created new institute of the citizenship.

6. After restoration of independence a number of former USSR citizens stays in Latvia, which didn't have citizenship of Latvia or any other state. For them Latvia created special legal status - status of those former USSR citizens who do not have the citizenship of Latvia or that of any other state (non-citizens).

Key words: citizenship, continuity of citizenship, state continuity, Latvia

Constitutional asymmetry as a surrogate in conflict accommodation or how (not) to stabilize a constitutional system

Maja Sahadžić [3]

To date, the study of federalism in comparative constitutional law has been subject to considerable discussion. In particular, investigating in what capacity can federalism be exploited as a device for managing internal conflicts is a continuing concern within this field. Equally important, federalism studies have gradually gained interest in international public law due to overlapping debates about the right to self-

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determination and a right to secession and its potential consequences for the territorial integrity of the state. Nevertheless, what reverberates the debates in both fields is an existing and growing hiatus between traditional and contemporary theoretical postulates about what is a federal system and which federal devices can be consumed in addressing conflict accommodation linked to fragmentation caused by autonomy claims.

The most obvious finding to emerge from the theoretical polarization is that in contrast to the earlier theoretical framework, the contemporary research in federalism is mindful of the fact that federal relationships are dynamic and present in different tiers within the state organization. By the same token, it recognizes that diversity among groups with distinctive identity markers has been of crucial importance in the processes of fragmentation and thus in establishing intermediate tiers of government. As a consequence of tensions, federal dynamics linked to multinationalism, more often than not, culminate into constitutional asymmetries.

Consequently, the theoretical split that has dominated the field of federalism studies reflects on two important aspects linked to constitutional asymmetries: firstly, the understanding of the stability of the constitutional system; and secondly, related to the first, the potentials of using constitutional asymmetries as a federal device in conflict accommodation. Unlike the traditional federal approach, the contemporary federal perspective remains open for dynamic interpretation of stability to match the contemporary challenges, as well as for discussing the application of constitutional asymmetries as a tool ensuring the stability of the system.

Drawing upon two strands of research into federalism, this paper attempts to transform the narratives about understanding constitutional asymmetry as a federal device. To that end, the paper explores: first, the theoretical split between traditional and contemporary federal theory with regards to multi-tiredness, multinationalism, and constitutional asymmetry; second, its effects on the stability of constitutional system; and third, prospectives about using constitutional asymmetry in conflict accommodation.

EU minority conditionality and the rule of law: Case of Croatia

Snježana Vasiljević

After 1991, the break-up of former Yugoslavia caused a harsh war that changed the whole picture of the Western Balkans and the state of minds. The notion of creating ethnic minorities on the territory of new independent states was closely linked to religious affiliation and expression of national identity as an indivisible part of the historical process in the former Yugoslavia. The consequences of the war and a very complex economic and social situation have aggravated the exercise of the rights of national minorities. During the accession period, Croatia put a huge effort to fullfil all necessary conditions to join the EU.

One of the criteria set up by the European Council at the Copenhagen Summit in 1993 was "that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities". Moreover, Article 2 of the TEU stipulates, "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Minority rights are a central issue in building rule of law in the EU. On one hand, it is important to investigate why rule of law is a necessary element of the democratic survival in multi-ethnic Europe. On the other hand, addressing the needs of minority groups in a post-war period is crucial component of rule of law reforms. Supporting minority rights can help to safeguard citizen's respect to rule of law and build confidence in a new, fragile justice system.

Although pre-accession minority conditionality did result in implementation of international and European norms on minority rights into Croatian legislation, minority conditionality has remained vague and lacks solid normative grounds in the EU legislation beyond the anti-discrimination legislation. The EU minority conditionality designed for the CEE countries have evolved with respect to the Western Balkans region. Along those criteria that were originally designed for CEE countries, the second-generation minority conditionality developed for the Western Balkans furthermore requires the sustainable return of refugees to take place, the pursuit of transitional justice and inter-ethnic reconciliatory activities in the post-conflict setting to emerge. However, in Croatia the same issue remains. The biggest problems related to certain national minorities are the return of refugees and the

resolution of their status (the Serbian national minority), the social problems and the problems of integration (the Roma national minority) as well as the return of lost property (Serbs and Jews).

The paper tries to answer following questions: What are objectives and outcomes of the harmonization of the Croatian legislation and policy on minority rights with EU standards? Does the effectiveness of EU conditionality deteriorate necessarily after accession? Are changes of national legislation and minority policies generated by pre-accession conditionality improved minority rights after accession? Does the EU have competence in minority issues or protection of minority rights belongs to 'soft law'?