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# Constitutional Aspects of Sovereignty and the Institutional Structures of States in Pluriethnic Countries

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## 1. The Conceptual Interrelationship of Sovereignty – State – Nation

When we speak about the conceptual interrelationship of the terms sovereignty – state – nation, we have to take into account the tremendous changes in international relations and the institutional structures of nation states in Europe after World War II. The very concept of the „modern state" based on the „essential" attribute of being sovereign, is no longer an accurate description of social and political reality. „Sovereignty", conceived as original and absolute power both in regard to external as well as internal affairs in order to legitimise monarchic absolutism in the medieval ages, is dispersed above, below and beyond the „state." The „state" is no longer „the" sole actor in decision-making processes, nor a „closed" political and/or economic or cultural „entity" which can any longer be defined by territorial delimitation of state borders as this has been the ideology and political practice of the nation state in the nineteenth and twentieth century.

As far as international relations are concerned we have to face the processes of globalisation with all of the political, economic and cultural effects circumventing and/or eroding the borders of the nation states through new global and regional actors such as, for instance, multinational corporations, and a process of European integration in which the „traditional" nation states voluntarily delegate more and more state powers to supra-national institutions thereby creating a „new" legal order to which they are bound. Despite the fact that the European Union is – due to the still prevailing notion that the Member States have remained sovereign - not recognised by most lawyers and politicians as simply a new „traditional" state „in the making", it is obvious that the supra-national institutional architecture of the European Union resembles a quasi-federal institutional structure. However, what is important here, is the concept of „direct effect" and „supremacy" of EU law over all national law originally developed by the European Court of Justice which makes clear that there is no sovereign power any longer, in the logic of either of the EU or the Member States, but a dynamic balancing of autonomy and integration.

The same holds true for the development of the constitutional structures of Western and South European nation states. Since the phenomenon of the new regionalism in the old, classic central states in Great Britain, France, Belgium, Spain, Italy after 1970 we can observe a trend in all of these nation states – in the majority of them based on political claims of „stateless nations" which had been suppressed over the centuries – to devolve or to decentralise state powers to the regional level. „Federalism" and „regionalism" are, therefore, no longer restricted to the historic examples of the US or Switzerland, followed by Austria and Germany after World War I, but is now the prevailing „model" in Western, Southern and Central Europe with a great institutional variety and structural „asymmetry" of federal entities or regions with or without their own constitutions, original and not only devolved legislative power, judiciary, treaty-making power in foreign relations etc. Again, the old question, who is sovereign, the federal level or the „original" members, has become obsolete in search for a dynamic balancing of autonomy and integration.

So far I have referred to the concept of the nation state in a rather abstract way. However, in the historic processes of state formation and nation-building in Europe, we have to distinguish at least two concepts: the „French" concept of the state-nation based on strict individual equality of citizens before the law, not recognising any ethnic differences and group formation on this basis, and the „German" concept of the national state based on the recognition of ethnic differences and their legal institutionalisation, thereby creating the notions of „majority" versus „minority." Hence, until the

very day, France does not recognise the existence of „ethnic“ or „national minorities“ on her territory, whereas, according to the „German“ model, the question is raised how to „protect“ minorities adequately? Only by legal instruments providing for non-discrimination of individuals? Or is it necessary to protect members of such groups „effectively“ through group related affirmative action instruments, in particular ethnic quotas? As we can see from political and scientific discussions as well as the jurisprudence of supreme courts or constitutional courts, this question and the binary codes used such as „civic“ versus „ethnic“ or „individual“ versus „collective“ rights is in no way resolved due to the underlying ideological differences between a strict individualistic liberalism on the one hand and a a communitarian liberalism or all those who stand for more solidarity. Looking into the history and the political effects of both concepts of the nation state, we can see however, that neither the French nor the German concept can resolve the problem of managing cultural or ethnic diversity on the basis of equality. Members of groups of „others“ are assimilated at best in the process of social upward mobility in France, more often, however, discriminated and/or marginalised as we have learned from the burning banlieus throughout France last year. The German „model“ based on the artificial notion of ethnic purity of the nation and state which did nowhere exist in fact, but had to be achieved through coercive measures produced even worse consequences: segregation, ethnic cleansing, or even genocide.

Hence, the question is raised: Is there no way between the Scylla of assimilation and the Charybdys of segregation or ethnic cleansing?

## 2. Functional Requirements For Pluriethnic Systems: Autonomy and Integration:

As was demonstrated above, neither the French nor the German model of the nation state with the transfer of the concept of sovereignty from the state to the respective nation, can be the conceptual basis for the successfull management of cultural or ethnic diversity within a political entity or between them. Due to the interdependence of various political entities and actors in Europe, instead of sovereignty and strict territorial division or institutional segregation, only autonomy and integration on various territorial levels through overlapping „authorities“ can be the guiding lines for the successful management of pluriethnic states and their enviroment.

How can this be achieved in constitutional-legal terms?

First of all, as we can see from the experiences of state-reconstruction and nation-building in the Western Balkans, we have to overcome these wrong, ideologically, but not factually determined dichotomies of civic versus ethnic and individual versus group rights.

The Dayton Agreement in Bosnia and Herzegovina, based on the idea of power-sharing between „constituent peoples“, i.e. Bosniaks, Serbs and Croats, through a rigid system of ethnic quotas and mutual vetos, was a tool to institutionalise the cease-fire between the fighting parties on the ground, but – after ten years – proved to be totally ineffective for state-reconstruction and sustainable economic development: the institutional segregation and territorial separation along ethnic lines is cementing and re-inforcing ethno-nationalist identities and politics with the consequence of blocking the political decision-making process and therefore legal security and the establishment of a single market, the necessary requirements for rule of law and a sustainable economic development. The

same holds true for Kosovo under UNMIK administration, where these instruments of „consociational democracy" to overcome the ethnic divided simply did not work for various reasons.

Should the concept of „consociational democracy" with a preponderance of rights of ethnic groups therefore simply be replaced by the French, „civic" model ? I do not think so. Nowhere in South-East Europe, Central Europe or even in France can somebody be told: forget your cultural heritage, your mother tongue, or your identity in order to be treated as an „equal" citizen. What we all have and what needs to be protected by public international law more effectively than it is today, is my right to express and live my multiple identity as native of Graz, citizen of Austria and Europe and human being not only in my private, but also in public affairs.

Instead of the „exclusive" logic of either – or of the various nation state concepts and the dichotomies following from this logic, we must therefore create a „mix" of legal instruments and institutions which preserve the different identities through autonomy and, on the other hand, enable co-operation through representation and participation.

A look into comparative constitutional law reveals that we have different legal instruments for the institutionalisation autonomy and integration:

• liberal human rights;
• cultural or personal or functional autonomy;
• territorial autonomy;
• electoral mechanisms (exemptions from threshold requirements or benign gerrymandering) for the representation of ethnic groups through political parties;
• reserved seats;
• ethnic quotas;
• various forms of advisory bodies/ombudsmen;
• veto-powers;

None of these instruments itself can bring a „solution", but only a careful mix of these legal instruments which have been developed in different countries under different social and political circumstances. The idea of an „export" of „models" such as Switzerland, Belgium or South-Tyrol is therefore simply wrong.

In conclusion, against the old - from Western European history inspired - concept of the multi-national state, a new concept of multi-ethnic democracy which then has to be carefully adapted to country specific needs 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. 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.

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 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.