JEMIE
Journal on Ethnopolitics and Minority Issues in Europe

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Issue 4/2002

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Territorial Autonomy in Eastern Europe – Legacies of the Past

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Working within the framework of normative multiculturalism, this paper critically assesses Will Kymlicka's assertion that accepting certain multicultural programmes in Eastern Europe implies the simultaneous adoption of various territorial autonomy arrangements. In contrast, the author stresses the historically separate paths of state- and nation-building in Eastern Europe, highlighting the artificiality of territorial arrangements during the period of state socialism and examining the ramifications of such arrangements on the former Yugoslavia. The author concludes that if present and future autonomous arrangements in Eastern Europe are to be normatively justified, then the primary task of the societies involved should be to enhance traditional democratic institutions, such as the rule of law and constitutionalism.

I. Introduction

The aim of this paper is not to criticize the normative concept of multiculturalism.[1] Generally, multiculturalism can be understood as the politics of granting political and legal recognition to relevant and distinctive collective minority identities when the liberal paradigm of 'equal rights for equal citizens' seems to promote injustice, instead of preventing it.[2] Moreover, all my arguments are presented from *within* the general framework of multiculturalism, which is, in my opinion, an inherently preferable normative framework for the ethnoculturally heterogeneous societies of Eastern Europe. Instead, what will be challenged in this paper is Kymlicka's belief that the full implementation of some sort of multicultural programme in these countries necessitates the adoption of various autonomous territorial arrangements, and that, essentially, no serious arguments exist on the side of those who emphasize the high sensitivity of such a solution

[1] Regardless of the fact that he is a harsh critic of multiculturalism, Brian Barry offers quite a useful distinction between the sociological and normative meaning of this notion. Since it refers "simultaneously to a state of affairs and a political programme", one should keep in mind that the sociological usage of the term multiculturalism "points to the socio-cultural diversity that one may find in contemporary society", while the normative usage "indicates that this diversity has become an essential attribute of society itself". As for Barry, he accepts the reality of cultural diversity, while at the same time rejecting the normative multiculturalist programme as being incompatible with the liberal concept of equality (Barry, 2001: 22, 23).

[2] Kymlicka rightly asserts that "multiculturalists have successfully redefined the terms of public debate in two profound ways." Firstly, nowadays there are only few thoughtful people who continue to think that, regardless of context, justice can be defined in terms of difference-blind rules or institutions. It is now widely accepted that, quite to the contrary, difference-blind rules and institutions can cause disadvantages for particular groups – "Whether justice requires common rules for all, or differential rules for diverse groups, is something to be assessed case by case in particular contexts, not assumed in advance." Secondly, the burden of proof has consequently shifted, and it "no longer falls solely on defenders of multiculturalism to show that their proposed reforms would not create injustices." Instead, defenders of difference-blind institutions have to prove on their part "that the status quo does not create injustices for minority groups." (Kymlicka, 1999: 113).

in the region of Eastern Europe. However, one should be aware that the following argumentation neither implies nor wishes to propagate the so-called 'security-based approach'[3] to the question of accommodation of minority claims. It merely stresses the fact that certain common legacies of these countries require greater caution in dealing with this particular measure of multicultural programme.

II. The Concept of Territory in Eastern Europe

We should start this brief investigation of the multi-layered past of Eastern Europe by revealing the significant features of the processes of nation- and state-building. Although these processes were mutually connected, they were not marked by parallel developments. As for the former, most Eastern European nations were fully formed under foreign political rule. Therefore, national consciousness was primarily embedded in the cultural sphere, connected to literature, folklore, language and history, and, in the opinion of Hans Kohn, it was much more mystical in its nature than Western type nationalism.[4] In the literature, this concept of nation-building is also referred to as *ethnic nationalism,* i.e. "the sense of national identity and loyalty shared by a group of people united among themselves and distinguished from others by one or more of the following factors: language, religion, culture; and, most important, a belief in the common genetic or biological descent of the group." (McPherson, 1998: 31). [5]

Being distinct from the nation-building process, the state-building process in this part of Europe was decisively determined by the conflicting expectations of Austro-Hungarian, Ottoman and Russian imperial regimes, and by the constant discontinuities of state development, as a result of foreign invasions, armed conflicts and dynastic usurpations.

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[3] This is the phrase Kymlicka uses in his work with Magda Opalski (Kymlicka and Opalski, 2001), see especially the closing chapter ***Reply and Conclusion***. In his paper for JEMIE, he adopts Ole Wæver's phrase "securitization of ethnic relations" (Kymlicka, 2002: 20). Both phrases are opposed to Kymlicka's preferred justice-based approach to the question of minority claims.

[4] "Nationalism in the West arose in an effort to build a nation in the political reality and the struggles of the present without too much sentimental regard for the past; nationalists in Central and Eastern Europe created often, out of the myths of the past and the dreams of the future, an ideal fatherland, closely linked with the past, devoid of any immediate connection with the present, and expected to become sometime a political reality." (Kohn, 1961: 330).

[5] In contrast to this concept, civic nationalism is "the collective identity of a group of people born or living in a specified territory with a shared history, and owing allegiance to a sovereign government whose powers are defined and delimited by laws enacted and enforced through institutions such as parliament or Congress that evoke common loyalty to powerful symbols and myth of nationality." This type of nationalism is characteristic of most of the Western European countries. (McPherson, 1998: 33).

From the period of disintegration of these great empires, throughout the Second World War, until the latest Balkan conflicts, this part of Europe witnessed the phenomenon which the Hungarian philosopher Istvan Bibo calls "a pathological absence of continuity in territorial status". He is of the opinion that, as a consequence, the most characteristic feature of the unstable East European political spirituality is "the existential fear for the community" (Bibo, 1996: 51). Obviously, this fear could have been strengthened only after the break-up of three ethnically complex socialist federations in the early 1990s, which resulted in the creation of twenty-two new sovereign states, of which fourteen are in Europe. Although the new states are based on distinct nationalities, "it would be inappropriate to label them nation states because each has its very own minority problems." (Harris, 1993: 301).[6] While in Western Europe the territories of modern states historically preceded nations, so that these terms – state and nation – coincide and can be used interchangeably, in Eastern Europe "(t)hose countries that have acquired statehood late revel in it even though the state they have has come too late to fit the nation for which it was intended." (Liebich, 1995: 314).

To conclude, soon after their formation, the new Eastern European nations got stuck in endless quarrels over the lines of territorial demarcation. It seems that one can hardly find more proper candidates for the characteristic, which French international lawyer George Scelle called the 'obsession du territoire' (Scelle, 1958). Almost every case of the present interethnic hatred and intolerance in this part of Europe is historically rooted, or can be expressed, in terms of some territorial dispute – "National pride is measured in km²." (Kovacs, 1996: 221). Not surprisingly, national minorities in these countries often consider themselves trapped on the 'wrong' side of the borderline.[7] Therefore, the ethnoculturally based territorial organization of one minority national group in Eastern Europe, whether in the form of autonomy or a federal unit, is much more than mere political delegation of powers and competencies. It carries a strong psychological dimension for the minority, as well as for the majority nation, and one should take this dimension seriously when proposing such a measure. On the other hand, this precaution should not be interpreted as an outright rejection of the concept of autonomous territorial arrangements for Eastern European countries, but rather as a reminder that overcoming resistance to solutions of this

[6] See especially the useful tables, concerning the area and population of new European states (Table I), and main ethnic groups in those states (Table II). pp. 317-318.

kind is likely to be a very slow process,[8] which should be subjected to as little external pressure as possible. (Cf. Liebich, 1995: 317).

III. Territorial Autonomy in Real-Existing Socialism

In discussing this problem, Kymlicka says that "in Eastern and Central Europe, many national minorities have less autonomy than they had 30 or 50 years ago" (Kymlicka, 2001: 322). This statement is true in as much as one grounds one's argument in the empirical fact that legal systems of the former socialist countries did grant autonomous territorial status to various minority national groups.[9] However, knowing the essential features of this regime, we could question whether Kymlicka's thesis is valid from the normative standpoint of liberal-democratic political theory.

In her comprehensive study of autonomy, Ruth Lapidoth defines a territorial political form of autonomy as "an arrangement aimed at granting to a group that differs from the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity." (Lapidoth, 1996: 33). In a similar fashion, Hurst Hannum says that the "right to autonomy recognizes the right of minority and indigenous communities to exercise meaningful internal self-determination and control over their own affairs in a manner that is not inconsistent with the ultimate sovereignty – as that term is properly understood – of the state." (Hannum, 1990: 473-4). One should be aware of the fact that under the present framework of international public law, "minorities or peoples do not yet have a legal right to autonomy". Nevertheless, "this claim might be evolving, particularly in the light of a right to democracy as part of the 'internal' right to self-determination" (Heintze, 1998: 32; Cf. Cassese, 1995: 348-359).

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[7] Linz and Stepan speak about the so-called 'stateness' problem, where "a significant proportion of the population does not accept the boundaries of the state (whether constituted democratically or not) as a legitimate political unit to which they owe obedience." (Linz and Stepan, 1992: 123).

[8] Although Kymlicka himself acknowledges this fact, he seems to be convinced that the arguments he presents are sufficient to outweigh the irrational fears of disintegration and secession on the side of Eastern European countries, i.e. their majority nations.

[9] In his JEMIE paper, Kymlicka reaffirms that position by saying that in some ECE cases "pre-existing forms of minority autonomy were scrapped: Serbia revoked the autonomy of Kosovo and Vojvodina; Georgia revoked the autonomy of Abkhazia and Ossetia; Azerbaijan revoked the autonomy of Ngorno-Karabakh." (Kymlicka, 2002: 16). With reference to the revoked 'minority' autonomy of Vojvodina, a common mistake, repeated by Kymlicka, is that this territory was granted autonomy for the sake of the Hungarian minority rights. However, this province was historically a Serbian autonomy within the Austro-Hungarian Empire, and as for the Hungarians, with a population of 339,491 in the last census, they represent no more then one fifth of the total population of Vojvodina.

Autonomy, by definition, includes the right of an empowered entity to legislation and administration, and to a much lesser extent, to adjudication, within the transferred spheres of responsibility. From the normative point of view, proper understanding of these functions presupposes democratic process and various liberal rights and liberties, such as those to free assembly, political organization, free and fair multiparty elections, etc. Otherwise, we end up speaking about a shell with no content. And that was the exact nature of the so-called autonomies, granted under the regime of real-existing socialism.

The same is very much true for socialist federations. For example, Thomas Fleiner argues that "that these countries have actually never been federal states in a proper sense. Indeed, they were no states at all, but prepolitical communities and parastate orders functioning upon only one constituting principle – that of total party control." (Fleiner, 1996: 13).[10] As for the alleged potential of these states to promote their ethnocultural diversity through the federal system, Stepan rightly considers the former USSR to be the prime example of the so-called 'putting-together' federalism, defined as "a heavily coercive effort by a nondemocratic centralizing power to put together a multinational state, some of the components of which had previously been independent states." (Stepan, 1999: 23).[11]

To sum up, if we are to treat territorial autonomy not as an end in itself, but as a meaningful form of self-government and one possible mechanism for achieving justice in a multinational state – and Kymlicka suggests exactly that kind of treatment – then we have to admit that the legacy of real-existing socialism is far from being good practice, capable of serving as a foundation for the establishment of multicultural, liberal-democratic Eastern European states. Therefore, the primary task for these societies is to build and consolidate democratic institutions, defend the principle of constitutionalism and the rule of law, and protect, to the full extent, fundamental individual rights and liberties of their citizens, and vital collective rights of minorities – those concerning the preservation of their distinctive cultural identity. Only within this kind of institutional and procedural embodiment could various ethnoculturally based autonomous territorial arrangements, including multinational federations, be fully justified and legitimized. Otherwise, to disregard these principles and

[10] Kolstø also says that after the federal establishment of the USSR, "Lenin and his advisors reasoned that nothing much was lost by that: real power in the Soviet Union rested not with the state structures anyhow, but with the Communist Party, which remained strictly centralised." (Kolstø, 2001: 187).

[11] This type of federalism is opposed to two regular types – 'coming-together federalism', with the USA being an example of this, and 'holding-together federalism', of which Belgium and Spain after their last constitutional reforms are examples. (Stepan, 1999).

institutions would amount to safeguarding, at least on the surface, certain autonomous or federal *structures*, but not the *process* itself.[12] That way, we would find ourselves defending something I propose to call *the feudal concept of autonomy* – the total control over a delineated peace of land, not just in terms of political power, but also in terms of ownership.[13]

IV. The Legacy of the Badinter Borders Principle

The latest legacy in Eastern Europe, which triggers the problems of territory, autonomous and federal arrangements, and secession, concerns the Opinions of the Badinter Commission (Pellet, 1992). It is well known that this body of constitutional lawyers[14] provided the legal interpretations of the hard facts in the case of the former Yugoslavia. Furthermore, the Opinions of this Commission served as the legal basis for the subsequent international recognition of new states in this region. Starting from the highly contentious thesis that the then-Socialist Federal Republic of Yugoslavia was "in the process of dissolution",[15] the Commission found that international legal principles – of self-

[12] Among federalist scholars, Elazar was the first one to insist that federalism is as much a process as a structure (Elazar, 1985).

[13] Unfortunately, in post-socialist countries we are witnessing exactly this negative trend. Kolstø says: "What is the record of territorial autonomy arrangements in the post-Soviet space in this respect? Sad to say, it is not a particularly good one ... A common socio-psychological mechanism seems to be 'winners take it all'." (Kolstø, 2001: 196). Discussing the present state of affairs in the Russian multinational federation, Codagnone and Filippov note that "the power struggle between the federal centre and the federal subjects has produced a situation in which there is no longer a common set of applied and respected federal principles and provisions. In this context, the federal subjects, both the 'national' and the simply territorial ones, behave de facto as quasi-independent states." (Codagnone and Filippov, 2000: 270). As for the reestablished autonomy of Kosovo, under UNSC Resolution 1244, one of the very first decisions of the new Assembly was to act out of the scope of its competencies and to challenge the border demarcation agreement between the then-Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, signed on 23 February 2001. In its presidential statement (S/PRST/2002/16), the Security Council deplored the adoption of Kosovo's Assembly "Resolution on the Protection of the Territorial Integrity of Kosovo", on 23 May, and concurred with the Special Representative of the Secretary-General Michael Steiner that such decisions by the Assembly on matters which do not fall within its field of competence were null and void. The Portuguese OSCE Chairman supported this statement. This trend, of disregarding the questions of everyday life, and 'deciding' on highly controversial political matters, such as the borderlines or, even, independence of the province, is the dominant feature of the autonomy resurrected in Kosovo. At the same time, autonomist political parties in Vojvodina, not just those of national minorities, consider all state-owned property, located on the territory of the province, to be owned by this autonomous region. Therefore, they insist that provincial authorities should operate the process of privatization of this property independently, and that the proceeds should go into the provincial budget.

[14] The Commission was chaired by Rober Badinter, president of the French Constitutional Council, and other members were the presidents of the German and Italian Constitutional Courts and Spanish Constitutional Tribunal. The only exception was the president of the Belgian Court of Arbitration.

[15] After analyzing all relevant facts of the Yugoslav case, Radan gives the following comment on that Committee's opinion: "One is forced to the conclusion that, had the American Civil War broken out 130 years later than it actually did, the Arbitration Commission would have ruled by mid-1992 that the U.S. had

determination and *uti possidetis*[16] – are both applicable in this case,[17] and concluded that four Yugoslav republics should become independent states within the existing administrative borderlines of federal units. Peter Radan calls this solution the ***Badinter Borders Principle*** (Radan, 2000: 52).[18]

The question arising here is whether this principle should be interpreted as a new general rule of international law, or whether it should be treated as a precedent, geographically limited to Europe, or more precisely Eastern Europe. It seems that the territorial limitation of the Badinter Borders Principle has been manifestly abandoned by the mere fact that the 1992 report, prepared by a team of five experts and commissioned by the Quebec government,[19] heavily relied on that principle in concluding that the present borders of this province would automatically become international frontiers if this federal unit was to secede from Canada (Cf. Radan, 1997: 200-214).

The second possibility is to limit the application of this principle to federal states. In justifying the positions of the Badinter Commission, Malcolm Shaw offers a basis for such limitation: "The weight of the presumption of *uti possidetis* is variable. It can indeed only operate where there is an internal border or administrative line. The more unitary the state, the weaker the presumption ... the more entrenched a particular administrative line may be, the stronger the presumption. In the case of federal states ... the presumptions would be at its least assailable" (Shaw, 1997). Yet, if that was the proper reading of this principle, "it

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ceased to exist as a state in international law." (Radan, 1997: 548). Hannum similarly notes that "(t)he cases of Yugoslavia and the Soviet Union were considered to be instances of dissolution rather than secession, despite the obvious fact that secession was precisely what was occurring in Yugoslavia." (Hannum, 1993: 62).

[16] Considering the implementation of the *uti possidetis* principle outside the colonial context, Tomas Bartos concludes that "it is inconceivable that the case stands for any proposition extending beyond the context of decolonisation", and, therefore, "the Commission's employment of the principle in the Yugoslavian context is unsupportable." (Bartos, 1997: 74; Cf. Frowein: 1993: 216-217). In addition, Ratner says that the "application of *uti possidetis* to the breakups of states today both ignores critical distinctions between internal and international boundaries and, more important, is profoundly at odds with current trends in international law and politics. Many internal borders do merit transformation into international boundaries based on historical and other characteristics; but the assumption that all such borders must be so transformed is unwarranted." (Ratner, 1996: 591).

[17] However, elsewhere it is argued that these two principles are in constant tension with each other, the former being of dynamic and the latter of static nature – "The disintegration of Spanish imperialism in America produced the norm of *uti possidetis*. The end of the German, Austrian, and Ottoman Empires gave rise to self-determination. In the post-1945 era *uti possidetis* and self-determination were redefined and synthesized into a doctrine of decolonization. Since the end of communism, however, this synthesis has become unstable and new norms are required which are developed not by conflict but by fairness discourse." (Franck, 1995: 146-147).

[18] It implies that in all cases of secession from federal states, internal federal borders should automatically become international frontiers.

would be a curious rule of law ... that accepted a process of dissolution of a federal state but insisted that such process was not available to distinct peoples of other types of states. Thus, Scots would have lesser rights than Bavarians, and Quebeckers would have more options than Corsicans regardless of any factors associated with the identification and rights of self-determination units" (Rich, 1993).

From the perspective of federalist theory, the Badinter Borders Principle "in effect declassifies federal states internationally into 'second class unitary states'" (Fleiner et. al, 2000: 17). What is even more important, this decision is likely to "dissuade governments in the region either from entrusting minorities with a broad measure of local autonomy or from entering into federal arrangements as a method of regulating interethnic relations. In the event of a severe crisis, in which it is judged by an outside authority that the state is in the process of dissolution, the sub-state units of government so created may be considered as vested with a right to separate statehood" (Rady, 1996: 387).

V. Conclusion

This paper should not be understood as a call for the abolition of the existing autonomous and federal territorial structures in Eastern European countries. However, concerning the present state of affairs, the preservation of most of these arrangements "is seen more as a political necessity than as a normatively legitimate provision" (Codagnone and Filippov, 2000: 272). If current and, more importantly, some future autonomous structures are to be justified from the standpoint of liberal-democratic theory, Eastern European societies should provide them with the necessary political and legal backing.

As already mentioned, one of the important elements of that institutional environment refers to the protection of vital minority rights. In the cultural sphere, that implies the protection of minority language rights – the right to education in a native language, the right to public information in a national minority language, the right to protection and preservation of minority cultures, traditions, and religions, etc.[20] In the political sphere,

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[19] The primary author of this report is Allan Pellet (France), but his collaborators were also Thomas Franck (United States), Rosalyn Higgins (United Kingdom), Christian Tomuschat (Germany), and Malcolm Shaw (United Kingdom). The English version of the report is available at www.mri.gouv.qc.ca/etiqeaso.html.

[20] In theory, this corpus of rights is sometimes referred to as the *personal autonomy* principle, "which applies to all the members of a certain group within the state, regardless of the place of their residence" (Lapidoth, 1996: 37). However, Kovacs rightly points to the fact that the implementation of this principle very often leads to the phenomenon of the 'reterritorialisation of some personal autonomies' (Kovacs, 1996: 225).

that implies the effective participation of national minorities in decision-making processes on the local and national level, through special electoral mechanisms (reserved seats, lower suffrage threshold for minority political parties, special electoral counties) and/or through certain instruments of consociational democracy and power-sharing (minority participation in grand coalitions, reserved posts for minority politicians, veto power over certain decisions), etc.

What, then, is the prospect of various autonomous arrangements in Eastern Europe? Kymlicka is interested in a more proactive role of the international community in "helping to 'normalize' and 'desecuritize' the democratic expression and mobilization of minority nationalism in Eastern Europe" (Kymlicka, 2002: 22). As was discussed earlier, the international right of national minorities to autonomy could evolve only through the concept of democratic or internal self-determination. In that sense, Cassese notes that "satisfactory treatment of minorities is based on the imperative condition that *internal self-determination for the whole population* should first be realized" (Cassese, 1995: 351). If *people*, as the totality of citizens of one state, are the primary holder of the right to internal self-determination, then, in another step, we need "a less majoritarian, more differentiated, participatory and communitarian meaning of people" (Thornberry, 1994: 188), if we are to recognize that minorities play a distinct role and have their own status in the life of one people. Finally, if international legal theory is moving toward the interpretation that minorities should count as peoples,[21] or that the right to internal self-determination should be ascribed to minorities,[22] I would subscribe to Thornberry's opinion that the core substance of the mentioned right is *effective and democratic participation*, rather than autonomy. To say this "is not to imply an antithesis between autonomy and participation; on the contrary, 'active' participation in the life of states may lead to autonomous structures, as individuals and groups find levels of organization appropriate to effective participation" (Thornberry, 1993: 134). Given the burdensome legacy of autonomous arrangements in Eastern Europe, this proposition just refers to the logical primacy of the

[21] A definition of people, as the ethnoculturally distinct community, is provided in Makinson (1988: 75).
[22] Cassese is speaking about "developing new rules for the internal self-determination of ethnic groups and minorities" (Cassese, 1995: 348).

democratic process and liberal rights, if territorial autonomy is to be valued as the normatively legitimate provision.

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ISSN: **1617-5247**

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As an electronic journal, JEMIE aims to make scholarly debate available to as wide an audience as possible, providing easy access to cutting-edge academic literature and creating a forum where young scholars and practitioners can present their ideas alongside more established academics.