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The Role of Historic Identities in Shaping Post-Communist Constitutional Identity in Hungary, Serbia, and Montenegro: A Comparative Analysis

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ABSTRACT

In the last two decades, the question of dynamics behind the establishment of constitutional identities, especially ones concerning the relationship between constitutional identity and pre-constitutional and extra-constitutional identities raised significant scholarly attention. Following this interest, this article will examine the role pre-communist constitutional identities and traditions had in shaping the novel post-communist constitutional identity in three countries: Republic of Hungary, Republic of Serbia and Montenegro. We will first examine the manner in which these three countries established a discontinuity with their communist past. Afterwards, we will investigate to what extent, and in what manner, did these countries draw upon or reaffirm their pre-communist identity in the process of shaping their novel post-communist constitutional identity. In doing so, we will pay special attention to two constitutional factors – the definition of the constitutional subject and the relationship between the state and the church. After we compare the different approaches, we will conclude that the legitimacy of the new constitutional identity and in turn the overall stability of the constitutional project noticeably relies on the extent to which the constitution makers successfully reintegrated and reinterpreted different historic identities.

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Introduction

In his well-known work “The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community” (2010), Michel Rosenfeld introduces us to the dynamics between the “constitutional identity” and, what he calls, “preconstitutional and extraconstitutional” identities. These two categories of identities are different but intertwined. Constitutional identity is the identity which is set up by a constitution, while pre-constitutional and extra-constitutional identities are those which exist in a society prior to and/or independent of a constitution. In Rosenfeld's own words: “constitutional identity and the constitutional subject first emerge as a lack, as an empty place holder, to be filled through a process of negation, deconstruction, reconstruction, reincorporation and recombination”¹. It is exactly the pre-constitutional and extra-constitutional identities that are among the “raw” elements which are being, through the constitutional effort, “refined” and “reinterpreted” into a constitutional identity. Although somewhat ambiguous, the categories of pre-constitutional and extra-constitutional identities can cover a vast array of possible identities. It is safe to perceive them as cultural, religious and ethnic identities of a society.

However, what is important is that in each case, the constitutional identity is inherently different from these societal identities. Each constitution introduces a set of values and ideas which it wants to implement into the reality. In reality, it is in this discrepancy between what is (ger. *Sein*) and what is to be (ger. *Sollen*) that the normative function of law in general, and in specific of the constitutional order takes place. Within this distinction, the extra-constitutional and pre-constitutional identities fall within the category of *Sein*, while the category of constitution or, better said in this context, the constitutional project – falls within the category of *Sollen*. In geometrical terms, the function of the law is to drive the societal behavior from point A (that what is, *the Sein*, the factual point) to point B (that what is to be, *the Sollen*, the nominal point). If the distance between point A and point B were to be set to zero, then the legal order would be of zero potential and thus of no effective existence in comparison to non-legal social orders. On the other hand, if point A and

point B are set too far away, the effort which needs to be put into the realization of the legal project is all the greater. In case the distance is too great, then the point B, i.e. the constitutional project, can amount to a simple, unachievable, utopia. It seems that the wisdom of the constitution makers is to achieve the right equilibrium between the nominal and the factual. In other words, it is to make the nominal different, but also achievable within the context of the factual.

Rosenfeld explains this in the following terms: “At the same time that a constitution must be set (at least in part) against the constituent group's identity, it must not veer so far off from that identity as to become non-viable and hence incapable of genuine implementation. (...) Similarly, if certain rights (...) go so much against the core identity of the polity that they remain largely unobserved and unenforceable, then they are more likely to contribute to undermining rather than reinforcing the prevailing constitutional order.”²

The era of post-communist state-building and restoration provided us with numerous examples for analysis. Many countries, especially in Eastern Europe, were faced with the challenge of developing a post-communist identity. This post-communist identity was to be, naturally, inspired by the liberal democratic constitutional values and in such opposed to communism. However, each country had an extra flavor of its own particular societal and historical experience and identity, or what Hörcher calls “reservoir of traditional values”,³ which needs to be expressed and/or taken into account in the new constitutional project. Some societies were heterogeneous, others were more homogenous. Some countries, even, had a pre-communist state identity and ideology which they now, could either “resurrect” or simply “reinterpret” in accordance with the values of liberal democracy. Such countries were faced with three normative needs in comparison to which they would form their novel constitutional identity. These three needs could be summed up as: 1.) achieving discontinuity with communism, 2.) establishing liberal democracy, 3.) expressing the state's particular cultural and historical identity.

Our thesis is that a new constitutional project should take into account all these three principles and achieve a suitable equilibrium between them, in order to form a legitimate and cohesive constitutional identity. This equilibrium is important since the constitution makers can

¹ Rosenfeld, Michel. *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, New York, 2010, p. 244.

² *Ibid*, 11.

³ Hörcher, Ferenc. “7 Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation” In *The Concept of Constitution in the History of Political Thought* (ed. A.Górniewicz and B. Szlachta, 89-112), De Gruyter Open Poland, Warsaw, 2022, p. 92.

“borrow legitimacy” from cultural or historical revival in their attempt to establish principle number 1 and 2 – forming discontinuity from communism and establishing liberal democracy. On the other hand, if the cultural revival is to be too stressed, it could jeopardize the realization of this objective, especially if a particular country historically nurtured forms of government which are incompatible with liberal democracy. Same way, if the constitution-makers project a constitutional order which is too abstract and distant to the average citizen, not expressing their cultural and historical identities to a sufficient degree, it is safe to assume that citizens will feel alienated to such constitutional order, failing to provide it with suitable cohesion and legitimacy.

We will test our thesis on the example of three countries: Hungary, Republic of Serbia and Montenegro. All these three countries possessed a pre-communist statehood and state identity. All these three countries, as it will turn out, took different approaches towards their historical and cultural identities in their constitutions. Through our examination, we will point out the eventual shortcomings and/or advantages of each of these approaches in the context of producing legitimacy and cohesion of the post-communist constitutional project.

Results

The Case of Hungary

The development of the constitutional identity of Hungary can be traced in two steps. The first one is one starting from 1989 up to 2011. In these two decades, it seems that Hungarian constitution-makers foremost relied on establishing discontinuity with the communist identity and implementing values of western liberal democracy. This endeavor was done in a process of amendments to the old constitution, which, despite not producing a formally novel constitution, did change the old one up to the point that it was famously noted that the only provision that remained unchanged was the one prescribing that the capital of Hungary is Budapest.⁴ The change of content implied the abandonment of the communist identity of the constitution and the introduction of the liberal

democratic one. Rosenfeld qualified the particular method of post-communist constitution making which occurred in Hungary as “pacted transition”, describing it in the following terms: “a new conditional order was crafted as a result of roundtable negotiations between a politically weakened communist leadership and an ascending and invigorated non-communist opposition that lacked the means to gain power through force”.⁵

However, while undoubtedly achieving the goal of introducing the values of western liberal democracies, it was noted that this approach had one shortcoming: “One of the key problems of the 1989/1990 Hungarian constitution was that ordinary citizens could hardly identify with the view of politics that it presented. Instead, the general public regarded the document as the constitution of law professors, legal experts and lobby groups primarily interested in individual rights.”⁶ To put it in the terms of the three previously presented “vectors” of post-communist constitution making, the constitution of Hungary from 1989/1990, while achieving discontinuity with communist tradition and implementing values of western liberal democracies, had the shortcoming of not addressing the specific cultural and historic background of Hungary to the appropriate extent.

This shortcoming was remedied in the 2011 Constitution (Fundamental Law) and its subsequent amendments. The preamble of the novel constitution, known as “The National Avowal”,⁷ contains detailed reference to Hungarian historical identity, including its historical constitution as well as the doctrine of the “Holy Crown”. The preamble makes it explicit that the *Sollen* of the Hungarian constitutional project is to provide for a “spiritual and intellectual renewal” of the nation after “the decades of the twentieth century which led to a state of moral decay”.⁸ This spiritual and moral renewal is to be achieved with respect to the historical tradition of Hungarian statehood and its identity. Therefore, the preamble proclaims pride in the fact that “King Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago”, it recognizes the “role of Christianity in preserving nationhood”, while taking on itself the commitment of “promoting and safeguarding” Hungarian heritage, language, culture and other assets.⁹

⁴ Rosenfeld M. 2010, p. 31.

⁵ *Ibid*, p. 198.

⁶ Hörcher F, 2022, p. 108.

⁷ For a detailed study of the Preamble, see: Hörcher, Ferenc. “The National Avowal.” *Politeja*, no. 17, 2011, pp. 19-38.

⁸ Fundamental Law of Hungary, the official English translation of the Hungarian constitution, up to the 9th amendment is available at:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e) (accessed on 8th of December 2024).

⁹ *Ibid*.

The Fundamental Law makes reference to the Hungarian historical constitution and the doctrine of the Holy Crown, “which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation”. The Fundamental Law is presented as “an alliance of Hungarians of the past, present and the future. It is a living embodiment of the nation’s will, an expression of the ideals by which we collectively aspire to live”. In addition to this, the Constitution makes a sharp discontinuity with the communist era, explicitly stating that it does not recognize the communist constitution of 1949 and its subsequent tyrannical rule, proclaiming it invalid, highlighting that the country’s self-determination had been lost in 1944 and only regained in 1990, which it considers to be the “the beginning of our country’s new democracy and constitutional order.”

It is clear that the novel Hungarian constitution decided to put the historical and cultural identity, as well as moral and spiritual renewal of the Hungarian nation in the center piece of its constitutional identity. The Constitutional Court of Hungary in its decision from 2011 ruled that the “Hungarian self-identity” is a fundamental value which is not made, but merely acknowledged by the Fundamental Law.¹⁰ In context of such determination, Szente noticed that it can be said that the concept of constitutional identity, possess a “kind of transcendence over the constitution”,¹¹ providing a link between the constitutional text and that what Hörcher called “reservoir of traditional values” of Hungary.¹²

While the legacy of the Fundamental Law of Hungary remains to be assessed through the life of the constitutional subject, it seems that its historical and cultural determinations do not cause significant disputes in Hungarian society. It seems that even the authors which are critical of the new Constitution do not present it as being unpopular, rather the contrary.¹³

Questions can, of course, be raised regarding the exact nature and place of the concepts such as the historical constitution and the doctrine of the Holy Crown within the contemporary Hungarian constitutional identity.¹⁴ Such questions can also be posed regarding the exact meaning of Christian values according to the Fundamental Law, especially in the context of the fact that majority of the Hungarians, according to the latest population census, do not associate themselves with a specific religion.¹⁵ It seems that the reference to Christianity isn’t meant to associate with any concrete Christian church or denomination, but rather to Christian historical and cultural heritage in general.

In conclusion, it can be said that the shift from a constitutional identity which was primarily defined in liberal terms through its rejection of the communist legacy, to a constitutional identity which, in addition to negation of communism, also positively promotes a specific understanding of a Hungarian cultural and historic “self-understanding”, successfully serves the purpose of legitimizing the legal order and fostering social cohesion of contemporary Hungary. With that being said, Hungary can be seen as an example of a successful valorization of pre-constitutional and extra-constitutional identities in the project of building a new constitutional identity.

The Case of the Republic of Serbia

The Constitution of the Republic of Serbia from 2006 is not the first post-communist constitution of Serbia. It was adopted after the 1990 Constitution of Serbia,¹⁶ which effectively introduced principal discontinuity with the communist tradition, introducing liberal democratic values such as parliamentary democracy, market oriented economy and respect of private property. The 1990 Constitution of Serbia was, however, adopted while Serbia was still a part of the Socialist Federal Republic of Yugoslavia (SFRY). It cannot be said that this Constitution contained strong expressions of Serbia’s national and

¹⁰See *par. 67* of Alkotmánybíróság (Constitutional Court of Hungary). 22/2016. (XII. 5.) AB határozat. December 5, 2016., Internet, available at: <https://njt.hu/jogszabaly/2016-22-30-75>. (accessed 9th of July 2025); also Szente, Zoltán. “Constitutional identity as a normative constitutional concept”, *Hungarian Journal of Legal Studies* 63, 1, 2022, p. 12.

¹¹ *Ibid.*

¹² F. Hörcher, Ferenc. 2022, p. 92.

¹³ Bard, Petra; Chronowski, Nora; Fleck, Zoltán. “Inventing Constitutional Identity in Hungary”, *MTA Law Working Papers* 2022/6, p. 11.

¹⁴ See: F. Hörcher, 2022; Bard P, Chronowski N. and Fleck Z, 2022, pp. 3-15.

¹⁵ According to the 2022 population census, 16.1% of Hungarians identified as not belonging to any church or denomination, while 40.1% of them gave no answer regarding their religious identity. See: *Key data on settlements, Census 2022*, Internet, available at: https://nepszamlalas201622.ksh.hu/eredmenyek/vizualizaciok/a-telepulesek-legfontosabb-adatai/index_en (accessed on 8th of December 2024)

¹⁶ Ustav Republike Srbije (Constitution of the Republic of Serbia) („Službeni glasnik Republike Srbije“, broj 1/1990), the English translation of the Serbian 1990 constitution is available at: https://www.worldstatesmen.org/Serbia_const_1990.htm (accessed on 8th December 2024)

historical traditions or identities. It is only in the preamble that Serbia is defined as a “democratic State of the Serbian people”. The normative part of the constitution, however, defined the country as civic: “a democratic State of all citizens living within it, founded upon the freedoms and rights of man and citizen, the rule of law, and social justice.” (Article 1). It is only in Article 72, par. 2 that specific national commitment to Serbs is made, through the introduction of the right and duty of the Republic of Serbia to “maintain relations with the Serbs living outside the Republic of Serbia in order to preserve their national and cultural-historical identity.” Regarding religion, Article 41 of the 1990 Constitution introduced the freedom of religious belief as well as separation of church and state, noting that the state can, however, financially support religious communities.

The 2006 Constitution of the Republic of Serbia was the first post-communist constitution of the Republic of Serbia as an independent state. It can be noticed that, in comparison to the 1990 Constitution, the 2006 constitution contained a stronger acknowledgement of the historical national identity of Serbia, insofar as it stated that the Republic of Serbia is: “a state of Serbian people and all citizens who live in it” (Article 1). Therefore, Serbia is defined as a national state of the Serbian people (Serbs) but also a state of all its citizens.¹⁷ However, it is safe to say that the Constitutional model of Serbia, even after the 2006 Constitution, remained more civic than national. The Article 48 of the Constitution prescribes that: “The Republic of Serbia shall promote understanding, recognition and respect of diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information”. In fact, the only provision in the Constitution which seems to constitute a special treatment of Serbs is not directed towards citizens of

Serbia, but is rather directed externally, towards Serbs who live outside of Serbia. Repeating the Article 41 from the 1990 Constitution, Article 13 par. 2 of the 2006 Constitution states that “The Republic of Serbia shall develop and promote relations of Serbs living abroad with the mother state”.¹⁸ It is noteworthy that the 2006 formulation defines Serbia as “mother state” of all Serbs, which implies a stronger commitment than the 1990 formulation, which did not explicitly classify Serbia in those terms. The change from simply a country which helps Serbs outside of Serbia preserve their national, cultural and historical identity, to the “mother state” of all Serbs can also be interpreted as a step towards stronger affirmation of Serb national identity within the 2006 Constitution. However, other than that, no strong references aimed at to promotion of specific Serb national identity are made in the Constitution.

If the Constitution of Serbia emerged as a “empty placeholder”, then the later political life of this country, it can be argued, determined the nuances of its constitutional identity. The determination of Serbia being “mother state of Serbs” was further developed through legislative, specifically the Law on the Citizenship of the Republic of Serbia, which enables Serbs living outside of Serbia to gain the right to citizenship of Serbia in a simplified process.¹⁹ It is also promoted through a series of educational and cultural privileges Serbia provides to Serbs living abroad, as well as public manifestations and holidays. In 2020, Republic of Serbia together with Serb entity from Bosnia and Herzegovina, Republic of Srpska, established joint celebration of the Day of Serb Unity, freedom and national flag.²⁰ In 2024, the All-Serb Assembly was called for the first time in Belgrade, which adopted a “Declaration on the protection of national and political rights and the common future of the Serb people”, promoting the need for the protection of cultural and political rights of all Serbs, as well as their shared national identity.²¹

While it seems that the national flavor of the 2006

¹⁷ According to Article 47, line 2 of the Constitution of the Republic of Serbia: “no person shall be obliged to declare his national affiliation”. Therefore, Serbia is a “civic” country insofar as it is a country of all of its citizens without any discrimination in respect of the ethnic, religious or other identity of its citizens. This means that the citizens of Serbia who are Serbs do not gain any special status based on their ethnic identity. As is explained in this chapter, the only special treatment of Serbs which the 2006 Constitution provides is directed towards Serbs who are not citizens of Serbia, as they are put in a privileged position in regards of the possibility of gaining citizenship of the Republic of Serbia or other rights within the country.

¹⁸ The first paragraph of this Article makes the distinction between “Serbs” and “Citizens of Serbia”, with the latter

falling, regardless of their national identity, under the protection of the Republic of Serbia (art. 13, par. 1).

¹⁹ Article 23, Zakon o državljanstvu Republike Srbije (“Službeni glasnik Republike Srbije”, br. 35/2004, 90/2007 i 24/2018)

²⁰ See: Stopić, Zvonimir. „Bosnia-Herzegovina political briefing: The Day of Serbian Unity, Freedom and the National Flag”, Weekly Briefing, China-CEE Institute, Vol. 44, No. 1 (BH), 2021, available at: https://china-cee.eu/wp-content/uploads/2022/08/2021p10_BosniaHerzegovina.pdf (Accessed 9th of December 2024).

²¹ The text of the Declaration is available in Serbian on: <https://www.predsednik.rs/pres-centar/saopstenja/deklaracija-o-zastiti-nacionalnih-i-politickih-prava-i-zajednickoj-buducnosti-srpskog-naroda> (Accessed 9th of December 2024).

Constitution is undisputable, its relation with religious identities caused much more scientific and political interest. Namely, the 2006 Constitution determined Serbia as a “secular country” in which no “no religion may be established as state or mandatory religion” (Article 11, par. 3). The 2006 Constitution, unlike the 1990 one, did not explicitly prescribe that state can financially help religious communities. This caused debates regarding what exactly is to be understood under “secularity” in terms of the 2006 Constitution. The immediate cause for this discussion was the Law on Churches and Religious Communities from 2006 (LCRC).²² This law was adopted a couple of months prior to the 2006 Constitution, and the question of its validity was posed only after the adoption of the new Constitution. LCRC contained provisions that the state can financially help churches and religious communities, also granting them tax allowances and social rights to the clergy. The question remained – can such provisions remain in power after the adoption of the 2006 Constitution which no longer explicitly recognized the possibility of cooperation with religious communities? In other words, was the omission of these provisions meant to be interpreted as a step towards a stricter separation of religious communities and state?

The same question applied to the fact that LCRC recognized three categories of religious communities, following the criteria of their historical presence in Serbia: traditional churches and religious communities, confessional communities and “other” or rather “new” churches and religious organizations. Traditional churches and religious communities were those denominations with “centuries-long historic continuity in Serbia”. Among the traditional churches, the law listed foremost the Serbian Orthodox Church (SOC), to whom it, in a separate Article recognized the “highly significant historic, nation-building and civilization-building role in forming, preserving and developing of the Serbian national identity” (Article 11). In addition to SOC, as traditional churches and religious communities, it recognized the Roman Catholic Church (RCC), the Islamic Community, Jewish Community and a number

of protestant churches.²³ In addition to the traditional churches and religious communities, the Law recognized “non-traditional” denominations, which fell under the categories of “confessional communities” which were granted legal subjectivity pursuant to the prior Yugoslav laws on religious freedoms from 1953 and 1977 (Article 16), and “new” churches and religious communities which were to be registered in accordance with this law. According to LCRC, the traditional religious communities only filed an application to be registered, while the non-traditional religious communities had to file a request for registration, proving that they meet a number of criteria set by LCRC.²⁴ The foundation of such “categorization” of religious communities was also to be problematized, as it would be claimed that it implies a certain level of “privilege” which has no basis in the text of 2006 Constitution.

It was argued that the new Constitution brought with it a break from the previously established regime in state-church relations, by enforcing a strict separation of church and state instead of a cooperative separation of the 1990 Constitution of Serbia. The argument for this claim was, as was said, the fact that the new Constitution omitted the provision according to which “the state can financially help religious communities”. Furthermore, it was claimed that the classification of churches and religious communities in different categories according to their historical seniority and using such a distinction as a basis for distributing additional obligations on the “non-traditional denominations”, is not in line with the constitutional principle of equality of denominations.²⁵

The National Assembly of Serbia, as well as some authors, didn’t share such views. As one of the participants in the discussion before the Constitutional Court and the ensuing scientific debate noticed, this discussion was a “proof that secularity in Serbia is being understood quite differently, and that the a priori stances on this question which is ultimately political, and its divergent interpretations, more often than on serious theoretical foundations, are based on prejudices which strongly influence even the stances and legal discussions in the country’s top body tasked with protecting constitutionality and legality”.²⁶ This debate, therefore, touched upon the self-understanding of what

²² Zakon o crkvama i verskim zajednicama (“Službeni glasnik Republike Srbije”, br. 36/2006), the translation of the law is available at: <https://licodu.cois.it/?p=1448&lang=en> (accessed 8th of December 2024).

²³ Specifically: Slovakian Evangelist Church a.v, Christian Reformist Church and the Evangelist Christian Church a.v (Article 10, par. 1).

²⁴ Marković, Vasilije; Romić, Marko. "O ustavnosti registrovanja crkava i verskih zajednica - prilog proučavanju

državno-crkvenog prava." *Strani pravni život*, no. 1 (2020): pp. 50-51.

²⁵ See: Marinković, Tanasije. "Prilog za javnu raspravu o ustavnosti Zakona o crkvama i verskim zajednicama," *Anali Pravnog fakulteta u Beogradu*, vol. 59, 2011, no. 1, pp. 367-385.

²⁶ Avramović, Sima. „Poimanje sekularnosti u Srbiji – refleksije sa javne rasprave u Ustavnom sudu“, *Anali Pravnog fakulteta u Beogradu* vol. 60, no.2, 2011, 280.

secularity means in Republic of Serbia. Ultimately, the Constitutional Court of Serbia reached a decision which found that the law to be in line with the Constitution, stating that “according to the opinion of the Constitutional Court, the Constitution of the Republic of Serbia from 2006 opted for the system of cooperative separation”, further elaborating that the constitutional provisions “do not imply a system of the complete separation of church and state”.²⁷ With this decision, as Đukić notices, the “uncertainties about the meaning of the term ‘secular state’ in the 2006 Constitution of the Republic of Serbia were resolved”.²⁸

The cooperation of church and the state in Serbia, next to its legal dimensions, is evident in the public sphere. The custom of celebrating religious holidays (*slava*) of different municipalities and state institutions emerged in the post-communist decades. Next to this, the presence of state official in religious celebrations became normalized. The support for the SOC manifested itself also through the construction of the Saint Sava Cathedral in Belgrade, as well as other projects of joint interests. However, it is safe to note that the “constitutional we” of Serbia does not overlap with the “religious we” of the SOC. Or, in the language of the Constitutional Court of Serbia: “there is no state church and no identification of the state with a particular religion or religion in general”.²⁹ A good paradigm of this divergence is manifested through the interesting case was the erection of the monument to Stefan Nemanja, the founder of medieval Serbian dynasty of Nemanjić. Stefan Nemanja, next to being a ruler, also became towards the end of his life a monk, later venerated as Saint Simeon the Myroblyte. Stefan Nemanja, or rather Saint Simeon the Myroblyte, holds a central place both in the Serbian statehood and religious identity. This was reflected in the fact that the initial design of the monument in Serbia’s capital of

Belgrade had Stefan Nemanja holding a cross in his right arm. However, in the final design, the cross was replaced with a sword. This move was explained by arguing that, since Stefan Nemanja “was both the founder of Serbian statehood and spirituality, the idea of statehood prevailed, and it was not accomplished by the (...) cross, but, as always, by sword”.³⁰ This move can be interpreted as a move towards building a Serbia’s self-understanding in a manner independent of its religious undercurrent.³¹

It can therefore be concluded that the constitutional identity of contemporary Serbia, although remaining different from them, contains a noticeable acknowledgement of Serbia’s pre-constitutional and extra-constitutional identities, foremost its national (Serb ethnic identity) and religious one (Serbian Orthodox identity). This acknowledgement allows the state to nurture a link between itself and Serbia’s major historical identities, foremost national and religious one, strengthening the latter while also using them as a source of its own legitimation. However, the fact that these identities are not placed as dominant pieces of contemporary Serbian constitutional identity, allows Serbia to define itself as a civic and pluralist country. It seems that in Serbia, the „light link“ between the historic values and the constitutional identity successfully manages to serve the purpose of legitimizing the legal order and achieving a sufficient degree of social cohesion, while not overreaching to the extent which would undermine its civic and pluralist character, generating dissonance or division within the society. The fact that the Serbia achieved a satisfying balance between the historical and constitutional identity is also proven by the fact that the only revision (2021) of the Constitution of the Republic of Serbia was directed towards ensuring better realization of rule of law and independence of judiciary, while no greater discussions concerning its identitarian provisions have risen in the

²⁷ Odluka Ustavnog suda Republike Srbije br. IUz-455/2011 (“Službeni glasnik Republike Srbije” br. 23/2013).

²⁸ Đukić, Dalibor. „The Legal Regulation of Religious Symbols in the Public Sphere in Serbia”, *Religious Symbols in the Public Sphere Analysis on Certain Central European Countries* (ed. Paweł Sobczyk), Ferenc Mádl institute of comparative law – Central European Academic Publishing, Budapest – Miskolc, 2021, p. 146.

²⁹ Odluka Ustavnog suda Republike Srbije br. IUz-455/2011 (“Službeni glasnik Republike Srbije” br. 23/2013).

³⁰ Novi Standard, *Zašto „Stefan Nemanja“ drži mač a ne krst?*, Internet, available at: <https://standard.rs/2021/01/26/zasto-stefan-nemanja-drzi-mac-a-ne-krst/> (accessed 9th of December 2024).

³¹ Đurić concludes that „the fact that Serbia is a secular state which does not identify with one specific, concrete, religion

and in which exists a clear constitutional expression of the awareness of the pluralism of religious identities in the state as well as of the determination that they be preserved; does not collide with certain, strong influence of religious heritage on the legal treatment of state symbols as well as public holidays, nor is it incompatible with the structure of state-church relations, which can be determined as cooperative separation - and which, in a specific way, proves that religion is included into the domain of what is to be considered constitutional identity”, see: Đurić, Vladimir. “Religija i ustavni identitet”, *Zbornik radova sa međunarodne konferencije posvećene desetogodišnjici izdavanja časopisa Politikologija religije*. Centar za proučavanje religije i versku toleranciju – Fakultet političkih nauka u Beogradu, Beograd, p. 246.

recent years.

The Case of Montenegro

Montenegro's first post-communist constitution was the 1992 Constitution of the Republic of Montenegro.³² At the time of its adoption, Montenegro was, together with Serbia, one of two members of the Federal Republic of Yugoslavia (FRY). The 1992 Constitution introduced the basic principles of liberal western democracies, such as political pluralism, free market, private property etc. The preamble of the 1992 Constitution determined Montenegro to be formed on the basis of the "historical right of the Montenegrins", the normative part of the Constitution, however, determined the country as civic, in which the citizens were carriers of the sovereignty (Article 2). The official language of the Republic of Montenegro was Serbian language in its "iekavan dialect" (Article 9). The Constitution made reference to the three largest religious denominations in the country: "The Orthodox Church, Islamic religious community and the Roman Catholic Church" (Article 11), although it did not grant them any recognizable rights in comparison to other religious communities.

After Montenegro gained its independence in 2006, it adopted the 2007 Constitution of Montenegro.³³ The new Constitution of Montenegro proclaimed Montenegro to be a "civic" country in which no specific collective (*ethnos*) is the carrier of sovereignty, but rather the individual "citizen".³⁴ Alongside this, the Constitution proclaimed Montenegro to be a secular country, omitting any mention of traditional or dominant religious denominations. With that being said, it can be estimated that unlike the of Hungary and Serbia, whose current constitutions promote a constitutional identity which is, to a bigger or lesser degree, linked with specific historical identities of these countries, Montenegro chose to develop a

constitutional identity which omits explicit links with its historic identities.

The difference between the approaches can be explained by the fact that Montenegro, in comparison to the two previously examined countries, is noticeably more heterogeneous. Ever since its independence, Montenegro, according to official data, had no ethnic or linguistic majority. According to the latest population census, the national make-up of Montenegro is: 41.12% Montenegrins, 32.93% Serbs, 9.45% Bosniaks, 4.97% Albanians, etc. The linguistic make-up of Montenegro is also fragmented, and at the same time does not correspond to the national make-up: 43.18% of inhabitants speak Serbian, 34.52% speak Montenegrin, 6.97% speak Bosnian and 5.25% speak Albanian. Montenegro's only majority is the religious majority – with 71.10% of its population being adherents of the Eastern Orthodox Church.³⁵ The vast majority of the Eastern Orthodox Population of Montenegro identifies itself as adherents to the Serbian Orthodox Church (SOC). Although the official statistic did not collect data in this regard, relevant studies suggest that over 90% of Orthodox identify with the SOC, while less than 10% identify with the uncanonical Montenegrin Orthodox Church.³⁶

The 2007 Constitution makers wanted to overcome the fact that Montenegro is a nationally and linguistically heterogeneous country by constituting a *civic* (demos) identity of the country, according to which no individual nation (*ethnos*) inhabiting Montenegro would be a constituent nation or a carrier of sovereignty. The carrier of sovereignty would, rather, be individual citizens, meaning that Montenegro would foremost present a *union of abstract citizens* regardless of their national, linguistic or religious identities.³⁷ The idea of a civic constitutional identity, however, was from the offset criticized as being inconsistently implemented through the constitutional text. The constitutional identity projected by the new Constitution was criticized as engaged rather than neutral in terms of its identitarian provisions. One of most

³² Ustav Republike Crne Gore ("Službeni glasnik Republike Crne Gore", br. 48/92) An english translation of the 1992 Montenegro Constitution is available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2005\)096-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2005)096-e) (accessed 8th of December 2024).

³³ Ustav Crne Gore (Constitution of Montenegro) ("Službeni list Crne Gore", br. 1/2007 i 38/2013), the english translation is available at: https://www.constituteproject.org/constitution/Montenegro_2013 (accessed on 8th of December 2024).

³⁴ Article 2, line 1, Constitution of Montenegro.

³⁵ Montenegrin office for statistics – MONSTAT, *Release 135/2023 - The 2023 Census of Population, Households, and*

Dwellings Population of Montenegro by National, i.e. Ethnical Affiliation, Religion, Mother Tongue, and Language a Person Usually Speaks, 2024. Internet: available at: https://www.monstat.org/uploads/files/popis%202021/saopstenja/SAOPSTENJE_Popis%20stanovnistva%202023%20II_ENG.pdf (accessed on 8th of December 2024).

³⁶ Bešić, Miloš. *Gdje je crnogorsko društvo 16 godina od obnove državne nezavisnosti? Analiza trendova političkog javnog mnjenja Crne Gore*, Centar za demokratiju i ljudska prava – CEDEM, 2022, pp. 24-25.

³⁷ Šuković, Mijat, *Ustavno pravo*, CID, Podgorica, 2009, pp. 181-187.

criticized decisions was that according to which the official language of the state was determined as “Montenegrin”. This determination was criticized because of the fact that at the time of the Constitution’s adoption, majority of citizens spoke the Serbian language, while only a minority of citizens spoke the Montenegrin language.³⁸ The decision to call the official language “Montenegrin”, was thus judged as an attempt to impose such language on the majority of citizens, and in consequence impose the Montenegrin ethnic identity on citizens of Montenegro who didn’t identify themselves as ethnic Montenegrins. In the wake of the results of the 2022 population census results, with Serbian being the most numerous languages in Montenegro; new calls to amend the Constitution in a manner which would acknowledge this fact have risen.³⁹

However, the issue of linguistic identity of Montenegrin citizens is an ongoing topic in Montenegro, which remains to be assessed in the future. What can be assessed at this moment is how the dynamics between the projected constitutional identity of Montenegro and the religious identity of its citizens influenced the legitimacy and political stability of the country. According to the aforementioned statistics, the sole identity which is common to the majority of Montenegro’s citizens is their religious identity as Orthodox Christians – with 71.10% of citizens identifying as such, the absolute majority of them associating themselves with the Serbian Orthodox Church (SOC). According to sociological studies, the SOC is traditionally among the institutions with the highest percentage of public trust in Montenegro. Starting from 2012, SOC overpassed the trust in both the Parliament, the President of Montenegro and the Government of Montenegro, having received a positive opinion from more than 50% of the population.⁴⁰ The high percentages persisted in the later years as well, with the

most recent study showing SOC still enjoying bigger trust than the aforementioned institutions, being ranked 3rd in the country, after the educational system and the police.⁴¹

However, while Montenegro’s stance towards religious communities was, much like in Serbia, at the time of drafting the Constitution an “empty placeholder”; unlike Serbia, the subsequent legislation and political life unveiled that political elites pushed for a specific understanding of secularism, which, as it turned out, was not aligned with the affiliations of the people of Montenegro. First insight into the Montenegrin understanding of secularism can be gained from the General Law on Education, which banned religious activities in public schools, unless they were licensed as religious high schools (Article 5, par. 2).⁴² This in practice meant there would be no religious instruction in Montenegrin public schools. Moreover, the lack of legislation such as laws on restitution of religious communities also proved that the state wasn’t sufficiently interested into developing a cooperative relation with the religious communities, especially the largest religious denomination in the country, the SOC. The falling out had been deepened by the fact that the state concluded “fundamental agreements” with all the major denominations in Montenegro (RCC, Islamic community and the Jewish Community), excluding from the process only the SOC. However, the culmination of the negative state-church relation came with the adoption of the Law on Freedom of Religion or Belief and Legal Status of Religious Communities in December of 2019.⁴³ Although this law contained generic provisions introducing freedom of belief it contained quite unusual Articles in its provisory and final provisions. One of them, Article 62 prescribed in its first paragraph that: “religious buildings and land used by the religious communities in the territory of Montenegro which were built or obtained from public revenues of the state or were owned by the state until 1 December 1918, and for which there is no evidence of ownership by the religious communities, as cultural heritage of Montenegro,

³⁸ According to the 2003 official data, 63.49% of population of Montenegro spoke Serbian, while 21.96% identified as speaking Montenegrin. See: Zavod za statistiku Republike Crne Gore – MONSTAT, Saopštenje br. 60 - Stanovništvo prema vjeroispovjesti, maternjem jeziku i nacionalna ili etnička pripadnost prema starosti i polu, 2004, Internet, available at: <https://www.monstat.org/userfiles/file/popis03/saopstenje60.pdf> (accessed on 8th of December 2024).

³⁹ MINA, “Mandić: Sprovešćemo volju naroda, srpski će biti službeni jezik”, *Vijesti*, 2024. Internet: <https://www.vijesti.me/vijesti/politika/731080/mandic-sprovescemo-volju-naroda-srpski-ce-bit-sluzbeni-jezik> (accessed on 9th of December 2024).

⁴⁰ CEDEM, *Political Public Opinion in Montenegro – September 2012*, 2012, Internet, available at:

https://www.cedem.me/wp-content/uploads/2022/03/september_2012.ppt (accessed 9th of December 2024)

⁴¹ CEDEM, *Političko javno mnjenje Crne Gore – Mart 2024*, Internet: available at: <https://www.cedem.me/wp-content/uploads/2024/03/Prezentacija-MART-2024-.pdf> (accessed 9th of December 2024).

⁴² Opšti zakon o obrazovanju i vaspitanju (“Službeni list Republike Crne Gore”, br. 064/02 – “Službeni list Crne Gore”, br. 04/08 ... 84/24)

⁴³ Zakon o slobodi vjeroispovijesti ili uvjerenja i pravnom položaju vjerskih zajednica (“Službeni list Crne Gore”, br. 074/19) The English translation of the Law’s Draft is available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2019\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)014-e) (accessed 9th of December 2024).

shall constitute state property.”⁴⁴ The second paragraph further prescribed that: “Religious buildings constructed in the territory of Montenegro based on joint investment of the citizens by 1 December 1918, for which there is no evidence of ownership rights, as cultural heritage of Montenegro, shall constitute state property”.⁴⁵ Therefore, Article 62 proclaimed that all religious property constructed prior to 1918 on the territory of Montenegro will become state property, and that the respective religious communities will have to prove their ownership in an administrative procedure, shifting the burden of proving ownership to the religious communities.⁴⁶

While being, at the first glance, natural – this provision was directed foremost towards SOC, which was the only religious community in Montenegro which, at that time, didn’t conclude a “fundamental agreement” with the state of Montenegro. The adoption of this law, politically, was motivated with the wish to nationalize Orthodox temples in Montenegro belonging to SOC in order for them to be put at the disposal at the uncanonical Montenegrin Orthodox Church, which the ruling party was promoting.⁴⁷ This move turned out to be deeply unpopular, generating dissatisfaction with both the SOC and the citizens of Montenegro. This dissatisfaction generated a protest movement headed by the popular Metropolitan of Montenegro and Littoral of the SOC, Amfilohije. These protests were being conducted in the form of religious litanies, based on which they gained their name – *litije*. With the 2020 parliamentary elections on sight, litanies generated their political articulation, which eventually brought with it first change of government in Montenegro since the fall of communism. The new post-2020 parliamentary majority soon removed the disputed provisions from the Law on Religious Communities.⁴⁸ After some time, a “fundamental agreement” was reached between Montenegro and the SOC, which, among other things, acknowledged the integrity, subjectivity as well as historic role of the Metropolitanate of Montenegro and the Littoral of SOC

in shaping Montenegro’s statehood, as well as the contribution of the SOC the social, cultural and educational development of Montenegro.⁴⁹ This agreement was subjected to disputes before the Constitutional Court of Montenegro. It was claimed that it brings SOC to a favored position in the legal order of Montenegro, thus hurting the principle of secularity and equality of denominations. In 2022 the Constitutional Court of Montenegro, however, ruled that: “The religious rights and freedoms from the Fundamental Agreement, (...) are substantially contained in an almost identical or similar form in the aforementioned contracts concluded with other religious communities. The above shows that the state continuously and consistently realizes the respect for the autonomy of religious communities and religious rights in general, which is committed to by the Constitution of Montenegro, the Law on Freedom of Religion or Belief and the Legal Status of Religious Communities, as well as confirmed and published international treaties”.⁵⁰

It can be, therefore, ascertained that the fall of the 30 year long rule of the Democratic Party of Socialists (DPS) which was warranted foremost due to unpopular identitarian policies, brought with it a gradual change of paradigm in the self-understanding of Montenegrin constitutional identity. This change was foremost expressed through rethinking the relationship between the constitutional identity and the religious, extra-constitutional identities of the state. The prior direction towards the concept of strict separation of state and church, which turned out to be unaligned with the extra-constitutional and pre-constitutional identities of the majority of citizens, was left behind in favor of a model of cooperative separation, which was more in line with the historical and religious identity of majority of citizens of Montenegro.⁵¹ By resolving the so-called “church question,” Montenegro demonstrated a degree of flexibility by aligning its constitutional identity with the country’s prevailing pre-constitutional and extra-constitutional identities, forsaking an unpopular and, ultimately undemocratic activist approach which had resulted in decrease of legitimacy and social cohesion in the state. Such a movement can be

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ For a critical overview of this law; see: Đurić, Vladimir B.; Marković, Vasilije V. "Predsekularni karakter crnogorskog Zakona o slobodi veroispovesti u kontekstu Fulerovih zahteva za unutrašnjom moralnošću prava." *Strani pravni život*, no. 4 (2020): 7-26

⁴⁷ The speech of the then-president of Montenegro, Milo Đukanović, at the 8th Congress of DPS from November 2019, available at: <https://dps.me/govor-predsjednika-dps-a-mila-đukanovica-na-viii-kongresu-partije/> (accessed on 9th of December 2024)

⁴⁸ Zakon o izmjenama i dopunama Zakona o slobodi vjeroispovijesti ili uvjerenja i pravnom položaju vjerskih zajednica ("Službeni list Crne Gore", br. 08/21)

⁴⁹ Temeljni ugovor između Crne Gore i Srpske Pravoslavne Crkve („Službeni list Crne Gore, 96/22)

⁵⁰ Odluka Ustavnog suda Crne Gore U-II br. 30/22, 37/22 i 9/23 ("Službeni list Crne Gore", br. 079/24)

⁵¹ See: Marković, Vasilije. „Temeljni ugovor između Crne Gore i Srpske pravoslavne crkve - izazov i/ili preobražaj shvatanja nacij i sekularnosti u Crnoj Gori?“, *Arhiv za pravne i društvene nauke* 118, no. 1 (2023), 29-59

ascertained as prudent and even necessary in order to establish a viable and sustainable constitutional identity in Montenegro. It remains to be seen whether such approach will be followed in solving other issues which divide the citizens of Montenegro, further reinforcing the establishment of „constitutional we“ and civic identity of Montenegro.

Conclusion

Returning to our starting point, we can conclude that all of the three countries examined, when leaving the communist era manifested a common tendency towards establishing discontinuity with their communist past through an introduction of liberal democracy and its values in their constitutional systems, thereby establishing a liberal constitutional identity. However, the countries differed in their subsequent approach to the further development of their constitutional identity, specifically in regards to the degree to which they chose to introduce their pre-constitutional and extra-constitutional identities in their novel constitutional identities. Looking back to our starting thesis that the constitutional identity of a country must be constructed with respect to a certain minimal level of alignment with the basic pre-constitutional and extra-constitutional identity of the society, it seems that Hungary and Serbia, despite noticeable differences in the intensity of utilizing the historical identities of their societies, both constructed their constitutional identity in a manner which did not collide with the pre-constitutional and extra-constitutional identities of these countries. Because of this, both these countries are in a position to utilize their cultural and historical identities in a manner which would generate legitimization of their legal order as well as cohesion within these societies. Montenegro, on the other hand, provides us with an example of the contrary, or rather – of what happens when a constitutional identity is projected in a manner which is incompatible with the basic pre-constitutional and extra-constitutional identities of a state. Having shaped the constitutional *Sollen* in a manner which drove the majority of citizens of Montenegro to the point where they felt that their adherence to their religious identity is not compatible with adherence to the policies of their state, the then-government of Montenegro brought upon itself loss of political legitimacy and ultimately, a loss of power. The new parliamentary majorities and the governments they formed, however, managed to remove the irritation between the projected constitutional identity of Montenegro and the religious identity of the society, reclaiming the legitimization and

social cohesion in the country. This ultimately supports our thesis that a minimum compliance between the constitutional project and societal identities must exist in order for the constitutional identity of a country to be viable and sustainable.

COMPETING INTERESTS

The author has no competing interests to declare.

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