


CONSTITUTIONALIZATION OF PATRIOTISM – IS CONSTITUTIONAL IDENTITY POSSIBLE?

ABSTRACT: Constitutionalization of patriotism implies insisting on unquestionable and universal values around which social cohesion is achieved, instead of insisting on differences, which are often insurmountable. Constitutionality is a metavalue, a value above personal and narrow group interests, as well as national, religious, cultural, or political affiliation. The key research question is whether constitutional patriotism can be an alternative to nationalism. In this paper, the author seeks to provide socio-political and legally grounded answers to a number of other dilemmas: whether this concept is suitable for achieving social cohesion and political loyalty in multicultural societies, whether it serves as a tool for the political empowerment of citizens, and whether conflicts in deeply divided societies can be mitigated through it. In addition to the normative consideration of this concept, by applying the empirical comparative law method, the author examines the credibility of constitutional patriotism in states governed by the rule of law with a developed democratic and civic political culture. The findings of the paper show that constitutional identity is not possible in deeply divided societies marked by war wounds and national traumas. Societies accustomed to nationalism as a political technology do not constitute an adequate milieu for the constitutionalization of patriotism.

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Constitutional patriotism is difficult to achieve in an environment characterized by widespread corruption, clientelism, a subservient political culture, and dysfunctional institutions. In other words, the rule of law and a state governed by the rule of law are prerequisites for building a constitutional patriotic identity.

Keywords: *constitutional patriotism, rule of law, nationalism, identity.*

1. Introduction

If a normative reconstruction of modern states were to be made, one would come to the conclusion that each of them was founded by some kind of founding act, starting with the republican one created by a lone founder, through the social contract, and ending with the founding myth. The latter is centered on the negation of all previous historical identities, except the one that builds itself. It could be concluded that the state is the source of its own unity, which in the post-national era is characterized as constitutional patriotism.

Like most concepts of political philosophy, constitutional patriotism is a theoretically vague concept, on which no consensus has been reached in the academic and scientific community. Jürgen Habermas was the pioneer in the theoretical clarification of this term and he had the ambition to devise a form of collective identification of post-national Germany. Habermas redefined patriotic sentiments, moving away from the dominant ethnic and territorial concept of patriotism (blood and soil), focusing on constitutional principles, above all on democracy, the rule of law and freedom of thought as a new connective tissue. Habermas's (1992) intention was to deepen the idea of a political union in the context of European citizenship, "held together by voluntary subscription to a system of government created and maintained by the constitution" (p. 7).

The socio-political reading of the mentioned idea is reflected in the view that in a multinational milieu, the nation cannot be the basis of political unity. Hence, a post-national identity is constituted as a form of political identity based on the appreciation of democratic values of human rights, as a category with a constitutional tradition (Habermas, 1992, p. 17). In other words, the center of gravity shifts from national identity to a new constitutional-political identity. John Eric Fossum (2007) followed up on Habermas's ideas, focusing on the concepts of particularism and universalism that determine commitment as the supporting pillar of constitutional patriotism. For this author, constitutional

patriotism is a bit of an oxymoron because it tries to bridge the universalism of human rights and the particularity of the community of commitment (loyalty) and identification (p. 4). Fossum introduces to the research agenda the notion of “thickness of commitment”, which is manifested through exit (exit strategy), voting and loyalty. Exit is measured against the ability of individuals to enter or leave the group, respecting their identity diversity. Historical memory, as the basis of nationalism, leaves no room for leaving the group (in the form of separatism, secessionism), since common history and ethnicity are strong links. Voting in this context is result of consensus of large number of actors who have different expectations and starting points, but who, through discussion and valid argumentation, reach a consensus about the constitutional order, which they consider indisputable. Loyalty is broader than a juridical-political arrangement and it is perceived, most broadly, as a commitment to joint action (Fossum 2007).

Nationalism, as a dominant concept of the 19th century, has largely lost its foothold in post-war Europe. Over time, pluralism of ethnic identities has become a constitutional category in many European states, known as constitutional pluralism. Some authors consider that in order to prevent the tension between nationalism and constitutionalism, a suitable alternative should be found in the form of constitutional patriotism, as a value-neutral and ethnically blind legal structure (Öğr & Gözler Çamur, 2021, pp. 1183–1184).

Müller (2010) sees constitutional patriotism as “a normatively appealing form of civic, national, perhaps even post-national commitment to increasingly multicultural societies” (pp. 9–10). The aforementioned author approaches constitutional patriotism as a “collective learning process”, in which the actors in the situation (losers and winners) are aware that their daily political engagement and values are legitimized in their constitutional system (Müller, 2008, p. 85). Müller starts from the assumption that universal moralistic principles legitimize constitutional patriotism because civil disobedience as supra law, protection of minorities, and political debate arise from them. It is easier to detect what constitutional patriotism is not. First of all, it is not a theory of justice *per se*, nor a justification of the democratic and political system. Some authors go a step further, considering that constitutional patriotism is a legitimating paradigm for civil attachment to a sustainable form of government, primarily democratic and moral (Stepanov, 2012, p. 650). Commitment is the biggest challenge since it implies that individuals should determine which values to support while it is up to the state to determine which programs to support.

It is important to point out that the constitutionalization of patriotism is not a theory of justice, but theoretically this phenomenon could be subsumed under the theory of modern pluralistic democracy. Deliberative democracy is based on freedom and equality, as its procedural requirements, which coincide with the concept of modern liberal democracy. Constitutional patriotism is not a normative legitimation of liberal democracy. At its core is the deliberative activity of free members of the political community, who through discussions achieve a broad social and normative consensus, which is also reflected in the constitutional text (Breda 2018). The viewpoints that see constitutional patriotism as civil religion are also unfounded, since the inherited constitutional culture should not be an immutable dogma. Freedom, equality and the goals of constitutional patriotism (finding rational agreements) are its epistemological structure. Everything else is superstructure subject to change.

The theory of constitutional patriotism assumes that discussions/debates on local or national topics led by members of the political community provide individuals with a sense of ownership over general constitutional principles (Cohen & Sabel, 2002). Discussions about the common good can take place informally or within state institutions. Informal discussions do not have the capacity to result in changes to constitutional norms. However, the constitutional norms themselves legitimize the open discussion of laws and policies, which creates an internal feeling of belonging to the constitutional order. Unlike informal discussions, deliberative discussions in public institutions (representative bodies, courts, etc.) have a greater capacity to lead to changes in the constitutional system (Breda 2018).

Constitutional patriotism needs to be viewed from a normative and empirical perspective. Constitutional patriotism is faced with a series of dilemmas and questions that require socio-political and legally thoughtful answers. Constitutional patriotism is a boundless construct, which also sheds light on the dilemma of whether it is more suitable for achieving moderate politics or rather contributes to the development of civic activism. Theoretically, the question of whether the constitutionalization of patriotism is possible in supranational entities is also inevitable, as well as whether elites who seek to marginalize minorities in order to present them as constitutionally unpatriotic are prone to it?

The answer to the question of whether constitutional patriotism can replace nationalism is extremely complex, especially in Serbian but also in all other post-Yugoslav national contexts. At this point, I emphasize that I do not see constitutional patriotism as a supranational identity, and I believe that its essence is not distancing from state and national symbols, such as the flag, coat

of arms, and anthem. Constitutional patriotism seeks to overcome artificially created intolerance and negation of otherness as a ubiquitous phenomenon in multinational societies. The key value of constitutional patriotism is equality before the law, which implies the rule of law, separation of powers and its compliance with the constitution and the law. In the milieu of complex social identities, an ideological Piedmont is needed that would gather citizens around the value of the constitutional order instead of ethnic or some other affiliation. Belonging to certain identities, innate or acquired, constitutional patriotism does not question since the constitution provides guarantees for their enjoyment.

2. Applied constitutional patriotism – comparative experiences

Constitutional patriotism shows loyalty exclusively to the highest legal act as a defense against usurpation of power and centralization of power, giving primacy to democratic values in relation to (ethno)nationalism. Constitutionally, patriotic identity is a civic concept that is not in itself non-national since the constitution itself guarantees citizens the preservation of their otherness, nationality and other personal characteristics. He is the Piedmont that holds together the members of the nation and different nationalities, enabling their inclusiveness and belonging to different cultural and ethnic groups. Constitutional patriotism maintains stability in politically and socially heterogeneous environments, in which attachment to the state and its constitutionalism is tied to citizenship, not to common ethnic and national origin and language. The author of this work does not approach constitutional patriotism as a holy grail, but value-neutrally detects its advantages in nationally heterogeneous environments, which have opted for its norming by socio-political consensus. The spirit of constitutional patriotism prevails in post-war Germany, which faced the Nazi past, in the United States of America, Switzerland, Canada and the European Union, as a supranational category. Constitutional patriotism is not only an integrating factor, but also a key guardian of legality and guarantor of the apparatus of state coercion, which is applied in case of gross violations of the constitutional order. Constitutional patriotism is primarily based on cosmopolitan, universal values, but the question arises to what extent it can transcend states. This concept has its empirical confirmation not only in the normative documents that will be analyzed in the text that follows, but also in the constitutionally patriotic ethos and solidarity that has taken root among citizens as addressees of constitutional norms. In this way, the dichotomy between rights on the books

and rights in action was avoided despite the constant political challenges and social frictions that exist even in established democracies.

2.1. The Canadian Charter of Rights and Freedoms (Charter)

The Charter of Rights and Freedoms of multicultural Canada (1982) respects diversity, but still gives priority to integration. Reflexivity towards constitutionalism is gradual so that newly arrived members of the community get to know and accept the values and constitutional tradition (Fossum 2007, p. 14). The Canadian Charter of Rights and Freedoms (Charter) is an integral part of the Constitutional Law from 1982, which, through defining the relationship between the state and citizens, guarantees the rights and freedoms of all citizens. The Charter guarantees basic freedoms, such as religious and media freedoms, provided that they do not violate the rights of others or undermine public programs and policies. Democratic rights are reflected in the active and passive voting rights of every adult Canadian and impose the obligation to periodically call elections (at least once every five years), which can be postponed in the event of a state of emergency. According to the letter of the Charter, Canadian citizens and permanent residents have the right to freedom of movement, that is, the right to live or to look for a job anywhere in Canada. This right can be limited in the case of obtaining health and social benefits. The Charter also protects legal rights by ensuring fair treatment within the judicial system (right to a fair trial, protection against arrest without good reason, right to legal representation, prohibition of deprivation of liberty without good reason, legal protection after arrest, protection against cruel and unusual punishment, corpus of judicial rights, primary presumption of innocence). The Charter guarantees the freedom of expression of thoughts and ideas, without the intervention of the executive power, as well as the right to equality, which prohibits any form of discrimination, especially those based on race, national or ethnic origin, skin color, religion, gender, age, physical or mental disability, sexual orientation, residence, marital status.

2.2. Constitutional Patriotism in the European Union

The Charter of Fundamental Rights of the European Union is a normative attempt to find the smallest common content for the peoples of Europe who have shown a willingness to share a peaceful future based on common values. The European Union was formed on the universal values of human dignity, freedom, equality, solidarity, democracy, rule of law, security and justice.

The European Union as a supranational creation does not have a constitution, but through the concept of citizenship of the Union, multiculturalism and national identities of the member states and their organization of government are respected. In other words, the European Union has citizenship, but it has neither a classic *demos* nor a generally accepted codified Constitution, which doesn't mean that its constitutionalization did not occur.

Some authors go a step further, considering that the Union inherits an “anti-revolutionary, uncodified and living Constitution that was created in the process of the constitutionalization of the Union”, which they state is the result of “limitation of public authority by legal norms” (Beširević, 2013, p. 27), which occurred when the Union transitioned from an international to a constitutional legal order. Constitutionalization in this context refers to the process of constituting a new legal order (Möllers, 2011, p. 195). Applied constitutional patriotism is possible in the European Union due to the absence of a common cultural and historical heritage of the member states of this supranational organization. The European Union is not based on the national but on the political and legal order and that's why it is easier to build a common constitutionally patriotic identity. The citizens of the member states of the European Union simultaneously inherit their individuality and identity and cultural patterns by building a common European identity, based on universal values.

The Spanish Constitution of 1978 is an applied model of constitutional patriotism, which represents a tectonic phenomenon in Spain's constitutionalism and political history. The Spanish political system and the values on which it is based, as well as the sources of law and the system of territorial organization were redefined by this Constitution (Juberias, 2018, p. 56). The Constitution redesigned classic Spanish nationalism that took on the contours of civic nationalism. Civic nationalism is the opposite of peripheral nationalism and incorporates historical determinism and cultural Spanish patterns. The constitutional arrangements of 1978 gave birth to the democratization and decentralization of Spain and gave primacy to the civil over the ethnic dimension (Muro & Quiroga, 2005, pp. 25–26). In this way, the embryo of constitutional patriotism was established on the inclusive concept of citizenship and the sense of identification with a political system that provides freedom and equality to every individual (citizen). Despite the tendencies of Basque and Catalan separatism, the constitutionally patriotic identity persists, transcending spatial and temporal framework.

3. The limits of Constitutional Patriotism

Critics of constitutional patriotism criticize it for its lack of particularism, that is, the fact that the absence of self-understanding is not enough to feel a strong commitment to foreigners with whom one does not share the same origin, culture, or place of residence. A justified criticism of this concept also refers to its insufficient constitutiveness. In order for a common identity to empower citizens to feel solidarity, attachment and loyalty to politics and institutions, it is necessary for citizens to perceive it as an inseparable part of themselves. The question is whether the constitutional patriotic identity possesses such a capacity since its nature is procedural, achieved by a wider social consensus. Criticism that maps the artificial character of constitutional patriotism, which lacks naturalness, is also established. Constitutional identity is a construct that should provide citizens with a sense of kinship, which, although not inherited, is created through adherence to common institutional values. Democratic citizens who choose to be constitutional patriots should understand the new identity not as a reflection but as a creation that they create themselves (Hayward, 2007, pp. 187–188).

In order to establish constitutional patriotism, a deeply developed legal awareness is necessary, which is the core of the rule of law. The rule of law is two-dimensional category, which has formal and material component. The formal (procedural) dimension of the rule of law gives primacy to the formal regulation of legal acts, without focusing on their content. Legal certainty is in the centre of the formalist rule of law. On the other hand, the material component of the rule of law focuses on conceptual and metalegal landmarks woven into the structure of legal norm, to the moral and value contents embodied in the idea of justice and truth. Hence, the rule of law is understood as the core of a just society (Lauc, 2016, pp. 51–52). According to some authors, the rule of law is complex concept which constitutes ultimately a durable system of laws, institutions, norms and community commitment that delivers accountability, just laws, open government and accessible justice to people in the way most appropriate for governance according to the principles that are universal (Paleri, 2022; Perić Diligenski, 2024).

Constitutional patriotism can be sanative for deeply divided societies, in which intragroup loyalty and identity sensitive to any otherness are created within opposing social groups. Great social distance, social schism, exclusivity, intolerance, unwillingness to dialogue and cooperation with dissenting groups can only be overcome through the constitutionalization of patriotism. The polarizing spiral emphasizes belonging and commitment

to one side, while at the same time social distancing between rival groups (Kopecký, Meyer-Sahling & Spirova, 2022, p. 225). Socially, it is most dangerous when polarization turns into violence directed at members of a rival group, which is not condemned but affirmed as the crowning proof of loyalty and solidarity towards one's own group. It is necessary to avoid the social atmosphere that leads to the so-called zero sum game, i.e. a situation in which the victory of one group is equal to the loss (defeat) of another group (Perić Diligenski, 2023, p. 807).

4. Conclusion

Building a legal culture is a *conditio sine qua non* for a patriotic constitutional environment. A legal (non)culture that obeys the executive power, selective application of law and a tendency towards legal uncertainty is an obstacle on the strengthening of constitutional-patriotic sentiments. The legal order has its own logic, which must not be the art of the possible but a strict adherence to the letter and spirit of the law. Constitutional patriotism is not a *panacea* that can solve all legal and social ills, nor is it a legal transplant that can be grafted into any country, at any time, in any legal order. Authoritarian systems, deeply polarized societies and systems with a poorly developed civil political culture are, as a rule, a foreign body for the constitutionalization of patriotism. In post-war and post-conflict societies, nationalism as a political technology (not nationalism *per se*) favors false national sentiments and narratives that are at odds with universal principles of equality and justice. Turning to particularistic values dilutes the possibility for the constitutionalization of patriotism and the establishment of principles and values with which the majority of members of a society could identify.

Constitutional patriotism cannot even be a generally accepted legal transplant, especially in deeply divided societies, with war wounds and national traumas. In such a milieu, community members reject this concept as a foreign body. National identity is not capable of subordinating to constitutional patriotism in societies accustomed to nationalism as a political technology. Constitutional patriotism implies a developed legal culture and a generally accepted awareness of respect for norms, not only out of fear of sanctions, but also because of confidence in the correctness of the disposition. I believe that constitutional patriotism is not an appropriate form for societies where legal nihilism flourishes and where there is no democratic and participatory political culture. Legal nihilism is reflected in distancing, relativizing and negating the values incorporated in legal norms (Perić Diligenski, 2020, p.

346). Societies with developed clientelism, parochial and subservient political culture, captive and dysfunctional institutions cannot be candidates for the formative process of patriotism norming.

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KONSTITUCIONALIZACIJA PATRIOTIZMA – DA LI JE USTAVNI IDENTITET MOGUĆ?

APSTRAKT: Konstitucionalizacija patriotizma podrazumeva insistiranje na neupitnim i univerzalnim vrednostima oko kojih se postiže društvena kohezija umesto insistiranja na razlikama, koje su neretko nepremostive. Ustavnost je metavrednost, vrednost iznad ličnih i užegrupnih interesa, nacionalne, verske, kulturne ili političke pripadnosti. Ključno istraživačko pitanje odnosi se na to da li ustavni patriotizam može da bude alternativa za nacionalizam. Autor u radu nastoji da pronađe društveno-političke i pravno osmišljene odgovore i na niz drugih dilema – Da li je ovaj koncept pogodan za postizanje društvene kohezije i političke lojalnosti u multikulturalnim društvima, da li je to sredstvo za političko osnaživanje građana i da li putem njega mogu da se ublaže konflikti u duboko podeljenim društvima?

Pored normativnog sagledavanja ovog koncepta, primenom empirijskog uporednopravnog metoda autor ispituje kredibilitet ustavnog patriotizma u pravnim državama sa razvijenom demokratskom i građanskom političkom kulturom. Nalazi rada pokazuju da ustavni identitet nije moguć u duboko podeljenim društvima, sa ratnim ranama i nacionalnim traumama. Društva naviknuta na nacionalizam kao političku tehnologiju nisu adekvatan milje za konstitucionalizaciju patriotizma. Ustavni patriotizam je teško postignuti u ambijentu sa razvijenom korupcijom, kljiteljizmom, podaničkom kulturom i nefunkcionalnim institucijama. Drugim rečima, vladavina prava i pravna država jesu preduslovi za izgradnju ustavnog patriotskog identiteta.

Ključne reči: ustavni patriotizam, vladavina prava, nacionalizam, identitet.

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