

*Constitutional patriotism as a form of
citizenship for the European Union –
recognizing minorities*

by

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INTRODUCTION

If first and everlasting question of political theory is that of ideal polity, then citizenship must be its central concept. Citizenship is a reflection of the construed intersubjective political reality which determines our status, rights and responsibilities, as well as our relations towards others and state. Normative concept of citizenship broadens the field of analysis offered by political science and law with reference to the whole spectrum of notions: justice, liberty, equality, recognition etc. In other words, the notion of citizenship somehow resonates with the whole kaleidoscope of political theory and any research of this notion is necessarily a complex investigation of many interconnected notions.

This research started before “Greek” and way before “migrant crisis”. Nevertheless, some of the principles important for understanding these crises, as reader will be able to see, have been discussed in this research. The point is not in non-existent author’s forecast ability, but rather in my belief that citizenship, as one of principal notions of political theory must find its expression in theorizing the European Union. Clearly, not for pure academic motives, but rather out of need to philosophically reflect on the important issues posed by everyday life in today’s Europe. The existence of clearly defined (predominantly national) majorities and various (not only national) minorities in most of the European states must make us think about the normative grounds of this division. Might the way we conceptualize citizenship influence these divisions? Given that we are equal and state neutral to our particular conceptions of the good, aren’t these divisions unjust?

The recent political life in Europe was marked by variously labelled or self-identified subjects: migrants, xenophobes, terrorists, antiracists and the main point of clash among and many other

participants of public life was the right, idea and ideal of citizenship. They are only an indicator of many other cleavages engraved in the mosaic of European national states, products of modern history inspired by romanticism and Enlightenment. Citizenship shows itself again as a shared point of reference that should bridge divided comprehensive worldviews and offer an intersubjective platform of mutual recognition.

Citizenship entails also certain forms of loyalties, allegiances. Being a citizen of a state clearly does not necessarily entail a positive attachment to it. Recent horrible events in Paris, Brussels and Ankara, and many others in the long history of terrorism, show how radical citizens can be in questioning the legitimacy of political order often invoking arguments of misrecognition. What does it take to be a good patriot today, what do we owe to polity and what must polity guarantee to us? Patriotism, impregnated by historic events and writings, often resonates as a big heroic, epic word that means sacrifice for the big cause at all costs. This research will show that constitutional patriotism is rather different, for big causes are illegitimate and more often we find them in the spheres outside of politics. Instead, constitutional patriotism entails the idea that if we owe our loyalty to anything in the broadly understood political life of contemporary plural societies then we owe it only to the common political principles that we can all adhere to, thus in no way misrecognizing our ideas of good life. In the era of deep discrepancies of ideas of the good life, in the continent of majoritarian mainly nationalistic constitutional traditions, constitutional patriotism perfectly fits into the puzzle of European Union's postnational citizenship and is a big step in accommodating rights of various minorities produced and reproduced by national states for centuries.

Main research problem

This research is a normative enquiry into the citizenship of the EU from a specific perspective. The citizenship in question is the one formed at the supranational level of the EU as *sui generis* polity, while the perspective I am taking considers minorities and a way to accommodate their needs in a just way. Europe is integrating, both horizontally and vertically, and adjusts, among others, its legal and political norms and practices.¹ Today, the question of its future citizenship is more important than when it was first legally formulated in the Maastricht treaty. Furthermore, the external power of globalization and economic interdependence, migration and immigration, internal revivals of ethnic and national identities, social movements of various identity groups, put the question of citizenship on the top of the EU agenda. The problems that arise from immigration, national minorities, subaltern and disadvantaged groups are ‘the greatest challenge facing democracies today.’² There are certainly many ways to look at this issue, the one taken here is based on normative arguments of philosophical philosophy.

The European Union citizenship was introduced by the Maastricht Treaty, which was signed in 1992, and came into force in 1993. European citizenship is complementary (additional) to national

¹ In *Ruling the void*, Mair explains why “the point is not how to come to terms with something that is exceptional and *sui generis* – the issue of Europe as an *n* of 1 – but rather how to understand why the EU has been made that way.” v. Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso, 2013). Thus, instead of putting the EU into the already existing terminological and conceptual apparatus of political science we should rather take an etiological and explanatory approach to this new political entity.

² Kymlicka, Will. *The Rights of Minority Cultures*, (Oxford: Oxford University Press, 1995), 1

citizenship as Treaty on the European Union Article 9 stipulates: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”. In the Preamble of the Charter of Fundamental Rights of the European Union, which came into force with the Treaty of Lisbon, it is stated that the EU “places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”. These legal provisions say little about possibilities in which we might use the broaden the notion of the EU citizenship.

The notion of citizenship will be used in this research as a set of legal and political rules, practices and discourses encompassing the issues of membership within a political community as well as rights, obligation and allegiance towards that community. It will enable me to address the normative dimensions of the EU citizenship and theorize its prospects. The main normative perspective will be the one which tackles the issue of minorities, misrecognition and injustice that member of minorities face in the context of national states. In other words, the task of the research is to test whether constitutional patriotism, as an overall model of citizenship, would be the best solution for a polity in *statu nascendi*. Obviously it is a question of *should* and not *is*, it is a theoretical enquiry of the possible policy reformulations according to certain normative criteria, not the description of the *status quo*.

The idea of universal citizenship has been strongly challenged by the communitarian and multiculturalism scholarship, always in the name of minority groups. That is why it seemed a logical starting point to consider the nature and normative questions that lie within a specific minority condition. In other words, what sort of citizenship should be embraced, given all the circumstances, in order to give a just answer to the needs of minorities? This question becomes more complex once minorities are defined. Minorities in this study will be taken in a

constructivist and relational sense. Instead of limiting the notion of minority only to certain groups, this concept should be understood as a reflection of the interplay between individual and groups self-perception and the recognition they might invoke in a public, political sphere. Minorities are a fluid concept, but still contain the features that allow us to put them in a theoretical inquiry. Thus, when considering the definitional scope of minorities, I refrain from setting one a priori but put forth a minimal set of conditions that allow for any group significantly affected by the said interplay to be defined as minority.

Identity has indeed become a buzzword of contemporary political theory. As a boundless concept it is often an obstacle for precise theoretical use. Nevertheless, the importance of identity is often in the heart of the claims by which the contemporary social movements contest the legitimacy of the nation state. Identity of a citizen in the postmodern era is often fluid and elusive, sometimes radicalized and in quest of its authentic true forms, contradictory and complementary depending on the subject who evaluates it in the particular historical and social context. Minority identity cannot be defined *in abstracto*. It is necessarily a relational contextual concept. The values, world-views and practices of identity minorities are different to majoritarian ones. It is a particular good, worldview and lifestyle that minorities are trying to preserve, protect and uphold. If we look at a random European constitution, among nominally liberal democratic states, we would identify many visions of a good life and principles that some citizens cannot adhere to. In some cases, these provisions go even further, disabling the possibility of these minorities to identify with the political community or to lead the life they want.

There are two methodological and theoretical frameworks from which I analyze the issue of identity minorities: intersectionality and recognition theory. I believe that the research should reflect the

difference between identity as a concept in theoretical assessment and identity as a personal and group self-identification and its use in political life³. It is important to engage with the notion of identity in a way which will reflect its nature in the contemporary world where identity became highly politicized. Intersectionality⁴ grasps contemporary identity in its fluidness and complexity without reifying it. It comprehends the complexity of human existence and its plurality of identifications. Finally, recognition theory is beneficial for the intersubjective nature of its approach which reflects the relation between majority and minority.

The project affirms the idea that constitutional patriotism is a legitimate and normatively desirable form of governance and citizenship, capable of accommodating minorities' perspective and as such it should be embraced by the EU in the course of its incremental constitutionalization. Its argumentation is based on a concept of political that acknowledges the fact of human diversity under the conditions of liberty and the importance of deliberation and compromise in the quest for a polity that allows its citizens, in the full spectrum of their diversity, to enjoy the maximum of freedom as long as the freedom of others is duly respected. This concept encompasses the Janus face of human beings both as rational and emotional individual beings but also as agents embedded within particular groups. Not only do these aspects define us as political beings but they also influence the way we negotiate and cooperate with others.

Constitutional patriotism represents post-national and post-conventional political identification and allegiance to the set of normative components of a constitution, broadly understand as a political and legal order within a certain polity. As such, constitutional

³ v. Rogers Brubaker and Frederick Cooper. "Beyond 'Identity'" *Theory and Society* 29 (2000): 1-47

⁴ v. Anthias, F. and N. Yuval-Davis 'Contextualizing feminism: Gender, ethnic and class divisions'. *Feminist Review*, 15, 62–75, 1983, and Crenshaw, K. *Demarginalizing the Intersection of Race and Sex*, (Chicago, IL:University of Chicago Press, 1989)

patriotism leaves the public sphere open for the dynamic development of various identities putting the otherness, based on color, race, nation, religion, sex, sexuality, ideology etc., in the context of a common citizenship. It is focused on fostering political participation, public discussion and the exchange of worldviews under the determined set of legitimate principles.

Contextually speaking, EU constitutional patriotism is not only the guarantee of the protection of minorities' rights but a step toward genuine equality of EU citizens - legal and political, but also ethical. The political project of constitutional patriotism is not, as it was criticized, determined by particular identities, histories, constitutional patterns and ethics. Constitutional patriotism is rather a different form of understanding politics, political community and citizenship. It was ideally developed in a particular setting of plural Western societies and, as it will be shown, provides answers to the questions posed by globalization and decline of nation-states. Its focus are basic political and legal principles rather than particular national or cultural discourses, metanarratives and conceptions of the good.

That constitutional form in the globalized post-national should abandon the framework of national state and focus of universal principles of democracy, human dignity, peaceful coexistence and diversity. For that constitutional form I use the notion of constitutional patriotism, Dolf Sternberger's syntagm, that proved to be a good denominator of a form of citizenship and loyalty to political community other than national liberalism, republicanism or cosmopolitanism. After elaborating my own theory of constitutional patriotism I will apply that theoretical framework to the case of EU and once again, now in practical level, tie the idea of justice for minorities with constitutional patriotism. The development of the EU as a plural, heterogeneous entity – aimed at peace on the continent, as well as at economic prosperity and protection

of human and minority rights, is a robust reason for the EU to embrace this model of citizenship.

Constitutional patriotism can be perceived as statist and centralist⁵. This is especially true for the way in which Sternberger elaborated it and the way the critiques of this concept understood it. However, the reinterpretation of this concept by Habermas and Muller and the way it will be developed in my theory sheds a different light on constitutional patriotism. I will show that, despite its aspiration towards universal consolidation of the common political principles, it offers a normatively acceptable discourse for minorities. There are two heuristic contributions of this dissertation. Firstly, it will be shown that constitutional patriotism is theory of citizenship and not only a form of patriotic loyalty. Secondly, this thesis stresses the normative potential of constitutional patriotism for the accommodation of minorities and their need for recognition.

To conclude, constitutional patriotism in the EU is a new answer to an old puzzle in a new setting. That old puzzle is how to synchronize the different comprehensive ethics, especially those of minorities' which are misrecognized, into a unique post national political community. New setting refers to the change of the role of national state and the exterior factors of globalization, economic interdependence and, more specifically, the historical emergence of the EU citizenship.

Research questions and hypothetical framework

This research tries to tackle the relation between identity on one side and basic forms of 'social contract' and citizenship on the other.

⁵v. e.g. Müller, Jan-Werner, *Constitutional patriotism* (Princeton Univ. Press, 2007)

When minorities and their needs become question that needs normative answer? When due to their identity they feel perpetuated forms of injustice? There is a certain type of identity that needs a special attention – the one that puts our worldviews and lifestyle in a direct contrast to main constitutional norms and principles. This identity makes us think about the originating moment of a society in a form of social contract in order to see what kind of issues we are not reluctant to leave to democratic proceduralism. Besides, a citizenship as a form of belonging should not include ideas and paradigms that stand in contrast or denigrate our lifestyle, provided that these are in accordance with the basic postulates of mutual recognition.

The main theoretical research question is: *What kind of political and legal arrangement of citizenship would bring the least injustice to the arbitrary nature of personal and group identity in multi-identical and deeply diversified societies?* It might be divided into several research subquestions:

1. What kind of political recognition is needed and just for identity minorities and what are the elements of that recognition? 1.a. Why and under what circumstances can identity become a matter of justice? In other words, what are the spheres of injustices for identity minorities?
2. Which theory of minority rights recognition would be normatively the most acceptable to correct this injustice? 2.a. Why answers given by liberal multiculturalism and liberal nationalism seem to be inadequate?
3. How globalization, proliferation of identity politics and recognition claims, intensive migration and the erosion of state sovereignty in post-national and post-modern era influence the change in the core elements of the citizenship theories?
4. What could be a theoretical alternative for a type of universal citizenship that accounts for minorities' recognition?

5. Finally, in the application of this theoretical question at empirical level of a polity in *statonascendi*, can we apply this normative theoretical model to the case of the European Union? Why is this case particular in the light of the research puzzle?

The main research question is how to re-actualize the notion of universal citizenship which would still account for the recognition of minorities. Liberal universal citizenship⁶ has been discredited as biased by feminist⁷, multicultural⁸ and postmodern theories⁹. What form and content of universal citizenship would enable minorities to fully participate, give legitimacy and identify themselves with a polity?

Multiculturalism, on one hand, has proposed multicultural citizenship based on the respect of cultural differences. It determines national culture as a fundamental element for a functioning democracy (Tamir 1993, Raz 1994, Kymlicka 1995). There are, in my view, many normative and empirical flaws within this framework that a competing theory should readdress. Liberal culturalism has given superior position to the notion of culture over other types of identity with detrimental normative implications for the problem in question (Gianni 2001, 228-230). We must rethink the idea of injustice based on individual's identity, defined in broader terms, in the context of contemporary national state. Differentiated citizenship, on the other hand, proposed by postmodern authors, questioned the very idea of citizenship and its

⁶v. e.g. Rawls, John, *A theory of justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971.) and Barry, Brian, *Culture and equality: an egalitarian critique of multiculturalism*. (Cambridge, Mass.: Harvard University Press, 2001)

⁷e.g. Davis, Nira. *Woman-nation-state* (New York: St. Martin's Press, 1989)

⁸e.g. Kymlicka, Will, *Multicultural citizenship: a liberal theory of minority rights* (Oxford: Clarendon Press ;, 1995. Print.)

⁹e.g. Young, Iris Marion, *Justice and the politics of difference* (Princeton, N.J.: Princeton University Press, 1990.)

capacity to answer to the issues of social cohesion and participation of minorities¹⁰.

The main hypothesis of the thesis is that constitutional patriotism is a normatively desirable and feasible form of governance and citizenship, capable of accommodating minorities' perspective and as such it should be embraced by the EU in the course of its emerging citizenship. Constitutional patriotism gives an answer to both desirability and feasibility criterion. The criterion of normativity is concerned with the question how one community *should* be organized in order to satisfy given ethical criteria while feasibility criterion assesses practical possibilities of such enterprise. There are two sub hypotheses.

The first is that universal citizenship can satisfy the need for recognition of various minority groups better than competing theoretical frameworks if it is based on the accepted minimum of political and legal principles. We must be recognized as *equal citizens* despite our differences, though difference will dictate *a different implementation* of the universally binding legal and political norms. We should be free to assemble in various groups but still be free to exit from that group if our personal worldviews differ. The only way to apply this in practice is to guarantee mutually accepted minimal constitutional rights that allow us to freely enjoy our particular concept of good life as long as we respect the liberty of others.

The second is that both stability and legitimacy of a polity depends on its ability to adopt a form of citizenship that corresponds to contemporary social dynamics. Globalization, economic interdependence, migration and the decline of sovereignty as a paramount value of national state indicate a need for a different allegiance to political community. This new social momentum needs

¹⁰ see Gianni, Matteo, "Taking Multiculturalism Seriously: Political Claims of Differentiated Citizenship." In *Citizenship After Liberalism*, edited by Karen Slawner and Mark E. Denham. (New York: Peter Lang, 1998.)

different types of patriotism and solidarity which must be theoretically reformulated. Constitutional patriotism is a possible and, in my view, normatively superior option that presents an acceptable form of allegiance and identification for minorities in the post-national context of the European Union.

Two main argumentation lines and three levels of analysis

Contextually speaking, EU citizenship inspired by the principles of constitutional patriotism is not only the guarantee of the protection of minorities rights but a step toward genuine equality of EU citizens - legal and political, but also ethical. The political project of constitutional patriotism is not determined by particular identities, histories, constitutional patterns and ethics. Thus, though the theoretical inquiry starts with a problem of rights violation I will deal with it as a reflection of recognition issue in a more philosophical sense. Once I define what political recognition implies, I will argue that there ought to be a citizenship form which responds to this recognition. That political and legal framework should define us as equal members of society, with neutral attitude towards our identity, and should not advocate any majoritarian discourse or particular concept of good. For me that constitutional form in the globalized post-national should abandon the framework of national state and focus of universal principles of democracy, human dignity, peaceful coexistence and diversity. After elaborating my own theory of constitutional patriotism I will apply that theoretical framework to the case of EU and once again, now in practical

level, tie the idea of justice for minorities with constitutional patriotism. The development of the EU as a plural, heterogeneous entity – aimed at peace on the continent, as well as at economic prosperity and protection of human and minority rights, is a robust reason for the EU to embrace this model of citizenship.

Constitutional patriotism, as the focal point of the research, offers a new theory of citizenship and civic allegiance for today's culturally diverse liberal democracies. It rejects conventional accounts of republicanism, liberal nationalism and cosmopolitanism. It gives a different conception of an allegiance to the polity, its axiological value and the principles upon which the rights are provided within a political community. That is why it is very applicable to the case of the EU, which is not neither a national state as we know them neither it can have universal, cosmopolitan aspirations. Being 'in-between', the EU has to find an adequate theoretical framework which would concede to its multicultural character and supranational, *sui generis* nature. The literature, however, does not show clear cut differences between the substrate of constitutional patriotism and liberal nationalism, for example. What is the normative content of constitutional patriotism, which together with the universality of its political claim makes it different to other concepts of civic allegiance? Are there particularities (e.g. 'militancy and memory',) that Muller defended as normative components of constitutional patriotism? Given the theoretical importance of constitutional patriotism as a new theory of citizenship and patriotic allegiance, it is puzzling why this concept has not already been conceptually and theoretically differentiated from republicanism, liberal nationalism, cosmopolitanism etc. A thesis succeeding in such an endeavor would already be a valuable heuristic contribution. That theory should include the elaboration of the theoretical assumptions and political principles of constitutional patriotism. My conception of

constitutional patriotism is an ideal type, a normatively galvanized theoretical model.

There are two crucial ways to refer to injustice that go in favor of proposing constitutional patriotism as a superior form of citizenship in contemporary plural societies. The first is based on the theory of recognition and the idea that we want to be recognized as equal participants in political life of certain community, in the same time having the equal rights and being able to identify with that *patria* on the bases of minimum principles in its constitution that we can all share. The second one stems from a contractual theory and democratic theories that equate sovereignty and rights and have a rather simple argument: we legitimize the political community by investing our own body and rights and in return we can only legitimize the rules we can justify¹¹. One might say that the former is focused on *good* while the latter deal with *right*.

Recognition argument. The first way to perceive injustice is deeply ethical and touches upon our worldviews and self-understanding. Considering a common ethical point of view, generated by plurality and incommensurability of ethical standings, it is politically more acceptable and legitimate, though not necessarily in accordance with principles of democracy, to opt for a form of citizenship that will allow for different conceptions of the good. In other words it would be unjust to impose a common form of citizenship that excludes, internally or externally,

¹¹The difference between legitimacy and justification was precisely captured by A. John Simmons. As he explains, 'legitimacy is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively'. Justification assesses goodness of the state, to what extent its actions and rules present certain values. I follow Simpson when he says that 'proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution' and that legitimacy is a logical correlate of individual duty to comply with imposed norms. Here, I use legitimacy both as a concept that includes consent and justification, though this distinction will be stressed when needed. v. Simmons, A. John, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press. 2001).

certain individuals and misrecognizes them as equal participants of a political process on an arbitrary, subjective basis. Arbitrary might be a problematic formulation here. The citizenship rules must be such not to misrecognize the citizens' conception of the good, thus allowing for a political community based on consensus and mutual recognition.

Recognition functions on both individual and collective level. This concept corresponds to the definition of minorities advocated in this research: as a relation of an individual or collective towards a greater dominant entity. Recognition functions on both private and public level it considers us both as members of particular identity groups and citizens of a certain polity.

In the first part I explain why I do not agree with the basic premises of multiculturalism as a political solution for plural societies. Though multiculturalism is a social fact, it should not be however transformed into a normative perspective and reflect on political and institutional arrangements within a society. Once it is employed as a normative theory it seems to go against the principle ideas around which citizenship is construed as a social theory. I put forward an argument that if we want to pay due respect to the numerous groups and their respective worldviews and lifestyles we must provide a universal level of recognition that guarantees equal rights and freedom to them.

Citizenship by definition involves a form of closure, that necessarily leaves some individuals outside. While cosmopolitan citizenship may dissolve this closure it excludes the concept of political rights and obligation, and these are foundational elements of a citizenship as such. Constitutional patriotism admits that citizenship is a necessary closure of certain individuals with respect to others but at the same time makes sure that this exclusion is not biased and arbitrary. Basing the focus of patriotic loyalty to commonly accepted universal principles legitimized by all members of political community

constitutional patriotism reduces the possibility for particular and biased objects of allegiance. Arbitrary exclusion is the one that excludes even those who have the legitimate right to be included in citizenship. For this, however, I will use the concept of constitutional patriotism to clarify the sphere of legitimate inclusion/exclusion.

The argument of political liberalism. The other way to think of justice is not less ethical in its consequences, but it primarily considers political injustice - injustice that stems from every illegitimate rule. Legitimate is only the rule to which we can give our consent, and every majoritarian rule in a plural society over the questions that cannot be left to pure democratic procedure is deeply illegitimate. Political liberalism thus comes as a *modus vivendi* for plural societies that citizenship must reflect.

Namely, every society must be based on a minimum of principles that protect individual rights and freedoms and mutual relation between individuals, groups and state. These principles are the main criteria of legitimacy of any act or practice. Therefore only in the political order which does not infringe upon perception and auto-perception of us as equal citizens and our worldviews and lifestyles can we allow the democratic proceduralism to take place.

This argument is based on a theory of constitutional democracy and the idea of autonomy, broadly speaking. It understands constitution, as the basic set of principles, as *charter of liberty* (Dimitrijevic, 2007). Those who are governed must accept the rules by which they are governed as legitimate. No set of rules can be imposed on us, unless we can accept them – reasonably so in Rawlsian or discursively so in Habermasian terms. By the autonomy that we possess as the creators of the social contract we agree on the regulations that will protect us from illiberal rule. Furthermore, we want to be sure that all the rules within a polity we belong to stem from a set of principles we have already agreed

upon. Constitutional patriotism should in its procedural dimension be read in that way: we can accept only those rules that are in accordance with constitutional principles that are rooted in our private and public autonomy.¹² These two dimensions of individual's liberty to act and create, one confined to his private domain and other based on the principles of common intersubjective political life, are in accordance with common norms of a political community (constitutional order) in different ways. Just like negative and positive freedom, one is based on limitation of intrusion of the others (keeping the liberty of private life), while the other one is a matter of publicly achieved endeavors (active participation in political life).

There are three level of analysis of this problem. These levels are differentiated by the scope and the level of theoretical inquiry. Although it is important to keep them analytically separate, all these levels are intertwined in the course of argumentation. The research problem of the thesis requires various layers of argumentation and one could roughly identify three of them:

- a) ***Philosophical level.*** This level answers the foundational normative questions of the thesis. The relation between right and good, the source of the values, the nature of recognition and its importance for autonomy and self-realization. What is the nature of particular good and is there a universal need of *homo politicus* to belong to a political community?
- b) ***Social theory level.*** At this level I put citizenship in a global context of globalization, market economy and immigration. The change of the national state, its sovereignty and welfarism, also influences the concept of citizenship. Many of the concepts in this research are historical and relational. These changes must have their reflection in theoretical analysis.

¹² Habermas, Jurgen, *Between facts and norms: contributions to a discourse theory of law and democracy* (Cambridge, Mass.: MI Press, 1996. Print.)

- c) *Political analysis*. This level of the thesis deals with the politics of multiculturalism and looks for the best constitutional arrangement. Once we analyze the philosophical problems and put them in a macro historical context, what is the input for creating a concrete policy? This level entails an empirical perspective about the given concepts and pays particular attention to the development of EU citizenship.

The structure of the dissertation

The division of chapters should reflect different levels of argumentation concerning this multifaceted issue put forth above. In the first part, I deal with the notion of citizenship and theories of recognition. I try to identify the main spheres of injustice that minorities face in modern national states. The structural injustices caused by the form of citizenship existing in liberal national states, within the particular political and legal forms. In other words I focus on political injustice that falls to identity minorities due to the normative implications of national citizenship. In this chapter I also address liberal multiculturalism as the most prominent theoretical framework that deals with minorities' issue. Multicultural citizenship as a dominant set of related theoretical approaches and policies that tackles the issue of minorities, has shown certain flaws, both theoretically and empirically. The crucial reason for this might be the prevalence of particularistic, communitarian perspective in these theories and the minimization of the importance of concepts like active citizenship and civic virtue. In this chapter I engage with a general normative critique of multicultural approach. Though I agree with liberal egalitarians that multicultural world brings new forms

of injustice, especially to internal minorities, I do not endorse the claim that contemporary liberal states are neutral. While liberal culturalist indirectly legitimize the encroachment of the state by majoritarian culture (since culture is so essential for our autonomy and wellbeing) and look for similar sublevel spaces for minorities, liberal egalitarians seem to neglect that encroachment by claiming that Western liberal democracies are neutral. I claim that there are many oppressive discourses entangled in the very concept of nation formation that produce injustice and misrecognition.

In the second part, chapters IV and V, I proceed with the elaboration of constitutional patriotism as a distinct form of post-national citizenship, tracing its historical roots and critically assessing the relevant literature. In fifth chapter I analyze this concept with reference to the other similar concepts and ideas within political theory. I elaborate theoretical assumptions (anthropological, ethical and historical) and practical principles of a general theory of constitutional patriotism. In the final part of this chapter I explain why this form of citizenship would be acceptable from the standpoint of minorities and their identities. Zooming in from the preceding general comparative analysis, therein I also give a comparison of constitutional patriotism to other theoretical frameworks of citizenship.

In the last part, chapters VI and VII, I will try to apply the theoretical framework to the case of the EU as a special type of post-national postmodern citizenship *in statu nascendi*. I embark on a reasoning exercise and try to provide reasons in favor of constitutional patriotism in a specific historical and political context of the EU. In this part, I try to apply the previously developed normative and theoretical findings in the concrete empirical setting of an emerging citizenship form. This part should indicate the flaws of the ideal theory and open additional normative questions that a citizenship theory should address

before it can be of practical consequence. Here I will apply the concept of constitutional patriotism developed in the second part to the emerging EU citizenship. Combining and cross-examining theoretical thresholds and empirical evidence from the EU will bring me to three main arguments in favor of constitutional patriotism as an optimal concept of citizenship for the EU, particularly from the perspective of minorities.

Chapter I: TOWARDS A NORMATIVE THEORY OF CITIZENSHIP

1.1. Introduction

Judith Shklar writes that there is no notion more central in politics and none more variable or contested in history than citizenship¹³. This notion remains a constant of political philosophy and few political thinkers have remained immune to the need to reflect on this phenomenon. At the same time, the look on what minorities need and can justly claim shifts to the question of the overall citizenship design normative aspects. In this section I will try to elaborate on the definitional issues concerning citizenship. I will also explain the historical reasons why citizenship became so prominent in academic discussions and what the heuristic and theoretical benefit of employing this concept is in the context of minorities. First of all, this entails revisiting the main theories of citizenship and identifying some general normative issues. Only once this task is fulfilled can and should the minority perspective on the macro/concept of citizenship be employed.. In other words, I will develop a normative theory of citizenship that takes the minority perspective into account and all the issues entangled with the notion of minority identity.

The normative theory of citizenship must take the definitional conundrum connected to this notion into account. The problems mentioned with the definition of citizenship, however, provide two

¹³ Shklar, Judith, *American citizenship: The quest for inclusion* (Cambridge, 1991) 1

important points of caution to be considered before any normative discussion on this issue takes place. The first one is that citizenship is a multidimensional notion and as such it cannot be reduced to any of its constitutive categories. It is a generic term for different psycho-social, micro and macro political, economic and cultural phenomena detectable in the relations among citizens and between citizens and a state. Nevertheless, it seems reasonable to stress one of these aspects of citizenship in a normative analysis and leave aside others. The second important caveat, stemming from the multitude of forms of citizenship in the past is that citizenship is a historical and highly changeable phenomenon. This lesson seems especially important in an era when most of the academia still reckons that citizenship is exclusively possible in the form of a national state.

Definitional problems apart, there is also the important question concerning the theoretical importance of citizenship: why does citizenship matter and why should we study it?

In this section I look at the normative essence of citizenship – what staying together in a polity and following one overarching set of principles means and what sorts of practical issues of contemporary plural states are rooted in the actual forms of citizenship. Besides, this section should provide the answer to the question why a certain form of universal citizenship is still a normatively superior option for the perspective of the interest of minority groups. It would set the groundwork for the subsequent section about constitutional patriotism in detail.

It is a common place to state that citizenship is one of the many deeply contested concepts in political theory. The reasons for its contested nature might be both logical and historical. Logical in the sense that the concept of citizenship includes so many aspects in its definition (duties, rights, status, identity etc.) that a plurality of

possibilities to define it arise and consequently make the concept vague and potentially inaccurate. Also, the historical use of citizenship has been so diverse and plural that it is hard to give a unique, overarching definition of this concept. The citizenship of polis, Roman Empire, medieval Italian city-republics and the citizenship of post-Westphalian national state is very different, at least on institutional and civil participation level.

There is a consensus in the literature that the revival of the idea of citizenship in political theory coincides with the end of Soviet socialism on the East, welfare state on the West and the parallel rising of the New right economy¹⁴. The loyalty to the state motivated by its paternalistic relation to its subjects had to be reformulated with other sets of attachments. The idea that we are not only holders and recipients of rights but also bearers of certain obligations became a mainstream. The whole discourse behind this idea was corroborated by the republican quest for the ‘ideal citizen’, usually looked for in the patina of classical antique glory.

The other and equally important reason for resurgence of citizenship in academia is the re-ethnification of politics i.e. the newly emerged importance of ethnical identities in the aftermath of Cold War. The presence of national and language minorities and their perspective in a new post-ideological context of national state gave a new impetus to normative political philosophy. The novel question was: how to integrate these pre-political forms in a new political context of common citizenship. Consequently, the constitutional values of polities were questioned, supporting the view that all our worldviews, including political ones, stem from a cultural community we belong to.

¹⁴see e.g. Kymlicka, Will, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000)

The third development that has brought citizenship in the spotlight was the decline of national state in its Westphalian, exclusive sovereignty form and the emergence of new subjects in international arena. Globalization brought not only new supranational forms, be they political (such as the EU, The African Union) or economic (such as WTO and IMF), but also stressed the importance of subnational units such as regions and cities. Naturally, as the result of these emerging forms, the important question of how to deal with the issue of rights, duties and identities in this new globalized context has also emerged. In the last two centuries, interconnectedness of the world economy and the issue of failed states and conflict regions made the issue of immigrants one of the main themes of public policies in Western democracies¹⁵.

Finally, new democratic phenomena, in the form of social movements advocating the protection of human rights, pacifism and resolution of environmental issues, are a manifestation of a contemporary participatory democracy turn that clearly has repercussions on our understanding of citizenship. It seems that the issues in question, like human rights, peace and sustainable development are universally important and treating these issues on a national or inter-governmental level is perceived as inadequate or insufficient. The last corpus of reasons focuses on participation as an important feature of contemporary citizenship.

All these political and historical reasons themselves confirm the multidimensional nature and historical/temporal character of citizenship. Namely, there are different aspects of citizenship involved in the set of the reasons given here. For example, economic change triggered the social aspect of citizenship, or what we might call social citizenship

¹⁵v. e.g. Bauböck, Rainer "Towards a Political Theory of Migrant Transnationalism", *International Migration Review*, vol. 37, No. 3, (2003): 700-723, Bosniak, Linda, "Universal Citizenship and the Problem of Alienage", *Northwestern University Law Review*, vol. 94, no. 3: (2000): 963-982.

which sees the state as the guarantee of certain rights and goods. The revival of nationalism influenced the shift of focus to the identity side of citizenship, while globalization brought into the debate the issue of democratic citizenship and the old debate on the relation between ‘ruled and those who rule’. This, however, does not prevent us from investigating this concept integrally and historically using the toolkit of normative political theory.

The heuristic reasons for discussing citizenship in normative political philosophy seem to lie in the nature of citizenship: the fact that it integrates the important questions of political theory. Kymlicka sees the renewed interest in citizenship as ‘a natural evolution in political discourse because the concept of citizenship seems to integrate demands of justice and community membership – the central concepts of political philosophy in 1970s and 1980s, respectively’¹⁶. It seems that the main philosophical concerns of contemporary liberalism intersect in the notion of citizenship. The phenomena of globalisation, migration, international economy cross at the notion of citizenship, which is capable of keeping the focus on rights vindication (citizenship as “a right to have right”) and in the same time remedying the limitations of a state centred political philosophy (denominating citizenship as transnational phenomenon). The two normative dimensions of intersubjectively determined justice and belonging to a community are both articulated in an overarching theory of citizenship. As Kymlicka explains, this concept is connected to the idea of individual entitlements on one hand but also to particular communities on the other hand¹⁷. Judith Shklar distinguishes between citizenship as a social status that contributes to the individual's sense of self and citizenship as the manifestation of national identity (two of four understandings of this

¹⁶Will Kymlicka and Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory," *Ethics* 104 (1994): 352-381

¹⁷*Ibidem*.

notion)¹⁸. Both individual and collective dimension of identity are necessary for an integral understanding of citizenship, because they both constitute the threshold of the good life in a political community and cover both spheres of one's everyday life. Furthermore, we could even stress the instrumental value of culture. As Raz observes: "Cultural, and other, groups have a life of their own. But their moral claim to respect and to prosperity rests entirely on their vital importance to the prosperity of individual human beings."¹⁹ In any case, neither can we imagine a modern self detached from group identities nor can we deduce his/her existence to his/her individual sphere.

In order to see the 'anatomy' of citizenship, it is crucial to analyze this concept in light of political sociology, sociology and social theory in general. While political philosophy gives a particular normative perspective, these disciplines help us understand the etiology and phenomenology of empirical citizenship. In the following chapter I will give a brief overview of the social research in the field of citizenship and present the review of the main literature.

1.2. Social theory of citizenship: A brief overview

The classical sociological analysis of citizenship came from Thomas Marshall and his genealogical theory of the history of citizenship. For Marshall citizenship is a "status bestowed on all those who are full members of a community".²⁰ Those members share rights,

¹⁸ Shklar, Judith N, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991) 7

¹⁹ Raz, Joseph, Multiculturalism: A Liberal Perspective, in *Ethics In The Public Domain: Essays In The Morality Of Law And Politics* (1994): 155, 163

²⁰ T H Marshall, *Citizenship and Social Class: And Other Essays.*(Cambridge : University Press, 1950)

duties, and the protections of common law. The bonds of modern citizenship grow among them first through the ‘struggle to win those rights’ and then, once gained, by their ‘enjoyment’. ‘Citizenship requires a bond of a different kind (*different to kinship, common origin, author*), a direct sense of community membership based on loyalty to a civilisation which is a common possession’²¹. Though primarily sociological, this study unquestionably contains normative elements. The primary aim of his study is to show ‘the impact of a rapidly developing concept of the rights of citizenship on the structure of social inequality’²².

Marshall reconstructs the development of citizenship in three phases: characterized by three types of citizenship: civil, political and social, all of these including certain rights and corresponding to different social/political institutions. The civil element, according to him, is composed of basic rights necessary for individual freedom, freedom of speech, thought and faith, the right to own property, contractual rights, and the right to justice. Institutions connected to these rights are the courts of justice. The political element of citizenship includes the right to participation in political bodies with an active and passive right to vote. The corresponding Institutions are parliaments and councils of local government. Finally, by the social element Marshall means ‘the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society’²³. He sees educational institutions and social services as the institutions mostly related to the social component of citizenship.

²¹T. H. Marshall, *Class, citizenship and social development*, with an Introduction by Seymour Martin Lipset. (Garden City, New York: Doubleday & Company, 1964) 77

²²T. H. Marshall, *Citizenship and Social Class*, 85

²³*Ibidem*

Since in the early times of the British history all these three types of institutions were blended so were the abovementioned civil, political and social rights. Once separated, these elements of citizenship were developing independently. There was an evolutionary sequence of the development of citizenship and the interactive relation among its elements in the three centuries following the 1688 Revolution when constitutional monarchy was established. He assigned the formative periods to the three elements of citizenship, each to a separate century—civil rights to the eighteenth, political to the nineteenth and social to the twentieth century.

Marshall was heavily criticized for the linear progressive vision of the development of citizenship, excluding the possibility of reversible processes. Another cluster of critique was aimed at the national character of his study and the impossibility for broader theoretical implications, especially in a period of disorganized capitalism, when ‘capital operates on a global scale, labour tends to operate within a local national market²⁴. He was also criticized for his theory does not take deeply into account the issue of tension between civil liberties and social rights.²⁵

Though Marshall’s study might be outdated for the contemporary political and historical settings, especially due to the restrictions already mentioned, it is still possible to draw some important normative conclusions from his study. Firstly, citizenship in this theory is formulated as a form universal equality of status that as Marshall elaborates existed once and is being achieved again in the course of modern history. Even if the sequence and gradualism of rights achievement is questionable, it remains that diverse rights are necessary condition for the full citizenship due to the interdependence of civil,

²⁴Turner, Bryan ‘Outline of a Theory of Citizenship’ *Sociology* 24 (1990): 195

²⁵v. e.g. D. Lockwood, ‘For T.H. Marshall’, *Sociology*, 8, (1970): 363-7

political and social component. Although mainly preoccupied by social classes, his theory implies that citizenship equals direct membership in a community based on universal principles rather than expression of various particularities.

Marshall's theory appeared significantly before the re-emergence of the interest for citizenship. The article 'Ruling class strategies and citizenship' by Michael Mann, as a coryphaeus of the new academic interest for citizenship, was among the first important critiques of this classic.

In a comparative historical analysis of industrial societies, Mann reveals different strategies for the institutionalization of class conflict that he calls *liberal*, *reformist*, *authoritarian monarchist*, *fascist* and *authoritarian socialist*. Briefly, all these strategies proved themselves capable of handling the modern class struggle. In explaining their origin and development, also contrary to Marshall's view, emphasis is placed on the strategies and cohesion of ruling classes and *anciens régimes* rather than on those of the rising bourgeois and proletarian classes which was the case in the previous theories. By the ruling class he means the dominant economic class, political and military elite. That the durability of these strategies should be explained by geo-political events, especially the two world wars, rather than by their internal efficiency is one of the Mann's theses since he finds it had been neglected in the preceding social theory. He goes through different types of historical forms of citizenship and the ways they were employed as a strategy of the ruling class. Mann's contribution to the sociology of citizenship is considered 'not only a major theoretical advance over the Marshallian paradigm, but also an important contribution to our understanding of the historical processes of citizenship formation'²⁶.

²⁶Turner, *ibid.* 197

While Marshall sees citizenship as the empowerment of the new classes, Man sees it as a ruling class strategy to remain in power.

Turner, however, points out the three crucial points of criticism in Mann's theory which I find fully reasonable. Firstly, Turner thinks that Man fails to consider the issues of aboriginality, ethnicity and nationalism in the creation of modern citizenship. In that sense, Mann's analysis, just like Marshall's, remains class-reductionist and does not examine other forms of social stratification. Secondly, Mann neglects the cultural elements influencing citizenship: e.g. the role of the Christian culture in the formation of private/public spaces or the Protestant role in producing a cultural basis for the national state. Finally, Turner criticizes Man for his central concept of citizenship as a ruling class strategy, which precludes the analysis of a citizenship from below. This critique seems to have been solidly confirmed as correct by the new forms of participative democracy. However, Mann's theory shows the possibility of misuse of the idea of citizenship by the political elites. Taken out from a strictly class context, this idea does represent a significant warning for any normative theory of citizenship. Still, it does not allow us to fully understand national citizenship of nowadays and the way that ethnicity can affect citizenship.

After elaborating the main points of critique of the previous theories, in order to overcome their weaknesses, Bryan Turner develops his own concept of citizenship in his article 'Outline of a theory of citizenship'²⁷. In contrasting the citizenships of Germany, Holland, France, England and the United States, he identifies two key variables of citizenship, expressed in two dichotomies: active/passive and private/public. The first pair indicates whether the citizenship has been developed from above (passive) or from below (active), in other words by the state and political elites or by local participatory institutions,

²⁷Ibid.

trade unions etc. This dichotomy reflects the old question of individuals being citizens in the full sense or merely subjects. The other dichotomy is related to the existence, significance and valorization of private and public space in the development of citizenship. What might be indicative in the context of this research is that citizenship of plural multicultural societies should be dominantly conceived from below in order to claim its legitimacy. In the sphere of citizens, the social cleavages are now sharper and do not follow only one or two dominant social-economic lines. Therefore, a theory of citizenship must be construed in a way to allow for active participation of all its members – who can question and challenge the main postulates and practices of citizenship. If active participation is a way to vindicate rights and indicate injustice, then it is a *sine qua non* condition for a good citizenship and as such it should be open to all members of the community. However, this does not mean to advocate a political philosophy that forces anyone to be part of political life if one does not want to be part of it. Political participation should be an option, an alternative and not the only way to be a good citizen.

Citizenship

Below	Above	
Revolutionary French tradition	Passive English case	+
American liberalism	German fascism	-

public space

TABLE Citizenship, B. Turner

In his article 'Citizenship studies: A general theory', Turner offers us a theory of citizenship in secular societies where it functions as a major foundation of social solidarity. Since every society is organized around two contradictory principles: allocative (that corresponds to scarcity) and integrative requirements (social solidarity), citizenship is an important mechanism of balancing these two, especially because it constitutes social identities and communities and is a prerequisite of civic virtue.

Citizenship controls 'the access of individuals and groups to scarce resources in society'. The resources in his model, however, do not include only economic ones (right to housing, work e.g.) but also cultural (education, knowledge, religion) and political (access to sources of power, right to vote etc.). In that sense, citizenship and its relation to fundamental values of inclusion and exclusion, might be perceived as a 'social closure' – a Weberian term that refers to process and practice of constructing boundaries and identities, building communities in order to monopolize the use of scarce resources. Social closure necessarily produces 'alienation and stigmatization of outsiders'²⁸. Though he names this model sociological, this inherent feature of the citizenship justifies the normative interpretation of such a model. It seems that Turner also supports this view when he says that 'any benchmark of citizenship would have to include some notion of egalitarian openness to difference and otherness as an essential ingredient of liberal democracy.'²⁹

One of the important aspects of citizenship is its connectedness to a political community, with its territory and history – with the nation state usually acting as its basis. It is through that political community that individual achieves civil, political and social rights. Unlike human

²⁸B.S. Turner, 'Citizenship Studies: A General Theory', *Citizenship Studies* 1, no. 1 (1997): 7

²⁹Ibidem.

rights which are conferred upon people as humans irrespective of their origin and nationality, citizenship rights belong only to the members of political community³⁰.

There is an important teleological explanation of citizenship in Turner's theory. In secular societies, citizenship functions as a form of a secular religion, providing a common national culture, common set of identities and a common value system³¹. Thus, citizenship is 'a kind of social glue that holds societies together which are divided by social class, by gender, by ethnicity and by age groups'³². He concludes that the issue of social solidarity in plural contemporary societies is the focal point of citizenship. This is a crucial point in any normative interpretation of citizenship. The main idea of contemporary social theory should be to critically assess the prevailing discourses of citizenship and offer a symbolically and normatively more acceptable form of citizenship.

Gianni differentiates between two general normative interpretations of citizenship: citizenship as *a rule* and citizenship as *a content*³³. Citizenship as a rule is set of procedures that are shaped by deliberation and decision processes. On the other hand, citizenship is not only a procedure but also a substantial value that citizens should follow and promote; it is not just status, but also a practice³⁴. This differentiation implies different conceptions of political identity: the

³⁰ Some authors, like Hanna Arendt, would not agree with the idea of human rights as previously existing institution that gives universalistic legitimacy to rights of citizen. In her view it is rather the other way round, there is a right to have right, because being without political status in a community is 'fundamental deprivation of a place in the world which makes opinions significant and actions effective.' Hannah Arendt, *The Origins of Totalitarianism*, (San Diego, New York, London, Harcourt, 1968), 296

³¹Ibid. 10

³²Ibidem.

³³ Gianni, Matteo, "Taking Multiculturalism Seriously: Political Claims of Differentiated Citizenship." In *Citizenship After Liberalism*, edited by Karen Slawner and Mark E. Denham, (New York: Peter Lang, 1998), 39

³⁴ibid.

former is atomistic, thin and procedural while the latter is intensive, thicker and substantial.

Apart from this division Gianni points out three perspectives of citizenship: liberal, communitarian and postmodern. Liberals are dominantly focused on procedures and rules, communitarians on content that is produced within a political community. Postmodern theory of citizenship as he argues faces an epistemological gap since it deconstructs both elements of citizenship and question the need for citizenship without offering a plausible alternative.³⁵ The first two clusters of theories are burdened with a normative problem - the absence of the perspective from those outside the societal culture milieu. Postmodern theories on the other hand employ a broader notion of culture which leads to “the dissolution of citizenship as the referent of political identity.”³⁶ I agree with him that none of these theoretical approaches is normatively complete and satisfactory. But that still leaves one question unanswered - namely how hybrid situations would fit into this picture: rules understood as content and content understood as rules. One might say that for liberals rules are not only the procedural mechanisms of common life, but the content of the idea of citizenship. Also, for communitarians – citizenship could present the content the procedural aspects stem from. These two ‘antipodes’ are mutually dependent, they should be analytically differentiated although practical differentiation is often not clear or possible.

³⁵Ibid. 42

³⁶Ibid. 43

CITIZENSHIP MODELS		Understanding of the (national) (cultural) community	Rule/Content based concept of citizenship	Main flaw for the theory of citizenship
LIBERAL	Liberal proceduralism (e.g. Rawls, Dworkin)	National community as a necessary framework (Rawls)	rules	Normative gap between the theoretical promise of equal citizenship and reality of contemporary plural democracies.
	Liberal perfectionism (e.g. Galston, Macedo)	Thick concept of cultural community.	content	
LIBERAL MULTICULTURAL (e.g. Kymlicka)		Essential (thick)	content	Normative issue of the thick concept of (societal) culture.
REPUBLICAN (e.g. Barber)		Thick concept of national community.	rules and contents are fused	Normative issue of thick republican values.
COMMUNITARIAN (e.g. Taylor, Mac Intyre)		Thick concept of cultural community.	content	Normative issue of the thick concept of national culture.
POSTMODERNIST (e.g. Young)		Thin concept of national/cultural community as one of the sources of identity.	Deconstructing rules and content as universalizing categories.	Epistemological gap between critique of citizenship and proposed solution.

Citizenship and multiculturalism, based on Gianni, 'Taking Multiculturalism Seriously', adapted

1.3. Differentiating citizenship

In Turner's analysis, citizenship is an undivided concept the quality of which changes through the pair of variables explained above. That which was still undifferentiated in Marshal's conception and in Turner's typology was defined as active and passive citizenship, received a new interpretation in Angus Stewart's 'Two conceptions of citizenship'. Namely, he proposed two conceptions of citizenships in order to clarify the debate. First is the *state-centered citizenship* which 'involves the identification of citizenship with the elaboration of a formal legal status, co-terminus with the emergence of nation states and their diverse lineages'³⁷. Second conception implies democratic citizenship, in which political communities are the product of citizenship practice. While in the state-centered conception of citizenship, 'it is assumed that preferences, interests and identities are given exogenously in advance of public discourse and deliberation', in the democratic citizenship these are discursively constituted and represent, as Nancy Fraser formulates, both outcomes and antecedents of public deliberation³⁸. The crucial contextual referent in democratic citizenship is "common membership of a shared and imminent community."³⁹ It is this conception of citizenship that requires us to recognize other members of political community as being of equal social worth.⁴⁰ This differentiation within citizenship theory is more analytical than substantial. Although devised into two conceptions, citizenship in Stewart's theory still remained in unique platform of identification in what he called democratic citizenship. In other words, citizens in all the

³⁷Angus Stewart, "Two conceptions of citizenship", *The British Journal of Sociology*, Vol. 46, No. 1 (Mar., 1995), 63-78.

³⁸Ibid. 75.

³⁹Ibidem.

⁴⁰Ibid. 76.

above-mentioned theories are perceived either as divided along class lines or are members of a unique corpus.

Cultural or any identity-based differentiation is not present in theories I have elaborated so far. Citizenship is perceived as universal, unified and homogenous axiological and normative platform within a political community. However, as Kymlicka explains, “many groups – blacks, women, Aboriginal peoples, ethnic and religious minorities, gays and lesbians – still feel excluded from the common culture, despite possessing the common rights of citizenship.”⁴¹ In other words, the questions of redistribution present in the class centered theories of citizenship did not take into account the issues of recognition. The ideal of universal citizenship, as Iris Marion Young explains, can have ‘at least two meanings in addition to the extension of citizenship to everyone: (a) universality defined as general in opposition to particular; what citizens have in common as opposed to how they differ, and (b) universality in the sense of laws and rules that say the same for all and apply to all in the same way; laws and rules that are blind to individual and group differences’⁴². This reconstruction of liberal citizenship poses a serious threat to its universality and opens a space for a radical development in citizenship theory that would enable certain individuals to be incorporated into the political community both as individuals and as members of particular groups.

The differentiations of the universal world of citizenship came from different sides and pointed to different perspectives. Walby argues that citizenship cannot be understood without a dynamic theory of gender relations and that political citizenship is a transition from private to public patriarchy, not only civilizing of capitalism as Marshall used to point out. Analyzing the Marshall/Man/Turner paradigm, she identifies

⁴¹Kymlicka, Norman, *ibid.* 370

⁴²Young, Iris Marion, *Justice and the politics of difference*, (Princeton, N.J.: Princeton University Press, 1990) 250

the reductionist, class based character of these theories that do not include the sophisticated issues of gender relations, division of public/private, effective participation of women in paid work etc. Citizenship in Walby's view 'is about gender and the transformation of the form of patriarchy as much as it is about class, nation/ethnicity and capitalism'⁴³.

Diane Richardson goes a step further and claims that citizenship status in the West 'is closely associated with the institutionalization of heterosexual, as well as male, privilege'. There are certain forms of citizenship that include concepts like national identity, formed in a hegemonic heterosexual discourse, what consequently has implication for the social inclusion and exclusion of lesbian and gay men. There is a set of legal entitlements that these categories of citizens simply do not enjoy, pension, inheritance, parenting, employment etc. 'Lesbian and gay men are entitled to certain rights of existence, but these are extremely circumscribed, being constructed largely on the condition that they remain in the private sphere and do not seek public recognition or membership in the political community'⁴⁴. In other words, citizenship is also sexualized and not only gendered concept.

The whole idea of the critique of universal citizenship is the existence of many layers within that notion. These layers are important for understanding the idea of citizenship but also its normative implications. Citizenship, as Charles Taylor explains, 'not just the formal membership of a nation state, but a whole set of socio-economic and ideological practices associated with nationalism'. These practices, he continues, become criteria by which particular groups and categories of individuals are excluded from the entitlements envisaged by

⁴³Walby Sylvia, "Is citizenship gendered?", *Sociology*, 28 (2), (1994) , 391

⁴⁴Richardson, Diane "Sexuality and citizenship", *Sociology*, 32 (1) (1998): 83–100, 89 see also Richardson, D. "Constructing sexual citizenship", *Critical Social Policy*, 20 (1) (2000): 105–35.

citizenship: those without property, women, racialised groups and differently abled, children, LGBT.

Differentiated citizenship, in my view, can relate to notion of universal citizenship in two ways. On one side, it can negate the very idea of citizenship as unnecessary and oppressive. If we consider citizenship as an important category for individual and group rights achievement and overall political and social stability, this stream of thinking is not acceptable.

On the other side, differentiated citizenship might be understood as amendment of the old universal notion of liberal citizenship. The critique of that liberal abstract citizenship is well-established and accepted among authors and its arguments are reasonable and justified. Nevertheless, the implication of this critique, the way to overcome universal citizenship, might be problematic. There are two possible interpretations of this position.

One would be that differentiated citizenship means the parallel existence of different citizenship clusters – religious, sexual, national and so forth. This idea was already elaborated in this chapter. I do believe that this approach is a contradiction *in adjecto* to the idea of citizenship. The main idea of citizenship lies in status equality which would be impossible in a society where people are politically (in the sense of citizenship as political membership) attached to their respective cultural groups.

Another possible interpretation of this approach sees differentiated citizenship as a way towards the achievement of equal universal citizenship that liberalism promised. In this way, criticizing universal citizenship, the advocates of differentiated citizenship propose another encompassing category that will now include national, religious, gender and other differences etc. as its constitutive elements. This approach is problematic on a purely logical level. This concept –

differentiated citizenship now becomes a new universal category just as it is the case with universal citizenship. It brings us back to the old question: why instead of seeing how universal citizenship and its theoretical implication can lead us to status equality, should we invent another intermediary, and again, universal category. In other words, all labels contain universalising power and risk to have reductionist and homogenising effect for the whole group. Gender approached citizenship, for instance, would be a problematic notion to cover so different and sometimes opposing claims of diverse feministic streams: communitarian and liberal feminism. Therefore, even if we break up the universal general notion into particularities it still does not mean that these will be capable of subsuming the complexity of reality. Conversely, we can still benefit from citizenship as a sphere of universal warranty of equality of rights.

In Gianni's view the very idea of differentiated citizenship, as a "fertile equilibrium between the protection of difference and the recognition of uniqueness of citizenship" is based on the principle of political equality. Differentiated citizenship in Gianni's view is a pragmatic experiment for reaching a better political integration in deeply culturally divided societies that needs reconsideration. That would mean "passing over the universalistic liberal model of citizenship" and consider changes in both aspect of citizenship: as rule and content. Collective recognition of cultural specificity of some groups is to become one of the rules of citizenship and that content of citizenship should be adjusted in order to allow minority groups to feel that, despite their differences, they make part of the community⁴⁵. Through this concept of citizenship liberal states should strive to a) *improve the political resources* of the members of discriminated groups b) *to endow with symbolic recognition* of stigmatized or presumed abnormal cultural

⁴⁵Gianni, *ibid.* p. 42

differences, providing political visibility and respect and c) *to reinforce through democratic integration the legitimacy of representative democracy*⁴⁶. I do share the belief that these steps are necessary in order to make the overall system more democratic and legitimate. However I do not think that differentiated citizenship might be the best solution.

First, improving political resources of discriminated groups must start from the question who is given the right to citizenship. For those who are not entitled this right at all (immigrants e.g.) differentiated citizenship would not be helpful. It is the idea of citizenship and the membership criteria that need to be questioned in this case. Also, in case of groups that possess formal citizenship, LGBT for example, differentiated citizenship is not helpful either – these groups need the same universally recognized political rights like a right to assembly that in some cases might be imperilled. In the case of Serbia, a country candidate for the EU, gay parade, as an expression of political request for equal right, was cancelled several years in a row for the security reasons. It is clear that in this case it was not the universal citizenship an obstacle for this manifestation but the lack of idea that universal citizenship and the body of rights it entails belong to this specific group.

The second aim that deals endowing with symbolic recognition stigmatized subaltern groups seems in my view opposite to the idea of universal citizenship. Just like in case of LGBT or even national minorities it is not about particularizing and separating these identities from the universal citizenship but making space for their symbolic recognition. I will refer to the same case. The law on non-discrimination of LGBT groups as a sort of differentiated approach to the issues that these groups face was in force in Serbia when the ban of gay parade was

⁴⁶Gianni, Matteo, “Multiculturalism, DifferentiatedCitizenship, and the Problem of Self-Determination”, in: Fred Dallmayr and José M, Rosales (eds.), *BeyondNationalism? Sovereignty and Citizenship*, Lexington Books, New York, 2001, pp. 221-222

supposed to take place. However, the universal right to express discomfort with the present state was seen as exaggeration by most public opinion surveys. My point here is – if we need to show that someone is politically equal and deserves equal symbolical recognition of our universal rights despite our differences.

Finally, in order to look for a democracy to be more legitimate I think we shall employ in Fraser's terms *transformation* not affirmation (modification) of the status - quo. There is something deeply wrong and illegitimate in the contemporary context with the idea that citizenship is an exclusive privilege of some people, with the idea *cuius region ilius religio* meaning that the majority group can arbitrarily decide upon the symbolic formulation of citizenship and finally that legitimacy stems from procedural democracy. All this mix of communitarianism and democratic proceduralism needs transformation rather than reconstruction. That is why we should ask what is illegitimate with the present idea of citizenship, what in its contents makes it unacceptable for some groups and individuals rather than feudalizing it.

The laws and the constitution of the state should promote the idea of citizenship as equal status, even if it requires differential treatment. It unites two ideals: liberty and equality and as such is an ideal itself. The fact that it is a normative ideal does not mean, however, that the very idea of citizenship is useless. On contrary, this ideal is a moving force of the emancipation and recognition within plural societies, the guarantee of stability and justice within a polity. Citizenship is rather a projected status, an ideal form of membership that corresponds to the normative request of justice – to have equal standing compared to others and not having your identity misrecognized. By this ideal we judge all other membership rules and principles as well as disparities that naturally occur in political community.

In other words there is no normative problem within the idea of universal citizenship itself but in its content and assumptions. The universal citizenship should be seen as ideal of political parity rather than a culturally biased model of living or the conception of good. These aspects of citizenship, in my view, needs to be revisited. “To conceive citizenship as a democratic standard in a multicultural society” as Gianni explains “involves an important change in the liberal, neutralist view of political integration: citizenship is no more only the medium of integration, but a standard for evaluating the actual realization of integration”⁴⁷. Conceived in this way citizenship should be the essence of the whole dispute of plural societies – the content of the totem of the society, to say in Durkheim manner. The symbolic content and the normative input of that totem should be the crucial focus of normative political theory, for that is the field of the crucial (in)justice battles in plural democratic societies.

In my view, it would be too idealistic to think of a form of citizenship that might put all injustices to end. It is, however, obligatory task of political theory to come with a notion of citizenship that will not terminate, at least not perpetuate all forms of discrimination. As stated before citizenship is a historical category. Normative political theory should come up with a category flexible to account for the changes of citizenship but still normatively grounded in our understanding of the just citizenship. The laws and the constitution of the state should promote the idea of citizenship as equal status, even if it requires differential treatment. It unites two ideals: liberty and equality and as such is an ideal itself. The fact that it is a normative ideal does not mean, however, that the very idea of citizenship is useless. On contrary, this ideal is a moving force of the emancipation and

⁴⁷ Gianni, Matteo, “Taking Multiculturalism Seriously: Political Claims of Differentiated Citizenship.” p. 49

recognition within plural societies, the guarantee of stability and justice within a polity. Citizenship is rather a projected status, an ideal form of membership that corresponds to the normative request of justice – to have equal standing compared to others without having one’s identity misrecognized.

1.4. The changes of contemporary citizenship

Every normative theory of citizenship should account for its historical nature. Citizenship changes and the contours of this phenomenon have a distinct form in every historical moment. The changes of the citizenship, as a paradigm and policy, were definitely not linear and progressive. However, we might identify the two global tendencies of the citizenship that a normative theory should account for. If we take a general view on the history of comparative electoral systems we would notice the first one: the change of the quantity of subjects citizenship referred to, which was progressively enlarging. The second general tendency which was way less linear and progressive is the change within the qualities that citizenship itself included as a concept. These *horizontal* and *vertical* changes of citizenship and their essential difference should be appropriately stressed.

For Christian Joppke the important dimensions of citizenship in which there has been a significant change are: status, rights and identity. Status denotes formal state membership and the rules of access to it, as one of the important elements⁴⁸. The other two elements are rights and identity. His conception of citizenship is fairly state-centered what

⁴⁸I agree that this category is vitally important for the idea of citizenship. However, I find that since it comes as an antecedent question of political membership, it should be analyzed separately. Also, I will try to explain that the very character of the citizenship and the way it is expressed through its constitutive elements: political, legal and identical, influences access to citizenship, i.e its inclusive or exclusive character.

Joppke implicitly concedes⁴⁹. His analysis is important as it shows the changing nature of citizenship in the light of global political and economic but also internal changes within the declining paradigm of national state.

The normative change of the today's theories of citizenship, as he elaborates, differs significantly from the one in 'the golden age of nationally closed welfare state' when the lines of conflict were functional, not territorial. His arguments include the important changes in the development of citizenship within three dimensions.

In the status dimension there has been the liberalization of access to citizenship, removing certain barriers, like sexual and racial, to naturalization. The territorial principal of *jus soli* gained the importance over the nation-state principle of *jus sanguinis*. 'As a result, practically all European Union states now provide either automatic or optional citizenship for second- and third-generation immigrants⁵⁰.

This opening of the citizenry as a consequence has its internal diversification along cultural, ethnic and religious lines. This, consequently, influences the rights paradigm of citizenship – this ethnic diversification made a shift from socio-economical right to multicultural rights of recognition, anti-discrimination etc. He quotes Rosanvallon's description of contemporary multicultural society and the shift of its axiological focus 'The central social values are tolerance rather than solidarity, and impartiality rather than equality...The principle of citizenship no longer implies a demand for redistribution in this framework, but is reduced to a common trust in autonomy'. In other words, in the interplay of quantity and quality, the more people got access to citizenship, but the substantive benefits of the citizenship do not exist anymore. There are two legal developments Joppke

⁴⁹ Christian Joppke, 'Transformation of citizenship: status, rights, identity', *CitizenshipStudies* 11, no. 1 (2007), pp. 37–48, p. 38

⁵⁰*Ibidem*.

distinguishes within this dimension: the extension of citizenship rights to non-citizens and the strengthening of minority rights.

Finally, for Joppke identity can have two possible meanings: the one held by what he calls 'ordinary people', and the official one propagated by the state. He reckons that in contemporary multicultural states identity is detached from the state, and remains within primordial group affiliations (ethnic, cultural, racial), which are protected and furthered by multicultural rights. As a result, it leaves open the questions of unity and integration of highly diversified societies. Now, as he states, states can no longer impose a substantive identity as a precondition for acquiring citizenship, primordial group identities are protected by multicultural rights. However, he reckons that while the liberalism of toleration was a dominant philosophy of the state during the blooming of multiculturalism, the need for an integration in a post-national society made state to embrace liberalism that prescribes autonomy, ie. a certain forms of what Rawls called 'comprehensive doctrine'.

In my view, Joppke's analysis precisely depicts the phenomenal changes within the legal sphere of citizenship and the sociological implications of such trends. However, it seems that the macro-level of injustice experienced by the citizens of Western democracies. This remark is especially important on the level of identity. Leaned in certain way to Marshall's analyses this analysis sees citizens as a compound unit that benefits from rights given by the state, from above. The participatory element is not present in this study. It treats the citizenship as a pure status without the praxis that confirms it. Nevertheless, this analysis gives significant contribution to what I call temporality of citizenship, its formal and substantial historical changes. All these transformations indicated in Joppke's analysis clearly show that the issue of minorities and symbolic inclusion is the central question of the

today's citizenship. The change of the normative locus from distribution to recognition has structural and functional changes of citizenship.

Thus there is a need for a democratic concept of citizenship that is flexible and open for a change. If the issues of injustice and oppression were functional once (along the class lines) and not territorial, if later these were territorial (ethnicity) and today perhaps symbolic and identical (concerning different worldviews and conceptions of good), it is an imperative for a normative theory of citizenship to account for these injustices that historical citizenship has produced, integrally and in their interdependence.

1.5. Normative axes of citizenship

1.5.1. Identifying dimensions of citizenship

In abovementioned classical theories of citizenship we might identify the hint of three crucial elements: legal, political and identical (symbolic). Although not present integrally in all theories, these definitional elements of citizenship seem to be part of a consensus within contemporary social thought⁵¹. In this part I will elaborate on these three important dimensions of citizenship and try to identify the fundamental questions for a normative theory of citizenship. Then, I will proceed with normative arguments that form part of a normatively ideal concept of citizenship.

Legal part includes the rights that define our status of citizens. These rights can be civil, political and social. These rights define citizens' status within a polity. They are defined in the legal system,

⁵¹v. W. Kymlicka, W. Norman "Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts", in *Citizenship in Diverse Societies*, W. Kymlicka, W. Norman (eds.), Oxford: Oxford University Press, 1–41 Carerns, , Culture, Citizenship, and Community. A Contextual Exploration of Justice as Evenhandedness, Oxford: Oxford University Press.2000Cohen, J., 1999, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos", *International Sociology*, 14 (3): 245–268.

through constitutions, laws, bills of rights etc. It would correspond to what Pocock described as *homo legalis* and historically located in the period of Roman Empire⁵².

The political element of citizenship is focused on citizens as active participants in political processes. It is a dynamical principle that enables the changes in the political system. It represents a significant normative input of many republican and neo-republican theories of citizenship, focused on civil virtues and ethics of responsibilities and rather than rights. In Pocock's reference to classical ideals of citizenship, this idea of citizenship relates to Aristotle's *zoon politikon* and emerged in the times of ancient polis.

Finally, third, identity presumes that we can perceive ourselves as members of a distinct political community. It is a synthesis of the other two parts of citizenship. If we are granted the status of citizenship and we can ameliorate our status and change the deficiencies of the status quo through the means of political participation we can identify ourselves with the political community we belong to.

Formally, a theory of citizenship includes two nominal subjects: citizens in various forms, as groups and individuals, and the polity. Within the citizens as a category it is possible to detect those, again both as group of individuals and groups who suffer certain forms of injustice. In this way it is possible to imagine the complex set of relations among citizens, minoritarian on one side and majoritarian on the other, and relations between minorities and the polity. These two lines of social and political interaction are particularly interesting for this thesis. This scheme also enables me to use the broad concept of minorities without limiting the notion to particular cultural groups and accounting for individuals who due to some group feature suffer injustice but do not

⁵²Pocock, J.G.A. "The Ideal of Citizenship Since Classical Times." *Queen's Quarterly* 99/1 (1992): 33–55

have membership in a clearly organized and politically active group (women, sexual minorities).

This division follows Stewart’s analytical division between state-centred and democratic citizenship⁵³. It also includes the differences among the citizens that normative theory must consider. In this conception citizenship remains universal, ie. it remains a main point of reference for all political values within a certain polity. It also reflects the complexity of citizenship since it touches upon different spheres of our social and political life.

TABLE, Dimensions of citizenship

CITIZENSHIP	DIMENSIONS		ACTIVE/PASSIVE ELEMENTS (above/bellow)	RULE/CONTENT	DOMINANT THEORY
	LEGAL	<i>Civil rights</i>	active/passive	rule	LIBERALISM
		<i>Political rights</i>	active	rule	
		<i>Social rights</i>	passive	rule	
	POLITICAL		active	rule	REPUBLICANISM
IDENTITY		active/passive	content	COMMUNITARIANISM	

⁵³v. supra 1.3.

1.5.2. Normative questions for contemporary citizenship theory

Now I shall tackle the main normative questions within citizenship theory. These questions were addressed by the abovementioned theories to a certain extent. However, I consider that these concepts of citizenship based on sociological, historical and political descriptive interpretations need to be reconsidered within a normative theory of citizenship.

The first question considers the issue of social, *democratic closure*. Social closure 'refers to processes of drawing boundaries, constructing identities, and building communities in order to monopolize scarce resources for one's own group, thereby excluding others from using them'⁵⁴. There are different levels of legitimizing such a closure, usually stemming from the idea of the utmost importance of national state and the right of the majoritarian nation to proclaim their vision of the good in the main constitutional document, while leaving certain degree of recognition and representation to minorities.⁵⁵

Citizenship by its definition, defines those who are entitled to use the scarce resources within a society. This issue has its internal and external side. This issue of inclusion/exclusion – within vibrant contemporary societies with a high level of migrating trends can be perceived within and outside the national state boundaries. The social closure does not follow binary logic and corresponds to the level of civil, political and social rights achieved as well as the level of political participation of citizens within a polity. As Benhabib clarifies that the

⁵⁴ Juergen Mackert "Social Closure".In: *Sociology*, <http://www.oxfordbibliographies.com/view> (accessed 6-Mar-2014).

⁵⁵ The question of intentionality of social closure, whether it is a deliberate or unintended consequence of social interaction is not particularly important. Anyhow, the consequences of these arrangements are evidently unjust.

politics of membership 'becomes the site of *jurisgenerative* politics through which the *demos* faces the disjunction between the universalist content of its constitutional commitments and the paradoxes of democratic closure'⁵⁶. The decision on who is supposed to be a member of a community depends on those who are in power to decide, even for those who are outside the community at the moment. Besides, the laws of those who are full members of community influence *the others*, those with limited or no political rights. As Benhabib explains 'every democratic *demos* has disenfranchised some, while recognizing only certain individuals as full members'⁵⁷. Therefore, we might say that closure is inherent to the very idea of citizenship but the nature of its closure is extremely salient from the normative point of view. The fact that citizenship is always a form of closure does not *per se* justify all kinds of rules that a community can use as a strategy to keep the benefits of citizenship status away from certain individuals.

It is hard to distillate normative implication for a theory of citizenship out of a historical development of citizenship rights that, contrary to Marshall's conviction, was not always progressive and linear. But the theory of recognition should, however enable us to think of models of social closure that imply injustice. Once we rectify this injustice, in an ideal world imposing ideal norms, we cannot guarantee that the new forms of social closure leading to other social injustices. That means that the system, apart from eliminating the present forms of misrecognition should be modelled in a way which brings the least danger for new forms of social injustice and leaves the space of contestation broad enough for new voices of recognition claims.

The social closure has always been present in human interaction and seems to be inextricable from the very idea of citizenship. That is

⁵⁶Benhabib, Seyla. *The Rights of Others: Aliens, Residents and Citizens*. Cambridge: Cambridge University Press, 2004. p. 20

⁵⁷*Ibidem*.

something that goes beyond the scope of predictability of any political theory whether certain concept will be (mis)used in order to legitimise social closure. It is to determine, however, which forms of social closure that are just and legitimate from those which are not. “Equal opportunity and respect for cultural difference cannot ultimately be enforced by legal decisions”⁵⁸. The role of political theory, in that regard, would be to assess different normative models and to propose, if not the just one at least the one that brings the least injustice to the members and potential members of a political community. I do see constitutional patriotism, due to its form and contents the best “approximation”⁵⁹ of the ideal inclusive and just citizenship that leaves little space for illegitimate social closure.

Another important issue, especially in the context of minority groups, is *the dichotomy of universal and differentiated citizenship* that was already elaborated. Universal citizenship should not be understood as a difference blind set of rules that affects everyone equally. In cases where there are no specific laws that target minority groups, judicial intervention in all modern legal systems is aimed at synchronizing universally proclaimed rights to the diversity of rights claimants. Besides, there can be different and decentralized levels of political and civic participation (various forms of territorial autonomy) that coexist in harmony and still recognize particular territorial rights to certain groups. Nevertheless, I claim that at the any given territorial level – of a city, country or supranational level – citizenship must obtain its universal meaning – there must be a set of rules that determines our status of community members, our rights and duties and is accepted by all. In my view, the idea of citizenship as membership and ideal of egalitarian political inter-subjectivity is to define the basic rules of entry and the

⁵⁸Gianni, ‘Taking multiculturalism seriously’, p. 50

⁵⁹Ibidem.

minimum principles of mutual interaction in “a club” called – political community. I believe that only when these rules are accepted by the ones who are and who intend to be part of that community. This question reflects two important concerns: the problem of legitimacy of a universal and particular citizenships and the issue of minority identities, their recognition and/or their possibility to identify with their political community. In other words, are the political decisions taken by citizens of polity X legitimate for the members of minority community *m*, and if yes under what conditions? Does political identity of community X necessarily reflect the particular concepts of good of the majoritarian group?

Again, I do believe that some constitutional principles of citizenship must be addressed from the central and more encompassing level. I think that *equal status*⁶⁰ (rather than equal possibility or equal treatment) is the main idea within this argument. Partially it can be explained by the recognition argument – namely that the standards by which we recognize each other and the substance of that recognition must be universal in order to have full normative impact. Determining the standards and criteria by which someone will be recognized is a deeply normative issue. Here we talk about universality of scope, not universality of content. Universality of scope means that we can determine common criteria by which we will mutually recognize each other's rights and duties. The content of these citizenship rules, however, should not be equated with emptiness or universality in the sense of global principles and values. Every community, with sharply different cultures within it, would probably have a specific constitutional

⁶⁰ Judith Shklar, due to the pejorative use of term *status*, suggest the term *standing*, to denote the meaning of the idea of citizenship. (For Shklar *standing* is one of the meaning of the idea of citizenship, other being: citizenship as nationality, citizenship as participation and ideal republican citizenship. Shklar, 1991, Introduction Shklar, Judith N. *American Citizenship: The Quest for Inclusion*. Cambridge, Mass.: Harvard University Press, 1991.

identity that relates to its cultural and historic contexts. Furthermore, this universality does not preclude the different cultural paradigms, particular ethics by which certain community might organize its life as long as it does not imperil the basic principles accepted by all citizens. *Equal status* should make us think about the overall symbolic, normative and legal context in which this equality should be guaranteed. Frankly, modern national citizenship is far away from this equality and presents a reflection of biased particular ethics, ethnic or civic social closures based on arbitrary citizenship criteria.

Finally, there is an important aspect of *the form of the citizenship* that has important normative implications. Should the citizenship be confined to a national state? Is citizenship without a state, in its cosmopolitan version, normatively plausible idea? These questions include the different levels of loyalty that citizens might feel in highly intertwined political and social setting.

Historical perspective might be useful here. Namely, citizenship in the course of its history significantly changed its scope and structure. From polis states to empires and from mixed medieval allegiances towards a centralized universal citizenship of a national state. Citizenship has its diversified axiological points: on one side it is a utilitarian modus of common life – people unite within a polity in order to enjoy their liberties and achieve different goals, on the other side there is a deontological value of every citizen within a polity whose rights and duties are guaranteed and proscribed. This being said, there is nothing inherent in the idea of citizenship that would associate it exclusively with a national state. The pairing of nation and national state and national state with the idea of citizenship are historically constructed ideas that need to be revisited. Besides, the evidence from the social theory based on globalization of capital, ideas and risk as well as

intensive migration of people, might indicate the need for supranational citizenship⁶¹.

1.6. A theory of just citizenship – contractualism revisited

1.6.1. Justice as a principle of citizenship

Citizenship theory reemerged in the focus of political theory out of the need to reconcile the big philosophical questions of justice and epistemological and axiological determinism of community membership. Instead of being an overall principle of political life, justice should be the main principle of relations between citizens and the state, and among citizens themselves. It elaborating a theory of justice and a theory of state would go beyond the scope of my research questions. The justice I refer to is not limited by the boundaries of a national state in its application. It is not the overarching principle of state organization and political processes within one community. Rather, it is an auxiliary axiological test of the criteria and practices connected to membership in a political community. The principle of justice is thus a way to put in critical scrutiny the idea and praxis of citizenship that is usually associated with national state. There should be a holistic approach, thus, including citizenship from within and from outside the traditional framework of national state.

⁶¹see e.g. Sassen, Saskia (2002) *De-Nationalization Territory, Authority and Rights in a Global Digital Age*. Princeton, NJ: Princeton University Press. Soysal, Y.N. (1994) *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press.

The principle of justice, in the most prominent theory of justice in contemporary philosophy, is consisted of two political values of equality and liberty. In the context of minorities this breakdown might be particularly interesting.

The members of minority communities are usually not equal compared to those belonging to majoritarian ones. Sometimes, their rights are not equal - in the case of gay community, in some European and many countries around the globe, it is the right to marriage. Simply, members of these communities are deprived from their basic citizenship rights to marry, right to inheritance, right to family life etc. In that case it is simply to identify the pattern of injustice, in the form of inequality. In some more liberal countries, these rights are guaranteed to same sex partners. Nevertheless, if we imagine a gay albeit traditional Turk woman living in Cologne the very fact of belonging to a patriarchal Muslim immigrant community might again make her unequal in this particular vernacular social setting. Inequality in this example is relative and its consequences would probably depend on the type of citizenship we employ. In a multicultural differentiated citizenship this inequality would more visible and effective: the values of the community would in this or other way be imposed to this young woman. The same question of equality might be posed in the case of her hypothetical activism in the public sphere of local Cologne politics, concerning the issue of private and public sphere and the stereotyped view of women's position that still strikes women in general, especially in traditional communities. Finally, we might want to ask ourselves whether she can identify her with Germany and express her civil loyalty to Germany's political decisions. Is she equal to other citizens of Germany when it comes to way they feel about their *patria*?

Equality is relational and procedural. We might imagine a totalitarian state with absolute equality among its citizens. In quest for a

democratic citizenship, we should use additional criterion of justice: liberty. In the context of citizenship the main question is: does the formal and substantial arrangement of political and legal principles within a polity jeopardize my ability to pursue life goals valuable for me and/or for my community. Does citizenship imply certain goods that do not correspond to mine and that I do not find legitimate? In the paradigm of positive/negative freedom in Berlin's terminology this might be reformulated: citizens in a plural, polytechnic polyvalent societies must be free from any kind of particular concept of good that they cannot accept (negative freedom) and the citizenship itself should entitle them to pursue their life projects (positive freedom) with respect for freedom of others.

Equality should be understood as a value that connects all dimensions of citizenship. As it was already elaborated citizenship is a structured system of intersubjective relations within a community. Only when equal in all dimensions citizens are truly equal. In that sense, I believe that ideas of *participatory parity* (Fraser), *politics of presence* (Phillips) lack one or two other important dimensions of citizenship that might be subsumed under a generative notion of political context which ultimately determines the overall equality of a citizen.

Once these two principles of justices are elaborated I will try to address contractual theories with the focus on minorities. Namely, it is hard to draw conclusions about the principles of citizenship *ex post facto*, after all historical and political processes, as a mere reflection on *status quo*. I reckon that the explanatory arguments of theories connected to communitarians and cultural liberalism find their foundation in such approach which limits epistemological and ethical concerns to the *present* historical moment and *particular* political community. The arguments of justice oblige us to reconstruct the imaginary political and social environment in which the need for the

universal axiological and normative power of the state emerges. Nevertheless, it is necessary to test the normative findings in a concrete situation, to see if the institutional framework gives result and eradicates the injustice. This approach to justice should be seen as a middle way between Rawls' *transcendental institutionalism* and Sen's *realization-focused comparativism*. Referring to two different concepts of justice in old Indian jurisprudence Sen differs *niti* and *nyaya* approach, the former relates to organizational propriety as well as behavioral correctness and institutional arrangements whereas the latter 'is concerned with what emerges and how, and in particular the lives that people are actually able to lead'⁶². I find that this differentiation poses a challenge for a concept of citizenship that aspires to be just. On one hand it must start from the empirical evidence of injustice. On the other hand, it should conceive an institutional, but also normative and symbolic institutional model. Leaving the burden of proof for injustice to those who face injustice within the system and as a consequence of the system as such, as participatory and agonistic models of political would suggest, in my view, seems pretty harsh to these individuals and makes vindication quite unrealistic. Ideally, for every single citizen and community as a whole, it should be a matter worth reasoning and advocating this cause especially when the main subjects are incapable or incapacitated to do so. This argument might lead into the fallacy of paternalism, but is way more realistic than the vision of *status quo* in which everyone is equal and competes from equal positions.

The use of paradigm of social contract might be outdated in the normative reasoning. However, it helps us to deal with the complex notions around the ideal of citizenship, like rights and obligation, status, equality. The very idea of social contract became the part of what

⁶²Sen, Amartya. *The Idea of Justice*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2009. xv, see also Maffetone, Sen's Idea of Justice versus Rawls' Theory of Justice Indian Journal of Human Development, Vol. 5, No. 1, 2011, 119-132

Charles Taylor calls ‘social imaginary’ – our perception of the origin and *telos* of political community:

The underlying idea of moral order stresses the rights and obligations which we have as individuals in regard to each other, even prior to or outside of the political bond. Political obligations are seen as an extension or application of these more fundamental moral ties. Political authority itself is legitimate only because it was consented to by individuals (the original contract), and this contract creates binding obligations in virtue of the pre-existing principle that promises ought to be kept.⁶³

Instead of imagining a political community as a given fact, tailored by national and international rules, we can imagine it as a result of a hypothetical social contract⁶⁴, defined broadly as free deliberation and praxis of equal and different individuals. By analyzing the contemporary issues of recognition and minority accommodation, taking the plurality of modern societies seriously, we might “go back” to the imaginary initial moment of accession to community (as initial fact of citizenship), not only in legal but also in historical, political and philosophical sense. The injustice is so structural and inherent to the system within we look for the normative solutions, that this is the only plausible philosophical method to think the avenues for a more just political community.

The problem with social contractualism we find in theories like the one of Rawls is that though being based on political human nature it somehow comes to the results which are apolitical. Once achieved, social contract in these versions seems to revoke the need for political

⁶³ Taylor, Charles. *A Secular Age*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2007. p. 159

⁶⁴ “Contractarianism” usually refers to both a *political theory of the legitimacy* of political authority and a *moral theory about the origin or legitimate content* of moral norms. Thus, one could speak of two strains of social contract theory: “contractarianism” and “contractualism”. v. Cudd, Ann, "Contractarianism", *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2013/entries/contractarianism/>>. My version of social contract is clearly more in line with contractarianism, it rather looks for the legitimacy of political authority than it generates the principle that should justify social morality.

deliberation. It seems to me more prudent to have a social contract as a constantly revisable normative model. The history of citizenship in the Western world shows the progressive inclusive trend of citizenship and justifies the model which is flexible to catch the normative changes of contemporary societies.

Finally in the contemporary world of constant changes there must be a theory of citizenship that can encompass the change of the Westphalian order into permeable polities with multilevel sovereignty structures. These changes, in my view, must find a reflex in a broader theory of citizenship that puts immigration and internal displacement into the focus of normative theory. That is why in the theory of citizenship I elaborate, I will make a distinction between relations between citizens and polity and citizens themselves as contractual parties. This differentiation should reflect the dual nature of citizenship and its multifaceted normative character. I will particularly focus on political principles of liberty and equality in the context of minoritarian identities.

1.6.2. Relations between citizens and the polity

Freedom of individuals and their political and legal equality, which make them capable of being contractual parties, are the necessary presumption of all liberal democratic concepts of social contract. In the context of multicultural societies and the communitarian critique of liberal individual paradigm we might pose the question why are not groups considered as possible parties in the social contract? I think that the reason why we should omit groups from this consideration is less ideological and rather prudent. The very reason for constructing a hypothetical social contract is addressing present injustices. Injustice, as Nancy Fraser states, is felt individually, although that feeling is often

due to the membership in some social groups⁶⁵. The normative ideal of citizenship should be aimed at the “empowerment of the members of disadvantaged cultural groups”⁶⁶ rather than at the conservation of groups as such, however we define it. Due to all various possibilities of being oppressed within a society it seems necessary to take individuals as the main moral agent of the hypothetical historical reconstruction of the contemporary citizenship and at this level dismiss social groups as normative and ontological units of political society. Nevertheless, this does not mean that individuals cannot calculate their group identities, community membership and belonging into the overall picture of citizenship. Constitutional framework should start from the ideal where individuals remain the creators and

If we take all the dynamics of the contemporary world it seems reasonable to constitute the ideal version of the social contract as an on-going process which has the aim of achieving legitimacy by the consent of all citizens – existing ones and those applying for citizenship or asking for the recognition of rights .

1. *Cooriginality thesis*

Habermas’s *cooriginality thesis* is a way to reconcile the question of primacy and tension between human rights and sovereignty by using the elements of contractual theory. In his explanation it is a certain kind of bridge between Lockean and Hobbesian position with regard to the results of social contract. The rights that stem from citizenship are thus necessary for the formation and exercise of sovereignty while sovereignty is the principal guarantee of the rights’ protection. Thus, there is not a ‘temporal’ or normative precedence of

⁶⁵ Recognition, Redistribution and Representation in Capitalist Global Society: An Interview with Nancy Fraser
Hanne Marlene Dahl, Pauline Stoltz and Rasmus Willig, *Acta Sociologica* Vol. 47, No. 4, Recognition, Redistribution, and Justice (Dec., 2004), p. 379

⁶⁶ Gianni, *ibid* p. 48 see also Jürgen Habermas, *Multiculturalism and the Liberal State*. *Stanford Law Review*, Vol. 47, No. 5. (May, 1995), pp. 849-853.

one over the other. In other words, the contract legitimate as long as none of the civil, political and social (defined by the prevailing theory of distributive justice) rights of citizens are imperiled.⁶⁷

2. *Accountability*

This principle is especially important in the context of EU citizenship and other forms that overcome the boundaries of national states, either to sub-national or supranational level. It reflects the idea that there must be a correspondence between ruled and those who rule in the sense of responsibility for the political decisions. It means that all forms of citizenship must reflect the multifaceted character of a citizen: a citizen of the city, region, state or supranational political form. The only way accountability and legitimacy can be achieved is if there is political participation accessible to all citizens. In representative democracy this is a condition *sine qua non*, and it becomes even more salient in multilevel governance. Accountability is also important with regard to question which scope of rights shall be guaranteed by which level of governing.

3. *Reasonable criteria for access to citizenship*

In that imaginary social contract there are not a fixed number of parties, ie citizens, that once and everlastingly determinate the rules of the community. Instead this contract should be seen as open, so that parties can continuously become part of the treaty. It is impossible to conceive a static social contract in a dynamic setting of contemporary migrations and interactions among citizens within certain global regions.

This modification of the traditional social theory should tackle the idea of social closure. Namely, to what extent the social changes of

⁶⁷I will elaborate extensively on the notion of cooriginality thesis in the chapter on constitutional patriotism.

the globalized world relate to the way that access to citizenship is granted.

If the social contract is containing all the rights and obligation that citizenship entails, it seems that the acceptance of the terms of the contract should be the only legitimate criteria for accessing the citizenship.

1.6.3. Relations among citizens – intersubjective recognition and solidarity

Citizenship, as explained, is Janus-faced: it includes the institutional framework but should also account for the inter-group relations. Majority versus minority is the most interesting since it tackles the issue of identity within the broader scheme of democratic citizenship. If democracy is the will of majority how can we ensure the system in which that majority will not always be the one with a specific cultural, gender or class identity. More specifically, we must ensure that the core elements of someone's identity are not part of democratic decision process i.e. cannot be eradicated or modified by the will of others (majority).

Identity is a feature shared by all individuals and under conditions of liberty expressed in myriad ways. As such, its free expression and flourishing, should be protected by political and legal order. Identity as a sort flourishing of our selves achieved through individual and collective efforts must be recognized by a political order that aims to be legitimate. The nature of the other interests being so different to identity (although both do change in the course of one's life) triggers a different mechanism of a constitutional protection. The

constitutional space for freely enjoyed identity must be protected especially the one of minority groups which due to the interests of majority can be easily neglected. In order to protect identities the state should also avoid imposing certain identities or encouraging practices connected to certain identity groups.

Here the principle of freedom should be interpreted as the set of basic rights that allows different individual and group worldviews. These worldviews should be protected from the infringement of majoritarian discourses, ideologies and power. Thus, both on institutional level which takes a universal stance and the micro level of interpersonal relations within a society there should be a principle of freedom.

Cooriginality thesis might be applied even in this post-contractual part, in its amended version. That amendment should guarantee that the protection of our identity is one of the prerequisite rights that envisaged by the social contract. Therefore, it is not only civil and political rights, basic social provisions and economic rights that we want to put in the foundations of a political community, but also something which is essential to us in a subjective, personal or collective symbolic way. Certainly without these provisions one might reasonable argue that no individual or group would accept the terms of social contract.

Equality of citizens in this level should be understood as equality of status, the mutual recognition of the quality of being a citizen with full spectrum of rights. The notion of status is revitalized by Nancy Fraser and leads to Weberian tripartite stratification theory: class, status, party that correspond to wealth, prestige and power. It is a sort of Greek *isonomia*, equality before the laws in its most ideal conceptualisation. This concept of equality is an approximation of *equality of opportunities*. Therefore other conceptions of equality: equality of

outcomes or equality of economic goods, in my view, are not primary questions of a normative theory of citizenship⁶⁸. Citizenship, in this normative paradigm, should be understood as a sphere of created opportunities given to individuals⁶⁹, which they can realise freely according to their own concept of the good life. Insisting that citizenship should be something else, leveling of life standard or equal redistribution of social goods, would be contrary to other constitutive principle of citizenship (liberty, e.g.).

The two levels – the relations between the citizens and a polity and the relation among citizens partially correspond to Mason’s differentiation between belonging to a polity and belonging together. For Mason a sense of *belonging together* means ‘a belief amongst them that there is some special reason why they should associate together which appeals to something other than, say, that they happen to live in the same polity’⁷⁰. National identity usually motivates this kind of belief. In the case of a sense of *belonging to a polity*: ‘a person has a sense of belonging to a polity if and only if she identifies with most of its major institutions and some of its central practices, and feels at home in them’. For this kind of belonging, the polity in itself must be valuable for an individual.⁷¹ ‘When a person identifies with those institutions and

⁶⁸ Scheffler distinguishes between two views of equality: the distributive view and the relational view. According to the first view, equality is an essentially distributive value, while in the relational view, equality is an ideal governing certain kinds of interpersonal relationships. In this thesis I operate with relational view of equality and integrate it in my theory of recognition and citizenship. V. Scheffler, Samuel, “The Practice of Equality,” in C. Fourie, F. Schuppert, and I. Wallimann-Helmer, *Social Equality: Essays on What it Means to be Equals* (Oxford University Press, 2015), pp. 21-44.

⁶⁹ Barry in his *Culture and equality* argues that egalitarian justice is only concerned with ensuring a reasonable range of equal opportunities, not with ensuring equal access to any particular choices or outcomes Barry, Brian, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Cambridge, MA: Harvard., 2001, 37)

⁷⁰ Mason, Andrew. *Community, Solidarity, and Belonging Levels of Community and Their Normative Significance*. Cambridge: Cambridge University Press, 2000, 117

⁷¹ Belong to a polity and belonging together can be interpreted as vertical and horizontal recognition. See Gianni, Matteo, “Multiculturalism, Differentiated Citizenship, and the Problem of Self-Determination”.

practices, she regards her flourishing as intimately linked to their flourishing. In order to be able to identify with something outside herself, a person must be able to perceive it as valuable, at least on balance, and see her concerns reflected in it.’⁷² One of his hypotheses is that liberal polity can be viable even if its citizens lack a sense of belonging together, so long as they have a sense of belonging to polity itself. As Gianni clarifies this does not mean that the dimension of belonging together is normatively irrelevant, “it means that belonging to a polity is the precondition for individuals to obtain resources that would allow them to find out ways to perpetuate their ‘belonging together’”⁷³.

In the case of constitutional patriotism these two allegiances are fused: belonging to a polity as a set of standards and norms that we can legitimize is equal to belonging to a community that puts these norms in the foundation of the polity’s constitution. The reason necessary for the belonging together lies in the normative value of the constitution as such rather than the tick ethical standing.⁷⁴ I do follow the argumentation that rejects liberal nationalism argument of the utmost importance of national identity for a functioning political community and I do believe in Mason’s reasoning that belonging to a polity which makes us ‘feel at home’ remains the crucial factor of a stable liberal polity. The problem with present polities is their “cultural overdetermination of belonging to a polity” which eventually leads to minorities’ discrimination and exclusion⁷⁵.

Having all this in mind, the fulfillment of the normative demands within two levels of relations and their synchronic interaction, should be a conjecture for the principle of solidarity. The principle of solidarity, as an important aspect of the identity dimension, stems from a

⁷² Mason, *ibid*, 127

⁷³ Gianni, *ibid*.

⁷⁴ I will elaborate this reading of constitutional patriotism in the part dedicated to it.

⁷⁵ Gianni, *ibid*.

teleological understanding of the notion of citizenship. It is based on a simple idea that once we can identify with a certain social project we might feel more motivated to contribute to its goals accepting certain burden of society and sometimes counting on its help. That is why the inclusion of immigrants in the main political project of the polity is on the top of political agendas in Western democracies. Ideally, when we think of solidarity in plural societies, we should not have in mind ethically burdened projects, national goals and ideals but rather an idea of a functional liberal polity through which we feel more incited to act in the spirit of solidarity. However, instead of imposing universalizing paradigms of citizenship and common national or cultural matrix, solidarity shall stem from the acceptance and valorization of common life on egalitarian basis. It means that commonness should be such that everyone might identify with the political and constitutional identity of a certain polity.

The revision of contractual theory was supposed to introduce the main argument of political liberalism, the argument that will be developed through the thesis, that we can only accept and abide to rules and principles that we could legitimize. Hypothetical return to the moment of community creation as an initial point of citizenship was supposed to serve to overcome inherited system injustices that history of almost every political community has. Similar to Rawls's original position but without any veil, with full knowledge of their identity/identities, individuals deliberate on the conditions of the new social contract. We enter the pseudo contractual relation of polity membership by imposing restrictions on our liberties and certainly doing the same to others and to the polity itself. The acceptance of certain reasons that lie behind laws (*ratio legis*) might heavily depend on our worldviews closely intertwined with our identity, our basic perception of the self – be it individual or collective.

1.6.4. Constitution as a process of positivization of social contract

Normatively construed social construct finds its social power through its positivization in the form of constitution. The liberty of those who possess less political power due to the fact that they belong to minorities might depend on the idea and reality of constitutional order. As Dimitrijevic puts it, ‘constitution is a charter of liberty’⁷⁶. Besides, constitutions refer only to those who are citizens of a certain polity. In other words, the idea citizenship is of a pivotal salience for one constitutional order, these two are mirror of the same social contract that I have depicted.

Not all empirical constitutions were perceived as having such a paramount normative value. Here, before the detailed argumentation in favour of conceptualizing constitutional norms as a source and object of citizenship identification I shall briefly elaborate the underlying idea of *political* of my research. We shall always bear in mind a concept of the political which overcomes the epistemological, ethical and even comprehensive divides that individuals and communities might face in their common life. In this vision of politics, *political* begins with overcoming the boundaries of our self, both individual and collective. This is exactly the essence of every political and in particular constitutional endeavor that political communities inevitably face. Rosenfeld explains this through the notion of constitutional identity which I will use later in the context of the EU to support my argument.

If we postulate that ethical concern is what prompts the quest to live in community rather than isolation, then imagining the constitutional subject and

⁷⁶ Nenad Dimitrijevic, “Kako čitati ustav” [How to Read the Constitution], u: Saša Ilić (ed.), *Kako čitati*, Beograd: Narodna Biblioteka, 2005

endeavoring to draw a constitutional identity-- inevitably subject to repeated erasures and constantly calling for redrafting-- figures as the political and legal expression of the need to persist and to engage with those who will to a significant degree remain irreducibly other.⁷⁷

Rosenfeld explains, and that is exactly where I depart from multicultural conception of politics and political, that any identity conceived as a sealed singularity could never lead to any common constitutional project. Plurality as a result of clash between universality whose interpretations are plural and singularity that wants to be preserved remains perpetually in question. The idea of my project, where I follow Rosenfeld, is to look for the least contested plurality by invoking universality which will allow for the least harms of various singularities that constitute certain political space.

Radical hermetically sealed singularity makes any cogent constitutional project impossible; thorough and permanent identity between self and other, on the other hand, would make constitutional projects superfluous as universal constitutional essentials would be self-imposing and beyond dispute. The constitutional subject and constitutional identity become intriguing, problematic, and challenging when some links of identity clash with claims to give singularity its due. It is precisely at that point that the dialectic between the universal and the singular is unleashed and that it becomes oriented to the plural. Moreover, because conceptions of the universal are plural, and those of the needs for purposes of preserving singularity are multiple, what qualifies as the plural is likely to remain perpetually in question.⁷⁸

Constitution is, in other words, act of positivation of so conceived social contract⁷⁹. Most of the contemporary societies are, as Rosenfeld names them, pluralistic-in-fact. The EU is not an exception. In Rosenfeld's view for

⁷⁷ Michel Rosenfeld, *The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics*, Cardozo Legal Studies Research Paper No. 358., 2012 See also: M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, 2010

⁷⁸Ibidem.

⁷⁹ Nenad Dimitrijevic, "Ustav kao akt pozitiviranja društvenog ugovora." (Constitution as an act of positivation of social contract) *Habitus* (1999): 117-138. While Dimitrijevic uses the word *act* I opt for word process in order to indicate fluidity of constitutionalisation.

heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression”⁸⁰ The hierarchy inherent for the constitutional order allows citizens to “challenge state-backed infra-constitutional laws”. In the heart of this process, we find *consent*, which is not necessarily actual. As Rosenfeld states that it is “arguably sufficient for purposes of assessing the legitimacy of a rule of law regime to determine whether acceptance of the latter would be reasonably consistent with the diverse agendas of all concerned.” Consent is a legitimation of coercion and a guarantee of a stable political order. How do minorities enter into this picture? How can we expect a social contract and its positivation through constitution and constitutional laws to be just for both minority and minority? Again, minorities and democracies are corollary effect of democratic procedure. The coercion used to impose certain laws is legitimate if it does not contradict the already “given”, *ex ante* consent⁸¹.

The majority minority relations are in the heart of this research. As I said this divide changes along different cleavages but in case of identity minorities it brings bigger harm to those who find themselves in minority position. In the case of epistemic or general policy clashes minorities might accept the will of majority knowing that in some future issue they might also be in majority. Nevertheless, identity minorities must have their rights always safeguarded; otherwise the constitutional ground of the social contract would not have sense.

To the extent it is democratic, constitutional democracy implements the will of political majorities and coerces political minorities to contribute to the realization of majority objectives with which minorities may strongly

⁸⁰ Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy”, Cardozo Law School, Public Law Research Paper, 2001, No. 36, 1310

⁸¹ Rosenfeld clarifies that “[w]hat is crucial in contract is that the consent be *ex ante*—before the legally binding transaction is set in motion. Once they know what they might expect in future from such a contract, even when its enforcement is against their preferences, “is both fair and consistent with respecting their freedom and autonomy” Rosenfeld, *ibidem*.

disagree. On the other hand, to the extent that constitutional democracy affords protection to certain fundamental rights and certain vindications of such rights frustrate the ability of majorities to fulfill certain objectives which they consider paramount, the enforcement of constitutional rights would seem to lead to a significant amount of coercion.⁸²

The answer to this conundrum that I will develop through this thesis is that this constitutionally embedded consent must necessarily encompass the protection of identity, through protection of autonomy of individuals and derived protection of the autonomy of the groups. Therefore, constitution in pluralistic societies cannot be based on “self-explanatory collective bonds but on rational agreement on common life”⁸³.

Reflecting *Social contract*, Rosenfeld stresses Rousseau’s binary nature of individuals in a political community. They are in the same time bourgeoisies who pursues private interests which often clash with those of others, and citizens, making each citizen a part of the sovereign which dictates of the general will. In the following two chapters I will try to identify the importance of the identity as a crucial interest of the individual’s wellbeing. “If adherence to the general will requires complete suppression of private interests”, continues Rosenfeld, “then Rousseauian legitimation of law would remain unpersuasive”⁸⁴. I fully subscribe to this standpoint. If the participation in public affairs would mean the negation and suppression of someone’s identity then its legitimation would be even lower. While it is possible to imagine that one can restrain his particular interest (economic, social) it is completely different with someone’s identity. There, restraining is impossible since one can act only in his capacity of a being with particular identity. It is

⁸² Michel Rosenfeld,, “The Rule of Law and the Legitimacy of Constitutional Democracy”, 1312

⁸³ Nenad Dimitrijević, *Ustavna demokracija shvaćena kontekstualno*, Fabrika knjiga, Beograd 2007, 397 (my translation)

⁸⁴Rosenfeld, *ibid.* 1332

conceivable that a good citizen ignores his own interests for the benefit of whole community but going against her identity would be too much to expect.

Therefore, the constitutional arrangement, as a positivization of social contract and principles of justice built in the legal and political logic of a polity, must not risk a permanent injustice to identity minorities. This is exactly the starting point for multicultural dismantling of universal citizenship and the idea of constitution as an intersubjective normative platform for pluricultural societies. However, they take constitutional universalism as a cause and not as a result of a power and culture biased interpretation of politics which is unfortunately inherent to their own projects. Constitutions of modern national states have already inbuilt postulates of liberal nationalism. Recreating new political territories based on the same constitutional logic will do nothing but reproduce the injustice aimed at new minorities. If post 1990 constitutional framework of Serbia was inadequate to integrate and recognize the rights of Kosovo Albanians, there is a fear that the new constitutional order of Kosovo, unless international community continues to foster its civic character, will be equally unjust to non-Albanian minorities. In other words, the very logic of majoritarian nationalistic constitutionalism⁸⁵ is wrong – that gives community priority over individual.

In next two chapters, I will further develop these ideas once I deal with the notion of identity minority and show why I disagree with theoretical presupposition of multiculturalism. Then, I will have a clear ground for establishing the idea of constitutional patriotism as a superior

⁸⁵ In the case of ex-Yugoslav countries this phenomenon of national constitutions has obtained a grotesque form, in what Hayden calls “constitutional nationalism”. v. Hayden, Robert M. "Constitutional Nationalism in the Formerly Yugoslav Republics" *Slavic Review* 51, no. 4, 654-73, 1992

normative model of citizenship for the pluralistic polity of the European Union.

1.7. Conclusion

Citizenship remains the focal point of contemporary political theory. The questions of sovereignty, human and minority rights, immigration and international cooperation all face citizenship as their important dimension.

The citizenship I advocate in this thesis is a common one, shared by the all members of the political community. This citizenship remains flexible and adaptable to the various differences that exist among us. Constitutional democracy has to offer a unifying standard of citizenship which could be tailored to the needs of constantly emerging and changing identities.

Certainly there is a strong normative background behind this apparently scientific vision of citizenship. It origins in the idea that political community should serve the human emancipation, free development of the essential human needs: to act freely, to develop its identity, to contribute the common life of a cultural and other communities, to be willingly part of the political life and to preserve the domain of private life from the inference of the state.

The identity of the modern democracies is, in the vast majority of cases, strongly biased. One of the first hand reasons lies in the historical formation of the national state. The imposition of the majoritarian discourses by the political elites was to way to provide necessary unity and ensure political obligation to the newly formed level of political organisation. Nationalism was only one of the discourses and the

formation of Otherness that shaped citizenship as a particular form of social closure. Clearly, this concept needs deep normative revisiting.

Even though it seems reasonable to adopt group rights as a way of correcting the inherent injustices of the modern democracies, it still does not mean the concept of citizenship should be parcelled, leading to the independent citizenship regimes. The very idea of citizenship implies a comprehensive, universal and sphere of equal political and legal communication. Nevertheless, it does not preclude that this ideal of citizenship cannot be achieved through various forms of legal arrangements, including group rights⁸⁶. Any particularly targeted set of legal solutions (laws or temporary legal measures) does not contradict the idea of universally guaranteed status that a citizen in a political community objectively and subjectively enjoys. The gaps between cultures, lifestyles and worldviews do not preclude the possibility of intersubjective platform of recognition to exist as a guarantee of a common life.

The concept of national state, with its ideological background, cannot adequately respond to the diversity of contemporary societies. It is normal to expect that a political system cannot legitimize itself if it is grounded on a biased value system. In the next chapter I will discuss multicultural citizenship and the way it treats minority issue. After I indicate some of the flaws of this approach, I will elaborate the recognition argument – the idea that individuals and group reasonably expect from their respective polities not to be misrecognised. Moreover,

⁸⁶ Peter Jones makes distinction between *collective* and *corporate* group rights. While the collective conception of group rights ascribes moral standing only to the individuals who jointly hold the group right, the corporate conception ascribes moral standing to the group as such. I follow his reasoning that collective group rights are in better harmony with the concepts of democracy and human rights though I concede that in certain cases corporate groups rights are inevitable for insisting on individualistic perspective could be unfair both to group and individuals. v. Jones Peter, "Human Rights, Group Rights, and People's Rights", *Human Rights Quarterly*, 21 (1), 1999, 80–107.

the flourishing of diversity and respect for minorities depends on the various levels of intersubjective recognition and contemporary state with its rules of citizenship lies is the locus of normativity of the whole process. In general, the next chapter will deal with the identity and the injustice that citizenship rules might impose to us simply for the reason of identifying with a group, lifestyle or worldviews.

Chapter II: MINORITIES AND MULTICULTURAL CITIZENSHIP

In order to determine that constitutional patriotism is an adequate and normatively acceptable discourse and political formula for accommodating minorities one should engage with an exuberant body of academic writings dealing with the notion of multiculturalism. The reasons are twofold: contemporary debates on citizenship are rarely held outside the domain of multiculturalism and by default have to take its position in due consideration, and secondly, minority issue was predominantly and coherently elaborated in the theories of liberal multiculturalism. However, the paradigmatic character that multiculturalism obtained in last two decades, instead of dogmatic following, should instead trigger the analytical approach and subject the core ideas of multiculturalism to a high critical scrutiny.

After the inclusion of multicultural policies in certain western societies, multiculturalism emerged as a distinct concept in social philosophy during the 1980s and its main idea was to protest the eurocentrism and chauvinism of the discourses of the time and to promote the value of cultural, religious and ethnic diversity. The historical reasons that caused an increase of the interest in groups, their identities and principles, are diverse: the increase of immigrants to Western Europe in the last several decades of the 20th century, the rise of nationalism in post-Soviet countries after the fall of the Berlin Wall in 1989, the globalization and its 'incitement' of different local cultures, traditions and worldviews. Before proceeding to the practical issues of the political implication that multiculturalism had or might have in the future, one must discuss its theoretical assumptions and assertions.

Multiculturalism is not elaborated as a unique and coherent theory and should be rather understood as an umbrella term for various theories that recognize the importance of culturally differentiated citizenship. This body of political ideas was enriched by different theoretical and philosophical paradigms, including communitarianism, theory of recognition, liberalism, conservatism etc. The approaches, perspectives, normative background, and even the categorical apparatus of these theories significantly differ, leading to different practical solutions of the minority issues. It is beyond the scope of this thesis to deal with the multicultural debate in its integrity or with any multicultural theory in particular. Instead, I will try to focus on the main thorny issues of the debate, its positive contributions to political theory and then stress out the ones in which, in my view, this theory fails to provide sustainable solutions.

There are two ways, according to Gianni, to analytically construct the sociological meaning of multiculturalism which he calls *broad* and *narrow* conceptions⁸⁷. Their basic point of differentiation is different understanding of culture. While for the adherents of narrow conception culture is defined in a thick way to refer to national cultures as the main axiological and normative axes of individual's self-understanding, the broad conception of multiculturalism includes in theoretical consideration the sub-groups within the dominant cultural group (gay, women, immigrant etc.) and takes a more relational and pragmatic approach to culture. This chapter is dedicated to the critique of the narrow conception of multiculturalism⁸⁸.

⁸⁷ v. Gianni, Matteo, "Multiculturalism, Differentiated Citizenship, and the Problem of Self-Determination", in: Fred Dallmayr and José M, Rosales (eds.), *Beyond Nationalism? Sovereignty and Citizenship*, Lexington Books, New York, 2001

⁸⁸ Even the broad conception of multiculturalism is only a good starting point – sociological conception - in analysis rather than a normatively defined position. This ideal conception of multiculturalism is purely descriptive since it tells us little about the power relation of groups and various identities within a particular political context. In other words, it is not enough to state that there are various cultural and subcultural

2.1. Liberal culturalism⁸⁹

It is certain that multiculturalism enriched the debate among liberals and sharpened the critical issues of identity and difference. The old debates on justice, equality and freedom have been contested by value relativism – the philosophical perspective that is skeptical to any set of values that could legitimately claim universal validity. The vision of justice, according to this view, is essentially biased by the cultural identity of subjects. In other words, it is not plausible to advocate one universally acceptable concept of justice. However, many of the multicultural presuppositions and implications have been and continue to be challenged both theoretically, due to the incoherent and unpersuasive arguments, and by the reality and practice of multicultural societies.

According to the classical liberal theory, the methodological and axiological focus is on *individual*, her individual autonomy and equal right citizenship. Extensive regime of liberty and respect for individual as a basis for endorsing freedom are among the foundational premises of classical liberalism. Human flourishing and pursue of happiness is intrinsically connected to individual selfhood⁹⁰. This concept obviously

groups, but to determine the power relations between them and to see which group(s) benefits from the social closure of citizenship.

⁸⁹Multiculturalism is an essentially contested concept (W. B. Gallie), probably like most of the notions in political theory. Here, I use Kymlicka's general term *liberal culturalism*, which in his view includes liberal multiculturalism and liberal nationalism. I find this term adequate for it puts the stress on the notion of culture. It corresponds to the main line of critique of these theories that I elaborate in this chapter. See: Will Kymlicka, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (Oxford, UK: Oxford University Press, 2001), 41

⁹⁰As Mill states in *On liberty*: 'Having said that Individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce well-developed human beings, I might here close the argument: for what more or better can be said of any' condition of human affairs, than that it brings human beings themselves nearer to the best thing they can be?' John Stuart Mill, *Collected Works of John Stuart Mill, vol. 18*, ed. J. M. Robson (Toronto: University of Toronto Press, 1963), 267

leaves no much space for group rights and various collective citizenship(s). Liberalism has given the crucial importance to the autonomous subject and her choice. As a reaction to Rawls *A theory of justice*, two dominant theoretical streams of thinking the issue of identity appeared: communitarianism and liberal culturalism.

In communitarian view⁹¹ it is impossible to construe individuals as absolutely independent selves, detached from aims and social attachments⁹². The communitarian debate contested the foundational principles of liberalism and stressed its relative historical and geographical significance. The communitarian kind of multiculturalism with its view of moral and political relativism that discredits liberal pursuit of universality left a challenge for liberals to reconsider multiculturalism in the liberal paradigm⁹³. Although communitarianism itself is not in the focus of this thesis, it is important to stress this stream of critique of liberalism that provoked the multicultural debate and the need to accommodate liberal principles within multicultural discourse. However, some of the problematic communitarian standings seem to

⁹¹Communitarianism emerged as a strong critique of Rawls and contested liberalism's individualistic view of the person and the claims to universal principles abstracted from our specific beliefs, practices, and institutions. It pointed out to our social embeddedness, particularity of normative claims and the inherent value of the community we belong to. The creation of self, as communitarians claimed, does not depend only on our rational choice and revision but also on inherited customs, commune routine and the whole world of values and practices that exist within our community. Communitarians also questioned the deontological theories of ethics, justice and autonomy for being biased by a particular concept of the good (western, rational, liberal) which is not shared by all communities and individuals.

⁹²Sandel explains that we always conceive ourselves as "members of *this* family or community or nation or people, as bearers of *this* history, as sons or daughters of *that* revolution, as citizens of *this* republic" (emphasis added, P.Z.), ie. concrete and particular social attachments. Sandel, Michael, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1981, 179

⁹³v. Taylor, Charles, *Philosophy and the Human Sciences: Philosophical Papers 2*, Cambridge: Cambridge University Press, 1985 and McIntyre, Alister, *Against the Self-Images of the Age*, Notre Dame: University of Notre Dame Press, 1978, MacIntyre, Alasdair C. *After Virtue: A Study in Moral Theory*. Notre Dame, IN: University of Notre Dame Press, 1984.

persist in the succeeding, albeit liberal theory of multiculturalism: liberal culturalism.

This chapter has not the aim to give an exhaustive overview of the possible liberal positions regarding multiculturalism and to cover the entire debate during last three decades. In the chapter I will deal with those liberal theories that: a) see minority identity as an important normative denominator and b) that there should be some kind of correcting policy with the injustice that results from unequal status of minority within society, ie. of a normative character. This narrowing corresponds to the main argumentation line in this thesis that focus on the minorities' perspective. I have used this as a differentiating criterion in order to narrow the critique to the theories that, in my view, reflect on minority issues most adequately and with a highest degree of sensibility.⁹⁴ Liberal culturalism, as Kymlicka defines it, relates to the theories that advocate the idea that the liberal states should 'adopt various group-specific rights or policies which are intended to recognize and accommodate the distinctive identities and needs of ethnocultural groups'.

Liberal culturalism, in Kymlicka's terminology, is a generic term for two bodies of political theories that deal with the issue of multiculturalism and minority rights: liberal nationalism and liberal

⁹⁴In other words, Kukathas' *indifference politics* which sees cultural groups as mere 'voluntary organizations' or Brian Barry's egalitarian, *difference-blind* liberalism, e.g. will not be part of this analysis. Liberal archipelago is a Kukathas's metaphor for a model of the free society, with no collective goal or good assigned, in which there are many associations, none of which 'privileged' or regarded as having special moral significance. The basic principle of this society lies in the right and freedom of free individuals to association and disassociation. Nevertheless, since these theories represent a significant critique of multiculturalism some of the rationale used in their argumentation will more or less explicitly find its place in my reflections on multiculturalism. Barry, on the other side, sees multiculturalism as counter-Enlightenment theoretical standing and restates egalitarian liberal position. See Kukathas, Chandran. *The liberal archipelago: a theory of diversity and freedom*. Oxford: Oxford University Press, 2003 and Barry, Brian. *Culture and equality: an egalitarian critique of multiculturalism*. Cambridge, Mass.: Harvard University Press, 2001.

multiculturalism. Kymlicka defines liberal nationalism as a set of theories that legitimize the function of the state to promote national culture(s) within the borders and determine right to self determination to certain national minorities. Liberal multiculturalism, in his view, can be seen as an additional body of theory to liberal nationalism that advocates accommodation, recognition and representation for groups other than nationals. In his views these theories are compatible and make part of liberal culturalism as 'the most prominent position in the literature today'⁹⁵.

In order to illustrate the main arguments of multicultural theories I will use the works of Will Kymlicka and Bhikhu Parekh.⁹⁶ These two theories represent two different approaches to multiculturalism: the former is liberal pluralistic and offers a concrete solution in the form of group differentiated rights, the latter is somewhat more general and less policy oriented, offering a model of intercultural dialogue among cultures.

In the case of Kymlicka's theory of liberal multiculturalism the author starts from the individual's interest to lead a good life and the importance of his autonomy to choose from the range of alternatives offered within the societal culture. This rationale serves to justify the application of the minority rights within the concept of multicultural citizenship.

Kymlicka's concept of 'minority rights' is a heterogeneous category which refers to a wide range of public policies, legal solutions, constitutional provisions etc. These rights go beyond the standard set of

⁹⁵Kymlicka, *ibid*, 42.

⁹⁶I will particularly but not exclusively focus on these works of these authors: Kymlicka, Will. *Multicultural citizenship: a liberal theory of minority rights*. Oxford: Clarendon Press, 1995. Kymlicka, Will. *Politics in the vernacular: nationalism, multiculturalism, and citizenship*. Oxford, UK: Oxford University Press, 2001. Parekh, Bhikhu C. *Rethinking multiculturalism: cultural diversity and political theory*. Cambridge, Mass.: Harvard University Press, 2000.

common civil and political rights of egalitarian individual citizenship and their aim is to recognize distinctive identities and needs of ethno cultural groups.

In application of his theory Kymlicka makes several conceptual demarcations. Primarily, he distinguishes between multinational states (where diversity is a result of a previous incorporation of self-governing territorially concentrated cultures into one larger state) and polyethnic states (where diversity results from immigration). Accordingly, while the national minorities are present in multinational states, ethnic groups tend to claim their rights in polyethnic states. In defense of group rights, Kymlicka distinguishes *self-government rights* (the delegation of powers to national minorities, often through some form of federalism), *polyethnic rights* (financial support and legal protection for certain practices associated with particular ethnic or religious groups) and *special representation rights* (guaranteed seats for ethnic or national groups within the central institutions of the larger state) (*cursive added*)⁹⁷.

The differentiation of group rights reflects the difference between the legitimacy of the rights demand by minorities: in the case of ethnic groups, dominantly formed by voluntary immigrants, it is not legitimate to demand self-government rights since polyethnic rights correspond and fairly satisfy their needs. Indigenous peoples and national minorities are entitled to self-government rights for their minority status is unchosen and they were coercively incorporated into the larger state.⁹⁸

Faced with the issue of multiculturalism being overly used both as a denominator and a concept in order to determine different sometimes opposing views Parekh tries to delimit the incorrect use of

⁹⁷Kymlicka, *Multicultural citizenship*, 7.

⁹⁸ See: *ibid*, 117.

this notion and offer a revisited concept of culture and multicultural societies. These axiomatic statements can hardly be contested and I accept them as the basis for dealing with minorities within a multicultural societies. First, multiculturalism, as he states, does not mean that we are determined by or are prisoners of our culture otherwise we simply would not be able to benefit from a creative interaction with other cultures, and then there would be no case for cultural diversity or multiculturalism. Second, multiculturalism does not imply that every society is or should remain divided into neatly self-contained cultures, but takes the opposite view, which is why it insists on the value of cultural diversity and intercultural dialogue. Otherwise, it would not be multiculturalism but something that Sen defines as *plural monoculturalism*.⁹⁹ Third, multiculturalism does not imply that all cultural beliefs and practices deserve respect since it appreciates the limitations of each culture and the need for self-criticism that it stresses intercultural dialogue. Fourth, although multiculturalism cherishes cultural diversity, it is not committed to maintaining its existing forms. ‘Intercultural dialogue’ which is his solution to the fact of diversity, is bound to encourage cultural experimentation and throw up new forms of diversity. Fifth, multiculturalism does not imply that cultures are totally distinct and closed worlds with nothing in common otherwise they would have no resources with which to understand, interact and engage in a dialogue with each other. Sixth, multiculturalism does not imply relativism or the view that all moral judgments are relative to a culture and that the latter cannot be criticized from outside; our shared humanity gives rise to a body of universally shared thin but nevertheless significant values. Seventh, multiculturalism is not committed to the view that all cultures are equal in the sense of being equally good. It

⁹⁹Amartia Sen, “*The Uses And Abuses Of Multiculturalism*,” The New Republic, February, 27. 2006

states that all cultures deserve respect, partly because they mean much to their members and partly because each represents a vision of the good life and has something to offer to others. Eighth, multiculturalism does not imply that the state may not interfere and arbitrate in the internal life of a cultural community and ban some of its unacceptable practices. Non-intervention is usually advocated either on the relativist ground that the state has no means of judging other cultures, or on the autonomist ground that each cultural community has a right to lead its own life. He finds both of these untenable. We can judge other cultures, and no cultural community can claim an absolute right to non-intervention.¹⁰⁰

In the multicultural society, as Parekh sees it, which includes several cultures and consequently different system of values and visions of good life, some of which might be unacceptable, it needs to agree on the general principles which determines 'the permissible range of diversity'. In order to arrive to these principles to society should, in his view pursue 'a democratic' or 'intercultural' dialogue. Contrary to contractualists from Hobbes to Rawls, this dialogue does not take place in a historical and cultural vacuum, but in present, existing society. 'In political life', he states 'it is possible to reach a broad consensus on certain moral principles, and these can legitimately demand compliance',¹⁰¹. It is important to stress that the dialogue as Parekh defines is crucial to the public realm, but it has its purpose even in other areas of life where 'differences need to be clarified, filtered and rendered manageable before reaching the public realm',¹⁰².

The pursuit of *modus vivendi* is not a quest for some overarching super-value, but rather a commitment to common institutions in which the claims of rival values can be reconciled. It is a substitute for

¹⁰⁰ Bhikhu Parekh, "Dialogues between cultures," in *Democracy, nationalism, and multiculturalism*. ed. Suárez, Ramón, and FerranColl, (London: Routledge, 2005), 17-18.

¹⁰¹ Ibid, 20

¹⁰² Ibidem

the coexistence by means of a rational consensus regarding the best way of life, which was advocated by authors like Rawls and Habermas. That is why the aim of '*modus vivendi*' is 'not any supreme good – even peace', but 'reconciling conflicting goods' – it is an application of value-pluralism to political practice.¹⁰³ In order to come to some kind of agreement and engage in a discourse the representatives of the different cultures should be aware of some basic social values. Namely, Parekh introduces the notion of operative public values that 'represent the shared moral structure of society's public life' and 'provide the only widely acceptable starting point for a debate on minority practices. This is exactly the axiological platform that should be considered within the minimal norms of political culture that one political community should make part of its constitutional order. Besides, it is a condition for different cultures to communicate and adjudicate the issues of common relevance. This part of Parekh's theory, despite possible problems with its operationalization, I consider present in the premises of my own project.

2.2. Normative flaws of liberal multiculturalism

The main argument of this chapter is that the liberal concept of multiculturalism– sometimes named multicultural or national liberalism, although with unquestionably correct diagnoses of the normative issues within contemporary societies, does not offer an adequate normative and political answer to the burning issues of minorities within multicultural societies. In the three decades of academic presence, the theorists of multiculturalism developed a great debate and raised various question.

¹⁰³ John Gray, *Two faces of liberalism* (New York: New Press, 2000), 25

The normative issues within multicultural theories are various and could be divided into three main categories: *methodological, epistemological and practical*. Before proceeding with the elaboration of these issues, two disclaimers might be necessary. First, the division is purely analytical since the issues in question are highly intertwined. This means that the methodological aspects might have impact on epistemological ones and vice versa, all leading to the problems in the practical domain. The second disclaimer is that the titles for these groups should not be misleading since all these issues might be translated into claims how the things *ought to* be done, ie. have a normative character. In other words, cluster names should only indicate the segment of the theory in which these issues emerge and not blur its normative nature.

There is a structural reason for congregating these concerns in such a manner. This division follows the common structure of multicultural theories: they start with definition of the main categories, and after the elaboration of the theory about the essential phenomena they end up with some vision or proposal of concrete policy.

2.2.1. Methodological issues – defining key notions and causal mechanisms

2.2.1.1. Definition of minorities

The first methodological question, with its crucial significance for the implication of the whole theory, is who can be considered minority. Minority – majority dichotomy might appear more complex than it seems at first sight. The dominant view among multiculturalist is that only ethno-cultural minorities should be taken into account or that these minorities should take precedence over the others. Nevertheless,

the argumentation of the theorist of the recognition politics and multicultural theorists in favour of the protection of minority rights is for some reason reserved only to national, more specifically ethno-cultural minorities. Other minorities come into the focus only as a way to discuss internal minorities issue or to stress certain perspective: feminist, LGBT etc.

This methodological issue probably stems out from the way in which multiculturalist perceive culture –as an unquestionable and primary value. Both sorts of theories, those that give culture inherent value (*per se*, like e.g. Taylor) and those that consider it as an instrumental mean to achieving some other values (e.g. autonomy, like Kymlicka) give primacy to one category of identity on which the definition of minority/minorities is dependent on. However, I see no acceptable argument for minorities to be normatively differentiated within a theory. If we accept that different identity groups cohabit in contemporary societies and that their need for recognition and acknowledgment of their specific worldviews need to be valorized and respected, then leaving aside any group makes no sense. It is clear that different minorities have different status in different societies but the complexity of political reality will not disappear just because we have chosen one type of minorities. Forms of misrecognition are usually reflection of overall cultural system within which political and legal system are just a part. Constitutional identities are a sort of petrified experiences of cultural and political interactions. Thus, it is important to contextualize the problems of misrecognition and injustice, in their relative significance, but a general theory of citizenship should not give a priori superiority to any type of minorities. Undoubtedly, due to their different features and forms, different minorities will need different sets of laws, different set of policies and probably different constitutional reference. In other words, it is acceptable to treat different minority

issues separately when concrete policy is to be applied. This fact, however, should not prevent us from treating minorities equally on the normative theoretical level.

Deciding upon *the key word* in multicultural theory, *ie.* the most important feature of a certain group or phenomenon, has a strong normative impact. By stressing one or few dimensions of group's distinctiveness we actually determine which groups will fall under the notion of minority: identity, culture, autonomy, authenticity, the need for recognition etc. If we take a culture as a *differentia specifica* it will automatically cancel out all the groups like LGBT population or the whole population of women that obviously do not create a separate culture. It might also exclude individual immigrants uprooted from their one culture. The stress on autonomy would probably lead us to a more liberal solution, but again it would depend on the specific notion of autonomy that we use: moral, political or personal. This idea of undifferentiated approach to the issue of minorities, however, can be identified in some broadly defined multiculturalism theories like e.g. the politics of recognition of Charles Taylor. He identifies recognition and authenticity of life as important social need of individuals as well as of different groups, not necessarily defined in the national key:

The importance of recognition is now universally acknowledged in one form or another; on an intimate plane, we are all aware of how identity can be formed or malformed through the course of our contact with significant others. On the social plane, we have a continuing politics of equal recognition. Both planes have been shaped by the growing ideal of authenticity, and recognition plays an essential role in the culture that has arisen around this ideal.¹⁰⁴

The theory of recognition is an interesting perspective, for it puts us in the centre of multicultural dialectics: in the sphere in which certain

¹⁰⁴Charles Taylor, "The politics of recognition," In *Multiculturalism: examining the politics of recognition*, edited by Charles Taylor and Amy Gutmann (Princeton, N.J.: Princeton University Press, 1994), 36

groups recognize each other on the equal standing. It is the relational character of the recognition process that might lead us to the normatively comprehensive concept of minorities. The notion of minority must be defined in a way to avoid simplifications and reductions that usually stem out from the need of political theorists to offer concrete policy solutions.

It is highly questionable whether such an approach makes sense, especially taking into account the diversity of contexts and relations into which minorities are intertwined. For a theory that wants to give a comprehensive answer to the minority issue this is wrong and unacceptable on both practical and normative level. The question who will be self-understood and/or be seen by other groups as a minority depends on the dominant majoritarian cultural discourses. Therefore, minorities and their perspectives differ significantly across societies. This, however, does not mean that we should leave the question unanswered but rather to see what is the importance of identity *en general* and what place it should take in the realm of political philosophy. In other words, it is an endeavor of putting individuals with all their multilayered identities and loyalties, and the whole spectrum of different faiths, beliefs and philosophies into a single citizenship puzzle. That we are equal as citizens is not precluded by any set of legal or political mechanisms that give sense to that equality. The fact that these mechanisms among themselves will be different and defined on a case to case basis is also self-evident and common sense.

Identity cannot be simply reduced to its objective side. The perception of the others and self-perception both by individuals and groups is the arcane sphere of contemporary intercultural and interpersonal relations. Identities can be inclusive and exclusive, harmonic and conflicting, static and variable. The general theory that takes into account minorities should account for the relativity and

changeability entangled with the issue and offer a comprehensive normative theory of minorities. Instead of proposing static and reductionist solutions that would freeze and impose identities we might opt for a more liberal approach that would begin with a more sophisticated interpretation of the notion of identity.

In the theory I was particularly interested in, Will Kymlicka limits his argumentation to national minorities, as 'distinct and potentially self-governing societies incorporated into larger a state' and ethnic groups, 'immigrants, who have left their national community to enter another society.'¹⁰⁵ Kymlicka, however, concedes that there is a third group of what he calls 'new social movements' associations and movements that consists of LGBT population, women, the poor, persons with handicap etc. which, in his view, relate to the first two groups in many ways. Nevertheless, as I will show in my argumentation, already by stressing one form of identity and giving it primacy these different claims are put in the hierarchical order, with unequal normative weight.

For Birkhu Parek there are three kinds of diversity: subcultural, the one that stems from different ways of life among the members that share a broadly common culture, perspectival, in which some members of the society contest the dominant culture and ask for its reconstitution and finally, communal diversity that is sustained by the existence of communities with different systems of beliefs and practices.¹⁰⁶ Multiculturalism in his view refers to the society which had all the three kinds of diversities but the third one that includes communities 'has on balance the most to be said for it'. In my view, Parekh starts from the western societies in the present , in which the edge of conflicts and misunderstanding is dominantly between ethno-cultural groups. After

¹⁰⁵ Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (Oxford: Clarendon Press, 1995), 19.

¹⁰⁶ Bhikhu C. Parekh, *Rethinking multiculturalism: cultural diversity and political theory* (Cambridge, Mass.: Harvard University Press, 2000), 3.

the decades of fight for the recognition by gays, alternative groups, artist etc that Parekh puts in the first group, and women or liberals that he puts in the second, it might seem that the divisions between these groups and the corresponding majoritarian community with its discourse (heterosexual majority vs LGBT, petty bourgeois majority vs. alternative groups or simply patriarchal societies. women) is reconciled. It is true to some extent, since all of these groups relatively gained recognition within Western societies, recognition that is legally formalized in the set of rights and *de facto* empowered through the various forms of public discourse. This, however, does not mean that the need for a full recognition by these groups has been achieved even in contemporary Western societies, what would consequentially render this struggle for affirmation redundant – the lack of women in politics or the issues related to the same sex marriages legislation (the debate recently raised in France) should serve us as an ad hoc empirical confirmation that these groups still do not enjoy the citizenship equality even in prominent democracies. Nor does it mean that in other, less liberal and democratic societies, with lower standard of civil political and minority rights, this differentiation among communities makes sense. In certain societies the dominant culture with a patriarchal, traditional discourse can be equally shared by all ethnic groups and yet represent an oppressive matrix for the other abovementioned groups.

It would be absurd to claim that these minorities are identical in the way they are politically and socially organized, their political relevance and influence and coherence of their membership. Women can hardly be organized in a political groups and parties in the way the representatives of national minorities might be. The elements of identity that constitute these groups might be not adequate for a single issue based political activism, but the issues connected with these identities

are part of many political parties' programs.¹⁰⁷ Besides, there are certain rights like the right to self-determination that are inherently group rights and cannot be enjoyed individually, thus the territorial concentration of the group is sometimes condition *sine qua non*. But when dealing with minority identity in the realm of constitutional framing of modern states do the contingent historical and geographical features always have to be crucial?

This is, in my view, the starting point of the critique of multiculturalism. If multiculturalism was 'invented' as a way to address the inequalities among individuals belonging to different groups, it should not confine itself to the pure inter-group equality, forgetting the internal minorities and individuals. Multiculturalism should not be understood as onetime policy, but as a continuous exploration of the mutual recognition of the individuals and the groups within a complex plural society. The very fact that it deals with questionable and contested notions like recognition, equality, identity should make the authors in this field be more aware of the real politics implications of their theoretical findings. As Anne Phillips puts it 'the future critics of multiculturalism would be more likely to dwell on the way policies defended in the name of all members of a disadvantaged cultural group end up favouring some over others, creating a new kind of injustice in the course of redressing an old.'¹⁰⁸ In other words, if plurality and tolerance, together with liberty, are the ground normative reasons advocated by multicultural theories, then the existing empirical plurality of the modern society must remain in its very focus.

¹⁰⁷ There are to my knowledge very few historical and contemporary cases of these social groups (perspectival and subcultural groups in Parekh's terms) making political parties, like Christable and EmmelinePankhrust's Women's party in 1919, or LGBT party Ladlad, founded in 2003: <http://www.ladladpartylist.blogspot.it/>.

¹⁰⁸ Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007), 12.

To sum up, treating only ethno-cultural minorities separately and making case out of them exclusively on the normative level bears several serious shortcomings:

1. Obviously, it does not allow for a general theory of minority rights. If the arguments of political theory do focus on *should* claims, and operate on a required level of abstraction, it is necessary that a theory dealing with minority issues should take in consideration all identity minorities.

2. This exclusion of various identity minorities¹⁰⁹ has no normative justification and is based on ethno-cultural determinism, liberal nationalism and similar biased concepts and the corresponding arguments of territorial concentration, historical presence, national state etc. which in these theories often take precedence over normative arguments of equality and justice.

3. This prevents us from understanding the complex dynamics of internal minorities' issues¹¹⁰, which might be crucially important for the liberal perspective. Minority within a minority is still a minority. It is the perspective that changes, the focus that we take either as apologists of universal or vernacular language but the normative challenge remains: how to correct unjust political arrangements¹¹¹. Moreover, we are not allowed to quantify, compare minorities as in that way we just reiterate majoritarian arguments: the injustice done to few random immigrants in

¹⁰⁹v. *infra* 3.1.

¹¹⁰v. Green, Leslie, "Internal Minorities and Their Rights," in *Group Rights*, J. Baker (ed.), Toronto: University of Toronto Press, (1994): 101–117.

¹¹¹Once the right of a self-determination of a group whose culture does not fit in the universalism of a certain political and legal is respected and it is granted autonomy or political independence we might still face with the problem of a new minority within a new political and legal context. This is similar to the problem of new minorities in the context of Kosovo that I have already mentioned. Besides, there is an issue more precisely defined as internal minority which relates to the issue of subaltern categories within cultures: women, children, old, homosexuals etc. What Kymlicka calls "internal restrictions" poses an important question when and under what conditions can state intervene in the tissue of cultural practices in the name of proclaimed universalism. At this stage of analysis I shall confine to claiming that reductionism of minorities to ethnicity and nationality is simply not normatively acceptable.

its essence is not different to the same or similar injustice done to the members of a numerous and territorially organized national minority. Again, the claims of these different groups have a different weight taken in their historical complexity and encompassing positive legal arrangements as they are, but should not the scope of normative investigation go beyond that? It seems to me that this kind of theorizing of minorities which consequently gives the advantage to the national minorities over immigrants, and to these two over other minorities, simply for the reason of leaving them out of the focus or by imposing general liberal ideals of autonomy, self-determination etc. goes contrary to the essence of *minority issue*. When treating minority issues, the majoritarian arguments of democracy (e.g. majority decides) are unacceptable: it cannot be persuasive reason for a coherent normative argumentation.

2.2.1.2. Individual or community – the issue of primacy

In the ‘pre-multiculturalism’ period, before the liberal interpretation of the pluralist societies, it was clear cut: liberals saw individual as a focal point of political thinking while communitarians in their writings privileged the notion of community¹¹². Clearly, though the supremacy of individual or community was sharply determined, neither of these approaches did exclude the other entity entirely. This issue, associated with the *realism vs. nominalism* debate within philosophy and

¹¹²However, as Mason explains the notion of community, especially its normative significance, was not adequately addressed by communitarians who often had different even opposite views on this issue. See. Mason, Andrew. *Community, Solidarity, and Belonging Levels of Community and Their Normative Significance*. Cambridge: Cambridge University Press, 2000, 3

sociology, and the way it is approached is crucial not only for a methodological purpose but for its direct normative consequences.¹¹³

In the theories of multiculturalism it is not always clear who is given a primacy when minority issues are discussed: individual as a bearer of autonomy or the group as a source of choices, lifestyles and values. This has an impact on the coherence of the theory but also on its practical implications. These two approaches are apparently mutually exclusive, at least to the extent to which we try to translate them into a normative judgment.

If communities are given precedence then we have an issue with internal minorities in non-liberal cultures. On the other side, if we put the stress on individual we might be in the danger of imposing a dogmatic liberal view with little understanding for non-Western cultural models. So, both normative standpoints, taken as exclusive, are unsatisfactory: the relationship between the individual and community varies and is dependent on certain set of cultural norms. This is to say that we cannot give an *a priori*, final and universal answer to this problem without being ideologically or culturally biased.

The view I find satisfactory, having in mind the peculiar nature of minority issue, is to accept both individuals and groups as entitled to certain rights and duties within a common citizenship. Both of these entities entail different but equal normative value, and represent two forms in which human beings pursue the life goals: as free individuals and as members of various cultural, political, ethnical groups. There is no value-neutral approach to the question of primacy between individuals and cultural groups, since we all value them from our own moral perspective influenced by over uprising and the level of

¹¹³ In philosophy and logics the origin of this debate, with its peak in medieval scholastic concerning the universals, can be tracked back at least to Plato, who was a realist. In sociology this debate is reflected on the issue the existence of society – if it is a separate entity or just a plain collection of individuals.

collectivity present in our lives. Thus, the theory dealing with minority issue should eliminate this question as redundant. Consequently, the state that wants to be or at least try to be neutral must consider both forms of political agency equal.

In the dialectical process of human development, individual might dedicate himself to an already formed concept of happiness dwelling in the sphere of his own communal or other's community life (as traditional Catholic or Muallaf, a newly converted Muslim) or he might simply choose to invent new life projects as an individual outside the communion. Any reduction to individual or deduction from concepts like group and community without taking in consideration the variety of human beings and cultural models and the interaction of the two would be inaccurate and simply wrong. Only by embracing both perspectives of human flourishing as equally valuable and acceptable can we escape the dead ends of communitarian and liberal philosophy of the selfhood.

This question also touches upon the issue of internal minorities. Namely, it would be incoherent from the liberal point of view not to allow the individuals within the minorities to choose their *mode* of citizenship, be it collective or individualistic. This solution adequately corresponds to the reality of everyday political life where both individuals and groups or group representatives participate in the political process. It would be culturally biased to prioritize one way of participating in public life.

The answer is quite simple so far. Nevertheless, there must be an unambiguous legal demarcation of individual and collective enjoyment of the rights and citizenship, and these have to be found in the basic constitutional consensus and the norms and principles that constitute it. It must be a legitimate constitutional power that will define and determine the scope of various entities within public and social life. Undoubtedly, these norms cannot be just the mere projection of a

majoritarian will and must take in due consideration the minority viewpoint.

2.2.2. Epistemological issues – understanding “the essence of culture”¹¹⁴

1.2.2.1. Essentialising culture

What comes to be problematic in the theories of multiculturalism is the essentialized concept of culture. Put simply, we speak of essentialism when the culture as a dynamic and complex process is perceived as static and homogenous. Instead of perceiving culture as a changing and adapting phenomenon that reacts actively to social reality, the essentialising approach rather focuses on elements that in its view represent the core of the culture, its never changing essence.

Liberal multiculturalists stress the importance of ‘the respect for cultural groups in instrumental terms—that is cultural groups are respected because doing so helps secure the liberal goal of individual autonomy’¹¹⁵. Kymlicka sees intercultural diversity as a contribution to the richness of people’s lives which expands cultural recourses. For Parekh culture refers to a historically inherited system of meaning and significance, it has no co-ordinating authority, and develops over time, with internal variations.¹¹⁶ The communitarian perspective on culture is substantially different. Charles Taylor makes a stronger case for the

¹¹⁴ The inverted commas in the title should indicate a simple epistemological fact: though cultures might have essence from the perspective of those who belong to them it does not mean that social scientists should give culture in scientific terms the same essence and meaning.

¹¹⁵ Jeff Spinner – Halev, “Multiculturalism and its critics,” in *The Oxford handbook of political theory*, ed. John S. Dryzek et al. (Oxford: Oxford University Press, 2006), 547.

¹¹⁶ Bhikhu Parekh, “Dialogues between cultures,” in *Democracy, nationalism, and multiculturalism*. ed. Suárez, Ramón, and FerranColl, (London: Routledge, 2005), 13.

inherent value of the culture and sees culture as an irreducibly social good. Independent of our individual instrumental use, cultures have inherent significance and value and as such should be protected by the society.¹¹⁷ The difference is in an axiological status of the culture: while for the liberal culturalists the value of culture is instrumental and comes through the perspective of individual, Taylor's culture is a good *per se*. It is not a mere instrument of the individual goods' and '[i]t can't be distinguished from them as their merely contingent condition, something they could in principle exist without'¹¹⁸.

Culture in the liberal multicultural perspective, significantly resembling communitarian concept of culture despite the obvious differences, is perceived as a monolithically formed, homogenous body of values and worldviews from which the individual is supposed to autonomously choose and interpret her lifestyle. Seen in this way, cultures do not communicate or exchange among each other, they remain as isolated cultural values and signs. The problem, according to Parekh, can be interpreted as 'culturalism' or 'pluralism' which argues that human beings are culturally defined, and 'share in common only the minimal species-derived properties from which nothing of moral and political significance could be deduced.'¹¹⁹ This view ignored the differences within the culture itself, it's internal and external dynamic, alterability and historicity.

There are several problems with this kind of defining and conceptualizing of culture. First of all, though he considers culture a source for individual choices, it leaves little space for individually construed context of values and meanings. Culture in this way obtains moral superiority over individual since it contains the meanings and

¹¹⁷ See Charles Taylor, "Irreducibly Social Goods," in Taylor, C. *Philosophical Arguments* (Cambridge, Massachusetts: Cambridge University Press, 1995), 127-45.

¹¹⁸ Charles Taylor, *Philosophical arguments*, (Cambridge, Mass.: Harvard University Press, 1995), 137.

¹¹⁹ Parekh, *Rethinking multiculturalism*, 10.

interpretations necessary for the individual to pursue a life worth living. The two-way interaction between an individual and culture is biased in favor of culture. It is not an individual who, together with others, constructs cultural structure and its ethical paradigms, but rather the opposite: culture is the primary source of sense and value. No doubt, social constructivism is always a two ends process. In normative political theory, however, we should not give a primacy to already biased conceptualizations of culture (see Scheffler 2007). Liberal cultures are more individualistic and progressive while some others might be collectivistic and traditional. Does it allow us to give normative primacy to culture and practically essentialise it? I am equally skeptical of so called strategic essentialism, because though we might have strategies in theories and reasoning in reality these tend to be more than that: once we give cultures the utmost importance it would be hard to imagine that those profiting from such a normative perspective (cultural elite, empowered) would leave the acquired benefits once that the justice was done to their culture.

Secondly, this concept of culture obscures the whole range of differences within cultures. The culture is depicted as a homogenous and harmonic set of norms, beliefs and signs. Defined in this way, this 'abstract' culture is inert to internal conflicts and debates, what renders changes theoretically impossible.

Finally, it does not allow for natural change and dynamics of cultural processes that result from the intercultural influences. Even when not exposed to assimilation and oppression, cultures constantly change adapting to social circumstances, inventing new functional but also axiological models.

2.2.2.2.. Reducing political to cultural

The corollary of essentializing culture is, using Habermasian terminology, the *encroachment* or *colonization* of politics. In other words, the norms and principles of certain cultures are interpreted as rules of political life in general. By stressing out that the culture is necessary for our autonomous acting, which defines us as individuals endowed with an ability to conceive and develop life choices, this logically gives a culture a superior position within the social world. Societal culture is in this understanding a self-referring system and source of all values, including political ones. If there is a dichotomy politics – culture, culture prevails as a primary structure. I will now briefly elaborate the theoretical, both legal and broadly political implications of putting the culture and its particular values and practices on the pedestal of social life.

On the one hand, if cultures we are part of have so indispensable role in our social and political life, then this consequently leads us to the need to preserve culture through the system of collective rights. Moreover, multiculturalism tends to protect cultures legally as inherently valuable phenomena of social life. As Habermas explains, ‘one cannot think of “preservation” of cultures in the same sense as most of us advocate the preservation of animals or other species. The reproduction of traditions and cultural forms is an achievement which can be legally enabled, but by no means granted’¹²⁰. If culture is defined as ethno-national idiosyncrasy of certain groups, it is impossible to think in terms of positive obligations of the state. Furthermore, it deprives the individuals from free enjoyment and continuous assessment of the value of that culture and destroys ‘the very space for hermeneutical appropriation which provides the only way to maintain cultural

¹²⁰Jürgen Habermas – Address: “Multiculturalism and the Liberal State”, Stanford Law Review, Vol. 47, No. 5 (May, 1995): 850.

forms'¹²¹. In this regard, Habermas is right when he indirectly argues for negatively formulated rights for the reproduction of certain cultural forms.

On the other hand, is the culture the only paradigm that we should be led by in politics? Needless to say, cultural models and frames will influence the way we perceive politics and decide on ethical issues. Notwithstanding the importance of ethnicity as a sort of pre-political self-understanding, there is a whole range of issues in contemporary societies that stem out from the common interests. The complexity of life in modern polities implies a vast array of political, security, economical, ecological and other issues where the particular nature of the cultural membership does not matter. It is simply wrong to define and reduce politics to a dialogue among cultures or more precisely the set of legal obligations to be adopted by the majority in order to preserve minority's existence. Politics is multi-layered, multi-level communication and interaction of different agents. Only by understanding the complexity of both culture and politics might we grasp these relations. Besides, politics as a virtue and practice of finding a compromise in thorny situations might be imperiled by the encroachment of culture. Cultures, understood in their complexity, are so different among themselves; sometimes they have different, even opposite epistemological and axiological standards¹²². It might be extremely hard to reconcile such deep clashes in the political realm. The politics of contemporary diversified states confirms that it is necessary to find solutions for the peaceful and tolerant coexistence. It seems more realistic to look for the compromise not in the immense realm of culture, but in the parts of public life where citizens express themselves in a

¹²¹Ibid, 850.

¹²² A persuasive vision of multiculturalism that is escaping from cultural essentialism can be found here: Anne Phillips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007)

more prudent way and accept the plurality as a condition for common life *sine qua non*¹²³. That is also a part of the culture understood broadly, but one which is more intersubjective, prone to dialogue, understanding of the otherness and toleration of the difference. It comes from culture as *modus vivendi*, not from ahistorical ideal of self-referring cultural system.

Culture and politics, however, cannot be fully separated, especially if culture is defined as to represent the totality of human life. Instead of conceptualizing culture as a monolith, as defined structures with inherent dynamics independent of the surrounding, we might try to define culture in relation to politics. When does identity, be it cultural, linguistic, religious or other become relevant for political and legal policies to be thought through and implemented? In my view, only when this identity has entered the realm of power politics, when it is used and abused in the political arena in order to give dominance or impose oppression to certain groups. Without this ‘momentum’, omnipresent in almost contemporary societies, interfering in the sphere of private, in the particular conception of the good would be deeply wrong. This might sound tautological, but the complexity of the biological, social and cultural essence of the human being is the imperative to be borne in mind when theorizing pluralism within political theory. Sexuality is a private matter of every individual, but once it is used as a reason for oppressing certain population and restricting their basic civil and political rights, then it becomes politically relevant and enters in the public sphere. The same with language or cultural rights: if the oppression of certain groups has the elements of discrimination or disables the group from exercising basic

¹²³v. e.g. Quong, Jonathan. *Liberalism without Perfection*. Oxford: Oxford University Press, 2010. Oxford Scholarship Online, 2011. doi: 10.1093/acprof:oso/9780199594870.001.0001.

rights, it is not only a question of culture any more, but a question of a significant public importance.

Finally, in this way of multicultural stress of collective identity, not only would we protect the difference among various cultures as it is claimed, but we would also empower the argument of culture in the future political struggles. We should understand political processes and phenomena in their entirety and dynamics, the use and abuse of human rights claims including collective ones and their conflictual nature (collective vs, individual e.g.). What was once instrumentally and strategically achieved to correct injustices of the time might in the long course of time re-essentialise its own grounds. Religious autonomy rights that were meant to preserve vulnerability of the group might later cause other vulnerabilities to internal minorities within the group. Besides, the controversial use of the right claims often poses a threat to unity and intercultural understanding. Insisting on national minority rights in a community might impede the building of civic nation, or too liberal language rights might be an obstacle for a normal functioning of a community, just to name these two. That is why it is so crucial to determine the set of basic principles according to which one political community will be organized. Without this minimum of constitutional standards we might end up in a situation of perpetual conflict of culturally biased claims that would draw 'legitimacy' from the overall discourse of multicultural citizenship.

2.2.2.3. Constructing absolute identities

One of the essential flaws of multicultural theories is the idea of a monolithic and culturally defined identity. Generally speaking, the notion of *collective* identity, understood as an idea that we have a set of

values and practices in common with our cultural group, is the focal point of multiculturalism. The idea that we need our culture as a source of values and life choices can hardly be argued. Although some people might find their ethnocultural origin as a crucial dimension of their identity, it is disputable whether could we make a general case out of it. This problem is related to the previous one regarding essentialised culture. It is that inert and auto-referring culture, depicted above, that now becomes the unique and only source of our moral decisions and acts. Once one defines culture in that manner, the next step is deducting this rigid and abstract concept to the members of communities as bearers of the presumed identity.

The philosophical, psychological, social and political, and many other identity dimensions and the discussions about them certainly go beyond the aim and scope of this project. Nevertheless, it does not mean that we might neglect their importance. Even if we confine ourselves to the political dimensions of identity and say that in this sphere the cultural (national) identity prevails, we would again harshly reduce the concept of political and the whole sphere of class, ideological, party and other affiliations one might have. Possibly, this reduction might appear as justifiable to a certain degree in deeply divided or culturally sensitive societies (Bosnia and Herzegovina, Belgium eg.) but it only shows a correlation, in a complex historical and social circumstances, and does not equip us with a causal mechanism which would prove that culture is a dominant normative or explanatory variable in the life of a political community. In other words, culture does not provide us with answers to all important political processes in a political community. New social movements that arise in Bosnia and Herzegovina show that people's preoccupation is focused on pensions, social security and other issues from the left political spectrum. Besides, many of the tasks put before Bosnia are often obstructed by the complex ethnically divided decision

process¹²⁴. Similarly, the recent issue of terrorism in Belgium shows that crucial political issues often go beyond and might be impeded by pinning responsibility between linguistically divided levels of governing¹²⁵.

As Parekh notices, even though collective identities have their advantages, they have three important drawbacks. Firstly, collective identity tends to 'essentialise identity and impose on the relevant groups a unity of views and experiences they do not, and cannot, have'. 'Not all women, gay people, black people and Muslims', he continues, 'take the same view of their identity, or manifest it in the same way'. Nevertheless, the need to impose an official view of certain identity and 'dismiss dissenters' creates the omnipresent issue called 'the paradox of identity'¹²⁶. Instead of being the sphere of free self-realization, identity becomes already tailored and imposed construct that is in severe contradiction with the plurality of forms and shapes in which one can express herself. Secondly, collective identity might create 'we-others' dichotomy and breaks the society into 'exclusive, hostile and epistemologically closed groups'¹²⁷. Finally, collective identity has a tendency to freeze or naturalize historically shaped identity. By giving importance to their acquired identities, as the result of the marginalization that group faced through the history, the groups tend to stress and perpetuate their heteronomy¹²⁸. If the aim of political theory is to find a solution for diverse societies and with respect to differences determine the realm of common values and principles, these

¹²⁴<https://www.theguardian.com/global/2015/nov/10/bosnia-bitter-flawed-peace-deal-dayton-agreement-20-years-on>

¹²⁵https://www.washingtonpost.com/world/europe/a-terror-attack-exposed-belgiums-security-failings-europes-problem-is-far-bigger/2016/03/28/47be66ac-f39d-11e5-a2a3-d4e9697917d1_story.html

¹²⁶ Bhikhu C. Parekh, *A new politics of identity: political principles for an interdependent world* (Basingstoke: Palgrave Macmillan, 2008), 36.

¹²⁷Ibid, 37.

¹²⁸Ibid, 38.

disadvantages of collective identities should be taken seriously into account.

It is true that the second part of the XX century brought into life various forms of identity politics, articulated by the different social and cultural groups. The 'globalization era' accelerates these process and modern technologies seem to enhance the exchange of know how among civil society networks and activist putting the pressure on the monolith 'tower' of national state. In the same time, we have been witnessing the revival of the old identity paradigms, national movements in the case of post-Soviet and post-Yugoslav states for instance. Does this allow us to reduce politics to ethno-cultural clashes within societies and more importantly does it suffice to give ethno-cultural membership normative superiority when we deal with questions of justice and equality? In my view, the answer is no. Oppressing certain ways of life is equally wrong as imposing certain models of life as compulsory. This is exactly what happens when the ethnicity, as a particular and contingent feature, is given the supreme moral authority and the ultimate importance in the political structure of multinational societies. The Grand Chamber of the European Court of Human Rights in *Sejdic and Finci vs. Bosnia and Herzegovina* had found that has found that applicants' ineligibility to stand for election to the House of Peoples violates Article 14 of European Convention on Human Rights (ban of discrimination in the field of Convention rights) taken in conjunction with Article 3 of Protocol No. 1 (free elections), and that their ineligibility to stand for election to the Presidency violates Article 1 of Protocol No. 12 (general ban of discrimination)¹²⁹.

For the aforementioned reasons, there is no doubt that the construction of identity in absolute terms poses at least two problems. Firstly, it reduces the richness of identity perspectives for the individual

¹²⁹ECHR, Applications No. 27996/06 and 34836/06 of 22 December 2009

and imposes the dominant one. In the case of national liberalism it is national or societal culture, in the politics of recognition the dominant feature varies: cultural membership, gender, sexuality, race etc.

Secondly, instead of ensuring that members of certain groups freely enjoy and construct their identity, the politics of recognition, using the same logic I described above, this approach imposes an identity model that others should implicitly follow. According to Appiah, the politics of recognition “requires that one’s skin color, one’s sexual body, should be acknowledged politically in ways that make it hard for those who want to treat their skin and their sexual body as personal dimensions of the self. And personal means not secret, but not too tightly scripted.” In this way, the politics of recognition becomes ‘the politics of compulsion’.¹³⁰ If identity and its expression are necessary requisites for a citizen in plural society to lead a good life then clearly it cannot be based on compulsion. We might not agree on the level of salience or definitional aspects of the notion of identity but we might easily agree that it cannot be equated to imposing any kind of models or prescriptions on how to lead a good life.

2.2.2.4. The issue of ‘groupism’

In the theories of multiculturalism culture, ethnicity, race, nationality and gender are often conceived not only as categories but rather as ‘monolith’ agents in the conflicts and cooperation. This issue is analogous to the issue of essentialized cultures and the construction of absolute identities. Brubaker uses the notion of groupism to describe ‘the tendency to take discrete, sharply differentiated, internally homogenous and externally bounded groups as basic constituents of

¹³⁰ K A. Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction," in *Multiculturalism: examining the politics of recognition*, edited by Charles Taylor and Amy Gutmann (Princeton, N.J.: Princeton University Press, 1994), 149-163.

social life, chief protagonist of social conflicts, and fundamental units of social analysis”¹³¹ This is exactly the flaw of the theories dealing with multiculturalism: the idea that the conflicts or understanding takes place among the cultural groups as if those was real agents. It is often forgotten that national groups are only represented by certain political parties, cultural institutions or lobby groups which cannot be equated to the whole nations. As Brubaker suggests, we can keep ethnicity, nationality etc. as categories but they should not be understood as substantial groups. ‘Ethnicity, race, and nation should be conceptualized not as substances or things or entities or organism or collective individuals-as the imagery of discrete, concrete tangible, bounded, and enduring "groups" encourages us to do - but rather in relational, processual, dynamic, eventful, and disaggregate terms.’¹³² This might be especially important for the issue of minorities since it takes into account the processes, phenomena, events as objects of scientific inquiry bypassing omnipresent simplified and stereotyped concepts of minority groups. The problematic collectivizing character of culture within the political theory of multiculturalism was elaborated by Ann Phillips. Although she defends the basic idea of multiculturalism, Philips contends that ‘...any analysis that divides up the world through categories like sex, gender, culture sexuality, ethnicity, or religion will invoke stereotypes...’¹³³. If the policies envisaged in the theories of liberal culturalism operate with such simplified categories then it would be hard to imagine that they would bring about the recognition that individuals within these overlapping groups need. One wants to be recognized in complexity of his identity not to be reduced to collectivities.

¹³¹ Rogers Brubaker, “Ethnicity without Groups,” *European Journal of Sociology* 43, no. 3 (2002), 164

¹³² Rogers Brubaker, *Ethnicity without groups* (Cambridge, Mass.: Harvard University Press, 2004), 11

¹³³ Ann Phillips, *ibid*, 58.

2.2.2.5. Accepting status quo

Instead of looking for Archimedean points in politics it seems more prudent to determine the normative coordinates that should stand as a barrier to different types of aberration in politics. Domination of majority over minority is one ‘political disease’ of that kind. Modern national states, with several exceptions, are constructed in a way to reflect the culturally biased rules and to determine nation, i.e. dominant ethno-cultural group, as a crucial element of the national state. In this sense, multiculturalism that questions the neutral character of the modern state correctly diagnoses the *status quo* and detects the flaws of modern constitutionalism. Nevertheless, ‘anamnesis and therapy’ of these theories that include mechanism of collective rights and self-determination, in my view, does not tackle the complexity of the issue and might have numerous negative backlashes, some of which I have indicated.

Multiculturalism accepts majority-minority dichotomy and all of its consequences. Paradoxically, multiculturalists seem to justify the imposition of culturally biased rules to the state. The solutions that these theories usually dwell on are concerned with how to find an autonomous domain of political life where minorities will do what majorities have already done: impose their rules, ethical and political principles to everyone within this domain. Usually, in practice, these guarantees are envisaged only for ethno cultural minorities. In other words, it seems that for multiculturalism the state is not neutral because it cannot be neutral so the by recognizing the autonomous space of cultural minorities can proportionally do more justice.

The ‘emerging consensus’ among liberal nationalists regarding the role of culture, and its legitimized use within a national state, is

nothing else but the acceptance of *status quo*. Kymlicka makes clear that “[u]nder a scheme of liberal nationalism, public institutions may be stamped with a particular national character (i.e. the institutions may adopt the language, holidays, and symbols of a particular national group)”¹³⁴ It seems to me that this kind of reasoning does not fully realize the fundamentals of the national state idea. The constitutional basis of the contemporary national states is deeply influenced by the elements of majoritarian culture. In this way, minorities are excluded from a dominant constitutional discourse which consequently keeps them out of the unified citizenship. Nevertheless, I shall be precise here: it is not the form of unified concept of citizenship that is problematic but rather the character of that unity which reflects the identity and the value system of the dominant group. In other words, it is not the *form* of universal citizenship (as a common set of rights and corresponding allegiances) but rather its *content* (implicit biased normative standpoints) that poses a problem. I consider universal citizenship still capable of serving as a tool for vindicating vast spectrum of rights once it is deconstructed and its majority imposed features are problematised. Believing in equality and fraternity as a promise of French citizenship and doing one’s best to see these principles work does not necessarily mean subscribing e.g. to secularism and Enlightenment. Universal ideas often ask for debate and questioning but they can be clearly distinguished from imposed values and identities.

Constitutional patriotism, in its theoretical projection, starts from a different conception of the political order legitimization. The source of the legitimate exercise of political power lies in the minimal political rules accepted by citizens, including members of different ethno-cultural groups.

¹³⁴ Will Kymlicka, *Politics in the vernacular: nationalism, multiculturalism, and citizenship* (Oxford, UK: Oxford University Press, 2001), 39

In my view identity minorities should be seen differently than minorities in a procedural democratic sense. It is a platitude to state that the latter are a common part of everyday political life while the former raise serious questions for the definition of citizenship and the formation of political entities. In other words, instead of looking for the invention of various types of plural citizenship and atomizing different 'ethical communities', should we ask how was the common set of political rules and principles colonized by the dominant ethno-cultural, race, religious or national group in the first place? Why would it be legitimate for a majority to impose a value system and build it into the basic political structures of the society and impose it to minority groups and individuals? Unlike it is the case with common democratic process where you as individual expect to be sometimes in majority and sometimes in minority, meaning that you consciously accept to be in a win – lose game called democracy, the issue with minority identities is different. That is to say, as a member of minority group in a state with majoritarian ethical, political and legal discourses you are doomed to permanent political defeat.

It seems that multiculturalist view often forgets the very essence of politics. The difference and the new *modus vivendi* are what politics is about. Otherwise, we would not be discussing the issue of plurality within contemporary societies.

The status quo of contemporary national states hinders the diachronic formation of the national state. Majoritarian nations conquered the public space, which, in ideal theory, should equally belong to all citizens, and imposed a specific discourse in the form of sectarian values and principles that *encroached* political life in its entirety. In other words, the first task of political theory should be to determine the legitimacy of these sectarian systems of values to be applied to all individuals. In this regard, some of the principles of

political liberalism and constitutional patriotism in different aspects might be a helpful tool for such a task.

2.2.3. Practical issues¹³⁵ - applying multicultural theories

The issue of multicultural societies and the normative principles by which those should be organized poses the underpinning question: is a general multicultural theory possible? As Parekh correctly notes the political theorist in the past ‘claimed universal validity for their vision of good life, models of political unity, theories of rights, justice, political obligation, equality and so on.’¹³⁶ The societies, societal culture, communities etc., as many theorists were pointing out, are so different in their worldviews. The relations between minorities and majority as we can see differ from state to state. The histories of intercultural dynamics within the states are so various that one could hardly propose a normative solution equally applicable to various minority issues around the globe. How is a theory of multicultural citizenship possible then?

The issue of diversified identities within a national state is an emerging issue that political theory is trying to reflect. However, theories dealing with such a touchy notion of identity and the value added these bring to the general discourse will be measured not only by theoretical coherence and the respect for plurality of worldviews, but

¹³⁵ The term practical in this title is a reminiscence of an Aristotelian concept of ‘practical wisdom’ as ‘a reasoned and true state of capacity to act with regard to human goods’ not only as feasible or functional. Certainly, all the things discussed in this thesis would be, according to Aristotle, addressed by practical thinking (*praktikê dianoia*) which is aimed at changeable and contingent and where the truth is defined and attained with regard to human action. Nevertheless, political theory, as the name suggests, has subsequently inclined towards a scientific method that clearly departs from Aristotelian view of politics. However, this does not preclude theory from testing its ideas in the phenomenal world of everyday political life whatsoever. The practice remains the final test of theoretical inquiry.

¹³⁶Parekh, *Rethinking multiculturalism*, 9.

moreover by the empirical implications of its assumptions and conclusions.

General, universal and abstract theories of multicultural citizenship fail to correspond to historical and political circumstances. This discrepancy between the theory and the praxis leads often to incoherent argumentation. Interestingly enough, while these theories as I mentioned try to narrow the concept of minorities, they still seek for the universal application.

Kymlicka's idea for practical solution of minority issue is based on minority-majority dichotomy, for it presupposes that majority should grant certain types of rights to minorities, while Parek's concept is more egalitarian in its outset which puts all cultures in the position to deal with the common issues by discussing them using 'public operative values'.

The problems with Kymlicka's solution is in the construction of argument: if autonomy that stems from the culture is so important as the source of choice for the life worth living then why should there be a differentiation between different types of minorities. Why would a descendant of a migrant in Belgium, already rooted in the life of the political community, would have a different status with regard to his Walloon peerif autonomy is so essential? This is not to say that differentiated group rights make no sense, or that autonomy stemming out from our 'societal culture' is not important but if these two are connected inherently then for the cause of justice everybody should be granted an equal treatment, thus be granted the maximum standard of minority rights. And that includes immigrants, guest workers and everyone who plans to continue his/her life in that political community and has legitimate claims for it. Autonomy is something universal, in liberal interpretation, so it is vital for everyone and this does not depend on context. If the autonomy associated with societal culture cedes to

exist or modifies its importance in the moment when someone decides or is forced to leave it (in the case of emigrants) then I wonder if it is coherent to base the whole argument of multiculturalism on it. Obviously, this is an argument taken to its extreme but it is still a logical interpretation of it. Starting with a highly theoretical and vague concept of autonomy and then adjusting it to the needs of real-politics is neither coherent nor prudent.

Secondly, granting the right of autonomy to a dominant cultural group on a certain territory does not solve all the issues between minority and majority. On one hand, it might equally worsen their relations although this argument strongly depends on the case to case logics. It remains, however, the fact that these groups have other questions to tackle in the common politics, questioning the existence of basic social unity necessary for dealing with the common ground issues in one political community. The case of terrorism in a societally divided Belgium would be one of the examples. On the other hand, the whole point of multicultural theory lies in the fact that contemporary states and regions are not ethnically and culturally homogeneous, so granting autonomy will inevitably open the issue of new minorities within self-governing areas. All these assumptions clearly stem out from the reality of interethnic relations in contemporary and historical dimensions.

The type of inter-cultural dialogue offered by Parekh, a harmonic vision of intercultural dialogue leaves us with unresolved questions: a) what is to be done with majoritarian discourses that already exist within the state – its organizations, institutions etc. – are they just and legitimate? b) who would judge the relations between cultures in the case of conflict of paradigms and worldviews, or more important which standards shall be used for adjudication and c) how are we to deal with residue majoritarian discourses within a liberal state – its sediments in constitution, positive law, institutionalized practice, i.e. in

abovementioned ‘operative public values’? Even though I find plausible Parekh’s findings on the normative issues of contemporary pluralistic societies and the concept of the selfhood and culture in general I wonder whether his suggested policy would be beneficial to minorities, their need for recognition and equality. Clear constitutional guarantees that majority will not use democracy to impose culturally biased rules is a prerequisite that would secure a fair and just inter-cultural dialogue, between groups and individuals. In my view, this is the element which some multicultural theories, including Parekh’s, seem to neglect.

To sum up, both these examples of multicultural citizenship theories, albeit they have different policy proposal they still do not offer a satisfactory solution for the minority issue. In this part I discussed the implications of some multicultural theories, take the view ‘from inside’ – what are the consequences that these theories entail inherently. In the next section I will explore one specific problem related to the applicability of multicultural theories in a broader context of inter-cultural relations.

2.2.3.1. The dialectics of unity and diversity

One of the crucial questions of the theories dealing with multicultural society, especially having in mind the feasibility of their proposed practical policies, is the question of cohesion and unity. The starting point of all liberal multicultural theories is a national state, modern state which should be adapted in order to accommodate minorities. That national state by definition has to have a more or less unified political authority and to give a consensual umbrella to the diversified collective ethical worldviews. .

These two social values, diversity and unity, stand on seemingly opposite ends and rekindle the never-ending debate in political theory how to reconcile this issues. Just like liberty versus security or liberty versus equality, diversity and unity are a mutually dependent pair of values that need to be taken together in consideration. Unlike the mentioned pairs, unity and diversity are not only mutually dependent but also directly proportionate. It would be hard to conceive a highly diversified society with no cohesion. That would rather be a what Amartia Sen calls 'pluralistic monoculturalism' ie. a compound of divided cultures that barely interact and understand among each other. Unity is often perceived as a way to impose a dominant majoritarian discourse and assimilate minority cultures and their values. In the deeply divided societies, with little understanding for otherness, this might be often the case. Nevertheless, it is possible to conceive unity as an inherently positive category that fosters and strengthens the diversity.

Multiculturalism, in its deliberation on the politics of plural societies, though primarily focused on diversity and particularity, does not forget the importance of unity and solidarity in contemporary societies. Multicultural society should, according to Parekh, 'foster a strong sense of unity and common belonging among its citizens, as otherwise it cannot act as a united community able to take and enforce collectively binding decision and regulate and resolve conflicts.'¹³⁷ For Parekh, cohesion is a necessary prerequisite for holding the society together and 'nurture its diversity'. 'Identifying the bases of social unity in multination states is' as Kymlicka concedes, 'one of the most pressing tasks facing liberals today'¹³⁸In his view 'despite these long-standing mutual suspicions, it is increasingly recognized that any plausible or attractive political theory must attend to both the claim of ethnocultural

¹³⁷Parekh, *Rethinking multiculturalism*, 196.

¹³⁸Kymlicka, *Multicultural citizenship*, 7.

minorities and the promotion of responsible democratic citizenship'¹³⁹. How this ideal of unitary overarching citizenship can accommodate the ethical specificity of ethno cultural and other minorities remains to be a question.

This question is crucial for this thesis. I advocate that constitutional democracies defined in a form constitutional patriotism might provide us with the answer. The idea is based on the presumption that the minimal political consensus provided by constitutional patriotism, beyond the discursive constitutional aberrations of the national state, allows for the recognition of the various group identities and their inclusion in the common citizenship on an equal footing.

1.3. Conclusion

In this part I have dealt with the issues related to the politics of multiculturalism. I tried to advocate the claim that multiculturalism, notwithstanding the correct detection of the principal problems of plural societies, does not propose correct answers to these problems. Moreover, through an evaluative inquiry, I tried to detect the problematic and pernicious consequences of cultural liberalism.

For Rawls, at least in *A theory of justice*, the concept of justice was the Archimedean point in the kaleidoscope of politics. It seems that in the communitarian and in a more sophisticated way in liberal nationalism paradigm, the new focal point is found in a pretty much vague concept of culture. Developing the idea of *the political* in its integrity definitely goes beyond the scope of this thesis. Nevertheless, the history of political thought teaches us that the reduction of *political*

¹³⁹ Will Kymlicka and W. J. Norman, *Citizenship in diverse societies* (Oxford: Oxford University Press, 2000), 1.

either deductively from the abstract universalistic concepts (ethical, metaphysical etc.) or inductively from single notions (like nation, labor, race, law) proved to give not only static but also erroneous answers to this complex and dynamic sphere of human activity. This 'ontology' of politics, its inherent nature, is crucial if we want to make some conclusions regarding actors, processes and institutions.

The politics, in my view, is defined by the interaction of various individuals, groups and institution that are often substantially different among themselves. The difference is, however, inherent to politics; it is the cause of the political. Inter-subjectivity, dialogue and compromise would make no sense if the agents in question would all be the same. Nevertheless, it does not mean that political theory cannot judge the normative aspect of these processes taking always into account its synchronic and diachronic relativity. Multicultural theories exist less than three decades but there are centuries of the existence of multicultural and polyethnic societies. This is not to question the relevance of multicultural theories or to blame political theory for a significant flaw, but rather to warn us about constructivist and discursive character of political theory itself.

The theorist within some of the multicultural theories I have explored, primarily Kymlicka, tacitly concede that majority is legitimately imposing its culturally biased rules on the state apparatus, laws and institution and that the remedy would be giving some kind of autonomous space for the minorities in the form of group rights. It overlooks the need for recognition coming from the groups whose basis of identity cannot be found in national or territorial keys. These groups, following the essence of the identity politics, must be part of scientific agenda and be taken in due consideration. Besides, minorities do not have to be necessarily politically organized to be treated as minorities. Their need for recognition might only indirectly use political and social

mechanisms (lobbying, party organization, NGO activism) but this should not prevent us from reflecting on their perspective on citizenship.

The second part was dealing with the ossification of culture as a by-product of national liberalism. It explains why reducing politics in its complexity to indeterminate and broad notion such as culture or 'univalent' concepts of ethnicity and nation. It does not mean that these parts of human experience do not matter at all. However, their use in normative political philosophy should undergo a necessary critical scrutiny. Once the culture or ethnicity gains normative value, we might expect socially constructed identities and the authenticity of self-understanding might be lost. If authenticity and self-respect were the initial values one wants to preserve in the politics of multiculturalism, then this might be its dead-end.

The final point deals with *status quo* – the idea that multiculturalism accepted value biased national state as legitimate and instead of questioning the whole political order it asks for the remedies in the form of minority rights. Liberal and constitutional norms in the view of liberal culturalism reflect the axiological principles inherent to culture (here equal to nation). Moreover, some of its grounding points – that separated cultures are unique sources of autonomy and other political values, perpetuate this legitimization.

One of the crucial problems of the multicultural theories is the problem of adjudication. Specifically, all theories show great respect and concern for the plurality and diversity within society while the only problem is posed by so called illiberal minorities. When it comes to illiberal minorities the answers are different. The only thing in common is that all theories advocate suppression of the illiberal practices but there is no clear answer how would the level of deviation be established? What kind of political organ would do it? In my view, the

sense of vagueness in these issues should raise concern whether the minority interest would be adequately protected.

In the last part, I take a consequentialist view on the prudence of theories within multicultural liberalism. Namely, the studies of minorities and multiculturalism in general represent only a part of the complex political puzzle called citizenship in its diachronical/synchronical, local/global, redistribution/recognition paradigms. A functional conception of citizenship that can accommodate the ethical and other specificities of the groups in need of recognition, remains to be more of an ideal for multicultural liberalism than its sensible project.

Chapter 3: THEORIZING THE CONCEPT OF MINORITY

In the previous chapter I criticized the dominant variants of the liberal culturalism and explained why multicultural citizenship is neither normatively nor practically acceptable as a model. In this part I elaborate the significance of minority issue within the theory of citizenship. I define minorities as the individuals in the society whose lifestyle, social practices and worldviews are different to those of dominant majoritarian group, visible in normative expression (legal, symbolic, political etc.) of political community. This definition allows for a dynamic and non-essentialised conception of identity, its changeable and relational character. The definition of minorities and its theoretical and methodological concerns at the outlook of this research will determine the employment of theories that regard identity, recognition and citizenship. In order to tackle particular need of the minorities within contemporary societies I mobilize the recognition theory and from there I draw some important normative inputs. Namely, I try to elaborate on what it means to be recognized in plural contemporary societies and what kind of recognition would be possible and just at the level of constitutional norms.

One could reasonable argue that the democratic theory, from its Greek roots towards our times, had always had to answer to *tyranny of the majority* objection. Namely, democracies by their very nature, without the corrective mechanisms, might imperil the basic liberties of individuals and minority groups. The definition of tyranny of the

majority that Tocqueville and Mill had in mind referred mostly to the prevalence of dominant dogmas and paradigms, beliefs and political convictions.

Nowadays, however, we might with even stronger argumentation speak of tyranny of majority with regard to the basic existential matters – general worldview and the particular concept of a good life. This change was influenced by the social changes that put stress on identity as a result of a struggle for group recognition by women, people of color, LGBT etc. It seems that, in the context of contemporary democracies, we might differentiate two types of minorities here: the one that belong to minority for the reason of *thinking* differently and those who are minorities simply for *being* differently. We might name these *epistemological* and *identity (ontological)* minorities. This difference is important: it detects the importance of criteria by which we find ourselves in minority and poses new dilemmas with democracy theories. Identity minorities have different particular ethics and life views to those of majority group and this is what makes them so vulnerable within a contact of a contemporary plural state.

At the constitutional level this issue becomes evident. Majority often reflects its own particular ethics into the constitutional principles and citizenship rights and presents them as universal. Where is the line between goals and principles, values and procedures? We might interpret this theoretical issue as *goods* versus *rights* – one of the main normative dilemmas that cover vast part of moral philosophy¹⁴⁰. As Abraham Edel clarifies these two concepts ‘conceptualize basic phenomena in human life’, the good interpreting man as ‘goal-seeking beings who have desires and aspirations’ and the right that sees men as

¹⁴⁰ Broadly speaking, the concepts of good and right lie in the foundation of two normative approaches: one which emphasized goodness – teleological (*telos*, gr. aim, purpose) and the other focused on rightness is - deontological approach (*deon*, gr. duty, obligation). I will refer to this division further on in the thesis.

beings living ‘in groups that require some modes of organization and regulation involving practices, rules, and institutions’¹⁴¹. With regard to this issue it is possible to take different standings: to discuss the goods and compare them, to focus exclusively on rights or to combine both. In order to cover these two important notions of moral theory I use two different theories: for the idea of good that certain community might share and the importance of that good for the group I mobilize *recognition theory* while for the rights level I engage with *political liberalism* in its various forms and use the argument of autonomy.

3.1. Defining minorities and understanding identity

The definition of minorities must be broad enough to include different sorts and variants of identities that suffer from misrecognition but still specific to differ from those *ad hoc* minorities that every democratic society necessarily forms on almost every day basis. I take that the main definitional element of such minorities is identity. It goes without saying that modern societies consist of different groups that claim to have specific identity that differs them from others. Having different values and worldviews is not problematic as long as these are not in direct opposition or clash. Only then the common, universal norms take the role of the mediator and resolve these conflicts. The real problem occurs when these norms, instead of being impartial and universal, turn out to be biased and particular.

In the next chapter I would like to explore the main definitional element of minorities in this thesis - the concept of identity meticulously and to include the concepts of intersectionality and relationality.

¹⁴¹Edel, Abraham. “Right and Good.” *Dictionary of the History of Ideas*. On-line publication. Archived at http://www.bmeacham.com/whatswhat/OP/Edel_RightAndGood.htm

The word identity has, without any doubt, become a buzz word in contemporary scholarship. Consequently, many theorists suggest omission of this concept and suggest various substitutes.¹⁴² As a boundless concept it is often an obstacle for precise theoretical use. Nevertheless, identity is often in the heart of the claims by which the contemporary social movements contest the legitimacy of national state¹⁴³. Identity of a citizen in postmodern era is often fluid and elusive, sometimes radicalized and in quest of its authentic true forms, contradictory and complementary depending on the subject who evaluates it in the particular historical and social context¹⁴⁴. Therefore, minority identity cannot be defined *in abstracto*. It is necessarily a relational and contextual concept. The values, world-views and practices of identity minorities are different to majoritarian ones. It is a particular good, worldview and lifestyle that minorities are trying to preserve, protect and uphold. If we look at a random European constitution, among nominally liberal democratic states, we would identify many visions of a good life and principles that some citizens cannot adhere to. In some cases, these provisions go even further, disabling the possibility of these minorities to identify with the political community or to lead the life they want and still be accepted as equal citizens. The case of French secularism and Muslim community is a paradigmatic example.

Identities are plural. Contrary to mathematical identities, social identities can vary and individuals can in the same time belong to different socially shaped identities. This is probably the crucial aspect of identity that lies in the basic hypothesis of this thesis: people can have their religious, cultural or sexual identity and in the same time identify with the polity they belong to. The levels of private/public,

¹⁴²v. Rogers Brubaker and Frederick Cooper. "Beyond 'Identity'" *Theory and Society* 29 (2000): 1-47

¹⁴³v. Stryker, Sheldon, Owens, Timothy, Joseph, White Robert W., *Self, Identity, and Social Movements*, (Minnesota Press, 2000)

¹⁴⁴v. e.g. Bauman, Zygmunt. *Liquid Modernity*. (Cambridge, UK: Polity Press, 2000)

rational/emotional vary but the same minimum of belonging to an imagined entity or group is always there.

Identities are fluid, dynamic¹⁴⁵. They change in the course of time. But since some of the identities are prevailing and have the crucial role in the life of an individual, their change would proportionally be more difficult and the cost of transition from one identity to another would be higher. These identities usually trigger constitutional importance, for citizens find them so essential for their political life.

Social identities are both collective and individual, and etiology is always twofold¹⁴⁶. We perceive our identity through individual prism and try to negotiate it with the given collective frames. Individual interpretation and realization interact with symbolic, esthetic and normative dimensions of collective models and paradigms.

Identity is sameness, correspondence.¹⁴⁷ A is identical to B if all that is true for B is true for A¹⁴⁸. At the individual level, in the sphere of human psychology, identity is sometimes subsumed in a phrase 'I am

¹⁴⁵ The transition from national to plural identities and the reflection of this change in Indian parliament was explored here: Shankar, B.L., and Valerian Rodrigues. "From National Identity to Plural Identities." In *The Indian Parliament: A Democracy at Work*, by Shankar, B. L., and Valerian Rodrigues.. (Delhi: Oxford University Press, 2011. Oxford Scholarship Online, 2012)

¹⁴⁶ v. Tajfel, H., Turner, J. C. The social identity theory of intergroup behavior. In J. Sidanius & J. T. Jost (Eds.), *Political psychology: Key readings*, (New York: Psychology Press, 2004)

¹⁴⁷ With the Parmenide's statement that "thought and being are the same" identity becomes one of the crucial categories in the Western philosophy. It has been usually thought as unity, as the unity of a thing with itself (as Plotinus said "It is in virtue of unity that beings are beings.") and as simplicity, individuality and, above all, uniqueness in the formulation of the principle of the identity of indiscernibles. For Heidegger, who revisits this philosophical notion in the modern philosophy, identity is "belonging together", "unity that forms a systematic totality of the world with God or Being as the ground, as the first cause and as the highest being."¹⁴⁷ Philosophically, identity has been always conceived as: unity (as the inner harmony and homogeneity), opposition to otherness (thus, difference as an inherent feature of identity) and especially in Heidegger version as belonging to the sameness. These three features have clear resonance in identity politics. See: introduction of Joan Stambaugh to Heidegger, Martin, *Identity and Difference* (New York: Harper & Row, 1969).

¹⁴⁸ This logical relation is sometimes referred to as Leibniz's Law or the principle of the indiscernibility of identicals.

who I am'. At the level of collective identities, we might define identity as the actual correspondence or the perception of correspondence between individual or group's attitudes, values and practices with imagined or given set of these attitudes, values and practices. For this project, only elements of our identities that face misrecognition at the level of broadly defined constitutional norms, those that we can percept as an essential *ratio* of our minority condition. Specifically important are those aspects of our identity that is influenced in certain way by the constitutional norms within a contemporary national state: language, official religion, discourses relating to belonging and symbolic presentation of the community, the constitutional norms regarding marriage, social security rights etc.. These elements cannot be purely epistemic and relate to ideological view of an individual. These are always deeply existential and by definition include the prevailing aspect of our self-understanding and the way others perceive us. These elements cannot relate to passing subculture identities, though changeable they are a long term determinant of our social being.

The interplay of identity and difference is crucial for understanding inter-group, especially inter-cultural and inter-ethnic relations. Namely, the logic of identity imposes false sameness within and false diametric opposition towards other entities. The logic of identity has certain rules by which it constitutes this concepts and everything it is related to:

The logic of identity expresses one construction of the meaning and operations of reason: an urge to think things together, to reduce them to unity. To give a rational account is to find the universal, the one principle, the law, covering the phenomena to be accounted for. Reason seeks essence, a single

formula that classifies concrete particulars as inside or outside a category, something common to all things that belong in the category.¹⁴⁹

This reasoning is often present in our theorizing of the political. We tend to group and subsume similar individuals and propose different concepts of the political order according to that. Identity and difference are dialectically connected. Unity of identity presumes internal difference, among its parts, just like it differs from the otherness. Two different entities can also presume some identical points. The logic of identity in Western philosophical and theoretical discourse seeks “to reduce the differently similar to the same, it turns the merely different into the absolutely other”¹⁵⁰. This is another reason for being careful with the use of notion of identity in theoretical political analysis – it is easily politicized and for the political use it can change its meaning and sense.

This point is important for it shows the dynamic of group identities within a broader picture of a national state. It poses a principal question: should we acknowledge and reinforce identities through legal norms and political arrangements? If the construction of identities is already a field of binary, Schmitian logic of friend and enemy should these oppositions be mirrored into political and constitutional space? In the course of my argumentation I will try to show that constitutions should not reflect the particular cultural identities but rather make sure that no identity is unjustly misrecognised. That is why it is important to determine the meaning of the notion of identity. We shall look for the aspects of identity that has *de facto* effect for our citizenship status.

There are certainly many theories that place identity in the heart of the political. Communitarianism and liberal multiculturalism insisted on narrow cultural identity as the locus of our personal and political

¹⁴⁹ Young, Iris Marion. *Justice and the Politics of Difference*. (Princeton, N.J.: Princeton University Press, 1990) 98

¹⁵⁰ *Ibid.* 99

autonomy. Feminism gives importance to gender and puts this facet of identity on the top of citizenship agenda. This research shares the idea that identities are important element of our political behavior and an important variable of our citizenship. However, there is always a question how to interpret the complexity of identity in the context of political and legal arrangements. In order to fully understand identity and make it more operational for my research I add additional clarification of this notion through the concepts of intersectionality and relationality.

3.2.1. Intersectionality and relational character of minorities

3.2.1. 1. Intersectionality

Minority should be analysed through the paradigm of intersectionality. Intersectionality was first developed as a concept in the field of feminism theory, this term was introduced by Kimberle Crenshaw¹⁵¹. Originally, it was supposed to indicate the issue of theoretical analysis of black women who fall between the theoretical frameworks of anti-racism and feminism. It stressed the overall social context in which individuals face injustice and captures the plurality and relational character of their identities¹⁵². It is important to engage with

¹⁵¹ see : Crenshaw, Kimberlé ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, *University of Chicago Legal Forum* (1989) 138–67

¹⁵²This concept travelled from theory to practice, and was also used by some UN forums and found its place in UN Commission on Human Rights resolution. see

the notion of identity in a way which will reflect its nature in the contemporary world where identity became highly politicized. Intersectionality grasps the contemporary identity in its fluidness and complexity without reifying it. It comprehends the complexity of human existence and its plurality of identifications. This concept shows both the interaction of multiple, diverse identities and experiences of exclusion, misrecognition and subordination.

The way intersectionality can be interpreted in the realm of political is very indicative for this research. Intersectionality starts from the idea that one identity feature cannot encompass the totality of us as political and social beings, and that different identity aspects mutually determine each other. Understood in this way, intersectionality leads us to the inequalities at the level of citizenship showing how micro elements of identity combined with macro social and political structures generate injustice. The table that compares four social categories linked to inequalities in the context of the EU shows that *the organization of citizenships* is one the main location of inequality of the three modes of representing social categories (gender, race, sexual orientation). This table also shows the interaction of nature and nurture and points out the importance of social constructivism in each of these.

Yuval-Davis, N. (2006) 'Intersectionality and Feminist Politics', *European Journal of Women's Studies* 13(3): 194

Representations of Social Categories in Terms of:	Gender	Race/Ethnicity	Sexual Orientation	Class
Range of positions	Dichotomous	Multiple	Three/four or more	Dichotomous
Origin of social category	Contested: Nature/nurture	Contested: Nature/nurture	Nature (constructed)	Socioeconomic construct
Location of inequality	Organization of labour, intimacy and citizenship	Organization of citizenship and labour (intimacy)	Mostly organization of intimacy and citizenship	Organization of labour
Mechanisms (re)producing inequality	Material (resources) Discursive (norms) (Sexist) Violence	Discursive (norms) Material (resources) (Racist) violence	Discursive (norms) [material, violence]	Material (resources)
	(White heterosexual middle class) man	White (heterosexual middle class man)	(White) heterosexual (middle class man)	(White heterosexual) middle class (man)

TABLE Comparing Four Social Categories that are linked to Inequalities, M. Verloo¹⁵³

¹⁵³ Verloo, Mieke (2006), Multiple inequalities, intersectionality and the European Union. *European Journal of Women's Studies*, 3, 211-229.

Intersectionality does not allow us to interpret the dominant social relations exclusively through the paradigm of culture or any other mono-determining factor. Reducing identity by giving supremacy to only one of its aspects is normatively and methodologically wrong. If the whole idea of recognizing someone's identity is to enable personal flourishing and development, then limiting her to one identity would be, in a certain way, a form of misrecognition. Furthermore, this means that using identity in political theory means understanding its contextual and complex nature. Citizenship theories that stress one of these identities might risk marginalizing other aspects of identity which would eventually have misrecognition and injustice as a consequence in a concrete context. Identity as a theoretical ideo-typical category is not the same as identity in given real-life context and political theory should be aware of this distinction. Therefore, a normative political theory has to consider both philosophical and sociological aspects of identity when proposing concrete politics and policies to deal with this issue.

To conclude, when we think about identity we should think about the complex networks of possible personal and social identification that individual might be part of. Identity is not just a paradigm, a general concept or abstract idea but a determinant of individuals' status among their co-citizens. Through intersectionality we see how these general concepts become real and "touchable" especially in the quest for a just citizenship. Once I identified the intersectional nature of identity I proceed to its other important feature: relationality.

3.2.1. 2. Relational character of identity

There has been a big debate between essentialism and constructionism in the theorizing of identity. Essentialism advocates the

innermost, given and pre-existing set of features that identity has and that is not easily changeable in the course of time. Constructionism relies on the processes in the social realm as a source for identity formation.

There are many other ways to pose this question especially if we take the perspective of an individual. An interesting essayistic approach to this question can be found in Trilling's *Sincerity and authenticity*¹⁵⁴. Sincerity is our candid corresponding to what we are; authenticity is the quest for a real self which is covered with socially manufactured self. This ideal of self-realisation was continued to be researched in Taylor's *The ethics of authenticity*¹⁵⁵, elaborating authenticity as one of the most important modern values. The notions of essentialism and constructivism can conflate in unexpected ways. We might think of a constructed essentialism or essentialised constructionism. Besides, the binary logic of essentialism was critiqued by some authors as limiting, while some, like G. Spivak, advocated strategic essentialism¹⁵⁶. In other words, dialectics of essentialism and constructionism that relate to identity is so complex when it comes to question of origin that it resembles the chicken or the egg causality dilemma. However, it is not always necessary for a normative theory to answer this question. We might simply start from the importance of identity for its bearers without identifying its roots. For example, instead of determining whether being a Muslim essential identity feature of an individual or simply socially construed religious affiliation we should rather analyze why is it important for an individual that he is religious and Muslim in a given political and social context.

¹⁵⁴ Trilling, Lionel. *Sincerity and Authenticity* (Cambridge, Mass.: Harvard University Press, 1972)

¹⁵⁵ Taylor, Charles. *The Ethics of Authenticity* (Cambridge, Mass.: Harvard University Press, 1992)

¹⁵⁶ Phillips, Anne (2010) What's wrong with essentialism? *Distinktion: Scandinavian journal of social theory*, 11 (1). pp. 47-60

To defend essentialism would mean to neglect any possibility of a change and allow for totalizing discourses in the field of identities. Advocating exclusively social constructionism would implicitly undermine the values which individuals give to identity. I have referred to the notion of identity and its phenomenology in the previous chapter, showing that a theory that operates with this notion should account that identities are often something between ascribed and chosen¹⁵⁷.

Relationalism is a way to exit this debate leaving the metaphysical grounding questions aside. Relationalism goes in hand with the idea of progressivism, cultural change and communication and intersubjectivity as the main realms of identity creation. It puts culture in context and dynamics in which change is inevitable¹⁵⁸. Identity is "a socialized sense of individuality, an internal organization of self-perception concerning one's relationship to social categories, that also incorporates views of the self-perceived to be held by others", and as such "...is constituted relationally, through involvement with—and incorporation of—significant others and integration into communities"¹⁵⁹ Our identities and the importance we give to it in a particular context arises from the interpersonal and intergroup relations. As Young explains "a group exists and is defined as a specific group only in social and interactive relation to others. Group identity is not a

¹⁵⁷ v. supra 1.2.1.1

¹⁵⁸ Waldron explains: "We live in a world formed by technology and trade; by economic, religious, and political imperialism and their offspring; by mass migration and the dispersion of cultural influences. In this context, to immerse oneself in the traditional practices of, say, an aboriginal culture might be a fascinating anthropological experiment, but it involves an artificial dislocation from what actually is going on in the world" (Waldron, James, "Minority Cultures and the Cosmopolitan Alternative," in *The Rights of Minority Cultures*, (Oxford: Oxford University Press, 1995), 100) Protection and preservation of culture might result in petrifying one version of culture impeding its ability to change and adapt to changing world. v. Waldron, *ibid* and Scheffler, Samuel, "Immigration and the Significance of Culture," *Philosophy and Public Affairs*, 35(2): 93–125.

¹⁵⁹ Epstein, Steven, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism." *Socialist Review* 17 (1987) 29, cited in Young, *ibid*. p. 45

set of objective facts, but the product of experienced meaning”¹⁶⁰. We enter into social relations, both individually and as members of groups, with an idea of our collective belonging and we defend, change and revisit it.

Identities are socially constructed even when based on more or less fixed biological or psychological “realities”. One might follow Foucault’s argumentation on this issue and say that homosexuality before Victorian times was not fully constructed as social identity but rather as an aberration. Homosexuality ‘appeared as one of the forms of sexuality when it was transposed from the practice of sodomy into a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species’¹⁶¹. Finally, the dynamic of identity in the paradigm of its social and political connotation might lead us to conclusion that certain identity can lose its relevance in a society where certain sources of identification become politically unimportant, irrelevant. Thus we must always think of political value of identity with a particular political and social context. It happens when the worldviews of certain group gain wide recognition and their position in the society social action, new bills of law etc. might not be needed any more.

While intersectionality focuses on an individual, relationalism puts the stress on the power relations between individuals and groups it takes a macro perspective¹⁶². Relationalism explains while in certain

¹⁶⁰ I. M. Young, “Polity and group difference”, in *Theorizing citizenship*, ed. Ronald Beiner, (Suny Press, 1995) cited in Gianni, Matteo, “Multiculturalism, Differentiated Citizenship, and the Problem of Self-Determination”, (2001)

¹⁶¹ Michel Foucault, *The History of Sexuality. 1: An Introduction*, tr. Robert Hurley (New York 1980) 43. see also Altman, Dennis *The Homosexualization of America*. Beacon Press. (Boston:1982). Halperin, David M. *One Hundred Years of Homosexuality: And Other Essays on Greek Love* (New York: Routledge 1990)

¹⁶² Interlocking oppressions is a term that is complementary to the concept of intersectionality, but relates to a broader social picture rather than a specific individual context. see Hill Collins, Patricia, et al., “Symposium on West and Fenstermaker's

contexts culture would be more important identity feature than gender for example. Not all identities are equally important. Most multicultural theories focus on nationality and ethnicity as main forms of identity and project this standing into institutional resetting of liberal democracies. Certainly, national and regional identities present a dominant medium of political articulation. It is still not the reason to give these identities a paramount importance. If we look at causal relations within a national state we can easily conclude that the formation of national minority identity as a main political reflex takes place especially in states whose constitutional framework is in favour of a dominant national group. These processes reinforce and condition each other and politics becomes the field of contestation of different cultural groups, majoritarian centripetal and minority centrifugal forces. This is exactly the nature of the tension within modern plural democracies where citizenship, with its normative and symbolic relevance, is perceived as one of the “bastions” of a majoritarian group.

Therefore, there must be a contextually determined threshold for determining the *socially and politically relevant minorities*. By this I mean the minorities whose rights and prospects for self-determination and development are imperilled by constitutional norms. For example, we cannot consider *hipsters* as socially and politically relevant minority since nothing that makes the identity and lifestyle of a hipster cannot be endangered by a law or a policy. Possible examples, like law that would prohibit certain type of sunglasses (so particular for this subculture group) do not deserve serious attention. In other words, in the society we live in, and where this particular subgroup emerged, there is nothing particular within hipster identity that might situate them in minority that is disabled to achieve its rights and self-determination. Put in a different

‘Doing Difference’,” in Sarah Fenstermaker and Candace West (eds.), *Doing Gender*, Doing Difference, (New York: Routledge. 2002)

way, there is no reasonable argumentation that would make the members of this group feel politically exceptional. Again, if we take in consideration LGBT members and their fight for recognition we will see many differences between this movement in western democracies of the EU, the eastern European states and the EU candidates. The political relevance of certain identity changes depending on the overall context which certain identities are faced with. The ideological inclination of these groups might be universal (generally proliberal, leftist etc.) but the request for recognition is essentially different.

To conclude, minorities should be taken in an intersectional and relational sense, as an umbrella term for *identity minorities*: ethno-cultural, sexual, gender minorities, immigrants. In other words, I define as minorities all individuals and groups that, due to their particular identity, experience misrecognition, injustice and rights violation or simply do not share the dominant culture norms. Instead of limiting the notion of minority only to certain groups, this concept should be understood as a consideration of the interplay between individual and groups' self-perception and the recognition they might invoke in a political domain, which reflects both their private and public concerns.

3.3. The politics of recognition and minorities

Recognition¹⁶³ might be helpful theoretical tool when dealing with minorities for two reasons: on one hand theory reflects the psychological dimensions of political interactions between diverse

¹⁶³ It is worth mentioning though it is not in the focus of my intention, that the recognition theories have their source in the writings of Hegel, Humboldt and George Herbert Mead. These theories show that morality is constructed in intersubjective communication between the subjects who engage in the relations of reciprocal recognition. A comprehensive theory of recognition that leans on the writings of Hegel and Mead, and finds empirical support in researches from various disciplines is the one of Axel Honneth. Honneth, Axel, *The struggle for recognition: the moral grammar of social conflicts* (Cambridge, UK: Polity Press, 1995. Print.)

subjects and on the other hand it shapes the normative perspectives included in this issue. The main idea of this theory is that in our political self-understanding we depend on others' views, others being different individuals, groups or the state itself. In order to be treated equally we want our particular worldviews and values not to be ignored, discriminated or denigrated. Formulated in this way, recognition always bears normative impact and can be formulated as a question of justice¹⁶⁴.

Unlike other conflicts, the conflicts of recognition can seriously "imperil the stability and cohesion of liberal democracies" and "are not reducible to negotiation"¹⁶⁵. Conflicts of recognition are not new. However, they seem to be very paradigmatic for contemporary plural societies. Identity becomes politicized and sometimes plays just another argument in the quest to the political power.

As Charles Taylor explains due recognitions are 'not just a courtesy we owe people' but 'a vital human need'¹⁶⁶. Being recognized is crucial for our self-understanding. 'Nonrecognition or misrecognition can inflict harm...imprisoning someone in a false, distorted, and reduced

¹⁶⁴What lies in the foundation of the justice theories that are focused with recognition is the transition from having to doing, from the goods that a person should pose towards the standing that that person has in a broader social context¹⁶⁴. This problem of Janus faces justice recognition *versus* redistribution reappears in the debate between Honneth and Fraser. Stressing recognition over redistribution can be explained by Honneth's support of Habermas's linguistic turn that places the focal point of the critique on communication and language rather than the material production. The focus of my research is belonging and the set of rights and obligation that belonging imposes on someone who is considered to be a part of a polity. It imagines the ideal context in which membership is the only question, where distribution is not an issue. It theorizes an idea of citizenship that will accept each other's *right to being* rather than *right to having*. In that regard, I put the questions of distributive justice apart though these will be taken in consideration in a broader scheme of injustice. Obviously, these two are often entangled and Fraser is right that the cases of injustice are two-dimensional. But in the sequence of my argument the question of recognition precedes the question of recognition.

¹⁶⁵ Gianni, Matteo, "Taking Multiculturalism Seriously: Political Claims of Differentiated Citizenship." In *Citizenship After Liberalism*, edited by Karen Slawner and Mark E. Denham. New York: Peter Lang, 1998. p. 34

¹⁶⁶Taylor, Charles, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, A. Gutmann (ed.) (Princeton: Princeton University Press, 1992) 26

mode of being'¹⁶⁷. Recognition in his view is a prominent feature of the modern times in which honour is substituted by dignity and individualization of identity focused on the specificity of every individual human being. Recognition operates both on the level of our inter-subjectively recognized equality of our dignity and our human essence and the level of recognizing our particularities and differences. 'With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else.'¹⁶⁸ Thus, there are two requests for recognition, for equality and difference, and each of these has different normative and policy implications.

3.3.1. Honneth's theory of recognition: love, rights and solidarity

Other authors also stressed the importance of recognition for the wellbeing of an individual. One of the most prominent theories of the recognition which is a result of the author's theoretical insight supported by empirical researches in the field of psychology and sociology is Honneth's *The struggle for recognition: the moral grammar of social conflicts*. For Axel Honneth, the lack of recognition constitutes an insult and triggers an aspiration to struggle for recognition. Three phases of the struggle for recognition to a certain degree denoted by Hegel and Mead, are given a foundation in the psychology of social and personal development through "love, rights and solidarity". The three patterns of intersubjective recognition are: (i) the demand for *love*, confirming the

¹⁶⁷Ibid. p. 25

¹⁶⁸ Ibid. p. 38

reliability of one's basic senses and needs and creating the basis for self-confidence, (ii) the demand for *rights*, through which one learns to recognize others as independent human beings with rights like oneself, creating the basis for self-respect, and finally (iii) the demand for *solidarity*, ie. recognition as a unique person, the basis for self-esteem and a complex and tolerant social life¹⁶⁹. For Honneth injustice occurs when intersubjective recognition is denied in any of the three levels. Self-confidence, self-respect and self-esteem are, thus, the important prerequisites for a successful life.

Honneth's project is particularly interesting for its comprehensive approach to recognition as a complex and multidimensional phenomenon. He rejects the idea that his recognition theory implies politics of identity as he was critiqued by Fraser. Honneth agrees with Fraser that identity politics leads to culturalist reduction of the concept of recognition as such.¹⁷⁰ In general, Fraser's critique of Honneth's theory is twofold: he is said to overly psychologize justice and that his form of ethical life is too thick¹⁷¹. I believe the first critique can be easily dismissed by stressing the plurality of perspectives contained in his theory. Namely, many levels and not only psychological are empirically supported and have a clear resonance in the sphere of political and inter-subjective. This part of critique, however, and here comes the second stream of critique, relates to whether his theory is purely ethical or it has political implications¹⁷². I share partly the second line of that critique. Although I do find the general idea of the Honneth's project useful in its affirmation of recognition as a vital social need that individuals are entitled to and I find the tripartite division both

¹⁶⁹Honneth, Axel, *The struggle for recognition: the moral grammar of social conflicts*, (Cambridge, UK: Polity Press;, 1995. Print.)

¹⁷⁰Fraser, Nancy, and Axel Honneth. *Redistribution or Recognition?: A Philosophical Exchange* (London: Verso, 2001) 161-168

¹⁷¹See *ibid.*

¹⁷²see Jean-Philippe Deranty, Emmanuel Renault, "Politicizing Honneth's Ethics Of Recognition" *Thesis Eleven* 88 (1):92-111 (2007)

academically appealing and empirically useful. His concept of solidarity, the third level of intersubjective recognition – and its thick ethical formulation might be problematic.

Putting aside *love* for the reasons of its dominantly personal, reasonably psychological character, the difference between *right* and *solidarity* may be particularly interesting. In the second level (rights) the basic moral respect and equal rights are the main goal of recognition, everyone is entitled to same status and treatment as every other person.

Self-esteem, however, looks for the features that make one special, unique, different. While modern law identifies the universal characteristics of individuals ‘this form of recognition demands a social medium that must be able to express the characteristic differences among human subjects in a universal and, more specifically, intersubjectively obligatory way’¹⁷³. Social esteem as a result comes from the ability of individual to express herself in a way that correspond to the collectively defined goals¹⁷⁴. Honneth explains that his formal conception of social life stands between moral theories and communitarian ethics, in this way overcoming the gap between morality and ethics¹⁷⁵. His normative project, in his words, is concerned not solely with the moral autonomy of human beings but also with the conditions for their self-realization in general, thus in an ethical context. In his research morality is one of the protective measures that serve the

¹⁷³Honneth, *ibid.* 122

¹⁷⁴ ‘...the two processes of, on the one hand, the universalization of 'honour' into 'dignity' and, on the other hand, the privatization of 'honour' into subjectively defined 'integrity'. Thus, social esteem is henceforth no longer linked to legal privileges of any sort, and does not constitutively include the designation of moral qualities of one's personality." Rather, 'prestige' or 'standing' signifies only the degree of social recognition the individual earns for his or her form of self-realization by thus contributing, to a certain extent, to the practical realization of society's abstractly defined goals. *Ibid.* 126

¹⁷⁵ In Hegel's philosophy, ethical life (*Sittlichkeit*) is a synthesis of abstract right and morality as self-determination (*Moralität*). See Hegel, Georg Wilhelm Friedrich, and Allen W. Wood. *Elements of the Philosophy of Right*. (Cambridge England: Cambridge University Press, 1991)

goal of enabling a good life. This concept of the good according to him does not relate to particular ethics and ‘has to do with the structural elements of ethical life, which, from the general point of view of the communicative enabling of self-realization, can be normatively extracted from the plurality of all particular forms of life’¹⁷⁶. Nevertheless, it seems too thick his conception of the socially defined aims that individual members should strive to achieve. It is not clear why this sphere of recognition has to relate to the totality of society instead of particular and intercrossing social groups.

Honneth in his conception of the solidarity, just as for the other two levels, follows Hegel, and explains that for Hegel ‘in the *emotionally* enlightened relationship of recognition found in the State subjects they are recognized as concrete universals, that is, as subjects who are socialized in their particularity’¹⁷⁷. I believe that his tries to overcome the *sittlichkeit* nature of the state in Hegel’s conception of political identity¹⁷⁸ are futile as long as it is expected that the society as a whole has the same and unique overarching value standards according to which its members should behave and compare each other. Thus, Honneth’s solidarity as a unique, one and only, overarching relationship of recognition should be revisited.

Nevertheless, it would be possible to conceive *two types* of solidarity in the third level of recognition that might be a solution that gives his theory intermediating role he had had in the first place. Both are related to the recognition within a group, but while one would be focused on thick standards of recognition within particular groups (cultural, subcultural etc.) the other would be universal within one political society and relate to the basic morality necessary for

¹⁷⁶Honneth, *ibid.* 172

¹⁷⁷ Honneth, *ibid.* 25

¹⁷⁸ See e.g. Moland, Lydia L. *Hegel on Political Identity: Patriotism, Nationality, Cosmopolitanism*, (Evanston, Ill.: Northwestern University Press, 2011)

interpersonal and intergroup relations. This distinction is an evident departure from Honnet's concept of solidarity but I do believe it is not against the overall idea of his project.¹⁷⁹

If we endorse this amended version of Honneth's recognition theory then I would like to stress its biggest normative impact for this project. It is considered with the relations between the levels of recognition – the particular role that legal relations have on other forms of recognition.

Admittedly, within this ethical framework, rights (thus conceived) have a restricting effect on love relationships as well as on conditions of solidarity, still to be explained. Patterns of recognition based on law extend into the inner sphere of primary relations, because individuals must be protected against the danger of physical violence that is structurally inherent in the precarious balance of every emotional bond...Modern legal relations have a different influence...on conditions of solidarity. Here, they establish normative limitations to which the formation of community-generating value-horizons must generally be subject. The question, therefore, as to whether solidarity is to be included as a further element among the conditions for post-traditional ethical life cannot be settled without some reference to legal principles.¹⁸⁰

The fact that the legal form of recognition where we recognize each other as equal bearers of rights and responsibilities has a central role in his tripartite structure has a strong normative potential. Despite our need for different and hierarchically organized forms of recognition equality of us as legal persons must be always superior. There are several reasons why this position is justified. First of all, it reflects the plurality of the modes of recognition that correspond to the lifeworld

¹⁷⁹When Honneth explains the state according to Hegel's stage theory – he says that the corresponding recognition mode of recognition is intellectual intuition – *affect that has become rational*. I believe, however that his mode of recognition might be applied to specific solidarity within the mentioned particular groups. The mode of recognition present at the level of the modern constitutional state functions other way around – *rationality that might become affective*.

¹⁸⁰Honneth, *ibid.* 177

and still points out the solution in the case of their conflict. Secondly, it addresses the issue of identity, which, as I explained, is always plural and intersected. The three forms of recognition cover what we might call the normative value of the recognition – the various subjectivity of an individual (subject, legal person, member of a society) that corresponds to the same need (to be recognised) that are satisfied in different patterns. Thirdly, this is an effective way of advocating the rights of minorities within minorities, it poses the set of criteria that stem from the same ground – recognition of the group within a broader society is a normatively parallel situation to the one in which we should recognise an individual or a subgroup within a minority. Finally, in this way only those forms of social esteem that correspond to the basic legal principles might be advocated by the state, and only those forms of social esteem that do not violate the basic human rights can be accepted. This is the point, where in my view; recognition theory addresses the issue of political culture in plural societies with a very instructive set of solutions.

3.4. Three normative questions and the right to non-misrecognition

There are three important normative questions for the further development of my analysis and conceiving what I will call political recognition: a) which claims are normatively justified the ones relating to our equal standing or those that stress our particularity?; b) what should be the role of the state with regard to these types of recognition claims?; and finally c) what is the relation between recognition and citizenship, how these two concepts relate to each other?

a) Which claims are normatively justified the ones relating to our equal standing or those that stress our particularity?

The claims to recognition, as Taylor explained, can be aimed at recognition of the common features that a member of a particular group shares with the society in general, or at the recognition of the specificity, particularity that a group possesses. So the first question deals with the dilemma whether recognition should consider only our claims to equality or our claims to difference too? “‘Egalitarian’ and ‘differentialist’ claims to recognition should be seen as two ideal-typical categories”¹⁸¹. In the normative level we might pose the question which of these types of recognition should have precedence and are both of these politically relevant. As Gianni explains, from a liberal perspective, these recognition claims pose normatively different statements: “groups should be politically recognized to be able to express their difference” and “the groups should be politically recognized to reach better forms of political equality”. I believe there are epistemological and ethical reasons in favour of egalitarian claims. If we understand different social groups within a society as groups with different ethical values and worldviews it might be a bit high expectation to expect from a state or other groups to fully understand its difference. We might be free to exhibit our difference but epistemologically others might not be capable to understand it ie. to fully recognize it¹⁸². Furthermore, ethically we might be more obliged to recognize each other’s equality (in rights, standing) than our difference. In the case of state as an intermediary political institution the situation is even clearer: state can only remain neutral take into account our differences if it starts from the ideal of our equality. Again, exhibiting difference is and remains the main value and virtue of liberal societies but asking for their recognition might have

¹⁸¹ Gianni, Matteo, “Multiculturalism, Differentiated Citizenship...”, 223

¹⁸²Recognition in its etymological and general sense clearly relates to knowledge as *gnosis*.

problematic if not negative consequences in the plural contemporary societies.

Equal in rights but different in lifestyles and worldviews should be the dictum of contemporary citizenship. Equality of rights should be understood as the equality of applied principles to the possible maximum within the given political, economic and cultural context.

b) What should be the role of the state with regard to these types of recognition claims?

The second question considers the position of state in plural societies with regards to recognition. Should the state guarantee recognition? What should be the aim, object and subject of recognition?

The position of liberal egalitarians is that the state should not recognise any particular culture. Multiculturalists, however, insist that minority cultures are dully recognised since the state is never neutral but always biased. Considering the plural nature of our identities, the first question would be who should be the subject of that recognition. The bearer of recognition rights and the central focus of citizenship theory should be individual. There are three major reasons, some partly elaborated in the previous chapter. Injustice is always felt individually – the biggest harm at least at the level of our intersubjective relations lies in individual. Second, individuality with a complex intersection of identities is the locus of “recognition need” – groups are a collective expression of singular or plural but monochrome identities, only individual recognizes the completeness of a request for recognition. Finally, having in mind the possibility of oppression within the minority groups (internal restrictions, Kymlicka) it seems just to secure the framework of liberty for an individual putting her in the focus of recognition.

When it comes to object of recognition, it seems to be clear that the state cannot guarantee something as preservation of culture that also

depends from intergroup and interpersonal relations among citizens. A state cannot guarantee a preservation of something as sophisticated and elusive as culture, as a network of meaning, constant construction and deconstruction, innovation and repetition etc. It can, however, make sure that it does not provide biased criteria for recognition. These would, as their consequence, have misrecognition of some citizens. The state obligation should be understood negatively, to allow for interpersonal recognition without favouring any particular ethical form of life.

The state, however, is obliged to protect the minimum conditions under which any recognition is possible. The protection of physical and psychological integrity, property and freedom should not be seen as state intervention in the sphere of recognition, rather as the minimum that every state should be obliged to fulfil. The state can guarantee only the equality of rights, ie. that no one is misrecognized by the biased constitutional and legal rules.

The *recognition* of our essentially important features of identity is our precondition for accepting a social contract. Thus, we do not enter the social discourse of constitutionalizing certain polity without having guarantees that our worldviews and lifestyle will not be prohibited, misrecognized, denigrated etc, always under reciprocity of the liberty of others. Reciprocity is the acceptance of the equality of liberty and rights, equality of status. Recognition is the implicit acceptance of difference through the explicit guarantee of reciprocity. These two processes come together; they are two sides of the same coin: constitutionalisation of plural liberal democracies.

The social contract can only ideally be a contract of individuals. And only ideally can we conceive a situation in which majorities and minorities do not exist. Nevertheless, in order to answer the normative question of an ideal society we might use this mental exercise and put aside the power relations of minorities and majority. We might think of

individuals as well as groups having particular paradigms of the good, distinct lifestyles etc. equally participating in a social contract. If the whole normative significance that stems from recognition is to pay due respect to a different worldview that affects one's life in important aspect, then we have no reason to give prevalence to a group. Both individuals and groups should be perceived as equal (equality of status)¹⁸³ in this battle for a political order that will bring them the framework in which they can lead good lives.

Recognition should not be the power relation of the majority towards minority in which majority group recognizes the minority. It is a reciprocal equality relation defined by pre-defined constitutional norms, accepted for the sake of common life in a political community. Normatively, recognition should be deprived from power relations. Power relations would change the basic logic of recognition as an ethical value that individuals and groups tend to. Recognition is an underlying value in all spheres of citizenship. Misrecognized, we cannot fully participate and utilize the advantages of citizenship. In that sense I find all theories that posit recognition as the relation of the minority and majority group in which majority group should be the one recognizing the legitimacy of minority's request for recognition normatively unacceptable. The theory of recognition of Nancy Fraser exhibits some of the elements of the abovementioned theories. Though Fraser rightly identifies the status as the main criteria of equality she reckons that individuals bear the burden of proof to show that some form of recognition would bring them to what she calls *participatory parity*. My arguments against such a theory of recognition are twofold.

Firstly, and this was already posed by some authors and Honneth himself in the debate, why parity of participation, even when achieved, necessarily brings justice. According to participatory parity as a norm

¹⁸³v. supra 1.6.3.

‘justice requires social arrangements that permit all (adult) members of society to interact with one another as peers.’ We could easily conceive a world in which a certain minority (religious or sexual for example) would have parity of participation and still lack the possibility to change the fundamental norms and principles that directly violate their version of a good life. In that formally egalitarian participatory debate, minority would have a burden of proof of showing that their values deserve equal standing. What if these values are fundamentally different, divergent or contrary as it is the case with the vast majority of societies? They would, though equal in participation as peers with one another be outnumbered, outvoted, overruled. Why and how then would parity of participation resolve the issue of misrecognition injustice? In other words, if some basic rights to conceive and practice your identity as a free person are not guaranteed, there is a great danger that despite the participatory efforts of that person, the democratic result will be against her will. In the concept of citizenship I propose participation is only one of three elements (constitutional *rights*, and shared common and particular *identities*). Participation enables democratic development of citizenship (as a dynamic and changeable category) but is not per se guarantee that citizenship will be formulated in a fair and just way. Participation is a necessary but not sufficient element of citizenship puzzle. It seems that if we think of an individual or group in the contemporary context we must take all these three aspects taken together as necessary and sufficient condition for just citizenship. Besides, some elements of our identity must enjoy *a priori* protection and be outside of majoritarian democratic decisioning.

Secondly, what criteria the debate itself would be based on. The recognition process takes place according to some normative biases, affirming the specificity and value of each other’s beliefs, practices and lifestyles. The crucial question is where these normative criteria stem

from. That axiological sphere from which we draw the criteria for intersubjective recognition cannot reflect majoritarian position and should not follow the master – slave logic; otherwise the essence of recognition would make no sense. Posed in this way, it would never be fair. It would always be particular, partial and inherently unjust. Instead, we shall look at the basic constitutional framework as a set of norms, institutions and principles by which we accept and recognize the other. Thus, not recognition of *m* by *M* according to the norms and values of *M*, but mutual recognition of *m* and *M* by commonly achieved norms and values.

c) What is the relation between contemporary citizenship and recognition?

The normative concept of citizenship can be interpreted through the paradigm of recognition. The laws are the main medium of intersubjective recognition of modern societies. The focus is on political recognition, understanding basic set of political and legal institutions as a platform for recognizing identity diversity. I agree that recognition is a positive value that all reasonable individuals strive for. Nevertheless, **in my view**, recognition becomes normatively important for political theory only when it comes into a question as a form of misrecognition. Thus, recognition, just like justice or any other social value becomes normatively important only when it appears in the forms of its negation¹⁸⁴. But the right to be in political and social circumstances in which our actions and beliefs can be fairly recognized (in other words: are not unjustly misrecognized), must be an imperative in modern plural societies. Political theory at least in the version of some kind of a theory of justice, cannot deal with the value that someone's identity is given in

¹⁸⁴ In other words, we analyse and consequently propose remedying policies referring to concrete cases of misrecognition, legal and political. Therefore, ideally, state should refrain from misrecognizing rights rather than having a role of active recognition.

a social context. It should however assess the fairness and legitimacy of the political and legal frameworks that reflect misrecognition issues. Thus, I would say that recognition should be a normative question in political theory only in its negative form – *misrecognition*. Misrecognition should be understood to include even *non-recognition* if in particular context other cultures or groups have not been recognised.

In other words, pure non-recognition does not raise the question of political justice automatically. Only if the norms and worldviews embedded in the basic constitutional norms directly or indirectly lead to misrecognition should this question be treated as a question of injustice. Norms often present the reflection of certain group's cultural background. Nevertheless, these norms can still be legitimately accepted by all, including minority groups in sense that they do not conflict their own norms and worldviews. This idea leans on the concept of political that presupposes the free exchange of political ideas between individuals and groups within certain society. As long as these norms are voluntarily accepted by individuals and groups do not oppose to it or even see it compatible to their own particular ethics, they do not represent injustice in the form of misrecognition.

Recognition, as positively defined term, is the mutual acceptance of the common legal framework and the corresponding practices of political institutions through which individuals and groups' identity rights can be duly respected. Political recognition is thus the common moral platform, a pre-condition of a social contract and its basic principle, which enables us to conceive and live particular concepts of the good freely without state misrecognizing them. In the next step I will identify the injustice or misrecognition at the level of citizenship. In the same time I will look for the justification of this injustice in some citizenship theories.

3.5. Domains and types of injustice

I see three domains of injustice that loosely follow Fraser's division and find their source also in Weber's tripartite division of social stratification (*social, political, economic* – status, party, class). Ultimately, we might analyse the injustice towards minorities as a lack of power to form, revise and adhere to their particular concept of the good. Understood in this sense, Weber's distribution of power within a community comes as a helpful way to categorize the injustice¹⁸⁵. Following on his class (wealth), status (prestige) and party (power) we might see these goods as dominant motives for social closure. These levels cover and categorize the domains in which injustice takes place. Status, party and class can be understood both as goods (particular values and goals) and as rights (entitlements to certain actions). The political and legal system of modern democracies with its practice and discourses is organized in a way to bear structural injustice to minorities on economic, social (cultural) and political level.

As I already explained, the focus of the thesis will be the conception of citizenship employed on the supranational level of the EU that is just to identity minorities and corresponds to their claims. That conception of citizenship can include the constitutional arrangements, basic laws dealing with citizenship and the more elusive concept of normative ideas connected to belonging to a certain political community. As I elaborated in previous chapter, I use the notion of citizenship as an umbrella concept for three important spheres of membership within a political community, namely *rights, participation and identity*. Within these three levels of citizenship, one can identify

¹⁸⁵Weber, Max, and Guenther Roth. *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978) 926

the forms of injustice that are present in most of the world citizenship laws and discourses.

Within the sphere of the rights as one of the crucial aspects of citizenship, there are three possible forms of injustice within three different types of rights: political, social and economic. The corresponding types of injustice are: *disempowerment*, *misrecognition* and *maldistribution*.

Disempowerment – a result of the democratic proceduralism that favours majority rule without taking in consideration the substantive character of issues involved. Minorities are disempowered when issues of their utmost concern are decided without their possibility to intervene in political procedure. Young defines empowerment as “participation of an agent in decision-making through an effective voice and vote”¹⁸⁶. As she explains, “justice requires that each person should have the institutionalized means to participate effectively in the decisions that affect her or his action and the conditions of that action”¹⁸⁷. In this case I talk about lack of effective political rights rather than absence of political rights as such. The dominant legitimizing concept for this type of injustice can be found in the argument of democratic proceduralism that perceives political processes as justified as long as they follow certain laws practices and procedures. The minaret case in Switzerland would partially fall into this category of injustice since it put the substantive issue of religious freedom to a democratic procedure of referendum¹⁸⁸. The concept that questions this kind of injustice relies

¹⁸⁶Young, Iris Marion. *Justice and the Politics of Difference*, 251

¹⁸⁷Ibidem.

¹⁸⁸ Discussing Muslim question within Swiss context, Gianni shows that securitization of the Islam is done through securitization of: a) public sphere by advocating an apolitical concept of citizenship and b) Swiss democratic values to which Muslims have to adapt. He is defending the standpoint that ‘in order to defuse the performative negative effects of the Muslim Question on Muslims’ democratic agency, we should address it without rendering them invisible in the public sphere and in enhancing their political agency’. I fully agree with these findings. However, the Minaret case shows that it is not only deprivation of citizenship rights (only 15% of all Muslims residing in

upon the inviolability of basic identity rights that as such cannot fall into democratic procedure at the first place.

Misrecognition is a result of imposing majority culture and the concept of good to all citizens and residents within a political community. It relies on the idea, found in theories of nationalism and liberal nationalism¹⁸⁹, that communities can never be neutral that these are always culturally and territorially biased and culture as such is a connecting tissue of a political community. In order for laws and the ideas of justice to be legitimate, the argument continues, they must find approval within the deeply based cultural norms¹⁹⁰. This idea and its counterargument are *in nuce* the contents of this thesis. Here it will suffice to indicate that the dominant delegitimizing arguments against this paradigm can be found in theories of political liberalism. The main idea is that state as such must be silent on the good life and not advocate any particular values.

Maldistribution is another form of injustice. Just like other forms it is interconnected, and can stem from all other types of injustice. As already mentioned, there is a complex and interesting debate on this issue between Fraser and Honneth. I do believe that these phenomena can be co-original. Nevertheless, I am interested in cases when maldistribution is an effect of constitutional arrangements or legal framework that stems from the very concept of citizenship. The national solidarity is a common argument for the basis of the welfare state. The motivational and affection level of this argument serve to legitimize the

Switzerland are Swiss citizens), de-politization, marginalization, the lack of participation, and political visibility the problem here *but also* the very constitutional setting that allows you to decide on someone's religious freedom by referendum. v. Gianni, Matteo "Muslim's Integration in Switzerland. Securitizing Citizenship, weakening democracy ?", in Guillaume, Xavier et Huysmans, Jeff (eds) *Security and citizenship. The constitution of political being*. (London: Routledge, 2013) 212-226.

¹⁸⁹ v. e.g. Miller, David, *On Nationality*, Oxford: Oxford University Press, 1995, Meisels, T., *Territorial Rights*, (New York: Springer, 2009)

¹⁹⁰ v. e.g. Buchanan, Allan, *Justice, Legitimacy, and Self-determination*, (Oxford: Oxford University Press, 2004)

exclusion or partial exclusion of certain members of the community from the common welfare scheme (immigrants, guest workers etc.) The counterapproach can be found in functionalist approach to welfare state which instead of affective employs utilitarian arguments of participation in a national welfare scheme.¹⁹¹

In the sphere of participation, *exclusion* is the dominant form of injustice. Even if the rights are guaranteed by excluding someone from political processes we might impose injustice on the excluded subjects. This is a proactive side of citizenship, with the idea that we are the creators and not only subjects of the laws, and that through participation and deliberation within political institutions as well as through civil society, we make changes to the rules that determine our common life. In the multicultural-communitarian version, the political community shares certain values and worldviews which enable the compatriots to participate in political processes and decode political symbols. Republicanism on the other side, by insisting on a political participation, excludes those whose worldviews are less political and more religious, artistic or orientated towards the private life in general. I find both of these forms as exclusionary in the context of contemporary plural societies. The delegitimizing arguments might be found in the literature of deliberative democracy, orientated towards finding a common standing among different mutually equal subjects within a democratic polity.

Finally, citizenship also reveals itself in dominant discourses on who belongs to certain community that are not necessarily written down in positive laws. Here the question is to what extent a citizenship of state X can be neutral to the dominant cultural group's values. Does being Montenegrin includes certain ethnographic and bio-cultural features or

¹⁹¹ See e.g. Arash Abizadeh, "Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments," *American Political Science Review* 96, no. 3 (2002): 495-509

is it open for any member of a national political community? While communitarians would advocate the idea that these values cannot be extracted and abstracted from the reality of everyday political communication, contemporary notion of identity relativizes this standing. In contemporary notion of identity, identity can be fluid as well as fixed, dynamic and static, but these are never essential but rather constructed. In that way of reasoning, it would be possible to conceive of another level of common identity that overcomes the particular identities and leaves citizenship more inclusive.

		DOMAIN OF INJUSTICE (class, status, party)	TYPE OF INJUSTICE	DOMINANT LEGITIMIZING CONCEPT/THEORY	DOMINANT DE-LEGITIMIZING CONCEPT/THEORY
C I T I Z E N S H I P	RIGHTS	Political	<i>Disempowerment</i>	Democratic proceduralism	The inviolability of basic identity rights
		Social (cultural)	<i>Misrecognition</i>	National state/majority culture	Political liberalism
		Economic	<i>Maldistribution</i>	The national solidarity as the basis of the welfare state	Functionalist approach to welfare state
	PARTICIPATION	Political/social	<i>Exclusion</i>	Republicanism/Multiculturalism	Deliberative democracy
	IDENTITY	Social/political	<i>Marginalization</i>	Communitarianism	Post-structural approach to identity

TABLE *Citizenship and types of injustice*

All these forms of injustice, which might be subsumed to term misrecognition, need a normative reformulation at the level of citizenship theory. I have shown that they occur both in positive law and in the way we think of citizenship and construct it in public discourses. A normative theory of citizenship must take both of these generic streams of citizenship into account. As I will show, constitutional patriotism includes all the theoretical streams that address the issues of misrecognition at the citizenship level, its theory rests upon the arguments that delegitimize the misrecognizing tendencies of contemporary theory and practice.

3.6. Autonomy as an argument for just citizenship

Apart from recognition as a specific moral request of individuals and groups towards others, another concept that stems from intersubjectivity is autonomy. Autonomy is usually perceived as capacity to live, conceive and realize one's life, with her own motivation and argumentation, deciding on various aspects of that life independently without the distorting external influences¹⁹². As it is the case with other important notions in political theory, there is no unique or common definition of the notion of autonomy. There is no doubt that

¹⁹²Stanford Encyclopedia of Philosophy starts the entry on autonomy by defining it as “an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces”. Christman, John, "Autonomy in Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>>. In this thesis when I use notion autonomy I used it not only as moral but overall “personal autonomy”, what Dworkin defined as a trait that individuals can exhibit relative to any aspects of their lives, not limited to questions of moral obligation (Dworkin, Gerald, *The Theory and Practice of Autonomy*, New York: Cambridge University Press., 1988, 34–47)

it is one of the most present and challenged concepts within liberal political thought. Autonomy might relate to individuals, collectives as well as to political and territorial units. Nevertheless, the prevailing use of this concept within the realm of multicultural theories refers to individual autonomy. Therefore, the criteria by which we judge the presence of autonomous thinking and acting is adjusted to a single average individual, to an *everyman*. Autonomy is an ability and set of conditions, which allow us to define, re-formulate, change and achieve life goals free of manipulative and self-distorting influence. By this definition we refer to comprehensive or *moral autonomy*. Narrowed version of autonomy which is exclusively connected to the public sphere is called *political autonomy*. However, it is possible to differentiate the types of autonomy in a dissimilar manner.

David Johnston defines agency as the capability of ‘conceiving and acting on projects and values including... projects and values that are about things other than that being's own experiences’. Apart from this basic concept of autonomy as agency, Johnston defines moral and personal autonomy. For him, moral autonomy is the characterized by the possession of the sense of justice. ‘To have a sense of justice’ as he explains, ‘is to recognize that other human beings are agents like yourself, with projects and values of their own, projects and values that may impose limits on the things you can do in pursuit of your own projects and values’. Finally, personal autonomy ‘is achieved when a person autonomously chooses his own projects and values.’¹⁹³ While basic autonomy, defined as agency, is necessary for the other two types of autonomy, those two are mutually independent. Instead of emphasizing the differences among them, these types of autonomy should be seen as different perspectives of the individuality: in personal

¹⁹³ David Johnston, *The idea of a liberal theory: a critique and reconstruction*, (Princeton, N.J.: Princeton University Press, 1994), 72-75

autonomy one is only conscious of his will and abilities while for moral autonomy one must consider the universal or common moral claims that might impose restriction on his freedom. Autonomy of the will, for Kant, is the *formal supreme principle* of practical reason and the sole principle of all morality¹⁹⁴. Pure reason is practical of itself alone and gives to a person an universal law, moral law.¹⁹⁵

The legitimation of the laws takes place within the realm of the individual's ethical reasoning in an *a posteriori* manner –we think of possible empirical context in which law will intervene and justly act, in other words *ex post facto*. Though morality might take the form of a priori formal reasoning, where moral norms seem to emerge before the contexts in which they will be applied, the justification of ethical standpoints contained in laws is not found in any transcendent autonomous sphere different to everyday reality. The ethical worldviews and concerns of the community and its morality, the question that multiculturalists are particularly concerned with, is not considered by the pure reason. The critique of this ethical paradigm stresses the changeable and historical character of morality and in its dependence on social and political institutions. This is a simplified version of the great debate within political philosophy between Kantian and Hegelian concepts of morals, a debate that significantly marked the last two centuries of German moral philosophy. The communitarian revival of the Hegelian standpoint through the affirmation of the idea of the individual embeddedness in the community reflected on the argumentation of the national-liberals in the multiculturalism debate.

The exemplary definition of autonomy, that includes reformulation and change as one of its elements, could be easily questioned as excessively liberal. There are certainly many ethno-

¹⁹⁴Immanuel Kant, *The critique of practical reason* (USA: Wilder, 2004.), Google eBook, 24.

¹⁹⁵Ibid, 23.

cultural groups who do not give as much importance to the self-governing individual. The concept of autonomy seems to be hardly applicable to the illiberal minorities and usually represents one of the weakest points of multicultural theories. In the heart of the concept of autonomy lies the idea that the individual is governed by his own ethical and esthetical, in one word axiological, principles. The problem is that these values and principles for the members of some groups come from the community, not as a result of self-reflection. If we see a culture as a set of norms, does it imply that individual autonomy should be a capability to question and revise these norms, by referring to a different ethical dimension? If not, then we might need to look for the other determination of this notion. If yes, then this category might indeed sound as ideologically biased, in favour of the cultures that put the individual before the community.

The other question is: are there other values inherently important for autonomy? What are these goods and who can decide upon them? Finally, if there are some intrinsic common goods connected to the idea of autonomy, like liberal education for example, should the state promote them? These questions and various combinations of answers lie in the heart of contemporary liberal debate. For Raz it is beyond any doubt that the value of autonomy depends on the social circumstances within which the ideal of autonomy is supposed to be affirmed or not. 'The autonomous life depends not on the availability of one option of freedom of choice. It depends on the general character of one's environment and culture. For those who live in autonomy supporting environment there is no choice but to be autonomous: there is no other way to prosper in such a society'¹⁹⁶. This further implies that the liberal state should promote the common goods intertwined with the autonomy.

¹⁹⁶Joseph Raz, *The morality of freedom* (Oxford : Oxfordshire: Clarendon Press , 1988), 391.

Calling autonomy a perfectionist principle Raz states that ‘autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones’¹⁹⁷.

Nevertheless, authors like Kymlicka try to reconcile the ideal of autonomy with their basic claims about the importance of community and group rights. Moreover, he reckons that the respect for minority cultures is beneficial for the respect of the ideal of autonomy. The liberal defense of minority rights, in Kymlicka’s conception of liberal nationalism starts from two assumptions: that individual freedom is intertwined with the membership in a national (cultural) group and that group-specific rights can promote equality between the minority and majority. Kymlicka defends the idea that the grounds of individual freedom, as the basic principle of liberalism, are in the autonomy of a national group. Thus freedom is closely linked and dependant on ‘societal culture’.

Different types of liberal theory can be distinguished according to their commitments in respect of the following two claims: the state ought to promote autonomy (the autonomy claim of the perfectionist liberals); and the state ought not in its action to promote any value (anti-perfectionist claim advocated by political liberals).¹⁹⁸ Instead of the promotion of autonomy in all spheres of life, the state should be focused exclusively on the public sphere. In this way the basic social value is tolerance rather than autonomy.¹⁹⁹

¹⁹⁷Ibid, 417.

¹⁹⁸See Ben Colburn “Anti-Perfectionisms and autonomy,” *Analysis*, 70 (2) (2010): 247-256. The difference between two liberalisms is usually denominated in other dichotomies: autonomy vs. tolerance,, comprehensive vs. political liberalism, ‘Kantian’ and *modus vivendi* liberalism.

¹⁹⁹Galston reckons that the clash between autonomy and diversity is deeply rooted in the historical development of liberalism: liberal autonomy is linked to what he calls Enlightenment project, which understands reason as the prime source of authority, while

The perfectionist liberalism reflects a certain mode of thinking within the history of political thought dating back to Plato. 'The idea that a normative conception of persons might play the key role in an account of the bases of political criticism is one of the oldest organizing assumptions in political philosophy'.²⁰⁰ This anthropomorphic vision of the political order does not take into account the differences among human beings and the collectives which they are involved in. It seems that liberalism overlooks the implication of such a totalizing ethical standing. 'Forced to be free', the Rousseau's idea from *The Social Contract*, does not seem to be in accordance with the basic liberal postulates, especially autonomy. Liberal multiculturalism accepts the value pluralism within the society but some of the particular theories seem to believe in the power of liberalizing minorities. 'Hence liberal reformers inside the culture' in Kymlicka's view 'should seek to promote their liberal principles, through reason or example, and liberals outside should lend their support to any efforts the group makes to liberalize their culture'. The empirical findings of intercultural relations seem to be more complicated than this Enlightenment vision of gradual liberalization would suggest. This standpoint presumes that within the cultures there is a minority of avant-garde liberals who would, together with the external liberal forces, change the dominant matrix of the community. It also assumes that these liberal values are superior to others and that the abovementioned liberals have the duty to affirm them.

Perfectionist liberalism obviously does not represent a constructive field for developing a multicultural theory. The reasons of

liberal diversity is part of the Reformation Project, a project that was aimed at dealing with the plurality within Christian church of the time. See William A. Galston, "Two Concepts of Liberalism", *Ethics*, Vol. 105, No. 3 (Apr., 1995): 525. The difference between two liberalisms is usually denominated in other dichotomies: autonomy vs. tolerance, comprehensive vs. political liberalism, 'Kantian' and *modus vivendi* liberalism.

²⁰⁰ Johnston, *The idea of a liberal theory*, 68

incommensurability and *incomparability* of values, that are the foundation of value pluralism as an ideal, stay in a sharp disagreement with perfectionist liberalism. The reasoning is simple: different values within a society cannot be compared since there is no a common denominator, a general value by which these values could relate to and be ranked. This view, however, leads to moral relativism and narrows the possibility of determining the common normative and constitutional ground for a plural liberal society.

The most common answer of political liberalism to this issue, sort of way to reconcile autonomy and tolerance, value monism and moral relativism, but also to open up the political space for illiberal entities, was to confine autonomy to the public, political sphere while leaving the private realm free of imposing any liberal value, including autonomy. 'Political liberalism views this insistence on the whole truth in politics as incompatible with democratic citizenship and the idea of legitimate law'²⁰¹. Here again we have an important departure from the totalizing encroachment of liberal ideology. In my view it is justifiable to leave certain spheres of life outside the realm of politics. Whatsoever, it is necessary to demarcate where politics as a matter of public interest ends.

The difference between the Kantian concept of autonomy, referred to as *moral* or *comprehensive* autonomy, to a redefined concept of *political autonomy* which satisfies the criterion or reciprocity is explained in this paragraph:

One is political autonomy, the legal independence and assured political integrity of citizens and their sharing with other citizens equally in the exercise of political power. The other form is moral autonomy expressed in a certain mode of life and reflection that critically examines our deepest ends and ideals, as in Mill's ideal of individuality, or by following as best one can Kant's

²⁰¹ John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2011), 447

doctrine of autonomy. While autonomy as a moral value has had an importance place in the history of democratic thought, it fails to satisfy the criterion of reciprocity required of reasonable political principles and cannot be part of a political conception of justice. Many citizens of faith reject moral autonomy as part of their way of life.²⁰²

This perspective of reasoning starts from the idea that every political action, act or decision must be legitimate. The political power may be exercised in according to the principle of reciprocity, only when the reasons given for its justification can be accepted by the citizens.²⁰³ The political autonomy advocated by Rawls is a prerogative of a citizen in a pluralistic society that makes her equal to other citizens in the expression and use of her political power. The full (political, not ethical) autonomy 'is realized in public life by affirming the political principles of justice and enjoying the protections of the basic rights and liberties; it is also realized by participating in society's public affairs and sharing in its collective self-determination over time'²⁰⁴. The political conception of justice affirmed and exercised by the public use of reason and overlapping consensus, takes place over comprehensive doctrine.

Apart from these conceptions of autonomy we might invoke Habermas's somewhat differently conceptualised dichotomy of private and public autonomy. In his understanding, the constitution can be seen as 'an interpretation and elaboration of a system of rights in which private and public autonomy are internally related'²⁰⁵. His approach is based on the need to reconcile the liberal and the republican standpoint

²⁰²Ibid, xlii. Here it should be mentioned that Rawls also uses the concept of rational (artificial) autonomy which is a characteristic of persons inhabiting the original position. This type of autonomy has an auxiliary role in his theory.

²⁰³Ibid, xliv.

²⁰⁴Ibid, 32.

²⁰⁵Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy*, trans. William Rehg. (Cambridge, Mass.: MIT Press, 1996) 280

with regard to the primacy between the concepts of sovereignty and human rights. A point to be dealt with much more extensively later on in my argumentation, namely, co-originality thesis, I use in this occasion in order to point out that mutually enforcing character that, in Habermas's view, public and private autonomy have. Both of these spheres of individual autonomy are endowed with corresponding rights, positive and negative freedoms respectively. Private autonomy is a precondition for a free political participation of the citizens. Public autonomy is a guarantee of the necessary protections of private autonomy.

It seems to me that the concept of autonomy indeed has a crucial significance when it comes to treating minority issues. Comprehensive autonomy as a liberal ideal is not appropriate for plural societies. As Quong explains, 'since free and equal people can and do reasonably disagree about morality, religion, and the good life, the exercise of our political power must be justified in ways that avoid appeal to these, and other, controversial domains'²⁰⁶. That would not be legitimate and would probably cause the disapproval within a society by those groups leading to the lack of legitimacy of political order and the injustice towards the members of the minorities.

In the further elaboration I will try to use Rawls's and Habermas's concepts of autonomy integrally, in order to adumbrate a possible use of the notion of autonomy in the plurality context of multicultural societies. The aim is to keep the importance that autonomy has for the constitutional self-understanding of the citizens of modern liberal states, and as a condition *sine qua non* of peaceful coexistence and toleration but to allow for the necessary derogation of this ideal within private sphere. This 'fusion' should be seen as a justification for the protection of the identity and political interests of minority, the

²⁰⁶Johnatan Quong, "Liberalism without perfection - A précis" *Philosophy and Public Issues (New Series)*, Vol. 2, No. 1 (2012): 2

pluralism of values within a unique citizenship framework. Moreover it should reconcile the rights vs. goods dilemma usually associated with the communitarian critique of Rawlsian concept of justice.

In my view, the only appropriate way to apply the concept of autonomy is via the concept of human rights, especially group rights in the case of minorities. In other words, the ideal of autonomy should be translated into a set of constitutional rights that guarantee the equality of opportunities for the members of the minority and for minorities as such in relation to different cultural and social groups. The set of constitutional principles that should tackle the question of autonomy should particularly be concerned with three important aspects:

1. Any legal articulation of autonomy should be concerned with its legitimate basis: autonomy in the public sphere should be seen as a necessary prerequisite of the citizen in the modern democratic society that enables her to participate in politics as equal, have his rights protected, including the right to pursue her own project of happiness, lifestyle and worldview. It is reasonable to expect that this justification of autonomy will bring additional legitimation in a diversified society since it empowers the individual with rights and protects her from other individuals and political units, including a state.

2. The principle of autonomy still has to protect the autonomy of the minorities (here in the sense of collective autonomy), their identity and lifestyle as long as those do not imperil other constitutional principles related to autonomy in the public sphere. Private autonomy of the members of certain communities should enable them to have and lead the life which is not based on or is even contrary to the concept of autonomy. Paradoxical as it may sound, the concept of private autonomy should be rather seen as a liberal barrier to the invasive influence of the state rather than a maximalist ethical concept. Having said that, this concept of private autonomy should not be confused with moral

autonomy, which should remain to be regarded as a particular ideologically biased concept and not as a value that state should promote.

3. The idea of private autonomy, already established as a legitimate principle, should secure that individuals within illiberal groups enjoy the necessary protection. Thus, the minorities within minorities might invoke private autonomy as a way to protect their right to specific identity and worldviews, which are not shared by the groups they belong to. The basic principle according to which the groups can legitimately form and exist, is now used for the protection of the sub-units, i.e. internal minorities.

The idea is to combine Rawls' dichotomy (political vs. moral autonomy) and one used by Habermas (public vs. private). By combining these types of autonomy we find the necessary connection between rights and goods. Rights and goods in this conception correspond to each other: one the one hand, rights serve us as a way to preserve our right to conceive and achieve different types of good, and on the other hand the goods of us as politically and fully morally autonomous individuals legitimizes the existence of rights preserving our public and private autonomy. This concept of rights remains detached from particular moral conceptions of the good life. Private autonomy is the guarantee that we can freely develop and pursue our goods while public autonomy empowers us as the members of shared common political sphere self-impose the rules we find legitimate.

3.6.1. Private/public dichotomy

Culture defined in the way I portrayed above in a way might be reflected as a totalizing concept which leaves little space for the

private/public dichotomy, necessary for the understanding of contemporary societies, their legal and political foundation. If our cultural identity is prevailing, and if culture is the unique, comprehensive and the most adequate system for interaction among individuals, then the division between private and public makes no sense. Our beliefs, collective identities and practices define our capacity for political communication that it would be impossible to leave them outside the public sphere. Public sphere, as a space of common deliberation and action for the purpose of collective interests, is disavowed by multiculturalism as a matrix of domination by the majoritarian discourse. For multiculturalists this prevailing discourse is the symbol of a false unity and an area of political life which is more or less unintelligible to a 'culturally embedded' citizen²⁰⁷. The same critique came from feminist authors²⁰⁸.

The public and private are a dichotomy. These two concepts cannot exist independently and the task of political theory is justifying the demarcation and adjudicating the concrete line that is to be drawn between those spheres. It is a lesson from the history of political thought that only totalitarian ideologies tended to equalize private and public. The private sphere of the citizen was fully dedicated to the aims of a totalitarian state.

²⁰⁷ Fraser, for example, calls for subaltern counter-publics: "(P)arallel discursive arenas where members of subordinated social groups invent and circulate counter-discourses to formulate oppositional interpretations of their identities, interests and needs" (Fraser, Nancy "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in Craig Calhoun (ed.). *Habermas and the Public Sphere*. Cambridge, MA: MIT Press) 123

²⁰⁸ Some feminist have seen the emergence of public/private as the revival of the same division known to old Greeks where private (*oikos*) was reserved for women and children, where man was unquestioned master and public (*polis*) where men exercised their liberty. The idea of public sphere that liberalism is trying to bring in is based on the same patriarchal foundations. See e.g. Pateman, Carole "Feminist Critiques of the Public/Private Dichotomy." *Public and Private in Social Life*. S.I. Benn and G.F. Gaus, eds. (New York, NY: St. Martin's Press 1983). pp. 281-303.

The question could easily be related to the issue of two freedoms: the freedom of the antique democracies and the freedom of modern nation states. ‘Among the ancients’ as Benjamin Constant contends, ‘the individual is nearly always sovereign in public affairs but a slave in all his private relations.’ In modernity, political individuals realized the dangers of the omnipotent Leviathan, delineating the private sphere by the concept of negative freedom. The modern concept of negative freedom, usually formulated as a set of constitutional and legal constraints on the absolute power of those in public offices and state itself, bounds us to distinguish citizen and human being, political and non-political, public and private.

Habermas states that ‘the constitutional state is committed to grant equally the private and civic autonomy of every citizen, and it should give ‘the opportunities for both the pursuit of one's own conception of the good, and for the public use of reason (to put it in Rawlsian terms), are complementary.’²⁰⁹

In the table I depict the overlapping of the two normative arguments and citizenship. Rights as the sphere of intersubjective recognition in Honneth’s system, the domain of our intersubjective equality, stem from both public and private autonomy. In the context of citizenship, these are clearly defined through the dimension of civil and political, economic and social rights. In this model, intersubjective acceptance of equality has a central role.

The table shows the connection between the notions I have used here: autonomy, recognition and citizenship. It also shows how these categories are intertwined and mutually dependent: for example that rights, as relations of recognition between the equals, are not only reserved for the public, and that they necessarily include also participation ie. cannot be reduced only to legal (rights) dimension etc.

²⁰⁹Habermas, “Multiculturalism and the Liberal State”, 851.

This table is also a helpful tool when important issues of multiculturalism are dealt with: internal minorities, private and public dichotomy, spheres of citizenship etc.

AUTONOMY	RECOGNITION (Honneth)	CITIZENSHIP
PRIVATE	LOVE	CIVIL AND POLITICAL ECONOMIC SOCIAL RIGHT
	RIGHTS	
PUBLIC	SOLIDARITY	PARTICIPATION
		IDENTITY

Table: Autonomy, recognition, citizenship

1.7. Conclusion

In this part I proposed a different perspective on minorities within citizenship theory using some already elaborated theoretical tools, like intersectionality and relationality. Through these concepts I try to define the notion of identity as the *differentia specifica* of the minorities I am dealing with in this thesis.

The main arguments exposed in this chapter could be summarized in this way. Recognition arguments says that we are entitled to freely enjoy flourish our different lifestyles and worldviews without state misrecognizing that right of ours. In multicultural societies, this means that state should refrain from recognizing and affirming majoritarian cultural groups and that is obliged to enact the principle of non-misrecognition regarding its citizens, both as individuals and as members of specific cultural and social groups. As I argued, every attempt to separate citizens on the basis of their culture or some other social or biological particularity lowers the possibility of a genuine mutual recognition. The only genuine form of recognition takes place within the common public sphere, determined by the legal and political norms. That common sphere is citizenship, our shared status that defines us as members of a political community. Even if this separation of ethnical or political units might be the temporary solutions in war-torn and conflict-affected societies, it cannot be the final normative answer to the challenge of common life in multicultural societies.

Political liberalism argument confirms this idea by stating that only the political principles (in their normative and symbolic sense) that we can autonomously approve of. In multicultural societies this practically means that only basic principles of common life are to be the foundation of the imaginary and enacted social contract. I dealt with the notion of autonomy, one of the thorny concepts of contemporary

liberalism. I propose the integral use of autonomy being related to both rights and goods, if. Conceived in this way, private autonomy should guarantee that the preservation of our goods – mores and identity (as a result of our moral autonomy) while public autonomy should empower minorities to be part of self-governing *demos* and legitimize or not legitimize universally binding rules.

These two arguments taken together will make a theoretical platform for a different concept of citizenship that I define as construct as constitutional patriotism. The additional normative value constitutional patriotism has for minorities is contained in these two arguments which reconstruct the very idea of citizenship. To have equal standing, not to be misrecognized and define main dimensions of citizenship (rights, participation and identity) in the terms of universally acceptable principles and rules is the normative core of constitutional patriotism that makes it normatively suitable for all identity minorities in plural contemporary democracies.

Chapter IV: THEORETICAL FOUNDATIONS OF CONSTITUTIONAL PATRIOTISM

Constitutional patriotism is a relatively new concept in the kaleidoscope of political theory. It might relate to different and often opposite empirical and theoretical phenomena. There are various approaches to constitutional patriotism and these approaches shed light on different aspects of constitutional patriotism. In this chapter I will simultaneously develop a theory of constitutional patriotism and indicate its normative implications for minorities.

As indicated in the introductory parts of this thesis, the main focus is on the notion of constitutional patriotism as a concept of political order, and how this notion relates to the issue of citizenship and accommodates minorities. That is why it seems justified to start with the theoretical investigation of constitutional patriotism.

Constitutional patriotism can be defined as a form of citizenship that entails identification and allegiance to the set of normative components of the constitution of a certain polity. Constitution in the phrase should be understood rather as a political and legal order than exclusively a written, comprehensive, codified legal document of the principal legal validity. This operational definition would remain incomplete if not supported with an extensive theoretical examination of constitutional patriotism.

The syntagm of constitutional patriotism was coined by Dolf Sternberger. Etymologically the concept invokes two seemingly contrary notions: constitutionalism and patriotism. Müller calls this

‘aspirational oxyomoron’²¹⁰. Since these notions are so broad, constitutional patriotism cannot be the simple summation of the scopes of these two concepts. Constitutionalism refers to the set of rules of a certain polity – the laws enacted in order to protect the rights of citizens and limit the power of state. Patriotism, however, points out the importance of a loyalty towards that political unit. So, while the former concept is predominantly liberal and individualistic, the other is communitarian, collectivistic. Constitutionalism invokes the rational basis of law making while patriotism is emotionally galvanized. Constitutionalism implicates universal norms²¹¹, patriotism is by definition particular.

A broader understanding of the historical precursors and theoretical elaborations of constitutional patriotism is given in this chapter. Here, I give the overview of the theories in which constitutional patriotism is promoted as a new, distinctive concept. In the subsequent section, I focus on the critique of the constitutional patriotism and try to offer a rebuttal of crucial arguments. One might say that this rudimentary concept was somewhat more critiqued than elaborated. Certainly, the rebuttal by those in favour of constitutional patriotism has helped the concept to mature and gain stronger normative argumentation.

²¹⁰ Müller, Jan-Werner, *Constitutional patriotism*, (Princeton Univ. Press, 2007) 5

²¹¹ It is true that constitutional order finds itself in particular social, political and historical context and in this way loses some of its universality. Nevertheless, on a conceptual level we can say that constitutionalism is primarily defined by universalistic claims. Universalism here should be understood in two meanings: universalism in scope (it relates to all subjects constituting a polity – *ratione territoriae*, *ratione personae*) and universalism content (it is significantly animated by the language of rights in the way it was formulated by the common legal heritage).

4.1. Dolf Sternberger - the historical perspective and genealogy issue

When constitutional patriotism is defined and when the source of its normative power is to be determined, two possible errors might occur. Both of these issues, taken in their extremes, are usually labelled as *genealogy issue*. Before dealing with Sternberger's concept of constitutional patriotism, I will briefly discuss this issue.

The first defining flaw is to treat this concept as purely theoretical, born in the mind of social philosophers that still looks for its use in *realpolitik*. This approach is wrong for at least two important reasons. Firstly, it deprives this concept of its practical side and in this way questions its feasibility in the real life context. Crucified between the realm of theory which is ideal and practice which is hyper determined, the opponents of constitutional patriotism use this as the main argument why constitutional patriotism simply 'cannot work'. Secondly, this approach diminishes the normative power of this concept that is clearly spotted only when this concept is put in a causal sequence of historical events. Only by judging the concrete historical moments and the constitutional, social and doctrinal may we evaluate the normative significance of constitutional patriotism.

The contrary problem is to equate this notion with the specific historical background in which it was promulgated. Over-historicizing of this notion deprives it of its more universal applicability. It limits the significance of constitutional patriotism to a particular historical moment. Being exclusively historical, this concept cannot 'travel' since the historical circumstances in their complexity can never be the same. Finally, it overlooks various other historical situations in which some form of constitutional patriotism emerged.

The optimal approach to constitutional patriotism necessarily needs to explore and analyse the historical context in which it emerged. However, when theorizing this concept, one is not obliged to replicate its historical shape or the one that was given to it by person who coined its name. I will now briefly depict the historical moment of the birth of constitutional patriotism and shed some light on its normative implications.

The notion of constitutional patriotism re-emerged in the context of historians' dispute (*Historikerstreit*) during the mid-1980s, between conservative and leftist intellectuals over the evaluation of Nazi crimes and critical memory in general. Since the shared history was full of crimes committed in the name of ethnicity, the past, nation or the state itself could not be legitimate reasons for the national unity. There was a need for a different focus of common identity and allegiance. Thinking that the democratic basis of identity should be looked for in the basic norms of the polity rather than in ethnic affiliation, Dolf Sternberger elaborated his constitutional patriotism in *Frankfurter Allgemeine Zeitung* of 23 May 1979, on the date of 30th anniversary of German Basic law (*Grundgesetz*).²¹²

We are still mourning, we are still hoping. But meanwhile national sentiments have been augmented by a clear conception of the benefits deriving from this Basic Law. The constitution has emerged from the shadow in which it was created. To the extent that it came to life, that powerful actors and actions emerged from mere regulations, that the political organs it created took form, that we ourselves exercised the freedoms guaranteed therein, and that we learned to move within and with this state, a new, second patriotism formed imperceptibly, one founded upon the constitution. The national sentiment

²¹² see Müller, Jan-Werner, *Constitutional patriotism*, (Princeton Univ. Press, 2007) 24

remains wounded; we do not live in a full Germany. But we live in a full constitution, a fully constitutional state, and that itself is a kind of fatherland.²¹³

The fatherland is constitution not the territory inhabited by conational. National sentiment is wounded but it seems that it is not necessary for our patriotic need. The production of the political continued despite the separated parts of Germany – through the constitution and the way it expressed and defined a new political community. Finally, in Sternberger’s view constitution was a guarantee of citizens’ freedoms in a fully constitutional state. In other words, we have a transition in understanding of the national state and the relation between the concepts of nation and state. Particular concept of nation yields the floor to the more universal idea of rights which now becomes the unifying object of patriotic sentiment. For German national and constitutional history this was rather a Copernican shift.

From Sternberger’s text we can see the way he sees the distribution of power and authority: ‘State authority is not concentrated in one place, neither at the top nor the bottom, neither on the left nor the right; instead, it is distributed widely.’ Authority is not neither exclusively democratic nor elitistic, it is not determined by ideological concerns – it is rather distributed widely and from the rest of the text we can read that what he thinks it resides in a living constitution as an overall regulator of social life. Constitution is not limited only to what Rawls would regard as sphere of public use of reason – it includes political participation in all its forms: “Citizens’ initiatives and demonstrations are also part of a living constitution: the state is present not only in the squads of police officers who escort them and assure the peacefulness required by the constitution.” Thus, already at the roots of

²¹³Dolf Sternberger, “Verfassungspatriotismus” [“Constitutional Patriotism”] (1979), in *Schriften* [Writings]. Frankfurt am Main: InselVerlag, 1992, vol. 10, pp. 13-16. Translation: Allison Brown. All further citations taken from the same source.

the idea of constitutional patriotism we see a very broad conception of constitution.

Sternberger's constitutional patriotism is decidedly statist and bureaucratic. As he explains "[o]ne must only understand that there can be no freedom without a state. And no human rights outside of the state, which converts them into civil rights. And no state without bureaucracy". Constitution depends on the state as its guarantee. State on the other side cannot exist without the complex apparatus that organizes the whole system of political and social communication.

Important aspect of Sternberger's notion of constitutional patriotism considers the idea of militant democracy. This probably stems from the historical experience of German democracy. Sternberger explains that a patriotic duty is to defend constitution "against declared enemies"²¹⁴. In plural democratic societies militant democracy might bring about difficulties of practical nature. In the context of contemporary multi-ethnic European states with plurality of comprehensive and religious doctrines, this principle of patriotic allegiance can be highly problematic. The view over what constitutes basic democratic or liberal order might be divergent.

The trauma of the fall of Weimar republic and the emergence of Nazism shows fragility of democracy and its inner contradiction: the strength of a liberal democratic order might depend of militancy by which we are ready to defend it. The solution to this problem is not simple, though Sternberger's vision does bridge the discrepancy between political and patriotic of Germany of that time. However, I do

²¹⁴ Many scholars find article 21 section 2 of Basic law the embodiment of 'militant democracy' principle. It stipulates that parties which 'by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.'

https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_1aw-data.pdf

not believe that Sternberger offers us a comprehensive argumentation in favour of constitutional patriotism in the context of contemporary plural European states.

4.2 Constitutional patriotism in the kaleidoscope of Habermas's social theory

Constitutional patriotism is usually associated with Habermas's political philosophy and only recently with his intellectual debates on the future of the European Union. As he explains, the universalist core of the constitutional state that was a result of American and French Revolutions is contained in *democracy* and *human rights*. "This universalism still has its explosive power and vitality, not only in Third World countries and the Soviet bloc, but also in European nations, where constitutional patriotism acquires new significance in the course of an identity transformation."²¹⁵ These two notions are essential for understanding his political theory and his understanding of history of political thought. His theory of post-metaphysical reason (4.2.2.1), facticity and validity (4.2.2.2.), and legitimacy (4.2.2.4) reflect this dichotomy that he tries to overcome in his cooriginality thesis (4.2.2.3). I will try to elaborate briefly these salient theoretical questions of Habermas philosophy in the light of constitutional patriotism.

In the appendix to *Between facts and norms*, one of his *opera magna*, Habermas quotes Rudolf von Thadden, German historian, at the German-French meeting in Belfort: "With immigration at seven to eight percent, nations run the risk of changing their identity; soon they will no

²¹⁵ Habermas, Jürgen, 'Popular sovereignty as procedure' in James Bohman, and William Rehg, eds. *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997) 37.

longer be able to understand themselves as monocultural societies, if they do not provide any points of integration beyond pure ethnic descent. In these circumstances it becomes urgent that we return to the idea of the citizen as the *citoyen*, which is at once more open and less rigid than the traditional idea of ethnic belonging." It is clear that the idea of constitutional patriotism is the change of citizenship in general as a ground notion of political life since its emergence. Plurality of cultural and worldviews within modern states makes us rethink the role of culture in political life.

Habermas presents constitutional patriotism within a dichotomy of political culture and culture in general. "A liberal political culture is only the common denominator for a *constitutional* patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society."²¹⁶ While culture relates to overly thick ethical, esthetical and generally axiological values, political culture results from the exchange of different traditions' perspectives. These statements are rather conclusions that hide an exuberant philosophical reasoning. I will shed some lights on certain parts of his political theory that are relevant for the issue of constitutional patriotism.

4.2.1. A postmetaphysical theory of reason and discourse ethics

In the course of developing his social theory Habermas advocates a type of post-metaphysical theory of reason. This theory is aimed at reconstructing the normative conditions of legal and political intersubjective communication. Roughly speaking, its main idea is to

²¹⁶ Habermas, Jürgen, *Between facts and norms: contributions to a discourse theory of law and democracy*, (Cambridge, Mass.: MIT Press, 1996, Appendix II) 500

overcome the abyss between morality and ethics, morality and democracy, facticity and validity. This change also reflects on the idea of *political* as such by giving it a special normative valence.

Referring to other authors that tried to distillate law from comprehensive ethics, Habermas points to “John Rawls's "political not metaphysical" theory of justice and Ronald Dworkin's theory of "law as integrity.”²¹⁷ His concept of reason reflects the overall linguistic turn as one of the major streams of Western philosophy in 20th century. As some authors indicate, “for Habermas a postmetaphysical vindication of reason is possible only insofar as philosophy....can show how the use of language and social interaction in general necessarily rely on notions of validity, such as truth, normative Tightness, sincerity, and authenticity.”²¹⁸ The notions of legitimacy and validity are thus linguistically construed which implies that the circumstances of speech acts in the public sphere are crucial for determining the overall value of these notions.

The change in the concept of reasoning had to find its correspondence in the overall political and ethical – in one word, normative self-understanding of modern subjects. The difference between moral and ethical in Habermas view only partially reminds Kantian position.

The distinction between autonomous and heteronomous actions has in fact revolutionized our normative consciousness. At the same time, there has been a growing need for justification, which, under the conditions of postmetaphysical thinking, can be met only by *moral discourses*. The latter aim

²¹⁷ Ibidem, 6. Though elaborating these two complex theoretical framework goes beyond the scope of this thesis one common feature with Habermas's theory might be determined at this point. Namely, both Rawls's transition from justice as fairness towards political justice and Dworkin's law as integrity, which presumes that rights should be understood as constructively interpreted by judges and stemming from community's conception of justice and fairness, imagine a sort of *shared consensus* over matters of justice.

²¹⁸ William Rehg, Introduction to *Between facts and norms* by J. Habermas, (Cambridge, Mass.: MIT Press, 1996) xiii

at the impartial evaluation of action conflicts. In contrast to ethical deliberations, which are oriented to the telos of my/our own good (or not misspent) life, moral deliberations require a perspective freed of all egocentrism or ethnocentrism. Under the moral viewpoint of equal respect for each person and equal consideration for the interests of all, the henceforth sharply focused normative claims of legitimately regulated interpersonal relationships are sucked into a whirlpool of problematization.²¹⁹

Unlike in Kant's theory, morality, as well as rationality, does not lie in private individual ethical and practical reasoning but results from interpersonal interaction. Since the discursive democracy and discursive ethics are most focused on the communication process itself rather than its presumed aim it is necessary to determine conditions that would ideally have to be satisfied by a form of communication free of the kinds of distortions that impede the argumentative search for truth or rightness. These conditions are stated more formally by Habermas in the form of three principles: principle of universalisation, participation and free acceptance.²²⁰

There are rules which should enable an ideal speech situation, a context in which discourse principles may be fulfilled. In "Discourse Ethics" there are the reasons of discourse ethics: 1. every subject with

²¹⁹Habermas, *ibidem*, 97.

²²⁰ Habermas, Jurgen, Discourse Ethics: Notes on Philosophical Justification. In *Moral Consciousness and Communicative Action*, 43-115. (Cambridge: MIT Press, 1990.) Principle 1: a principle of universalization, one that intends to set the conditions for impartial judgment insofar as it "constrains all affected to adopt the perspectives of all others in the balancing of interests" . The principle of universalization itself states: All affected can accept the consequences and the side effects [that] its [a proposed moral norm's] general observance can be anticipated to have for the satisfaction of everyone's interests (*ibid*, 65); Principle 2: "Only those [moral] norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse" (*ibid*, 66). The conditions for the practical discourse out of which universally valid norms might emerge include the participation and acceptance of all who are affected by such norms, as such norms are tightly connected to their interests.; Principle 3: Consensus can be achieved only if all participants participate freely : we cannot expect the consent of all participants to follow "unless all affected can freely accept the consequences and the side effects that the general observance of a controversial norm can be expected to have for the satisfaction of the interests of each individual" (*ibid*, 93).

the competence to speak and act is allowed to take part in a discourse. 2a. everyone is allowed to question any assertion whatever. 2b. everyone is allowed to introduce any assertion whatever into the discourse. 2c. everyone is allowed to express his attitudes, desires, and needs. 3. No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (1) and (2).²²¹

This part on discourse ethics has clear implication for constitutional patriotism. Through there can be particular ethics individuals and groups can still come up with a common morality that results from their common interaction and communication. The relevance of the truthfulness of the results of such deliberation depends, as explained, on the conditions in which a debate takes place. For a constitution to be an object of allegiance and to enjoy full legitimacy the context in which it is deliberated must be in accordance with the rules of dialogical requirements of discourse principle. Furthermore, taking a minority standpoint, a member of minority is entitled to express his attitudes, desires and needs and only those claims that have her approval as one of the affected in her capacity as participants in a practical discourse can be considered legitimate.

4.2.2. Facticity versus Validity – Habermas’s Concept of Law

In Habermas’s social philosophy, law should be understood as an overarching communication matrix that enables the exchange between system and lifeworld, between the network of our determined and

²²¹ (Habermas, Jurgen, *Discourse Ethics, : Notes on Philosophical Justification in Moral Consciousness and Communicative Action*, (Cambridge: MIT Press, 1990) 86, also Habermas, Jurgen, *Between Naturalism and Religion*, C. Cronin (trans.). Cambridge: Polity, 2008, 50)

expected relations and background contexts and discourses, roughly said between public domain and private predispositions. For Habermas, “the language of law, unlike the moral communication restricted to the lifeworld, can function as a transformer in the society-wide communication circulating between system and lifeworld”.²²² That language of law should have specific rules and grammar which differs from moral communication. This is to say that law emerges in a specific discourse context where specific reasons prevail.

Legal system and law cannot be understood merely in a functional way. The subjects within a complex society with vast range of differences communicate via law. The whole integration of the society occurs in the process of mutual recognition of validity claims which are the other name for arguments in favour of imposed obligations and rights. Acceptability of validity claims is legitimation of facticity – laws as a given and imposed medium of intersubjective communication.

But law must do more than simply meet the functional requirements of a complex society; it must also satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims.²²³

The system of law includes two connected but essentially different phenomena: the positivity of law (sociological, facticity) and the legitimacy claimed by it (normative, validity). This Janus-faced nature of contemporary law can be conceptualised in two ways: as facticity, sociologically identified network of imposed laws and validity, as internal legitimation of the laws by the citizens of a polity. Habermas’s reconstruction of the social contract, as well as his vision of deliberative democracy, has its roots in this dichotomy.

²²² Habermas, *Between facts and norms*, 81.

²²³ *Ibidem*, 83.

Ideally, democracy, which is essentially about public autonomy and external acceptance of the rules, should correspond to our internal justification of these rules. Only then the dialectics of internal and external legitimation of laws make sense and our public and private autonomy equilibrate. The tension between facticity and validity within a democratic polity can be resolved only if the laws can be fully legitimized by those on whom these are imposed, which, in other words, requires that the subjects of law can identify themselves as the law's authors. This ideal of deliberative democracy brings some normative impact for the theory of constitutional patriotism. The political and social substance that enjoys our respect and allegiance can be found only in the basic set of principles and rules – since these are legitimized and crucial for the overall functioning of the polity. Feeling and showing patriotic attachment to any other kind of particular political phenomenon (practice or narrative) would not be normatively desirable since it does not include common internal acceptance by all members of a polity. If only norms that enjoy internal validity of polity's subjects can be imposed via constitutional and legal acts it implies that majoritarian norms that include particular ethics should be excluded.

Constitutional patriotism as a form of citizenship implies that the only domain of normatively relevant political unity can be contained within basic constitutional norms and principles. We as citizens of a polity are unified by principles that determine our common life, our inter-subjective relations and impose the limits on our liberty that we can legitimize for the sake of coexistence in an ordered society. No symbolic or normative concept should be an object of our patriotic loyalty unless it corresponds to legitimate basic principles and rules²²⁴.

²²⁴ Continuous contestation of these rules would be a clear sign of illegitimate nature of these rules. Nevertheless, this contestation has to be sound and reasonable and in harmony with minimal rules of rule of law and democracy. Ergo, radicalism, terrorism and fundamentalism cannot be considered reasonable contestation of the order.

These principles and rules should be such to allow us to live freely and pursue our life goals without the intervention of state or any other party.

4.2.3. Cooriginality thesis

The solution for the biggest antipodes in modern political theory, which can be described through binary opposition: republicanism vs. liberalism, security vs. liberty, public vs. private autonomy, democracy vs. human rights, positive vs. natural law, coercion vs. legitimacy, Habermas found in his concept of co-originality. Namely, though all these concepts entail opposite ideas and reflect diversely the idea of main values, the role and nature of the state and citizen, they still emerge in the same conceptual point of the creation of modern state.

The two great traditions of liberalism and republicanism cross their spears in the primacy dilemma between human rights and sovereignty. As Habermas notes "liberal" traditions conceive human rights as the expression of moral self-determination, whereas "civic republicanism" tends to interpret popular sovereignty as the expression of ethical self-realization²²⁵.

The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form. I understand this interpenetration as a *logical genesis of rights*, which one can reconstruct in a stepwise fashion. One begins by applying the discourse principle to the general right to liberties—a right constitutive for the legal form as such—and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively I assume

²²⁵ Ibid, 99.

an elaborated legal shape. Hence the principle of democracy can only appear as the heart of a *system of rights*. The logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law—hence the democratic principle—are *co-originally* constituted.²²⁶

Thus, democracy and rights, legitimising and legislative power, constitute each other through private autonomy which retroactively assumes legal shape – transforming legal forms into legal norms, ie. rights. For him, this is a logical dialectics of rights genesis.

Habermas introduces the three categories of rights *in abstracto* that define private and public autonomy of persons who consider one another as free and equal: a. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties* and two corollaries b. Basic rights that result from the politically autonomous elaboration of the *status of a member in a voluntary association of consociates under law*. c. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*. As Habermas explains these three categories of rights result from the application of the discourse principle to the medium of law, “to the conditions for the legal form of a horizontal association of free and equal persons”. These rights should not be confused with *Abwehrrechte* - liberal rights against the state (negative personal rights), because “they only regulate the relationships among freely associated citizens *prior to* any legally organized state authority from whose encroachments citizens would have to protect themselves”.²²⁷

²²⁶Ibid, 121.

²²⁷Habermas, *ibid*, 122.

Discussing the normative theory of citizenship I already pointed to the difference between relations among the citizens and relations between citizens and the state. I believe that the laws governing the relations among citizens in the moment of social contract must remain the same in post-contractual reality. The liberal and democratic state, which is constituted with such a contract, should preserve the principles of equality and freedom that exists among citizens and put it in the basis of the new social contract. The relations between state and a citizen should be such that they do not imperil the already established principles of liberty and equality. This reading of Habermas might be crucial for our understanding of minorities within contemporary plural societies. If the equality (of status) and liberty (of lifestyles and worldviews) as principles require that our identity is fully recognized then these become the essential elements of public autonomy, as our capacity to form a polity through a contractual (constitutional) arrangement and consequentially element of our private autonomy through which we legitimize the state. Unless our right to have our identity fully recognised is respected, we can rightfully consider and express delegitimation of the public order of the community we belong to.

Again, the rights that protect our liberty and equality do not have to be construed necessarily as a group targeted concept – a set of amending rules that relates to particular kinds of minorities. These rights can be also formulated generally – as a right to non-discrimination, a principle that can be easily operationalised within any legal system. But even when they are formulated, since in certain cases due to historical or current political reasons it must be so, they do not have to change the overall idea of common citizenship – they should rather be understood as a way to make citizenship live to the ideals of equality and liberty that constitutional platform guarantees. Common citizenship as a legal, intersubjective platform that allows for acceptance of axiological

principles of common life, is not against the idea of recognising difference when it is contextually necessary to do so, but ideally, and Habermas's theoretical apparatus suggests the same, that platform should be such not to include any form of misrecognition.

4.2.4. Legitimacy: moral vs. Legal norms

The law and morality are not congruent as in the long tradition of platonistic philosophy. The importance of recognition and its various forms is also evident in within Habermas's theory of law and the differentiation between morality and legality. Namely, he differentiates *moral norms*, those that regulate interpersonal relationships and conflicts between natural persons who are supposed to recognize one another both as members of a concrete community and as irreplaceable individuals from *legal norms* that regulate interpersonal relationships and conflicts between actors who recognize one another as consociates in an abstract community first produced by legal norms themselves.²²⁸

The contemporary states should be understood as communities organised legitimately binding legal norms and not particular ethics. It would be too difficult for this analysis to go into the process of state formation and adjudicate the legitimacy of various forms of nation building. But with the exception of colonial states, occupied territories and semi-sovereign territories the process of constitutionalisation was the main process and source of legitimacy in modern states. Thus, it is the legality and legitimacy of the basic constitutional norms that matter at the end although morality plays a role in the general formation of legal norms.

²²⁸ See *ibid*, 112.

Habermas defines democratic principle of legitimacy in a way that “only those statutes may claim legitimacy that can meet with the assent (*zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted”²²⁹. There must be a point of view from which the norms can be *impartially justified, a principle that* reflects those symmetrical relations of recognition built into communicatively structured forms of life in general. To introduce such a discourse principle already presupposes that practical questions can be judged impartially and decided rationally.

Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses....The predicate "valid" (*giltig*) pertains to action norms and all the general normative propositions that express the meaning of such norms; it expresses normative validity in a nonspecific sense that is still indifferent to the distinction between morality and legitimacy! I understand "action norms" as temporally, socially, and substantively generalized behavioural expectations. I include among "those affected" (or involved) anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue. Finally, “rational discourse" should include *any* attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations.²³⁰

How could this be interpreted in the context of constitutional patriotism? Two types of norms have different application scope. In contemporary plural societies this would be a prudent way to overcome the opposite or conflicting moral norms by referring to ones which have democratic legitimacy. Constitutional patriotism is based on the idea that only a minimum of political principles, shared by all political

²²⁹*Ibid*, 110.

²³⁰*Ibid*, 107.

subjects, should be the part of constitutional core. In the same time this protects the minorities from the domination of majoritarian moral norms by guaranteeing the basic minimum principle that guarantees mutual recognition since only those norms to which all possibly affected persons could agree in a rational discourse can be considered valid. Taking the divergence of modern plural society it is reasonable be in favour of the minimalist rather than maximalist expectation to the core set of constitutional norms.

Why does co-originality, as outlined by Habermas, matter in the context of minority standpoint on citizenship? Because the most of citizenship theories begin with the majoritarian perspective: (liberal) national and republican in particular. These versions give precedence to the group entity that shares a dominant culture, certain thick values, collective political autonomy or particular cultural worldviews. Most of these theories do indeed recognise the rights of minorities but seem to either accept (liberal nationalism) or ignore (liberal egalitarianism) the way that the general idea and practice of citizenship is already biased. Co-originality helps us rethink the relation between private and public autonomy, it stands in the heart of contractarianism and the idea that state as an escape from the state of nature starts with social contract²³¹. Social contract can be established only among the units that possess the basic contractual rights and the free will to achieve social contract. The liberty of individuals, as well as groups', is in the heart of social contract. That is why constitution must build liberty in its foundations.²³²

²³¹ This social contract, as I have explained previously, should be consieved as a hypothetical game in which we rethink the laws in some kind of original position but without vail, ie. with full knowledge of contextuality of our status within a real political order.

²³² see Dimitrijevic, Nenad, *Ustavna demokratija shvaćena kontekstualno*, (Fabrika knjiga, Beograd) 26

4.3. Müller's theory of constitutional patriotism

Jan-Werner Müller is among the few authors who dealt with the constructive but still critical elaboration of the concept of constitutional patriotism. In other words, his principal aim was to further develop the theory of constitutional patriotism and answer the critiques instead of deconstructing it. In *Constitutional Patriotism*, Müller defines this concept as a new theory of citizenship and civic allegiance for contemporary culturally diverse liberal democracies. It would be not an overstatement to say that this book's contribution to the constitutional patriotism in academic debates is unquestionably crucial.

In the central chapter of the book, Müller develops a theory of constitutional patriotism. After dealing with the historic perspective of constitutional patriotism in the previous chapter, here he broadens the discussion toward 'a general account of constitutional patriotism'²³³.

The first remark that Müller makes about constitutional concept is its normative dependency. Namely, constitutional patriotism as such is not a fully developed theory, it is only a part of 'a response to the challenge of conceiving, justifying, and maintaining political rule'. It is rather a way of collective self-reflection, 'ethical self-clarification' that needs to give answer to the source and mode of the rule over ourselves²³⁴. Constitutional patriotism 'conceptualizes the beliefs and dispositions required for citizens to maintain a particular form of

²³³Müller, *ibid*, 46.

²³⁴*Ibidem*.

political rule'²³⁵. In other words, Müller sees constitutional patriotism as an empty and critical concept that needs an additional normative input. That normative substance he sees in a moral background theory of fairness. He reckons that it is possible to have positivist and moral reading of constitutional patriotism, the former as an attachment to persisting political arrangements irrespective of their orientation toward human rights and democracy, and moral, the one he advocates, that renders political arrangements legitimate through an additional normative theory.

The even thicker version of constitutional patriotism might include what Müller calls a 'normative surplus' which might be a justification for civil disobedience. This means that, while polities that subscribe themselves to constitutional patriotism are quite immune to illiberal and antidemocratic tendencies they nevertheless become vulnerable to 'normative disturbances'²³⁶ that civil disobedience might bring about.

In Müller's view the general theory of constitutional patriotism should be able to provide an account of the three categories: object of attachment, the mode of attachment and the reasons of attachment. The core normative impulse of constitutional patriotism in Müller's view is 'the idea of individuals recognizing each other as free and equal and finding fair terms of living together'. In other words he repeats the contractual principle that political rule 'ought to be justified to those subject to collective decisions'. The justification is not needed for every single legal act, it is rather the 'the law of lawmaking' that needs to be justified. Once that the 'constitutional essentials' are determined it possible to expect from citizens to accept the output of such a political system as legitimate even when it does not reflect their views. In such a

²³⁵*Ibid*, 51.

²³⁶*Ibid*, 49.

situation ‘...also reasonable disagreements about particular interpretations of the constitution itself, should be acceptable even to those who find themselves in a minority’²³⁷. These are the reasons of attachment that lie behind constitutional patriotism, the sociological explanation of the attachment expressed for constitutional patriotism:

As far as reasons for attachment are concerned, I’ve already indicated that citizens who seek to treat each other as free and equal in a common social space have reasons to adopt the principles of constitutional democracy. They also have reasons to sustain a struggle for the best realization of these principles through the course of reasonable disagreements.²³⁸

For Müller, the object of attachment of constitutional patriotism is not the constitution understood in a positivist way. Rather it is abovementioned ‘idea of citizens mutually justifying political rule to each other’²³⁹. In the paradigm of constitutional patriotism, fair and democratic procedures, enacted through the positive law of certain state and the norms and values that are part of constitutional essentials represent the ultimate object of attachment. In relation to the object of attachment Müller explains ‘a requirement of specificity’, a constitutional culture that stems from a particular historical context. That specific constitutional culture is a connection between universal norms and particularity of national culture. The constitution and the particular culture are in a dialectical relation, mutually enriching one another. Just like norms that stem from a particular political culture find their materialisation in constitution, some constitutional norms tend during time to become part of political culture.

Answering the question about the mode of attachment Müller points out the ‘reflective, critical, or sometimes even ambivalent’²⁴⁰ nature of the affection that constitutional patriotism invokes. Müller

²³⁷ *Ibid*, 54.

²³⁸ *Ibid*, 62.

²³⁹ *Ibid*, 58.

²⁴⁰ *Ibid*, 61.

compares constitutional patriotism with the Habermasian notion of ‘collective learning process’ – a constant reflective questioning of the status quo and the quest for possible alternatives. Responding to the critique of liberal-nationalist that constitutional patriotism is too abstract and ‘bloodless’, Müller claims that the symbolic content of a constitutional culture will necessarily evoke particular emotions. Among the passions or emotions usually related to belonging, he reckons that shame, indignation, spiritedness, anger, and guilt might play a more significant role compared to other possible sets of emotions. Unlike some other types of allegiance that express loyalty to people constitutional patriotism is a form of loyalty to principles²⁴¹. Finally, he concludes that constitutional patriotism, as a form of post-conventional, post-traditionalist and post-nationalist belonging is reflexive and finds ‘the normative resources for contestation with itself’.

A general theory of constitutional patriotism in Müller’s view must be aware of its own limits. Firstly, it is not a free-standing theory political boundary formation and therefore has to rely on already existing political units. Constitutional patriotism takes for granted the given political space and cannot ‘offer a full-fledged account of political demarcation’²⁴². Constitutional patriotism is compatible with what he calls ‘transnational norm-building’ – the cross-border interchange of political and moral ties and the practices of mutual learning and deliberative engagement. Furthermore, it recognizes legitimate differences among different constitutional cultures of different polities²⁴³. This makes constitutional patriotism plural and open for different variations and forms i.e. is open for legal interventions from outside and for interchange with other legal and juridical orders..

²⁴¹*Ibid*, 65.

²⁴²*Ibid*, 68.

²⁴³*Ibidem*.

Secondly, constitutional patriotism does not generate high degrees of social solidarity – and that solidarity is dependent upon an idea of fairness adopted. Nevertheless, he explained that trust can also derive from a shared political project and from the willingness of the people to accomplish the objects of that project. In his words “it’s real practices and actually shared activity, such as the maintenance and furtherance of a constitutional culture, that generate political identity, not a supposedly given, reified ‘national culture’”²⁴⁴. Responding to the claim of liberal-nationalism that the welfare state is normatively connected to the community’s shared fate, common origin etc. he states that welfare state is a primarily ‘a result of political struggles for participation and justice’²⁴⁵. The emotions of almost religious sacrifice and transcendent abstraction should not, in Müller’s view, be confused with the readiness of citizens to pay taxes and contribute the welfare scheme²⁴⁶. In other words, the functioning of the social welfare scheme is dependent on rationally created decisions of individuals rather than sentiments.

However, despite these conceivable shortcomings, constitutional patriotism is still capable avoiding the ‘sources of moral danger’ and serves both as a source of civic trust (stability) and civic

²⁴⁴ *Ibid*, 73.

²⁴⁵ *Ibid*, 73.

²⁴⁶ For Miller and some other authors (Gellner, Schnapper) there is a correlation between single national public culture and functioning of liberal democracy, including its welfarist policies. Abizadeh has strongly attacked Miller’s argument that level of trust democratic polities require can be attained only by conationals (Miller, 1995, 91), by differentiating between social and interpersonal trust, as well as explaining that trust argument is usually dependent on other untenable arguments (transparency argument and argument that shared affective identity can stem only from public national culture). He shows why all four arguments that back up the above mentioned correlation fail: people can affectively identify with each other despite not sharing particular norms or beliefs, the trust necessary for social integration is not directly dependent upon shared public national culture, cultural diversity can raise costs but does not rule out communicative transparency and homogeneity is not an “objective imperative” for industrial liberal democracies. Abizadeh, Arash, “Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments” *The American Political Science Review*; Vol. 96, No. 3, 2002, 495-509

empowerment.²⁴⁷ By moral dangers, Müller means the possibility of constitutional patriotism becoming statist and illiberal or a form of civil religion. As he explains both of these objections, though with different theoretical and practical background, are based on a distrust of ‘identitarian logic’ which necessarily excludes some members of a society and creates Otherness²⁴⁸. However, constitutional patriotism is not primarily tied to the state but to political principles²⁴⁹, it ‘does not designate the homogeneity of individual beliefs, or of ascriptive or voluntary identities’²⁵⁰, and its normative focus is on the principles themselves, not on state, political community republic etc.

The important aspect of Müller’s conception of constitutional patriotism is its never ending quest for the realization of the universal norms:

It then appears more plausible to say that, since no actually existing constitution, or actually existing state structures more broadly, can ever live up to expectations drawn from a pristine universalism, critique inspired by constitutional patriotism is indeed a form of *permanent* critique that will never result in anything like an unproblematic civic identification with an existing polity. Such a *lack* of closure will at the same time provide an incentive to continue struggling for an ever fuller – and yet never full -- realization of universalist ideals. It’s tempting to call this the Sisyphus-conception of constitutional patriotism.²⁵¹

In this way, constitutional patriotism is seen as an ideal rather than a politically conceivable form of citizenship. Nevertheless, Müller manages to identify the criteria by which we can judge the level of realized principles of constitutional patriotism within a certain community. That is exactly the sphere in which we might test the

²⁴⁷ *Ibid*, 48,49

²⁴⁸ *Ibid*, 75.

²⁴⁹ *Ibid*, 80.

²⁵⁰ *Ibid*, 79.

²⁵¹ *Ibid*, 76.

relation between different types of minorities and the general idea of constitutional patriotism. The basic principle that secures the respect for minorities' perspectives is fairness, which above all means that '*there is a prima facie case for civic inclusion* for those who have lived and worked within a polity that understands itself as subscribing to constitutional patriotism'. This vision of constitutional patriotism goes against 'interminable exclusion' of illegal aliens²⁵², guest workers for these people contribute the determined scheme of social cooperation.

Müller suggest certain indicators that 'detect an actually existing or a developing form of constitutional patriotism' as a real existing phenomenon and not just a theoretical concept. The first question is whether the immigration regime of a certain country can be defined as a 'universal-source' regime or ethnic preferences prevail. If the latter is the case, this would be an indicator of inclination towards liberal-nationalism rather than constitutional patriotism. Second, if the citizenship tests are focused on political values rather than thicker ethical dimensions like culture or way of life then it is an indicator of constitutional patriotism. Inconsistency in the application of certain test and rituals (only to citizens of certain cultural background, e.g. Muslims) would also indicate some forms of citizenship that do not coincide with the very idea of constitutional patriotism. Fourth indicator is the type of public justification of immigration regimes and membership rights – if it is oriented towards constitutional essentials, political values and principle or other criteria like historical connections, economic benefits etc. Fifth indicator deals with the legal approaches to multiculturalism in certain countries and if that approach is consistent across various cultural and ethnic communities. Any inconsistency to these indicators would be a retreat from constitutional patriotism immigration laws and policies should be formulated in a way not to

²⁵²*Ibid*, 87.

target nor impose special requests on any particular cultural groups. Hungarian Prime minister's statement that Hungary has the right to decide that it does not want large number of Muslims is a clear example of immigration politics that goes against the principles of constitutional patriotism²⁵³. Finally there is an indicator that deals with the culture of memory: in his view, a stress on universal lessons from the history, entwined histories of different regions would point toward constitutional patriotism and indicate the readiness of the political cultures to be more reflexive and open.²⁵⁴

Müller's constitutional patriotism is an elaborated and defined theoretical concept. While for Sternberger it is only a term that denotes vague national identifications, Müller's notion is clearly defined. Unlike Habermas who uses this notion as a theoretical ideal without clear definitional boundaries, Müller seems to be more precise and tries to relate this notion to political reality. However, there are still some normative flaws to which I would like to address several remarks.

a) *Constitutional patriotism as normatively dependent*

It is certain that constitutional patriotism in its essence does not define all aspects of a political, legal let alone broader social life. However, it seems incorrect to define constitutional patriotism as normatively neutral or empty concept. The idea of constitutional patriotism itself bears a strong normative potential²⁵⁵ as an alternative concept of citizenship and organization of political order. Its implications on the legal and political organization of a polity and institutional changes it might create are normative *per se*²⁵⁶.

b) *Ideal vs. ideal type*

²⁵³ <http://time.com/4022635/hungary-orban-muslim-refugee-migrant/>

²⁵⁴ *Ibid*, 89, 92.

²⁵⁵ V. infra Chapter V

²⁵⁶ *Ibidem*

The notion of constitutional patriotism should be seen as a theoretical concept that has certain characteristics that define it, rather than an ideological cliché of an unattainable state of perfect political order. Though the difference between these two views might be blurred, I find it more desirable to treat constitutional patriotism as a sort of Weberian ideal type rather than an ideal. This approach allows for a more thorough and systematic analyzes of this concept without trivializing it as a politicized and ideological concept. Defining something as a practical ideal might question both the scientific and practical use of a certain notion. Once a notion enters the kaleidoscope of ideological semantics it is impossible for it to be scrutinized in a coherent scientific manner. Normative political theories often deal with ideal worlds and paradigms though sometimes we might simply limit ourselves to giving arguments in favour of a certain concept rather than trying to prove that it is an ideal.

Defining constitutional patriotism as an ideal type, which will be my task in the subsequent chapter, leaves a lot of space for exploring this concept theoretically without being constrained with the reality of national states. It enables us to determine the origins, elements and the normative map of this notion and analyze it in a context of *realpolitik*.

c) *Negative definition rather than elaboration of the concept*

The general critique of the past theories of constitutional patriotism is that most of them define constitutional patriotism in a negative manner, usually by contrasting to republicanism or liberal nationalism. It is methodologically incorrect to define one notion exclusively via negative definition. I believe that this concept needs to be elucidated integrally as a full fledge theory that will posit constitutional patriotism within general political theory and relate it to other concepts but also show its added value in constructive terms.

d) Normative clashes – value pluralism, the response of constitutional patriotism

Despite his strong and original advocacy of constitutional patriotism, Müller seems to forget certain dilemmas of contemporary multicultural societies. He does not explain how constitutional patriotism is achievable in a multicultural society and what kind of justification is plausible for a society with deep value and identity clashes. Müller says nothing about the justification of political order in polities with different axiological communities and how does constitutional patriotism get into the picture there.

e) Minority issue

In Müller's analysis of constitutional patriotism little place is left to minorities and the normative issues that the existence of minorities poses to political order and patriotic allegiance as such. The monograph is about constitutional patriotism as a modality of patriotic allegiance towards a polity that does not differentiate the citizens but rather takes them as a whole. However, I believe that there is a lot to be said as constitutional patriotism as a model of changing intersubjective relations among citizens and that is where the normative impact on minorities should be looked for.

4.4. The critique of constitutional patriotism

Since its appearance in academic context constitutional patriotism has raised serious concerns. There are two general streams of critique. On one side there are authors who think that constitutional patriotism is not normatively desirable. On the other side, there is a line of critique that says that even if it could be potentially desirable,

constitutional patriotism is not feasible. I believe these two lines of critique deserve separate analyses even though they are interdependent. The main hypothesis of this research was that constitutional patriotism is both viable and desirable form of citizenship from the standpoint of minorities. Therefore, both lines of critique will be adequately answered.

Müller identifies seven ways to misconceive the idea and concept of constitutional patriotism²⁵⁷.

a) *Too universalist*. It is the most common objection that constitutional patriotism lacks specificity and has no motivating power as a bloodless concept. His defence for this argument is that c.p. is not so much foundational as transformative, it does not construe a political order ex nihilo but rather moves it towards more universalist position. Besides, as he adds, universal norms are always “appropriated, contested and re-appropriated” within particular political cultures. When it comes to motivational deficit Müller relativizes the motivation that is usually associated with a national state, and in his words often confused with routine or fear of coercion.

b) *Any trace of particularism invalidates universalist aspirations*. Here Müller depicts the opposite critique: that any particularity and contingency trumps the universality of constitutional patriotism. Such universalism, completely “pure” from particularities, is not available in his opinion, but still the conceptions of political allegiance that c.p. presents, both at principle and policy level, is clearly distinct to others (liberal nationalism e.g.).

c) *Too particular (or too contextual)*. This argument says that constitutional patriotism. originated in particular context in particular historical moment and as such cannot easily travel. This argument would make sense if we were to apply the original Sternberger’s concept to

²⁵⁷ Jan-Werner Müller, "Seven Ways to Misunderstand Constitutional Patriotism", *notizie di POLITEIA*, XXV, 96, (2009) 20-24

other polities. However, even though constitutional patriotism appears in particular historical context its theoretical reformulations give new normative meanings to it. In other words, constitutional patriotism as a theoretical concept is not fully dependent on its historical precursor and there is no one universal definition of this concept.

d) Reification. Here constitutional patriotism is understood literally as a patriotism showed towards specific written document – constitution or the highest law. This is clearly a misconceiving of the whole concept: constitutional in the name refers to constitutional culture, identity or general citizenship norms as it was argues in this thesis. In such a context constitutional closure is less possible since norms can always be debated and contested. Again, constitutional patriotism should be understood as in ideal type which in its idea prevents certain forms of democratic paradox²⁵⁸.

e) Juridification of politics. This critique point out that stressing constitutionalism necessarily needs to juridification of politics, putting courts and judges in the heart of political system. Müller defends constitutional patriotism by stating that contestations are more likely to take place within a broad liberal-democratic context rather than specifically in courts. In the context of minorities that is important for this thesis, this critique does not have to be necessarily negative. Namely, in order to protect rights of minorities, certain forms of deliberation have to take place in a forum that is more prone to human rights and minority rights protection. This is a good strategy to overpass democratic majoritarianism.

f) McCarthyism; constitutional patriotism as a civil religion. Constitutional patriotism would necessarily render chauvinism of certain kind, giving to those inside the polity a sense of superiority for their norms and principles. This idea is based on the presumption that identity

²⁵⁸v. supra 1.5.3. on “*democratic closure*”

necessarily triggers difference, we differ to someone else in the present rather than to something we have been in the past. Clarisa Hayward claims that democracy needs identity and that identity formation is often accompanied by practices of other-ing, repression, identification of 'aliens' etc. Constitutional patriotism as a form of civic identity in her view leaves a big space for determining others as illiberal and undemocratic. Democracy's identity problem in her view is a "chronic problem" that demands constant disturbing of "any settled sense of having achieved a democratically legitimate identity"²⁵⁹. Constitutional patriotism in Müller's view contains "normative resources to contest developments in the direction of intolerance, a reverential, uncritical attitude towards the past, etc". I consider this true if we take into account the fact that constitutional patriotism leaves aside national and other majoritarian discourses and is based in universally accepted norms of constitutional and political order. From that point, it is more easy to critically assess past and axiological dilemmas stemming from it. Müller concludes this critique quoting Taylor's view that while constitutional patriotism poses dangers, but is still "the least dangerous form of social-political cohesion". Democracy indeed needs identity and it is in the heart of the citizens' motivation but identity does not have to end in other-ing among contemporary others, it can also be a departure from wrongful identity in the past and does not have to be *a priori* exclusive.

e) *Dependence on a particular social theory*. This theory is usually targeted at Habermas since he nested constitutional patriotism within his broader social theory. Müller's defence is that constitutional patriotism is normatively dependent, upon a particular theory of justice. I already explained why I depart from this conception. Constitutional patriotism certainly depends on the overall social theory one might

²⁵⁹ Clarisa Hayward, "Democracy's Identity Problem: Is Constitutional Patriotism the Answer?" *Constellations*, vol. 14, no. 2 (June 2007), pp. 182-96.

advocate but I will show that certain normative implications stem from the very principles of constitutional patriotism. Few things are completely value neutral in social sciences but one might say that constitutional patriotism advocates instrumental values – the ones that enable common existence of incommensurable substantial values which gives it certain form of value neutrality or at least fairness with regard to issue of values in plural societies.

Certainly, this list does not cover all the spectrum of the critique of constitutional patriotism but certainly enumerates the main arguments of the debate. Based on the last critique, there is another foundational argument against constitutional patriotism. It is focused on theory of rationalisation as the basis of the whole theory. This critique says²⁶⁰ that since rationalisation hypothesis is not well-grounded in the empirical world, the whole theory of constitutional patriotism fails. I think we should get to should/is difference so inherent to any kind of normative thinking. I do share the view that constitutional patriotism should not rely on Enlightenment modernist view on humanity if it wants to keep its validity in plural diverse societies. Rationalisation should be understood as a normative (reasonability or soundness, distinct to its modernist understanding related to *ratio*) and not descriptive phenomenon. Reasonable consensus in politics is still possible even if people have not really become more rational and even if they do not approach rationally in all spheres of life. The rationalisation thesis does not have to be built in the overall theory of constitutional patriotism. Namely, we do not have to base constitutional patriotism on any descriptive ground. That is especially the case with its normative elements. Also, we can state that rationalisation (as shift towards

²⁶⁰ v. e.g. Andrea Baumeister, "Diversity and Unity: The Problem with 'Constitutional Patriotism'", accessed at: <https://dspace.stir.ac.uk/bitstream/1893/1391/1/Diversity%20and%20Unity%20The%20Problem%20with%20Constitutional%20Patriotism.pdf>

reasonable deliberation) is not desirable in all spheres of life but would be beneficial in the politics of plural societies as the sphere where our intersubjective relations are defined.

As I explained so far, constitutional patriotism emerged in a specific historical context and for D. Sternberger it was conceived as a way to give national project a new form. Instead of nation and state (both divided and contested) he put the constitution in the focus of patriotic loyalty. This is the main source of misunderstanding when it comes to new theories of constitutional patriotism which depart from Sternberger's etatism.

In my interpretation based to a certain degree on Habermas and Muller which I will elaborate in the chapter that follows, this shift can come from completely different political and historical motivations and theoretical reasoning and is normatively superior to other objects of patriotic loyalty. And above all it gives a clear chance for minorities to live in a polity where the main mechanism of their protection (constitutional order that provides integration and fair distribution of power) is put in the focus of both citizenship and patriotic loyalty.

Chapter V: A THEORY OF CONSTITUTIONAL PATRIOTISM

In this part I will define, determine the scope, content and normative input of constitutional patriotism and give my positive account of this concept. As I explained, this notion is used to determine various, often opposed, meanings in political theory. Constitutional patriotism as a “fully fledged” free standing theory was never developed²⁶¹. One of the heuristic contributions of this thesis should be showing that constitutional patriotism is an inference of a complex interplay of different principles. This task exacts a deep theoretical inquiry both in terms of historical investigation and critical and argumentative approach to contemporary debates.

The working definition employed in this thesis determines constitutional patriotism as post-national and post-conventional political identification and allegiance to the minimum set of normative components of a constitution, broadly understand as a political and legal order within a certain polity. All the elements of this definition need detailed elaboration. I will elaborate my idea of constitutional patriotism as a form of citizenship through theoretical assumptions and practical principles. Both are equally ideal and theoretical but while in theoretical assumptions I develop underlying theory necessary for understanding the notion of constitutional patriotism as such, in practical principles I elaborate the empirical normative guidelines that this concept might imply.

²⁶¹ The author who went furthest into conceptualizing constitutional patriotism was J.W. Muller. However, his main idea is that constitutional patriotism is dependent on other normative theories ie. that it is not a freestanding theory.

Before elaborating my theory of constitutional patriotism, I would like to give a general statement about the importance of idea of constitutional patriotism within political theory. Constitutional patriotism, in my view, radically changes the approach to two fundamental questions in political theory: the best form of government (ruling) and the very idea of the *political*. The best form of rule is a classical question and constitutional patriotism confirms the old Plato's idea, the one advocated in *Laws*, that the best form of government is the one that is based on the rule of law.²⁶² This confirmation taken to its furthest logical consequences, though it confirms a very ancient idea, radically changes view on the modern context and the predominance of national states as the shelves of our political life. We shall constantly revisit the idea of the rule of law in order to spot its problematic elements in contemporary context. Likewise, the changed "nature" of the law in contemporary plural societies with a critique aimed at its legitimacy foundations raises the mentioned radicalism. It should answer the question: what laws should be in the foundation of our political communities and in what political and social context should they exist to become legitimate and universally binding.

The concept of the political that constitutional patriotism is brings an added value. It focuses neither on conflictuous nature of intersubjective relations advocated by *agonistic* models of democracy nor on *consensualist* view of political propounded by so called "post-

²⁶² Though it is a matter of controversy, it is notable that in Plato's work after *Republic* king-philosopher "seems to disappear" (Kamtekar). In the *Laws*, the Athenian warns that with unchecked power, even one who has an expert's grasp of what unites a city will favor himself and pursue pleasure rather than acting for the sake of the common good (875b-c). In *Statesman* the criteria for the good constitution is not wisdom of the ruler (who) but the good it brings to the ruled (what or which principles) (296d-e), so "in the absence of wise rulers, a constitution should adopt the rule of law as the embodiment of wisdom (293e-303b)". Kamtekar, Rachana, "Plato" in *The Routledge Companion to Ancient Philosophy* (2013) 208

political” approaches of Rawls and even Habermas²⁶³. *Political* means a quest for the best regulation of intersubjective relations in the context of moral and ethical plurality that must be constitutionally guaranteed. The whole point of politics as practical activity is to find the best practical and normative solutions to political and other challenges making sure these are legitimate. In other words, these rules must (implicitly) acknowledge the diverse ethical standpoints of those to whom these rules aimed at in order to be legitimate. We can understand and communicate with each other *politically* as long as we can recognize each other *legally*. Only once we attribute equality to each other in the sphere of laws can we exchange and communicate our needs and interests. The same reasoning can be applied to migrants, LGBT minorities members, or any other minority when these have no legal entitlement²⁶⁴. Empirically, legal recognitions usually come from political struggles but my view is that these struggles should not be considered necessary and that ideal political philosophy should account for a brighter outlook for subalterns.

My conception of constitutional patriotism is clearly very close to political liberalism, in particular Rawls. I shall underline that I share the main assumptions with these theories and, as I indicated in introduction, significant part of my argumentation is drawn from political liberalism. Nevertheless, throughout the further elaboration, it will become evident that there are many spots in which my findings differ. In my interpretation, to begin with, constitutional patriotism is less statist and more inclusive concept of citizenship than Rawls’s opus

²⁶³ For a claim that mentioned authors aim at a postpolitical order in which ‘politics as we know it no longer exists’ see Glen Newey, *After Politics: The Rejection of Politics in Contemporary Liberal Philosophy* (New York: Palgrave, 2001)

²⁶⁴ Here Agamben’s distinction between biological existence (*zoe*) as different political life of speech and action (*bios*). Unless legally recognized these subjects remain incapable to participate politically, confined to private sphere. Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*. tr. Daniel Heller-Roazen (Stanford University Press, Stanford, 1998)

suggests. Besides, the whole elaboration of identity issues and recognition give substantially different view and different normative conclusions.

The idea of this chapter is to offer a different theoretical understanding of constitutional patriotism and develop that idea to the level of coherent theoretical approach to the issue of citizenship. Antinomic nature of the nominal side of this concept will be analysed in the first part. There I deal with these two constitutive and seemingly opposite elements of constitutional patriotism. Subsequently, I try to determine the theoretical assumptions and practical principles that support the theory of constitutional patriotism. Once I formulate the normative coordinates of constitutional patriotism I will try to test its normative validity with competing theories. The last section is dedicated to the comparison of constitutional patriotism with other forms of citizenship.

5.1. Constitutional patriotism and its constitutive elements

5.1.1. Constitutionalism

Constitutional patriotism changes fundamentally both notions contained in its name. However, it keeps several important layers that signify these terms. Several meaning of constitutionalism are preserved in the notion of constitutional patriotism: a) constitutionalism as the basic set of principles of the common life, b) constitutionalism as the protection of minorities from the tyranny of majority and c)

constitutionalism as the protection from the arbitrary power of groups, individuals, discourses and comprehensive doctrines. These notions that emerge from the historical development of constitutionalism bear the main normative power of this notion.

The relation between constitutionalism and democracy is particularly interesting. The idea that democracy is not enough to make one state a polity of freedom and rights is self-evident. The twentieth century has given enough empirical evidence for this claim. Popular sovereignty has shown distinct illiberal tendencies. In other words, democracy needs control mechanism in order not to turn into illiberal forms of government. Constitutionalism in its ideal form is one form of control of majoritarian democratic will²⁶⁵. Its interpreter and keeper, constitutional court is an institutional mechanism to protect individual but the state as well from the potential harm by other, democratically elected, branches of government.

The issue of majoritarian rule becomes particularly salient in multicultural societies with deep cultural and identity divisions. National state and the residues of its historical formation (the role of church, inherited political myths, the historical merits of the dominant nation etc.) legitimise itself through popular sovereignty expressed through elections, popular petitions, referenda etc. Thus, constitutionalism should be the principal barrier for illiberal democracy and the ultimate protection of minority rights. Constitutionalism, ideally, makes individual citizens equal, as bearers of equal rights and responsibilities, despite their relative difference rendered by their membership in national, cultural and other identity groups. However, constitutions are often the mere reflection of popular sovereignty. András Sajó explains the illiberal tendencies of contemporary democracy and its constitutions:

²⁶⁵v. e.g.

Authoritarianism in democracy, and in rule of law based legal systems, however, remains a major intellectual puzzle for constitutional theory, as it is very difficult to identify the specific factors of authoritarianism and illiberalism in the constitutional-legal systems. The residual (and reproduced) authoritarianism of specific organizations (police, immigration, tax inspection) still causes tensions in the West, too. Churches with authoritarian structures remain not only constitutionally protected; the authoritarian elements of their religious practices are often endorsed by the state. This is a constitutional anomaly in many liberal countries. National identity protection throughout the democratic process tends to add to the difficulties of constitutionalism everywhere.²⁶⁶

The ideal of constitutional patriotism is to revitalise the main premises of constitutionalism as a protection from authoritarianism, illiberal tendencies and exclusiveness that national states have generated. It is the reason why it should be primarily seen as a reconstructive approach to citizenship. Only in that way could constitutionalism serve the needs of minorities – protect them from biased and unfair laws.

Hanna Arendt wrote that "against the egalitarian order of persuasion stands the authoritarian order."²⁶⁷ Constitutional patriotism should look for the allegiance and legitimacy based not in authoritarian orders of the unquestioned wisdom brought by particular ethics but rather in the common political communication, deliberation and persuasion of the equals, by rights and status. Thus, the authority that once belonged to the concepts like nation, national myths, religion etc. should be transferred to constitution, broadly understood as a field of reasonable deliberation about basic principles of common life. Minorities clearly benefit from such shift of normativity since it favours

²⁶⁶ Sajó, András, "Erosion and decline of the rule of law in post-communism: an introduction" in Sajó (ed.), *Out of and into Authoritarian Law*, p. ix-xxiii

²⁶⁷ H. Arendt, *Between Past and Future, Eight Exercises in Political Thought*, London: Penguin Books (1977) 93. Cited in Sajó, xv

the sphere in which they have equal standing. While religious and other particular ethics function as self-understandable for the members of particular identity groups, in the sphere of constitutional deliberation members of minorities must be persuaded that certain laws and norms are valid.

The protection of minorities from the tyranny of majority, as well from arbitrary power of groups and comprehensive ideologies is particularly important for this research. Constitution shall be understood as a political and legal platform that protects minorities from arbitrary interventions. It protects both individuals and groups that fall under the notion of identity minority. It is also a protection for minorities within minorities. In order to achieve this, normatively desirable constitutionalism should be *a)* based on a legitimate set of rules and principles and *b)* avoid any form of misrecognition and have the legal mechanisms for its elimination (constitutional review, e.g.).

Tully reckons that contemporary resistance and demands for recognition of the members whose cultures have been marginalized, excluded or exterminated is a consequence of national and liberal constitutions and their universalizing tendency. In Tully's view the dominant language of modern constitutionalism shared by liberals, nationalist and communitarians was shaped by the discourses and practices of pre-modern (ancient) and modern constitutions. The "strange multiplicity" of voices in the age of diversity that Tully depicts is aimed at intercultural and intracultural, primarily constitutional, recognition which takes place at various levels, national and international, and includes subjects that range from linguistic and ethnic minorities to women, indigenous people and national states²⁶⁸.

²⁶⁸ Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge: Cambridge University Press, 1995)

Tully analyses constitutionalism through the paradigm of language as social acts of communication. There are two languages of constitutionalism that intersect in present times. The authoritative political traditions of interpretation of modern constitutional societies: liberalism, nationalism and communitarianism tend to impose a dominant culture “while masquerading as culturally neutral, comprehensive, or unavoidably ethnocentric”. This language was designed to exclude or assimilate cultural diversity and justify uniformity.

The other language, in which claims to cultural recognition are taken up and adjudicated, is the language of contemporary constitutionalism. According to Tully, this is an extremely complex language that goes against and acts in accordance with modern constitutions, it is not monolithic masculine, European and imperial it is an assemblage that results from historical dynamics, interaction and struggle. In his words, “constitutionalism is thus a game in which participants alter the conventions as they go along”²⁶⁹

As a reaction to the language of modern constitutionalism and the demands for constitutional recognition, three counter non – authoritative schools of interpretations have arisen: post-modernism, cultural feminism and interculturalism. Their main argument is that authoritative traditions of constitutionalism have been formed by “European men in the age of imperialism”. As Tully explains, these authors have turned particularly to concepts such as identity, sovereignty and recognition which have been used “rather to co-opt than to recognize the cultural demands of women, non-European and others who have previously been excluded from the public sphere of modern societies”²⁷⁰.

²⁶⁹Ibid. 40

²⁷⁰Tully, *ibidem*, 45.

The language of modern constitutionalism has seven features that are aimed at enhancing uniformity and are often deaf to dissonance. The first feature of modern constitutionalism comprises the concepts of popular sovereignty which tends to diminish and ignore cultural diversity as a constitutive aspect of politics. The people are sovereign and culturally homogeneous in the sense that culture is irrelevant, capable of being transcended, or uniform. The second feature of a modern constitution is that it is defined in contrast to an ancient or historically earlier constitution. Tully reckons that these are almost identical in this regard. Modern constitutionalism sees cultures and peoples hierarchically, in accordance with their place in the historical process of progressive development. In contrast to the assemblage of ancient constitutions, and this is the third feature, modern constitutions are aimed at legal and political uniformity: “a constitution of equal citizens who are treated identically rather than equitably, of one national system of institutionalized legal and political authority rather than many, and a constitutional nation equal in status to all the others.”²⁷¹ This idea of uniform institutional and legal arrangements emerged at the birth of Westphalian state and Tully explains it with the diagnosis of the modern theorists that the conflicting jurisdictions and authorities of the ancient constitutions were causing the war. Thus, there was a niche for a centralized locus of sovereignty. The fourth feature is the recognition of custom within the theory of progress - uniform manners and institutions are result of historical progression. Fifth, modern constitutionalism equates constitution with a specific set of European institutions. “Institutions of representative government, separation of powers, the rule of law, individual liberty, standing armies and a public sphere are definitive of a modern or republican constitution, for it is only at the modern level of historical development that they are necessary. Since

²⁷¹Ibid, 66.

the French and American revolutions, the sixth convention has been that a constitutional state possesses an individual identity as a 'nation', an imaginary community to which all nationals belong and in which they enjoy equal dignity as citizens. “Although the nation is interpreted differently in each society, as Anthony Smith and Benedict Anderson have shown, it engenders a sense of belonging and allegiance by means of the nation's individual name, national historical narrative and public symbols”²⁷². Tully concludes with a final feature of modern constitutionalism: a modern constitution comes into being at some founding moment and stands behind - and provides the rules for - democratic politics. The constitution somehow seems to be outside of democratic processes. This feature is induced by modern revolutions and founding acts – constitutions as agreements for all time and enhanced by “the myths of the single lawgiver in the republican tradition, the original consensus of the community or nation in the nationalist tradition and the original or hypothetical contract, to which all citizens today would consent if they were rational, in the liberal tradition.”²⁷³

Contemporary constitutionalism suited for the age of diversity is distinct from the one interpreted by three authoritative schools. It is based on “the sovereignty of culturally diverse citizens”. In other words, identity plays a crucial role in understanding the normative outlook of contemporary constitutions. Constitutional negotiations are not monologues anymore rather intercultural dialogue where “limited and complementary stories are exchanged”²⁷⁴. These constitutions are aimed

²⁷²Ibid, 68.

²⁷³Ibid.

²⁷⁴Limited and complementary are the adjectives that Tully uses to depict the anti-universalism of contemporary constitutions and his inspiration probably comes from the quote of Albert Jonsen and Stephen Toulmin: “abstract theories in moral philosophy are read against their historical and social backgrounds, they will need to be understood not as making *comprehensive and mutually exclusive* claims but, rather, offering us *limited and complementary* perspectives on the whole broad complex of human conduct and moral experience, personal relations, and ethical reflection.” Ibid. 115.

at preserving plurality and promoting diversity of “criss-crossing and contested narratives”. Instead of being fixed and unchangeable constitutions are “chains of continual intercultural negotiations”, an intercultural dialogue that enables culturally diverse sovereign citizens to “negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity”.²⁷⁵

Constitutionalism should not be perceived as homogenous, unitary, incontestable but rather open, diversified and contestable. Open to include new subjects and forms of protection, diversified to allow different forms of political order and different legal mechanisms of rights protection, and finally some parts of it should always be open to contestation. It should correspond to the diversity and changing nature of political life in contemporary polities. The contestation of the constitutional order, as a dominant form of questioning the overall system by those it refers to, should be possible but still enabling the core principles that guarantee the functioning of the society and basic civil rights untouched.

We might agree with certain elements of Tully’s critique regarding modern constitutionalism. Nevertheless, even such a critical author of universalism of constitutional discourse allows for the possibilities of its normative reconstruction. Furthermore, this is exactly one of the tasks of constitutional patriotism – to reconstruct this notion.

Constitutional patriotism departs from the idea that diversity is an unavoidable fact and that basic *minimal* principles of common communication is the *highest* aim a modern social contract can possibly achieve. Instead of looking for total constitutionalisation (determining the basic principles for all spheres of human existence) constitutional patriotism is focused on the minimum of common acceptable principles

²⁷⁵Ibid, 184.

and norms that are needed for a common life. In my view constitutional patriotism revives the oldest convention of constitutionalism: *quod omnes tangit ab omnibus comprobetur* (what touches all should be agreed to by all)²⁷⁶ and gives a new meaning to it. Constitutionalism should be understood as a guarantee of consent, understood both as acceptability and actual acceptance. In this theoretical research I will elaborate the acceptability of constitutional patriotism in the light of theories and offered normative arguments. Actual acceptance should, consequently, be the final empirical test of the consent i.e. of the legitimacy of given laws, norms and practices.

5.1.2. Patriotism

Constitutional patriotism is often interpreted as a form of patriotic loyalty that is different to one depicted by nationalism or republicanism. My approach in this thesis is that constitutional patriotism is a fully-fledged theory of citizenship rather than just a patriotic allegiance. Nevertheless, patriotism itself is an important political issue that does not lose its salience in the present times²⁷⁷.

Why patriotism is important and what normative value it has in the case of constitutional patriotism? Patriotism can be analysed from various disciplines and theoretical perspectives two of which are distinctively important: ethical and political perspective. These dimensions of patriotism are salient for the overall normative impact of constitutional patriotism.

The ethical substance of patriotism lies between the extremes of universal morality and particular, local or personal attachments. This division reflects the content of the theories dealing with patriotism. On

²⁷⁶Ibid, 75.

²⁷⁷ See e.g. Primoratz, Igor. *Patriotism*. Amherst, N.Y.: Humanity Books, 2002.

one side, partiality is often seen as morally incomputable with the notions universal justice and common human solidarity. Cosmopolitanism advocates loyalty to humanity in general as the only normatively acceptable object. These theories stem from Kantianism and certain forms of utilitarianism.²⁷⁸ On the other side of the spectrum we find authors for whom patriotism is “expression of attachment to the land where we were born and raised and of gratitude we owe it for the benefits of life on its soil, among its people and under its laws”²⁷⁹

The beginning of this change was marked by Andrew Oldenquist's account of morality as a matter of various loyalties, rather than abstract principles and ideals, and Alasdair MacIntyre's argument that patriotism is a central moral virtue²⁸⁰. Interestingly enough the rise of the interest for patriotism coincides with the interest for community and citizenship. At the conceptual level, all these notions relate to collectivity, common life and polity as such. While for McIntyre patriotism is a virtue, for Kateb it is a mistake, “constructed out of transmitted memories true and false; a history usually mostly falsely sanitized or falsely heroized; a sense of kinship of a largely invented purity; and social ties that are largely invisible or impersonal, indeed abstract ...”²⁸¹ Patriotism is based on an abstraction, imagined constructed notion of community but isn't that the case with all communities bigger than small local commune? From a citizen standpoint the fact that these communities are imagined does not weaken their normative, emotional and mobilisation potential.

²⁷⁸ Primoratz, Igor, "Patriotism", *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/spr2015/entries/patriotism/>>.

²⁷⁹ Primoratz, Igor. *Patriotism Philosophical and Political Perspectives*. Aldershot, England: Ashgate, 2007, 1.

²⁸⁰ See Oldenquist, Andrew, 1982, “Loyalties,” *Journal of Philosophy*, 79: 173–193 and MacIntyre, Alasdair, 1984, *Is Patriotism a Virtue?* (The Lindley Lecture), Lawrence: University of Kansas. (2002).

²⁸¹ Kateb, George, “Is Patriotism a Mistake?” *Social Research*, 67 (2009): 901–924

Oldenquist is absolutely right when he says that “our wide and narrow loyalties define moral communities or domains within which we are willing to universalize moral judgments, treat equals equally, protect the common good, and in other ways adopt the familiar machinery of impersonal morality”. This statement can also be seen from the perspective of the chasm between ethical and political that political philosophy is trying to resolve. Though we owe ethical responsibility to humanity as such sometimes these responsibilities can only be actualised through concrete political obligations.

The abyss between particularism and universalism is not unbridgeable. R.M. Hare, for example, adopts a two-tiered consequentialist position that seeks to justify the particularistic obligations of loyalty within a broader consequentialist schema: we contribute more effectively to overall well-being if we foster particularistic obligations²⁸². Again, this consequentialist reasoning makes sense especially if we consider the ethical/political dilemma and the fact that without political obligations certain ethical concerns usually remain null. Political and legal obligations and schemes which promote social trust are more capable of shaping and influencing our behaviour.

Constitutional patriotism is not devoted to particularistic values, as such might promote biased standpoints and make hard the road towards genuine universalism. It does not mean that a political community that adheres to the principles of constitutional patriotism is empty and has no values at all, but all these values can be interpreted as principles of just coexistence that allows plurality and does not entail any comprehensive doctrine. Inter-group tolerance and respect for the wellbeing of individual are nothing but result of accumulated history of intolerance, conflict and mutual denigration. They are constitutional interface that enables individual and groups to achieve their particular

²⁸²Ibid.

visions of good guaranteeing that by this they will not jeopardize the same right of others.

Primoratz differentiates five types of normative versions of patriotism: extreme, robust, moderate, deflated and ethical²⁸³:

a. *extreme patriotism*. Here, Primoratz quotes Machiavelli and his famous state reason “When the safety of one's country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious”. This patriotism excludes moral considerations putting interests of one's country at the pedestal of values;

b. *robust patriotism*. Primoratz depicts this form of patriotism with MacIntyre's conclusion that patriotism is not to be contrasted with morality; it is rather a central moral virtue - the foundation of morality. The patriot's allegiance is not to any government and given state of affairs, but rather to “the nation conceived *as a project*”²⁸⁴. Viroli writes that we have moral obligation towards our country “because we are indebted to it”. “We owe our country our life, our education, our language, and, in the most fortunate cases, our liberty. If we want to be moral persons, we must return what we have received, at least in part, by serving the common good”²⁸⁵. This form of patriotism is critiqued for its simplified analogy with communitarianism and irrational character²⁸⁶ of this allegiance which allows no critique or questioning;

c. *moderate patriotism* is advocated by philosophers who try to accommodate both the universal and the particular point of view within the notion of patriotism – “both the mandates of universal justice and

²⁸³ Primoratz, "Patriotism", *The Stanford Encyclopedia of Philosophy*.

²⁸⁴ MacIntyre, Alasdair, *Is Patriotism a Virtue?* (The Lindley Lecture), 1984, 13

²⁸⁵ Viroli, Maurizio, *For Love of Country: An Essay on Patriotism and Nationalism* (Oxford: Oxford University Press, 1995) 9

²⁸⁶ In the plurality of contexts (local, cosmopolitan, particular) in which human being, in the quest for the good life, can flourish its virtues and capabilities, it is irrational to deduce the sources of morality to patria, especially in the times when *patria* itself is in a constant dynamics of changing world.

claims of common humanity, and the concern for the *patria* and compatriots". In Primoratz's view moderate patriotism²⁸⁷ is not uncritical, unconditional, or egocentric;

d. *deflated patriotism* is a standpoint that sees patriotism as having neither moral duty nor a supererogatory virtue and finds that its moral pretensions are deflated. Patriotism becomes morally irrelevant and bears no moral significance;

e. *ethical patriotism* finds its adherents in those who want to promote their *patria's* moral well-being and integrity. Their primary interest, unlike in the previous forms, is not the utility of the state (political, economic or social welfare) but rather its respect for the ethical and moral values. This conception of patriotism imposes responsibility for patriots – it might easily associate them the state's wrongdoings²⁸⁸.

Understandably, within this division constitutional patriotism would definitely go under the label of moderate patriotism. It combines the universality of broader liberal and democratic principles (constitutionalism, democracy, human rights) within particularities of historical and geographical contingences (depending on the context to which this notion refers). Unquestionably, this type of patriotism is in no regards extreme or robust since it denies thick normative notions as the object or modus of patriotic loyalty. It is not ethical, since for constitutional patriotism *patria* is nothing but the idea of consensus of compatriots on basic political principles. Nevertheless, it does not leave patriotism as such completely void of meaning or normative importance. Constitutional patriotism reaffirms the significance of patriotism for

²⁸⁷v. e.g. Nathanson, Stephen. "In Defense of "Moderate Patriotism"" *Ethics* 99, no. 3 (1989): 535-52. <http://www.jstor.org/stable/2380865>.

²⁸⁸v. e.g. Dimitrijevic Nenad, *Duty To Respond: Mass Crime, Denial, and Collective Responsibility* (Budapest - New York: CEU Press; 2011), Dimitrijevic Nenad, "Values for a Valueless Society: Constitutional Morality After Collective Crime". In: Sajo A, Uitz R, editors. *Constitutional Topography*. (The Hague: Eleven Publishing; 2010) 123-43.

common life in a political community. It presumes that there are certain ethical standpoints that patriotism must include without discrimination and in that sense constitutional patriotism is ethically relevant. Nevertheless its main normative strength is its political salience and I shall briefly discuss that in following paragraphs.

As Primoratz said there is another line of thinking patriotism as “ethos of the stable and well-functioning polity”. Here its political function is stressed. Constitutional patriotism is seen as political patriotism that purposely omits ethical referencing. It keeps the centripetal features of patriotic attachment, the political obligation that it triggers but leaves it deprived of thick ethical concepts. In the case of constitutional patriotism we have identity of patriotic loyalty and the source of political obligation and legitimation – the minimal rules that we impose on us as guiding principles of the common life.

Patriotism as an attachment towards a polity and its principles is an important side of citizenship. Without it, citizenship would be no more than a private association of individuals and groups and all decisions would be taken according to the scheme of self-interest and competition. Obviously, the standpoint that patriotism can legitimately ask us to bury our lives for patria is clearly anachronistic and would probably not pass the test of contemporary plural societies where the idea of sacrifice would apparently have to resonate with different comprehensive doctrines.

Patriotism, redefined and adapted to the reality of multiculturalism, can still be the source of integration in plural societies. It can still have motivation power for citizens even without being overly emotionally galvanized. Some authors have shown interest for so called “covenanted patriotism” that “appears to be the only type of love of country available to an ethnically and culturally heterogeneous population”. Schaar argues that this form of patriotism is “conception of

patriotic devotion that fits a nation as a large and heterogeneous group as our own”²⁸⁹ This resembles constitutional patriotism, beyond synonymous names, resembles constitutional patriotism to many regards. Primarily for “this conception of political membership transcends the parochial and primitive fraternities of blood and race” and attaches the loyalty to set of principles and rules rather than notions of nation, patria etc. However, certain differences should be noted. Linguistically – semantic layers of covenant and constitution are clearly different and the latter are exempted from religious connotations²⁹⁰. Covenant favours collective dimension and petrified unity once achieved at the expense of its constituting parts and the changing external settings. Even though in Schaar’s explanation it is not static legacy that covenant patriotism affirms it is still “activity guided toward the mission established in the founding covenant”²⁹¹. Constitutional patriotism does not set off from any petrified historical constitution but from constitution that codifies the dynamics of ever changing common life – the constitution as a network of legitimately determined, but changeable, principles of common life. In the case of constitutional patriotism and minorities, what they might see as an impetus for patriotic attachment would be exactly the feeling that they are not excluded from the community, that the community is based on rules that they can also adhere to. Compared to majority of societies where minorities feel misrecognised, excluded, denigrated this is a normative breakthrough: it is not a community without values, it is a community

²⁸⁹Schaar, John H, “The Case for Patriotism,” *Legitimacy in the Modern State* (New Brunswick: Transaction Books, 1981) 285–311, 293

²⁹⁰ Online etymology dictionary traces covenant from Old French covenant "agreement," originally present participle of *covenir* "agree, meet," from Latin *convenire* "come together" (*convēne*). It also says that this term is applied in Scripture to God's arrangements with man as a translation of Latin *testamentum*, Greek *diatheke*, both rendering Hebrew *berith*.

²⁹¹*Ibid.*

that acknowledges the existence of various value systems and for that reason remains silent on them.

Constitutional patriotism is different to others forms of patriotism not only for the object of attachment (constitutional principles of a polity) but also for the type of attachment it triggers. The modes of patriotic feeling are also culturally determined. Depending from a country to country we might speak of love, respect, obligation or loyalty. I believe that a patriotic formula of diversified societies should be able to accommodate various versions of these culturally determined expressions of patriotic attachment. In that sense, constitutional patriotism is more inclusive allowing *other ways* to be a patriot, the minimum required being respect for the commonly achieved norms.

Constitutional patriotism certainly keeps the idea of patriotic solidarity as a necessary condition of modern citizenship in plural societies. As it was explained, it redefines the object of loyalty; instead of a nation/patria it puts the basic set of principles. Changing the object of allegiance redefines the quality of loyalty – it is more rational, argumented loyalty but it does not exclude potential emotional attachment. If constitutional patriotism arises in a specific historical context, after all the history of interethnic mutual extermination, discrimination and denigration, constitutional patriotism is a new way of valorising plurality and identity. Taken *per se* this concept might sound empty, too academic and cold, “hard to feel”. But if it is taken in its historical emergence, constitutional patriotism is not an empty concept: it is a symbol of accepting diversity and putting tolerance on the pedestal of constitutional values. It is a new way of political self-understanding that gives a primacy to the idea of equal citizenship and favours political over historical or ethical. Moreover, it should be understood as a prudent shift in the perception of allegiance to the polity and common life among diverse individuals and groups.

5.2. Theoretical assumptions of constitutional patriotism

In this part I will examine the foundations of the all principles that stem from constitutional patriotism. When we try to conceive a theory we use certain assumptions. I believe these assumptions should also undergo critical scrutiny, all the more so for the whole theory is based on them. Like everything else in the kaleidoscope of social sciences these presumptions are the reflection of our particular perspectives on society, history and humanity. I will elaborate anthropological, ethical and historical theoretical assumptions for the theory of constitutional patriotism.

5.2.1. Anthropological assumptions

Rousseau wrote in *The Social Contract* that his purpose is “to consider if, in political society, there can be any legitimate and sure principle of government, taking men as they are and laws as they might be”. This is the starting point of many normative analyses – accepting the anthropological outlook of a human being and constructing normative political solutions to the challenges she faces. It is a hypothetical normative outlook in which try to guess what a legitimate political community should look like based on given anthropological findings. Enlisting anthropological features of modern Western society’s man gives a framework within which one shall propose normative solutions: be it laws or political institutions and policies. So what are the

elements of social and cultural anthropology that a normative theory of citizenship should take into consideration?

The main empirical phenomenon from which constitutional patriotism draws normative implications is diversity of human beings and their lifestyles under the conditions of liberty. When men are given the freedom to organize and conceptualise their life the way they want the only empirical consequence can be diversity.

The liberty has its boundaries, defined by the social context in which human beings flourish. A man is *zoon politikon*, as Aristotle was explaining, political animal, a being that lives in a political community. Political community is a consequence of human development. The political communities of contemporary national states are complex societies where the abovementioned liberty of diverse racial, ethnical, national and subculture groups interact.

Contemporary political communities have plural axiological paradigms. Individuals and groups differ over many criteria. Nevertheless, due to global trends of migration, people are often faced with the necessity to live within the same political entity, under the rules which somehow must enable their *modus vivendi*. The need to be together within a certain polity is triggered by the complexity and interdependence of individuals within modern societies and the obsolescence of pre-political forms of common life. Politics is normative and determining the norms of common life is the main object of politics in a plural society.

The disparity of identities, the way it was elaborated, and commonality of political and other goals that are politically operated are in tension within contemporary societies. Identities are often fluid and changeable. Constructed or essentialised, identities are still an important denominator of political life. Human beings are not only led by identitarian but also practical and instrumental reasons.

The complex anthropological outlook should prevent us from coming up with a simplified theory of citizenship that would favour one or the other part of human identity. Complex human nature is often contradictory and coming up with a clear-cut theoretical solution might not be always an easy task. The rules of citizenship in a polity must reflect the world of complexity of contemporary individual and her need to make these identities flourish and commute peacefully.

Anthropological complexity of human beings cannot be reduced to any of its containing elements. Different spheres of our human essence have diverse modes of expression. Our political mode of being, faced with existence of objective need for common life, is orientated towards deliberation, debate and exchange of worldviews. In its extremes it has extreme opposition and conflict one side and ideal situation of a unity on the other. These two modes are captured by antagonistic and consensual concepts of political. However, there is a whole spectrum in between that might be indicative for an ideal vision of *political*²⁹².

5.2.2. Ethical assumptions

The relation between the good and the right is a principal dilemma of political theory. A starting premise of constitutional patriotism regarding ethics, both as individual morality and collective *sittlichkeit*, states that there can be a common justification of the basic rules and principles of political order – not exclusively rational but based on the principles that stem from the common life with the protection of minority groups and individuals.

²⁹² v. supra pp. 203-204

The constitutionalism in a plural society cannot end up with any particular concept of the good promoted by the state. It should advocate individual liberties and their quest for diverse goods but none of these should get the universal promotion by the state. The limit of individual and groups liberties is liberty of (other) individuals.

There is a normative distinction between ethical and political, between morality and democracy in Habermas terms. This distinction is the best reflection of *ethical* versus *political* issue in political theory. The assumption of constitutional patriotism, especially in contrast to cosmopolitanism, is that certain ethical standpoints related to obligations among individuals are dependent on their actualisation in the form of legitimate positive law and political obligation that accompanies it.

The plurality of ethical worldviews obliges us to look for universal modes of communicating to others on matter that involve common issues. Ethical principles, unlike political, cannot be always deductible to an exchange of arguments. Certain layers of our comprehensive ethical beliefs might be incomprehensible to others and the obligation to interpret or transmit its content might present a big burden for a subject. That is why the political order should be based on a *maximin* principle: maximising the minimal constitutional norms and principles that can be achieved in an open and free exchange of arguments.

5.2.3. Historical assumptions

The idea of constitutional patriotism historically has emerged within a particular context. As explained, this concept is historically

determined though it is not necessarily historically dependent. Constitutional patriotism historically emerged in a post-war divided Germany as a substitute for a national state with a strong *ius sanguini* approach to citizenship. Its features, however, can be equally related to a specific post national era defined by globalisation and interdependence in global governance.

Citizenship in the globalized world has to be redefined: economically, politically and socially. The interaction within and across the borders of national states has intensified and national state has lost its primacy in economic affairs. Instead of states more often the main actors in the international arena are supranational organisations and regions²⁹³. Multinational companies redefine the economic outset of the modern world but indirectly shape the new forms of citizenship.

Politically, the new treats of asymmetric warfare, global terrorism, the challenges of climate change, global health issues, organized crime etc. make Westphalian state powerless and look for new forms of governance.

In this context, the very understanding of history, community and public consciousness and their meanings for contemporary *homo politicus* have significantly changed. Habermas elaborates this change stating that religious and metaphysical self-interpretation have now been substituted by history and its interpretation as “the medium in which cultures and peoples find their self-reassurance”.

During the nineteenth century, a posttraditional identity first took on a definite shape under a close affiliation between historicism and nationalism. But this was still fueled by a dogmatism of national

²⁹³ See e.g. for regionalism: Telo, Mario(ed), *European Union and New Regionalism*, Ashgate, 2007, and for the emerging power of supranational organizations: Lloyd, Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions*, Princeton University Press, 2000

histories that has since been in the process of disintegration. A pluralism in the ways of reading fundamentally ambivalent traditions has sparked a growing number of debates over the collective identities of nations, states, cultures, and other groups. Such discussions make it clear that the disputing parties are expected to consciously choose the continuities they want to live out of, which traditions they want to break off or continue. To the extent that collective identities can develop only in the fragile, dynamic, and fuzzy shape of a decentered, even fragmented public consciousness, *ethical-political discourses* that reach into the depths have become both possible and unavoidable.

Thus, there was a salient change of the nationalist paradigm as the major normative and interpretative tool of modernity by the concept of post-nationalism. Post-nationalism can be understood both in its discursive (theoretical) and practical (empirical) meaning. Discursively it denotes a concept of thinking citizenship and polity in terms that depart from nationalism as a dominant philosophical paradigm. Practically it can refer to *a temporal* dimension – a state of art in history when nationalism is not relevant any more or *spatial* – a new geographical space where local national contexts gain different normative importance to those they used to have.

I shall understand postnationalism a common denominator for shift in general understanding of the state and citizenship based on political, economic and societal change in global governance. The standing of postnationalism should not be understood as complete negation of the importance of national state both real and socially constructed (perceived). Postnationalism should be understood as a critical standing towards the supremacy of national state paradigm and

certainly not as an irreversible and finalized historical process²⁹⁴. Either way, it does not have to be understood strictly as non-nationalism.

The argument advocated by those who approach the concept of nation in a developmentalist and constructivist manner, like Gellner, Smith and Anderson e.g.²⁹⁵ – who stressed the contingency of nation as a notion constructed to answer the needs of political and economic structure of the time, as a by-product of a growing need for nationalism in a particular historical context, can be revisited in a new context.

Historical circumstances in the wake of 19th century, the development of global governance, international interdependence and globalisation are distinct to those of present day. Globalisation and high interdependence, regionalism and the decline of Westphalian concept of sovereignty seem to ask for new legitimizing discourses. If nation was a product of a certain period of human history that defined our political obligations and legitimized state coercion then new forms of political unity should be invented for emerging circumstances. The time we live in is determined by the relocation of the focus from national to subnational and supranational levels. Thus, even if the hypothesis of the necessity of nation as a specific form of individual and collective self-understanding had its conditionality in the political and economic circumstances, these circumstances have significantly changed and call into question the nation paradigm. These questions evidently go beyond the scope of the research question. Nevertheless, I think that

²⁹⁴ v. Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994)

²⁹⁵ See Gellner, Ernest. *Nations and Nationalism* (Ithaca: Cornell University Press, 1983) Smith, Anthony D. *The Ethnic Origins of Nations* (Oxford, UK: B. Blackwell, 1987) Anderson, Benedict R. O. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Rev. and Extended ed. (London: Verso, 1991) While perennial approaches are usually fuelled by the fact that even modern nations use symbolic and normative baggage of times before Modernity, constructivist theories of nation explain that symbolic and normative narrative can be *post-festum* construed if there is a need for that. The role of the elites might be decisive in nation building.

constitutional patriotism as it will be elaborated gives certain answers to issues raised here and corresponds better to the depicted circumstances. Its conceptual and normative approach to citizenship embraces better the outline of the new era: pluralism of values and loyalties, mobility and interdependence. I will elaborate on this more in detail in the chapter dealing with the constitutional patriotism as a form of citizenship for the European Union.

5.3. The practical principles of constitutional patriotism

After elaborating theoretical assumption we shall now proceed to practical principles of constitutional patriotism as a form of citizenship. Practical principles are the fundamental normative coordinates for the policies and citizenship regulations when applying constitutional patriotism as an ideal form of citizenship to a real polity.

These principles should be understood as arguments in favour of constitutional patriotism from the perspective of minorities. In this part the elements of a citizenship construed in the spirit of constitutional patriotism will be elaborated. These principles will be divided according to the dimensions of citizenship I defined in the first chapter: rights, participation and identity. How can we interpret the notions of autonomy and liberty in a way to avoid liberal dead end or ideals of unity and participation in a way does not subsume assimilation or a

particularistic ethics put on a pedestal of social values? What are the limits of the scope of law in order to remain functional and legitimate?

5.3.1. Rights

5.3.1.1. *The rule of law (Plato's principle²⁹⁶)*

The old debate of dichotomy between rule of law and rule of man can be traced at least back to Plato. The main reason for facing such a dilemma is how to establish and guarantee the functioning of a political order. In other words, shall the rule over the polity be assigned to men, human beings capable of rational and emotional acting or to impersonal norms set down in positive acts and customary law? It seems that in the present times this question sounds absurd. The rule of law is among the core values of contemporary polities and the opposition to it is usually equated with dictatorship. However, the political theory history might shed a new light on this issue, particularly on some aspects of modern citizenship.

The reason why Plato in particular is interesting is the change of ideas that is perfectly reflected in his books. Namely, in *The Republic* he proposes rule of king-philosophers according to the tripartite division of the classes. In *The laws*, his last and longest dialogue, however, he gives preference to norms saying that the second optimal but possible city is the city of laws. Interestingly enough, especially in the context of present citizenship debates, at the end of the *Laws* even the *xenos* is invited to participate in the process of law making. Aristotle followed the same reasoning of the late Plato and advocated the rule of laws as the best possible type of government.

²⁹⁶ Reference to Plato might seem odd. Nevertheless, the reason for naming this principle after him is clear: it was the first author to give precedence to good laws over men, given the volatility of the latter and neutrality of the former.

This brief reflection on part of ancient political philosophy should depict the main idea of this distinction. The rule of man, for the purpose of its contemporary use, might be understood broadly as the rule of any individual or group of people. In that sense, nationalism and liberal nationalism seem to put the rule of men above the rule of universal law. By that I mean they curtail the universal language of law and its quest for justice to the features of men that law should refer to. Therefore, many of the national laws reflect the privileges of the certain cultural groups and give them the right to rule the polity. The reason why Plato and Aristotle left the idea of the perfect government of the divine creatures was their apprehension of human nature, as volatile and easily rotten. Clearly, their concept of law was at least as much parochial as ours, but the idea that laws at the end will be more impartial than men is a conclusion we owe to them.

The impartiality of the law invoked by the ancient philosophers in today's term would seem something a bit different. The rule of law put the accent on the law, as the result of deliberation among equal citizens. In national interpretations of the law it seems to be the product of the common will of the community and the rule of the group of all citizens over the entire political unit. So proceduralism and legitimacy are central but not the only aspects of the rule of law.

To become legitimate, explains Rosenfeld, the rule of law would seem to need *democratic accountability*, *procedural fairness*, and even perhaps *substantive grounding*. In his view, these are necessary but not sufficient preconditions for the rule of law. "Democratic laws may be oppressive to minorities, procedural fairness may be consistent with a significant measure of substantive inequity, and the substantive values vindicated by any particular instantiation of the rule of law may be rejected by a sizeable portion of the polity, particularly in pluralist

settings marked by clashing conceptions of the good.”²⁹⁷ Rule of law, in other words, must have an antimajoritarian dimension which accounts for those that find themselves in constant minority position. Constitutional patriotism puts rule of law in the center of both democratic procedure and patriotic allegiance. In this way the tension between rule of law (procedures, legality) and national state (accountability, legitimacy) would be resolved. Legitimacy of polity is not any more found in extraconstitutional notions of ethnicity, culture, tradition, destiny etc. but in the laws that stand in the foundation of all democratic procedures.

5.3.1.2. Autonomy and equality before laws (Aristotle's principle)

‘The pursuit of happiness’, public and private sphere is an ideal that politics can account for but cannot and must not²⁹⁸ guarantee. An ideal political community might guarantee the pursue of happiness but not happiness itself, as a form of a *good*. Happiness is relative and deeply contested notion of existence and imposing any model of

²⁹⁷ Rosenfeld, Michel, “The Rule of Law and the Legitimacy of Constitutional Democracy”, Cardozo Law School, Public Law Research Paper, No. 36 (2001). In this article Rosenfeld follows describes the evolution of this concept in in three different traditions, namely that of the German "Rechtsstaat", the French "Etat de droit" and the Anglo-American "rule of law". He explains that while Anglo-American rule of law is based on antagonistic relationship between the state and the rule of law, making it in the same time paradoxically both independent and guaranteed by the state, German "Rechtsstaat" is a sort of symbiosis between the state and the law. Unlike both of these concepts, French “État de droit” does not refer to the whole system of all but rather on fundamental rights. In my view, constitutional patriotism shares that specificity with French concept of the “state of rights”. As far as its relation to state is concerned, I have already explained that the idea of rights in constitutional patriotism comes before polity, so polity is just like in American model, just a guarantee of the full enjoyment of rights.

²⁹⁸ If happiness is an elusive, relative and debateable notion it means that there must be no politics that can try to enforce it. Only totalitarian regimes can guarantee “happiness” to its subjects, define it and then impose it to everyone. Individuals, however, orientate their actions around things that fulfil them, bring to their flourishing and happiness.

happiness through state would be contradiction *in adjecto* to the essence of that notion. This normative aspiration that an ideal polity should adhere to should be operationalised through the notion of autonomy.

Autonomy is a controversial principle and value built in the foundations of many liberal theories and ideologies. Both group and individual enjoy the right to autonomy with regard to matters that concern only them. In this way, for the matters of a common life in a polity only a common constitution can be the guarantee of private and the expression of a public autonomy. Habermas co-originality thesis might be helpful here as well. Rights that we invest in initial social contract are co-original to rights we impose on ourselves as an abstract political community. Autonomy is a guarantee that we can achieve our life-goals without external impediments, but also an abstract and cohesive constructive element that makes common life possible. In its first sense autonomy is protecting our difference in another it is a warranty of our equality.

5.3.1.2. a) Equality

Equality that stems from public and private autonomy should be understood as *isonomia*²⁹⁹ – equality of laws or even better equality of individuals in front of the laws. The laws should be such to *reflect the public autonomy* – the expression of a common public reason and minimum common denominators and *protect private autonomy* as a sphere of our intrinsic ethical difference. This form of equality should have precedence over other forms of equality since it is a direct normative consequence of the applied principle of autonomy. Some

²⁹⁹Greek term for a special form of equality. Other types of equality were referred to as “*isokratia*” (political equality), “*isegoria*” (equality to propose initiatives) etc.

authors, like Hanna Arendt have identified *isonomia* with no-rule, a state in which the difference between rulers and the ruled disappears³⁰⁰.

Equality in question was political. It is the equality in the sphere of rights in Honneth's system, not "essential equality". It did not refer to overall conditions but rather to the quality of individuals as political subjects and the way universal law affects them. This equality as she explains was obtained by virtue of citizenship and not by virtue of birth. Equality and liberty were *artificial* and *conventional* not inherent to human beings.

Isonomy guaranteed equality, but not because all men were born or created equal, but, on the contrary, because men were by nature not equal, and needed an artificial institution, the *polis*, which by virtue of its *nomos* would make them equal³⁰¹.

This quotation perfectly grasps the normative input of constitutional patriotism – the liberty and equality are put in the basis of constitution as a corrective for natural or inherited inequality. Autonomy and the equality of status of an individual who de-facto belongs to a political community cannot be trumped by any other principle that gives precedence to membership in a cultural community or *jus sanguinis* rules of citizenship. Belonging in this case should be understood as permanent

³⁰⁰ "Freedom as a political phenomenon was coeval with the rise of the Greek city-states. Since Herodotus, it was understood as a form of political organization in which the citizens lived together under conditions of no-rule, without a division between rulers and ruled. This notion of no-rule was expressed by the word *isonomy*, whose outstanding characteristic among the forms of government, as the ancients had enumerated them, was that the notion of rule the 'archy' from *arhein* in monarchy and oligarchy, or the 'cracy' from *kratein* in democracy was entirely absent from it. The *polis* was supposed to be an *isonomy*, not a democracy. The word 'democracy', expressing even then majority rule, the rule of the many, was originally coined by those who were opposed to *isonomy* and who meant to say: What you say is 'no-rule' is in fact only another kind of rulership; it is the worst form of government, rule by the demos." Arendt, Hannah, *On Revolution* (New York: Viking, 1963) 30.

³⁰¹ Arendt, *ibid*.

residence: *animus simper vivendi*³⁰². In the heart of this conclusion is the presumption that in the interaction and exchange of power between states, groups and individuals, individuals remains the weakest entity. Equality of status, equality before the laws should guarantee her the possibility to adequately vindicate her rights and use it as a form to correct any form of misrecognition.

5.3.1.3. Liberty (Mill's principle)

The constitution should always serve to protection of a citizen—the value of constitution should be measured by its capacity to protect minority's view. The idea of liberty as a cornerstone value of modern society was captured by Mill's On liberty:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him,

³⁰² This concept I borrow from international private law that usually relates to notions of residence and citizenship.

or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise³⁰³.

The constitution reflects our common features and in that way makes us equal in exercising our liberty. This liberty is limited to adults and people who are capable of reasoning and self-protection. There is a part in which Mill advocates the idea that one should have a right to a minority opinion no matter what. His liberty is only limited by liberty of another individual. We draw our equality and liberty from the constitution as citizens of a certain polity. This is the precondition for any democratic form of governing and the only way to preserve the liberty of individual or the group and put it in the heart of constitutional values.

5.3.1.4. Antiuniversalism (James Tully)

In *Strange multiplicity* James Tully addresses the demands for cultural recognition that constitute the major conflicts of today, ranging from nationalism and federalism to the claims of indigenous peoples, feminism, national and language minorities. He concludes the survey of centuries of modern and contemporary constitutionalism practice with a finding that modern constitutions cannot adjudicate these claims in a just way. His underlying assumption is that modern political thought has been informed by the belief that cultural affinity of a political community coincides with its constitutional setting.

Anti-universalism should be understood as a principle that counters the tendency of constitution to communalize the normative and symbolic impetus of constitution and create biased majoritarian

³⁰³John Stuart Mill, *On Liberty*, Oxford University. (1859), 21–22

constitutional identities. This is probably the most utopist principle of constitutional patriotism. Constitutional patriotism reaffirms this principle with its orientation towards *minimal* set of *rules* instead of biased ethical content and the importance it gives to individual and group autonomy with regard to the public autonomy of the whole political community.

5.3.2. Participation

5.3.2.1. Participation (*Rousseau's principle*)

The principle of participation should be understood here to include deliberation and decision making as well as any form of political and social activism both within civil society and state institutions³⁰⁴. Political and civil participation are crucial for democracy. Furthermore, these are very important forms of political communication for the protection of minorities. Minorities' positions are articulated in public

³⁰⁴ Participatory and deliberative democracy are two distinct concepts with different histories. "Participatory democracy" was developed in contrast to elitist theories of democracy by some authors of the 1960s and 1970s, in particular Carole Pateman (in the participatory theory, 'participation' refers to (equal) participation in the making of decisions, and political equality refers to equality of power of determining the outcome of decisions..."(Pateman, *Participation and democratic theory*, (Cambridge, Cambridge University Press, 1970) 43). Deliberative democracy, however, was "born" later as a distinct paradigm though still leaning on the tradition of participatory democracy. Roughly speaking, while participatory democracy is concerned mainly with effective decision process and attainment of preferred outcomes, deliberative democracy is primarily concerned with reciprocal exchange of reasons, and the way these are transformed and mediated in the decision making process. Here I take these two streams of democratic thinking as complementary in rendering an individual capable of autonomous political communication and decision making.

sphere and in this way their claims get public attention. However, as it was explained already, I do not see participation as the crucial aspect of citizenship. I believe it bears equal importance like the two other two dimensions of citizenship, rights and identity. Modern society is not a society of active Greek polis citizens where the concept of the good was clearly tied to public affairs. It can be also assumed, what modern political thought has partially proved, that lower participation might be beneficial to the stability of democracy.³⁰⁵

...To suggest that political judgment entails a whirl of public activity is to argue that it is in essence political and not cognitive--that political judgment is defined by activity in common rather than by thinking alone....The most important fact about citizens is that they are defined by membership in a political community and enact their civic identities only to the extent that they interact with other citizens in a mutualistic and common manner...³⁰⁶

Thus, participation should be understood as a necessary mean of political communication and decision process that enables individual or group's articulation of interests and political attitudes. Participation is determined by mutualism and guarantees the dynamic of a changing political system. However, it should be limited by other two broader dimensions of citizenship: rights and identity. Namely, participation of individuals or groups should not lead to change of the agreed rights and liberties. Also, participation should take place in a context that does not give symbolical precedence to anyone's identity. Only in this way, participants can be equal³⁰⁷ provided that other structural conditions are

³⁰⁵ See e.g. Berelson, Lazarsfeld, and McPhee, *Voting* (Chicago: University of Chicago Press, 1954) The same effect is captured by András Körösenyi and his concept of *stabilizing apathy*.

³⁰⁶ Barber, Benjamin R. *The Conquest of Politics: Liberal Philosophy in Democratic times* (Princeton, N.J.: Princeton University Press, 1988) 199-201

³⁰⁷ Parity of participation means "the *condition of being a peer, of being on a par with others, of standing on an equal footing*" (Fraser, 2003, 101); it is dependent on institutions according people "the status of full partners in social interaction" (Ibid, 229). One problematic aspect of Fraser's account focuses on circularity or the paradox of enablement. Kevin Olson has formulated it in this way: "the problem, in short, is

fulfilled (equal information, indiscriminative common mean of communication etc.³⁰⁸)

5.3.2.2. *Openness (Kant's argument)*

The contemporary globalised world cannot give priority to national communities and citizenship must find new normative grounds. On one hand, the rigidity of Westphalian borders and state sovereignty are deeply challenged by the interstate migrations of people as well as the flows of capital and goods. On the other hand, global interdependence and issues that affect global community as well as the global consciousness it triggers is being actively advocated by modern and contemporary philosophers. Even as early as in his times, Kant explained that the modern world is one in which 'the peoples of the earth have entered in varying degrees into a universal community' and 'a violation of rights in one part of the world is felt everywhere'.

Though this might be questionable and triggers the difference between ethical and political as well as the question universality of

that deliberation presupposes participatory parity at the same time that deliberation is supposed to set the standards for participation" ("Participatory parity and democratic justice", in N. Fraser (Ed.), *Adding Insult to Injury*, London: Verso, 2008, 261). Another issue is the thing that parity in political, democratic arena needs structural legal, social and economic changes which might be sometimes contradictory among themselves. Equality I advocate here, though aimed at goals identical to Fraser's, should be achieved primarily with reconstruction of constitutional prepositions of membership. Anderson formulated it simply as: "Everyone counts, and everyone counts equally". (Anderson, Elisabeth, "Democracy: instrumental vs. non-instrumental value", in T. Christiano and J. Christman (Eds.), *Contemporary debates in political philosophy*, 219).

³⁰⁸ v. e.g. Benhabib, Seyla, "Toward a Deliberative Model of Democratic Legitimacy", in Benhabib, Seyla *Democracy and Difference: Contesting the Boundaries of the Political*, (Princeton, PUP, 1996) and Cohen, Joshua, "Deliberation and democratic legitimacy" in Bohman, Rehg, *Deliberative democracy* (Cambridge, CUP, 1997)

ethical norms³⁰⁹, we might agree that the world has entered into the phase of high interdependence and globalization and migrations change the quintessence of citizenship. The third Article of Kant's "Perpetual Peace" concerns the right of universal hospitality - "cosmopolitan right" (Weltb urgerrecht). In Kant's vision of cosmopolitan law everyone was entitled to hospitality in a host country but not to citizenship³¹⁰. Benhabib, referring to Arendt ("*the right to have rights*"), argues that everyone shall be guaranteed the right to citizenship, and tries to incorporate citizenship claims into a universal human rights regime.³¹¹ Carens at the furthest left part of the continuum advocates open borders as an ultimate normative goal³¹².

Constitutional patriotism, however, implies different approach to permeability of borders. The membership in a community should be not

³⁰⁹ This dichotomy correlates to distinction between relational and non-relational cosmopolitanism with regard to its relation towards global justice. Relational approaches (Beitz, Pogge) are associative and focus on relations that keep subjects of justice united by common links and are membership-based. Non-relational approach (Caney, Buchenon) give precedence to the ideas of global justice independent from the membership or structural relations. For relational cosmopolitans there is a global basic structure analogous to the domestic basic structure (constitution, property, economy) and Beitz upholds that Rawls' principles of justice can be applied on global scale. v. Maffetone, Sebastiano, "Normative approaches to global justice" in *Globalisation, Multilateralism Europe: Towards a better global governance*, ed. Mario Tel  (Ashgate, 2013) Although global justice is not in focus of this dissertation, constitutional patriotism leans more toward relational approaches.

³¹⁰ Kant Immanuel, [1795]. "Perpetual Peace: A Philosophical Sketch." Trans. by H. B. Nisbet. In: *Kant: Political Writings*. Ed. by Hans Reiss (Cambridge, UK, 1994) 93-130

³¹¹ "I have not advocated open but rather porous borders; I have pleaded for first-admittance rights for refugees and asylum seekers but have accepted the right of democracies to regulate the transition from first admission to full membership; I have also argued for subjecting laws governing naturalization to human rights norms and rejected the claim of a sovereign people not to permit naturalization and to bar the eventual citizenship of aliens in its midst." Benhabib, Seyla. *The Rights of Others: Aliens, Residents and Citizens*, (Cambridge: Cambridge University Press, 2004) 221. Constitutional patriotism in my interpretation does not make a strong divide between human rights and constitutional rights, since I try to derive naturalization and other kinds full citizenship claims from constitutional setting of a political community.

³¹² Although he thinks it might be not immediately achievable, free immigration is a normative goal we should strive for. However, it does not preclude citizenship theory and distinction between members and non members. Where we certainly agree is his point that "if people want to sign the social contract they should be permitted to do so" Carens, Joseph, "Aliens and citizens: the case for open borders" *The Review of Politics*, 49(2) (1987) 251-273

unreasonably closed to immigrants who want to stay and become members in a polity (*animus semper vivendi*). It would not be against the idea of constitutional patriotism, however, to decide to limit immigration if the very idea of citizenship rights guaranteed to all would be imperilled. Nevertheless, this limitation cannot be biased, based on any discriminatory norm that favours or disfavors certain identity pattern. Coming back to Hungary and immigration issue: if the immigration would present a clearly demonstrable danger for the overall security or welfare system then it might be absolutely legitimate for Hungary or any other state to limit immigration. In other words, openness is not an absolute feature of constitutional patriotism. However, stating that Muslims, as particular religious group, are not welcome is clearly against the principle of constitutional patriotism and in this case closure is to be considered illegitimate.

5.3.3. Identity

5.3.3.1. Uunity (*James Medison*)

In Medison's view, the contention between different factions would give a system stability – so the different clashes of identities can function better than only one line of division which can make these parties enemies. Factions or partial organization might undermine the general interest of society³¹³ Existence of various factions in complex contemporary society might not be the best way to guarantee the common interest of society, if such can be precisely determined at all.

³¹³ Shapiro, Ian, *The Moral Foundations of Politics* (New Haven: Yale University Press, 2003) 34

However, this approach undermines the possibility of tyranny of majority and allows for certain level of unity in general.

In a strongly multicultural society like Bosnian or Belgium for example people associate their identity and organize political system according to ethnicity (and accompanying religious, national identities) and the space for unifying elements is rather small. On contrary in a society with plural lines of differentiation, like Swiss for example (where religious and language group belonging do not coincide for example) the space for common political identity is greater.

A diversity of identities does not have to impede unity as long as these identities are not politicized and used as a justification for fractions. Moreover, the plurality of identities should be surpassed by the quest for a common political identification and that is exactly what constitutional patriotism offers both to majority and minorities.

5.3.3.2. Deterritorialization (Deleze and Guittari)

Though historical in essence, constitutional patriotism is putting away the symbolic burden of national state. There is a consensus, at least in the realm of international public law, that population, territory and government³¹⁴ are the main elements of a state. These elements interact and constitute a main discursive matrix of national state. The symbolic flux of these categories can in certain case have normative implications. That is why constitutional patriotism should be understood as a decoupling of main constitutive elements and consequentially the symbolic and normative result of these amalgams: decoupling nation and national state, decoupling nation and territory and decoupling national state and territory. National state in its modern understanding of

³¹⁴The Montevideo Convention on the Rights and Duties of States, 1933.

liberal nationalism should correspond to a nation (civil or ethnic version) and defined territory. In the civil version of the nation there is a strong connection between nation and territory while in the ethnic version territory is less important but is still galvanized with romanticized discourses. Ideally, constitutional patriotism should depart from these entangled concepts and promote political community focused on political rules and principles, historical but not atavistic, territorially defined but not territorially over determined. I believe that the fluid term of Deleuze and Guattari³¹⁵ catches the essence of this theoretical *novum* that constitutional patriotism brings in the kaleidoscope of political theory. Constitutional patriotism deletes the old symbolic and normative paradigms and leaves the space for new, more inclusive narratives. Once the locus of citizenship and patriotic loyalty are mutually recognised rights and liberties, it is possible to construe new symbolic dimensions of common life without intrusion of majoritarian national culture. Instead of the school curriculum narratives and perspectives of dominant cultural group, that is usually nation, might think of other narratives that include all groups' histories and traditions or invents new political inclusive forms of identification. Hymns should refrain from clear references to majority nation's features (religion, history etc.) and try to look for more neutral narratives etc. Some historical projects have managed to do so³¹⁶.

³¹⁵ Gilles Deleuze and Félix Guattari, *Anti-Oedipus*, Trans. Robert Hurley, Mark Seem and Helen R. Lane. (London and New York: Continuum, 2004)

³¹⁶ The idea of second socialist Yugoslavia can be seen as an example for these new symbolic political interpretations. After the horrors of WW 2, and the royal Yugoslavia where Serbs dominated public and political life, new Yugoslavia was a space of common reinterpretation where new ideological matrix – “brotherhood and unity” - was strengthened by equality of all nations, despite their size.

	Dimensions of citizenship	Practical principles of constitutional patriotism	Recognition of minorities
CITIZENSHIP	RIGHTS	THE RULE OF LAW	Protection from the arbitrary majoritarian decisions, both as individuals and collectives.
		AUTONOMY	Protection of the inherent individual right to determine her own life goals.
		LIBERTY	Protection of the inherent individual rights to pursue life goals freely under the condition of the same right for the others.
		ANTIUNIVERSALISM	Protection of the minority's spheres of life that resist law codification.
	PARTICIPATION	PARTICIPATION	Affirmation of equal participation of minorities in different areas of decision making.
		OPENESS	Affirmation of openness towards new citizens, based on idea that laws are open for everyone who abides to them.
	IDENTITY	UNITY	Affirmation of common inclusive belonging based on the adherence to basic laws and principles.
		DETERRITORIALIZATION	Symbolical detachment of citizenship from the majoritarian myths of nationalism, patriarchy and different forms of cultural superiority.

Table, Practical principles of constitutional patriotism and recognition of minorities

5.4. Constitutional patriotism and competing forms of citizenship

When it comes to the issue of ideal form of political order, constitutional patriotism differs significantly from the competing forms of citizenship. These differences are seen in basic premises of these models but also in their practical implications. In the second chapter I dealt specifically with multiculturalism due to its specific treatment of minorities. Here, I compare constitutional patriotism with general citizenship models: republican, cosmopolitan and liberal-national.

It was already stated that the quest for the best form of government can be interpreted as the clash between the right and the good. Should the best form of government favour an idea of the good or should it simply be focused on the rules that regulate interpersonal relations and their relation to the state? This clash becomes specifically important in the context of plural societies of nowadays. In previous chapters I have shown the salience of these categories and defined their application. The idea of right is linked to autonomy, our entitlement to legitimize the government and protect our particularity from majoritarian infringements. The idea of good was connected to identity, our particular goods that we, as I defined, do not want to be misrecognized. It is also connected to any form of public goods that we are supposed to embrace as members of certain community. These two arguments taken together led me to idea that the best way to overcome them is a form of citizenship that excludes the biased good from the public life and allows for the free achievement of good in the private sphere while any form of public good should be legitimised by all, including minority groups.

Membership in a community is always more than a simple sum of individuals. This “more” is differently defined in various ideological standpoints. Citizenship denotes several concepts bundled in the general idea of membership. The way we relate to each other, to the polity we belong to, the value we give to different communities, ethical and political, the patriotic feeling towards the polity or the lack of it – it all belongs to the complex system of political questions around the notion of citizenship. In this part I will try to identify the main normative criteria by which the forms of citizenship are differentiated.

Based on the main philosophical basic question of relation and primacy between rights and the good I have identified five relevant criteria of differing between competing theories of citizenship. These criteria should relate to the abovementioned dichotomy between the good and rights. They reflect the main questions that should be answered by a theory of citizenship that includes community, members of the community and their interdependence. The first three are related to the idea of good: the value of polity, the object of loyalty and the concept of public good. Other two criteria are related to the idea of right and touch upon a specific relationship between individual as a (potential) member of a community and community itself. All these criteria influence the normative outlook of citizenship and its normative acceptability all members of community including minorities. In order to be relevant, these criteria must reflect all possible interactions between members of the community and polity, and among members of the community. In this way we get the main normative axes that tackle citizenship, membership and patriotic loyalty.

The importance of polity relates to the ontological status and *telos* of political community within particular theory, its very concept and end. This criterion tries to valorise what is the main sense of life in a community.

Polity can be perceived in instrumental way but it can be also essentialised and given normative value. This criterion also shows how different ideologies relate to national state and its normative aspects.

The second criterion should relate to the object of loyalty, what citizens within a certain polity find them loyal to. Is it republic itself, nation, humankind or something else? This criterion defines patriotic sentiment as depicted by main theories of citizenship.

The third criterion stems from the second one, and goes deep into the normative issue of good. How the concept of public good is defined, as common political good or national good or in some other way. The good can refer to our political or ethical (comprehensive) good. Public good refers to any of these goods publically advocated or affirmed by state institutions and bodies.

The fourth is also related to previous two criteria. Here we shall determine how the given concepts of citizenships answer the dilemma ethical vs. political in the constitutional foundation of a certain polity. In other words, what is the source of political obligation, a duty to obey the laws and constitutional and political order? Where do we find foundations for moral reasoning necessary for us to socialise with legal norms, to make them sound “just” to us? This is the heart of contractual theories and might be reformulated in this way: under which conditions are we ready to accept binding norms as legitimate?

Finally, the last criterion touches upon the access to the membership in the community whether it is more restricted or inclusive. If it is restrictive what criteria and justification are employed? This part should address the idea of democratic closure. The modern citizenship can seem impenetrable to those who want to obtain it: immigrants, asylum seekers, guest workers etc. The most important thing is what the nature of criteria

for getting a citizenship is: starting from personal and cultural characteristics of potential citizen to formulation of citizenship tests and other formal conditions for obtaining it. This criterion is equally important as other four, for it indicates the way in which citizenship theory defines the basic, *a priori* right: the right to have rights.

Having in mind these questions what would be the answers of an ideal theory of constitutional patriotism? What makes constitutional patriotism distinct? Finally what would be the value added by this approach to the idea of membership in a community?

Constitutional patriotism is a form of citizenship that entails identification and allegiance to the set of normative components of the constitution of a certain polity. As such, constitutional patriotism sees polities as a necessary form of law enforcement. Polities and the social contract they are based on are the guarantee of constitutional rights and liberties. So, the polity is neither essentialised nor seen as a pure instrument: it is a corollary element of political law enforcement. Though it is intrinsically critical to the concept of national state, the theory of constitutional patriotism is accepting the reality of polities (including states, supranational polities etc.) as a model of effective enforcement of commonly accepted rules and principles.

In the theory of constitutional patriotism, the object of loyalty and patriotic allegiance are legal and political rules and principles. The very foundation of the social contract and its supreme expression – constitution, is the object of our loyalty. We are loyal to the community exactly for the rules it put in the core of our intersubjective social relations. These rules should be consequently beneficial for the individual and group flourishing what gives them particular legitimising strength. They guarantee that our

particular concepts of the good and our rights will not be challenged by majoritarian will.

The concept of the public good is particularly important aspect of the citizenship theory. The problem with minorities in multicultural societies stem from their disagreement with the publically advocated good. In many cases, that concept of public good can go directly against the basic rights and needs of minority identities. The public good, unless approved by all, cannot be advocated by public institution or imposed.

The source of political obligation in constitutional patriotism is political. The political self-understanding in contemporary polities has precedence over ethical. We are obligated by the rules that we accept as minimal principles of our communal life. This stems from the concept of political which is aimed at overcoming inter-group and inter-subjective issues by appealing to non-ethical arguments. The state, its apparatus and mechanisms of law creation and enforcement, thus, should reflect this tendency.

Finally, and this brings a big portion of constitutional patriotism's normative superiority, the conditionality of membership in the community is not discriminatory. It is based on the acceptance of the basic rules and principles, which are already result of a standpoint which accounts for minorities. Compared to other forms of citizenship this variant is less discriminatory and more inclusive. It is evidently less inclusive then cosmopolitan variants of citizenship but it seems to be a trade off with the effectiveness of rights and obligations that citizenship entails - that only an organized political community can enforce.

	The points of normative differing	REPUBLICANISM	NATIONALISM/ NATIONAL- LIBERALISM	COSMOPOLITANISM	CONSTITUTIONAL PATRIOTISM
G O D	The value of polity	A state as <i>telos</i> of political life	Instrument/mean	National states as obstacles to universal community.	Polities as a necessary form of law enforcement
	The object of loyalty/attachment	Republic	Nation and national institutions	Humankind	Legal and political rules and principles
	The concept of public good	Common political good (politically thick)	National good (ethically thick)	Universal idea of good	Protection of particular concepts of the good.
R I G H T	The source of political obligation	Political	Ethical/political	Ethical	Political
	The conditionality of membership in the community	SIMBOLICALLY EXCLUSIVE Accepting the authority of republic	EXCLUSIVE Membership to a civic or cultural nation	INCLUSIVE Unconditional	INCLUSIVE Acceptance of the minimum of common rules and principles

Table: The forms of citizenship and “the good vs. rights” paradigm.

Chapter VI : EU & POSTNATIONAL CITIZENSHIP

6.1. Introduction

The European Union is a *sui generis* polity. It means that we cannot easily classify its nature within the well-defined labels of national state, international organization etc. It also means that we cannot predict its possible transformations in the time to come. However, we can and we should theorize the normative possibilities that the EU might be heading to.

Citizenship is a complex network of relations within a political community between individuals and a polity and among individuals themselves. If there is the crucial question for the development of the EU polity it is definitely citizenship for it comprises and unites various dilemmas of the European political life. Namely, here we face the dilemma how to conceptualize both philosophically and politically citizenship in a new polity that comprises of many national states. Hannah Arendt argues that a citizen 'is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited not only by those of his fellow citizens, but also by the boundaries of a territory'³¹⁷. Which territory defines the rights and duties of European citizen? In other words, which territory and what boundaries are more likely to satisfy the

³¹⁷Hannah Arendt, *Men in Dark Times* (New York: Harcourt, Brace, 1968) 81

conditions of a normative theory of citizenship elaborated so far?

In this part I will try to test theoretical points I made so far: that constitutional patriotism is normatively suitable for plural societies in the globalized and interconnected world and that it is the most legitimate form of citizenship that recognizes minorities in the sense elaborated in the third chapter.

The idea of this chapter is to determine the normative form and content of the European citizenship required if it is to account for minorities and their need for recognition. Again, the citizenship of the European Union is in *statu nascendi* just as its constitutional and political order. Nevertheless, it still allows us to determine the contours of its empirically evident aspects and also to theorize its future development and assess its normative potential. The „amalgam of financial, fiscal, institutional and constitutional crisis in the EU“ (Menéndez) necessitated a normative reassessment of all fundamental questions and citizenship is an issue of a great salience.

The dominant form of political community since the Westphalia peace was a national state. Paradoxically, more recently than a national state, in the course of 19th century, was born nation as a historical phenomenon. Though many authors would indicate its constructed, thus artificial nature, nationalism remains an important and galvanized concept of the European politics. Moreover, nationalism finds its adherents even among academics so questioning this notion necessarily means to engage in the debate and offer and refute certain philosophical arguments. This would, in brief, be the context of this section.

In the first part of the chapter I will deal with the notion of post national citizenship, a very important dimension of theorizing citizenship in general. Using a collage of approaches I will come with a revised reading of

nationalism – offering a new perspective to look at it. Understanding post national citizenship without a broader concept of post nationalism would be impossible. Then, I will focus on historical aspects of the emergence of the EU citizenship – explain why is this notion so salient today in the context of the political theory of EU. The EU citizenship exists both as a normative and descriptive category and I will try to delineate these two and determine their interdependence. How to tackle the main normative issues of citizenship theory through the prism of a supranational polity? Here I will mobilize some aspects of Habermas’s discourse theory of law to advocate the supremacy of the EU supranational citizenship. In addition, I will give a theoretical sketch of its form and content two aspects of citizenship that will help me establish a model of the EU citizenship that I will subject to critical scrutiny.

6.2. Towards postnational citizenship

As already said, Judith Shklar has written that there is no notion more central in politics and none more variable or contested in history than citizenship. This notion remains a constant of the political philosophy and few political thinkers remained immune to the need to reflect on this phenomenon. Its contested nature becomes even more prominent if we take into account the emergence of postnational forms of citizenship as it is the case with the European Union.

The close relation between national state and citizenship has recently come under a good deal of critique and reassessment. Processes and discourses of globalization mean that questions of political participation and everyday life which are framed in terms of the interests and values of citizens within separate and distinct nation-states are inadequate when these

are not contained within state boundaries anymore. As Yasemin Soysal has argued, citizenship is no longer unequivocally anchored in national political collectivities". There is reality of individuals "lives increasingly crossing the borders of national states that creates the space that attracts allegiance, attachment and gives a new idea of membership. In a new context of a sui generis multinational polity, minority-majority relations tend to get new forms. However, the old issues of structural injustice upon members of various minorities should make us rethink the emerging citizenship—its form and content, its normative significance and salience. The debate whether the rights are better guaranteed in a national state or rights transcend the state borders in a cosmopolitan discourse should take into account a middle way between these two poles a postnational paradigm—and if we take the issue of minorities—bring back the multicultural debate in it. At the same time, large-scale migration and settlement in states which were previously assumed to be made up of citizens with a somewhat uniform cultural background has also called the exclusionary basis of national citizenship into question. On a cognitive and axiological level, we have what Habermas calls "post-traditional" society, where "integrating world views and collectively binding comprehensive doctrines have in any case disintegrated".

The terms 'postnational citizenship', 'transnational citizenship', 'global citizenship' have been invented in order "to capture processes of cross-border inclusions, allegiances and affinities that have occurred in the context of globalisation"³¹⁸. Regardless of how we perceive or valorize national state and nationalism as discourse it is needless to prove that every citizenship theory should relate to nationalism and face its empirical

³¹⁸Michael Lister and Emily Pia, *Citizenship in Contemporary Europe* (Edinburgh: Edinburgh University Press, 2008) 85

domination. It is particularly true in the European context where the ideas of nationalism and national state emerged and has since then left distinct marks on European politics.³¹⁹ In the European continent it is impossible to think citizenship without nationalism. Nation state as an amalgam of citizenship ideals of belonging to a polity and nation as a cultural expression of its belonging convincingly confirms this thesis. However the big historical changes accompanied with the change of discourses and paradigms give us legitimation to put the supremacy of nationalism under a thorough critical scrutiny.

In this part I will elaborate the constructivist approach to nationalism and go step further to claim that the new social and political circumstances of contemporary societies go beyond the functional capacities of national state. That specific amalgam of social, historical and political circumstances I see as determinants of a post-national state. In the next part I elaborate why constitutional patriotism gives solutions to some of the issues posed by post-national state. Finally I will explain why this policy and discourse change in European context might be beneficial for the recognition of minorities and their rights.

6.2.1. Postnationalism

Postnationalism refers to state of affairs in nationalism has lost its inherent features associated with the emergence of national state (imaginary homogeneity and cultural thickness) and is not the only conception of

³¹⁹v. e.g. Hobsbawm, Eric J, *Nations and Nationalism Since 1780* (Cambridge: Cambridge University Press, 1990)

political allegiance. This, however, does not mean that nationalism does not play any role anymore. Moreover, it does not mean that nationalism is not relevant anymore especially that it ceded or will cede to exist.

I believe that postnationalism should be understood in its discursive (academic) and practical meaning. Discursively it denotes a concept of thinking citizenship and polity in terms that depart from nationalism as a dominant philosophical paradigm. Practically it can refer to a temporal dimension – a state of art in which nationalism is not relevant any more or a special – a new geographical space in which local national contexts gain different normative importance than they used to have.

There is an ongoing debate between perennialist and social constructivist theories of nationalism. I have no intention to deepen this debate, but rather to explain which argumentation I will be using in constructing my argument. On one hand, there are essentialists (perennialist, primordialists) who claim that nations are old phenomena which usually result in forming the perennial attachments and discourses around certain objects – biological and/or territorial origin. On the other hand social constructivists see nation as a historical construct fabricated in the interaction between elite and popular culture in the rise of industrialization and modernity in general. I will use social constructivist and functionalist argument in showing that post-nationalism offers better explanatory narrative in a new historical context.

In his famous essay “What is a Nation?” (*Qu'est-ce qu'une nation?*) Renan explains in a social-constructivist manner the way in which the nationalism was born in France in the aftermath of French Revolution. "Forgetfulness, and I would even say historical error, are essential in the creation of a nation." In order to achieve unity the newly created nation has more to forget than remember and the terrible facts of the history remain

forgotten for the sake of unity. "Unity is always achieved by brutality: the joining of the north of France with the center was the result of nearly a century of extermination and terror"³²⁰. In other words the imaginaries out of which we create the national discourses are so arbitrary and para-historical that it makes little sense to essentialise them. These social constructs in other words have precise functions in modern nations.

Brubaker stated that "we should think about nation not as substance but as institutionalized form, not as collectivity but as practical category, not as entity but as contingent event."³²¹ However, this does not allow us to negate the loyalties felt by many Europeans, and others, to their nations. They identify and give normative value to their national affiliations. Miller, for example, thinks that 'nationality and citizenship complement one-another. Without a common national identity, there is nothing to hold citizens together, no reason for extending the role just to these people and not to others'³²². Nevertheless, there is nothing that obliges us to think that national identity is the unique source of cognitive and normative inputs. Nation is certainly a historical phenomenon and as such is subject to constant change. The conclusion to be drawn is that though national loyalties are to be taken into account in scientific research there is no reason to petrify them and analyse them a-historically. Again, our scientific inquiry should always take into account social actors, who, for various reasons, want to keep relations and structures that correspond to idea of nationalism. Nationalism is not over, but is not "the only game in the city" anymore. I

³²⁰ Ernest Renan, "What is a Nation?", text of a conference delivered at the Sorbonne on March 11th, 1882, in Ernest Renan, *Qu'est-ce qu'une nation?*, Paris, Presses-Pocket, 1992. (translated by Ethan Rundell)

³²¹ Rogers Brubaker. "Rethinking Nationhood: Nation as Institutionalized Form, Practical Category, Contingent Event" *Contention* Vol. 4 Iss. 1 (1994) 8

³²² (Miller, D., "Community and Citizenship," in Avineri and de Shalit, *Communitarianism and Individualism*, (OUP 1992) 94

will now discuss some of the theoretical pillars of nationalism, though I have already indicated some of its flaws expressed by other authors³²³.

The functional theory of nationalism gives us a supplementary insight in the inherent historical nature of nations. In that regard, Gellner's argument on the historicity of nationalism and its intrinsic relation to modernity and transition to industrialized economy seem to be very persuasive. This argument manages to explain the homogenizing roles of the educational systems, national labor markets, and improved communication and mobility. The functionalist and constructivist argument of this kind has probably lost its explanatory power in the new historical context. New structures, actors and power relations allow us to think in different directions and reconsider the assumptions of Gellner's theory. The main circumstances of Gellner's conception of nationalism as historically rooted and nations as contingent products of nationalism have changed.

"In fact, nations, like states, are a contingency, and not a universal necessity. Neither nations nor states exist at all times and in all circumstances. Moreover, nations and states are not the same contingency. Nationalism holds that they were destined for each other; that either without

³²³ Abizadeh has dealt with four arguments that nationalism is based on in its claims about the importance of shared public culture for effective democracy. He has interpreted these arguments and attributed them to specific theorists: "(1) *social integration in a liberal democracy requires shared norms and beliefs (Schnapper)*; (2) *the levels of trust that democratic politics requires can be attained only among conationals (Miller)*; (3) *democratic deliberation requires communicational transparency, possible in turn only within a shared national public culture (Miller, Barry)*; and (4) *the economic viability of specifically industrialized liberal democracies requires a single national culture (Gellner)*". In refuting these arguments, Abizedah has shown that people can affectively identify with each other despite not sharing particular norms or beliefs, the trust necessary for social integration is not directly dependent upon shared public national culture, cultural diversity can raise costs but does not rule out communicative transparency and homogeneity is not an "objective imperative" for industrial liberal democracies. Abizadeh, A, *ibid*, 495. In this chapter I broaden the scope of critical perspectives towards nationalism and national-state centered paradigms.

the other is incomplete, and constitutes a tragedy. But before they could become intended for each other, each of them had to emerge, and their emergence was independent and contingent. The state has certainly emerged without the help of the nation. Some nations have certainly emerged without the blessings of their own state. It is more debatable whether the normative idea of the nation, in its modern sense, did not presuppose the prior existence of the state”³²⁴

Today we might think of European history in the same way: as a historical context in which new kind of nationalism (in the sense of loyalty) might be needed for a normal functioning of a new polity that unites many national states and peoples. That loyalty, however, could not rely on nationalism in its 19th century form. We should, instead, look for contextually more adequate forms in which the loyalty of the same functional and constructivist nature might be expressed.

There is also a question of political legitimacy. Namely, as Gellner explains nationalism is 'primarily a principle which holds that the political and national unit should be congruent' ³²⁵, it is a sort of political legitimation. In the new European context we might find this form of political legitimation as utterly anachronic. In this part I advocate idea that it is post-nationalism, a form that allows for old allegiances and legitimations but in the same time overcomes their shortcomings through new symbolic and normative paradigms.

This is normatively superior form of loyalty³²⁶ since it overcomes the particularities associated with nationalism. Furthermore, it is also a

³²⁴Gellner, Ernest, *Nations and Nationalism*, (Ithaca: Cornell University Press, 1983) 6-7.

³²⁵ *Ibidem*, 1

³²⁶ Loyalty is acceptance of the rules of a political community and as such it is intrinsically connected to the notion of legitimacy (I use this notion as a synonym for justification, as its *genus proximum* though I am aware of the distinction, v. p. 18, footnote

realistic paradigm. Anderson in his 1983 “Imagined communities” stressed that all modern conceptions of nation either stress or fully rely on its imaginary character. We imagine our community based on our and identity of those similar to us and the common and conventional symbolism that this group adopts. Certainly there are also narratives entangled with these phenomena: the stories and myths about the common history and shared destiny.

The constructivist paradigm of nation allows us to think of postnationalism as a new construct that should replace the symbolic cohesive strength of political community in the new historical context. New context of symbolic political crossing points, importance of mass media, new ideas of identity and cultural exchange, all these phenomena assure us that this reconstruction is not only desirable, but very probable. The reconceptualisation of the nation through imagination is not necessarily connected to any concrete and unchangeable identity feature, historical and/or geographical background etc. Nations invent themselves contingently and this invention is tied to state building. This source of identity is dependent on national state as its generator. The idea and ideals of national state perpetuate the idea of nationalism because they are somehow considered to be mutually dependent. Following this logic, this imagination process and source of identity could be revisited. Instead of the national state there should be another generator embodied in a certain type of political community to give the grounds to these processes. There are some historical examples, though in the contemporary history it would be

11). These notions (loyalty and legitimacy) overlap but do not mean exactly the same. Just like notions of private and public autonomy, or negative and positive freedom – legitimacy and loyalty are different in the sense that the former notion it is our intimate acceptance of the laws while the latter is more about a sort of public/expressed support to a political order. When I talk about constitutional patriotism as a type of patriotism I use the notion of loyalty. When I discuss it as a form of citizenship I am more focused on legitimacy.

certainly the EU. This process of revisiting can go vertically and horizontally: just as individuals can consider themselves members of two or more different nation they could in theory consider themselves as members of both supranational community and national state. This part of my theoretical argument can be unquestionably confirmed by the citizen identification with the EU and the rising of this identification with the EU integration process³²⁷. Thus, if we discuss the feasibility of new forms of allegiances, there are no obstacles to revision of national belonging as long as it can be upheld by a legitimate polity.

Instead of unique and universal national allegiance we can talk about plurality of allegiances and their possible revision. The fact that ideally the object of patriotic loyalty should be a set of constitutional norms does not exclude other variants of allegiances. However, unlike nationalist paradigm it gives normative superiority to laws rather than extra political objects of loyalty: ethnicity, nation etc. Besides, the very quality of national feeling, some authors argue, has changed. Namely, the national state has gone through such a dramatic change that has necessarily changed the perception of nation as such – it is not anymore perceived as homogenous as before. In other words it has changed its cultural into political nature³²⁸:

One's own tradition must in each case be appropriated from a vantage point relativized by the perspectives of other traditions, and

³²⁷ Standard Barometer 77, EU citizenship: “Almost four out of ten Europeans continue to define themselves only by their nationality12 (38%, -1 percentage point since the Special Eurobarometer survey 379 of December 2011). Nonetheless, an increased majority of Europeans **define themselves by their nationality and as Europeans** (49%, +3 percentage points). This feeling has increased significantly since the spring 2010 survey (EB73) when only 41% of respondents gave this answer, compared with 46% who then defined themselves solely by their nationality.”

³²⁸ These two models of nationalism are often referred to as German (ethnic) nationalism and French (political) nationalism. Certainly this division in today’s context can be debated. Furthermore, most nationalisms contain both aspects so these two should be understood as “ideal types” or theoretical constructs.

appropriated in such a manner that it can be brought into a transnational, Western European constitutional culture. A particularist anchoring of *this kind* would not do away with one iota of the universalist meaning of popular sovereignty and human rights. The original thesis stands: democratic citizenship need not be rooted in the national identity of a people. However, regardless of the diversity of different cultural forms of life, it does require that every citizen be socialized into a common political culture.³²⁹

On a historical level of big ideas things seem to be clear. But what is the anatomy of postnationalism? How does it establish its cognitive and normative significance? Postnationalism emerges in postmodern era of plural ethical and epistemological worldviews. In the new context thinking through the old monocultural paradigms is no longer possible³³⁰. This process, according to Habermas, belongs to a longer process of disintegration of religious and metaphysical self-interpretations through history itself.

During the nineteenth century, a posttraditional identity first took on a definite shape under a close affiliation between historicism and nationalism. But this was still fuelled by a dogmatism of national histories that has since been in the process of disintegration. A pluralism in the ways of reading fundamentally ambivalent traditions has sparked a growing number of debates over the collective identities of nations, states, cultures, and other groups. Such discussions make it clear that the disputing parties are expected to consciously choose the continuities they want to live out of,

³²⁹ Habermas, J. 'Citizenship and National Identity: Some Reflections on the Future of Europe', Praxis International. 12: 1; 1-19, (1992) 7

³³⁰ The questions that bothered national state in 20th century: welfare, health, education cannot be resolved anymore by taking the position of dominant culture/nation. Diversified citizenry, various forms of citizenships, interconnection between the levels of governance render that position reductionist and wrong.

which traditions they want to break off or continue. To the extent that collective identities can develop only in the fragile, dynamic, and fuzzy shape of a decentered, even fragmented public consciousness, *ethical-political discourses* that reach into the depths have become both possible and unavoidable³³¹.

Together with fragility of collective identities there is emergence of ethical-political discourses. We can use this Habermas' conclusion to say that political legitimation in postnationalism is based on *ethical-political discourses* rather than nation and national discourses. Again, these discourses can include nationalist perspective but this perspective can no longer be exhaustive. Therefore, I reckon that this is pretty much universal process and paradigmatic for Western democracies and their societies. The whole turn of multiculturalism in 90s, among other phenomena, indicates this change. Postmulticultural reality puts the pendulum back to national discourses. Nevertheless, my argument here is not that national discourse does not exist but rather that it is not anymore the only authoritative matrix of political self-understanding.

The rise of intersubjective universal norms, as Habermas explained, promoted the divergence of collective forms of life and strengthened individualism as a way of choosing one's one concept of the good life.

The intrusion of reflection into life histories and cultural traditions has fostered individualism in personal life projects and a pluralism of collective forms of life. Simultaneously, however, norms of interaction have also become reflexive; in this way universalist value orientations gain ascendancy. Once again, an altered normative consciousness is reflected in the relevant philosophical theories since the end of the eighteenth century.

³³¹ Habermas, Jurgen. *Between facts and norms: contributions to a discourse theory of law and democracy*, (Cambridge, Mass.: MIT Press, 1996) 97

One no longer legitimates maxims, practices, and rules of action simply by calling attention to the contexts in which they were handed down.³³²

Something even more radical happened in Habermas's view. Namely, the contexts in which these maxims and practices were handed down cannot serve anymore as the source of legitimation.

Without the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations can in the final analysis be gained only from rational discourse, that is, from the reflexive forms of communicative action itself. The rationalization of a lifeworld is measured by the extent to which the rationality potentials built into communicative action and released in discourse penetrate lifeworld structures and set them aflow³³³.

Clearly, rationalisation through forms of communicative action must be understood again as a result of interaction within a plural context of common life between various groups and individuals. In Habermas view the change is even more radical at the individual level where the big discourses can no longer provide justification for various concepts of good life.

Processes of individual formation and cultural knowledge-systems offer less resistance to this whirlpool of problematization than does the institutional framework. It is here, at the level of personality and knowledge, that the logic of ethical and moral questions first asserted itself, such that alternatives to the normative ideas dominating modernity could no longer be justified in the long run. The conscious life conduct of the individual person finds its standards in the expressivist ideal of self-

³³²Ibidem.

³³³Ibid. 98.

realization, the deontological idea of freedom, and the utilitarian maxim of expanding one's life opportunities.³³⁴

I completely agree that these three elements, we might call them *ethical*, *political* and *practical* elements of conscious life are *in nuce* standards of a good life. The fulfilment of these standards is just another name for the recognition, acceptance of someone's realisation, her idea of freedom and quest for opportunities. Once these standards are more and more valued individually, although it is hard to exclude institutional frameworks, the question is how can we guarantee that individuals achieves these standards in a just way within a common political community? The only way we can conceive it is through the idea of neutral state. However, and this point was already elaborated, it is not enough to simply inaugurate a neutral liberal state but also to deconstruct all biased forms of legal and political intersubjectivity which favour particular concepts of the good.

Many aspects of the modern state that we take for granted: inherent values of liberalism and individualism, secularism etc. need re-evaluation: are these really unbeatable axioms of our contemporary societies? A genuinely neutral state should begin with more neutral grounds or at least try to look for them.

Ethical, political and practical elements of conscious life could not be fuelled anymore solely from the resources of nationalism. The complexity of life changed the national paradigm as dominant and opened the space for other forms of allegiance and conceptualisation of the worldviews. The ethical substance of collective forms of life takes its standards, on the one hand, from "utopias of nonalienated, solidary social life within the horizon of traditions that have been self-consciously

³³⁴Ibidem.

appropriated and critically passed on” while in the same time looking for “just society whose institutions are so constituted as to regulate expectations and conflicts in the equal interest of all”³³⁵. The source of the political is now found in the discursive exchange aimed at the achievement of common political goods and not in exclusive traditional ethnonational paradigms. This is exactly the change that any theory of citizenship should consider when dealing with the plural societies in order not to be stuck in primordialism and solipsism of culture that cultural liberalism and communitarianism have advocated.

To conclude, I reckon that there is a historical (macro) and discursive (micro) change of the dominant paradigms that relate to the normative salience of the nation, that I determine as postnationalism. Postnationalism as a term should indicate only the emergence of the new paradigm and not necessarily the exclusion of the one it succeeds – nationalism.

6.2.2. What kind of postnationalism? The EU constitutional patriotism – between a national and world state

If nations and national states are arbitrary circumstances that determine the rights distribution over the globe it might stem from that reasoning that any kind of boundary defined polity will suffer from the same arbitrariness. Partially it is true. However, even this theoretical, essentially ethical question must resonate with two criteria in political

³³⁵Ibidem.

philosophy mentioned in this thesis several times: *desirable* and *viable*. These two criteria have internal dialectics, obviously determining the scope and the sense to each other. This could be easily interpreted as dichotomy between ethical and political which dominates modern political philosophy. This common place applies to the studies of EU citizenship. Should EU citizenship include a concept of good and is a set of political mechanisms necessary for an effective citizenship?

This is exactly the first theoretical question that needs consideration when we think about the EU citizenship. Is there certain concept of the good that particular nations have that the EU citizenship would lose? Or, if we think of the EU citizenship in order to make a bigger space of inclusion and dismiss national states as the only locus of allegiance and identity than wouldn't cosmopolitanism provide an answer for that?

These questions need contextualization in the European context. I have argued so far that post-nationalism is an emerging paradigm of European self-understanding that reflects on the idea and concept of citizenship too. Furthermore, I will argue that citizenship is a set of guaranteed rights (and certainly, responsibilities) and there must always be a political mechanism, enshrined within a certain polity, that enables the effective enjoyment of these rights. My conclusion is that, since we do not have and we have no indicator of having a world state that would overcome the state sovereignty and give rise to the citizenship of status at the global level, we must confine to post national forms that include some form of constitutional order³³⁶ – and the EU is a paradigmatic example.

³³⁶ Constitutional order is the presence of the hierarchy and *primacy* of enforced legal norms, usually associated to national legal systems. International community, governed by international public law, cannot be identified as constitutional order due to its specific nature (e.g. dominance of *ius dispositivum* over *ius cogens*, no enforcement mechanism, no compulsory judicial system etc.) At most, we might talk of the embryonic constitutional

In other to better understand European polity and the important of its citizenship we might need to have a look at major theories of European integration and the way the EU is perceived as a political body.

Some theories of European integration (neofunctionalism, intergovernmentalism, institutionalism and federalism e.g.) put different accents on what they find important for political life in integrating Europe³³⁷. Neofunctionalism perceives integration as an elite-led self-sustaining process driven by the logic of spill-over, within various spheres of political and other cooperation. The intergovernmentalist approach rests on the assumption that national states and national interests form the process of European integration. Institutionalism (in all its forms: social choice, historical or sociological institutionalism) emphasises the importance of institutions which can be both national and those created in the course of European integrations. Finally, in federalists' view, instead of analysing national states we should focus on an emerging super-state.

There is another way of similarly formulating this issue without bigger theoretical labels. We can analyse citizenship as an element of European *polity* (political community), *policy* (mechanisms, political instruments) or *politics* (actors and decision makers). Clearly, at this stage citizenship in the EU is somewhere between politics and policy. Therefore,

order. As Erika de Wett states the international legal order can be seen as a “co-existence of national, regional and sectorial (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order”. De Wet, Erika, The International Constitutional Order, *International and Comparative Law Quarterly*, 2006, Vol. 55, No. 1, pp.51-76, p. 75 European Union is *sui generis* in this regard too. Here we might clearly identify a form of *multilevel constitutionalism*. v. e.g. Halberstam Daniel, Conflict as Order: Plural Constitutionalism in the European Union and Beyond, paper presented at Yale Legal Theory Workshop on 18 April 2013, available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/LTW-Halberstam.pdf

³³⁷ v. Rosamond Ben, *Theories of European integration* (Palgrave, 2000)

citizenship at the polity level remains within the analyses of normative political theory.

On one hand, I believe we might discuss the importance of common EU citizenship without necessarily resorting to the form of government that this polity might/should have. On the other hand, in my view, citizenship is a question of policy and politics but before all it is a *per excellence* question of EU political community. In other words, I do not deal here with the question of the EU federal state, or state at all. Nevertheless, I reckon that the EU citizenship should have normative superiority over national citizenship. As such it should be one of the issues that have constitutional and not political meaning and interpretation. Dieter Grimm argues that one of the causes of the EU legitimacy deficit lies in the over-constitutionalisation, which means depoliticisation because once it is at the constitutional level it cannot be longer open for political decision making³³⁸. His point is that many laws that in national states would be considered ordinary get through the EU treaties constitutional character. Though I find this argument very persuasive I think with citizenship it is the contrary: it should a constitutional matter within EU legal system and once democratically and publicly deliberated closed for discretionary political decision making.

“While supranational democracy and free movement are *prescriptive* norms, the legitimacy of external boundaries implies two kinds of *permissible* decisions: to limit the accession of states that want to join the union and to limit the admission of immigrants from outside the union”³³⁹. This has shown its practical validity during the European migrant (refugee)

³³⁸ Dieter Grimm, “The Democratic Costs Of Constitutionalisation: The European Case”, *European Law Journal* Volume 21, Issue 4, (2015): 460–473.

³³⁹ Rainer Bauböck, “Why European citizenship – normative approach to Supranational Union”, *Theoretical Inquiries in Law*, Volume 8, Number 2, July (2007) : 461

crisis: the European states were against reception of immigrants but also against the accession of countries from which there was a significant immigration in the last decade. This however profoundly rests upon our conceptions of the national state and the sanctity of Westphalian sovereignty. This logic, as I have argued, has given a normative back up to mere historical and political contingency.

“This political, economic, and geographic self-limitation of a regional union turns the external border into an essential element of its collective identity³⁴⁰”. As Baubock argues, this fact will make a distinction between member countries nationals and third country nationals more visible and important³⁴¹. Again, citizenship is a balance between the openness guaranteed to all members of the political community and those that are to become ones and the thickness of rights that a community can guarantee them. Borderless world, providing that we could ever democratically establish it, would jeopardise the scheme of rights that lie in the very essence of citizenship. Constitutional patriotism is both ethically desirable and politically viable since the EU offers a context of political culture and juridical and legal mechanisms for its establishment. In other words, it is not only a nice idea but also a politically (through the will of the MS and EU citizens) and then legally (through the EU’s competence to create legal instruments) viable vision.

The questions concerning the idea of other regions forming around the same conception of citizenship is the best answer for those who claim that constitutional patriotism of the EU in this case is too exclusive, a concept that cannot travel or another Eurocentric concept based on modernism, liberalism, westernism and so on. It goes beyond the scope of

³⁴⁰Ibidem.

³⁴¹Ibidem.

this thesis to show that world government or any polity that would aspire to include all existing national states face serious legitimacy and democratic issues. There are however regions similar to the EU where the social, political and economic cooperation among national states is so high that we could imagine the constituting of new polities that would be consisted of all of these states (African Union, Union of South American nations e.g.) However, even though constitutional patriotism is the most open concept of liberal democratic citizenship it still has to be based in a minimal political culture and structure which is developed in its historical and political development. The law as a medium of communication has to be perceived as legitimate by all members of a political community. Imagining a global constitution, that universally guarantees rights and empowers and limits mechanisms for their protection, seems unrealistic at this moment. UN Charter is a sort of constitution of the states/peoples but not of world citizens. Bauböck reckons that “normative theory of supranational citizenship will necessarily be informed by the EU as the only present case and will be addressed to the EU in most of its prescriptions, but should still develop a model sufficiently general to potentially apply to other regional unions as well”. Kostakopoulou sees European citizenship in a similar way, as entailing “a number of fruitful ideas for a more ambitious transition to a post-national tableau and can be the prototype for institutional experimentation on citizenship on a global scale.” Likewise, I think that constitutional patriotism is exactly a form of citizenship that once applied to the regional level of the EU and potentially on other regions that share similar political culture, might be considered for experimenting at the global level. However it is a distinction between ethical and political in contemporary politics that force us to limit these theoretical experiments to certain geographical and historical units.

6.3. Mapping the theory of EU citizenship

The kaleidoscope of theoretical understanding of EU citizenship is complex: it can be analyzed in a descriptive and normative way, its form has to be placed within a triad of national, supranational and cosmopolitan citizenship, while it is still questionable what is its content: economic, social and/or political legal provisions. In the mixture of possible interpretations and descriptions and normative projects we might also look for ones encompassing minorities. Growing and expansive literature on citizenship of postnational and transnational citizenship questions the idea and relevance of state borders. Sociological, political and legal multiculturalism resonate strongly in the theory of citizenship and these considerations should have an important place in the theorizing of EU citizenship.

The relationship between borders and rights guaranteed by a polity is usually interpreted on a continuum between the poles of cosmopolitanism and liberal- nationalism³⁴². Postnational citizenship, like the one emerging at the territory of the EU, departs from extremes and looks for intermediary position that accounts for the authority of the polity that provides concrete citizenship rights but in the same time departs from national state as the only legitimate provider of these rights. Elizabeth Meehan's in *Citizenship and the European Community* (1993: 1) considers

³⁴²v. e.g. Vertovec, Steven, and Robin Cohen, *Conceiving Cosmopolitanism: Theory, Context and Practice* (New York: Oxford University Press, 2002)

the formation and character of EU citizenship and finds that in European Community „a new kind of citizenship“ is emerging and it is „neither national nor cosmopolitan. A new theory of EU citizenship should, thus, begin “from constellations of nested and overlapping polities, which it accepts as facts, and considers then how citizenship should be distributed among individuals and across polities in order to satisfy liberal democratic norms and aspirations”³⁴³ Moreover, and that is the essence of this thesis, we must include the normative considerations of liberal culturalism, multiculturalism and postmodern theories of citizenship in the reflection on new *sui generis* EU citizenship.

The European Union citizenship was introduced by the Maastricht Treaty, which was signed in 1992. European citizenship is complementary (additional) to national citizenship as Treaty on the European Union Article 9 stipulates: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”. In the preamble of Charter of Fundamental Rights of the European Union, which came into force with the Treaty of Lisbon, it is said that the EU “places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”. These legal provisions tell little about possibilities in which we might use the broader notion of EU citizenship³⁴⁴.

³⁴³ (Baubock, *ibid*, 455)

³⁴⁴ “European citizenship has matured owing to the European Court of Justice’s (ECJ’s) tactical interventions in-between Treaty revisions and developments, such as adoption of the Charter of Fundamental Rights of the European Union, which was proclaimed in Nice in December 2000, and the entry into force of Directive 2004/38 on 1 May 2006. In addition, it features centrally on the Commission’s policy agenda, as attested by the

Status quo of EU citizenship, however, does not allow for progressive changes and more inclusive approach towards citizenship. The immigration crisis has also shown the fragility of the European citizenship. It is still securitized and tightly connected to its social dimension citizenship of some, mainly western³⁴⁵, European states and perceived both by their citizens and immigrants as direct access to the welfare state. These are all the reasons to argue that EU citizenship as it is might even deepen discrimination since it makes an additional category of third country nationals that did not exist before.

Also there is an issue of “illiberal democracies” identified recently within discourse and political and legal changes of some European states.

In order to deal with EU citizenship and its potential to accommodate the needs for the recognition of minorities I shall deal first with preliminary questions of the form and substance of EU citizenship.

designation of 2006 as the European Year of workers’ mobility,² the conversion of the European Union Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency,³ the adoption of a Community action programme to promote active European citizenship⁴ and the follow-up „Europe for Citizens” programme that runs from 2007 to 2013, designed to ensure the public’s active involvement in the process of European integration.” (Kostakoupulou, 2008, 290) I will elaborate this in more detail in the section dealing with the history of the EU citizenship.

³⁴⁵

https://www.europeansocialsurvey.org/docs/findings/ESS4_toplines_issue_2_welfare_attitudes_in_europe.pdf

6.3.1. EU citizenship – descriptive and normative dimension

Legally speaking, the EU citizenship is a real fact that already produces certain legal consequences. This is clearly stated in the founding treaties of the EU which form the corpus of primary EU law. However, philosophical conception of citizenship advocated in previous chapters is a normative account with standards that the EU citizenship as it is simply cannot fulfil.

The main task was to prove that the constitutional patriotism as a form of the EU citizenship is normatively superior to others in recognizing minorities. Using the descriptive part where I elaborate the nature of today's EU citizenship I go further to show that a normatively inspired version of constitutional patriotism accounts for recognition of identity of various minorities. I use descriptive outlook of the EU citizenship as a support for the argument that the normative account of citizenship I advocate is not only desirable but also viable. I do it by recognizing patterns in policy and politics of the EU, legal and political practice. However, there are many authors who are sceptical towards the EU citizenship and its desirability. Combining theoretical and empirical possibilities the proposed normative theory has to show:

- a) That it is superior to other ways of conceiving citizenship (multiculturalism, nationalism)
- b) That it is desirable to have it at the supranational level, in this case at the level of the EU

Some of the normative arguments have been already explored. I have shown why the changing nature of citizenship in the social context of globalisation with all it brings must inform a new theory of

citizenship with new discourses and institutional settings. But desirability was not the only target I had in mind. It is also viability, empirical validity that I would like to show at the case of the EU. In other words, in the reality of the EU citizenship and its normative aspirations are mutually reinforcing.

In order to do so I will give a brief description of the EU citizenship with its historical background. Further I will apply the methodological approach in analysing citizenship elaborated in the first part of the thesis. The three dimensions of citizenship: rights, participation and identity can help in identifying to what extent a proposed model of the EU citizenship might satisfy the ideals of minority accommodation. Obviously the dynamics and the issues within these categories with regards to minorities and their political interests are substantially different.

Citizenship in its classical understanding is associated with national states. People are citizens of a state and not of international organisation or regions. However, this notion is still associated with cities and federal units. Sui generis nature of the EU puts us in front of question whether and to what extent is citizenship relevant in this context having in mind already established national states' citizenships with long histories.

The idea of citizenship, in my view, is salient in all spheres of political uniting where the questions of recognition and redistribution can be raised. This polity, through vertical and horizontal integration, is defining a political space in which our rights and duties, as well as political and social ideals are formulated. In that context raising the issue of citizenship is inevitable step. Citizenship is a uniting category for all the normative standards by which we judge one polity: the level of rights, the space of participation or the inclusiveness of a general discourses.

One disclaimer seems to be important to be articulated at this point. The whole theory dealing with democratic deficit and the lack of accountability of European institutions is only indirectly important for my argumentation and certainly belongs to a different level of analysis. As Timothy Garton Esh lucidly observed: "Imagine for a moment what would happen if the European Union applied for membership in the European Union. Its application would be flatly rejected. Why? Because the European Union doesn't live up to its own criteria of democracy." Unless we stick to some theory of direct participatory democracy this statement could be deeply questioned. But some authors rightfully claim that "arguments for a fundamental reform depend on a theory and vision of the EU's *telos*", its future evolution towards a more deeply integrated federation, and it is not possible to "plausibly claim that the present arrangement violates basic democratic norms and is therefore fundamentally illegitimate"³⁴⁶. Nonetheless, even if we concede that certain elements of European governance are Schmitian undemocratic reflex of the EU integrations, this point does not influence the reasoning applied in this thesis. The reason is simple: the whole normative concept of citizenship in this project was presented as subject to a particular account of democracy and legitimacy. Both these concepts were investigated in their fundamental assumptions, balancing between the power of democracy that stems from public autonomy and the legitimacy threshold in the form of constitutionally guaranteed rights. The EU and its legal and political reality differ somewhat to these ideal theoretical assumptions. However the limitations of *status quo* do not prevent us from suggesting a different normative perspective.

There is another important issue which is more methodological. Namely, in analysing supranational citizenship we have few existing empirical examples. Again this does not impede the normative

³⁴⁶ Baubock, *ibid*, 458

assessment of its character nor does it limit the application of the general part of the theory to other possible and future cases. The normative theory of citizenship should in principle be applicable to all forms of polities. In specific, in this research, constitutional patriotism was discussed both as a general normative theory and its outcomes in a concrete polity such as the EU. As it usually goes with the interchange between empirical and theoretical, we should acknowledge that some of the important normative dimensions of the concept presented in this research were clearly informed by the EU history and politics. However, this does not mean that its implications end there. Thus, the main argument is that the emerging EU citizenship should adhere to the principles of constitutional patriotism, even though it would be desirable that even member countries embrace elements of this model.

In a broader sense we could also qualify the debate about the theoretical implications of the EU citizenship in two camps. “The broad literature on European citizenship can be subdivided into a sceptical stream, dominated by lawyers who explore the implications and limitations of this status within the framework of the European Treaties, and a visionary stream that interprets it as the harbinger of a post national constellation”³⁴⁷.

To repeat Bauböck’s statement, we shall enrich the debate with a theory of supranational citizenship which would be the counterpart to already existing theories of differentiated, transnational, and plurinational citizenship. The historical development of the EU citizenship has evolved around the basic idea of narrower economic exchange among the states, ie. among European nations and its development shows a clear departure from initial minimal and functional idea. Even though it is only additional to national citizenships in certain aspects of the EU citizenship has developed an intrinsic quality, mainly

³⁴⁷ Ibid. 454

through further “constitutionalisation” of the EU and through the activity of the ECJ.

6.3.2. The European Union citizenship – historical perspective

The introduction of Union Citizenship by the Treaty on European Union raised some concerning issues such as legitimacy and democracy, the EU constitution, as well as the ideas of the EU democracy, public sphere and finally, identity³⁴⁸. Weiler finds the concept of the EU citizenship as the key element of the normative turn in EU studies. The normative salience of the concept of citizenship was evident since it tackled the EU in all of its levels: policy, politics, polity. The question of belonging to a community that is legitimate to guarantee rights and policies dealing with them has been gradually getting up on the European agenda.

Although citizenship of the Union was introduced by the TEU, it was, as already mentioned, regarded by some as embryonic in the original EEC Treaty of 1957. That view was based mainly on the novel character of the Treaty, the original features of which were highlighted by the ECJ as early as 1963 and 1964 in *van Gend en Loos* and *Costa v ENEL*³⁴⁹, 2 and by certain provisions of the Treaty, notably those on the

³⁴⁸ Weiler, Joseph, *Democracy and Federalism in European Integration*. Bern: Verlag Stämpfli Cie AG, 1995. Meehan Elizabeth, *Citizenship in the European Union* (London: Sage 1993) Kostakopoulou, Theodora. *The Politics of "belonging" and "exclusion" in the European Union: Citizenship and Immigration*. 1996.

³⁴⁹ “As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer

free movement of persons.

In this part I will try to elaborate two hypotheses that will help me with the general hypotheses I elaborated at the outset of this research. The first is that European citizenship has been developing according to Marshallian matrix (gradual acquisition of economic/civil – political – social rights) and that this change reflects the overall change of social context within contemporary EU. My second hypothesis is that the ECJ has used its prerogatives in order to give the EU citizenship specific legal validity, overcoming the initial *ratio legis* given to the EU citizenship by the founding agreements. I find both of these theses in favour of the argument that the development of the EU citizenship can bring additional, positive value to the recognition of the rights and needs of individuals belonging to minority groups.

The history of the EU citizenship roughly coincides with Marshall's model of the evolution of the citizenship rights. European citizenship was understood for a long time as a 'market citizenship'; acting as a participant of the common market it was thus relevant to citizens in their capacity as workers, professionals and their families, moving across borders (Everson 1995: 73). Market citizenship and the rights that it included helped the constitution of the EU as a free market zone, with the free flow of goods, capital services and to certain extent people. The quality of this economic arrangement has been clearly more than rights guaranteed by some typical economic agreement between two or more states. Nevertheless it is obviously far away from the idea and conception of citizenship advocated in the normative theory.

According to Lister and Pia "the political origins of the concept lie in the 1974 Paris summit, where a working group was established to examine the conditions under which citizens of the member states 'could

of powers from the States to the Community, the member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves."

be given social rights as members of the Community' (CEC 1974: item 11)" One might say that even the roots of social citizenship in the EU lie in this very point.

European citizenship has been often perceived as a symbolic and decorative institution (Everson 1995; d'Oliveira 1995) The legal formulation in the Maastricht treaty leaves a lot of space for claims of this kind since it is only a derivative to the extent that citizenship could be regarded as being embedded within the context of the existing framework of the 'constitutionalised' European Community treaties, it was firmly linked to the common market concept, European citizenship and European identity and to the idea of the European Communities as a legal framework – at least in the first instance – for economic integration³⁵⁰. Some authors expressed optimism with regard to the capacities of the legally established EU citizenship³⁵¹. This optimism was not based exclusively on the positive law implications of the citizenship itself but rather the overall juridical and political context in which the citizenship has been developing.

Maastricht Treaty was without any doubts the crucial point of the emerging political citizenship. In 1993, amendments to the EC Treaty introduced by the Treaty of Maastricht put in place a section on citizenship (Part Two: Articles 8-8E EC): 'Every person holding the nationality of a Member State shall be a citizen of the Union' (Article 8(1)). The reference to the nationalities of the Member States is crucial here and indicates the limited nature of EU citizenship. It links back directly to one of the framework 'constitutional' provisions of the Treaty of Maastricht itself, Article F(1) TEU:

'The Union shall respect the national identities of its Member

³⁵⁰Bellamy, Richard, Dario Castiglione, and Jo Shaw. *Making European Citizens: Civic Inclusion in a Transnational Context*. (Basingstoke: Palgrave Macmillan, 2006) 10

³⁵¹Kostakopoulou Dora European Union Citizenship: Writing the Future European Law Journal Volume 13, Issue 5, (2007) 623–646

States, whose systems of government are founded on the principles of democracy'. The rights and duties of EU citizens as defined in Article 8 are first and foremost those conferred or imposed by the EC Treaty (Article 8(2)) (i.e. including rights and duties to be found elsewhere in the Treaty). The following provisions go on to confer some specific rights including:

- the 'right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' (Article 8A);
- the right to vote or stand in municipal elections for those citizens residing in Member States of which they are not nationals (Article 8B(1));
- the right to vote or stand in European parliamentary elections for the same group of citizens (Article 8B(2));
- EU citizens finding themselves in the territory of a third country where their own country is not represented have the right to diplomatic or consular protection by any Member State which is represented there (Article 8C);
- the right to petition the European Parliament and to apply to the Ombudsman established under Article 138E.

All these elements were indicating a political community in *statu nascendi*. The EU was not considered any more as a mere international organisation but rather as a political union. The pillars within the Maastricht architecture have illustrated this change. A Declaration attached to the Treaty setting up the European Community notes that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned". In other words, union citizenship was considered a dangerous arm against what was perceived as an exclusively internal affair of national states.

The Amsterdam Treaty introduced amendments to the principle of European citizenship in Articles 17 and 21 clearly stating that ‘‘citizenship of the Union shall complement and not replace national citizenship’’³⁵² Nevertheless, it brought some new rights to the EU citizen. Every citizen of the Union can now write to the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of Regions and the Ombudsman in any of the twelve languages of the Treaties and receive an answer in the same language. Moreover, the Amsterdam Treaty has formally empowered the European Court of Justice (ECJ) to ensure the respect of fundamental rights and freedoms by the European Institutions (Shaw 2000).

The next major negotiations, at Nice in December 2000, did not offer substantial changes to EU citizenship. The Nice summit neither European Union’s finest hour nor a catastrophic moment as some authors have indicated. Most of the negotiations concerned the way in which decisions would be made after enlargement, and the resulting changes were ‘technical’ and ‘limited’ (European Commission 2001). The member states did exempt passports, identity cards, residence permits, social security, and social protection from qualified majority voting. Provisions in those areas would continue to require unanimity, but decisions about free movement provisions could now be made more easily.

In the new millennium, the EU was focused on giving the spirit to the legal provisions of its citizenship. In the Commission report, it was stated that the EU has recognized ‘‘the need to get closer to the citizens of the Member States and to enable them to fully participate in the construction of an ever closer Union, while emphasizing the

³⁵²

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:a12000&from=EN>

essential values that are shared by the European citizens.”In order to achieve these objectives, the 'Europe for Citizens' programme was established, from 1 January 2007 to 31 December 2013. Council Regulation No 390/2014 established the ‘Europe for Citizens’ programme for the period 2014-2020. These programmes have been supposed to be an initial step towards a more coherent strategy and policy in the area of civic participation. They were designed to support a wide range of activities and organizations promoting active citizenship through the involvement of individual citizens, local authorities and civil society organizations in the process of European integration.³⁵³ The purpose of Europe for citizens for the period 2014-2020 is to: to contribute to citizens' understanding of the EU, its history and diversity, to foster European citizenship and to improve conditions for civic and democratic participation at EU level, to raise awareness of remembrance, common history and values, to encourage democratic participation of citizens at EU level, by developing citizens' understanding of the EU policy making-process and, by promoting opportunities for societal and intercultural engagement and volunteering at EU level³⁵⁴.

Finally, to follow Marshallian logic, the new Lisbon treaty has strengthened the social dimension of the European Union. It recognizes the social values of the Union in the founding Treaties and includes new objectives for social matters although the implementation remained responsibility of national states. Though this change is pretty much declarative and leaves little space for the EU's policies within social policy matters I believe that this dynamics of the rights show that the spheres in which common policies and politics are needed are constantly growing as the social interaction between European citizens is becoming

³⁵³ COM(2015) 652 final

³⁵⁴ https://eacea.ec.europa.eu/europe-for-citizens_en

higher and higher. These changes will necessarily bring to contradiction identified already in Marshall's writings on citizenship, the relation between negative integration that eliminates trade barriers with positive integration which should tackle the malformations of the market is some kind of a tension between liberal and social democratic projects within EU³⁵⁵. However, this question clearly fall outside the scope of my research interest at this point, and here it just serves to indicate the complexity that effective EU citizenship is necessarily bringing about.

Interpretation of the existing legislation and their reading by the judiciary is crucial in our evaluation of the EU citizenship. Kostakopoulou differs two approaches to the EU citizenship: sceptical and constructivist³⁵⁶. The first is based on the idea that the EU citizenship is just a pale reflection of national citizenship, symbolic and decorative without any additional normative significance. Some scholars pointed out that the EU citizenship "reflected a loose and fragmented form of mercantile citizenship designed to facilitate European integration"³⁵⁷. The already mentioned Declaration on Nationality of a Member State, annexed to the Final Act of the Treaty on European Union, European Council in Edinburgh and Birmingham states that, "wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned."³⁵⁸ However, Maastricht's definition could not limit other

³⁵⁵ One of the conclusions of Barometar 77 from 2012 was that a majority of Europeans feel that they are citizens of the EU, with significant shared elements, such as the currency and values, and a key lever for strengthening the sense of citizenship: social harmonization. Even from a theoretical point of view, in order to gain full legitimacy the EU citizenship must also account for social dimension.

³⁵⁶Kostakopoulou, Dora, *ibid*.

³⁵⁷*Ibidem*

³⁵⁸ Declaration no 2 annexed to the Treaty of Maastricht on nationality of a Member State1, accessible on <http://eudo-citizenship.eu/inc/policydoc/Maastricht%20Declaration.pdf>

legal and juridical means of a broader concept of citizenship.

The role of the ECJ with regards to citizenship somehow resembles the role of national constitutional courts. Obviously, the court itself was sometimes more and sometimes less activist in its interpretation of the founding treaties³⁵⁹. Without any doubt it deeply questioned the international law maxim that determination of nationality falls within the *exclusive* jurisdiction of national states. In *Micheletti*, the ECJ did confirm that determination of nationality falls within the exclusive competence of the member states, but it went on to add that this competence must be exercised with due regard to the requirements of Community law while in *Kaur* it stated that ‘it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality’³⁶⁰. *Chen v Home Secretary* was a decision of the ECJ which decided that a minor who is a national of a European Union member state has the right to reside in the European Union with her or his third-country national parents. In *Zambrano* case we have a step further, in paragraph 45 the ECJ concludes that: “...Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.” Some newer cases dealing with some aspects of the EU citizenship have shown somewhat

³⁵⁹ On judicial activism of the ECJ See e.g. Pola Cebulak “The role of judicial activism of the CJEU in shaping the relations between legal orders in a pluralistic structure of international law” Besson Samantha, Levrat Nicolas (eds.), *(Dés)ordres juridiques européens / European Legal (Dis)orders*, (Schultheiss, Zürich 2012)

³⁶⁰ *Kostakoupolou*, *ibid.*

more conservative approach of the court (e.g. Iida case or Danu case)³⁶¹. In any case, it is important to notice that the court has doctrinal and legal grounds to interpret the notion of the EU citizenship broadly even in the *status quo*. This is just to show that there are existing legal and political avenues for introducing normatively and legally more substantial notion of citizenship.

An opposing perspective in Kostakopolou's view was concerned with "the maintenance of nationality as a proxy for defining political community and encouraged by developments above and below the nation-state, such as globalisation, multi-level governance arrangements, transnationalism and growing internal differentiation, constructivists focused on the potential of European citizenship to call into question traditional ways of thinking about community and membership and to prompt wider socio-political transformation"³⁶². The change was both discursive and juridical and indeed it had some impulses in the everyday politics.

In this regard, constitutional patriotism at the EU level seems to be not only a normative prescription as my thesis advocates, but also an explanation of the etiology of this particular form of citizenship. The new legal and political self-understanding changed the normative salience of cultural and thick ethical concepts that, according to the nationalist paradigm, seem to be indispensable elements of citizenship. Therefore, both nationalism and any form of exigent thick concept of republicanism at the EU level have constitutional patriotism as a viable alternative, and a clear normative opposite.

³⁶¹ C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, C-40/11, *Yoshikazu Iida v Stadt Ulm*

³⁶² *Ibid.*

6.3.3. The form of EU citizenship

The form of the future European citizenship is particularly important. It raises the question of democracy with the EU– will it be democracy of European demos or democracy of various *demos* – democracy³⁶³. Translated into the language of citizenship, the question is whether the future EU citizenship be universal or multinational–will it include a common set of rights, obligations and modes of participation and identification or it will be an expression of indirect belonging through separate constitutional orders as it is the case of the *status quo*.

In order to theoretically grasp such a crucial question we shall invoke a theory that can satisfy both individual rights (liberal condition) and democracy perspective (republican condition). We might call this also *internal* and *external legitimacy* of the political order. Helpful analytical tool to deal normatively with these issues is Habermas's cooriginality theses³⁶⁴. This concept of Habermas refers to the relation between liberal and republican principle inherent in modern national states. It should explain the relation between individual rights and sovereignty as legitimizing forces of political order. In his view these principle cooriginate – they are mutually conditioned by each other making a non-dissolvable amalgam. Cooriginality thesis is the essence of citizenship theory – it explains the source of rights that a political community guarantees to an individual but also the legitimate

³⁶³ Philippe van Parijs 'Should the European union become more democratic?' in Follesdal, Andreas & Koslowski, Peter *Democracy and the European Union*, 1998
Philippe van Parijs 'Should the European union become more democratic?' in Follesdal, Andreas & Koslowski, Peter *Democracy and the European Union*, 1998

³⁶⁴v. Habermas, *ibidem*.

source of sovereignty of that political community. Practically it means that member of any identity minority has the right to have equal standing (rights, neutral state symbols, participation) as a citizen in a polity even if she does not belong to dominant nation, or linguistic group. In normative reasoning without cooriginality theses, some might say that since they are majority, it is completely democratic that they decide. However, cooriginality thesis puts democracy in the same line with rights (legitimacy) and impedes this kind of reasoning. This is exactly the anti-majoritarian notion that stems from cooriginality thesis and should find its expression in constitution as a basic social tool for intersubjective understanding and recognition.

How does this relate to the EU? It is consisted of both national states and their *demos* and hypothetical Europe and *demos*. Europe is clearly not a state but the thickening of its jurisdiction raises the issue of legitimacy. We can judge the EU legitimacy as a virtue of its institutions, acts and norms on these two levels: level of national states and level of citizens taken as a whole. Thus, in many regards we must analyze the legitimacy of the EU through the actual or tacit acceptance of its acts by states and citizens? These fields might include foreign policy, security or some of the common policies within the Union. But how should we treat citizenship?

The question is whether there should be something like the EU citizenship in its full-fledged sense should be separated from the question how that citizenship should be empowered. Since the development of the EU citizenship is dominantly marked by its competition with national citizenship(s) there is a question whether such citizenship (if the answer on its desirability is positive) should be enacted through national citizenship or it should be applied directly. The discussions on European citizenship had as a focal point whether

or not the rights inherent in the concept should have direct applicability.

If we understand states and their actions in international arena as expressions of their (external) sovereignty it is clear that we cannot use cooriginality theses in the cases of *demos* but only in the case of European *demos*—the sum of European citizens. The legitimacy of the European polity, its public sovereignty that is supposed to legitimize citizens “rights must cooriginate them and not with sovereignty of national states. Since the rules of European citizenship are decided by the states, again as expression of sovereignty, we shall not be bound by status quo legal aspect in our reimagining of European citizenry.

Thus far my analysis was contextual. Here I turn to a more normative one in which I shall not be bound by the constraints of the legal status quo. In order to do so, I will use the elaborated notion of *postnationalism* to determine the historical and political discourse in which national states are not completely put out of the scene and still matter but allow for the emergence of a new form of membership³⁶⁵. “Postnational citizenship”, as Lister and Pia explain, “conveys the desire and aspiration for a multifaceted and pluralized understanding of citizenship identities and solidarities”³⁶⁶. Though it does not cancel the national sentiments and loyalties it certainly opens a space for new type of political allegiance.

³⁶⁵ As Shaw suggests “it should be noted that postnationalism is neither a fixed or defined concept within academic writing and thinking, nor a certain and empirically observable phenomenon of law or politics [...] it can be defined dispositively as an open textured concept used to express many of the dynamic and sui generis elements of the EU as integration project involving the process of polity formation and in particular constitutional processes. (Jo Shaw Postnational constitutionalism in the European Union. *Journal of European Public Policy* 6 (4), (1999): 579-597

³⁶⁶ Lister, Pia, *Ibid.* 79

Thus, in the matter essential for citizenship as status that determine our standing within a political community, we can only consider citizens of the EU as the contractual parties in the imagined European constitution. The result of such a hypothetical contract would be universal European citizenship – the main and basic status given to existing and new citizens residing on the territories of the EU member state. Universal status, guaranteeing basic liberties and rights, though given on a supranational level should certainly be conditioned by residential and other criteria which would be decided by individual states. One of the applicable models would be Swiss citizenship, its tripartite structure that could be easily applied at the European level. The main target is equal treatment as one of the fundamental principles and values of the EU legal order. It certainly does not mean access to equal outcomes or equal conditions but equal legal status – *isonomia* (status equality as equality before law) of all EU citizens which should be enhanced towards equality of opportunity³⁶⁷. Europe is socially, economically and politically still so diversified that imposing high

³⁶⁷ This conception of equality should not be interpreted as purely legalistic. Namely, throughout the dissertation I have indicated that equality of constitutional subjectivity is the first step towards the ideal of recognition. Nevertheless, equality does not negate difference. Rosenfeld, basing his findings on abstraction from historical events and the history of ideas, references to the dialectic of equality and of the three stages of which it is comprised, namely (1) difference as (justifying) inequality; (2) equality as identity; and (3) equality as difference. This dialectic, in his view, is historically rooted in the case of women in both France and the United States and of African-Americans in the latter. These stages should be understood “as an account of the logic, but not necessarily the history or politics, of the Enlightenment based conception of equality”. Michel Rosenfeld, “The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics”, *Cardozo Legal Studies Research Paper No. 358* The EU jurisprudence (positive laws, court practice and doctrine) is construed in a way to acknowledge difference while providing everyone with equal treatment. Equal treatment, developed to its ultimate form in judicial reasoning, should account for differences. As Rosenfeld explains in the same text, explaining difference between formal and substantial equality, “formal equality requires that all those in the same essential category be treated the same and all those in different essential categories be treated differently. Explaining that substantial equality must comply with formal equality he adds that the latter “does not tell us what similarities and what differences are relevant, only that all coherent substantive equality conceptions must perform sort similarities and differences in terms of relevance and irrelevance”.

thresholds of social standards is not possible and having in mind all circumstances probably not desirable. However, recognition at the level of law of all citizens on the grounds that overcome the limits of national paradigm, can be a way of elevating minority and human rights at a completely new level.

6.3.4. The content of EU citizenship

At this point we are already in the substance of EU citizenship. Namely, what would that mean (in terms of rights and obligations but also on a symbolic level) for an individual to be a European citizen? There is a whole debate about the substance of the legal provision dealing with EU citizenship.

In determining the substance of EU citizenship we should account for the scope and the strength of the legal provisions but also associated discourses. Citizenship is always also a symbolic category, a type of social practice (Benhabib) to which we give certain meaning. EU citizenship emerged as a functional, economic citizenship and has developed into “genuine” citizenship like national ones. The historic progression of EU citizenship allows us to claim the rise of its salience.

The substance can also refer to the particular concept of the good – ethical or other worldview. We could refer to this as a *quality* of citizenship. In the plurality of various cultural groups in Europe it would be hard to conceptualize a citizenship with a certain concept of good that would fit all. There is a big debate about the definition of liberal state neutrality, as a respect for personal and group autonomy, and the way it should be achieved.

I argue that EU citizenship should not contain any ethical quality or worldview, excluding the ones that are conditions *sine qua non* of a tolerant coexistence and the life in dignity³⁶⁸ of all the citizens. The EU is a neo-polity, it has a half-century history and a part from antifascism and commitment to peace and universal human rights there are no substantial cognitive or worldview doctrines that inspire its existence. This new and “clean” symbolical space on the same territory I denote with the term “*detrterritorialization*”³⁶⁹. In other words, only the guaranteed rights should be the content of EU citizenship and all other elements of citizenship, participation and identity should stem from those.

Redefining political community as we find it today should include several steps: redefining concept and meaning of territory so it does not refer only to national states and one territorial unit and redefining nationality (citizenship) so it is not anymore an ascriptive but rather achieved and accepted status. This would inevitably lead us to a new idea of citizenship which would bring in itself a new connotation for minorities. In simple words, being European does not have to trigger necessarily and exclusively connotations of thick cultural background (Christianity, Westernism, individuality etc.), the boundaries should not be perceived as impermeable and dividing

³⁶⁸Human dignity was a basic value put in the foundations of the positive human rights law of post WW 2, and the Universal Declaration of Human Rights was the first document to use this notion. Together with liberty, equality, and brotherhood principle of dignity makes part of Articles 1 and 2 as founding blocks of the whole system of human rights. Dignity has found its expression in positive laws of certain constitutional orders. Article 1.1 of German Basic Law stipulates that “human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”.

³⁶⁹ This term I have borrowed from Deleuze and Guittari. *Deterritorialization* can be defined as the severance of social, political, or cultural practices from their native places and populations (Oxford dictionary). In this case it means severance of all majoritarian forms that advocate particular concept of the good from political and legal order of the EU. It should indicate the same geographical space but a new political context, or again using their terminology - *reterritorialization*.

distinct rights regime (but rather changed with territoriality that includes local, regional but also supranational units) and the very idea of who and under what conditions can become European should be changed.

The strict relationship between nationality and citizenship is deeply questioned by the changes in international public law especially in the fields of criminal law, state responsibility etc. Though ethical requests of cosmopolitanism remain utopia, it is clear that its ideals constantly inspire the dynamics of international politics. Nationality is not anymore impenetrable domain of exclusive sovereignty. Minority rights³⁷⁰ and human rights in general are in the centre of this change.

As David Held explains ‘in the modern times, rights have nearly everywhere been effectively enshrined within the institutions of nation-states’³⁷¹. The nation state was a unique guarantee of rights protection for a long time. Human rights have to a certain degree internationalised the doctrine and the implementation of rights. Consequently, this has changed the idea of citizenship giving it a distinct *rights* dimension. Many authors find human rights a crucial aspect and expression of supranational and transnational conception of citizenship.

The gap between human rights and citizenship rights becomes more and more salient in the time of thick globalisation and interdependence. Moreover, it poses the question whether the

³⁷⁰ See e.g. The Framework Convention for the Protection of National Minorities (FCNM), a multilateral treaty of the Council of Europe aimed at protecting the rights of minorities.

³⁷¹ Held, David, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. (Stanford, CA: Stanford University Press, 1995) 223

boundaries between the two should be so fixed and impermeable. It is clear that both *corpora* of rights have different *ratione legis* but it is also clear that they are interconnected. The concept of citizenship makes a division between the two bringing about certain normative issues.

Constitutional patriotism bridges this gap between something that is universally declared and something that is guaranteed under particular politico-economic and often arbitrary conditions to the maximum that any idea of citizenship, as a necessarily closed membership, can account for. In the same time it puts human and minority rights in the heart of constitutional projects giving a specific constitutional identity to the whole EU polity. In the next parts I will give the arguments in favour of the idea that the distinct character of EU constitutional identity compared to the one of national states gives a better ground for minority recognition. What I am trying to stress is that recognition is not only unilateral recognition of rights of a majoritarian group to minorities but rather reshaping the whole political and legal system in a way that does not misrecognize them. In other words, minority and human rights must be understood as constitutional rights, stemming from the basic social contract and rendering it legitimate.

In the next part I will shed a light on minorities and try to look at the theoretical arguments for constitutional patriotism as a form of citizenship for the EU. In order to do so I will depict *differcia specifica* of the EU constitutional post-national project and indicate the scope of its normative possibilities.

Chapter VII: EU CITIZENSHIP - ACCOMMODATING MINORITIES IN A POST-NATIONAL POLITY

7.1. Introduction

The chapter is focused on minorities and their perspective on the emerging European citizenship – it gives a normative framework within which a future citizenship should be construed in order to do justice to the claims of individuals belonging to minorities. It deals with the paradigms of postnationalism and deterritorialization that give normative potential to EU citizenship with a specific focus on identity minorities in Europe. This chapter should also give arguments in favor of EU citizenship as universal legal status, explaining how it broadens the scope of equal treatment, leads toward civil and more inclusive concept of citizenship and reconciles the gap between human and citizenship rights.

Democracy and nationalism are the big narratives that often leave little space for marginal phenomena. Both express majoritarian will in one way or another. My particular interest in engaging with the theory of citizenship was to address it from the minorities' standpoint but still keep the "universal" ideal of this notion. In doing so, I came with the concept of identity minorities as those whose identity features are in opposition or discordance with constitutional or political practice. Identifying these minorities in the EU would be the target of the second section.

Nationalism stands to national, ethnic and language minorities

just like patriarchy stands towards women, heteronormativity towards LGBT minorities or orientalism towards immigrants. These big narratives are sometimes embraced by the majoritarian culture and tend to overflow to other spheres of life, including political. This was one of the reasons not to focus only on national minorities. Firstly, these are not the only minorities and it is very relative to determine which minority is more discriminated in various contexts. Secondly, minority status sometimes combines various dimensions of exclusion. Intersectionality was a theoretically and methodologically most prudent way to deal with this issue.

Clearly, these are two big notions to be dealt in details here, and overpass the goal of this project. But in one form or another all these forms can be identified in the legal and practical expression of citizenship across the EU. Once they become part of a legally binding norm they presuppose legitimacy and justice. These big notions of postmodern interpretation of social reality (heteronormativity, binarism, postcolonialism) become relevant for political theory once when they can serve as a key of understanding for injustice towards someone's identity and right to life in dignity. Having in mind spheres and structures of injustice today one can legitimately broaden the scope of minorities beyond those who belong to nations and ethnicities.

The well-established conceptualization of citizenship that includes three dimensions: rights, participation and identity will be subsequently use to indicate the different qualities of the EU citizenship along these dimensions with an eye of minorities. In the final section I will give some empirical and normative arguments in favour of constitutional patriotism as a form of EU citizenship showing why I see it as both normatively desirable and practically viable concept.

7.2. European constitutionalism and minority recognition

7.2.1. European constitutionalism as anti-majoritarianism

Two events in the recent history of European integration tackled the two crucial elements of every constitution: rights and functioning of the polity. *European Convention* and the *Convention on the future of Europe* were both tries in constitutionalising a new polity, limiting arbitrary power through clear division of power and protection of human rights. The European Convention was the 1999 convention where Charter of Fundamental Rights of the European Union was drafted. This convention was called in 1999 by the Cologne European Council to consolidate rights for EU citizens and protect them at EU level.

The Convention on the Future of Europe was a body mandated by the European Council in December 2001 and came as a result of Laeken Declaration. To certain extent inspired by Philadelphia Convention that led to the adoption of the United States federal Constitution, its purpose was to create a draft constitution for the EU. Particularly interesting was the part dealing with EU citizenship. In the Laeken Declaration the government leaders of the member states affirmed that, within ‘the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union’s broad aims, but they do not always see a connection between those goals and the Union’s everyday action’ (European Council 2001). Constitution and citizenship are intrinsically connected. They are both the founding question of organising a polity: who belongs to a polity and what this belonging means to an individual.

The incorporation of the Charter of Fundamental Rights into the

future constitutional text will play a vital role in achieving the goals of Laeken Declaration. The Charter was thought to enable every national of an EU Member State to recognise European citizenship as a source of new rights and the expression of belonging to a new community. (European Convention 2002). The Charter will become legally binding in 2009 within Lisbon treaty.

The constitutionalisation is supposed to give normative, both political and legal outlook to many practices and policies born in the sphere of economic and political integration. The convention on the future of Europe, as Nicolaidis argues, has its mission somewhere “between pragmatic simplification and radical refoundation: to give the Union a form of government adapted to its new size and ambitions and to do so whilst reinventing it as a democratic polity”³⁷².

In my view there are two sets of problems that impede our understanding and assessing the EU’s legal order and its level of democracy. The first one is that constitutionalism as a concept is understood both in academia and general perception as tightly connected to idea of statism. We might, however, ask ourselves is supranational constitutionalism really incompatible with state sovereignty? European constitution as a verbalised expression of an ongoing process of European legal order has faced the rejection probably because it collided with nationalist vision of state affairs and equation of state sovereignty and constitutionalism. Constitution of a state is imagined as a basic and supreme law. European Constitution did not fit into this paradigm of national states with constitutions as a sacrosanct embodiment of their politics in modern history.

Another problem associated with evaluation of the EU standards

³⁷² Kalypso Nicolaidis “The New Constitution as European Democracy?” *Critical Review of International Social and Political Philosophy*, Volume 7, Number 1, Spring (2004): 76

of democracy, legitimacy etc. is in insisting on comparison to national state. We often witness what Richard Bellamy and Dario Castiglione call “the uncritical transfer of national to supranational paradigm” and Shaw and Weiner criticize as ‘the often invisible touch of stateness’; “the tendency to measure many of the supposed normative shortcomings of post-state entities like deficits of democracy, legitimacy, accountability, equality and security in terms of a statist template and against the benchmark of a statist standard”³⁷³. Evidently, using entrenched statist paradigms cannot be productive especially in a normative investigation that should look for the new perspectives and concepts instead of petrifying existing ones.

In both sets of problems there is one diagnosis: the EU becoming constitutionalised polity with laws supreme to national does not *per se* include EU becoming a federal state or state of any kind. What my argument includes is the thesis that certain elements of EU polity and its policy, in this case citizenship, should adhere to constitutional order with EU supremacy. Furthermore, this normative change would be beneficial also from the viewpoint of minorities because it is inherently antimajoritarian. With the new developments of the EU legal order and the place that protection of human rights has taken with it give us the right to define it as anti-majoritarian. There are certain levels in which the EU functions as a *demoicracy* but citizenship should not be one of them. The need for universal EU citizenship should go beyond the national state policies and it should be harmonised at the European level. Two recent crises, economic and migrant, have shown the salience of common European policy regarding citizenship. The problem of redistribution present in both crises was lacking a constitutional recognition framework of European citizenship that would legitimise or exclude certain policies.

³⁷³Lister, Pia, *ibid.* 169

The development of the EU citizenship was mainly focused on *recognition* of the citizens of the EU and their rights. Recognition was obtained through legal mechanisms and interpretations of non-discrimination, freedom of movement and was generally inspired by the principle of *equality*. This is exactly the reason why the theoretical argumentation from the beginning of this thesis fits into the reality check of the EU. Again, we might advocate the desirability of constitutional patriotism *a priori* as an ideal theoretical model but this normative finding certainly finds part of its legitimacy in the reality of the contemporary EU. This also corresponds to my main heuristic premise that a desirable form of citizenship must also pass the threshold of viability.

7.2.2. Identity minorities in the EU – intersectional approach

It is not hard to conceptualize the notion of minority in the context of the EU. Minorities have been historically determined within European continent though its politics was usually determined by well established “majorities”. Most European national states are founded on the 19th century concept of nation state which defines a culturally more or less homogenous group that bears the sovereignty of the whole political community. Even though national sovereignty is the synthesis of individual sovereignties the fact of numerical majority gives us the right to name cultural majorities as *de facto* bearers of sovereignty as such. Minorities within national states, however, are usually perceived as national and that was the main methodological premise questioned by this research. The link between nationalism and clericalism, patriarchate

and heteronormativity brings us to conclusion that national state puts in minority position not only ethnicities and nations but also women, LGBT population, religious minorities etc.³⁷⁴.

It is often perceived that once the EU federal state would be established the plurality of nations, religions and other cultural and epistemological communities would leave little space for anyone's domination in the discourse or politics of the future polity. This presupposition, articulated by federalists, finds its expression in some of the contemporary theories of democracy As Shapiro explains Madison's contention in Federalist Number 10 that multiple factions could make democracy viable on a large scale might be the earliest statement of the logic of crosscutting cleavages on which Dahl would build his pluralist theory of democracy³⁷⁵. However, we can witness even today that the big discourses on identity defining us and them easily change form and content. In the current migrants crisis we face the discourses of othering which divide Europeans from the others on various basis. But also within Europe, and the constitutional debates have revealed this, there are voices who want to determine Europe as profoundly Christian giving in this way a majority a political and constitutional primacy. In other words, though plurality of identities, group affiliations and concepts of life might enrich the spectrum of toleration it is necessary that this plurality remains constitutionally guaranteed and recognized. In other words, no majoritarian concept of good should find its articulation in the law or universally binding practices. Some group's religious practices and believes, "modes of life", values and ideas that particular groups share must not obtain universal legitimacy just because that particular group is a democratic majority.

'Additive' or 'compound' discrimination would signify instances

³⁷⁴See Young, 1990.

³⁷⁵Shapiro, Ian, "Democracy Man The Life and Work of Robert A. Dahl" Foreign Affairs 12.02.2014

of discrimination against certain members of minority groups on more than one ground, where the role of the different grounds can still be distinguished. However, intersectionality tells us more than mere discrimination. It gives us idea about the interaction of various discourses, some of which are built deep within the practices of national states, that combined together bring about injustice. Discrimination as a set of repeated acts towards certain individuals is just an indicator of a difference of status within the broader spectrum of citizenship. As identity is polyvalent, so are the basis of discrimination and intersectionality should help us dealing with them once they are compound or entangled.

Discrimination and the way it is legally defined is, however, the basis for applying the complex theoretical notion of intersectionality in juridical way. That is why we might analyse the way that the notion of discrimination is dealt with within European discourse in order to see the capacity of this polity to justly address the broad inequalities among its citizenry. As Mieke Verloo explains after three decades of creating a considerable body of European legislation to address inequality between women and men in the recent times there was an intention to include discrimination on a range of additional grounds. The Treaty of Amsterdam (1997) introduced a broader anti-discrimination provision in Article 13, involving appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Charter of Fundamental Rights, signed in 2000 and effective in 2009, provided further initiatives to tackle discrimination on these different grounds. In 2000, the Council unanimously adopted the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC)³⁷⁶.

³⁷⁶ Verloo, M. 'Multiple Inequalities, Intersectionality and the European Union'. *European Journal of Women's Studies*, 13 (3) (2006): 211-228.

Theoretical puzzle that minorities put in any consideration of the EU citizenship is in the need in establishing the common framework that will adequately respond to plurality of minorities and their diverse needs for recognition. The new framework must be, both in terms of the form and content, such to account for the minorities claim for equal status. It must include the adequate legal provisions (rights), allow for participation and articulation of the minorities' political voice and in the same time provide a symbolic context in which such a normative account of citizenship would be possible. In the next chapters I will give a scratch of theoretical issues that stem from the EU citizenship seen from the minority perspective.

7.3. Three dimensions of the EU citizenship

In this part I will analyze the three constitutive elements of citizenship in the context of the EU. Special task here is to determine within each of these elements to what extent can these bring about the better conditions for accommodation of minorities.

In different segments of citizenship one shall look for different normative targets. In rights dimension we shall look for right scheme that accounts for the recognition of various minorities, national, LGBT so on in a way to protect them from discrimination but also to allow them to flourish and achieve their particular concepts of the good. In identity dimension, however, we might look for more universalistic conception of identity that is inclusive and thin. Participation should allow for minorities to express their needs and requests for recognition at the EU level. Recognition is an ideal, a state in which citizens mutually accept rights and duties of common life through an intersubjective constitutional platform. All these elements of citizenship

(rights, participation, identity) resonate between the claims for equality and difference, but their common should be *equality of status*.

7.3.1. Rights

The first aspect of the EU citizenship that needs to analyse is what is usually defined as liberal paradigm – namely, rights. Though it is contested to what level the EU represents a democratic polity, there is way less doubt about its liberal character. The article 2 of TEU stipulates that The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. It also adds that “the rights in the form of rule of law, minority rights and human rights in general are the aim and the purpose but also the main values of the EU”. Article 49 of TEU makes all this provisions obligatory for the new member states. Fundamental charter and European Convention on Human Rights and Fundamental freedoms – as the highest standard for human rights and minority rights protection now become part of something what might be called the constitution of the EU. In other words, the EU as a legal entity obliges itself to respect human right standards that are higher than those provided by the national states.

The European citizenship at the level of rights has gone through a development that overcomes its intended legal sense, *ratione legis*. As it was explained, this was mainly done by its court who was using its power for progressive application of its jurisdiction and the EU law.

Some minorities are protected by the rights that are guaranteed at

the EU level in a specific manner: LGBT and persons with handicap, e.g. The EU level offers legislation that recognises discrimination on these (additional) grounds explicitly and includes the whole set of policies in order to improve the positions of these minorities in the society. This *status quo* indicates the point that I try to elaborate theoretically, that at the universal level of political intersubjective communicating it can be sometimes easier to account for the needs of individuals belonging to minorities compared to various local, grass roots and other “vernacular” challenges of the political order³⁷⁷. Reasons are twofold: the EU as such was formed on the value of individual rights protection and it does not suffer for the impediments posed by national conception of citizenship: the role of the church, margins of appreciation associated with ethos of traditional societies, constitutional nationalism (Hayden) etc. Non-discrimination and the protected grounds that it includes in the jurisdiction of European courts is just one of the signs of a polity that can offer a more tolerant public space to those who have been deprived in national states. Rights and their application depend not only on the written legal norms but on the general context in which legal norms are communicated.

The EU has also recognized its special responsibility towards the Roma, who live in all Member States, candidate countries and potential candidates and form the largest ethnic minority in the EU. The Commission and the Council produced several documents that deal with

³⁷⁷ Through reading the universal constitutional guarantees we can sometimes deductively achieve equality for minority groups without the stress on difference or need for special laws often advocated for by multicultural theories. The new example of this might be the landmark United States Supreme Court case in 2015. In *Obergefell v. Hodges* the court found the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court analyzed the nature of fundamental rights guaranteed to all by the Constitution, the harm done to individuals by delaying the implementation of such rights while the democratic process plays out, and the evolving understanding of discrimination and inequality.

integration of Roma at national levels³⁷⁸. The level of attention towards Roma and recognition of their needs by the EU is not comparable even to the best national policies. The more the questions of citizenship would be in the hands of the EU institutions we might expect a better status guaranteed to present and future Roma citizens.

Clearly, there are certain aspects in which the status quo of European law makes new discrepancies between nations and consequentially some minority groups within these nations. This is the case with the right of free movement. Employment and free movement are the rights within the EU that cannot be fully enjoyed by residents in the EU who are third country nationals.

Democratic closure is an inherent feature of every kind of citizenship. It makes the borders between those who are legally in its possession and others. The task of normative theory is to proclaim the normatively superior concept of citizenship – and though we might start from deontological premises we might at the end also take into account utilitarian arguments. In the case of citizenship this means that we might employ deontological arguments about the wrongfulness of existing rules regarding national citizenship but we could equally condition these arguments with utilitarian aspects of citizenship as such. Citizenship is both a status and a good (if rights we understand as goods) so both ethical arguments taken together would be perfectly reasonable. This is the reason why I think that constitutional patriotism though comparatively more inclusive conception of citizenship is not equal to open borders concept.

Liberal political theory can, as Ackerman explains, support a

³⁷⁸ Comission adopted several communications on this issue: Communication on the economic and social integration of the Roma in Europe(Communication on an EU Framework for National Roma Integration Strategies by 2020) (National Roma Integration Strategies: a first step in the implementation of the EU Framework) The European Council adopted a recommendation on effective Roma integration measures in the Member States on 9 December 2013.

much stronger universal norm, which is not recognized in current international law, namely, that free movement between states may only be restricted for the sake of preserving liberal democratic institutions and internal redistributive schemes that promote domestic social justice.³⁷⁹ As I explained, my idea of constitutional patriotism includes the same: the community belongs to all those who might want to be part of it as long as it does not endanger the basic constitutional provisions of recognition and redistribution. I claim that constitutional patriotism informs its citizenship theory with same normative reasoning: the limitation on membership can be done only if the closure is justified with the preservation of the overall scheme of rights and principles that citizenship entails. In theory, this would mean that new-borns as citizens of a polity have the same status as immigrants³⁸⁰. Following this logic, limits on immigration should be equalised with birth control policies. No special ties and relations should be considered here from a normative position. However, since the birth of children also entails the rights of their parents as citizens of a polity the birth control and immigration limitations cannot have exactly the same status. In other words, right to plan a family or generally formulised as a right to private life should trump the rights to free movement. Obviously, this logic does not apply to cases of asylum and immigration due to atrocities, natural disasters etc. for which a polity that abides to constitutional patriotism should always be open.

Finally the problem with this dimension at the EU level is the lack of knowledge of the EU citizens about their rights. Somewhat complex structure of the European legal order might have impeded the

³⁷⁹ Ackerman, Bruce A, *Social Justice in the Liberal State*, (New Haven: Yale University Press, 1980), 69-106

³⁸⁰ In 2009 *The Birthright Lottery*, Ayelet Shachar argues that birthright citizenship in an affluent society can be thought of as a form of property inheritance, a sort of entitlement transmitted by law to a certain group of recipients under conditions that perpetuate the further transfer of this prerogative to their heirs. v. Schachar, Ayelet, *The birthrights lottery* (Harvard University Press, 2009)

common understanding of the rights and duties of the EU citizens so far³⁸¹. The last development of the EU law towards overarching charter of rights will probably lead to bigger interest of citizens for the jurisdiction of the EU court in this regard.

7.3.2. Participation

Participation in public life as an important dimension of citizenship is particularly present in the first modern theory of democracy of J.J. Rousseau. This republican aspect of citizenship is present in the theories of Aristotle, French Enlightenment, American federalists so that both revolutions were raised also in the name of more substantial participation of the citizens in political matters. Republican authors like H. Arendt, J. G. A. Pocock and A. Oldfield³⁸² have also enriched republican theories with the ideal of participation, for them the crucial dimension of someone's political life. Already mentioned Fraser's participatory parity is a theoretical contribution which gives the participation the pivotal role in recognition and redistribution process. What is the relation between the recognition of minorities and participatory politics? Furthermore, what are the challenges of participation on the supranational level?

In the scheme elaborated in the first part of the thesis I defined

³⁸¹ A substantial minority of Europeans say that they know their rights as citizens of the EU (43%, -3 since spring 2013). An absolute majority of Europeans continue to say that they do not know their rights as citizens of the EU (55%, +2). Whereas between spring 2011 (EB75) and spring 2013 (EB79), the proportion of Europeans answering that they knew their rights as citizens of the EU varied between 45% and 47%, the level measured now is closer to that recorded in spring 2010 (EB73), the first time this question was asked (42%). Barometar 80, Autumn 2013

³⁸² Hanna Arendt, *The Human Condition* (Chicago, University of Chicago Press, 1958), John Greville Agard Pocock, "The Ideal of Citizenship Since Classical Times" in Beiner, *Theorizing citizenship* 1990, Citizenship: An. Unnatural. Practice?. Adrian. Oldfield. Source: *The Political Quarterly*, vol. 61 (1990): 177-187

this element of citizenship as a dynamic one – the one that enables the change of rules and principles that citizenship within a community entails. This is exactly why citizenship has to be always perceived as a changing category. This change is essential for citizenship – without it the very idea of self-imposed rules, as a defining element of democratic citizenship, would make little sense. Participation is also expressive element of citizenship – the requests for recognition and claims of misrecognition are articulated through active participation.

In the ancient time the freedom was intrinsically connected to our public ie. political life. So one of the necessary prerequisites of freedom was participation³⁸³. Through speech and active participation (“great words and deeds”) individual would confirm her inherent political nature (*vita activa*). The public sphere has always greater value than the private world of an individual. However, we cannot disregard the fact that the contemporary individual has a notable private space she wants to keep away from the political/public life and that possesses the utmost importance for her ethical self-realisation. Furthermore, in the omnipresent differentiation and specialisation it is somewhat expected that politics is not dealt by all of us. Still, people enter and leave the space of the political in a way that was not known before. Many mass media spheres of the political give the individual space in which she can easily enter and exit, without traditional forms of political participation. My standing is that participation should be unhindered, but not compulsory. In other words, it is an important aspect of citizenship but we shall not expect from all individuals to be actively in politics neither shall citizens participation be in position to determine some basic principles of a political community. These, like human and minority rights, need to be already constitutionally guaranteed and set in stone,

³⁸³ "Constant, Benjamin, , 'The Liberty of the Ancients Compared with that of the Moderns' (1819), in *The Political Writings of Benjamin Constant*, ed. Biancamaria Fontana, (Cambridge, 1988), 309–28"

otherwise they might always depend on the volatile majority will. Representative democracy often leads to decisions that (un)intentionally under-represent minorities (based on race, class, gender, or any other source of identity) interests.

Democratic level of the EU, especially when confronted to the national state standards, shows a big democratic deficit in its functioning. The EU citizenship participation is certainly not a bright side of European polity. Citizens seem to show little or at least less interest in European than in national politics. The reasons can be various, the perceived lack of real prerogatives of European institutions might be one of them, though at this point of argument they are irrelevant.

Like political participation in any polity, which is not controlled by the legislative and judiciary protection of the rights, the participation at the EU level has a risk of majoritarianism. Democratic (participative) element of governance might collide with liberal dimension of individual and minorities' rights protection. Therefore, we might speak of participation as beneficial for minorities' recognition only once the constitutional and judicial mechanisms for minority protection are established.

The opportunities for the minorities to be better off are several. They would have a stronger voice at the EU level and the possibility to build common platform for various minority political issues especially in cases of minorities other than national ones³⁸⁴. Clearly, the whole

³⁸⁴ Transnational context opens new spaces for social movements. The similarity between transnationalism and Europeanism is easily notable. We might say that transnationalism is *genus proximum* for Europeanism. Della Porta and Tarrow, Tarrow, and Risse-Kappen explain the rise and outcomes of transnational activism: the current complex internationalisation (growing density of international institutions, regimes, and contacts among state officials and non-state actors), and multiplication of linkages between local, national, and international issues (Tarrow 2005: 8); the multilevel political opportunities created by the interaction between complex internationalisation and domestic structures (i.e. 'institutional features of the state, society, and state-

concept of the EU citizenship rests on active participation, otherwise it would not have any meaning. However, it must be understood in a broader context of conception of citizenship that I have elaborated– with liberal (rights) and communitarian element (identity) so we could identify the salience of this component in the EU context.

7.3.3. Identity

The most intangible part of the EU citizenship is undoubtedly identity. This aspect of citizenship should make us think about the nature of the bonds that make European citizens and European nations part of the same political project. Or, as some might argue, maybe these bonds are inexistent? In this part I will examine the tradition of conceptualisation of the EU identity as cultural, social and political phenomenon. Then I will deal with question what kind of common European identity can be normatively acceptable by minorities and account for their recognition. In other words, could we draw some conclusions from constitutional patriotism as a normative model of citizenship for the type of common identity it shall create?

There are certain elements within the life of a political community like common history, culture, legal and political tradition and values that could serve for EU citizens as identifying element. This is exactly how the narrative of national belonging and allegiance were construed in the past two centuries. Therefore, we can easily find the unifying element in many aspects of the broader notion of the culture and put it in as the symbol of collective identity of European citizens.

society relations' (Risse-Kappen 1995: 20)); and the emergence of a stratum of activists best described as *rooted cosmopolitans* ('a fluid, cosmopolitan, but rooted layer of activists and advocates' (Tarrow, 2005, 34)). All these elements, with a high density, are present at the European level. Therefore, this model can have explanatory value for the movements focused on minority issues.

However, having in mind the multicultural nature of today's Europe, we might risk excluding *the others* by including the elements of culture that are not shared by all. I have already elaborated the normative shortcomings of this kind of conceptualising polity and its legal and political order. The biased constitutional platform strikes at the core of legitimacy and social order of a polity.

Identity is an important aspect of citizenship. In order to feel allegiance to the polity citizens must identify to it, too thin concept of identity might risk being too abstract to be identified with. In the same time, if that identity is too thick it might polarise the citizenry and make the social tissue fragile and polity illegitimate and unstable. So where should we look for the sources of the EU identity that would back up the EU citizenship and still remain acceptable for minority groups? There is a whole history of using the concept of identity in the course of European integrations.

At the Copenhagen European Summit in 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept of European identity into their common foreign relations³⁸⁵. Since Copenhagen, identity has appeared in a plethora of political documents. The Tindermans Report on European Union in 1975 refers to a 'People's Europe' that is evident in the 'concrete manifestations of the European solidarity in everyday life'. In 1983 in Stuttgart the heads of government signed the Solemn Declaration on European Union and invited the member states to advance 'European awareness and to undertake joint action in various cultural areas' (CEC 1983). At the European Council meeting in Fontainebleau, in 1984, the European Council considered it vital for the Commission to 'respond to the

³⁸⁵ http://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9f03a8db7da32/publishable_en.pdf

expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for citizens and for the rest of the world' (CEC 1985). Symbols play a key role in the consciousness-raising, but there is also a need to make the European Citizen aware of the different elements that go to make up his European identity, of our cultural unity with all its diversity of expression, and of the historic ties which links the nations of Europe. (CEC 1988) The introduction of the 'Cultural article' (Article 128) states: 'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore' (CEC 1992). The cultures of the states should be understood in a broader sense that includes not only majoritarian national cultures. However, this axiologically galvanised concept of European identity has changed under the argumentation of postmodern philosophy and the new perspectives it has brought in political theory.

Identity is a notion that by logic includes difference. Difference is often conceptualised as otherness, lack of identity and not its dialectically integrated part³⁸⁶. Romano Prodi, the former President of the European Commission, argues That Europe's destiny is not inherently Eurocentric, but one of universality and this universality should aspire to a new cultural unity. This new unity must acknowledge 'otherness' and the ability of cultures to live together: This means the

³⁸⁶Postmodern perception of culture and identity can inform our normative conception of political community. Namely the ideal of homogenous and what is proper to a culture is not to be identical to itself. Derrida's idea that what is proper to a culture is to not be identical to itself. v. Jacques Derrida, *The Other !-leading: Reflections on Today's Europe*, trans. Pascale-Anne Brault and Michael B. Naas (Bloomington: Indiana University Press, 1992), 38-41. So one entity is never identical to itself, it is always in dynamics and process of change. However, we can imagine that entity being able to identify itself to gather around a principle or in certain cases even a value. But these must be general to account for the doctrinal and other differences among the communities in Europe. They should also include the impulse of criticism especially having in mind the history of (ab)use of identity in European political reality.

mutual acceptance among European of their cultural diversity.(2000: 46–7) I would say it means even more than that, accepting the vibrant nature of culture in the age of intensive exchange both of material and spiritual goods and its critical assessment.

The question of identity in general can sometimes be separated from the identity of political community, or more specifically constitutional identity. The latter is disengaged from thick concepts of the good and relates to *modus vivendi* of people belonging to that polity. However it is sometimes difficult to separate these two. That is exactly the reason why minorities do not believe in constitutional outset of national states presented as neutral and unbiased³⁸⁷. The immigrant crises has also shown that instead of political arguments of the ability of certain European states to accept migrants, the issue was revolving around the issues of religion, historical heritage, othering etc. On one side Europe is often perceived and interpreted as a cultural unit contrasted to non-European world. On the other side Europe is highly diversified in itself.

Lister and Pia see the interaction between diversity and unity through four possible models: The first stresses the historical importance of Greco-Roman and Christian heritage. It advocates unity and diversity as complimentary values. The second approach is based on unity achieved by overcoming differences. This is a project very popular with EU policy makers and it is “manifested in cultural policies like the Cities

³⁸⁷ Let us take example of Serbia as a modern postconflict transitional society, candidate for the EU to show the kaleidoscope of citizenship and its manifestations which resonate with minorities and their need to be recognized as equal. Last Serbian constitution from 2006 stipulates that “Republic of Serbia is a state of Serbian people and all citizens who live in it” marking clearly the line between members of majoritarian ethnic group and others. (Similar provisions regarding particular ethnicities, language or religion can be found in almost all Balkan and many European constitutions today.) Serbian hymn was a matter of controversy because Adem Ljajic, football player, a Bosniak from southern Serbia's ethnically mixed region of Sandzak, refused to sing it. Serbia's national anthem, "God of Justice", reads: "God our Master! Guide and prosper the Serbian lands and Serbian nation”.

of Culture programme and other cultural programmes supported by the Commission”. The third position emphasises diversity and is genuinely multicultural. Finally the last model is inspired by works of Habermas and who argues that a European identity should be related to political values that can be internalised by all Europeans. Therefore, the only common values are “the constitutional ones because of the risks of nationalism and the divisionary practices of culture”.³⁸⁸

Having in mind the axiological divergence of Europe it would be very difficult to find a common point in a broad notion of culture. However culture is a part of everyday life and as such it should be dealt with by all European institutions and several of the models indicated here might be constructive and not mutually exclusive. Cultures and the values they nourish should not be judged by the same standards we use for common laws and policies. Thus, if we cannot fully separate cultures from political cultures we must at least be sure that what comes as a result of political culture can pass the criteria of justifiability and legitimacy.

When it comes to the sphere of common rules for a new polity of European citizens it is clear that only common *political culture* might find its place in its new constitutional grounds. That is why constitutional patriotism is useful here: culture is not to be negated or ignored but in the basic rules that determine our common life we can put only those we can all equally adhere to.

The European ideal of conceptual imagining of the fluid and changeable world and its platonic translation in the world of ideas, as well as rationalism and big narratives, have a long tradition in its intellectual history. The platonic world of ideas parallel and identical to the existing empirical has its reflection also to identity which has been always conceptualised as substantialist and teleological notion.

³⁸⁸ Lister and Pia, *ibid.* 182

Modernity has brought this process to its peak, strongly advocating Enlightenment ideas of progress and rationality. Critical theory, poststructuralism and some streams of postmodern theory have tried to cope with this issue to indicate its disastrous effect on society we leave in and the way Europe is auto-conceived. “This dramatic breaking up with the teleological and autochthonous discourse of modernity is necessary for Europe so as not to close itself within its own identity and head towards the other.”³⁸⁹ The gap between the ideals of Enlightenment and the reality of two world wars, Holocaust, atomic bomb have put Europe in front of a mirror in which the relations between progress, rationalism (science), state, nationalism etc. had to be revisited. Modernity has been perceived as a contradiction, and the correlations between science and progress, state and nationalism, democracy and equality were put into question. Since most if not all of these concepts were of European provenance it has been necessary to have them scrutinised again by European scholars, philosophers, theoreticians but by the whole public as well. Furthermore, many of these concepts were in the heart of European political identity. Together with Christianity, these have been the kaleidoscope of European self-understanding. The multicultural turn, however, alongside with philosophical rupture expressed by postmodern and post structural thinking has accelerated the deconstruction of these big narratives.

The same process that has been described here at a level of philosophical ideas and the project of modernity which accompanies the birth and formation of nation states can be transliterated in the language of legal norms – constitutions as some kind of petrified social and political experience. The philosophical change, what Tully brilliantly showed, is also visible in legal discourses. Contemporary concepts of

³⁸⁹Ibid, 185

constitutionalism avoid the flaws of homogeneity that modern constitutions suffer from. A new conception of European identity inspired by the radical philosophical shift should be accompanied with adequate political and constitutional framework and that is where the idea of constitutional patriotism comes into the picture.

Identity is not only connected to cultures. Once we found out that we should put political and not culture in general in the heart of EU constitutional project we also determined its constitutional identity. Only recently have authors realised that we might speak in terms of identities also about constitutions. The EU constitutional identity is such that it favours human rights, minority rights rule of law and peace. Furthermore, once we exclude particular cultures from the idea of the EU we also state that its constitutional identity is open to all.

The idea of a postmodern and deconstructed notion of identity is to open a new space for recognition of various minorities who within the paradigm of national patriarchal ethnocentric states remain always at the margin of the political. Its idea is to establish a new idea of the political – where groups recognize each other without the need to petrify and constitutionalize their particular visions of the good. Again, this is not only a normative deontological claim stemming from the argument that it is wrong and unjust to impose someone the concept of the good she cannot adhere to, but also includes the utilitarian, pragmatic spirit of political *phronesis* that only a community whose basic laws are accepted by all can be legitimate and stable. The changes in law cannot be separated from the broader context in which they take place. That is why it was important to indicate the shift in conceptualizing this aspect of citizenship because it determines the context in which our claims for recognition will be regarded and validated.

In the next part I will try to elaborate the arguments why such EU constitutional patriotism would be an advantageous form of

citizenship and what normative changes it brings about to our conceptions of the belonging and citizenship from the perspective of minorities.

7.4. Postnationalism and deterritorialisation – the normative potential of EU citizenship

Once I have analyzed the most important aspects of EU citizenship I will try to explain its potential for the recognition of minorities, its capacity to do justice to those who, due to various identity features, are deprived in the politics of national states. This injustice is particularly visible at the level of citizenship – in its practice, its conceptualization and discourses produced around it. In the previous part I have already elaborated the additional value of the EU citizenship through two concepts, one related to its form – *postnationalism*, and other related to its substance – *deterritorialization* that might bring additional value both as a context and substance in which the new citizenship should emerge: *constitutional patriotism*. In other words, constitutional patriotism would occur in a specific socio-cultural and historical context but it would also establish and strengthen new normative paradigm.

Therefore, I will give three important arguments in order to explain why this form of EU citizenship brings significant improvement to the recognition of minorities and lead to the principle of equal treatment. These arguments refer to changes at all three level of

citizenship: rights, participation and identity but each of these aspects is differently targeted by them. All three arguments try to reconcile the ethical/political divide within citizenship and the relation between the rights and the good that bothers contemporary political thought.

7.4.1. Universal EU citizenship as a new “space” of freedom and equality

Universal citizenship would account for equality of minorities, ie. Equality of the individuals as main barriers of rights, ideas of good, capability but also as the locus of injustice (Fraser). The European Court of Justice (ECJ) gives the European Convention on Human Rights "special significance" as a "guiding principle" in its case law³⁹⁰. The European Court of Justice uses a set of general principles of law to guide its decision-making process one of these being respect for fundamental rights, seen in Article 6(2) of the *Treaty Establishing the European Union* (Maastricht Treaty): "The Union shall respect fundamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This makes fundamental rights enshrined in this convention integral part of the EU constitutional order. Another document that supersedes ECHR in defining forms and types of discrimination, *Charter of Fundamental Rights of the European Union* enshrines certain political, social, and economic rights for European

³⁹⁰ Arnull, Anthony, *The European Union and Its Court of Justice* (Oxford: Oxford University Press, 2006), 339

Union (EU) citizens and residents into EU law. It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. However it was not legally binding until the entry into force of the Treaty of Lisbon in 2009. Having in mind the quality of these legal documents one can deduce that they will be beneficial for the citizenship rights of both for *new* and *national* minorities.

For new minorities there is a higher level of rights protection due to the very idea of the EU constitutional order that puts human rights in its core. The standardization of certain rights dealing with new minorities is set to correspond to the level of the member countries where these standards are the highest. Let us take the example of LGBT minorities as a type of new identity minorities. The principle of equal treatment is a fundamental value for the EU, and is also aimed at homophobia and discrimination based on sexual orientation. Article 21 of the EU Charter of Fundamental Rights explicitly prohibits discrimination based on sexual orientation, while Article 19 of the Treaty on the Functioning of the European Union allows taking appropriate action to combat this type of discrimination. This is one of the rare instruments that explicitly refer to sexual orientation and this is a clear example of progress within human rights standards.

If we turn to national minorities situation at the level of rights is similar. Respect for the rights of persons belonging to (national) minorities is one of the values of the EU. This value is explicitly mentioned in Article 2 of the Treaty on the EU. Clearly, there is a whole corpus of EU legislation and programs contribute to addressing certain difficulties, including discrimination, which are likely to affect persons belonging to minorities. Article 21 of the Charter of

Fundamental Rights of the EU explicitly prohibits discrimination on the basis of membership of a national minority and its application is now in the hands of supranational courts. Though the Commission ensures that EU countries, when implementing EU law, respect the principle of non-discrimination provided in already mentioned Article 21, “EU countries retain general powers to take decisions about minorities. They must use all legal instruments to guarantee that fundamental rights are effectively protected in accordance with their constitutional order and obligations under international law.”

The idea here is that human rights are so entangled with the EU constitutional identity that it is reasonable to expect that the status stemming from this citizenship would bring about more freedom and equality for individuals and groups they belong to. The EU is influencing national policies regarding human rights and with the progressive intervention of the ECJ we could expect mainstreaming of higher standards regarding these issues. Universal citizenship cannot be understood only through legal provision though these describe a general spirit and constitutional identity of a certain polity. Lockwood argues that the actual enjoyment of rights depends on two interlinked axes of inequality: the presence or absence of legal, bureaucratic rights; and the possession of moral or material resources, which generally operate informally³⁹¹. Also, there are policies by the EU that are aimed at combating discrimination and injustice and many countries where the level of minority rights protection has been low get substantial funds to deal with this issue (Projects like “Progress”, “Rights, equality citizenship” etc.).

³⁹¹As Kate Nash explains Lockwood’s position “from a sociological perspective, then, the enjoyment of rights is never simply a matter of legal entitlement; it also depends on social structures through which power, material resources and meanings are created and circulated. This is exactly the perspective we shall have in mind when theorizing European citizenship. **Kate Nash, “Dangerous rights: of citizens and humans”**, in *Rights in context, Law and justice in late modern society*, Reza Banakar (ed), Ashgate, 2010, 74

The whole corpus of rights that citizenship entails must be guaranteed in a broader concept of citizenship as status. Citizenship has a certain symbolic value. The symbolism of the EU citizenship must be such to allow the greatest number of individuals and groups to identify with it and still retain symbolic importance for them. In order to do so it must break with the past of nationalizing and ethnification of citizenship.

7.4.2. EU citizenship as a civic and inclusive form of citizenship

National minorities are the issue for all national states in the EU and this problem is especially salient in East and South East Europe. Nationalism is historically a European invention. According to Brubaker there is a triadic nexus that involves three distinct and mutually antagonistic nationalisms the 'nationalizing' nationalisms of newly independent (or newly reconfigured) states the transborder nationalisms of what he calls 'externalnational homelands and national minorities' nationalism (Brubaker, 1996). In this way nationalism is always a possible securitizing issue, easily construed around mythological binary national discourses of "us" and "them".

New universal citizenship would make a basis for a new civil (political) citizenship and loose the frustrations of nations divided in various states. This can be achieved only if there is an exchange of normative significance of national and EU citizenship. The loyalty and allegiance to the EU polity would lessen the national tension of the various national minorities since their rights and responsibilities would have a different locus and change the specificity and context of their

minority position. The issue of recent exit of the UK from the EU and the previous Scottish referendum clearly confirms this statement: the common life in a bigger political system was one of the conditions of the Scots who clearly said no to Brexit. The worry to lose the voice in such a pan European political forum was equally one of the reasons to stay within UK.³⁹²

Postnationalised and deterritorialized space of EU citizenship brings about its symbolic reconceptualization that allows for more inclusive identification, and lowers the barriers for loyalty – thick concepts of the good, ethical worldviews etc. which impede identification of minority groups and their members with political community. In a new constitutional setting the EU should provide „a remarkable instance of civic tolerance to be bound by precepts articulated, not by “my people” but by a community composed of distinct political communities: a people, if you wish, of “others”” (Weiler 2002, 568). The new space of symbolic and discursive formations freed from constitutionally encouraged nationalism like it is the case with in European national states, is a good soil for accommodating recognition rights of various identity minorities. As Kostakoupoulou explains, contrasting skeptical and constructivist approach to EU citizenship, “the main deficiency of the EU, namely the lack of a primordial substratum and/or cultural commonalities was, in the view of constructivists, its principal advantage ,since it signaled the construction of a genuinely pluralistic community that would take difference seriously and denationalize political belonging”. The new belonging is political, civil, inclusive and not mediated by any oppressive narrative.

Constitutional patriotism gives a best normative answer to the

³⁹²http://www.nytimes.com/2016/08/27/world/europe/brexit-scotland.html?_r=0

issue of democratic closure. In other words, it gives the criteria by which we can legitimize the closure of the rights and goods that citizenship entails. This leads me to the last argument.

7.4.3. EU citizenship as a way to harmonize human and citizenship rights

The gap between human rights and citizenship rights becomes more and more salient in the time of thick globalization and interdependence. Moreover, it poses the question whether the boundaries between the two should be so fixed and impermeable. The future development of the European citizenship as universal status can further affirm the human rights perspective within the polity and bring to its harmonization and unification. It means that the standards of the ECJ and ECHR would gradually become the standard for the whole territory of the EU: progressive character of the courts and the role of human rights within the constitutional order of the EU. The majority decided that the deportation of Beldjoudi from the country in which his family lives will contravene with ‘the right to respect for family life afforded by Article 8’ if it is not justified when weighed against what is regarded as necessary and thus allowable pursuant to Article 8(2). (*Beldjoudi v France*, European Court of Human Rights 1992: 41). Members of minority communities, through the interpretation of citizenship that heavily rests on the idea of human rights, can be sure that they will enjoy the better status wherever they reside in the EU. Again this desired state of affairs depends on the construction of a more concrete legal concept of the EU citizenship that I suggest in my thesis.

International bill of rights as well as other international instruments dealing with human rights has been integrated in the national legal systems. The core of the human rights is being permanently fulfilled with new rights and liberties. Moreover, idea that human rights are unquestionable heritage of Western democracies question the legitimacy of citizenship rights as a distinct corpus of rights. The logic of personhood supersedes the logic of national citizenship³⁹³ and this might find its resonance in the future EU citizenship which would redefine the normative grounds, *ratio legis* of rights given to citizens and residents. Once that most of the human rights have become citizenship rights we might ask ourselves are the remaining which make the difference between these two corpora of rights legitimate. Minorities are often deprived from citizenship rights and sometimes, when they possess them, the citizenship rights do not adequately respond to their need for recognition. International human rights continuously inspire national legal systems and in the case of the EU this would mean transforming the highest standards of regional human rights into citizenship rights of the EU polity.

Liberalised and more inclusive conception of citizenship would lessen the difference between the concept of human rights and citizenship rights that is so deep in Western democracies and reshape citizenship as an arbitrary privilege into its real political maximum. This would be done through the reexamining of the arbitrary nature of entitlements guaranteed by citizenship rights only to those possessing citizenship of a national state.

³⁹³ Soysal, *ibid*, 164

7.5. Conclusion

The introduction of Union citizenship by the Treaty on European Union raised some concerning issues such as legitimacy and democracy, the EU constitution, as well as the ideas of the EU democracy, public sphere and finally, identity. Weiler finds the concept of EU citizenship as the key element of the normative turn in EU studies. In this dissertation I have looked for arguments in favour of normatively desirable EU citizenship that accounts for multicultural nature of the polity and proposed a conception of constitutional citizenship as universal EU citizenship.

Recognition of identity minorities, those who face constitutional barriers within national states to fully practice and enjoy their citizenship status, entails a new symbolic and legal platform of citizenship. I have explained why it is the case with EU citizenship using the concepts of *postnationalism* and *detritorialisation*. These phenomena (process and state) enable me to argue that the EU citizenship might have an additional normative value for individuals belonging to minority groups, not only national but to all that I put under umbrella term of identity minorities.

In the final part I have given arguments for EU universal citizenship as it broadens and standardizes to the highest level the spectrum of human and minority rights (interpreted as constitutional and not international obligations of the state) in the supranational level, offering a new form of civil, inclusive citizenship that bridges normatively unacceptable gap between human and citizenship rights.

CONCLUSION

Contemporary political theory is focused on the question of common life of groups and individuals with divergent axiological worldviews. The need for common life, social cohesion and solidarity is sometimes in contradiction to the space of freedom that these groups and individuals require by their very nature. Recognition stands in the nexus of this contradiction: we need rules that will accept us as equal citizens of a polity but at the same time allow for the expression of our difference. In other words, what are the rules that should be written in the basic constitutional framework of one polity and should the latter include any particular values or only political culture shared by all? A special light is shed on these questions once we change the unit of analysis from national state to a postnational polity, like it is the case with the EU.

Undoubtedly, Skhlar was right to name citizenship one of the most contested concepts in the kaleidoscope of politics and political science. The complexity of the issue rises with the inclusion of various levels of interpretation and analysis of this concept. Citizenship is *status* we are ready to give to each other in an intersubjective game of politics and it embeds preconditions for the effective use of our rights within a functioning polity. At the same time it is a power game of majorities who try to instrumentalise it for their ambitions and minorities who see it as a way of protecting their basic rights. Seen in this way, normative idea of citizenship does not differ a lot from constitutionalism, a countermajoritarian concept with inherent anti-democratic effect. The citizenship, just like constitution, should be the bridge of the individual

towards political community, and limitation of power that groups and states can exercise over him.

The main target of the research were discursive and normative, i.e. academic interpretations of national state in the historical moment of its radical change. I have argued that liberal multiculturalism is to some extent just another reinterpretation of the national state which legitimizes the intrusion of the concepts of the good in the sphere not only in politics but in the constitutional outset of modern national states. National state has developed in the course of European history in particular way. That particular way has always entailed a normative dimension: national majority decides about the state affairs while the others should be satisfied with the basic legal and political protection. National majority has always come with various other forms of exclusion: patriarchal, white, heteronormative etc. Thus, with the main discourse of national states that stays at the pedestal of modern European intellectual history we have different kinds and types of minorities, phenomenologically distinctive, but all united by the constitutional and political exclusion they experience within a setting of a national state. Degrees and forms change both historically and geographically but the matrix of exclusion in its essence remains the same: citizenship is used a strategy for social closure that gives majority *more of something*, be it resources or status.

In this thesis I have argued that constitutional patriotism is an optimal form of citizenship for an emerging European polity. The main idea is that European belonging is based on the allegiance to a certain set of constitutional rights that stem from quasi-constitutional acts and practices of the EU and allow for better recognition of those who I named identity minorities. That citizenship is based on the rule of law as an object of citizens' attachment, not on the national, patriarchal, religious or any other cultural particularities that would discriminatorily

imply political or constitutional exclusions. Clearly, citizenship is a dynamic category and has many axes of interpretation. Mine was focused on recognition and acceptance of our equality despite of all our differences. To be legally equal means in my understanding to have the same point of reference, the basic set of rules that govern us and give equal standing for our different conceptions of good life. In other words, my thesis, in its philosophical core, is a story about the *good* and *right* and their mutual interdependence. Though liberals are often criticized for their insistence on rights, forgetting that rights themselves can be a form of particular good, I have tried to show that it is still the only normatively acceptable form of establishing an order in which *minimal common* rights will enable us to have the liberty to establish and achieve our conceptions of the good life. In other words, primacy of *rights* over *good* is the only logical solution for the axiological clash that might emerge between these two analytical categories.

To give equal standing and status, i.e. to recognize all of us and to avoid misrecognition/malrecognition, has to include deconstruction of our old concepts of the nation and nation state, citizenship and constitutionalism. As I have shown in my argumentation, it inevitably brings us to social contract theory. More precisely, to the question of all questions: whether sovereignty or rights come first, or, are republicans or liberals right. This questions lie in the very foundations of the idea of citizenship because it is always both a collective (public and sovereign) and individual (private and rights oriented). Here I dwell on Habermas's notion of cooriginality showing that rights that we invest in a polity come into existence in the same moment we recognize them through public sovereignty. The right to lead the life in way we want I find crucial in the spectrum of any possible conceptualisations of human rights. If that is true, then our public sovereignty cannot stand on our way of good life. Constitutionalisation that rests on paradox of this kind,

risks being the ground for constant political instability since it is evidently illegitimate to a part of its citizenry. Nevertheless, I argued in the line of political liberalism that state should not promote any particular way to lead a good life, but treat all concepts of good life that respect the minimal intersubjective consensus, equally without legal or political discrimination.

Postmodern and theories of liberal culturalism have arguably questioned modern citizenship's promises of equality. Although strong arguments were offered to support this, instead of leaving completely the notion of equal and universal citizenship it was worth trying once again to deconstruct and reconceptualise it. Why? Merely because citizenship, like constitution, remains a sphere of common intersubjective recognition and the field where the principal issues of common life have to be resolved and norms established. Its deconstruction, however, exacts both philosophical departure from the big modernist paradigms and the quest for new political formulas and mechanisms. That is, as Turner explains, "we must avoid the equation of citizenship with sameness. In citizenship it may be possible to reconcile the claims for pluralism, the need for solidarity and the contingent vagaries of historical change"³⁹⁴. "If citizenship", he continues, "can develop in a context with difference, differentiation and pluralism are tolerated, then citizenship need not assume a repressive character as a political instrument of the state"³⁹⁵. In the globalised and highly interdependent world citizenship has remained the point of crossing between our claims for difference and equality. Citizenship is supposed to keep us connected loyal to a system we can *ex ante* legitimise and in the same time allow for a free pursue of a good life, whatever it means for us.

³⁹⁴ B. S. Turner, "Contemporary Problems in the Theory of Citizenship", in: Turner, B. S.(ed.). *Citizenship and Social Theory.*, London, 1993, pp. 1-19, 15

³⁹⁵ *Ibid.*

This thesis was an attempt to capture the changing landscape of citizenship and try to sketch its transforming features by exploring its emerging transformative philosophical and moral underpinnings – both in its content and scope. The emerging citizenship of the EU was an ideal model against which the salient issues of membership in a political community could be theoretically contemplated as well as a backdrop for the reflection on common political frameworks that should account for high plurality of identities and values. It is not only about the micro perspective of minorities that perceive the political system in its entirety illegitimate but also about the intersubjective relations of individuals and groups that is a necessary precondition for an ordered society. I argued that constitutional patriotism is exactly the form of citizenship and patriotic loyalty that modern constitutional democracies should embrace in order to obtain these two goals. The concept emerged in a particular historical context of postwar Germany where old notions of ethical citizenship and territoriality could not offer the foundations for new constitutional and political ordered symbolized by the human-rights-inspired Basic Law. Nevertheless, even without making unsuitable historical parallels, we can still use the normative potential of constitutional patriotism for plural contemporary polities. In order to do so I have conceptualized a new theory of constitutional patriotism enriching it with a necessary theoretical substance.

I have argued that constitutional patriotism rests upon revised concepts of both constitutionalism and patriotism. Contemporary constitutionalism suited for the age of diversity is distinct from modern constitutionalism and is based on “the sovereignty of culturally diverse citizens”. In my view constitutional patriotism, on one side, revives the oldest convention of constitutionalism: *quod omnes tangit ab omnibus comprobetur* and gives a new meaning to it. Constitutionalism should

be understood as a guarantee of consent, understood both as acceptability and actual acceptance. On the other side, patriotic feeling that constitutional patriotism advocates is less sentimental, rather reflexive. Then I elaborate theoretical assumptions (ethical, anthropological and historical) as the foundation of my theory and give practical principles by which constitutional patriotism should be designated. These are: the rule of law, autonomy and equality before law, liberty, antiuniversalism, participation, openness, unity and deterritorialization. I have shown how each of these practical principles relates to the issue of identity minorities and how they can benefit from them.

Testing this theory on the EU level is adequate for two reasons. First, we might argue that the national state in the context of the EU ideal loses its grounds –it is a common political culture that takes precedence over cultural differences. I argued that post-national character of the EU might offer a better framework for the various national minorities within EU. At the same time, and that is the second reason, the EU as such is not an old historical entity with big colonial, war or exclusionary practices so it offers us a chance to conceptualize its citizenship in an inclusive way. Colonial history was entangled with the national militant rivalries of modern European national projects³⁹⁶. Though many of EU members have colonial history, the very idea of Europe emerged as a non-national vision of common and peaceful life and stands in clear opposition to colonialism. However, colonialism and its legacies still have to be normatively dealt by the EU³⁹⁷. Compared to

³⁹⁶ The World War I emerged as a consequence of conflicting colonial politics. Fischer thesis, which put forward the idea that responsibility for this war was on Imperial Germany, stimulated other historians to show that the war was an unavoidable result of national militaristic and imperial tendencies of big colonial powers. v. Fischer, Fritz, *Germany's aims in the First World War*, transl. 1968. Besides, the cause of the WWII was again the imperial politics of Germany.

³⁹⁷ The EU as a project was meant as a way to deal with internal imperial inclinations rather than questioning its policies over the seas. However, we could at least concede

national states, however, European Union can be reasonably perceived as a new space where this kind of (re)creation of political is possible.

However, it is not only a story told from the perspective of national minorities. I argued that the EU constructs a new symbolic space where old conceptions of otherness dissolve. So far, the EU has shown a tendency to stand up for minorities and open the space for their recognition and affirmation, from women to LGBT minorities, immigrants and others through the adoption of very specific antidiscriminatory laws but also through interpretation of citizenship by the ECJ that took into account the position of those belonging to minorities. *Deterritorialised Europe* is a new space of intersubjectivity that provides a different constitutional order, the one that does not exclude national one, but takes its role in its crucial dimension: citizenship. The way we understand each other, recognize each other's political subjectivity must be such to allow for inclusion and fairness. Through the thesis I have showed that EE constitutional patriotism, a form of allegiance that is focused on the basic rules and practices rather than particular conceptions of the good, is both viable and desirable at the European level from the viewpoint of minorities. In the future state of affairs, I claim, minorities would find a greater space for their recognition and a chance to strive for their own conceptions of good life. This is why my approach to minorities, more inclusive and inspired by postmodern theories, has turned out to be extremely helpful in the EU context. I have argued that in the new European context we have: a different normative system (legal, political, discursive, civic etc.), different legal mechanisms which go in favour to minority and human

that the EU project will have to scrutinize the legacy of colonialism since it is vital for its constitutional self-understanding and its relation to the world. As Onar and Nikolaidis put it "only by acknowledging the inflections of colonialism in the EU project itself, can the Union reinvent its normative power in the 21st century". Kalypso Nicolaidis, Nora Fisher Onar, "The Decentring Agenda: Europe as a post-colonial power", *Cooperation and Conflict* June 2013 vol. 48 no. 2, 283-303

rights and finally different arenas and possibilities for political participation of members of minorities.

The conclusion of the thesis is that citizenship is still the focal point of political theory and that the issues of multiculturalism might still be explored within the universal notion of citizenship, especially in the polities which by their constitutional identity affirm the right to difference and guarantee the equality of status. In other words, the story of citizenship took me back to constitutionalism and contractarian theory of state in order to assess where the right to be recognized³⁹⁸ resides and what it is in its political core.

Therefore, my argumentation lines might have proved to be a good methodological choice in affirming the main claim that constitutional patriotism is a legitimate and normatively desirable form of citizenship and one of the pillars of the EU emerging constitutionalism. The first argumentation line is inspired from recognition theory and claiming despite our often contradictory differences in conceptualizing good life, we must have a common intersubjective sphere of recognition which is in modern societies mediated by constitutional and ordinary laws. Minorities' identities should not be essentialised but still have to enjoy the primacy and protection in pluralistic-in-fact societies like the EU. I have argued that universal constitutional norms can still account for the issue at stake. The second argument draws on political liberalism in affirming that

³⁹⁸ In other words, my conception of rights is contractarian, somewhere between status and instrumental theories, between the view that rights belong to human beings by their very nature (deontological) and the one that sees rights as promotion of the best state of affairs (utilitarian). Right not to be misrecognised (as I interpreted right of recognition) is justified through the contractarian scheme and constitution as a basic social consensus. It does belong to everyone (and is particularly important to minorities) as equal, autonomous human beings with dignity. In the same time it has positive consequences both for bearers of rights (for their flourishing) and aggregately for social order. v. Wenar, Leif, "Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2015/entries/rights/>>

only those rules that include our consent might be legitimate. The consent does not have to be actual, i.e. explicitly manifested at each instance, but has to be reasonably implied with regards to the minimum of rules that we can always adhere to, knowing that these might in certain case go against our will. My argument was that whatever justification we can imagine for these rules they must be such that they do not go against our identities and our right to identify with the common political project. That is why we must omit all the rules stemming from particular cultures unless they fulfill these principles and as such are accepted by all. I have gone through contractual theory to support this claim, putting citizenship in a contemporary historical context.

Recognition needs a common intersubjective platform and a legal expression. Especially constitutional laws and constitution seem the likely candidates for that. This platform, if designed in the spirit of political liberalism, enables us to have our particular concepts of the good protected and, at the same time, is broad enough to allow our identification with it even if we belong to a minority group. When it comes to recognition, the EU citizenship has the utmost importance of all laws. Citizenship includes rights, participation and identity and recognition is equally important in all three segments. I have shown that EU citizenship is being created in a *detrterritorialized* and *postnational* polity. These two features give a distinct identity to the EU polity making it more open and inclusive for the *others*.

The EU as an emerging polity rests on “truncated” territorial sovereignties of national states giving a new legal and political, but also symbolic meaning to this space. I call this deterritorialization, the change of normative and symbolic order which makes it easier for minorities to identify with it. The EU has put in its constitutional foundations the idea of rule of law and human rights securing a legal

mechanism against majoritarian national and democratic tendencies. At the same time the function and salience of the nation has changed for European societies. I have marked the historical and social changes of paradigm which make citizens of all these national states to look for other or at least additional normative and legitimizing categories. Once I have described the changes in the notion of citizenship in the context of the EU policy, politics and polity, I was able to proceed with normative projections of constitutional patriotism that I had previously elaborated.

I have offered arguments in favor of a form of universal EU citizenship, based on the concept of constitutional patriotism, as the optimal normative answer. Firstly, such a citizenship would further broaden and standardize to the highest level the spectrum of human and minority rights at the supranational level. Not all EU countries have same standards and policies with regard to various identity minorities, national, cultural, sexual etc. It is through the constitutionalisation of certain standards and the idea of common citizenship that the EU would bring about a higher level of human rights protection as a necessary precondition for fully enjoying citizenship. Secondly, it would offer a new form of civic, inclusive citizenship, based on political culture as a deliberately chosen unifying element. Finally, it would bridge normatively unacceptable gap between human and citizenship rights. In essence a theoretical issue, it seems to be of a salient practical use today especially with the migration crisis and the issue of permeability of Schengen and national borders. Here, my claim was that citizenship should stop being a mechanism of ghettoization. Although we might not be able to claim that borders are irrelevant, we might still define the normative grounds on which these are drawn.

I share the view of the authors who think that political theory must reside somewhere between desirable and viable. I believe that this

thesis was a strong argument in favor of the view that the final test for a theory is in dialectics of these two qualities of political matters. EU citizenship might be the best theory of citizenship of all the possible worlds but I have argued that it is the optimal one in the reality of the world we live in. The walls of the EU might also be too high for its future citizens and might not bring the justice to all those who are already its citizens but I have argued that this citizenship is set on a normatively more acceptable grounds. Besides, theories in social sciences can hardly bring heuristic results seen in natural sciences. Nevertheless, the new perspective on an issue has a salient value for social reality. In my dissertation, I have tried to match apparently unmatchable things: the recognition of particular ethics with the universal citizenship. I have shown that even from a thick notion of recognition as a starting point we can imagine a common constitutional platform in which its purposes will be fulfilled. In order explain this I had to use intermediary, connecting notions of autonomy, contractual theory, internal minorities etc. The level of abstraction used in my argumentation is a reflection of the complexity of the notion of citizenship: from philosophical and theoretical insights, over social theory to concrete policies. Nonetheless, the research remains firmly rooted in my primary field, political theory. Thus, it is rather a philosophical sketch than a manual for policy makers but I do believe they could also relate to it. EU citizenship is still (for some of us) more a normative category than reality, *lex ferenda* that waits for its codification. Therefore, I hope that my research will put away some dilemmas or, in a more philosophical outlook, add new ones to be considered in the lengthy quest for common political life of present and future European citizens.

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