THE VAMPIRES OF TRANSYLVANIA:

ETHNIC ACCOMMODATION AND LEGAL PLURALISM

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ABSTRACT

This thesis presents a theoretical discussion of how legal pluralism and the idea of parallel systems of justice can address issues of ethnic accommodation.

It is divided into four chapters: (I) an introduction why Transylvania has been selected as a site of analysis; (II) a brief presentation of the ethno-history of Transylvania; (III) an analysis of law focusing on the possibility of applying parallel legal systems, in contemporary states, taking as a case study how Romania might deal with Transylvania; (IV) finding conclusions between utopia and reality.

The evolution of the ethnic composition of Transylvania over the centuries is used to illustrate the complexity of the legal and political issues that must be addressed. Several questions of legal theory are then addressed. When does a norm become legal? What is the relationship between Law and state institutions or the relationship between Law and society? Is Law a singular or a pluralist phenomenon? How is Law culturally, historically or politically determined? How can ethnicity or cultural membership be defined in legal terms?

The two main justifications for accommodating ethnic minorities through parallel legal systems are then examined: the argument based on the collective rights of national groups; and the argument based on protecting the cultural continuity of a national group. The thesis suggests that thinking about parallel legal system must be grounded in the specific historical, political, ethnic, and legal context of a region.

The goal of "The Vampires of Transylvania" is to challenge contemporary legal thinking rather than to provide an absolute final conclusion on the topic of parallel legal systems. Final answers in this field are possible only after legal mythology and ethno-cultural taboos have both been demolished.

SOMMAIRE

Cette thèse présente un analyse théorique de la contribution du pluralisme juridique et de l'idée des systèmes de justice parallèles à la résolution des questions relatives à l'accommodation des minorités ethniques.

Elle se divise en quatre chapitres: (i) l'introduction qui explique pourquoi l'auteur a choisi la Transilvanie; (ii) un court resumé ethno-historique de la Transilvanie; (iii) une analyse du phénomène juridique, concentrée sur la possibilité d'appliquer la notion de systèmes juridiques parallèles dans les états contemporains, en particulier dans le cas de la Roumanie; (iv) la conclusion.

L'évolution de la diversité ethnique de Transilvanie à travers les siècles sert à illustrer la complexité des questions juridiques et politiques qui doivent être abordées. La thèse soulève certaines questions de théorie juridique. Quand peut-on dire qu'une norme devient une norme juridique? Quel rapport existe-t-il entre le droit et les institutions étatiques ou encore entre le droit et la societe? Est-ce que le droit est un phénomène moniste ou pluraliste? Comment le droit est-il façonné par la culture, l'histoire ou la politique? Comment peut-on definir, en termes juridiques, la diversité ethnique et l'apartenance culturelle?

L'auteur examine les deux raisons principales qui justifient l'accommodation des minorités ethniques par l'entremise de systèmes juridiques parallèles: soit l'argument basé sur les droits collectifs des groups ethniques; soit l'argument basé sur la protection de la continuité culturelle de ces mêmes groupes. La thèse propose que toute réflection sur les systèmes juridiques parallèles doit se fonder sur une analyse minutieuse du context historique, ethnique, politique, et juridique spécifique d'une région donnée.

L'objectif du "Vampires de la Transilvanie" est de provoquer la pensée juridique contemporaine plutôt que de proposer certaines conclusions absolues dans le domaine des systemes juridiques parallèles. Des réponses finales aux questions abordées ne seront possible qu'après l'abolition de la mythologie juridique et la suppression des tabous ethno-culturels.

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CHAPTER 1. INTRODUCTION

1.1 What is Transylvania?

No doubt the best known "Transylvania" throughout the world is the one associated with the fierce Romanian Count Dracula. Hollywood studios perpetuated the Western European legend of vampires living in the exotic Carpathian-Balkan region. But Transylvania is not fiction. Nor is the name Dracula.[1]

Dracula is the nickname of the Romanian Prince of Wallachia: Vlad the Impaler (1456-1462).[2] In his short reign Vlad the Impaler became famous for his military victories over the Sultan Mohammed the II of the Ottoman Empire in 1462. These victories, together with those obtained by his father Prince Vlad I Dracul in alliance with the Romanian Prince of Transylvania, Iancu de Hunedoara,[3] put an end to the expansion of the Ottoman Empire north of the Danube River.

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[1]In Romanian "Dracul" means "the devil". Dracula, alias Vald the Impaler, was the son of Vlad I Dracul. The nickname Dracul was attributed to his father because of the order of the Dragon he was granted by King Sigismund of Hungary. See Josif Constantin Dragan, *Istoria românilor* (Bucharest: Editura Europa Nova, 1994) at 100.

[2]The data concerning Vlad Tepes (the Impaler) were extracted from: *Istoria Rominiei*, (Bucharest: Editura Academiei Republicii Populare Romane, 1962), vol. II, at 465 and following.

[3]Iancu de Hunedoara's military campaigns against the Ottomans were closely linked to the pan-European attempt to organize a "crusade" against the Turkish danger. The Catholic Church was able to use the outcome of the Concilium of Florence in 1439 to induce the Byzantine Emperor John VIII (the Paleolog) together with some representatives of the Orthodox Church to agree to a unification of efforts with the Catholic Church. Nonetheless, due to certain variances among the Catholic states and to the power of the Ottoman Empire this second attempt to achieve a united Church effort failed. For details concerning the impact of the Concilium of Florence on Transylvania see: *ibid.*, at 438.

After the fall of Constantinople in 1453, Mohammed II led his conquering Ottoman Army throughout the Balkan Peninsula. Vlad the Impaler was taken hostage together with his father in 1442. Upon the latter's death in 1449 the Turks tried to impose Vlad as the successor Prince, hoping he would be beholden to them. The attempt failed and Vlad the Impaler managed to escape to Moldavia. After a short while he left Moldavia for Transylvania where he lived under the protection of Iancu de Hunedoara until 1456. At that time, with the help of Iancu and a substantial part of the Wallachian aristocracy, he became Prince of Wallachia. The brief period 1449-1456 was his only stay in Transylvania.

As Prince of Wallachia, Vlad the Impaler soon alienated the high nobility through his reforms to the regime of landholding. The use of impalement[4] as a criminal punishment also made him unpopular among his own people. Moreover, he enforced a policy of economic protectionism against the Saxon merchants of Brasov (Kronstadt) in Transylvania, close to the Wallachian border. The dispute with Saxon merchants culminated in his military conquest of Brasov in 1460 and his subsequent punishment of the wealthiest merchants. The myth of Dracula was perpetuated by these Saxon merchants, who later organized a plot against him.

In 1462, he was betrayed by the Wallachian nobility, who negotiated a truce with the Ottoman Empire. The Turkish army defeated what was left of Vlad's army and he took refuge in Transylvania. There, the King of Hungary, Matei Corvinul (Mathias Rex),

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[4]Impalement is first mentioned by Byzantine sources in connection with the cruelties inflicted by the Slavic population who infiltrated in the Balkan Peninsula (Haemus) and who were constantly attacking the Byzantine Empire.

the son of Iancu de Hunedoara, decided to jail Vlad the Impaler and he lived the rest of his life imprisoned in Buda.

So much for Dracula. But what of Transylvania?

Generally, the term Transylvania is used to refer to the historical province of Transylvania located within the Carpathian Arch and bordered by the following neighbours: to the South - Wallachia, on the line of the Meridional Carpathian Mountains; to the East - Moldavia, on the line of the Oriental Carpathian Mountains; to the North-East - Bucovina (Bukowina), on the line of the Upper Oriental Carpathian Mountains; to the North - the Valley of the Tisa (Tisza) River; to the West and North-West - Hungary (Tisa Plain or the Plain of West); and to the West and South-West - Serbia (the demarcation line between the Serbian Banat and the Romanian Banat partially follows the line of the Danube). In this general meaning, the term Transylvania is interchangeable with Ardeal (Erdely, Siebenburgen), and the historical Province of Transylvania includes what are today Transylvania, Banat, Crisana and Maramures Regions.

There is, however, another more restricted meaning of the term of Transylvania. In this narrower geographic sense, Transylvania is a subdivision of Ardeal (Erdely, Siebenburgen) designating the region located within the Carpathian Arch, spread over the Highlands of Transylvania, and bounded at the South by Wallachia on the line of the Meridional Carpathians, at the East by Moldavia on the line of the Oriental Carpathians, at the North-East by Bucovina (Bukowina) on the line of the Upper Oriental Carpathians,

at the North by Maramures Region, at the West and North-west by Crisana on the exterior limits of the Occidental Carpathians and at the South-west by the Banat.

The precise limits of the Province of Transylvania have varied throughout its history. An overview of this history will show these variations and will also illustrate how the ethnic composition of this region evolved over time. Before undertaking such a historical and socio-demographic review, however, it is important to indicate why Transylvania has been chosen for this study of ethnic accommodation and legal pluralism.

1.2 Why Transylvania?

In a manner that mirrored the European trend of national aggregation according to ethnic criteria, a number of proto-nation states began to emerge in the late 19th century in the Carpathian-Balkan region. This emergence was not, however, unproblematic due to the location of the region at the frontiers of three Empires -- the Ottoman Empire, the Austrian-Hungarian Empire and the Russian Empire. Indeed, only the two Romanian Principalities of Wallachia and Moldavia, which united in 1859, actually managed to achieve or retain their autonomy during the 19th century.

In the early 20th century, the fall of the Ottoman Empire, and later the fall of the Austrian-Hungarian dual monarchy, raised two vexing challenges for the peoples living in this part of the world: one was sociological -- how to deal with the resumption of what was thought to be the "natural" process of evolution of the states in the region that had

been interrupted in the 14th and 15th century by the Ottoman invasion; and the other was political – how to negotiate the formation of "nation states", a model of governance taken on board as an acquisition from Europe. The task of statecraft was huge.

When the Ottoman Empire expanded its borders in the late 14th century, states in the Carpathian-Balkan region were just beginning to develop. The Byzantine Empire was at the end of a long period of decay. The proto-statal forms serving the populations of the Balkan Peninsula after the end of the 10th century migrations oscillated between an early type of feudal territoriality and a political organization based on ethnic identity.

Successive waves of migrations over centuries had dislocated not only the previous migratory populations but also the autochthonous populations. As a result, the new and old national groupings in the Carpathian-Balkan region were spread in huge overlapping layers. The statal organization of each of these national groupings was, moreover, in different stages of evolution. The Ottoman occupation – and in the case of Slovenia, Croatia and Transylvania, the later Habsburg occupation – froze indigenous political development in the region.

So, by late 19th century when the dominance of these two Empires in the region ended, the re-emerging local states were confronted with the complex issue of the national identification. The specificity of the Carpathian-Balkan region (ethnically – the huge overlapping layers of ethnicity; and historically – the inchoate statal organization before these Empires overran the area) can be considered as a major contributing factor to the apparently never-ending 20th century territorial quarrels. Hence, the expression,

"Balkanization". In addition, the political interests of various Western European Powers in the region further complicated attempts to build up post-Imperial state organizations.[5] Even today these conflicting political interests are playing themselves in the Balkans.

Ethnically, Transylvania has always been a very rich area. For example, a Hungarian census of population in 1900 indicated 5,853,476 inhabitants of the province. Of these, 47.2% (2,763,674) were Romanians; 23.8 % (1,394,647) were Magyars; 6.9% (404,392) were Szeklers; 12.8% (747,852) were Germans (Saxons); 4.7% (271,897) were Serbians and Croats; 2.5% (146,428) were Ruthenes; 0.7% (40,460) were Slovacs; and 1.4% (84,126) were "other nationalities".[6]

Throughout the 20th century Transylvania has been at the centre of a dispute between the post-Imperial states of Romania and Hungary. The conflict evoked history and became centred on the issue of territorial claims. The true underlying issue in Transylvania -- how to manage ethnic diversity in a modern state -- quickly became only a collateral aspect of the dispute. As has often been the case in the Carpathian-Balkan region, issues of ethnicity were manipulated for crass political ends.

The long-term history of ethnic intolerance and arrogance shown by the Empires that previously controlled the region lies, in large measure, behind the later ethnic

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[5]For details of the late 19th and early 20th century history of Transylvania see: Nicolae Titulescu, *Pledoarii pentru pace*, (Bucharest: Editura Enciclopedica, 1996), at 386.

[6]See *Magyar statistikai kozlemenyek*, New Series, vol. XVI, (Budapest, 1906), at 136-145, cited in *Teroarea horthysto-fascista in Nord-Vestul Rominiei*, (Bucharest: Editura politica, 1985), at xxix.

aggressiveness of the states that re-emerged. Moreover, the 20th century manipulation of ethnic minorities in political discourse in order to legitimize the drawing and re-drawing of territorial maps radicalized the position of states in the region toward their ethnic minorities. These minorities were perceived as a threat to the territorial integrity of a state. The tragic consequences of this perception are felt even today. And, as if this were not enough, successive border revisions were, in many cases, accompanied by a "politics of revenge" and ethnic cleansing.

Achieving an enduring peace in the region is closely linked to resolving the ethnic problem. Of course, any realistic and workable solution leading to ethnic accommodation will have to take the specific, on-the-ground, situation today into account. But a non-polemical, and relatively complete historical analysis of the evolution of ethnicity in Transylvania is a necessary first step towards understanding how the ethnic question might be approached. This being said, it is important to acknowledge that the history of the region has been manufactured and remanufactured several times for political reasons. In addition, the use of history as an instrument of manipulation has resulted in intransigence, intolerance and ignorance in the general population. This intransigence, in turn, has also made possible, even encouraged, further grotesque distortions of history.

It is precisely the deep historical roots of its ethnic conflicts and the richness of its ethnic diversity that makes Transylvania an ideal case study. Necessarily, the ethno-history presented here is only one interpretation. Necessarily also, it must be presented in a summary form that emphasizes political events and leaders, rather than ethno-culturally driven social history. Nonetheless, in its detail, this history reveals the complex

interplay of ethnicity, politics and law, and sets the stage for a re-construction of legal approaches to ethnic accommodation in culturally diverse states.

CHAPTER 2. A BRIEF ETHNO-HISTORY OF TRANSYLVANIA

2.1 Periodizing the Ethno-History of Transylvania

All periodizations are presentist justifications for foregrounding and backgrounding events and interpretations. In view of the objectives of this thesis, five major periodizations have been selected: the early history of Transylvania till the 9th century; the Hungarian period (9th - 16th centuries) ; autonomous Transylvania (1541-1688); the Austrian regime (1688-1918); and Romanian Transylvania (1918-1999).

The organizing frame of this chosen periodization is meant to reveal both the rich ethno-cultural composition of the region (given waves of migrations and conquests) and to show the effects of a long dissociation of political organization and population base during the Imperial periods. Other frames could have been adopted. However, I believe that this frame best shows why a new legal-political analysis of ethnic accommodation in Transylvania is possible.

2.2 Early History of Transylvania

A. A Methodological Caveat

Uncovering and understanding the early history of Transylvania is a real adventure. There are at least three difficulties to be overcome.

1. The first obstacle is the scarcity of sources. Successive waves of migrations and invasions, successive rulerships of foreign populations, and an endless sequence of wars, battles and uprisings, between 275 C.E. and the 14th century, destroyed most written historical sources. This lack of sources is partially compensated by archaeological findings but these also do not abound. What is more, some of these archaeological sources are not very conclusive.[7] Nonetheless, recent archaeological research has contributed significantly to eliminating some of the many competing historical hypotheses.

2. The existing written sources are confusing and contradictory. Because the sequence of migrations was fast-paced, Latin, Byzantine, Slavic or even Middle East sources of the period always lagged behind the actual situation of the region. In addition, these sources contain many confusions relating to the name of the nations to which they refer. One explanation for this confusion is that some written sources reported only the name of the ruling migrating population and not the real ethnic identity of the subdued autochthonous population.[8] Finally, some other confusions resulted from the

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[7]For instance, some ceramic pottery discovered in Romania dating from that epoch may indicate that it belonged to the proto-Romanian population but may as well indicate that it belonged to other migratory populations (Gepidae, or other). This primitive ceramic pottery was considered not to have enough distinctiveness. For details see: G. I. Bratianu, *O enigma si un miracol istoric: poporul roman,* (Bucharest: Editura Stiintifica si Enciclopedica, 1988).

[8]"...At Choniates, the 'vlahs' of Haemus continue to be named 'Moesians', according to the old name of the province [50], and at other writers,all the inhabitants at the north of Danube and in the regions of the Black Sea were named 'Scythians', name attributed, along the times, to Goths or Huns, in the first centuries of the Middle Ages, and to Petchenegs, Cumanians and even to Tartars, in the late Middle Ages. This procedure [...] is more than a fashion or a parade of erudition; it highlights categorically the territorial meaning of the ethnic names in the Balkanic and Danubian Middle Ages. We also have to highlight a nuance, important for their interpretation: besides the geographical meaning, referring rather to the territory than to the population, the ethnic names designate the conqueror element or the ruling class which exerts, within this territory, an effective leadership or a political influence, based on a certain right. This is an outstanding feature of the whole Balkanic history." *Ibid.*, at 99, 100 (translation by the author).

zealousness of various chroniclers when praising the bravery or the achievements of their leaders.

3. Recent revisionist exaggerations grounded in politics have infected almost all historiography. Here, as in so many conflict situations, history is constantly being rewritten by both winners and losers. For this reason it is probably best to speak not of a history of Transylvania but rather of the histories of Transylvania.[9]

B. From Paleo-lithic Times to Aurelian's Evacuation

B.1 The Dacians (Getae)

The definitive organization of the Thracian tribes and separation of the Thracians from the Illyrians (with whom they shared the old indo-european genetic stem) took place between 1800 and 800 B.C.E. Soon after, in the 7th century B.C.E., Greek colonies first appeared on the shores of Dobrudja. Not being numerous, the Illyrians were assimilated. In the following century, the Scythians came to occupy northern Thrace and established Scythia Minor in Dobrudja.

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territory, an effective leadership or a political influence, based on a certain right. This is an outstanding feature of the whole Balkanic history." *Ibid.*, at 99, 100 (translation by the author).

[9]In the following presentation I have adapted as a model a Romanian historical treatise: Vlad Georgescu, *Istoria romanilor - de la origini pana in zilele noastre*, (Bucharest: Editura Humanitas, 1992).

Most were ultimately chased away in the 3rd century B.C.E. by the Macedonians, although some remained in Dobrudja until the 1st century B.C.E. when they were assimilated by the Getic (the Romans called them Dacian) population.[10] In 80 B.C.E. the Dacian king Burebista organized a larger tribal union creating a centralized Dacian state over a vast territory from Bohemia and Pannonia in the west to the Dniester river and the Black Sea coast in the east.

After the third Macedonian War ended in 168 B.C.E., Hellenistic Macedonia became a Roman possession,[11] and by 74 B.C.E. the Roman Empire was the new Balkan neighbour of the Dacians. In 46 C.E. Dobrudja was actually annexed to Moesia by the Romans. Conflicts between the Geto-Dacians and the Roman Empire became chronic in the first century C.E. During this period the Roman influence over Dacia became increasingly significant.

In 88 C.E. Tettius Iulianus defeated the Dacian king Decebal. The peace imposed by Emperor Domitianus, that Decebal become a client of the Roman Empire, was accepted and Decebal received annual stipends, military training experts and war carts from the Romans. Nonetheless, in 101 C.E. the Roman legions crossed the Danube and following the second Dacian-Roman war, 105-106 C.E., Dacia became the last province to be conquered by the Romans.

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[10]*Ibid.*, at 15.

[11]Marcel D. Popa and Horia C. Matei, *Mica enciclopedie de istorie universala*, (Bucharest: Editura Politica, 1988), at 583.

B.2 Dacia Felix (106 - 275 C.E.)

Emperor Traianus included Oltenia, Banat and Transylvania in the new Roman province of Dacia. Muntenia, the south of Moldavia and Dobrudja were incorporated to the province of Moesia. Most of Moldavia, Maramures and Crisana (territories also inhabited by Dacians) were not, however, occupied by the Romans. Between 106 and 124 C.E. the Romans tried different organizational forms within these borders, all designed to secure Dacia as "the most advanced bulwark of the Roman world against the Barbarians then threatening it from the north and east".[12]

Historical sources variously place the population of the Roman Dacia at between 650.000 and 1.200.000.[13] A large Roman army plus auxiliary troops from throughout the Empire were brought into Dacia.[14] In addition to the army, estimated at 10% of the population, the Roman Empire brought in numerous colonists, the vast majority of whom were from neighbouring provinces: Moesia, Thracia, Pannonia and Dalmatia. The rest of the population was native Dacian.

Some Roman writers claimed that Dacia was *exhausta*[15] – devoid of inhabitants – although archeological and other evidence suggests that this was not the case.

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[12]Vlad Georgescu, *op. cit.*, note 9, at 18.

[13]*Ibid.*, at 18.

[14]For a detailed discussion of the Roman Army in Dacia see: *Istoria Rominiei, op. cit.*, note 2, vol. I, at 370.

[15]"*Dacia enim diuturno bello Decebali viris fuerat exhausta*" Eutropius (VIII, 6, 2) as cited in *Istoria Rominiei, op. cit.*, note 2, vol. I, at 389.

Indeed, the fact that in 117 C.E., Hadrianus was required to dispatch Quintus Marcius Turbo, a specialist in the repression of provincial uprisings, to Dacia argues that the Dacian population continued to exist. Later troubles around the time of the reign of Commodus (180-192 C.E.), confirmed the Dacian presence. Certain Dacians achieved high ranks in the Roman Empire, and Dacia became the province that supplied the largest number of soldiers to the Roman army after the reign of Traianus. One can thus conclude that the Dacians continued to live in the province notwithstanding claims of their extermination.

The Romanization of the Dacians intensified during the calmer reigns of Commodus, Septimius Severus and Caracalla. Despite their diverse origins, the colonists brought a common Latin language and a common Roman culture and civilization in Dacia. Throughout this period, however, the province was systematically attacked by the free Dacians, mostly the Carpae allied with the Goths, and the occupied Dacians often mutinied against their Roman conquerers. When the Goth invaders reached the borders of Empire, Aurelianus decided to withdraw from Dacia (274-275 C.E.).[16] Even earlier the Romans had given up Muntenia and the south of Moldavia which fell again under the domination of the free Dacians.

Only the presence of large numbers of Roman colonists prevented the Empire from abandoning the whole province. While the army, the administration, the rich, the townsfolk and the merchants left Dacia, moving south of the Danube, "the peasants, the

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[16]According to Vlad Georgescu, *op. cit.* note 9, the Aurelian evacuation occured in 274-275; according to *Istoria Rominiei*, *op. cit.*, note 2, the event took place in 271.

majority of the Dacian-Roman population, remained ..."[17] and their descendents continue to occupy Transylvania.

Dacia thus achieved the distinction of being the last conquered and the first abandoned province of the Roman Empire.

C. The Millenium of Migrations

C.1 The Origins of the Romanian People

Aurelian's order to evacuate Dacia has stirred an important controversy in modern historiography. The Daco-Roman population is the ancestor of the Romanian people. The Romanian people emerged during a five century period that lasted until the end of the migratory invasions in the 9th century.

But where was the present-day Romanian people formed. Opinions are divided. Two views are dominant: the theory of the continuity of the Daco-Roman population in the Carpathian-Danubian-Pontic area; and the immigrationist theory claiming that the Romanians immigrated from the Balkans (to where the Daco-Roman population had been evacuated by Aurelian) in the 13th century. There are also a number of mixed theories.

In the Carpathian-Balkan region Romanian historians have accepted both the theory of continuity and the immigrationist theory (Alexandru Philippide and O.

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[17]Vlad Georgescu, *op. cit.*, note 9, at 21.

Densusianu, for example) and the mixed theories of transmigration (D. Oncuil). Conversely, other national historians in the region have their own distinct and exclusive immigrationist theory about the origins of the Romanian people. Some sources -- Eutropius Festus and Vopiscus (Historia Augusta) -- suggest that Dacia was abandoned by Aurelianus who moved "the Romans from the cities and villages" into Moesia,[18] while the continuity theory has been accepted by historians such as Th. Mommsen, Homo, Patch and Altheim.[19]

Today, the archeological, toponymical and linguistic evidence along with various historical analogies suggest that the Daco-Roman population continued to live north of the Danube, in the territory of the former Roman province of Dacia. The continuity thesis is supported by historical sources until the 4th and 5th century.[20] Moreover, 10th and 11th century Hungarian and Byzantine sources also mention the existence of a Romanian people north of the Danube. While archaeological and linguistic sources point to the continuity of the Romanian people north of the Danube, it is doubtful that the Romanian people originated only on the left bank of the Danube.

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[18]G. I. Bratianu, *op. cit.*, note 7, at 68.

[19]*Istoria Rominei, op. cit.*, note 2, vol I, at 776. For a bibliography concerning the two theories see: C. Daivociciu, "Problema continuitatii" in *AISCL*, III, 1936-1940, Cluj, Sibiu, 1941; C. Daicoviciu, "Le problème de la continuité en Dacie" (1940) VI *Revue de Transyklvanie* 3-72 (Bucharest). An contemporary study supporting the conintuity theory is that of A. Armbruster, *Romanité des Roumains. Histoire d'une idée*, (Bucharest, 1977).

[20]*Istoria Rominiei, op. cit.*, note 2, vol. I, at 782; G. I. Bratianu, *op. cit.*, note 7, at 72; C. Patsch, *Beitraege zur Voelkerkunde von Suedosteuropa*, (Vienna: Sitzungsber. d. Akad. d. Wiss., 1925), at 215; Vlad Georgescu, *op. cit.*, note 9, at 21.

Invasions of migratory populations in the Carpathian-Balkanic region led to a displacement of one part of the proto-Romanian population on both banks of the Danube. Another part took refuge in the mountains during or after the Hunnish invasion. After the invasion of the Slavs and their migration to the south of Danube, a sizeable Romanian population was able to preserve its identity and to even assimilate those Slavs who remained north of the Danube in Transylvania.

C.2 From the Daco-Romans to the Romanians (3rd - 9th century)

After Aurelian's evacuation there followed a millenium of migrations in the Carpathian-Balkanic region. The Goths dominated Dacia between 275 and 376. They were setlled mainly in Moldavia and Wallachia but after 300 they also penetrated into Transylvania. The arrival of the Huns forced the Goths to cross the Danube and settle in the Balkan peninsula to the South. After 376 no traces of the Goths were found in the former province of Dacia.

The Huns established their political centre in Pannonia but they also kept control over Dacia. Once the Huns arrived the last surviving traces of urban life were destroyed, the autochthonous population being pushed into safer places. Apparently, the Huns did not settle in the former Roman province of Dacia. The scarcity of the Hunnish artifacts in Romania suggests that, even at the apogee of their regime during the reign of Attila, the Huns were content to collect taxes from the Carpo-Dacians (the Carps were a leading Dacian tribe).

Following the dissolution of the Hunnish state (454) the Gepidae, a Germanic population that played an important role in the defeat of the sons of Attila and which settled in Pannonia, came to dominate Dacia. The Gepidae also left few traces on the territory of Romania. They were defeated and replaced by the Avars in 567. The Avars dominated Central and Eastern Europe for more than two centuries, constantly atacking the Byzantine Empire. Archaeological evidence suggests the presence of the Slavs in Moldavia and Wallachia since the beginning of the 6th century and in Transylvania since the middle of the 7th century. The Slavs settled the territory of Romania as allies, and under the protection of, the Avars. Throughout this epoch of Slavic settlement the former Roman province of Dacia became increasingly rural.

In 602, taking advantage of the destruction of the northern border of the Byzantine Empire by the Avars and the assassination of Emperor Mauriciu, the Slavs flooded the Empire. They settled massively in the Balkans, colonizing vast regions all the way down to the south of Greece. The Slav invasion cut the ties of the Roman population north of the Danube with the rest of the Empire. This invasion substantially changed the ethnic balance in the region: in the Balkans the Roman element diminished while in Carpathians it was strengthened. To the north of the Danube the Romanic population ended up assimilating the remaining Slav population, whereas to the south, the Slavs assimilated the Romanic population. The last Slav elements were Romanianized by the 12th century.

In 681, after the migration of the Bulgarian tribes to the south of the Danube, the first Bulgarian Czardom was founded. This Czardom included the southern part of

Wallachia. In 1018 the Byzantine Empire dissolved this Czardom. Toward the end of the 9th century the Hungarians and the Cumanians arrived in the region, bringing about another change in its ethnic composition, perhaps the last important such change. By the time of the Hungarian migration the Byzantine Empire again stretched, at least in part, to the Danube, and Byzantines were the first to mention a "Romanian" people.[21]

The linguistic evolution of the name Romania was as follows. First, the Balkanic Vlahs were mentioned. Emperor Constantin VII (the Prophirogenet) (913-959) called them "Romans" to distinguish them from the "Romei" (the Byzantines). Armenian sources mention a "Balak" country in the 8th-9th century, as do Varangians texts. The Anonymous Notary of the Magyar King Bela (12th century) writing about the settling of the Hungarians in the Tisa (Tisza) Valley and the Danube Valley states that the Hungarians found there: " Slavi, Bulgari, et Blachi ac pastores Romanorum".[22] The Russian chronicle allegedly of Nestor observes that the Hungarian new-comers "started fighting with the Slavs and the Valahs living in those places".[23]

The name of *Valah* originated from the Germanic *Walh* or *Welche*, a name given to those who spoke Latin. The Slav *Voloch* (the Eastern Slavs) and *Vloch* (the Southern Slavs) both derived from the original form *Volchu* originated in the Germanic form. From the southern Slav *Vloch* the Greek *Vlachos* - âëá÷oò was derived. In Romanian the

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[21]"We can consider that beginning with 9th century one can speak of a definitively formed Romanian people". Vlad Georgescu, *op. cit.*, note 9, at 23.

[22]G. I. Bratianu, *op. cit.*, note 7, at 81.

[23]Vlad Georgescu, *op. cit.*, note 9, at 25.

word was *Valah*, in Hungarian - *Olah*, in Latin - *Valachus*, apparently derived from the eastern Slav *Voloch*.[24] If in the Germanic languages *Walh* designated originally the Romans and the Romanized Gauls and later all the Latinophones, the Slav *Voloch* designated the Romanian population. The same is true of the terms derived from Slav: *Vlachia* or *Wallachia* were names given to the territories inhabited by Romanians.

2.3 The Hungarian Period

A. From the Arrival of the Hungarians to the End of the 13th Century

The Hungarians arrived in Pannonia toward the end of the 9th century after having been chased away from the Dnieper river steppe by the Petchenegs. Apparently, on their way to Pannonia, they circled Transylvania, arriving there from the west. This would explain the very name they gave to the region: Transylvania (*Trans-silva* -- the land beyond the forests, in Hungarian: Erdö-elu, Erdeleu, ... Erdely). A similar pattern can be seen in their naming of Wallachia (*Terra Transalpina* - the land beyond the mountains, in Hungarian: Hava-selu, ..., Havasalföld). In Transylvania, the Hungarians encountered three principalities: that of Menumorut in Crisana, that of Glad in Banat and that of Gelu in the center of Transylvania"[25]

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[24]I. C. Dragan, *Istoria romanilor*, (Bucharest: Editura Europa Nova, 1994), at 52 and 74.

[25]Vlad Georgescu, *op. cit.*, note 9, at 25-27. This work also contains details about the archaeology of these three principalities of Transylvania.

The Hungarian invasion had a major impact on the principality of Menumorut (this was immediately annexed) but little effect on the other two Transylvanian principalities. The Hungarians had neither the human potential nor the necessary capacity to organize such a vast territory, from Moravia and Croatia to Transylvania. The Romanians, the Slavs and the Hungarian elements that remained after the first invasion continued to live in these principalities together with the Petchenegs, who arrived in Transylvania and in the other Romanian principalities toward the end of the 10th century.

The Hungarian domination was restored in 1003-1004 when the King Stephan the Saint occupied Transylvania after defeating Gyla (apparently a Petcheneg voivode who refused to convert to Christianity) in the heart of Transylvania[26].

The organization of Transylvania as part of the Hungarian kingdom occurred after 1085 C.E.. During the 12th century the Hungarian kings colonized the Saxons and the Szeklers in southern Transylvania in order to fortify the southern border of the Kingdom.[27] During the first half of the 13th century they settled the Teutonic Knights in Tara Barsei and the Knights of the order of St. John of Jerusalem (the Hospitallers)

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[26]Vlad Georgescu, *op. cit.*, note 9, at 27.

[27]The Szeklers were a Turkish tribe (ethnically speaking they are a mixture of Turkish, Oriental and Hungarian elements) attached to the Hungarian population. The word Szekler (*szekely*) comes from the Turkish word: *szkil -sikil* which means "noble one". The word Szekler designates neither a job (that of a guardian of a border, as it was suggested) nor a *sedes-szekek*. The Hungarians and the Szeklers cohabited long before the arrival of the Hungarians in Central Europe. The Szekler always fought in the vanguard of the Hungarian army, as the custom was for nomadic populations to prove their attachment to settled peoples by fighting first. This explains why the Szekler were colonized at the borders in order to protect them. The Hungarians and the Szeklers conquered together Pannonia. See *Istoria Rominiei, op. cit.*, note 2.

in Banat. During this period, Wallachia and Moldavia emerged after the unification of the smaller Romanian statal organizations existing at the east and south of the Carpathians. The process of unification was probably accelerated because the Romanians who took refuge in Wallachia and Moldavia refused to convert to Catholicism.

Soon after, Wallachia and Moldavia fell under the Hungarian suzerainty. In 1330, after the defeat of the Romanians and Bulgarians by the Serbs at Velbujd, the Hungarian King Carol-Robert d'Anjou (the father of Ludovic d'Anjou) attacked Basarab, under the pretext that he occupied some territories belonging to the Hungarian Crown. The expedition of Carol-Robert d'Anjou failed and Wallachia thus became the first independent Romanian principality.

Following the military victories of the Hungarian king Ludovic d'Anjou and of Dragos' army of Maramures against the Tartars in 1345 and 1353, Ludovic d'Anjou helped Dragos to become prince of Moldavia. The Romanian dynasty of the Dragos did not last very long. In 1359, the Moldavian nobility, dissatisfied by the presence of the Hungarians and of the Catholic missionaries, mutinied against the dukes appointed by the Hungarian king. Thus, Moldavia also escaped Hungarian domination.

The successors of Dragos became the voivodes of Maramures, converted to Catholicism and Magyarized their name as Dragffy. The last attempt of the Hungarians to subdue Moldavia was defeated in 1395 at Ghindaoani and the chronicles mentioned that "christiani sanguinis effusione largiflua".[28] The last attempt to subdue Wallachia

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[28]I. C. Dragan, *op. cit.*, note 24, at 87.

was in 1365 when Ludovic the Great was unable to defeat Prince Vlaicu of Wallachia. Throughout this period the Hungarians succeeded in conquering only Transylvania.

This domination of the Hungarian Kingdom in Transylvania meant the beginning of a long history of Romanian refugees from Transylvania. At the end of the 13th century, under the reign of the last Arpadian Kings the trend was to establish national communities (universitates).[29] The Saxons and the Szeklers managed to establish such organizations. The Romanians were also to establish a similar organization, but this development was not pursued further. After 1291 to escape discrimination and the strong pressures of the Catholic Church, many Orthodox Romanians from Transylvania took refuge in Moldavia and Wallachia.

In the second half of the 13th century the feudal regime of Transylvania generated the first social protests. These were the first in a long series of revolts, uprisings and mutinies that haunted Transylvania during its history. Peasant revolts apparently began in 1277.

At about the same time the Saxons mutinied against the Bishop of Transylvania who threatened their privileges in Alba Iulia. The Wallachian voivodes Litovoi and Barbat took advantage of the unrest in Transylvania to reinforce their former authority in the territories from the south of Transylvania occupied by the Hungarians.[30]

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[29]G. I. Bratianu, *op. cit.*, note 7, at 145.

[30]*Istoria Rominiei*, *op. cit.*, note 2, vol. II, at 134.

B. From the 13th Century to the End of the Hungarian Domination

B.1. Was Transylvania Ever Autonomous During The Hungarian Imperial Period?

Was Transylvania ever an autonomous principality during the Hungarian domination – that is, prior to Hungary's defeat by the Ottomans in 1526? Hungarian historians claim that Transylvania was part of the crown of Hungary and had no autonomy whatsoever; Romanian historians, on the contrary, claim that Transylvania was autonomous. No doubt, Transylvania had at least some form of statal organization.

Europe at that time was organized through feudal territorial divisions. But these small statal formations were incorporated in the emerging Empires: for example, the Roman-German Empire, which incorporated almost all Western Europe, and the Ottoman Empire, which swallowed the smaller states adjacent to it.

During this period Transylvania had a Prince as the head of the state and, after 1288, a "General Assembly" of the nobility – despite repeated attempts by the Hungarian Kings to dissolve it. Transylvania also developed its own political culture over this period. Between 1262 and 1275 King Bela IV was gradually obliged to cede Transylvania to his son Stephan. The same autonomy can be noticed during the reign of Ladislau IV (the

Cumanian), (1294-1315).[31] Indeed, there was little difference between the status of Transylvania and that of Wallachia and Moldavia.

The voivodes had the highest administrative, judicial and military prerogatives in Transylvania. Among the measures undertaken by the Hungarian Kings in order to limit the authority of the voivodes was tp limit the territory directly under their control to seven counties (Solnocul Interior, Dobîca, Cluj, Turda, Târnava, Alba and Hunedoara). There were, nonetheless, several enclaves outside the voivodal jurisdiction, especially the towns around various mining exploitations (Ocna Dejului, Dej, Turda, Baia de Aries, Cluj) and the estates of the Bishop and "Capitlu" of Alba Iulia as well as the estate of the Cluj-Manastur Monastery. By a royal decision of 1344, confirmed in 1395, the judicial immunity of the Bishop of Transylvania was limited in favour of the voivode.

The western counties of Satu Mare, Crasna, Solnocul de Mijloc and that Exterior, Bihor, Zarand, Arad, as well as the county of Maramures and the counties of Banat, were not part of the principality of Transylvania and they had an distinct organization. From the middle of the 15th century the voivodal congregations were replaced by the "general congregations of the nobility" or "of the inhabitants of the country" (in fact the privileged communities). In 1437 the congregation organized in order to repress the uprising from Bobâlna was constituted only of the privileged communities: the Hungarian nobility, and the wealthy Saxons and Szeklers.

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[31]For the reign of Ladislau Kan and the status of Transylvania during his reign see: *Istoria Rominiei, op. cit.*, note 2, vol. II, at 134-135.

During this period Transylvania was ravaged by uprisings and revolts that culminated with the Uprising of Bobâlna in 1437-1438. The first stage of the uprising ended with a covenant concluded between the nobles and peasants and later Hungarian nobility, the rich Szekler class and the Saxon patriciate. This union, which became the basis of the future Unio Trium Nationum, took measures in order to "protervie et rebellionis nefandissimorum rusticorum contricione et iradicacione".

The breach of the covenant with the peasantry led to a second set of uprisings that ended with a second agreement even less favourable for the peasants. This second agreement was also breached and although a revolt began anew, by the end of 1438 it had been repressed violently by the army.

Over these two centuries the political pluralism existing initially in Transylvania was gradually limited. The autonomy of the Szekler communities was restricted during the 15th century. Even the privileges granted originally to these communities and confirmed in 1499 by King Vladislaw II became a dead letter. However, the Szekler communities continued to benefit from a significant degree of territorial and jurisdictional autonomy.

The "Universitas Saxonum" obtained territorial autonomy toward the end of the 15th century. The head of the "Universitas" was a Sachsengraf. The justice system was initially decentralized, but in the 14th century this autonomy faded away. In a decree of 1366, King Ludovic I began to centralise the system. Thus, from the second half of the

14th century onward the Romanian communities complained that the courts did not take the "jus valachicum" or the "lex Olachorum" into account.

B.2 The anti-Ottoman Struggles of Transylvania, Wallachia and Moldavia

At the beginning of the 15th century the Ottoman Empire reached the borders of Wallachia and Transylvania. From 1420 onwards the Turks attacked the south of Transylvania. In 1441 Iancu de Hunedoara, who led the resistance to the Turks became voivode of Transylvania. After this the Turks were more inclined to make peace with the principalities north of the Danube. Nonetheless, after the fall of Constantinople in 1453, the Ottoman's besieged Belgrade, the last barrier to the Danube. In 1456 Iancu de Hunedoara broke the Turkish seige of Belgrade, although he died of the plague that same year. The victories of Iancu de Hunedoara along with those of Vlad the Impaler of Wallachia and Stephan the Great of Moldavia delayed the Ottoman expansion in Central Europe for more than half of a century.

Following Iancu's death feudal anarchy again broke out. In addition, the Roman-German Empire and Poland sought to interfere in the internal affairs of Hungary. Iancu had not been very popular among the higher nobility for promoting the interests of the lower nobility on whose political support he relied, and when his first son Ladislau de Hunedoara continued these policies, the higher nobility had him executed after a show trial in 1457. Iancu's second son, Matei Corvinul (Mathias Rex), was then made King of Hungary.

Soon the higher nobility of Transylvania became unhappy with the duties imposed on them, and decided to separate from Hungary. With the help of the King of Czechia and of the King of Poland, they appointed Ianos of Szentgyörgy as King of Transylvania. Nonetheless, prior to the death of Matei Corvinul at Vienna in 1490 more and more Romanian villages and territories came under the sway of the Hungarian nobility and the Saxon patriciate.

In 1521 the Turks finally occupied Belgrade and by 1526 they had defeated Hungary at the battle of Mohács. The defeat had many causes. In part, it was due to feudal anarchy prevailing in Hungary and to the nobility's fear of arming the peasantry -- a reasonable fear following the uprising of the Szekler in 1519. Moreover, when the Turks attacked Hungary, Ianos Zapolya, the voivode of Transylvania, delayed the arrival of his army, most likely deliberately as he was hoping to take advantage of the situation created by the Turkish attack and thus to take over the royal throne.

The defeat also had external causes. Poland made peace with the Ottoman Empire and Moldavia and Wallachia did not effectively support Hungary and Transylvania. The King of France, Francis I, previously defeated by Carol the Quint, took his revenge against the Habsburgs by founding the Cognac League in 1526 with Venice, Milan and Pope Clement the VII. This League actually supported the Turks. Even the Austrian Emperors sought to weaken Hungary in order to more easily take it over later.

For fifteen years, the Hungarians sought to recapture Buda but, in 1541, the Turks under Suleyman finally defeated them and also drove the Habsburgs from much of Hungary. Hungary was partitioned in three: the north and north-west of Hungary plus Slovenia, Slovakia and Croatia were part of the Habsburg Empire; Transylvania and Partium (a part of eastern Hungary) were organized as an autonomous principality; and the central part was transformed in a Pashalik for more than 150 years.

2.4 Autonomous Transylvania (1541-1688)

A. Early Years

A.1 Imperial Rivalries

For sixty years after the partition agreed to under the Treaty of Gilau in 1541, shifting alliances made for great political instability in Transylvania.[32] Although the Habsburgs were granted some Transylvanian territories by the treaty, they did not give up their plans to annex the rest of Transylvania to their Empire. In 1541 the Transylvanian Diet in Debrecen explicitly recognized Ottoman suzerainty and much of the second half of the 16th century saw an intense rivalry between the Habsburg and Ottoman Empires. Transylvania also developed closer relations with Moldavia and Wallachia. This latter rapprochement worried the Sultan as a possible military alliance would have jeopardized the Turkish interests in the Carpathian region.

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[32]*Istoria Rominiei, op. cit.*, note 2, vol. Ii, at 932.

In 1575 Stephan Báthory, the prince of Transylvania of that time, was also elected King of Poland. Stephan was a faithful supporter of the Catholic Church but also tolerated the Orthodox Church to gain the sympathy of the Romanian population and the loyalty of soldiers in his army. The Habsburgs also coveted the Polish throne and relations between them and Transylvania grew colder. Nonetheless, three years after Stephan's death in 1586, Sigismund Báthory, his nephew, proclaimed himself Prince of Transylvania. In 1595, he entered into an anti-Ottoman alliance with the Habsburgs.

A.2 The First Unification of Transylvania, Moldavia and Wallachia under Michael the Brave of Wallachia (1600-1601)

After 1592 Transylvania, Wallachia and Moldavia began to negotiate an anti-Ottoman alliance. The Treaty of Alba-Iulia in 1595 established a "confederation"[33] of the three principalities and an anti-Ottoman war soon started. The Habsburg Empire began to subsidize the war in 1597. The following year Michael the Brave of Wallachia forced the Turks to withdraw from north of the Danube. The removal of the Ottomans created a new problem at the international level. Both Poland and the Habsburgs wanted to replace the Ottomans as overlord of the principalities. In 1596 Moldavia quit the confederation of Romanian principalities and, led by Ieremia Movilă, concluded a treaty of vassalage with Poland. Moreover, the dissident nobility of Wallachia also sought Polish protection. The aim was to replace Michael the Brave with a Moldavian Prince, who they considered to be "of the same nation and language". The idea was that all the Carpathians including Transylvania, should become part of the Polish system.

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[33] *Ibid.*, at 957.

During the fall of 1599 Michael the Brave occupied Transylvania with the support of the Szeklers, the enemies of the Báthory family. Although relations between Michael the Brave and Poland worsened constantly, in 1600 the King of Poland accepted Micheal the Brave's his plan to unify the three Romanian principalities and to swear allegiance to the King of Poland. However, the negotiations failed, so Michael the Brave set about to conquer Moldavia. By the spring of 1600 he had unified Wallachia, Transylvania and Moldavia.

After occupying Transylvania Michael the Brave sought to confirm his title with the Habsburgs and to regain the Partium from them. The Habsburgs were interested in the controlling the three principalities but resisted their unification under a single Prince. They also opposed to ceding the Partium. A compromise was found: Michael the Brave was to rule in Transylvania as a Governor. But Michael was soon betrayed and assassinated in 1601 by a general of the Habsburg army. With the help of the Wallachian army a Turkish-Transylvanian offensive was repulsed by Michael's heirs, thus keeping Transylvania in the anti-Ottoman coalition. The unification of the three principalities lasted just over a year.

B. The Aftershocks of the Carpathian Confederation (1601-1688)

In 1606 after a series of confrontations the Sublime Porte of the Ottomans signed the Peace of Szitvatorok with the Habsburgs. The Treaty confirmed Wallachia as an independent state. In 1608 a series of treaties of alliance among Wallachia, Transylvania and Moldavia again established a confederation of the three principalities, although

Gabriel Báthory of Transylvania saw this as a chance to recreate the unified state of Michael the Brave and to become King of this state. In 1610 he attacked Wallachia and deposed Prince Radu Serban.

The Sublime Porte did not recognize Báthory as Prince of Wallachia and appointed Radu Mihnea in his stead. Meanwhile, with the help of the Moldavian army and the backing of the Wallachian population, Radu Serban defeated Báthory at Brasov (Kronstadt). His victory was short lived because the Ottoman army soon crossed the Danube and invaded Wallachia. At this time, despite the protests of Poland and the Habsburgs, both Moldavia and Transylvania fell under the Turkish domination. During the 17th century, the relations between Transylvania and the Ottoman Empire were practically the same as they had been during the mid-16th century, when it formed the autonomous Principality of Transylvania.

Between 1613 and 1629 the Prince of Transylvania was Gábor Bethlen. His reign was characterized by a period of relative stability. He sought to bring Transylvania into a coalition of the Protestant European States, although for political reasons he also supported the Romanian Orthodox Church. Bethlen tried to convert the Orthodox Romanians to Calvinism citing the "cultural backwardness and the poverty of the Romanian population, priests and monks in Transylvania".[34] He unsuccessfully lobbied the Patriarch Kiril Lucarius of Constantinopole (the Ecumenical Patriarch of the Orthodoxy) to this end.

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[34] *Ibid.*, vol. III, at 150.

The Habsburg Empire and Poland often sought to invade Transylvania during this period, but were always repulsed, usually because of the support of the Sublime Porte. In addition, Bethlen led three expeditions against the Habsburg Empire in the hope of becoming King of Hungary or Bohemia. Though in 1620 he was elected "King of Hungary" and, with the help of the Czechs, even besieged Vienna, his plans fell though.

In 1644 Transylvania entered the Thirty Years War on the side of the anti-Habsburg coalition, following the alliance of Alba-Iulia among Transylvania, France and Sweden, and after obtaining the consent of the Sublime Porte. Transylvania rapidly occupied most of Upper Hungary but the Transylvanian and Swedish armies were not able to join forces because of the intervention of the King Christian IV of Denmark who entered the War on the side of the Habsburg Empire. At the negotiation of the Peace of Westphalia, Transylvania took part as a sovereign state, recognized as such by the rest of the European states.

After Westphalia plans were made for a new anti-Ottoman alliance between Modavia, Wallachia and Transylvania. Leadership of the anti-Ottoman alliance was assumed by Poland but no military action took place because both King Vladislav IV of Poland and Prince Rákóczi I of Transylvania died in 1648. During the reign of Prince György Rákóczi II between 1657 and 1661, Transylvania together with Wallachia (Prince Constantin Serban) and Moldavia (Prince Gheorghe Stefan) organized a new anti-Ottoman coalition. This also failed.

Throughout the period of autonomy the boundaries of Transylvania were those settled in the Peace of Speyer of 1570. After 1622, however, seven counties from Partium and Upper Hungary were ceded to the Habsburgs. They reverted to Transylvania in 1645 as a consequence of the Peace of Linz. Following Westphalia, the Transylvanian Diets adopted a number of important collections of laws: *Approbatae Constitutiones* (1653) and *Compilatae Constitutiones* (1669). At this moment four official religions were recognized in Transylvania: Calvinism, Lutheranism, Catholicism and Unitarianism.

2.5 The Austrian Regime in Transylvania (1688-1918)

A. The Austrian Occupation

After 1688 Transylvania maintained its anti-Ottoman policies, and towards the end of the 17th century entered a new coalition with Austria, Poland, Venice, the Papal State and (later) Russia. This coalition changed the balance of power in Central Europe. Both Poland and the Habsburgs continued to have designs on the three Carpathian principalities of Moldavia, Transylvania and Wallachia. In the 1680s the Habsburgs invaded the northern part of Transylvania and Partium. After a number of failed treaties and military actions, at the end of 1691 the Emperor signed the famous "Leopoldian Diploma".

This became the Constitution of Transylvania for more than a century and a half. The Diploma established the frame of relations between Transylvania and the Habsburg

Empire. It recognized four official religions (Catholicism, Calvinism, Lutheranism and Unitarianism), preserved the most important laws of Transylvania and continued the laws of the Saxons and of the Szeklers, who together with the Hungarians, were considered as "autochthonous".[35]

A.1 The Union of the Romanians with the Church of Rome

Once Transylvania was occupied by the Habsburg Empire conflict broke out between the Catholic Church, which sought to convert the inhabitants, and the majority of the population of Transylvania, the Orthodox Romanians. The Habsburgs encouraged Catholicism by dividing Transylvania into the three historical "*natio*" that had been previously united in 1437. "The nobles, the Szeklers, and the Saxons" became "the Hungarians, the Szeklers and the Saxons" according to the new law, with no place left for Romanians other than as a "tolerated" nation. The union, intended to be similar to the one of the Ruthenes in Poland, was thought to be a success. The Romanians were promised the same privileges as the Catholics once they joined the union, and abandoned the status of "tolerated" nation. The arrangement was that the Romanians would preserve the Orthodox rite, the Orthodox canons and the Orthodox calendar. In 1697, the orthodox priests agreed, on condition that the Romanians were recognized as equals to other Transylvanians, eligible to occupy administrative functions and to attend Catholic schools.

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[35] *Ibid.*, vol. III, at 231.

The reaction to this union was not uniformly positive. First, the Governor of Transylvania (a Calvinist) demanded that the Romanians be permitted to join any of the four official religions. This condition was granted in 1699. The "privileged nations" of Transylvania contested this decision to grant the "Romanian nation" more freedom than it already had because this would be "insulting, saddening and prejudicial" for the three political nations. The Metropolitan Bishop of Wallachia, the Orthodox Partiarch of Jerusalem and the Patriarch of Constantinopole excommunicated Metropolitan Bishop Atanasie Anghel. The Metropolitan Bishop who did so was taken to Vienna where he was ordained according to the Catholic rite by the Cardinal himself, Bishop of the "Romanian nation". For the ordination, a new Diploma of Union was granted by the Imperial Court in Vienna. Nevertheless, the text of this second Diploma was never applied. After some uprisings, the Habsburgs signed the Peace of Satu Mare in 1711 to consolidate the Austrian regime in Transylvania.

After 1711, although Transylvania was preserved as a distinct state with its own institutions within the Habsburg Empire, its autonomy became more and more symbolic. The army of Transylvania was taken over by the Imperial army and from 1712 no local commander was confirmed. The prerogatives of the Government and of the Diet were gradually limited and the political forums of Transylvania became annexes of the Imperial policy in Transylvania. Discrimination against the Romanians in Transylvania kept worsening. In 1766 the population of Transylvania was: Romanians 66.5%, Hungarians and Szeklers 21.6%, Saxons 11.7%.[35]

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[35] *Ibid.*, vol. III, at 420.

The social and political system of the Austrian regime in Transylvania caused numerous revolts and mutinies. In 1759 the Empress Maria Theresa was forced by the events to sign a "Decree of Tolerance" in which the legal existence of the Orthodox religion in Transylvania was recognized. This Decree remained, however, without practical consequences. The emigration of the Romanians from Transylvania into Wallachia and Moldavia was a phenomenon that reached worrying levels for the Habsburg Empire.

In 1746 the border authorities were instructed to stop the emigration and Empress Maria Theresa established a commission of investigations of the causes of this emigration. In Wallachia in 1832 there were recorded 225 villages settled by the Transylvanian Romanians in the previous century and the colonizations of the Habsburg Empire did not change significantly the ethnic composition of Transylvania. An Austrian census of population of 1784-1787 showed that out of the 2,489,147 inhabitants of Transylvania (including the Banat, Crisana and Maramures regions) 63.5% were Romanians, 24.1% were Hungarians and Szeklers, 12.4% were Saxons and Swabian.[37]

Through the Peace of Passarowitz, the Habsburg Empire kept Transylvania as a distinct state within the Empire. After the death of Prince Mihály Apafi II Transylvania was no longer allowed to elect a new Prince, even though the Peace of Satu Mare recognized the old borders of the principality of Transylvania, including the Partium.

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[37]Vlad Georgescu, *op. cit.*, note 9, at 100.

A.2 The National Struggle of the Romanians in Transylvania

The political and social conditions in which the Romanians found themselves were difficult. Although the Habsburg Empire promised full civil status to Romanians in Transylvania who joined the Church of Rome, this promise was not kept. In 1728, Ioan Inocentiu Micu-Clain was ordained the Bishop of the Greek-Catholic Romanians. With him a new chapter in the fight of the Romanians in Transylvania for national emancipation began. In 1732 Bishop Micu-Clain obtained a seat in the Transylvanian Diet as a royalist, from where he lobbied over the next 16 years for the rights accorded by the second Leopoldian Diploma. The Transylvanian Diet did not, however, recognize the validity of this Diploma.

The Bishop demanded the improvement of the system of justice, the recognition of the civil rights of Romanians and in the case of the Romanian regiments to be allowed to have Romanian officers. He also advocated for the abolition of the serfdom on the Imperial estates. The Bishop claimed the right of the Romanians to be admitted freely into the guilds and trades and not to be excluded from the possession of forests, rivers and lakes, mountain areas and other things that were in their possession and those estates who were confiscated from the Romanians to be retroceded.

By 1746, he was demanding the admission of the Romanians, whether nobles or not, in *proportione geometrica* to public functions and that the Romanians should be granted the *jure concivilitas*. These claims were unsettling to the authorities. Eventually, under pressure from both the Emperor and the Pope, he was forced to abdicate in 1751.

B. "Enlightened absolutism" in Transylvania

A different politics of "enlightened absolutism" developed in Transylvania during the reign of Empress Maria Theresa after 1760. Although the Diet of Transylvania was summoned for the last time in 1762, Transylvania retained some autonomy as a "Grand Principality".[38] Reforms to the legal system included the enactment of a Civil Code, *Codex Theresianus*, and a Penal Code, *Constitutio criminalis Theresiana*. The system of education was also reformed in 1777.

The instigator of these reforms was Joseph II, whose policies between 1780 and 1790 were guided by the German versions of the French enlightenment (*Aufklärung*). In 1781 he abolished religious censorship in the press, despite the protests of the Catholic Bishops. In the same year he eliminated the dependency of the monastic orders on the Papacy and reformed the church system.

In 1781, the Edict of Tolerance maintained the pre-eminence of the Catholic Church, but established freedom of religion and gave non-Catholics access to positions in the public administration. The situation of the Jewish population in Transylvania was also improved. Further, centralizing, reforms were undertaken in the system of justice, and on Imperial lands the Romanians were recognized socially equal with the Saxons.

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[38] *Istoria Rominiei, op. cit.*, note 2, vol. III, at 730.

B.1 The Failure of the Reforms of Joseph II

The nobility in Transylvania expressed increased opposition to these reforms and many were either watered-down or rendered inapplicable. Joseph II's reforms were also delayed in Transylvania, as much as possible, by the bureaucratic apparatus of the principality. The abuses of the feudal masters became a real calamity in Transylvania. In 1784, a peasants' uprising broke out and violence spread rapidly in all the Principality. The main demand of the peasants was the abolition of serfdom. While the Emperor ordered the uprising to be suppressed, he also criticized the nobility and reimposed Imperial justice. The Emperor reconsidered the severity of repression and promised a general amnesty for all but the leaders.[39]

In 1785, Joseph II proclaimed "the abolition of serfdom" although he really only abolished the life-indenture of serfs on the estate of their feudal masters. The nobility of Transylvania greeted this proclamation with delays, demands for compensation and legal procedures which rendered it practically inapplicable. Toward the end of his reign, Joseph II revoked most of his reforms and re-established a feudal absolutist regime that was to last until 1848.

In spite of the constant emigration of the Romanians from Transylvania to Wallachia and Molodavia over this period the proportions of the population in the Principality were preserved. According to the 1787 census, the population of

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[39]Octavian Beu, *L'empereur Joseph II et la révolte de Horia*, at 53, as cited in *Istoria Rominiei, op. cit.*, note 2, vol. III, at 769.

Transylvania alone (excluding Banat and Partium) was about 1,575,130 -- of whom approximately 1,000,000 were Romanians.[40]

B.2 *Supplex Libellus Valachorum*

After the death of Joseph II, political conflicts were accentuated. Hungarian nationalism, based on the aversion of the Hungarian nobility to the Austrian regime, was growing. In the Diet of 1790-1791 a union of Transylvania with Hungary was discussed. Hungarian was proclaimed the official language in Transylvania, which deepened the conflict between the Hungarians and the Germans. The status of the Romanians was again degraded to that of "tolerated".

At this time, Romanian intellectuals and lower nobility, the Greek-Catholic and Orthodox clergy, Romanian officers of Romanian border regiments and other representatives of the Romanian people sought to elaborate a programme of national emancipation. They forwarded two petitions to the Imperial Court in Vienna in 1791. One was addressed in the name of the Greek-Catholic clergy and the second in the name of the Romanian nation. This latter petition, forwarded by the two Romanian Bishops, Orthodox, Gherasim Adamovici, and Greek-Catholic, Ioan Bob, was addressed to the new Emperor Leopold II. It is now seems as the fundamental act of the Romanian national movement, and is known as the "*Supplex Libellus Valachorum*".

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[40] *Istoria Rominiei, op. cit.*, note 2, vol. III, at 807.

Although a second *Supplex Libellus Valachorum* was presented in 1792 by the two Bishops, both were ignored. Leopold II refused to grant any concessions to the Romanians, and his successor, Francisc I (1791-1835), repealed various earlier reforms. The Hungarian nobility of Transylvania initiated a strong campaign to Hungarianization the other nationalities of Transylvania in the hope of unifying Hungary and Transylvania.

Miklós Wesselény, the leader of the nationalist nobility of Transylvania, declared: "I don't consider only just but also very necessary that in our country ordinary people enjoy national rights and representation but only on condition that they become indeed Hungarian, ... and for those who do not speak now Hungarian and are not Hungarian, as they start Hungarianizing themselves they will be granted national rights".[41]

In 1842 the Transylvanian Diet adopted a bill to declare Hungarian as the only official language. The representatives of the Romanians protested vehemently and it was never proclaimed by the Emperor. Nonetheless, those few Romanians who still occupied public functions were removed from office. By contrast with the nobility, Hungarian intellectuals in Transylvania who adhered to the ideas that led to the Revolution of 1848, supported the national aspirations of the Romanians. They protested the Hungarianization of other Transylvanian nationalities and argued for a fraternal alliance among all nations united by common interest and by a common future.

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[41]Miklós Wesselényi, *Balitéletekről*, at 233, as cited in *Istoria Rominiei*, *op. cit.*, note 2, vol. III, at 1026-1027.

C. From the Revolution of 1848 to the End of the Dual Monarchy

In the years preceding the Revolution of 1848 various nationalist movements grew in strength within Transylvania. Hungarian nationalists aimed to create a nation-state incorporating Hungary and Transylvania in which other nationalities -- the Romanians, the Saxons and the Slavs from Hungary and Transylvania -- would be assimilated; Saxon nationalists planned the incorporation of Transylvania in a huge Austrian nation-state; and Romanian nationalists sought the unification of the three principalities -- Transylvania, Moldavia and Wallachia -- in a Romanian nation-state.

C.1 From 1848 to the Dual Monarchy of 1867

In 1848, the Hungarian Diet of Pozsony proclaimed the equality of all citizens and the emancipation of the serfs in a Transylvania annexed to Hungary. In response Romanians sought the equality of the Romanian nation with the rest of the nations of Transylvania, the recognition of the Romanian Orthodox Church, the use of the Romanian language in the administration and in legislation, *etc.* Following the proclamation of union by the Diet of Transylvania, the government in Budapest ordered the arrest of the Romanian National Committee.[42] These arrests did not take place because of the Hungarian-Austrian conflict. At this time 12 Romanian legions were formed and a separate Romanian administration in southern counties of Transylvania was established.

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[42]Vlad Georgescu, *op. cit.*, note 9, at 167.

The following year, however, the Hungarians expelled the Austrians from Transylvania and most members of the Romanian National Committee took refuge in Wallachia. In Apuseni Mountains Romanian armed resistance continued under the leadership of Avram Iancu. Faced with Russian intervention in the Carpathian principalities, the Wallachian revolutionaries sought to negotiate a Hungarian-Romanian alliance. While Iancu proclaimed neutrality as between Hungary and Austria, in the last days of the Revolution, as a confederation of the Danubian states ("The United States of the Danube")[43] was being planned, the Hungarian Parliament adopted a law according national rights to Romanians and Slavs. With the success of the Russian and Austrian armies, however, the Revolution in Transylvania ended.

The restoration of the Habsburg regime in Transylvania resulted again in a discriminatory regime against the Romanians. Reforms were cancelled, serfdom was re-established and Avram Iancu was arrested. An active policy of Germanization suppressed Romanian nationalism. In 1859, in very difficult international conditions, Wallachia and Moldavia united. The new state was baptized "The United Romanian Principalities" and this gave a new impetus to the unionist movement of the Romanians

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[43]See Vlad Georgescu, *ibid.*, at 174. The Romanian revolutionaries conceived several plans for establishing a federation in the region. Dinicu Golescu thought of a Federation of the Eastern European *States*. Ion Ghica though of a more limited Federation: the *Serbian-Croatian-Hungarian-Romanian Federation* (in 1850). Eliade, another Romanian revolutionary, thought of a more ambitious plan for that epoch: a *Universal Republic of Europe*, or, if that would not be possible, at least, a *Federation of the Latin countries of Europe*.

in Transylvania. In 1860 Vienna decided to re-establish the autonomy of Transylvania, inaugurating a period of liberalism which lasted until 1867.[44]

A month later the Government of Transylvania summoned a conference of the nationalities in Alba-Iulia (24 Hungarian deputies, 8 Romanian deputies and 8 Saxon deputies). The Hungarian deputies opposed the autonomy of Transylvania and the Romanian and the Saxon deputies supported it. Eventually, the Imperial Court decided in favour of autonomy and summoned a new Diet of Transylvania. This Diet comprised 48 Romanian representatives, 44 Hungarian representatives and 32 Saxon representatives to which were added 11 Romanians, 12 Hungarians and 10 Saxons appointed directly by the Emperor. Political representation was then closer to ethnic reality. In 1860 the Diet adopted a law declaring the equality of the Romanian nation to the other nations of Transylvania and the Romanian Orthodox Church and the Greek-Catholic Church achieved equal status to the four official religions.

During this period, Austrian policy wavered. By 1865, Vienna sought out a compromise with the Hungarians which led to the creation of the dualist monarchy. The legislation passed by the Diet of Sibiu (Hermanstadt) was annulled and a new Diet was summoned in Cluj. The Austrians directly appointed 191 royalist representatives (137 Hungarians, 34 Romanians and 20 Saxons) and the rest of 103 representatives were elected under a quite restrictive franchise. The majority of the Romanian representatives refused to take part, and this permitted the Hungarian representatives to vote for the

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[44]The reasons for this decision and for the adoption of a more liberal policy are not clear although some suggest that it actually served the interests of the Imperial authorities. See Vlad Georgescu, *ibid.*, at 169.

integration of Transylvanian representatives into the Hungarian Parliament. In 1867, this Parliament voted to re-establish the Constitution of 1848, to annul the autonomy of Transylvania, and to proclaim the reunion of Transylvania with Hungary.

C.2 The Dual Monarchy till 1918

After this annexation, an active policy of Hungarianization of nationalities continued until 1918. The Law of the Nationalities of 1868 recognized only one nation: the Hungarian nation. A new Electoral Law strongly advantaged the Hungarian population. Electoral rights of non-Hungarians were constantly limited. A series of laws of education starting with the Law of 1868 and culminating with the Law of Appóny of 1907, imposed Hungarian as the official language in Hungary and Transylvania. In 1896 the Law of Bánffy provided for the Hungarianization of the names of the villages and towns.

Romanians always resisted the policy of Hungarianization, beginning in 1868 when, to coincide with the 20th anniversary of the 1848 revolution, Romanian leaders in Transylvania published the Pronouncement of Blaj. This Pronouncement set out the Romanian nationalist programme, and demanded the repeal of the union of Transylvania with Hungary, the re-establishing of the status of autonomy of the principality of Transylvania and the recognition of the rights of minority nationalities.

The newly founded Romanian National Party refused to participate in Parliamentary elections and pursued a policy of passive resistance until 1905. The most

important event of the Romanian national movement of this period of time was the Memorandum of 1892. This was conceived in an attempt to gain the support of the Imperial Court in Vienna and of the European Powers and it was meant to explain the Romanian point of view in relation to Transylvania to the Imperial Court.[45]

The idea for such a memorandum was first advanced in 1870 by Ion Ratiu. A first text was circulated in 1882. Between 1887 and 1892 several drafts were prepared, and in 1892, prior to publication, the Romanian National Party sent it to Bucharest, where the King Carol I of Romania thought it was appropriate and promised his support. The authors of the text were imprisoned but in 1895, at the request of King Carol I of Romania, the Austrian Emperor pardoned those who were still in prison. The Memorandum was a success at an international level, London and Paris supporting the cause of the Romanians in Transylvania.[46]

Relations between the Romanian National Party and the Hungarian authorities in Budapest (as well as the relations of the Budapest with the Serbians and the Slovaks; in 1895 the Romanians, the Serbians and the Slovaks created a "Congress of the

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[45]For details of the Memorandum of 1892 see: Mihai Stoian, "*Procesul unui proces*", (Bucharest: Editura Cartea Românească, 1978).

[46]In 1894, P.G. Cantilli published a brochure of 20 pages with the title: *Un procès célèbre: les roumains de Transylvanie*, (Paris: Imprimerie G. Pelluard, 1894) in which the following passage occurs: "Un profond mécontentement agite aujourd'hui le peuple roumain de la Transylvanie, grande principauté de l'Empire autrichien. Cette agitation se traduit sous la forme d'une lutte désespérée du peuple roumain [...] Les roumains ont soutenu en Transylvanie des luttes séculaires pour leur liberté. Le peuple roumain a toujours formé un rempart à toutes les invasions qui menaçaient l'Occident de l'Europe; son histoire renferme des pages glorieuses [...] Ils pouvaient, par conséquent, espérer une meilleure existence, dans le pays des leurs ancêtres, que celle qu'ils eurent à subir à différentes époques." See M. Stoian, *ibid.*, at 161.

Nationalities") degenerated continuously. In 1896 the national conference of the Romanians was outlawed, and in 1903 the newspaper of the Romanian National Party, "Tribuna" was suppressed.

For this reason, the national conference of the Romanians of 1905 decided on a change of tactics, abandoning the policy of passive resistance and political non-participation. As a consequence, 8 Romanian representatives, who together with a Serbian representative and a Slovak one formed the Parliamentary Club of the Nationalities, were elected to Parliament in Budapest. Over the years, the number of the Romanian representatives varied between 5 and 10, while there were generally almost 400 Hungarian representatives.[47]

The efforts of the Romanian representatives failed again to achieve a non-discriminatory regime for the Romanians. During the last years of the Dual Monarchy the Romanian representatives were divided in several factions. Some supported the union of Transylvania with Romania (Octavian Goga, Vasile Lucaciu), others preferred a wait-and-see attitude (Iuliu Maniu), and still others hoping for a federalized Austria (Aurel Popovici). All favoured radical change of the political regime, the abrogation of the Dual Monarchy and the abandonment of the historical concept of the Kingdom of Saint Stephan.

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[47]Vlad Georgescu, *op. cit.*, note 9, at 172.

2.6 Romanian Transylvania (Since 1918)

A. World War I and the Union of Transylvania with Romania

Between 1914 and 1916 Romania remained neutral but at the end of August, 1916, it declared war on the Austrian-Hungarian Empire and concluded an alliance with France, U.K., Russia and Italy. This created a difficult situation as the Imperial army sent Romanian troops from Transylvania to fight against Romania. Many refused to fight and deserted the Imperial army. At the end of the war, 1228 representatives of Transylvania gathered in Alba-Iulia, to declare the union of Transylvania with the Kingdom of Romania. Several liberal Hungarian intellectuals, among them the poet Ady Endre, and the famous composers Béla Bartók and Kodály Zoltán, favoured the union.[48]

After the Treaty of Trianon, Transylvania was annexed to Romania. Representatives of Transylvania were included in the Romanian Parliament in Bucharest. The Romanian Constitution of 1923 established a constitutional monarchy, guaranteed equality and freedom of conscience, freedom of education, freedom of the press and freedom of association and of public meetings, for all Romanians, "irrespective of ethnic origin, language or religion". Romania adhered to the European Convention for the protection of the ethnic minorities and was an active member of the League of Nations.

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[48]In a manifesto of November 3, 1918, several Hungarian intellectuals from Budapest stated: "We don't have any claims toward the sister-nations. We also consider ourselves as part of a renewed nation, a force now liberated, just like our brothers who are aspiring happily to a new life on the ruins of the monarchy. We feel now relieved to be no longer forced to be the pillars of the oppression...". See Mihai Stoian, *op. cit.*, note 45, at 7.

Nonetheless, this regime governing ethnic minorities in Romania was far from perfect and the Hungarian minority began to agitate for reabsorption.

B. Border revisionism (1940-1947)

Hungarian politicians were not happy with the loss of Transylvania and other territories that they considered as belonging to the Crown of Saint Stephan.[49] The new map of Europe was considered in Budapest as unfair since Hungarians living in neighbouring countries were "foreigners in their own country". Hungary claimed that the international treaties and conventions after World War I were unjust, and demanded a revision to the newly established borders.

These claims reached the climax during the fascist regime of Miklos Horthy, who collaborated with nazi Germany in the invasion of Czechoslovakia in 1939. That year, Hungary completed the occupation of sub-Carpathian area to the north of Oriental Carpathians (today sub-Carpathian Ukraine) and in 1940, under the patronage of nazi Germany the Arbitration of Vienna (the Diktat of Vienna), compelled Romania to give up the north of Transylvania to Hungary.

During this time thousands of Romanians and Jews were murdered in northern Transylvania. Villages and Orthodox Churches were destroyed and 218,919 Romanians were deported to Romania. In the second half of 1944 the Romanian army and the

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[49]This historical claim is, of course, at the root of much of the border unrest between Hungary and Romania today. For a discussion, see N. Iorga, *Români si slavi, români si unguri. Doua conferinte ale Institutului pentru studiul Europei sud-orientale*, (Bucuresti, 1922), at 48.

Soviet army restored the Romanian administration in the occupied territories. In February 1947, by article 2 of the Peace Treaty between Romania and the Allied and Associated Powers, the Hungarian-Romanian border as it existed just prior to World War II was re-established.

C. The Magyar Autonomous Region (1952-1965)

A Magyar Autonomous Region in the middle of Romania consisting of approximately two counties (Harghita and Covasna) where the majority of the population is Hungarian (Szekler) was established in the Soviet-type Constitution of Romania of 1952. The language of the autonomous administration of this Region became Hungarian. The reasons for the creation of this autonomous region were complex, but had little to do with a concern for democratic governance or for the protection of ethnic minorities.

In the case of the Magyar Autonomous Region the situation of ethnic minorities was reversed: the Romanian minority was in a disadvantaged position because of their language. The 1952 Constitution did not, however, speak to the question of bilingualism or multilingualism in the public administration. This failure, coupled with ongoing criticism of the existence of an autonomous region within the territory of the state of Romania, led the communist authorities to revisit the special status of the Magyar Autonomous Region. In the Constitution of 1965 the idea was abandoned.

2.7 The Lessons of the History of Transylvania

This brief history has many lessons about the difficulty of situating the origins and development of socio-ethnicity as a prelude to legal analysis. Five general categories of lessons may be stated.

First, starting points and periodizations. A starting point is a choice that inclines or disinclines to certain conclusions. So are periodizations. They serve to foreground or to background events and interpretations. In view of the objectives of this thesis, five major periodizations were selected: the early history of Transylvania till the 9th century C.E.; the Hungarian period; Autonomous Transylvania (1541-1688); the Austrian Regime (1688-1918); and Romanian Transylvania (1918-1999). The organizing frame of this chosen periodization carries presentist political judgments.

While this frame reveals the rich ethno-cultural composition of the region (given waves of migrations and conquests), it also suggests that the long dissociation of political organization and population base during the Imperial periods had negative consequences. It also answers two significant questions in a manner that favours the maintenance of current facts on the ground. By arguing against the migrationist theory of the origin of the Romanian people, it implies a "prior claim" justification for Romanian control of Transylvania. And by arguing for the "autonomy thesis" in the 16th century, it limits the historical weight of competing Hungarian claims. Recent revisionist exaggerations grounded in politics have infected almost all histories of the region. Here, as in so many conflict situations, history is constantly being rewritten by the winners.

Second, geography. In the case of Transylvania, its location made it susceptible to early invasion by Greeks, Romans and Slavs -- each of whom sought to assimilate a pre-existing population. Later its situation at the frontiers of three Empires (the Ottoman Empire, the Austrian-Hungarian Empire and the Russian Empire) made it a highly contested territory. Local political institutions survived only precariously and developed slowly under the weight of competing Imperial claims. The long-term history of ethnic intolerance and arrogance shown by the Empires that controlled the region lies, in large measure, behind the later ethnic conflicts in the states that re-emerged.

Third, there are **political** overtones to all history. The history related here is primarily a history of political leadership, including the leadership of religious organizations. Emphasis is on Kings, empires and Princes. The micro-history of populations and daily life is not discussed. Nor is economic history. Yet these are as important as political history in shaping attitudes of tolerance or hatred, and the myths of people are fundamental to the construction of "legitimate" claims. The political interests of various global powers in the region today further complicate attempts to build up workable political structures. Moreover, the 20th century manipulation of ethnic minorities in the political discourse in order to legitimize the drawing and re-drawing of the maps of the region radicalized the position of states in the region toward the ethnic minorities.

During the 20th century Transylvania became a disputed territory between the post-Imperial states of Romania and Hungary. The focus of the conflict evoked history and became centred on the issue of territorial claims. The true underlying issue in

Transylvania -- how to manage ethnic diversity in a modern state -- quickly became only a collateral aspect of the dispute. These minorities were perceived as constituting a threat to the territorial integrity of the state.

Fourth, **religion** has always played an important role in keeping ethnic groups separated from each other. The history of Transylvania records several attempts by the Roman Catholic Church to assimilate other denominations. Moreover, divisions between Orthodox and Catholic hierarchies perpetuated contests over political authority at a time when monarchial and Imperial power felt the need for extra-terrestrial justification of sovereignty. Even today, much inter-ethnic suspicion derives from religious difference.

Fifth, **sociological** considerations. Today, Transylvania has a very rich ethnicity. In rough terms one can say that more than one-half the population is Romanian and one-quarter is Hungarian. An eighth are Saxon Germans, and a sixteenth are Serbs and Croats. Several other nationalities such as Ruthenes, Slovacs, Poles, Ukrainians, Jews and Gypsies comprise the remainder of the population. Over the years, waves of migrations dislocated not only previous migratory populations but the autochthonous populations. As a result, the new and old national groupings in the Carpathian-Balkan region were spread in huge overlapping layers in the area.

So much of the territorial competition related in this historical review is grounded in religion, class, ethnicity, language and culture. Tensions of the type that developed into ethnic hatred came to the surface when these various sociological fault-lines all fell in the same place. In view of these features, it is not surprising that the Carpathian-

Balkan region has an ethnic, historical, political and sociological specificity that has shaped centuries of territorial squabbles. The expression "Balkanization" is equally applicable to Transylvania.

What, then, do these various lessons suggest for a legal analysis of the situation in Transylvania today? Can they set the stage for a re-construction of legal approaches to ethnic accommodation in culturally diverse states? Any realistic and workable solution leading to ethnic accommodation will have to take the specific, on-the-ground, situation today into account. History has too often been used to justify an approach to law and the state that makes intolerance possible. It remains to be seen if an alternative legal approach may palliate, rather than exacerbate ethnic attitudes towards peoples and territory.

CHAPTER 3. LAW IN ETHNICALLY DIVERSE SOCIETIES

3.1 Plural Law and Multiple Legal Systems

Legal scholars often conflate two elements of modern legal orders: the idea of law as a norm; and the idea of a legal system as a compendium of norms. They must be kept separate. It is entirely possible to conclude that there are a plurality of sources of law understood as norms, without concluding that there are a multiplicity of legal systems operating in the same social space. Indeed, one of the principal ways in which modern States have come to deal with ethno-cultural diversity is to tolerate a plurality of sources of normativity while maintaining that the law-making power in each case is delegated from the State.[50]

The next two sections of this Chapter are devoted to exploring different dimensions of the distinction between plural law and multiple legal systems. The third section will examine some of the contemporary justifications for recognizing parallel justice systems that have been advanced to date. This Chapter will conclude with an

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[50]See, for discussion: H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985); M. Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Legal culture* (Japan: Tokai University Press, 1989); J.-G. Belley, "Law as *terra incognita*: Constructing Legal Pluralism" (1997) 12 *Canadian Journal of Law and Society* 1; B. de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 *Journal of Law and Society* 279; M.-M. Kleinhans and R.A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997), 12 *Canadian Journal of Law and Society* 25; J. Vanderlinden, "Vers une nouvelle conception du pluralisme juridique" (1992) 54 *Revue de la recherche juridique* 573.

attempt to apply these theoretical constructions to the ethno-cultural situation in contemporary Transylvania.

3.2 Is Law a Singular or a Pluralist Phenomenon?

"To reject the idea of legal pluralism does not require one to adopt the opposite idea of legal monism, according to which the State has an absolute monopoly upon the creation of the law"[51] argued my professor of legal theory in Romania. The legal pluralist theories of Malinowski[52], Thurnwald[53], Hoebel[54], Gurvitch[55], *etc.*, were critiqued on three main grounds: 1. the fact that the societies being studied were in a primitive stage of development and lacked an official apparatus capable of enforcing the law for the whole community from outside or from above the community[56] means that they had no law; and 2. the fact that sanctions were not applied by the whole community and there was no "jurisdictional hierarchy" also evidences an absence of law; and 3.

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[51]Nicolae Popa, *Teoria generalā a dreptului*, (Bucharest: Editura Proarcadia, 1993) at 56 (trans.).

[52]B. Malinowski, *Crime and Custom in Savage Society*, (London: Routledge and Kegan Paul, 1926).

[53]R. Thurnwald, *Werden, Wandel und Gestaltung des Rechts im Lichte der Wölkerforschung*, (Berlin, 1934).

[54]E.A. Hoebel, *The Law of the Primitive Man*, (Cambridge: Cambridge University Press, 1954).

[55]G. Gurvitch, *The Sociology of Law*, (London: Routledge, 1947).

[56]Nicolae Popa, *op. cit.*, note 51, at 55.

since in primitive societies there is no organized State there could be no law -- "without a State there is no law".[57]

The first argument is not analytically sustainable. It rests on unargued propositions: Why does there have to be an official apparatus to enforce law's obligatory character that exists outside or above the community? Is "State law" itself enforced from outside or from above society, even now? In addition, why does there have to be any kind of official enforcement apparatus at all?[58]

The third argument is also just an assertion. Even the Romans recognized the societal origins of law in the expression: *ubi societas ibi jus*. All that is necessary for the existence of law is the existence of a society, irrespectively of its evolutionary stage. Law existed long before the organized State. Moreover, law is not necessarily related to territory. Migratory peoples have always had their own legal orders.[59] One might say in fact the **law created the State** rather than the reverse.

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[57]Imre Szabo, *Les fondements de la théorie du droit*, (Budapest: Akademiai Kiado, 1973), at 114, cited by N. Popa, *op. cit.*, note 51, at 57.

[58]See, for a review of these questions, R.A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998), 15 *Arizona Journal of International and Comparative Law* 69.

[59]See the detailed review in W. Weyrauth and M. Bell, "Autonomous Lawmaking: the Case of the Gypsies" (1993) 103 *Yale Law Journal* 323.

The second argument is merely speculative and interpretative. It does not correspond with the anthropological and historical facts of certain communities, at least as understood by those who have studied them empirically.[60]

It follows that, whatever the case may be for dismissing legal pluralism, it is not to be found in any of these three arguments.

A. Formal Law and the Law of Society

Neither the legal pluralist interpretive perspective nor that which ascribes to the State an absolute monopoly on the creation of legal phenomena, helps to answer the question whether or not law itself is a pluralist idea. If one rejects the monist position it would appear to follow that law is a pluralist notion. However, to actually decide this question further analysis is necessary: when does a norm becomes a legal norm? For example does a norm become law when it is published in official journals? Or when it is promulgated by the head of State? Why not two days after being published or two days after promulgation? How is a norm less legal after it has been adopted by Parliament but before it is promulgated? And, who makes the law anyway? Parliament? Society? The ruling class? Finally, what values and whose values are reflected by law? What justice and whose justice is used by law or is done by law?

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[60]See Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective", in C. Geertz, *Local Knowledge* (New York: Basic Books, 1983); Sally Falk Moore, *Law as Process: An Anthropological Approach*, (London: Routledge & Kegan Paul, 1978).

From a sociological perspective, the moment chosen by a Parliament to proclaim a norm "legal" is arbitrary and is just a stage in the law-making process. One cannot absolutize this artificial choice of a legislator. Taking into consideration the way their members are elected, Parliaments can be seen as ratifying the legal order of the society they represent. They have, from this point of view, a bureaucratic function in elaborating, in a juridical language, the legal choices of a society. This bureaucratic dimension permits Parliaments (and not only the Parliaments but the whole apparatus of the State -- the government, the courts, *etc.*,) to introduce a number of formal factors into the sociological process of law making. But these factors do not themselves make the form the norm.

The most conclusive example of the divergence of form and substance is the case of laws that fall into abeyance. In this case the norms are technically still legal norms; they are part of the law adopted by Parliament, promulgated by the head of a State and published in the official journals. Further, no explicit procedures to abrogate them have been undertaken. But at the same time these legal norms are not operative functionally as part of the normativity of that State. In such cases the legal changes wrought by a society occur in complete abstraction from the stipulations of the State apparatus that is supposed to have a monopoly on law-making. So, it would appear that it is society that is really making the law.

The socio-demographic pluralism of most societies is beyond doubt. Hence, unless society is itself hypothesized as singular (being defined exclusively by reference to the political State) the law/society syllogism would seem to require that the

phenomenon of law also be seen as pluralist. It would, however, be overly simplistic to say "society makes law". What we do know is that society can in practice choose a system of legal normativity that is not necessarily related to the one chosen by the State. The two bodies do not always make identical normative choices. The explicit abrogation or amendment of formal law itself suggests as much. It is worth considering why a law is formally abrogated or changed.

In any normal society, and I mean by that the societies where changes in power is achieved by democratic means and where the democratic social mechanisms and mentalities are well-anchored, legal change ought to occur after a social change in attitudes about what the law reflected by the State legal order should be. That means that whenever a society changes its position about what the law should be, the State legislature will normally reflect that change through amendments to statutes. Any exception to this outcome is an indicator of democratic dysfunctionality. The congruence of the norms of formal law and societal norms suffers from two types of exception: unjustified legislative opposition or deranged legislative initiative. Unjustified opposition by the legislature occurs when it refuses unjustifiably to modify statutes to reflect legal change that has already occurred in society; a law is preserved although it is no longer endorsed by a social consensus. Deranged initiatives occur when the legislature decides to change or to introduce a law that is neither needed nor desired by society; in this case the society's prerogative to initiate legal change is hijacked by the State.

Nevertheless, there are cases when the legislature changes a legal norm benignly by challenging the social consensus. This might occur, for example, when society comes

under the sway of an ideology that is inconsistent with the values of democratic constitutionalism. Society might eventually agree with this change or it might continue to resist it. In a normal democracy, at least in theory, there will always a balance of power between the State and society, with the former usually complying with the desires of the latter. Whenever there is an imbalance of power in favour of the State, however, one can notice a dilution of the efficacy of law,[61] and an opposition between social norms and practices and that law. The opposition between social norms and practices and law simply imposed by the State will typically result, in the final analysis, by the latter having to adjust its norms to accommodate the desires of the former.

Of course, to say that whatever the State does is a mere reflection of society's values is just as exaggerated as to say that "society makes law". This is not least the case because it is difficult to see how a "society" is able to provide a universally acceptable set of values when it is so heterogeneous. The pluralism of the society involves a plurality of legal choices and a plurality of choices of the values which should be protected by the law. Indeed, it might be said that "every society and sub-society is also constantly mediating its diverse normative regimes and redeciding the relationships between them".[62] Various social units manage to negotiate the manner in which their normative values are consecrated within the State legal order, or to adapt the legal values suggested and promoted by the State legislature to their own systems in the

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[61]For the notion of "efficacy" and "effectiveness" of a law see: Guy Rocher, "L'effectivité du droit", in A. Lajoie, *et al*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, (Montreal: Éditions Thémis, 1998), 27.

[62]R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in A. Lajoie, *et al*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité* (Montreal: Éditions Thémis, 1998), 12 at 14.

complex and continuous process of law making. From this perspective the State law is like a bazaar where products from various producers are brought for sale or exchange. In any case the identification of social values is, ultimately, an empirical question.

Yet social statistics alone cannot take into account differences in the perception of a value. Even from the classic monist perspective the national State legal order is not the only one which is regulating legal relations in a society. Thus, a certain (although typically characterized as minor) normative competence is granted to different social units: for example, these may be local communities (in so far as customary law is concerned); or different regulatory organizations of civil society (in so far as the special legal authority of professional organisations is concerned); or the internal legal normativity of diverse other institutions of civil society (for example, universities, academies, churches, congregations, political parties, and so on).

Recognizing the extensive plurality of normativity recognized even within the official State legal system is the key to answering (as a formal matter) the question whether law is a monist or pluralist phenomenon. In other words, once it is accepted that the State does not have a practical monopoly on the law, and once it is accepted that social organizations and groups other than the State have the power to make law, and once the force of the adage "ubi societas ibi jus" is acknowledged, then the rest of the monist mythology will fall accordingly. That is, it is not just the association of law with the State that societal pluralism challenges; it is also the idea of law's positivity; and it is the idea that law must be made by an official institution.

It is obvious that even from the monist perspective the assumptions and choices about of what law could be or ought to be that have been used in legal theory for quite a long time, are no longer adequate for contemporary legal research. The monist standpoint gives no purchase on understanding the State-Civil Society dichotomy or the legal-societal dichotomy, other than to claim a sharp dissociation based on pedigree. A key problem with the legal monist perspective is that it is ahistorical. Conceiving and identifying law with the State is a relatively recent development arising for ideological reasons.

B. Excursus on Legal Monism

In ancient times there was no necessary connection between law and State. The situation was similar during the Middle Ages. But the adoption of a territorial criterion of law application made possible later this correlation between law and State (the modern State being founded around the concept of territoriality). The Peace of Westphalia can be seen as a key moment. Yet modern monism also needed a theoretical foundation. This it found in the enlightenment and the desire to subject law to democratic control. Depriving social organizations of law-making power and vesting the law exclusively in the State was thought to be a way to break down "the divine right of kings" and "feudalism". By the time that the notion of nation-states emerged in the late 18th century the association of the law with the State became the fundamental dogma of the legal

thinking. Legal scholars came then, suddenly, to the conclusion that law cannot exist without the State.[63]

The notion of State as we know it today is both a political notion and a relative latecomer to political theory. There is, moreover, no single correct interpretation of what the State is and where it is grounded. The theoretical correlation between law and State has no other consequence apart from the confounding of the notion of the State, as a political option, and the notion of law, as a normative phenomenon. This conflation permits the law and the ideology of justice and order that it carries to be confiscated by the State as an instrument in the service of political manipulation: a unitary State could not have but a unitary official law, a liberal State could not have but a liberal official law; a socialist State could not have but a socialist official law; a religious fundamentalist State could not have but a religious fundamentalist law; and so on.

Since the enlightenment, law has been presented, explained, justified, so as to fit the political mirror of the State. As such, any extra-statal normative phenomenon was ignored. Law came to be understood and defined in function of how the notion of State was understood and defined. "...The ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory"[64]. The ideology that the State has a monopoly over law has

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[63]For an explanation and critique of this modernist position see, B. de Sousa Santos, *Towards a New Common Sense*, (London: Routledge, 1995).

[64]John Griffiths, "What Is Legal Pluralism?", (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1, at 4.

led to the following paradox: there are certain phenomena which are really not normative, but which are decreed "legal" because of the connection to the State legislature; and there are other phenomena which are normative but which are excluded from the sphere of the "legal" because they lack any connection to the State legislature.

It is important to be clear about what is at stake. The monist perspective, despite claims of its adherents that it is merely descriptive, is strongly normative. As much as the pluralist perspective, the monist perspective raises the ontological problem of defining "law". What indeed does the concept "legal" include?[65]

For two centuries, legal monists have searched for a universally valid criterion for defining the concept of law. The exercise became purely formal for two separate reasons. First, law could not be defined by reference to abstract theories of justice because of profound disagreements between states, and even between people within states, as to what justice requires. Second, law could not be defined as an empirical phenomenon, because of the sociological complexity of social organization. The only way to define law in universalistic terms is to recur to purely formal definitions, such as the conflation of law and State: the law as State sanction; the law as State recognition; etc. But even then, everyday legal reality is more complex than these formal definitions allow. For example, legal rules expressed by canonical texts are porous: the meaning of texts themselves has a social referent that cannot be exclusively defined.

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[65]See P. Fitzpatrick, "Law and Societies" (1984) 22 *Osgoode Hall Law Journal* 115; and S.E. Merry, "Legal Pluralism" (1988) 22 *Law and Society Review* 869.

C. The Response of Legal Pluralists

Legal pluralists, sceptical about the possibility of a universally valid definition of the "legal", consider that formally defining law is not useful exercise. For pluralists, law has to be analyzed from case to case as a reflection of many different kinds of normative authority. This very denial of the importance of definitions lies at the root of a powerful critique of the coherence of the intellectual project of legal pluralism. The target of this critique is the apparent inability of pluralists to provide a criterion for distinguishing non-State law from anything else - social practice, economic forces, religion, *etc.* The difficulty, some argue, is revealed in the inadequacy of attempts by pluralists to find a term for "non-State law". But this observation merely confirms the political role of definitions: State-law for pluralists is just a sub-set of law.

Analytically, monist critics claim, legal pluralism cannot generate a non-formal criterion of law. Instrumentally, its project - to find a social scientific definition of law encompassing both State and non-State law - collapses against its ambitions. They argue that: (i) either law results from concrete patterns of interaction - in which case the institutional structure of State law is not law since it is determined by criteria other than concrete patterns of interactions; or (ii) law is differentiated by its attachment to some notion of institutional identification - in which case non-State law has no independent origin in concrete patterns of behaviour, but is simply State law without the State.[66]

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[66]This is the gravamen of essays by B.Z. Tamanaha, "The Folly of the Social Scientific Conception of Legal Pluralism" (1993) 20 *Journal of Law and Society* 192; and G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1993) 13 *Cardozo Law Review* 1443.

This is, at first blush, a telling critique. But upon examination it shows itself to be directed not at the project of legal pluralism, **per se**, but to an epiphenomenal expression of a certain version of legal pluralism -- social scientific legal pluralism. That is, nowhere does legal pluralism require that the only way to conceive law without reference to the State is to claim that it is grounded exclusively "lived patterns of social life". There exist innumerable institutionalized processes for patterning human interaction that compete for the loyalty of citizens. Moreover, it is nowhere required that the only way to conceive State law is institutionally. There are innumerable patterns of social life discernible within State institutions.

The criticism of the traditional legal pluralist project confuses the postulation of a **genus** with the assumption of a uniformed phenomenon within the **genus**. Once again, we can see that the criticism of traditional legal pluralism that requires either equivalence or contrast as the decriptor of State and non-State legal normativity presumes that either one or the other must provide a definitional criterion against which the other is understood.[67]

Even from this quite brief formal analysis it is easy to see why legal phenomena are best conceived pluralistically. The point has not been to explore all the potential hypotheses of legal plurality, but only to illustrate that law could not be considered to

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[67]R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and th mergence of Law" in A. Lajoie, *et al*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, (Montreal: Éditions Thémis, 1998), 12 at 16. See also J.-G. Belley, "Law as *terra incognita*: Constructing Legal Pluralism" (1997) 12 *Canadian Journal of Law and Society* 1; and B. de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 *Journal of Law and Society* 279.

arise from a State monopoly. Nonetheless, it would be wrong to see this analysis as simply asserting a dualism of "State law" and "non-State law". Both across different segments (horizontally) and at different levels (vertically) society is characterized by a real plurality of normative regimes which can rarely be delimited strictly. These normative regimes are interpenetrated and in continuous interaction, in various ways, with each other.

Not only do these non-State normative regimes interact with each other, they also interact with the State legal order. State law and non-State law co-exist in a constant process of reciprocal influence. Even the State legal order is, in its own way, characterized by a certain pluralism. Sometimes this is internal pluralism, as when different State agencies (courts and administrative tribunals, for example) compete for normative preeminence in a certain domain. Sometimes this pluralism is external, as when one can see conflict between State law produced exclusively by the State agencies and State law produced by various agents in civil society that the State has appropriated.[68]

The approach elaborated in this first section starts from the premise that, being ultimately a product of society, the State is subordinated to the society (societies) that it represents. This is in direct contrast to the typical monist perspective under which the State appears as the supreme normative entity.

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[68]See R.A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998), 15 *Arizona Journal of International and Comparative Law* 69.

3.3 From the Pluralism of Law to the Multiplicity of Legal Systems

A. Introductory Considerations and Theoretical Framework

Contemporary State legal systems, tailored according to those legal and political doctrines of the last century that gave expression to the "one state - one nation - one law" ideal, leave little room to accommodate multiple legal systems. The exclusive and homogenizing character of official "nation-State" law, is even more pronounced in unitary as opposed to federal States. Hence a basic dissonance. We have a unitary theory of the notions of State, society and law, but the vast majority of (if not all) contemporary human societies are culturally and ethnically diverse. Both the need for social peace or social balance and the requirements of justice and equity for all citizens, as we conceive these ideas nowadays, impose the accommodation of diversity. In the modern world, this would also suggest the need to accommodate multiple legal systems.

The efforts toward this goal have been impaired, so far, by what has been a dominant conception about law. Two premises have been fundamental in legal theory for a long time: (i) the law conceived as a singular normative output of a State, a conception derived from the romantic political theory of the nation State; and (ii) the law conceived as an attribute of State sovereignty, also a romantic conception within the political theory of the nation State.

With the emergence of nation States, the "one nation - one state - one law" ideal was quickly adopted within legal theory as a fundamental principle. However idealized,

this principle is, of course, empirically inaccurate. It is based on the double fiction of the liberal construction of the nation State: a State is formed of a single nation; a nation has only one legal normativity; hence, the syllogism can be completed by concluding that a State has only one law. The harmonious vision of the romantic legal theory was faced constantly with "recalcitrant data" and the contemporary realist (and sometimes even neo-realist) legal theory can no longer support the visions of the mono-nation State and of the homogenous docile society subordinated to the aspirations of the political State. During the relatively short history of monist legal theory, legal scholars pursued three of the main four intellectual strategies in dealing with recalcitrant data: denial, resignation and accommodation within traditional paradigms.[69]

The third is of greatest present interest. After World War I the State evolved the concept of "positive discrimination" in favour of ethnic minorities in an attempt to accommodate within the "omnipotent" State-law. But even these efforts at accommodation within the traditional paradigm were only partly successful. Scholars showed little agreement on the justification of the "collective rights" or "minority rights" and even less agreement on their interpretation.

An even more subtle, but no less important, foundation of monist legal theory was to see by the paradigm of the law as an attribute of State sovereignty. Beginning at the end of the 18th century, when law was nationalized by the "democratic" State (monarchist absolutism being replaced by what I call "State absolutism"), law became an indicium,

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[69]R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in A. Lajoie, *et al*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, (Montreal: Éditions Thémis, 1998), 12 at 14 *et seq*.

and an attribute, of State sovereignty. To recognize any encroachment upon the monopoly of State law and the monopoly of State institutions to produce this "singular" law would be to encroach upon the very sovereignty of the State. This conception that all law is a prerogative of State legislative power within a given territory is derived from a view that norms really become law only when formally made. Implicit social ordering has no relevance for law. State law is necessary and sufficient for territorial integrity and political sovereignty to be maintained.

It is easier to conceive the potential existence of multiple parallel legal systems in the case of federal states, even acknowledging that these are hierarchically integrated by the constitution. But even this minor concession to this plurality of legal systems is difficult to imagine in a unitary state. Indeed, short of calling every federated unit a "nation" it seems practically impossible to conceive multiple legal orders using a territorial criterion. As I will argue later on in this thesis, a territorial criterion is not a desirable criterion for allocating multiple systems, but the difficulties involved by the federalization of a unitary state in order to accommodate multiple legal systems on a territorial criterion should, in any event, not be neglected. In order to approach the problematic of recognizing and accommodating multiple legal systems within a State one has to establish a theoretical framework.[70] Can the legal pluralist perspective -- that all the

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[70]For various attempts, see A. Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities" (1991) 66 *Notre Dame Law Review* 1219; F. Glatz, "State, State-Nation, Cultural Nation" (1993) 1 *European Review* 385; W. Kymlicka, "Liberalism and the Politicization of Ethnicity", (1991), 4 *Canadian Journal of Law and Jurisprudence* 239; J. Laponce, J., "The Case for Ethnic Federalism is Multilingual Societies: Canada's Regional Imperative" (1993) 3 *Regional Politics and Policy* 23; and R.A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity" in K. Kulcsar and D. Szabo, eds., *Dual Images [:] Multiculturalism on Two Sides of the Atlantic*, (Budapest: Royal Society of Canada - Hungarian Academy of the Sciences, 1996) at 52.

legal normativities of the different social sectors (co)exist in a given society – be of help in answering the question: what does one mean by "accommodating multiple legal systems"?

Two main meanings of accommodating multiple legal systems may be suggested: (i) the counter poising of all the legal systems existing within a society (or at least the relevant normativities, *i.e.* the normativities of other ethnic or culturally different groups than the majoritarian one) by reconsidering the position of the State normativity in relation with other non- State normativities; and (ii) transforming non State normativities into parallel State normativities together with the reconsideration of the relation State/non-State law. To date, most legal scholars have argued for the second solution – either in the form of "collective rights"[71] or "parallel systems of justice".[72] Nonetheless, a reconsideration of the position of the State law in relation with non State law is implicit in these ideas.

Why is it important to reconsider the relation between State and non-State law if the transformation of present non-State law into parallel State law is the chosen alternative? Recent legal theory argued in favour of multiple legal systems mainly from the perspective of accommodating different legal normativities of ethnic minorities within a state. Of course, it is more correct, and more comprehensive, to take into consideration the accommodation of multiple legal systems on the basis of **relevant**

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[71]W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989).

[72]J. Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), at 133.

cultural difference - the law being culturally determined - the terminology used in recent legal theory equates "cultural community" with "ethnic community"[73]. But if a State is socially diverse, then a nation is culturally plural. Hence, there is the risk that elevating to the same privileged status as State law (in order to create parallel systems of justice) a legal normativity shaped by a temporarily dominant culture within a national community, would at the same time create an artificial privileged status for that culture.

So, ultimately, unless one reconsiders the relation of State and non-State law, the accommodation of parallel legal systems as State legal normativities would jeopardize the theoretical endeavour. Besides, the "one State - one nation - one law" ideal would be merely rephrased as "one nation - (one culture) - one law".

B. Notions of Identity and Equality of Identities

After the abolition of feudal monarchies, the idea of equality of individuals was phrased in terms of political equality. All the liberal systems of law which emerged after 1789 expressed, in one form or another, this idea of equality of all individuals before the law. The equality of individuals was equated with the equality of citizens, citizenship being perceived as the most important feature of an individual's identity. This fitted perfectly the dominant belief of the epoch that the totality of the citizens formed a unique nation, characterized by a unique culture, within a State. Therefore, the norm of equality had to embrace all citizens.

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[73]See W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989).

The development of the absolutist nation-State supported this conception of equality at the expense of ethnic and cultural minorities. The resistance of the ethnic minorities focused from the very beginning on the very obvious and practical issues of language and religion, two of the many defining elements of a national community. Although the State was held out to be the guarantor of the equality, welfare and happiness of all its citizens, in fact this outcome was rarely achieved. The State perpetuated the privileged position of the majority national community by enforcing the law shaped by the dominant culture of this community on all citizens. Because the State must be mono-national and mono-cultural, it can and must deploy law as a means to enforce social control in a singular way.

Such a result occurred even in liberal States. The liberal focus on the individual privileges individual values. Any collective value is seen as a generalization and an abstraction. In the best case, a collective value is an approximation of the values shared by the individuals forming a community, it establishes a standard of that community.

The concern of liberalism with the individual should not mean, however, that the community is less important or less worth of attention. To begin, human beings are social beings, and, therefore, individuals cannot be separated from the community. The social development of individuals is as important as their individual development. Communities are as important from the perspective of the concrete individual interest as from the perspective of the abstract collective interest.

The notion of an individual's identity is very complex: it has both psychological and sociological dimensions. Identity arises as a result of the interaction of an important number of identification levels: an individual has a political identity, a national identity, a specific cultural identity, a religious identity, a professional identity, a social identity, an economical identity, a sexual identity, etc. The equality of individuals is achieved only if there is an analogous equality of each of these identities of individuals. Each of these individual's identities is as important for the individual as political identity – that is, citizenship. This is why equality of citizens is just a part of true equality of individuals.

Take, for instance, the case of equality between men and women. Even if an equality of political identities now exists, there is not yet an equality of social or economic identities between men and women. Or the case of queer communities. There is, in some democratic systems, an equality of political identities between straight and queer people but there is not yet an equality of sexual identities based on sexual orientation. This notion of complex equality of identities requires nuance. An idea of equality as an absolute equivalence of situations leads inevitably to dystopia. Equality has to be conceived, rather, as an equality of opportunities or an equality of moral worth. In a truly liberal society equality of the economic identities of individuals (understood as equality of economic situation) does not exist. But there is an equality of the economic opportunities of the individuals. So it should be with other identities.

Although there is a fragile balance between determination and predetermination of these various identities, the freedom of individuals depends on the possibility of choosing (in some measure) all and each of these identities. "There is no permanent

hierarchy of normative regimes in any individual's life; each one of us is constantly deciding and redeciding (and refusing to decide) which normative regimes provides the symbol structure for evaluating normative discourse in any given situation. Each of us is constantly deciding the relative weight and internormative trajectory of rules, processes and values within our multiply divided loyalties. [...] but no individual lives in isolation, and no individual's reaction to normative plurality is a product of 'free will'."[74]

It is from this perspective that the equality of individuals should be considered.[75] It is also from this perspective that establishing parallel legal systems within the same State could be justified.[76] It is also from this perspective that the community becomes important for legal theory. Kymlicka observes that those who believe in the dignity and the equal worth of individuals may in some circumstances endorse rights for groups.[77]

3.4. Trends Concerning the Justification of Parallel Systems of Justice

It is one thing to argue, as an empirical question, that multiple legal systems can actually be seen to exist. It is another to justify their recognition and promotion. To date,

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[74]R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in A. Lajoie, *et al*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, (Montreal: Éditions Thémis, 1998), 12 at 15.

[75]See M.-M. Kleinhans and R.A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997), 12 *Canadian Journal of Law and Society* 25.

[76]See R.A. Macdonald, "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 232.

[77]See W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989), at 218.

there have been two main trends in justifying the accommodation of parallel systems of justice within the same State: (i) an argument based on collective rights in the name of national groups; and (ii) an argument based on protecting the cultural continuity of a national group.

For this purpose I will analyze critically the justifications advanced by Will Kymlicka,[78] for the argument based on collective rights in the name of national groups, and Jeremy Webber[79], for the argument based on protecting the cultural continuity of a national group. Both authors approach the problematic of accommodating cultural diversity from the perspective of the Canadian experience in accommodating Aboriginal communities. Although these approaches are significantly different, both as to what constitutes a justification and as to the solutions proposed, they have an identical factual starting point: the consequences of the Canadian anti-segregationist (or assimilationist) policy for Aboriginal peoples.

In the 1960s, many Canadian liberal thinkers and politicians, drawing on the U.S. example of dealing with the legacy of segregation directed to African-Americans, thought that the maintenance of Aboriginal reservations in Canada was not compatible with a liberal democratic political system. They argued for its dismantling, on the basis that it rested on similar assumptions to segregation in the United States. The results, far from being those foreseen or expected according to the American experience, had a strongly

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[78]W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989).

[79]J. Webber, "Individuality, Equality and Difference. Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 133.

negative impact on the Canadian Aboriginal peoples, who protested against them. This outcome and reaction led to subsequent reconsideration of the anti-segregationist policy and presented a major challenge for the contemporary liberal legal theory.

The difference in outcomes of the similar anti-segregationist policies in the U.S. and Canada shows the hazards of applying an identical policy to two historically and anthropologically different situations. Colonized African slaves in American society both sought and were constantly refused integration in the U.S. By contrast, in Canada, the integration of the First Nations was not desired by most Aboriginal peoples: conscious of their rights in Canada as "first nations", they opposed their assimilation into the occupant's society. Nor was formal integration in fact refused by non-Aboriginal society.

Moreover, the socio-cultural and economic situation of African Americans and of Canadian Aboriginal peoples differs substantially. African Americans to a large degree were assimilated into the American economy and society whereas Aboriginal peoples in Canada were not. They preserved their national identities and the cultural systemic differences between Aboriginals and non-Aboriginals even helped prevent the assimilation of Aboriginals into the non-Aboriginal dominant culture.

The North-American experience shows peremptorily that there is no one model for how law should conceive ethnic, racial or cultural minorities and respond to them.[80]

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[80]Compare, for example, the different prescriptions in J. Laponce, "The Case for Ethnic Federalism is Multilingual Societies: Canada's Regional Imperative" (1993) 3 *Regional Politics and Policy* 23; and R.A. Macdonald, "The Design of Constitutions to Accommodate Linguistic,

Certain principles about the protection of minorities may be established but there are no universal solutions. Each of these minorities has a different historical, social and cultural situation. This is why the first part of this thesis dealt at some length with the history of Transylvania. In order to conceive a solution appropriate to ethnic minorities in Romania it is necessary to take into consideration the historical context. First, however, the two identified justificatory theories need to be assessed in greater detail.

A. Collective Rights in the Name of National Groups

The approach taken by Will Kymlicka to the accommodation of parallel systems of justice rests on a critique of the traditional liberal conception of collective rights. He believes that the liberal focus on the individual and liberalism's conception of individual equality is damaging for ethnic minority groups in that it denies any justification for "collective rights". Kymlicka argues that the idea that only individuals can be, in Rawls' language, "self-originating sources of valid claims", is false. He claims that a community, or a group, has in itself certain interests and rights, and he cites the sufferings of Aboriginal communities in Canada in evidence. The wrong is caused by the way liberal "individualism" (individuals are viewed as the ultimate units of moral worth) and "egalitarianism" (every individual has an equal moral status) are conceived.

Kymlicka argues for recognizing interests and rights of ethnic groups and suggests a reconciliation between "minority rights" and "liberal equality". Minority groups or

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Cultural and Ethnic Diversity" in K. Kulcsar and D. Szabo, eds., *Dual Images [:] Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada - Hungarian Academy of the Sciences, 1996) at 52.

"minority cultures" are viewed as legitimately having rights of their own, independently of the rights of individuals. To ground these collective rights within a "colour-blind model of liberal equality", Kymlicka suggests the need for a "liberal theory which recognizes the value of cultural membership and the fairness of the special claims of minorities". He considers that minority rights can be justified only if there is an inequality of circumstances for the minority in question.

A.1 Terminological Considerations

A critical analysis of Kymlicka's claim depends on first clarifying terminology. As he mentions, there is a terminological inflation in the discourse of the "collective rights" justification. The terms used by different authors, "minority rights", "special status", "collective rights", "group rights", "consociational incorporation", "minority protection", are critiqued on the basis that, in certain conditions, they are either over-inclusive or under-inclusive or both. Kymlicka suggests that 'special status' and 'minority rights' are the least confusing terms.

Nonetheless, his own terminology is suspect, as he appears to equate ethnic minority with "cultural minority". These are two separate notions. For example, within an ethnic minority there might be several cultural orientations. Just as a State can be ethnically diverse, a nation can be culturally plural. Take another example. Can the term "cultural community" be equated with the term "ethnic community"? Is not culture just one of the defining elements of a national community? Equating "cultural minority" with "ethnic minority" would be equal to equating "linguistic minority" or "religious minority" *etc.*

with "ethnic minority". The term "cultural minority" is the appropriate term for considering the multiplicity of legal orders. After all, legal normativity is culturally determined.

Of course, culture or cultural difference are vague notions. Jeremy Webber considers that the Canadian culture cannot be "adequately described as a common set of values or beliefs" and that "any attempt to describe the Canadian identity by describing its values either produces a list of such broad generality that it could fit any western industrialized democracy."[81] On this basis it could be argued that there is a European culture, and this is actually invoked by the European organisms and by the European nations but there is no (pan-)European nation -- at least yet. There are obvious difficulties in investigating cultural evolutions and interactions as well as cultural differences, especially in the cases of similar cultural systems.

Kymlicka, by contrast, considers that peoples within the same cultural community share a culture, a language and history which defines their cultural membership. This is a highly relativistic criterion. Take for analysis the following cases: Hungary and Austria, Austria and Germany, Belgium, Transylvania and Hungary, Transylvania and Romania, *etc.* Even if the term "cultural" is replaced with the term "national" the analysis is still not very clear. Neither culture, nor history, nor language, nor religion can provide a sufficient criterion for determining a national identity. Besides, even within the same national community there are horizontal differences (*i.e.* regional cultural differences) and vertical differences. Do all these, for example, justify different systems of justice?

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[81]See J. Webber, "Individuality, Equality and Difference. Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), 133 at 137.

Consequently, a notion of shared culture, language and history for the definition of "cultural membership" is inadequate to the theoretical project being pursued here.

For theoretical purposes, it might seem more convenient to use the term ethnic/national community. But here again one encounters the predicament of defining the nation and ethnicity. From the transcendentalist definitions of Hegel and Spengler, to the socio-psychological definitions of N. Wundt, Durkheim, G. Hense and G. Michaud, to the anthropological definitions of Jean Cazeneuve or Edward Sapir, to the definitions based on the theory of basic personality of R. Linton and M. Dufrenne, to Marxist definitions of the nation, there is a vast diversity of conceptions of the nation. For practical reasons, I think it is preferable to use the notion of ethnic membership – even though the concept is, admittedly, under-inclusive – rather than "cultural membership" as a basis for accommodating parallel legal systems.

What is more, "ethnic community" and "cultural community" are interchangeable terms in Kymlicka's approach. His focus is on the traditional problematic of ethnic minorities and not on the much broader problematic of cultural minorities as conceived here. Interestingly, in another place, Kymlicka prefers to use the terms "multinational" and "polyethnic" instead of "multicultural" as "some French-Canadians have opposed the Canadian government's 'multiculturalism' policy because they think it reduces their claims of nationhood to the level of mere ethnicity" and "other people have the opposite fear (or hope) that the policy was intended to treat immigrant groups as nations".[82]

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[82]See W. Kymlicka, "Liberalism and the Politicization of Ethnicity", (1991), 4 *Canadian Journal of Law and Jurisprudence* 239.

In this respect it is interesting that in its Explanatory Report, section 12, the European Convention-Frame for the Protection of National Minorities (Strasbourg -- February 1, 1995), mentions that no definition of "national minority"[83] has been inserted in the Convention because of the disagreement of the member States, allowing a certain flexibility for a pragmatic interpretation of this notion. This is a welcome position since it opens the door for treating "recent national minorities" in the same manner as "historical national minorities". Indeed, the European trend is to abolish the distinction between "historical national minorities" and "recent national minorities" since no adequate theoretical justification has ever been offered for it. Ethnic minorities exist within a State and the reason for which they exist (an invasion, an occupation, a confederation, mere immigration, *etc.*) and the time the minority arrived in that State cannot justify any discrimination if one takes into consideration the principles of justice. Otherwise, one would be simply replacing the privileged position of the majority nation in a nation-State by the privileged position of a few select nations which arrived there earlier and elaborated a convenient criterion of justification for their privileged position.

As this thesis is concerned with the general ideas and principles of justice and not with political pragmatism, all cultural minorities or national minorities should be treated equally. One cannot establish, ironically in the name of national minority protection, first

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[83]Compare the remarks of Nicolae Titulescu before the *Academie Diplomatique Internationale* in 1929, cited from Nicolae Titulescu, *op. cit.*, note 5, at 131: "Qu'est ce donc qu'une minorité? Les traités ne le disent pas. Doit-il s'agir d'un nombre considérable d'hommes que la race, la langue, la religion distinguent des autres, ou doit-il s'agir de quelques-uns seulement? Les traités ne le disent pas. Doit-il s'agir de groupements établis depuis longtemps ou seulement de réfugiés établis récemment? Les traités ne le disent pas. Les textes parlent, il est vrai, de la différence de race, de langue, de religion. [...] Ce qu'il est important de relever, c'est que les traités qui protègent les minorités sont en fonction d'une réponse à une question capitale ayant trait à la définition de l'objet même de leur protection."

class and second class national minorities on the criteria suggested by Kymlicka. Any conception of two different types of national minorities, different in status and importance, is an invitation to forced assimilation of the lesser type. Forced assimilation is morally repugnant; but voluntary assimilation is not. Hence, as an empirical matter, if it appears that all "recent" immigrants want to be integrated into the dominant culture of the adoptive State, this should not be condemned. *De facto* these two categories of national minorities would be differentiating themselves, and there is no reason why the law should not take cognizance of this. The proof of such desires is not, obviously, self-evident.

I argue here that a more appropriate conception would be to conceive equality of treatment as not necessarily an identity of treatment. Of course, one then has to come up with a more complex justification for the differences of treatment. These might include the proportion of a minority within a State and the actual aspirations and needs of a certain national community. Notwithstanding these terminological difficulties, I think that "cultural minority" is the best term, if one's objective is to assess how one might go about accommodating parallel legal systems. This is because it is a criterion of justification based on **relevant cultural difference** (which is much easier to evaluate in practice).

Only when the cultural difference is relevant, is the co-existence of two or more cultural communities within a legal order reflecting the perspective of one of them problematic. Only then could a parallel system of justice be justified. This, obviously, is exactly the situation of Aboriginal communities within Canadian society today.

A.2 The Value of Cultural Membership

The collective identity of an individual is an important part of that individual's self-identity. Indeed, if one wants to respect individuals then one has to respect also their collective (ethnic/cultural) identity. In order to achieve an equality of individuals, it is necessary to conceive of an equality of all the identities of the individuals. According to Kymlicka, the traditional liberal conception of equality -- equal rights of citizenship -- "gives no recognition to individuals' cultural membership, and if it operates in a culturally plural country, then it **tends** to produce a single culture for the whole of the political community, and the undesired assimilation of distinct minority cultural communities".[84]

A unitary legal system conceived on the basis of the traditional liberal conception of equality raises a number of obstacles for the development of ethnic minorities within a State. Not only does it place individuals belonging to different cultural communities in a disadvantaged position, it has neither the capacity to produce a single culture for the whole of the political community nor the power to force the assimilation of ethnic minorities. Empirical data show this clearly. It is part of the monist mythology that State law can be uniform and that any kind of social engineering is possible through law. But most ethnic minorities are able to overcome the pressure exerted by the State on them; this is how they survive. Take the Jewish communities in Europe as an example. For several centuries, they managed to survive and to preserve their identity in harsh discriminatory conditions that forced them to comply with legal normativities determined

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[84]W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989), at 152.

by different cultures. There is no obvious case where State law managed to produce a unique culture in a society and, as a consequence, there is no case where an ethnic minority was completely assimilated into that society. Neither law, nor political ideology can homogenize a society culturally.

There are two issues here: the importance of cultural membership and the power of the State-law. One has to assess these factors independently. Cultural membership is the focal point in Kymlicka's approach. He seems to rank the cultural (ethnic) identity of the individual on the top of the individual's concerns or even above them. But ethnic identity is just a part of the individual's identity; there is also a political community identity, which is as important as the ethnic identity. Because individuals form a community, they cannot be, in any way, subordinated to it. Kymlicka's view of community as having a moral existence and claims of its own is suspect on this ground, as is his consequential quarrel with liberalism.

A community exists because the individuals composing it exist: the claims of the community are, again, the claims of the individuals composing it. A community cannot have an existence beyond that of its members and cannot have claims beyond those of the individuals belonging to it. A community has no value of itself; those values considered as being of a community are the values shared by the majority of the individuals forming that community. That is: "It is not that community is unimportant to the liberal, but simply that it is important for what it contributes to the lives of individuals, and so cannot ultimately conflict with the claims of individuals".[85]

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[85] *Ibid.*, at 140.

Although Kymlicka disagrees with this position, any contrary conception of the individual-community relation would mean to conceive a Kafkian universe. Logically, the claims of a community cannot come in conflict with the claims of the individual members' claims and the community and the individual could compete for the same moral space. Certainly, conflicts are possible among the members of a community, but not between community and its members. In an attempt to reconcile the liberal "individualism" with the "salience of cultural membership", Kymlicka evokes pre-World War II liberal thinkers like Mill, Hobhouse, Green and Dewey who only emphasized the importance of the feeling of nationality. However, the feeling of nationality, as important as it is, should not be exaggerated.

Ethnic membership is a process; states, nations and nationalities are merely stages of the evolution of human societies and their merits and virtues are just a function of time and space. Cultural/ethnic membership is valuable as long as it concerns the reference system for one's identity. Subordinating the individual to the community is not only undemocratic, but it also gives no ground upon which to build an argument in favour of accommodating parallel legal systems.[86]

A.3 Individual Freedom to Choose an Ethnic Identity

Ethnic identity and cultural membership are fluid concepts. There is no absolute determination of such a notion. Each individual constantly considers and re-considers

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[86]See the discussions in A. Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities" (1991) 66 *Notre Dame Law Review* 1219; F. Glatz, "State, State-Nation, Cultural Nation" (1993) 1 *European Review* 385.

her/his own position within a cultural community, evaluates her/his degree of integration into that community through the degree of overlapping individual values and the values statistically established as community values and construes her/his own concept of "cultural membership" or "ethnic identity".[87]

Even though it is impossible in practice to have a totally free option to choose an individual ethnic identity, the meaning of such freedom must be understood in a broad sense. From such a perspective, the ethnic identity of an individual cannot be conceived as just a mere accident of history, where the individual's will or power has no role whatever. In the case of mixed families all sorts of formal criteria have, in the past, been established in order to determine the ethnic identity of members. Yet very little, if any, consideration has been given in such situation to the choice that might be made by individuals. Such criteria were based, in the best case, on certain assumptions concerning the possible ethnic identity of an individual or, in the worst case, on an external choice, more or less arbitrary (blood criterion, kinship criterion, *etc.*).

Although the importance of freedom of choice is obvious in the case of mixed families, this cannot be denied also in the case of the families with a uniform ethnic background. In this latter case, freedom of choice concerning ethnic identity can be understood as the freedom to reject a certain ethnic identity or as the free choice of an individual to be integrated and assimilated into another ethnic identity. Kymlicka highlights criteria for establishing ethnic identity that are used in the case of mixed

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[87]For a general justification of this approach to identity see M.-M. Kleinhans and R.A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997), 12 *Canadian Journal of Law and Society* 25.

families from Aboriginal reservations in Canada and the United States. In both cases these criteria to determine ethnic identity (the blood criterion in U.S., the kinship criterion in Canada) have emerged in large part due to the limitations of territoriality in the application of the law. These criteria were conceived to prevent overcrowding on reserves, a purely pragmatic rather than principled rationale.[88]

It follows that the criteria for determining ethnic/cultural membership served, in fact, as mechanisms of control in order to prevent the overcrowding of a certain territory which was granted a special status. Ethnic identity became mainly a function of territory; little, if any, consideration was given to the individual's choice, or, in this case, even to the community's choice. Preventing the overcrowding of the territory of the reserve has nothing to do with the individual-community relationship. Kymlicka's critique of Glazer's approach to individual freedom of choice concerning ethnic identity is not justified. In fact, given his view that Glazer "misconstrues our relationship to our cultural community", his critique is much more sentimental than rational. The question is who are "we" in Kymlicka's approach as every individual construes individually her/his own cultural/ethnic membership value and ranks it among other individual values. Again, this is not to say that the community, in itself, lacks any value ; the community has the value that each member gives to it. Mainly, the community provides individuals with a system of reference.

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[88]See W. Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989), at 148: "If the band population grew at a natural rate from purely intra-band marriages, there wouldn't be a problem. But when there are a substantial number of marriages to people from outside the band, if the majority of such mixed couples prefer to live on the reserve (as they do), then there will soon be a problem of overcrowding. Unless there is the possibility of expanding the land-base, some mechanism is needed to control the membership."

Ethnic communities, no matter how defined, are not and can not be in reality closed communities in which historical accident is ranked as supreme destiny. Ethnic communities are not a goal in themselves, except if one considers a nationalistic approach, and therefore, only when the "feeling of nationality" is developed beyond a reasonable limit. Ethnic communities are primarily means for satisfying the cultural, spiritual, economic, political, juridical needs of their members. Another aspect of freedom of choice for individuals concerns the protection of the ethnic/cultural communities. It has been claimed both by Kymlicka and by others, that it is necessary to have a set of criteria through which the access of allogenous elements be prohibited or limited in order to protect and preserve a community.

Referring to the Aboriginal communities in Canada, Kymlicka concludes that "in all cases there are restrictions on the marriage and voting rights of both Indians and non-Indians : these are viewed as the concomitant of the reservation system needed to protect Indian cultural communities".[89] Yet such an assertion merely fudges some central questions of identity and membership: by whom are these measures viewed as such? By Indians? By non-Indians? By both? By the members of mixed families?

Likewise Kymlicka asserts: "allowing new residents in the community to receive education and public services in English would weaken the long-term viability of the community. Not only will new residents not have to fully integrate into the minority culture, the establishment of an anglophone infrastructure will attract new anglophone arrivals

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[89] *Ibid.*, at 149.

who may have no interest in even partial integration into the Aboriginal community. ..."[90] Of course, it is highly questionable that the "long-term viability" of a community is "weakened" by the arrival of new allogenous elements. But even more importantly it is simply incoherent to assert as a goal the creation of a pure, uniform ethnic community within some clear ethnic boundaries in the name of pluralism and in the name of the protection of minorities.

As a matter of fact, the situation of ethnic minority groups in the reservation is exactly like the fate of ethnic minorities in nation-States. The ethnically different members of a reservation must be assimilated into the majoritarian ethnic group just as it was thought in the past that the ethnic minorities of a nation-State should be assimilated into the majoritarian nation. Such a solution is, of course, problematic. If all ethnic groups existing in a given territory cannot co-exist on an equal basis, the very purpose of setting up parallel legal systems to enable the development of a pluralist society would be undermined. While some argue for the theoretical possibility, it is not realistic, at least in the modern world of mass mobility, to conceive a society as being formed of a multiplicity of ethnically compact and uniform territorial enclaves.[91]

Every community has its own mechanisms of self-control and practically, in normal circumstances, the "death" of an ethnic community is impossible. Historical data supports this conclusion. Cultural interaction among ethnic groups is not a phenomenon that can

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[90] *Ibid.*, at 150.

[91] See J. Laponce, "The Case for Ethnic Federalism is Multilingual Societies: Canada's Regional Imperative" (1993) 3 *Regional Politics and Policy* 23.

be controlled externally. Human societies have always interacted and influenced each other and it is utopian to imagine that territorial delimitation or even territorial insulation is equal to cultural delimitation or insulation. An ethnic community can be externally suppressed only if its members are physically suppressed. Therefore, the "death" of an ethnic community (in the sense of being caused externally) is possible only in such circumstances. The survival of an ethnic community from this perspective has everything to do with demography and not with the territorial distribution of other ethnic groups in the habitat of that specific ethnic community.

Assuming for the sake of argument that it is possible to see the death of an ethnic community otherwise than in the terms of a complete suppression of its members, in such a hypothesis it would be possible that an ethnic community undergoes a process of degeneration (whatever that could mean) and that this process has no external causes (forced assimilation, *etc.*). In such a hypothesis it is then illusory to think that an external intervention meant to stop such a degenerative process could be of some help except if it really makes a difference for the revitalisation of the mechanisms of self control of that endangered ethnic community. If these self-control mechanisms are completely lost, then the end of such an ethnic community is due to occur, sooner or later, in spite of any external intervention. Limiting the access of new-comers to a certain territory inhabited mostly by a certain ethnic group has a very little, if any, impact on protecting that ethnic group.

This is not to say, however, that the politically-oriented migration of a population to a given area in order to change the ethnic composition of that area should be

encouraged. States should not intervene in this field either limiting, or by encouraging ethnic migration. Moreover, if such limitations of access of different ethnic elements to an ethnic enclave involves the limitation of the freedom of individual's choice concerning her/his own ethnic identity then the outcome is even more damaging for both individuals belonging to different ethnic communities and for the recipient ethnic community. Ethnic diversity in itself has never been a weakening factor for an ethnic group. On the contrary, ethnic diversity stimulated both an awareness of individuals of their ethnic identity and a beneficial competition among the existing ethnic communities.

B. Cultural Continuity of a National Group

Jeremy Webber[92] argues in favour of parallel systems of justice from a quite different standpoint: the need to preserve the cultural continuity of an ethnic community. This approach offers a more valid perspective on the relationship between culture and law. Webber argues, based upon his own understanding of the significance of culture to law, that the need of an ethnic community to manage its own cultural development is a sufficient justification for organizing parallel systems of justice within a given state.

Like Kymlicka, Webber uses the case of Aboriginal communities in Canada as an illustration. His argument and reasoning "tries to justify the conviction that one can have Aboriginal systems of justice which are, in a very real sense traditional, but which

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[92]J. Webber, "Individuality, Equality and Difference. Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 133.

nevertheless are open, respectful of individuality and adaptable".[93] "Aboriginal justice is", Webber asserts in trying to give content to the idea of what comprises a system of justice, "above all about restoring continuity with Aboriginal ways of talking about society".[94] This perspective is worth further elaboration since legal normativity is a direct outcome of the cultural environment. Legal values and their hierarchy are established in function of cultural factors.

B.1 Cultural Difference

Although it is rather simplistic to say that each ethnic community has a unique culture, for the purpose of accommodating parallel legal systems this is a quite convenient starting point. Provided that the cultural variations within a given ethnic community are relatively insignificant when taking into consideration the accommodation of parallel legal systems, it could be assumed for practical reasons that each ethnic community has a unique cultural basis. Therefore, each ethnic community perceives the law from the perspective of its cultural basis. If States were formed only of a single ethnic community then the existence of a single legal system would not be logically problematic. But since modern states incorporate several ethnic groups it is necessary to know and evaluate the perception of each ethnic community both toward the legal system and the legal values enforced by the majority ethnic community.

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[93] *Ibid.*, at 135.

[94] *Ibid.*, at 138.

There are cases -- and this is currently the approach taken by Aboriginal communities in Canada or the U.S. to the criminal law -- when ethnic minorities perceive the legal system of the majority ethnic group as being excessively harsh. This makes the accommodation of the values and practices of such ethnic minorities even more difficult. There are other cases when ethnic minorities perceive the legal order of a certain State as too tolerant -- the case of the Moroccan community in Holland is a contemporary example. In both these cases there is a **cultural difference** that can justify the accommodation of parallel systems of justice. Theoretically speaking it is not difficult to conceive parallel systems in either of these circumstances. The situation of conflict between the culture of the ethnic minority on one hand and that of the majority ethnic group on the other cannot be solved effectively and efficiently unless a solution based on the equality of all cultural/ethnic communities is envisaged. But to do so apparently diminishes the status of the majority culture.

Webber explains in detail why this apprehension is not well founded. He explores three types of objections to parallel legal systems -- those based on the protection of individual liberty, those based on the legitimacy of authority and those based on equality -- with a view to demonstrating how the perspective and theoretical approach he has adopted effectively meets these objections. It is important to understand how cultural difference among ethnic communities influences their perception of a given legal system, in what conditions such a cultural difference could justify the accommodation of parallel legal systems, and if this solution is the only one which could solve the problems raised by such a cultural difference. Because of the variety of cultural perspectives and historical conditions, however, it is unlikely that a universally accepted theoretical

framework could be set up and used as a working tool for deciding how and when the accommodation of parallel legal system should be pursued.[95]

Consider the following questions: How can cultural difference be assessed? How can the dynamics of cultural evolution and interaction be monitored? When is a cultural difference a good enough ground for accommodating parallel legal systems? And, in what conditions is such accommodation acceptable, or even possible? On the basis of his analysis, Webber concludes that a parallel system of Aboriginal justice may, in certain circumstances, be justified; but the fundamental question -- a question he did not set out to answer -- remains: what are these circumstances?

B.2 Cultural Membership - Political Membership

Another question that is worth more attention concerns inter-cultural or inter-ethnic interactions. There is practically no state with a uniform ethnic composition and it is almost impossible to delimit States on an ethnic basis. How, then, can one conceive the accommodation of parallel legal systems and, at the same time, improve the co-habitation of various cultural/ethnic communities within a given state or a given territory as members of a broader community? The issue is this. Does not a society need a single set of values to prevent itself from disintegrating under the centrifugal forces of diversity?

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[95]See A. Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities" (1991) 66 *Notre Dame Law Review* 1219.

Webber responds by asserting a "core value" approach to inter-ethnic relations. He states: "Being a member of a society and sharing its benefits may well require acceptance of certain standards - basic standards essential to continued co-operation. That was the idea underlying my suggestion that participation in the broader Canadian society may require a measure of consistency in minimal standards of conduct, upheld by the criminal law or other means. We should be careful, however, not to exaggerate the need for uniformity."[96]

The need to identify the minimum common standards for all members of a political community is quite obvious. On this issue, it will be relatively easy to secure a wide agreement; less agreement will be reached as to the extent of these "minimal" common standards of conduct. The dilemma is how to ensure the cohesion of all the society by enforcing a set of common norms for all members of the political community without harming the opportunity of a certain cultural/ethnic community to develop its own system of justice. So, what is going to be left of the traditional construction of the legal system of a cultural/ethnic community after elaborating such set of common norms? Or, conversely, to what extent a parallel system of justice on ethnic grounds can be accommodated without harming the cohesion of the whole political community? A "juste milieu" between exaggerating the need for uniformity and exaggerating the need for diversity must be reached.

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[96]J. Webber, "Individuality, Equality and Difference. Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), 133, at 152.

At this point some concluding observations about how to find such a "juste milieu" are in order. To begin, it is not sufficient to say that human rights and criminal law should be common, but the civil law can be diverse. Especially in relationship to procedure and punishment, there are great divergences between, for example, the approach taken by Canadian criminal law and that taken in Aboriginal circles. Indeed, much of the rationale for pursuing the idea of parallel systems of justice comes from the comparatively very high percentage of Aboriginal peoples now placed in Canadian jails and prisons. By contrast, there appears to be little disagreement between Aboriginal and non-Aboriginal approaches to issues like contracts and torts.

Many other examples may be given. One of the key divergences relates to the manner in which processes of conflict resolution and civil disputing are understood.[97] In addition, numerous issues relating to the status of women and equality between sexes are at the core of divergences between ethno-cultural groups.[98] The point is, therefore, that in any given inter-ethnic situation, the precise contours of the parallel regime will have to be carefully negotiated. There can be no *a priori* or formal criteria for identifying what branches of law, and what types of legal issue are appropriate for accommodation in a parallel system.

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[97]For detailed empirical studies see: S.C. McGuire and R.A. Macdonald, "Tales of Woes and Woes From the Masters and the Muddled: Navigating Small Claims Court Narratives" (1998), 16 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 48; S.C. McGuire and R.A. Macdonald, "Small Claims Courts Cant" (1996), 34 OSGOODE HALL LAW JOURNAL 509; and S.C. McGuire and R.A. Macdonald, "Judicial Scripts in the Dramaturgy of Montreal's Small Claims Court" (1996), 11 CANADIAN JOURNAL OF LAW OF SOCIETY 63.

[98]See, for example, W. Weyrauth and M. Bell, "Autonomous Lawmaking: the Case of the Gypsies" (1993) 103 *Yale Law Journal* 323.

C. Common Aspects of Both Trends

Kymlicka's and Webber's approaches have several common elements. To trace these it is important to distinguish between the idea of delimiting territory on ethno-cultural grounds, and the consequences of doing so for ethno-cultural minorities within the territories so created. This will show where both approaches fail to give adequate expression to what might be called suppressed cultures -- those that do not immediately relate to visible manifestations of identity such as gender, skin colour, language, or even religion.[99]

C.1 Territorial Delimitation on Ethno-cultural Grounds

Both approaches (collective rights and cultural continuity) take into consideration a territorial dimension when envisaging the accommodation of parallel legal systems. In Kymlicka's approach territorial delimitation on ethnic/cultural grounds plays an important role whereas in Webber's approach this territorial dimension is not central, although it is noted. Why does this territorial dimension appear in the discourse of accommodating parallel legal systems? Two possible answers can be imagined: (i) because it might be thought that the cultural environment varies in function of territory, and (ii) because it is impossible to conceive parallel legal systems outside the principle of territoriality.

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[99]These suppressed identities are the focus of attention in M.-M. Kleinhans, M.-M. and R.A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997), 12 *Canadian Journal of Law and Society* 25.

The first possible response does not seem persuasive. If we consider the ethnic habitat of a given nation we are sure to identify certain cultural variations. Do each of these infra-nation variations justify, for instance, parallel legal systems? The regional differences in the culture of a ethnic community are typically not **relevant cultural differences**, although in some cases they might be. Only if there were such a relevant cultural difference could one begin to construct an argument for the accommodation of parallel legal systems.

But at this point, another question – central to this entire discussion – emerges: what is a relevant cultural difference? Is it really impossible to have a relevant cultural difference, for example, between the Christian Orthodox Serbians and the Muslim Serbians? Or, is only religious difference or only ethnic difference a good enough reason to think of a relevant cultural difference? Or, is both a religious and an ethnic difference always needed to ground the claim for a relevant cultural difference? The point goes further. Is a relevant cultural difference only tied to religion and ethnicity? Do men and women express a relevant cultural difference? Do social classes constitute a criterion of differentiation?

Obviously, there can not be a right or wrong answer to these questions. The second answer appears to be valid for many authors. The contemporary dominant belief that a uniform law has to be applied exclusively within a given territory left very little room for considering other options in accommodating parallel legal systems outside the principle of territoriality. But the limits of the principle of territoriality are quite obvious and they actually raise serious obstacles in achieving the accommodation of parallel legal

systems. The point is, of course, that it is much easier to address these questions once one abandons Westphalian territoriality as the necessary criterion for deciding the "true" frontiers of a legal system.

C.2 The Territorial Application of Parallel Legal Systems and the Fate of Ethnic Minorities

The reservation system for Aboriginal communities in Canada or any other system that delimits territory on ethnic grounds in order to accommodate parallel legal systems involves a series of inconveniences. It is impossible to find clear, absolute ethnic boundaries in any situation. Within the borders of almost all states there co-exist a number of ethnic minorities. Delimiting the territory on ethnic grounds does not change fundamentally the situation. In the new delimitation there co-exist other ethnic minorities; almost invariably, the majoritarian ethnic group in a state becomes, thus, an ethnic minority in such a territorial delimitation and, moreover, such a territorial delimitation cannot include all the members of the ethnic minority group. Therefore, the situation is changed merely quantitatively and not qualitatively. What is more, the euphoria of creating a new ethnic territory for a previous minority will typically marginalize the claims of those who become themselves ethnic minorities in the new State.

My standpoint is that it is not morally right to ignore the fate of these new ethnic minorities in the name of protecting previously constituted ethnic minorities. That is why I think that territorial delimitations on ethnic grounds in order to accommodate parallel legal systems will never be able to solve the problem of ethnic minorities. In most

approaches it is taken for granted that it is acceptable to assimilate these new smaller ethnic minorities. In fact, they are merely sacrificed on the altar of the principle of territoriality. Another inconvenience of the principle of territoriality is that it encourages directly the phenomenon of ghettoization. Instead of achieving a necessary and useful integration of all ethnic communities within a state, delimitation of the territory on ethnic grounds seems to have more of a communo-pathic effect. Integration in the discourse of ethnic minorities is, definitely, a "red herring" because it might raise assimilationist suspicions. Where the claim for territoriality is based on a previous fear of assimilation, the resulting new State will tend to be monist and will, invariably, itself seek to assimilate its own ethnic minorities.

To approach the problems of ethnic minorities only from the perspective of territoriality, with its concomitant fixation on monist approaches within territories, diverts various authors from the need and from the benefits of a real and equitable integration of various ethnic groups existing in a State. In this respect, a very high moral threshold should be placed upon those who would assert that a parallel system of justice can only be achieved through a territorial division of political authority. This might, for example, be phrased as follows: the case for territorial division of political authority to protect ethnic minorities can only be justified where the new State commits itself to treating its newly created minorities better that its founding ethnic group was treated in the previous territorial State.[100]

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[100]Such a criterion has been proposed in R.A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity" in K. Kulcsar and D. Szabo, eds., *Dual Images [:] Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada - Hungarian Academy of the Sciences, 1996) at 52.

This is not, however, to suggest that the issue of a land-base should be completely ignored in the context of ethnic minorities. In some cases, such as the contemporary situation of Aboriginal communities in North America, a solution to accommodate them might involve a division of territory. But the land-base should not be considered as the gravitational centre for solving the problems of ethnic minorities.

Another aspect which should be taken into consideration when envisaging a territorial division on ethnic grounds refers to the fears of separatism. Fears of separatism, even when the proposed territorial division is a federation, represent an important hinderance for the reforms needed in order to ensure an efficient and sustainable protection of the ethnic minorities. Dividing territory on ethnic grounds invariably fuels fears that a political community will fracture. The key issue is, then, how to manage parallel systems of justice without necessarily generating political separatism on territorial lines. Post-Westphalian ideas of "virtual citizenship" are one possible way of doing so.[101]

3.5 Parallel Systems of Justice in Transylvania - A Theoretical Hypothesis

In the Carpathian-Balkan region the problem of ethnic minorities stirs huge passions. As the history reviewed in Chapter 2 illustrates, there are few parallels in North America to the situation in Transylvania. The question of an autochthonous population was addressed first more than two millennia ago, and no territorial reservations for the

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[101]See, for example, A. Ong, *Flexible Citizenship* (Durham: Duke University Press, 1999); R. Janda and D. Downes, "Virtual Citizenship" (1998) 13 *Canadian Journal of Law and Society* 27.

Getae exist. In addition, present ethnic competition is clouded by alternative histories: several different ethnic groups have their own explanations as to why their claims are primary. Still further, there exist ethnicities that have never had social power, who lie in the margins of these more visible ethnic conflicts: for example, jews and gypsies. Finally, much of the current situation derives not so much from ethnic claims, as from political claims of present States that invoke ethnicity as a rationale for their territorial designs. For all these reasons, any attempt to consider the potential of parallel systems of justice to accommodate ethnic and cultural minorities in Transylvania must first address these socio-cultural factors. Unfortunately, however, because of the specific historical situation of the region ethnic minorities are widely perceived as a *taboo* issue and attempting to address their problem is thought to cause political destabilization.

A. Taboos About Ethnic Minorities

The situation of ethnic minorities understood in sociological terms is generally perceived as a *taboo* subject because it is so volatile. Attempting to address their problem is thought to cause political destabilization. Maintaining the stability of borders has captured all the attention and little concern has been given to the specific needs of the population. While borders have frequently moved in the past, the population has been largely immobile. For this reason, the political stability of the region depends not only on the stability of the borders but also on the regime governing the treatment of ethnic minorities. A more sensitive and democratic regime of the ethnic/cultural minorities in the Carpathian-Balkan region is consequently the key to ensuring the political stability of borders.

It is from this perspective that the problem of ethnic minorities in Romania -- and especially the case of Transylvania -- has been approached. Once one is free of social *taboos*, it is possible to undertake research and analysis that considers all possible outcomes. In the sections that follow, two territorial solutions alternative to the *status quo* of maintaining Transylvania as part of Romania -- are rejected.

These are, namely: (1) transferring Transylvania from Romania to Hungary, which would merely reverse the status of Hungarian and Romanian populations without addressing how either minority is treated, and would in any event not address the needs of any other minorities; and (2) creating an independent State in Transylvania, which would require an enormous effort at constitutional and institutional design with no guarantee that the various claims of different ethnic minorities could be accommodated in a manner that did not generate claims either for further Balkanization, or the annexation of certain territories into Hungary or back into Romania.

The point rather is to consider the potential of imagining parallel systems of justice to accommodate ethnic minorities in Transylvania as one possible outcome that does not involve border revisionism. From a theoretical point of view the idea of parallel systems of justice appears as just valid for Romania or Hungary as for any other state. Whether it is so from a pragmatic perspective is another question.

The objective here is primarily to illustrate that it is possible to have a different conception of the role of law and a different view of the relation of law and the political State than that heretofore dominant among jurists. Such a different conception would

have, necessarily, implications for the way inter-ethnic relations are imagined in Romania today. Already some steps have been taken to improve the situation of the Hungarian minority: it now participates in governmental organizations; the Democratic Union of the Hungarians from Romania is part of the governing political coalition.

These steps are different than the earlier attempt to create some sort of quasi-federal territorial solution through the Magyar Autonomous Region (1952-1965). Rather than address the ethnic question indirectly by carving out administrative territory, the attempt should be to do so directly by ensuring participation.[102] Obviously, developments designed to enhance public political participation should continue. But it should be noted that they still rest on the hypothesis of a single legal order.

The challenge is to imagine how to put into practice the idea of parallel systems of justice. Of course, while this is rarely noticed, to do so would not be so much a new departure as it would be a return to an earlier form of accommodation. For example, until the inter-War period there was in Romania a parallel system of private law for the Turkish minority in Dobrudja. In Transylvania, as well, until the rise of the dualist monarchy one could find evidence of parallel systems of justice -- although to be fair, as the first part of this thesis reveals, this was a highly discriminatory parallel system.

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[102]For an argument as to why this is a preferred option see R.A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity" in K. Kulcsar and D. Szabo, eds., *Dual Images [:] Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada - Hungarian Academy of the Sciences, 1996) at 52.

B. Imagining a Theory of Parallel Legal Systems for Transylvania

The main comparative sources for imagining and justifying parallel legal systems in liberal democracies were based on the situation of the Aboriginal communities in Canada. One important lesson of this experience is that trying to find an identical solution for African-Americans in the U.S. and Aboriginal communities in Canada is unworkable. Each situation has a specific set of problems and calls forth a different range of possible solutions. What form, therefore, might the idea of parallel legal systems take if it were to be applied to the situation of ethnic minorities in Transylvania?

Four observations are in order.

First, the proposed criterion of justification -- relevant cultural difference -- is a workable system of reference for the accommodation of parallel legal systems in Transylvania. The cultural difference must be significant in order to justify the implementation of such a system. This requires one to carefully assess the situation, being careful not to exaggerate either the similarities or the differences between the cultures in issue. It also has the advantage of not limiting the cultures in question to those in dominant political contestation, but recognizes the potential for claims by truly minority cultures.

Second, the criterion of application of parallel legal systems should not be territorial. Law should be seen as a personal attribute of citizens and not the attribute of territory. This ensures an effective and efficient solution to the problems of ethnic

minorities that does not generate fear of territorial partition and separatism. As a result, the inevitable claims to border revisionism can be sidestepped. Of course, this means that institutional accommodation must also be envisioned. In some cases, this can be accomplished by enhancing the sensitivity of judges and other officials to the normative regimes of minority cultures; in others, it will require the development of culturally specific dispute settlement institutions.[103]

Third, the principle that the member of the ethnic minority must have the right to choose the applicable legal order is fundamental. In those cases where there has been historical harm caused by the majority culture, persons choosing to identify with the minority ethnic/cultural community must be given satisfaction for any harm they have suffered in any situation where they interact with members of the majority culture. Because such satisfaction is also culturally determined, the claimant cannot be told what this redress will be, but must be able, should she or he so wish, to articulate this redress within the frame of his or her own cultural perspective. This presumably means that he or she must have the right to demand the application of his or her own legal system.

Fourth, it is important not to be essentialist about what constitutes ethnicity and culture. Once one begins to examine the possibility of parallel legal systems based on relevant cultural difference, the question of culture itself comes into play. One could then imagine that many other non-ethnic cultural differences might be sufficiently significant

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[103]For a discussion of these complementary strategies, see R. A. Macdonald, "Justice, Immigration and Legal Pluralism" in P. Kelly, ed., COLLOQUE DANS LE DOMAINE DE LA JUSTICE ET DE L'IMMIGRATION (Ottawa: Metropolis Project, 1997) at 94; and R. A. Macdonald, "Should Judges Be Legal Pluralists" in ASPECTS OF EQUALITY: RENDERING JUSTICE (Ottawa: Canadian Judicial Council, 1996) at 229.

as to merit a claim for accommodation through a parallel legal system. This possibility should not be discounted in complex geographic locations like Transylvania where personal, group, national, social, linguistic, religious and economic identity are so fractured.[104]

[104]See, generally, on the complexity of defining culture uniquely through ethnicity, J. Clifford, *The Predicament of Culture*, (Cambridge: Harvard University Press, 1988); and C. Geertz, *The Interpretation of Cultures*, (New York: Basic Books, 1973).

4. FINDING CONCLUSIONS BETWEEN UTOPIA AND REALITY

Parallel systems of justice should not be conceived as a goal in themselves. Rather, they are a means of solving the problems of accommodating different cultural communities existing in a given political State. Obviously, this is not the only solution to the problem. Ethnic cleansing, forced assimilation, voluntary assimilation, migration, and border revision are others that have been tried over the years. Indeed, even Jeremy Webber, who argues for the idea of a parallel system of Aboriginal justice does not do so as an absolute. He says that his argument "does not suggest that a completely separate system is essential or even desirable. It may even be that no separation is necessary."[105]

However, if one considers the pluralist perspective then it appears obvious that in each state there are multiple legal normativities. Such a perspective also suggests why it is preferable to avoid the term parallel -- all these legal normativities are not separate, but in fact interact and influence each other. What must be constantly held in view is that these spheres of law envisaged by such multiple systems of justice do not undermine the political sovereignty or the territorial integrity of any given State. Besides, such multiple systems of justice cannot be conceived as completely separate systems of

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[105]J. Webber, "Individuality, Equality and Difference. Justifications for a Parallel System of Aboriginal Justice", in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), 133, at 155.

justice; there will be in each state a minimal set of common norms for all the members of the political community as a point of intersection of all the systems of justice within a state and there will also be always a continuous interaction among all these various systems of justice.

The legal mythology that today presents the law as the monopoly of the state and as an attribute of State sovereignty can no longer be analytically justified. That is why imagining a state with parallel legal systems involves a paradox: nothing will change and, yet, everything will be changed. To say nothing will change means that the formal *status quo* of that State will be preserved; both the political sovereignty and the territorial integrity will be maintained. And yet, everything will be changed; both the notions of law and that of State will be reconsidered and a broader notion of the equality of all the members of a political community will be promoted.

When thinking about the practical possibility of accommodating parallel and multiple systems of justice in Transylvania, serious consideration must also be given to securing the socio-political preconditions that would make such a development possible. There are, on the analysis presented here: (i) promoting political reconciliation among all the other States in the region who see members of their own national groups as minorities in other States; and (ii) strengthening the stability of the frontiers by generating a better treatment of one's own ethnic minorities than the treatment afforded other national minorities by neighbouring States. The integration of States from this area into European and Euro-Atlantic inter-State networks appears to be a catalyst favouring the achievement of these two preconditions.

Not surprisingly, a legal pluralistic perspective that contests the monopoly of the State on the production of law will, at the same time, rest on the recognition that political reconciliation and the recognition of the multiple legal systems of ethno-cultural minorities go hand in hand.

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