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Migration, Population Exchange and Culture in the Hungarian National Strategy

Judit Tóth

Is there a Strategy on the Foreign Labour Force in Hungary?

Abstract

The author analyses the labour migration *trends in Hungary in recent years on the basis of hardly available statistics and public data. The workers' migration pressure in enlargement process and in period of transition measures have been below the expectations, labour authorisation of foreign workers remained non-accepting, rigid and bureaucratic without impact assessment of implemented provisions and economic effects. The Ministry of Foreign Affairs launched a foreign affairs strategy preparation project in 2007, while in August it proposed a decision on the European policy to the Government. Does it mean a new epoch in labour migration policy in Hungary? The article can describe only a continuous dilemma of the kin-state, community building, modernisation and economic competitiveness. The author describes an indirect labour migration policy which is going ahead together with combating illegal (labour) migration on the bumpy road towards a promising land of workers' acceptance and integration.*

Trends on labour migration to Hungary

Researchers have faced numerous shortages in statistical and public data system coming from three major sources: (a) labour office, (b) migration authority and (c) Central Statistical Office. The labour and immigration statistics cannot produce figures on the base of different legal categories that became more complex due to enlargement and transitional provisions on labour market. Although certain efforts for reform are going on in the ministries and Central Statistical Office, the existing proceedings and the practice of legal implementation have not been in harmony. There is an absence of public data base of judgements and labour permits, thus it is impossible to analyse and draw conclusions on jurisprudence on movements or relating authorisation issues to migrant workers. Although the right to access freely to information on public interest is a

fundamental right,[1] neither the Act on Statistics,[2] nor on Protection of Personal Data and on Free Accession to Information of Public Interest[3] contains concrete and standard method of implementation. The Act on accession to electronic information[4]entered into force on 1st January 2006, and some progress can be seen on homepages of authorities, state agencies and publicly financed institutions, but detailed statistics and up-to-date information are not available significantly easier. A Electronic data bases of judgements at appealing and the Supreme Court theoretically are available after 1 July 2007. Further on, enlargement, new bilateral agreements or provisions changed in the middle of the year are not covered by the yearly statistical brake or ratio.

Taking into account these circumstances, it can be said that the migration of EEA nationals and family members is stable. In comparison the data of issued labour permits, registrations, green cards and seasonal permits in 2005-2006[5], the migration activity of nationals of EU15 and EFTA did not increase, it has remained marginal, while the appearance of labourers from EU-8 is growing, in particular from Slovakia. Practically we are speaking of frontier or commuting workers (multinational companies carry daily the workers from Slovakia to Hungary for 12 hour-long shifts which is partially attractive for local unemployed people). The third country nationals' activity in labour migration is also stable but it is rather higher than that of EEA labourers. *(Table 1)*

Labourers from the EEA and third countries play different roles in sectors. The EU15 and EFTA nationals are represented in *financial services and processing industry*, while third country nationals are employed in building industry, trade and processing industry to a great extent. This difference is probably connected to the differing qualification of the two groups. If we have a look at the rate of labourers from *A8 a further disproportion can be seen: 80% of them is employed only in processing industry and financial services*. It means that workers from the EEA are employed in processing industry and financial services.

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[1] Article 60. (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest. (3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the public access to information of public interest and the law on the freedom of the press. (Constitution of the Hungarian Republic)

[2] Act XLVI of 1993

[3] Act LXIII of 1992

[4] Act XC of 2005

[5] Source: Állami Foglalkoztatási Szolgálat – FMM [Employment Service – Ministry of Employment Policy and Labour] and Bevándorlási és Állampolgársági Hivatal [Office of Immigration and Nationality Affairs]

Table 1: Labour migration in Hungary in 2004-2006

	2004	2005	2006
EU 15: Labour permit holders, green card holders and registered workers	2 064	2 322	2 349
EU 10: registered workers	12 457	15 932	17 893
Labour permit holders (third country nationals)	51 868	44 600	44 377
Total	66 389	62 854	64 626

Since August 2005 there has been an employment booklet available at labour authorities for occasionally hired foreigners and foreign spouses of nationals without labour permits. Though this booklet was introduced in 1997 only the recent amendment facilitated lawful employment and taxation, as well as social insurance contribution in a simplified way with fixed tariff fee for local employers and foreign labourers. In 2005 the work of segregated nationals and unemployed persons was equal with about the whole year activity of 11,000 workers (2,188,826 working days). The 68,107 working days of non-nationals in August-December of 2005 can be considered as marginal (3% of the total) but 2,236 foreign workers representing 97% were recruited from three countries: Slovakia (64%), Romania (23%) and Ukraine (10%). In average 12% of these working days were employed in agricultural seasonal work. It means that 2/3 of the temporary work booklets were used by Slovak nationals, and the remaining 1/3 by Romanians and Ukraine nationals. This reflects quite well the general tendencies characterising the Hungarian labour market as regards the representation of foreigners.

According to locality 60% of the occasional labour was employed in one county next to the Hungarian-Slovakian border and 18% in two rural counties. The total number of temporary booklets issued was 275037 and 124079 validated. In the year of 2005 the number of temporary work booklets issued for foreigners (non-Hungarians) was 9209. Out of this only 2236 booklets were validated (24,3%). With the validated booklets foreigners worked a total of 68107 days. 80% of the working days (56 thousand) fell upon the district Komárom-Esztergom (border region to Slovakia) where mostly Slovak nationals are employed. 3-3% fell upon Csongrád and Bács-Kiskun district while Budapest took only less than 1%. In the first half of 2006 the number of requested temporary work booklet was 230 000. At least 4 million € were paid as social insurance contribution and tax through this channel.[6]

[6] Népszava, 2006.aug.21., MTI július 24.

Table 2: Motivation of applicants for one-year long valid visa

Applicants for staying visa (D) for reason of	2002	2003	2004	2005	2006
Employment, labour	7 660	26 421	30 957	19 374	23 604
Study	5 095	6 742	4 721	3 659	3911
Visit	1 040	2 026	3 518	1 876	1509
Money making	856	1 340	1 823	906	891
Family re/unification	218	1 283	1 914	1 232	1805
Seasonal labour	0	796	779	34	34
Official trip	216	230	121	171	103
Medical treatment	15	20	37	21	16
Other	2 282	3 676	4 263	3 438	2 647
Total	17 382	42 534	48 133	30 711	34 520

Speaking of migration in a broader context we can give details on procedures of visa, residence permit, settlement permit and naturalisation as well as expulsion decisions,. The first observation is that the number of lawful migrants was growing in 2006 (+16%) in comparison with the previous year by the migration authority (OIN). Furthermore, employment, labour and study represents the major motivation of foreigners' entry to Hungary in growing numbers. *(Table 2)*

Although the absolute number of refusals was growing, the rate of success has increased for a staying visa in the application processes. *(Table 3)* It would require a deeper analysis whether it is thanks to better trained clients or less prepared officials.

As *Table 4* proves, the components of residing migrants have altered in two directions: the number of non-commuting labourers is reduced – perhaps due to certain liberalisation of the labour market – while the rate of students and family reunifications increases.

Among the applicants for residence permit the three leading positions have not changed since 2002: the major source of lawful migrants has been Romania, Ukraine and China. The rejection rate of applications slightly decreased but has remained really low (3.5%) including prolongation of

Table 3: Success of applicants for visa

For staying visa (D)	2002	2003	2004	2005	2006
Issued	15 800	37 838	44 701	29 362	32 714
Rejected	1 494	2 360	2 092	1 349	1806

Table 4: Applicants for residence permit

Applicants for residence permit on the reasons of	2002	2003	2004	2005	2006
Employment, labour	18 186	20 347	24 902	29 958	26 746
Study	5 436	5 559	4 855	4 693	5 297
Family re/unification	4 850	5 773	6 486	7 884	8 466
Remuneration, money making	4 310	3 206	2 232	658	479
Visit	1 483	1 391	1 923	1 916	1450
Official trip	207	193	79	105	109
Medical treatment	55	57	61	68	40
Other	2 798	3 011	3 994	1 384	4 000
Total	**37 151**	**39 564**	**44 532**	**46 666**	**46 587**

the validity. It raises the question how effective is the screening of authorisations in the territory of the county and also – looking at success in visa applications – abroad. According to field research[7] visa procedures are no more than a "game of presumptions". Furthermore, residence authorisation is supposed to serve as another screening method but the figures for holders (stock data) below represent actual staying persons. *(Table 5)*

Table 5: Stock of residence permit holders (2006)

By nationality of	Residence permit holders on 31 December 2006
Romania	21 473
Ukraine	5 386
China	4 114
Szerbia-Montenegro	2 216
Vietnam	1 601
USA	1 312
Others	8 584
Total	**44 686**

Among the residence permit and permanent residence permit holders (under the name of settlement or immigration permit owners) there are a lot of labourers indeed *(Table 6)*. Furthermore, permanent residence permit entitles to be employed without permit, therefore practically all of this type of authorisation makes a continuous working activity in Hungary possible.

[7] Luca Váradi: The Visa in Practice at the Serbian and the Ukrainian borders. *Regio*, Vol.9, 2006:150-178

Table 6: Stock of permanent residence permit holders (by changing legal categories)

Nationals of	Settlement permit holders on 31 December 2006	Immigration permit holders on 31 December 2006
Romania	21 434	23 139
Ukraine	3 784	4 654
Serbia-Montenegro	1 868	7 497
China	1 232	3 547
Russia	388	2 642
Vietnam	380	1 402
Others	2 428	9 788
Total	**31 514**	**52 666**

Table 7: Decrease of expulsion migrants

Expelled foreigners by nationals of	2002	2003	2004	2005	2006
Romania	3 301	2 881	2 573	2 735	2 024
Ukraine	824	833	634	955	312
Serbia-Montenegro	516	233	100	120	190
Moldova	340	166	143	67	64
China	240	89	98	48	54
Turkey	132	82	74	50	21
Other	742	545	589	401	367
Total	**6095**	**4 829**	**4 211**	**4 376**	**3 032**

Taking into account of the reasons of expulsion, the number of overstayed, illegally employed migrants was decreasing in 2006, in particular coming from Ukraine, Romania and Turkey *Table 7*). Otherwise, this reduction can be explained by the efficiency of entry and residence screening. However, the expulsion cases have been gradually reduced to half of figures of those in 2002.

The migratory movement described above can be supplemented with data on tourism gathered by the Central Statistical Office.[8] Accordingly, the yearly number of foreigners entered was 34 million in 2004, 36.2

[8] Jelentés a turizmus 2006.évi teljesítményéről. KSH, Budapest, 2007.

million in 2005 and 38.4 million in 2006. *Table 8* shows the foreigners' motivation of travel in 2006. Naturally, the number of persons is overlapping with number of entries, thus entry of (lawful and unlawful) labourers and commuters cannot be separated. However, 2.6 million cases of entry with labour motivation is much higher than the total number of all labour authorisation, registry or free accession to (lawful) employment.

Furthermore, of the visitors only 1.2 million persons required any kind of tourist services in Hungary while the overwhelming majority of foreigners entered, such as Romanian, Slovakian, Polish and Serbian visitors spent daily less than 20 € per capita. Who can suppose the the majority of entered foreigners were tourists or shopping visitors? On the other side, 16.6 million Hungarian nationals (cases) visited abroad in 2006 and from them 6.5 million (cases) went to Austria, 4.5 million to Slovakia and 1.7 million to Romania. What was their motivation? Among the one day spending travellers 15% left for labour; that rate was doubled in 3 years (from them 31% to Austria, 19% to Slovenia and 9% to Croatia), and among the more days spending travellers 10% left for labour. All in all, we can suppose an extensive rate of irregular or illegal (seasonal, occasional, commuting) remunerated work in Hungary and across the borders, too. Taking into account the low employment rate of the active age population in our region and the differing structure of labour force[9] and the level of salary in the old and new member states, regional labour migration (across Hungary) remains a standard component of migratory movements.

Table 8: Motivation of foreigners' entry into Hungary in 2006

Motivation	**%**	**Number**
Transit	38.2	14.7
Shopping	18.1	6.9
Tourism, free time programmes	28.0	10.8
Labour and employment	6.6	2.6
Business, conference tourism	4.5	1.7
Studies	0.8	0.3
Other	3.7	1.4
Total	**100**	**38.4 million**

[9] Education level of population in active age (25-64) in A10: 15% with low education, 67% with medium education and 18% with high education. In EU15 this rate is: 33%, 42% and 25%. In Romania and Bulgaria this rate is 25.5%, 60.1% and 14.4%. See A KSH Jelenti 2007/6: Gazdaság és társadalom. KSH, Budapest, 2007.

Summing up, the labour office can provide basic information on lawful employment of non-nationals. These figures may cover a narrower circle of migrant workers. Irregular and illegal workers entering or staying as visitors, family members or students can be better calculated on the basis of data from the migration office (OIN). It can be made more colourful by the general statistics on tourism in the year of concern. However, only trends and no precise (stock and flow) data on labour migration can be described through existing statistics in Hungary. It has to be taken into account in a strategic planning unless significant improvement of statistical system is devised as a part of the modernisation in migratory movement management. However, labour migration pressure on Hungary has not been dramatically increased in the enlargement period and this solid trend of migrant workers' movement can be projected in the (near) future but would also be necessary from the same sending region.

Legal rules on employment of foreign labourers

Describing the normative and administrative system on labour migration[10] in the last 17 years we may conclude that it has been more and more complicated, continuously changing and not based on impact assessment but rather on prejudices. Briefly, the following legal categories shall be divided:

a) The non-EEA nationals and persons under the transitional measures of the Accession Treaty can be employed in all kind of remunerated work in the possession of labour authorisation (permit, visa and/or residence permit) until its validity. Procedure takes about 120 days at least without appeal, while issued permit is applicable utmost 365

[10] 1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról [Act on Job Assistance and Unemployment Benefits], 8/1999 (XI. 10.) SZCSM rendelet a külföldiek magyarországi foglalkoztatásának engedélyezéséről [Decree of the Social and Family Affairs Minister on Work Permits Issued to Foreign Nationals in Hungary] Up to 22 October 2007 it was amended 7 times. 354/2006. (XII. 23.) Korm. rendelet a Bolgár Köztársaságnak és Romániának az Európai Unióhoz történő csatlakozását követően a Magyar Köztársaság által alkalmazandó, a munkavállalók szabad áramlására vonatkozó átmeneti szabályokról [Government Decree 354/2006 (XII. 23.) on the transitory rules applicable to free movement of workers by the Republic of Hungary after the accession of the Republic of Bulgaria and Romania to the European Union], 93/2004. (IV. 27.) Korm. rendelet a Magyar Köztársaság által az Európai Unióhoz történő csatlakozást követően alkalmazandó munkaerőpiaci viszonosság és védintézkedés szabályairól [Government Decree on the rules of labour market reciprocity and the safeguard measure to be applied following the accession of the Republic of Hungary to the European Union] that was amended by the Government Decree No.107 of 2006, 2 May and No. 218 of 2006, 9 November. The bilateral labour agreements as well as specific form of labour (volunteers, training, seasonal workers, service providers on the base of contract) are regulated in further legal documents.

days in the working place designated in it. The price of the transaction of authorisation is also high (personal submission of the application to the consular office, fee, authentic translation of necessary documents, health checking fee, time-synchronisation of travel, labour and employment periods and validity of documents).

b) Preferences are given for family members, certain EEA nationals and in determined jobs in authorisation, e.g. labour permit is issued without labour-market, economic necessity test. In other aspects of the general procedural rules shall be implemented. Bilateral agreements in yearly quota and in determined professions provide simple labour authorisation such as for Romanian and Bulgarian labourers for transitory period.

c) Labourers from new member states (A8) can be employed but its registry is required in parallel at the labour office by the employer. It is relatively simple administration but there is an estimation (10-20%) on the absence of registry in Slovak-Hungarian relations. It is more related to avoid taxation (shadow economy) than to illegal migration. The occasional labour booklet is also applicable in which paid taxation-stamp proves legality of employment.

d) The best privileged third country nationals and labourers from liberalised EEA countries are lawfully employed without labour authorisation. Exceptions are broad including refugees, settled migrants, athletes, key persons in top management, researchers, study-practitioner, clergymen, participant in short term posting and labour-exchange. Its preconditions are frequently altered and rationale is not clear.

Only two practical examples are given to demonstrate the weak efficiency of existing labour regulation.

There is the Government Resolution No. 2251 passed the 23th December 2006. It decides the administrative tasks on labour management in accordance with the Accession Treaty of Romania and Bulgaria providing a facilitated labour authorisation in sector in need of foreign labour force. It requires a quarterly scrutiny of the list of facilitated labour permits issuing for labourers from Bulgaria and Romania by the Ministry of Employment and Labour Policy. In addition a ministerial review of the implementation and first year experiences of temporary provisions is also ordered. The Government prescribed the necessary analysis of the labour authorisation system in practice up to July 2007 together with necessary modifications.

Although the minimal and maximal fine for illegal employment (e.g. employment without labour permit) was increased in 2006 (its minimal amount is 2000 € for the first time, and repeated infringement of the law is

3750 € in proportion with the level of lawful monthly salary), its retentive or preventive power is limited due to rare labour inspection control. The risk is really low for small and micro-entrepreneurs. As a branch leader of the Labour Inspector Office said: there are more cases when procedure is based on notices on an illegally employed gardener, babysitter, etc. coming from neighbours[11].

A foreign strategy and EU policy in germ

In 2006 the Minister of Foreign Affairs launched a public and expert debate on the foreign strategy of Hungary. This unique and ongoing project has remained in closed circle despite of electronically available sub-topic papers,[12] and interactive exchange of views in web and at local, academic or civil meetings. Although a foreign relation strategy may belong to the Republic or to the Government, democratic discussion on strategy may put into the shade the responsibility and accountability of the public power, Furthermore a connection to the common European foreign and security and defence policy limits substantially our democratic consent on a foreign strategy – as the Minister designates the finalisation of the discursive process[13]. The available sub-topic papers containing a situation analysis, possible scenarios, proposals on priorities and instruments have to face the contradiction of newly obtained independency and immediately voluntary framed sovereignty of the state in the Euro-Atlantic integration. Neither the timescale of strategy, nor organic relations to the economic, employment, law enforcement, migration or other policies are defined in the project, while foreign affairs have no own manoeuvring room beyond diplomacy.

Reading the available policy papers, labour migration is a marginal and not a strategic or comprehensively approached issue although it appears almost in each of them.

a) *Hungary has to stand for a liberal labour market* in the EU. Hungary as an internal periphery in the EU – at least until accession to the

[11] A büntetés minimum egymillió, Piac és Profit (29.03.2006)

[12] Sub-topic papers made by the Central European University and Hungarian Academy of Sciences are as follows: (a) security interests of Hungary in a bilateral and multilateral framework; (b) global environment forecast in medium-term; (c) economic aspects of security; (d) strategic issues of a successful EU membership; (d) neighbourhood policy and its tasks; (e) national identity and its keeping up; (f) cultural diplomacy; (g) social and cultural implications of foreign policy. These reflect results of discussions, too. http://www.kulugyminiszterium.hu/kum/hu/bal/Kulpolitikank/kulkapcsolati_strategia/

[13] At a press conference held on 19 February 2007 the Minister of Foreign Affairs (Kinga Göncz) announced that the government's new foreign relations strategy would be finalised by July this year.

euro-zone – cannot enjoy too much advantages of membership due to low development. For this reason free circulation of (cheap) workers must be provided based on the principles of equality and salary-advantage. Up till now only 50 000 Hungarian labourers are employed in the EU26. A wider liberalisation is due gradually in 2015 and after. Competitiveness and security of marketing equally requires liberalisation.

b) *Protectionism inside against free entry of foreign labourers into the Hungarian labour market is tacitly supported* because "there is no burning need for foreign labourers in the Hungarian economy, foreign investment can be absorbed by the domestic labour force in stock although since mid-1990s there has been a shortage of labourers in the Western part of the country". However, "Hungary becomes a net labour migration recipient, thus the low salary level of newcomers is the interest of the state". Hampering the free movement of production factors "at first glance means the protection of social model but political reactions explain it in each state". The introduction of transitional limitation against Romanian and Bulgarian labourers, reciprocity principle against EEA non-liberal labour markets and the whole incoherent labour authority belongs to this policy. Looking at contradictions of liberalisation outside and "economic patriotism" being simultaneously kept up inside the paper claims that "opposite interests shall be represented in parallel". Modernisation of Hungarian economy depends on external resources, thus labour migration and long-term migration policy would contribute to technological development and security of investment "although it demands a severe change of attitudes". However, the radical modernisation of vocational training and public education system in the next 10 years cannot be compensated or substituted by labour migration. This ambivalent policy has been accomplished in disregarding public debate on the Green Paper of the European Commission on labour movement, its common regulation or reluctant transposition of Directive on long-term migrant status that provides an almost free circulation at EU labour market[14]. Whether it

[14] The European Commission initiated in infringement procedure against Hungary for non-compliance with the residence directives (2006/0446-0451). The Hungarian government submitted two Bills in order to transpose the Directive 2004/38/EC and the Directives dealing with third country nationals' rights to the Parliament on 10 November 2006. The Parliament adopted the text (Act I of 2007 on the entry and residence of persons exercising their right to free movement and Act II of 2007 on entry and residence of third country nationals) at its plenary session on 12 December 2006. The new Acts introducing a completely new set of rules delete the rules in force. The Acts were published on 5 January 2007, and it enters into force on 1 July 2007.

means the faltering of reciprocity principle: if the others are liberal, we follow them but not earlier.

c) *Strong European cohesion policy* shall be supported. Due to enlargement heterogeneity inside the Union is growing and neither the reform of CAP, nor employment or education improvement can solve the high unemployment rate, low economic activity and deep poverty in rural areas in the new member states. Moreover, convergent programmes catching up budget and currency stability towards the EMU rally may provoke further social and political instability that shall be compensated by union financial instruments.

d) *Cultural diplomacy can improve the influential power* of Hungary as a complementary instrument to traditional foreign policy. It would require a stable finance and institutions of foreign representation of Hungarian and minority identity, festivals, cultural events while its governing competence, role or connection with tourism has been missing. In fact more scholarships for foreign as well as Hungarian students from state budget, supports for cultural projects would effect labour migration too.

e) *European Neighbourhood Policy shall be better developed for Eastern-European liberalisation of markets and improvement of security*. For this purpose national development planning shall be harmonised and iterated between Hungary and adjacent states including employment and human resource development policy. Full implementation of Schengen acquis may impede people-to-people contacts but "settlement of ethnic Hungarians from neighbouring countries to Hungary cannot solve the Hungarian deficit in demographic, skilled workers and social insurance but it endangers modernisation of the sending environment and community".

f) *A stable system of values* can absorb differing cultures and external impacts transmitted by migrants, minorities, intercultural exchange and dialogue. Hungary is not supposed to become an influential destination country but national identity and solidarity shall be developed or modernised to receive back emigrants, to accept multiple attachment and integrate immigrants through language teaching, scholarships, electronic networks inside the diaspora as well as protection of linguistic rights. Preparing integration measures, an "integration contract concluded with migrants" would be introduced which contains community services, individual efforts, rights and obligations. Migration policy cannot be isolated from the modernisation of health care, social care, public education, vocational training, with their interactions taken into account.

Regardless the ongoing discussions on foreign affairs strategy, the Government adopted a non-binding *decision on the "Europe Policy"* on 2 August 2007 – announced the spokesman of the Government. It was submitted by the Minister of Foreign Affairs referring on results of public debates that was respected by the Government. Although Hungary has not had European an integration strategy for ten years, and evaluation of its success is absent, the strategic decision covers the period up to the further planning period of community policies or to the end of the mandate of next European Parliament or Commission. The policy paper contains solemn slogans, glittering principles and goals related to the EU not in harmony with above described (academic) papers and debates. For instance, there is no answer what is the relation of European policy to foreign affairs strategy taking into account the CFSP and ESDP, or what is the major vision of the EU as an international actor. However, labour migration also indirectly appears wrapping into other themes as follows.

a) *Further enlargement is the key element of openness, moralistic and political liability of the Union*. Hungary "has a specific mission to support the integration of Balkan". It is not clarified whether supporting their migratory movements or only the accession to their markets is meant.
b) *Illegal migration* appearing on eastern and south-eastern borders of the country involves organised crimes, smuggling, trafficking in human beings, epidemics and supply of terrorism. Combating illegal migration and "providing aims to Balkan states in fight against them" *requires measures at EU level* that "avoid the dividing borders between states". However, the "Schengen external border control, visa policy and good neighbourhood may confront ad interim with possible risks of migration" and this non-separation concept. It is regrettable that a detailed decision has not been declared whether the government can accept further diversity of counter-migration legal instruments, such as to penalise the employers of irregular migrants[15]or it prefers economic, consumers' awareness raising or victim-oriented measures, actions.
c) *Competitiveness of economy demands higher employment activity, liberalisation in circulation of workers in parallel keeping up with the European social model*. It includes ongoing reforms of social security and evidence of impacts on prosperity of liberalised labour markets in 2004-2006. Ambivalent relation of labour movement to protectionism

[15] On 16 May 2007 the European Commission issued a proposal for a Council Directive providing for sanctions against employers of illegally staying third country nationals COM(2007) 249. See legal dilemmas of impact assessment, proportionality and effectiveness in Carrera, S. – Guild, E. 'An EZ Framework on Sanctions against Employers of Irregular Immigrants' *CEPS Policy Brief*, No.140, Bruxelles, August 2007.

and enlargement also can be detected in unification of ethnic Hungarians under the umbrella of the Union in 2006.

d) *A European policy on innovation and R+D is urged which includes support of researchers' mobility.* We add that without support at least 30 percent of academics, researchers from ECE countries have left in recent decade.[16] However, the transposition of Council Directive 2005/71/EC does not provide a liberal set of supportive conditions of admitting third-country scientists, neither does the Governmental initiative on innovation policy explain how it means to add value to the Amsterdam Process and European Research Area and to return migration of qualified brains.

Conclusions

After a decade of integration efforts and accession experiences where Hungary had neither foreign/European strategy, nor a comprehensive migration policy based on comprehensive statistics, within some months the Ministry of Foreign Affairs initiated a European (integration) strategic paper. The Government adopted this non-binding, decision which stressed goals and principles in August 2007. The relation of the publicly announced *European policy* paper would be a part of the ongoing foreign affairs strategy process, or a separate parallel instrument in the hands of the governing power. In the first case the adopted document is premature because the whole discussion is (officially) not finished, the available sub-topics are not amalgamated into a comprehensive one, there are some controversies in it and the Ministry of Foreign Affairs has not confirmed or adopted them. It would be a worse scenario if the adopted decision would mean a ready, equivalent instrument with a widely disputed comprehensive foreign affairs strategy. However, a continuous and ambivalent policy can be detected concerning the labour migration in the strategy papers:

a) *the whole issue of migration and major stream of workers have remained marginal and indirectly outlined.* It means that no analysis have been made on organic contacts of labour migration to modernisation, employment shortages in given periods or regions, as well as

[16] With regard to the effect of the European integration in Hungary, about 6000 Hungarian PhD students and post-doctoral researchers live and work all over the world (primarily in the USA) who, consequently, do not give their knowledge to Hungary and the EU. According to other estimation half of left persons would return to Hungary. It requires specific re-integration supports, scholarships, research teams, grants and post-national approach to third country nationals' admittance. See Illés, S. – Lukács, É. 'Towards Researcher Mobility' *Európai Tükör* (Journal of the Ministry of Foreign Affairs) Special Issue, August, 2007, 139-155.

its mid-term and long-term social, economic and cultural impacts concerning both immigration and emigration. For this reason prior experiences are not used in projections or calculations.

b) In the previous decades *liberalisation of labour market* in Hungary was covered by the *ethnic migration dilemma* whether the kin-state would or could attract and seduce ethnic minority as labourers leave the homeland of ethnic communities empty. After the eastward enlargement another context has been raised: whether liberalisation of EU15 labour market provides further employment for Hungarian nationals on an *equal footing* giving up transitional measures in reciprocity, our labour regulation ceases to be protectionist but never selective impediments for non-nationals. It takes some years that may assist the government to further postpone genuine decisions how to improve migration and labour statistics, how to change attitudes towards otherness, how to react on wage-pressure and brain drain, how to accomplish the reform of vocational training, labour inspection, work authorisation and tripartite system of the employment of foreign workers. During this time coercive measures and sanctions against illegal migration (and employment) have been developed stigmatising exploited victims of employment.

Summing up, employment, migration and labour migration policy as determined clearly on the basis of its own principles and relevant applicable instruments is within reach but its direction is not yet visible.

Pál Péter Tóth

The Role of Migration in the Development of Hungarian Demography

(Migration as a means of population increase)

Abstract

The article explains that all through recorded history, Hungarian population has had two main sources the internal one, depending on the productivity of Hungarian nationals and external, provided by those non-Hungarians and their descendants who joined the Hungarians and eventually assimilated to them. After WW1 the dissolution of the Austro-Hungarian Monarchy and the creation of new states around Hungary with a considerable Hungarian population in them changed the age old pattern: the external increase of Hungarians in Hungary was mainly represented by Hungarians migration into Hungary from the neighbouring states, thus, though the proportion of Hungarians within Hungary has increased, the number of them in the Carpathian Basin has remained the same, only their regional distribution having been changed.

Migration and demographic development

It is obvious that the process of migration movements play an important role in demographic developments. This role can be positive or negative – viewed from the sending or the receiving sides. The result of migration is a decrease in the population of the sending community and an increase in the receiving one. The ensuing result is not simply growth or decline of the population but will also modify other demographic specifications.

It is well known that in its history in modern times – from the middle of 19th c to the 1990s – The major participants in the classical processes of migration were young males who not only amended the men – women ratio of the receiving community, but also turned the relations of the age group composition in favour of the younger generation. In the sending communities developments counter act. In addition to the above direct demographic effects indirect ones (e.g. change in the rate of occupation, that of educated people, etc.) must also be taken into account. Of the indirect effects of migration the present study is especially focusing on the

question of productivity of the migrants. It is important to understand that it is not only his self the migrant adds to the new community or distracts from the old one but also his progeny appears as addition or lack in the new and old domicile respectively.[1]

When analysing the role of migration in demographic developments it should not be forgotten that the two major forms of migration – internal and external – play entirely different roles in demographic developments. In the case of external migration the effect is not restricted to the given sending community, to the direct and indirect influence over its population, but it effects the whole population of the country the sending community is a part. In the case of internal migration, though the migrants decrease the number of the local population, their movement do not influence the number of that of the country. On the long run, however, the migrant coming from an area with a higher productive rate usually takes up the lower productivity rate pattern of his new domicile and thus inside migration can lead to the demographic decline of the whole country.

The above scenario is unambiguously supported by experience as well as the findings of international research into international migration, namely that its role has proved to be positive in the population growth of the receiving countries while it is negative from the point of view of the sending ones. Apparently if a country's population is decreasing and at the same time growing older, moreover the tendency cannot be stopped, changed or reversed by any methods of population policy, the demographic increase could be attempted at by involving migration processes.

Keeping the basic contexts discussed above in mind, it has to be analysed what role has been played by the processes of international migration in the Hungarian demographic developments to increase the declining population of Hungary.

Historical flashback

There have been two interdependent processes to model the development of the Hungarian population since the time of the Hungarian settlement (end of the 9th c.). One element is demographic growth determined by the productivity of the Hungarian people themselves modified by the rate of

[1] The particulars of international migration have gradually changed since the 1990s. It most apparent in the tendencies of the composition of migrants according to gender , age, education and occupation. The composition of gender was the first to change, with the proportion of women gradually increasing. It was accompanied by the change of rates of education, occupation and age of the migrant. However, the more frequent participation of the older generation is new. It is closely connected to the migrations during the 1970s – 1980s to unify families.

death as well as the composition according to age and gender. The second element is represented by external factors, i.e. foreign elements assimilated to the Hungarian people adding to the result of the processes of the first factor by its own demographic growth.

This second element is not homogeneous being composed of three layers. To the first one belong those non-Hungarian groups which arrived together with the Hungarians to the Carpathian Basin; to the second belong the non-Hungarian people who had already lived in the territory before the arrival of the Hungarians; the third group consists of foreign, non-Hungarian groups and their descendants who were invited or accepted into the country by the Hungarians. Most of the members of all these groups became assimilated to the Hungarians in the course of their living together, and they and also their descendants continuously added to the productivity of the Hungarians. The complementing role played by non-Hungarian people in the population counts as a characteristic feature of the Hungarian demographic developments.

The results of the historical and historical demographic research have proved that by the time of the Hungarian settlement the majority of the non-Hungarian companions (and their descendants) had already changed their own ethnic identity and became Hungarians. Thus from the 11th – 12th cc their role in the demographic development was no longer additional and complementary but became an integral part of it.

The members of the people living in the Carpathian Basin not yet assimilated to the Hungarians together with the with the foreigners migrating there at later periods reproduced and kept alive the mechanism by which themselves and their progeny provided the population growth with a continuous reproductive source.

The Hungarian Kingdom and the territorial distribution of its people ensured suitable frame, background and conditions to keep up this complementary role and the process of assimilation too. The majority of the Hungarians occupied the central areas of the Carpathian Basin and by necessity this was the area where the central military, political, economic, cultural and administrative functions were concentrated. This means that this was the area where Magyarization of part of the non-Hungarian population and that of the foreigners migrating internally from the periphery toward the centre also was more dynamic.[2]

In agreement with the above explanation, it can be declared that in the centuries after the establishment of the Hungarian Kingdom till the end of

[2] There was also a parallel migration of Hungarian nationals toward the centre which reinforced considerably the assimilatory role of those areas.

World War I (WW1), the growth of the Hungarian population was ensured by the natural productivity of the Hungarian people complemented by the descendants of those non-Hungarian people who either had already lived in the Carpathian Basin or migrated there and became assimilated in the course of the centuries.

A break in the Hungarian demographic developments

The disruption of the unity of the Hungarian Kingdom as well as the military and civilian losses during WW1 caused serious changes in the Hungarian demographic developments. The state compressed within its new borders lost the important principle defining its population growth till 1918, namely the demographic contribution of the non-Hungarian people living in the outermost regions who, when migrating to the mainly Hungarian populated central areas, played an important role in the Hungarian demographic processes as they represented an additional source of the increase of the Hungarian population. Since then inner migration meant only regional rearrangements of the inhabitants according to the requirements of modernizing processes (as has been its function ever since). However, not only the role of inside migration has changed but also that of outside migration. With the new borders the attraction of Hungary as a migratory target changed and after the peace treaty became mainly important for Hungarian nationals who became the citizens of the newly defined neighbouring states. The result was that with their migration Hungarian nationals living outside Hungary did not increase the number of Hungarians living in the Carpathian Basin any more, but only the population of Hungary (though this is still preferable than their assimilation or migration to a third country; thus the number of Hungarians does not decrease in the Carpathian Basin for the short and middle term).

As the consequences of the above discussed developments since 1918, the migration toward Hungary have accelerated the processes which can be summed up as the concentration of Hungarians of the Carpathian Basin within the territory of Hungary causing obvious negative results in the demographic developments both in Hungary and among the Hungarians living in the neighbouring countries. As a necessary outcome of the changes – increased loss due to death, assimilation or emigration – the decline of the size, productivity and age-composition of the sending Hungarian communities in the neighbouring countries has been accelerated; in consequence the fragmentation of Hungarian nationals have become more pronounced just as the processes of their assimilation and the diminishing of their territories. Sooner or later population substitution would be the result

outside of Hungary slowly destroying those values created by Hungarians living there throughout the centuries.

Thanks to the continuous migration into Hungary its population is still above 10 million and the homogeneity of the inhabitants has become more pronounced.[3] Notwithstanding the basic problem, namely the decrease of the number of the Hungarian population, its tendency to grow old, or the reversal of the processes, will not be solved.

1. The population of Hungary between 1870 and 2006

Year	**Persons**
1870	12 996 653
1880	13 749 603
1890	15 231 527
1900	16 838 255
1910	18 264 533 *7 612 114*
1920	7 986 879
1930	8 685 109
1941	14 668 496 *9 316 074*
1949	9 204 799
1960	9 961 044
1970	10 300 996
1980	10 709 463
1990	10 374 823
2001	10 195 513
2006	10 067 000

Note: the first five census show the number of inhabitants of Hungary as part of the Austro-Hungarian Monarchy without Croatia. In order to represent the major relationships, the data for 1914 and 1941 given in italics are calculated to refer to the present territory of Hungary. From 1949 on the data represent the situation after WW2.[4]

The outcome of a possible official assistance, silent acknowledgement of Hungarian nationals migrating from the neighbouring countries to Hungary would prove to be disastrous on the long run. The dysfunctional influence of the described processes would *render the decrease of the*

[3] For the 2004 census data about the demographic characteristics of national-ethnic attachments declared by those born abroad cf. Tóth – Vékás 2004.

[4] Népszámlálás 2001. Központi Statisztikai Hivatal, Budapest, 2001. és a szerző számítása a KSH népmozgalmi adatokból (Demográfiai lekérdező). [Census 2001. Central Statistic Office. Demographic Questionnaire].

Hungarian population in the Carpathian Basin (Hungary included[5]*), and especially the increase of the old age group of the population irreversible*. While the migration to Hungary from the neighbouring countries would not stop the population decrease and senilescence in Hungary, it would result in the weakening and eventual disappearance of the demographic background of the Hungarian population in their present domicile.

The ensuing changes and demographic tendencies are clearly shown by the data below.

The number of the Hungarian population who became citizens of the neighbouring states decreased by a million in the last 90 years. The data of the 1910 census registered 3 175 000 people Hungarian nationals in the territories annexed after WW1; in 1991 the number was 2 667 000 (Hoóz 1996:937); and the process did not stop: in 2001 there were only 2 174 921 people who claimed to be Hungarian nationals living in the neighbouring countries. Percentage rates reflect the demographic losses of Hungarians even stronger. The proportion of Hungarians living in areas now belonging to neighbouring states has sunk from 32,1% in 1910 to 20,7% by 1991 and to 17,6 % in 2001, compared with the total of Hungarians living in the Carpathian Basin.[6] The population of Hungary attained the figures shown in Table 1 in 1920 and 1949 through the hundred thousands of Hungarians settled over the areas given to the new states.

Though on the short run the migration of those Hungarian nationals and their descendants who became minority inhabitants after 1918 to the once central territory increased the population of Hungary, it challenges even the restricted system of long-term conditions of the Hungarian demographic developments. It must be recognized that the result of the movements toward Hungary will endanger first the conditions of life of the sending communities and later that of the whole Hungarian population, eventually even liquidating it.

The loss of the migrants in the sending community not only decreases the number of the Hungarian population and their productivity and increases the proportion of old people but it also means that the territory will continuously be smaller too where now Hungarians are still living. Thus the migrants – unintentionally – further the fragmentation of those

[5] In 2003 the number of the Hungarian population, together with those Hungarian citizens who declared belonging to national minorities, was 26 474 persons more than 10 million; in 2004 it was 9 986 633, in 2005: 9 963 775. Thanks to 130 109 foreign citizens in 2004, 142 153 in 2005, the number of the inhabitants remained above 10 million.

[6] According to the latest census data the number of Hungarians living in the neighbouring states has increased only in Austria by 21,2%. In the other countries there has been a decrease: in Croatia 26,2%, in Hungary 6,6%, in Slovakia 8,2%, Slovenia 27% %, in Serbia 14,7%, in Ukraina 4% in 2001 and in Romania 11,7% in 2002.

staying behind on the one hand and quicken their assimilation to the majority people on the other.

It can be stated that since 1918 the role played by international migration in the demographic developments of Hungary, if regarded not only from the point of view of Hungary but the whole area of the Carpathian Basin, has been contrary to its earlier effects.

Future possibilities

It is very complicated to modify the factors which define demographic processes, especially to change the rate the older persons. Due to their characteristics it is impossible to influence even the short-term rate of decrease. On the middle term, on the other hand, in the next 15-20 years there may still be certain chances if aided by adequate demographic policy. The conception of the future Hungarian demographic developments can only be successful if the long term tasks are not restricted to the population of Hungary but – notwithstanding their fragmentation – all Hungarians are considered to be a unity.

It has been already mentioned that after 1990 the number of the inhabitants remained over 10 million, thanks to the immigrants who compensated for the decrease caused by natural loss and emigration. It would logically mean that the future population increase through migrants would still represent an important part of the Hungarian demographic processes. It could be true indeed if only the majority of the new settlers in Hungary had not come from the Hungarian communities of Romania, Serbia and Ukraina. It has been explained too how the silently accepting or deliberately supporting attitude toward the migration of Hungarian nationals from the neighbouring countries to Hungary does not solve the population decrease in Hungary but by its dysfunctional consequences renders forever impossible the long term possibilities of the Hungarian demographic developments still existing in the Carpathian Basin. Since there is little chance for important changes in the ethnic composition of the immigrants at present it would be advisable to choose other ways and means to increase the population.

What to do?

Due to a decline in the number of marriages, increase of divorces, the tendency toward partnership, deliberate childlessness, postponing childbearing to a more mature age – as well as to other demographic factors no radical changes can be expected in the coming years. According to

international experience, however, it is possible to positively influence the willingness to raise children in the countries where there is an active and complex family policy complete with financial aid and services in kind complemented with a many-sided employment system. (Tárkányi 2001) If there is a mutual will, the rate of natural population loss and the seniliscence accompanying it, can be slowed down. The data of Table 2 show the major changes in the population movements between 1960 and 2006.

2. Major figures of natural demographic movements, 1960–2006

Year	Marriage	Births	Deaths	Natural growth, Loss (-)	Marriage	Births	Deaths	Natural growth loss (–)
					Per 1000 people			
1960	88 566	146 461	101 525	44 936	8,9	14,7	10,2	4,5
1970	96 612	151 819	120 197	31 622	9,3	14,7	11,6	3,1
1980	80 331	148 673	145 355	3 318	7,5	13,9	13,6	0,3
1990	66 405	125 679	145 660	–19 981	6,4	12,1	14,0	–1,9
2001	43 583	97 047	132 183	–35 136	4,3	9,5	13,0	–3,4
2002	46 008	96 804	132 833	–36 029	4,5	9,5	13,1	–3,5
2003	45 398	94 647	135 823	–41 176	4,5	9,3	13,4	–4,1
2004	43 791	95 137	132 492	–37 355	4,3	9,4	13,1	–3,7
2005	44 234	97 496	135 732	–38 236	4,4	9,7	13,5	–3,8
2006	44 528	99 871	131 603	–31732	4,4	9,9	13,1	–3,2

Note: life expectancy was 68,59 years by men, 76,91 years by women in 2004. The netto reproduction index was 0,618 (based on the death rate of the year) in 2004. The number of the inhabitants of Hungary was 10 066 158 persons on the 1st January 2007, i.e. 10428 less than a year earlier.[7]

The family is the basis, it is the oldest voluntary community, the fundamental unit of society with its most important functions of raising its progeny. Since nowadays every newborn threatens the household with poverty, the marginalization of families must be stopped (Spéder 2002). Material goods should be distributed more justly for everyone to have an equal share of the socially accepted expenditure serving the raising of the new generation. Raising children is a long term investment for the family, only stable conditions have a favourable influence upon it. Thus

[7] Gyorstájékoztató. Népmozgalom 2005. január–december. Közzététel: 2006. február 27., illetve Gyorstájékoztató. Népmozgalom 2006. január–november. Közzététel: 2007. február 22. www.ksh.hu.

what is necessary is the realisation of a family subsidy system based on the consensus of the parties in the parliament spanning election cycles that takes into account the preferences and changed economic circumstances of the population.[8] It would also be necessary to transform public thinking where children will appear as the most important and natural gift of life who are not a burden, not a 'disaster' hindering or even ruining the career of the parents and especially that of the mother. Contrary to a practice favouring short-term financial balance, demographic policy should prefer families and family-like communities to aim at improvements in productivity, increase in the number of birth and decrease in the mortality rate.

Considering what dysfunctional consequences migration can have population increase in the Hungarian demographic developments, the existing people should be offered the possibility necessary for them to become active members of the society and successful in the labour market, till the necessary concepts required by the hoped-for changes of the demographic processes are formed and through practical measures realised.

Population decrease can be slowed down if the infants can grow up to have equal opportunities in social life. It is not only a question of decreasing infant and child mortality but every infant must be given a chance to grow up into adulthood in good health and in possession of the necessary education. There is no research to tell what a percentage of infants are without any prospect, when growing up, to participate in the social, economic etc. life of the country. Their estimated percentage could be around 20%. If normal conditions were realised a considerable number of children could start their path of life as well prepared Hungarian citizens, yearly about 18-20 thousand of them and already from 2025 or 2030.

There are reserves in the area of mortality too.[9] In the past fifteen years there were 500 thousand more death than birth. Though there was some decrease in the past years the death rate has remained high and is lastingly influencing the Hungarian demographic processes. Nevertheless it seems encouraging that this improvement concerned males and it can be supposed that under the advanced state in Hungary the unjustifiably high mortality will decrease in the decades to come. If this tendency wins and we shall be able to talk about a change in the mortality pattern we will be able to recognise the tendencies in the reduction of population loss too.

At present, however, there are still too many of the deceased belonging to the age group whose work would have been needed by the society for

[8] The experience of the last decade points out the direction since any negative change in the family policy had a negative influence upon child bearing decisions. It is also noteworthy that even if the abolished bonuses were reinstalled they could not fulfil their earlier role.

[9] In Hungary men's mortality per year is 1,5 greater than in the EU countries in general.

a longer time.[10] In case it could be achieved to diminish the mortality of those under 60 at least by 10% and later by 20% by mobilizing the 'reserves', it would be a great step forward in slowing down the rate of population loss.

Generally speaking, if all the infants growing up will be able to start their adult life in health and in possession of all the necessary knowledge and in addition the mortality rate of those prematurely deceased would be decreased, it would be a progress in the reservation of the size of the population and the slowing down the rate of its growing old without needing a considerable contribution of the Hungarians immigrating from the neighbouring countries. This would mean the first important step in reorganising the population development and preservation of the number of Hungarians in the Carpathian Basin.

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[10] In 2004 8,4% of the deceased belonged to the age group 15 – 49 years, and 9.9 % to the one of 60-65. If the supposition is right, there could have been about 2400 Hungarians still with us.

Attila Z. Papp

The Institutional Network of the Preservation and Maintenance of National Identity: Press and Media

Abstract

The article analyses the role of the press written in Hungarian outside the borders of Hungary: the printed press, with its old and new publications; the audio-visual media, and more recently the new medium of on-line press. It is also an important question, how these media are influenced and influencing themselves the social mobility in the areas where Hungarian nationals live as minorities.

1. The most important developments and tendencies between 1990 and 2006 and the present situation

From the beginning of the 1990s the Hungarian press of the neighbouring countries has been the most sensitive to the changes as it had frequently been directly involved on these changes. The changes of the media happened at three stages: in the sphere of the printed press, audiovisual and electronic media.

While the educational sub-system is more inert because of its character, press and especially printed press can react more flexibly to any kind of social changes (i.e. it is easier to start a paper than found a school). As a consequence a novel development of the printed press manifested itself after 1990, partly through the starting of new papers, partly through the renewal of the content of the old ones. While the new papers aimed frequently at the strengthening of the local powers, the renewed old papers became the outlet of the old-new elites which supplied the vocabulary necessary for the audience to understand the changes. In other words, this is the sphere where everyday ideology was created to preserve and maintain identities connected to minority life. Therefore the press became a constant bone of contention and the reordering of proprietorship was more frequently politically motivated than not.

Analysing the make up of the printed press it is apparent that (apart from certain re-namings) it has not been radically altered. In all the regions

the newspapers have been preserved which counted as important from the point of view of the Hungarian minority: in the Uplands *Új Szó* (since 1949), in Banat *Magyar Szó* (1944), in Transcarpathia *Kárpáti Igaz Szó* (1920) published at Ungvár. There have appeared important new papers through which the minority elite tried to 'colonise' the press through direct or indirect influence. Such papers are *Krónika* (the successor of old *Előre*, after 1989 renamed as *Romániai Magyar Szó*), *Új Magyar Szó* in Transylvania, *Kárpátalja* published at Beregszász in Transcarpathia, and characteristic is the fate of *Kárpáti Igaz Szó*, which now is being published as two separate papers of the same name (one printed in green, the other in black).

Besides the newly created system of the printed press, the important changes in audiovisual media – the second pillar – should also be mentioned. Local radio and television broadcasting was introduced in all the regions, and the development of the satellite dish and cable network television has enormously increased viewing. Since 1993 Hungary's Duna TV has been available in all the regions and the transmission of Hungarian commercial channels can be received too. Commercial television of the individual countries has also developed offering a keen competition to broadcasting in the Hungarian language.

The third pillar of the Hungarian press beyond the borders of Hungary is represented by the new appearance of online news. This again is a great challenge for the printed press because of the novel ways of presenting new kinds of news. Albeit still slowly manifested but already there is a competition among the web sites offering news, as well as the institutionalisation of them along political trends. At the same time the media of the first, traditional, line also have created home pages to widen their readership as well as to overcome the problems of distribution and to reach regions farther away from their localities.

Since this is a new segment of the Hungarian press beyond the Hungarian borders, here is a list of the more important websites[1]. In Transylvania the best known website is www.transindex.ro. The editors of the home page call it a 'project' and beside daily news there are forum, blogs, etc., too. The Transylvanian databank is also available with its data bases, research pages, chronologies and other links of scientific interest. There are news offered by www.hirek.ro and www.erdely.ma, but there are home pages of scientific, cultural, institutional interests, and also such of locali-

[1] So far the only concise summary of the topic is Balázs D. Attila: A határon túli magyar online médiumok tartalomfejlesztési trendváltozásai. *Médiakutató*, 2006/tél. 73-95. [Changes in the trends of content development of the Hungarian online media outside the borders of Hungary]

ties which serve their public with news and communal forum, e.g. www.relatio.ro, www.szatmar.ro, etc.

There are such websites for the other regions in the neighbouring countries: in Transcarpathia www.karpatinfo.net, in Banat www.vajdasagma.info, www.vajdasagportal.com in the Upland www.felvidek.ma, as well as portals with topical, cultural, literary and other professional interests: in Banat www.zetna.org.yu, www.symposion.org.yu, in Transcarpathia www.hhrf.org/ungparty, in the Upland www.foruminst.sk, www.katedra.sk, in Burgenland www.langos.at, to mention only some of them.

The securing of the development of networks is important for the Hungarian government too. Kálmán Kovács ex-minister declared that the informational strategy for the next ten years must include the Hungarians beyond the borders as parts of the whole nation.[2] In November 2003 there was a conference at Nagyvárad with the title *Hungarians in a Society of Information*, founding a professional consultative body of the same name (by its Hungarian abbreviation: MA-ITT "today – here"). In April 2005 the institute Hungarian Minorities Abroad organized the first meeting of the internet-developers living beyond the borders of Hungary together with the representatives of on-line media of Hungary. The same year in September was the second conference of MA-ITT with participants from several regions outside the borders. The so called Budapest declaration on the modernisation strategy of the Hungarians was accepted, the 4. paragraph of which declares that the program of the Hungarian e-points will create communal links capable of advocating a sense of belonging and helping to development in the Carpathian Basin and over-seas. The aim is to strengthen the cohesion of Hungarians and to help them to succeed in their native country.[3] Following up this statement in March 2006 came the opening of www.emagyar.net to connect eMagyar points at various parts of the world.

Reading the printed press in Hungarian language is facing serious technological/constructional challenge since the spreading of public service and commercial televisions of the countries, a similar TV service in Hungary and by the widening of the internet network itself.

How large is the media system beyond the Hungarian borders? Is it a homogeneous system? As to date there are no surveys of the media. The only register dealing with the Carpathian Basin has been the cultural survey carried out by the Research Institute for Ethnic and National

[2] http://etech.transindex.ro/?cikk=1546
[3] http://www.eurohirek.hu/modul.asp?name=cikk&file=article&sid=3930

Minority Studies of the Hungarian Academy of Sciences,[4] which presents the printed press, electronic media and websites as separate segments. According to this survey the following data are available for each of the countries:

	Austria	Croatia	Serbia	Romania	Slovakia	Slovenia	Ukrainia	TOTAL
Printed press	5	8	65	140	45	1	28	**292**
Elektronic media	1	1	19	28	4	2	2	**57**
Internet portal	0	0	4	5	0	0	2	**11**

Though the data indicate that internet portals are proportionately less represented, maybe resulting from their nature, they are more markedly present in media consumption (even when allowing for the shortcomings of the fieldworking).

There are more comprehensive data of the regional media consumption. In Transylvania such surveys are regularly carried out,[5] and there are data from the Upland too.[6]

Recent research have confirmed that the local Hungarian newspapers rule the market by a stable 20-30% which became characteristic by the end of the 1990s.[7]

Media consumption customs usually appear as a part of certain comparative research, e.g. the Kárpát Projekt in 1997 or Mozaik on young people in 2001. The latter revealed that media consumption first of all means

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[5] Magyari Tivadar – Veres Valér: *A Duna Televízió erdélyi közönsége. Audenciaelemzés kérdőíves kutatás alapján.* Hungária Televízió Közalapítvány, Budapest, 1998. Magyari Tivadar: A sajtó önállóságának kérdése a romániai magyar köztájékoztatás esetében. *Korunk,* 1996. 1. szám. [The question of the independence of the press of the oublic information in Hungarian language in Romania]. Magyari Tivadar: A romániai magyar média. *Médiakutató,* 2000/ősz. 95-107 [Hungarian media in Romania]. Magyari Tivadar: Miből tájékozódnak a romániai magyarok? *Szabadság,* 2000. október 18., 8. [Who informs the Hungarians in Romania?]. Magyari Tivadar: Elemzések a romániai magyarok sajtóolvasási szokásairól. *Erdélyi Társadalom,* 2003. 1. szám. 113-131. [Analyses of the press reading customs of the Hungarians in Romania].

[6] Lampl Zsuzsanna – Sorbán Angella: A szlovákiai és az erdélyi magyarok médiapreferenciái és fogyasztói szokásai. *Magyar Kisebbség,* 1999. 1. sz. 231-248. [Media preferences and consumption customs of Hungarians in Slovakia and Transylvania].

[7] Magyari Tivadar: Gyorsjelentés az erdélyi magyarok médiahasználatáról. *Erdélyi Társadalom*, 2005. 1. sz. 155. [Preliminary report on the media consumption of the Hungarians in Transylvania].

viewing television, secondly listening to the radio and reading news comes third. About 25% of the age group 15-29 years regularly read newspapers; it seems the proportions are somewhat less in Transcarpathia, maybe due to the lack of local papers.[8]

Besides the description of media constructions, the identification of media consumption customs, the sociological analysis of the operators of the system offers a special field of research. Though such research is fairly common in international literature, it is still rare in reference to minority situation. In the regions in question only Transylvania offers results relating to the Hungarian publicity in Romania.

The results of an inquiry among Hungarian journalists in Romania[9] indicate that this group has similar characteristics to the ones revealed by international surveys.[10] There is a tendency of social shift towards the middle classes and it is decidedly male centred. The most conspicuous difference appears between the age-groups: minority journalists became "elderly" by the end of the 1990s; it is an inheritance of the 70s and 80s at the same time it forecasts a rejuvenation of the profession which inevitably will influence the contents of the news too. The separation along the generations is already noticeable especially in respect of the use of the internet and knowledge of languages as well as in the attitude towards RMDSZ, the organisation representing minority interests. The contents appearing in the newspapers are the consequence of these changes.

There are characteristic generational features in social and geographical mobility as well. Social mobility is more frequent among the older generation than among the young, the result of the up grading of the prestige of journalism on the one hand and the changes in the school system on the other. In regards schooling, young people of today have more in common with their fathers, than the fathers with the grandfathers. However, the geographical mobility among young people has been decreasing in comparison with those above 40 years, probably because the

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[8] Szabó Andrea és társai (szerk.): *Mozaik 2001. Magyar fiatalok a Kárpát-medencében*. Nemzeti Ifjúságkutató Intézet, Budapest, 2002. [Young Hungarians in the Carpathian Basin]

[9] Papp Z. Attila: *Keretizmus. A romániai magyar sajtó és működtetői 1989 után.* Soros Oktatási Központ, Csíkszereda, 2005 [The Hungarian press and its operators in Romania after 1989].

[10] Cf.: Weaver Weaver, David – Wilhoit, Cleveland: *The American Journalist: A portrait of U.S. News People and Their Work.* Bloomington, Indiana University Press, 1986.; Weaver, David – Wilhoit, Cleveland: *The American Journalist in the 1990s: U.S News People at the End of an Era*. New Jersey, Mahwah, Erlbaum, 1996.; Weaver, David H. (ed.): *The Global Journalist. News People around the World.* New Jersey, Hampton Press., Inc. Cresskill, 1998.; Weaver, David H.: Journalists Arond the World: Commonalities and Differences. In: Weaver, David H. (ed.): *The Global Journalist. News People around the World.* New Jersey, Hampton Press., Inc. Cresskill, 1998.

old party-controlled recruiting of journalists has ceased and also new kinds of localities have developed.

If the starting point is that the press is an important scene of national identity politics, it is important to know what and how do the contents of the press reach its minority public. There are numerous analyses of discourse and content, but comprehensive description aiming at synthesis can be found only in connection to the Transylvanian communities. According to Magyari[11] the major characteristics of the Hungarian press in Romania is its literary style, minority neurosis, a-commerciality and lack of professionalism. He claims that the literary inclinations of the minority press (the journalist has to be a 'good writer') leads to the neglect of strict media-economic aspects, the overestimation of minority ethos resulting in an almost exclusive minority observation of the world's affairs.

Keeping Magyari's observation in mind during the present qualitative and quantitative research[12], the content matters of minority press has been put into a larger context, which revealed that the battle between minority ethos and the logic of the profession is always noticeable. The minority journalists move within the limits of their own *morbis minoritatis* ideology, which they cannot, dare not or will not leave.

When operating minority public, a regularly and selectively recurring inheritance has to be counted with. This 'inheritance' defines the journalists' limit of operation and is in close connection with the minority existence itself. To be creative as a minority intellectual presumes the conscious or unconscious acceptance of a minority ideology. The acceptance helps to define the seemingly constant framework of the minority press. It will be called *framism*, where the element *–ism* suggests the existence of a kind of ideological definition. The journalists define themselves as the best 'frame experts' and knowing their position, they act within the limits. They also contribute to the forming of the frame, since the existence of the limits facilitates their daily work. Being led by the framework they do not question issues which disturb the entity of the framework. Being minority journalists they also serve as the protectors of their own ethnic group, assuming a relationship between themselves and their presumed audience. Though the operation of the framework can contradict professional arguments or conflict with the journalists' conscience, it is, notwithstanding, preserved partly due to routine, but mainly to 'agenda setting' within the minority

[11] Magyari Tivadar: A romániai magyar média. *Médiakutató,* 2000/ősz. 95-107 [The Hungarian media in Romania].
[12] Papp, Z. Attila op.cit.

press generated by the limits themselves. Journalists most probably prefer topics reinforcing the framework of their work.

Professional logic and minority ethos contradict one another, sometimes exclude one another. Albeit a kind of confrontative professionalism appeared at the end of the 1990s, it did not necessarily meant logic to gain ground, it was halted by *framism*. Professional settling down does not lead to the loss of minority ethics permeating public thinking of the Hungarians in Romania. Exclusively professional and minority ethical values should be understood as values existing side by side which may distinguish certain journalists, but can also appear intermingled in the case of given persons, prompting them to strive for equilibrium.

The gaining ground of professional logic would not discontinue the deeply rooted frames, which define the operation of the press offering forums to open discussion. Because of *framism* the ideological and cultural frameworks have been preserved; their major features will be described in the various mechanisms, first of all in the process of creating taboos. Minority journalists feel compelled to protect their audience (i.e. minority itself) therefore operating the framework could conflict with professional logic.

The range of the present press publicity is defined by ideology assuming political, cultural, interethnic dimensions; these are constantly changing under the influence of inherent professional reasons as well of interactions (e.g. model-seeking, model-borrowing attitude toward the majority Romanian and Hungarian press). The plural and multi level character of the system of journalism have developed different measures at the various levels but the battle between public norms and professional expectations is still going on. There will never be a winner, this being the constantly recreating feature of minority public: if professional logic would get the upper hand, the guardians of minority ethics call the attention to the minority sense of mission based on the question of 'where we come from, where we go to'; if the minority feeling prevails, the profession would protest against its one-sidedness, as it actually happened in the second half of the 1990s.

To understand the workings of the minority press, it is not enough to observe it in the relationship between majority and minority as was done by authors of earlier publications[13], but can be better grasped through the Brubaker-theory known from the theory of nationalism.[14]

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[13] Riggins Riggins, Stephen H.: *Ethnic Minority Media: An International Perspective.* London, Newbury Park, Sage Publications, 1992.

[14] Brubaker, Rogers: *Nationalism Reframed: Nationhood and the National Question in the New Europe.* Cambridge University Press, 1996.

According to Brubaker's concepts it is expedient to operate in a threefold division: national minority, nationalizing state (the territory where the minority lives) and the mother country (the state the majority nation is linguistically/culturally common with the minority which are not its citizens). In contradiction with Riggins it is not only the strategies of the state and the minorities, which are at play but there is a third relationship, the one between the minority and the mother country. The question of taboos can be inserted into the model as their existence depends on the interaction among the three participants. To all this, the system of minority representation can be added which, playing an important role in the (political) life of the Hungarians in Romania, can also generate taboos.

Albeit the above description was about the Hungarian media in Romania, it could be successfully extended to the whole media system. The model seems to be valid in all the regions at least in three points:

1. Similar to the Transylvanian situation, the press should be treated in the threefold relations as described by Brubaker: the role of the mother country and the relations to the majority is important to operate every press;
2. the local representative organisations of the minorities, the minority political organisations want to 'colonize' the minority publicity. May be it is not as true in the case of the Upland in Slovakia (though there is only one daily newspaper of great circulation), but in Transcarpathia and Banat the parties of the minorities often try to influence the local press;
3. interethnic and intraethnic conflicts are present in every region's press and frequently serve territorial controversies, cf. the relationship between Szabadka and Újvidék, Ungvár and Beregszász, West and East Slovakia.

2. Current tendencies and processes

In addition to the above described threefold relationship, minority press in all the regions will meet the challenge of wrestling with the growing influence of globalization and the upgrading of localities. In order to be able to give authentic answers to the challenges, the present qualitative and quantitative characteristics of the Hungarian journalistic training should be reassessed. The only offer for higher education in journalism is in Transylvania, at the Babes-Bolyai University at Kolozsvár; there are schools for journalists at Nagyvárad and Újvidék, but no special training is offered in the other regions. The recurrent question is whether young

journalists should be educated at home or rather in Hungary.[15] Under the present conditions of globalization education and further training should be considered at various venues and in addition to the training in journalism media economic and managerial skills should also be included.

The question of instruction and further training of journalists have become timely in all the regions as a local interest and as one concerning the entire Carpathian Basin. In May 2005 the Convention of the Associations of Hungarian Journalists Abroad was founded at Szeged, the members are the Association of Hungarian Journalist in Romania, Association of Hungarian Journalist of Banat, the Association of Hungarian Journalists in Transcarpathia, and Association of Independent Hungarian Journalists in Croatia. The aim of the convention is to help sustain the European quality and Hungarian mentality of journalism, the cooperation between the Hungarian editors and journalists in Hungary and beyond the borders as well as to cooperate with press organizations in Hungary.[16] The second meting of the convention too was held at Szeged in May 2006 the central topic being the education and further training of journalists. It was decided that education should primarily take place in local communities and continuous further training be compulsory.[17] The question of authority is eminently important both for the audiovisual and online press as well as the traditional printed press. These forums operate mostly on marketing basis but their upkeep is unstable because of the smallness of their target groups (which could also be the reason of the absence of local, national or international investors) thus upgrading the role of the subsidies from Hungary (and from local resources). Hungarian grants (if not budget funded) arrive through the Illyés Foundation, the National Cultural Fund, and since 2005 the Szülőföld Fund. There has been no professional evaluation how these grants were used; the grants were frequently distributed according to political lobby-interests with overlaps of professional and political spheres, making the results sometimes questionable.[18]

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[15] Cf, *A délvidéki magyarság jövőképe.* Logos, Tóthfalu, 2003 [The vision of the future of Hungarians in the south].

[16] Interview with Attila Ambrus. http://www.brasso.ro/cikkek/cikk.php?n=292

[17] Tóth, Lívia: Legyen a nemzetstratégia része. *Hét Nap*, 2006. május 24. [Be a part of the national strategy].

[18] An example is the issue of the Transylvanian television which was planned to broadcast all day in Hungarian. The project enjoyed top priority support during the time of the Medgyessy government.

3. Developments expected during the next fifteen years: tendencies, perspectives, fallacies, conflicts

It is difficult to formulate a scenario for the operation of public life which would describe the developments of decades to come as this sphere operates along the logic of the market and depends – as has been pointed out above – on subsidies received from minority and mother country political sources. The two 'pillars', however, are unpredictable on the long run because the interaction of supply and demand within the press market can change just as the political decision makers come and go in democratic societies. There are four basic conditions for the planning of three scenarios in order to predict future possibilities:

1. The existence and widening of a global web culture
2. The spreading of online journalism and media
3. Existence and organisation of minority political and professional logic
4. The upkeep of political, professional and financial support (at some level) from the mother country

3.1. Scenario for the media network

This scenario assumes the minority press/media to be able to work genuinely within the conditions of globalisation; recognises that it cannot live without network-like cooperation therefore national and international connections are vital, of which the widening of professional cooperation with Hungary is of eminent importance. It envisages more common forums, more possibility for education and further training together resulting in the developing of common professional language and ethics. Constant exchange of news and the institutionalised rotation of journalists is part of the plan. It means that every journalist outside the borders of Hungary has to work both at home and in the mother country for a set period of time. Network cooperation can be extended to the media of Hungarians living in the west, thus Hungarians of the west, the mother country and those living outside the borders could get in closer contact. Special target programs could be outlined for young journalists to cover EU events live.

In this scenario the role of newspapers and portals is not only to transmit information but also to become cultural and initiative institutions. The basis of the scenario could be a Hungarian media strategy for the regions beyond the border with an outstandingly important common special digital strategy. In order to increase 'consumption', e-points,

tele-houses should be reinforced and where possible, developments to be launched to make the output marketable.

In the media net the professional values of journalism could gain more importance, albeit political influence would not cease, the institutional basis for a real cultural autonomy could still be created.

3.2. Media inclusions

According to this scenario the Hungarian minority media beyond the borders is not able to react to the challenges of web culture creating a big gap between written and electronic press. Written press carries along its cultural inheritance which, however, is not able to communicate, to make itself acceptable to the operators of the new media. This creates only a media gap but a social one too: there will be those who lag behind, living their present still closed in their past and others who live in a virtual world and look down at the real one from their ivory towers.

The rift of the media cannot create a stable framework for minority self-organisation, the chances for cooperation lessen because of the conflicting interests and dispositions within the institutions. There is the danger of scattering the available (meagre) material and human sources, 'clans' directing the institutions instead of autonomous communities. In the meantime autonomy is constantly in the centre of the news, albeit without the participation of the press and its operators themselves.

3.3. 'Social' support from the mother country

According to the third scenario the central role of the support coming from Hungary remains, preserving mechanisms based on hierarchic role distribution and patronage excluding partnership. The central role of Hungary is also that of a provider of positive and negative models. If the support plays an important role in the operation of the press beyond the borders, the political segmentation in Hungary will have its repercussions.

A partial development of the media system can be observed; there is strict division between segments following the demands of the market and those which, thanks to their lobby contacts, enjoy greater support and there are always the ones who lag behind. Instead of cohesion, divided press and society can be envisaged, hopefully still with some leading force left. The world of press is particularly vulnerable and politics is using its influence over the whole system. The lack of a mutual media strategy leads to striving for political and financial support in order to realise individual aims and ideas; in reality the whole system remains in stagnation and social supports serve mere survival.

Conclusion

Possibly none of the above scenarios would be realized in a pure form but in a combination of them. In certain regions different scenarios would be followed. In Transcarpathia and Banat there is the danger of media inclusion while in Transylvania there are movements toward networking. If genuine form of cooperation could develop in the field of the press the exchange of models could be livelier, Hungary could professionally 'oversee' the process and allot support by well thought over strategy. Local autonomy could be the outcome but the possibilities of cooperation within the press could be a real instrument of the policy of national identity.

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László Szarka

Significance of Czechoslovakian–Hungarian Population Exchange in the History of Intended Elimination of Hungarian Minority in Czechoslovakia

Abstract

The Hungarian government seemingly facilitated the resettlement of Hungarians living in Czechoslovakia. Diplomatic opportunities – provided by the treaty – were used to execute the population exchange in an orderly, financially settled way, as far as it was possible within the framework of the exchange quota. The other option of minority Hungarians to stay in their native land was reslovatization, which was treated as the lesser of two evils and chosen consciously as the only means to it.

The Czechoslovakian government tried to get free a hand from the winner great powers to expatriate the German and Hungarian nationals from Czechoslovakia. Since the cease-fire agreement with Hungary did not allow the realization of a process, a solution similar to the expelling of the Sudeten Germans was also considered[1]. In order to succeed in evacuating the greatest possible proportion of the two minorities, foreign secretary Vladimír Clementis handed over a memorandum to the government of the powers on the 3rd of July 1945, asking for permission to transfer i.e. for a one-sided expulsion of 2-2,5 million Germans and 400 000 Hungarians. According to the Clementis memorandum, the representatives of the Czechoslovakian government could have consulted the Allied Control Commission in Budapest over the question of the transferring of the greater part of the Hungarians living in Slovakia as part of a population

[1] Vavro Šrobár the Czechoslovakian finance minister of Slovakian birth proposed a plan to expel 70% of Hungarians from all the localities with Hungarian inhabitants leaving them to rely only on their own transport and means to move to Hungary. Vadkerty, Katalin: Maďarská otázka v Èeskoslovensku 1945–1948. Dekréty prezidenta Beneša a ich dosledky na deportáciu a reslovakizáciu. Kalligram, Bratislava, 2002. 579–582.

exchange for the 345 000 Slovakians of Hungarian citizenship, who should repatriate to Slovakia.[2]

To justify the deportation plans the Czechoslovakian secretary referred to the "conviction of the Czechoslovakian nation" that without the deportation of the Germans and Hungarians from Czechoslovakia it would not be possible to ensure the normal and peaceful development of the state nor the permanent peace and stability in Central Europe.[3] The memorandum presented to the great ambassadors of the great powers in Prague was a last effort of persuasion before the Potsdam conference. The deportation of the two minorities was introduced as the "most pressing problem" and stressed that any delay in solving it would seriously trouble every Czech and Slovak citizen. Of the three great powers only the Soviet government supported the request without reservation; the Brits kept raising more and more objections, while the Americans were from the start out against the suggestion of extending collective guilt to any other people except the Germans. Article XII. of the Potsdam conference protocol authorized only the orderly and humane transfer of Germans from Poland, Czechoslovakia and Hungary to Germany, prohibiting any further expelling of Germans from their native country. After the Potsdam conference the Prague government together with the Slovakian representative corporate could not but accept that they had no permission for the one-sided deportation of Hungarian minority.[4]

The road to a "pure Slav nation-state"

The Kassa government programme of 5 April 1945 set the aim at a Slav nation-state. In order to achieve it the Czechoslovakian authorities had to reach back to the treaty with Hungary about population exchange. The laws on the deprivation of civil rights were applied against the Hungarian minority communities. The edicts and national council regulations

[2] Churaň, Milan: Postupim a Èeskoslovensko. Mýtus a skuteènost. Nakaladatelství Libri, Praha, 2001. 109–110.

[3] Ibid. 110.

[4] 2. August, 1945, the last day of the Potsdam conference is the date of President Beneš's edict, 1945. no 33., on the regulation of Czechoslovakian citizenship of German and Hungarian nationals. The Czechoslovakian citizenship of German and Hungarian nationals who became the citizens of another state in 1938-39 or later was cancelled from the date of their new citizenship, and that of other German and Hungarian nationals from the date of the edict. Thus a legal background has been created for the eviction and deportation of Hungarians and Germans. Szarka László ed.: Jogfosztó jogszabályok Csehszlovákiában 1944-1949. Elnöki dekrétumok, törvények, rendeletek, szerződések. [Laws for deprivation of civil rights in Czechoslovakia. Presidential decrees, laws, regulations, treatises] MTA Etnikai-nemzeti Kisebbségkutató Intézet – Kecskés László Társaság, Komárom, 2005. 122.

deprived minority Hungarians of their civic, economic, social and nationality rights.[5]

Economic interests also motivated the measures against Hungarians in Slovakia. The February 1945 regulation of the Slovakian National Council ruling the confiscation of the land-property of Hungarians and Germans claiming the act as "giving back the land to Slovakia", was actually a radical nationalization of land-property. The first really concise presidential edict of Edvard Beneš against the two minorities was No.5, issued on the 19th May 1945 which, together with regulation No. 50. 1945 of the Slovakian National Council especially referring to the territory of Slovakia, ruled for the appointment of Czech and Slovak national trustees respectively to oversee the land-properties, factories, buildings and other valuables of Hungarian owners. A week later, regulation No. 51. dissolved all the Hungarian associations in Southern Slovakia and confiscated their possessions. This was the end of Hanza co-operative, founded in 1925, the Béla Bartók choir in Pozsony, even the Masaryk Academy, which was founded by the donation of President Masaryk, the founder of the Czechoslovakian state, and several hundred other institutions in Hungarian towns, villages, settlements.[6]

In their consequence the presidential edicts and the additional Slovakian National Council regulations seriously aggravated the situation of the Hungarian minority. The severest was the presidential edict of the 2nd August 1945, on the day of the signing of the Potsdam protocol, which deprived automatically Hungarians and Germans of their citizenship, with the exception of active anti-fascists. This edict became the source of every later deprivation of civil rights and grievances because the loss of citizenship by definition excluded the members of the two minorities from employment, compensation for nationalized property, pension and other state benefits.[7]

With the loss of their civic, minority, economic and social rights the Hungarians of Slovakia got into total legal and social void. The plan of

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[5] Šutaj, Štefan – Mosný, Petr –Olejník, Milan: Prezidentské dekrty Edvarda Beneša v povojnovom Slovensku, Veda, Bratislava, 2002; Jech Karel (red.): Němci a Maďaři v dekretech prezidenta republiky. Studie a dokumenty 1940–1945. Die Deutschne und Magyaren in den Dekreten des Präsidenten der Republik. Studien und Dokumenten 1940–1945. Nakladatelství Doplněk, Brno, 2003; Šutaj, Štefan (ed.): Dekréty Edvarda Beneša v povojnovom obodobí, Universum, Prešov, 2004; Szarka László (szerk.): Jogfosztó jogszabályok, etc.

[6] Szarka László ed.: Jogfosztó jogszabályok… pp. 93-99, 182-188.

[7] Analysing the phases of the composition of the edict, the final version clearly appears to be the medium of deprivation of civil rights because only thos Hungarians and Germans could keep their citizenship who officially registered as Czechs or Slovaks during the "increased danger of the republic". Szarka op.cit. pp 122-124. On the preliminaries and alternative text variants cf. Jech Karel (red.): Němci a Maďaři v dekretech prezidenta pp. 313–349.

the authorities was to fill the place of the deported Hungarians by repatriating Slovaks from other countries and totally disrupt the Hungarian communities by relocating Slovaks from the northern regions of Slovakia, all this being part of the battle for political power; the radical solution of the Hungarian question was to strengthen the position of the Slovak Communist Party.[8]

During the last phase of World War II. the Czechoslovak army, the Slovak resistance, later the Czechoslovakian government and the Slovakian National Council were considering to deport the Hungarians, similar to the Germans, with army assistance, or as an alternative, expelling them "spontaneously".[9] Immediately after the front having left the area the Czechoslovakian military and civil authorities were keen on creating an atmosphere for the Hungarians to flee to Hungary. However, the Hungarian inhabitants who had lived there for several hundreds of years did not show any remorse when the Czechoslovakian authorities returned. Though the 1945 spring plan of Czechoslovakian finance minister Vavro Šrobár was accepted by the Slovakian National Council as its programme to deal with the Hungarian question, the brutal deportations suggested by the plan were carried out at some Hungarian villages in the neighbourhood of Érsekújvár: in Andód, Udvard, Tardoskedd only, during the months immediately after the end of the war. Most of the families dumped at the Hungarian border soon returned to their homes.[10]

Extremist plans were also made for Pozsony and Kassa. On the 5 May 1945 extensive anti-Hungarian measures were introduced in Pozsony with reference to the 1945 No. 131 State Security Law; the ultimate aim was the deportation of the complete German and Hungarian communities.[11] The greater part of the members of the two communities were crowded into an isolated camp in Ligetfalu only accessible across a temporary pontoon bridge or were expelled from the country at short notice. The internment camp at Ligetfalu – there was another one established in the earlier lager for Jews at Szered – was cleared in August 1946. The Hungarians were

[8] Kaplan, Karel: Csehszlovákia igazi arca, Kalligram Kiadó Budapest–Pozsony, 1995. pp. 108–112. [Showing the true colors of Czechoslovakia]

[9] Baláž Július: Maďarská otázka v prvom povojnovom desaťroèí povojnového Èeskoslovenska (1945–1948) Kandidátska práca. FF Karlovy Unierzity. Katedra èeskoslovenských dějin, Praha, 1991. Kézirat, MTA KI Archívum 1/161 [Unpublished dissertation].

[10] Vadkerty, Katalin: A belső telepítések és a lakosságcsere. Kalligramm Könyvkiadó, Pozsony 1998. pp. 86-87.[Internal settling and population exchange].

[11] Ibid. p. 88; Salner, Peter: Premeny Bratislavy 1939–1993, Veda, Bratislava 1998. 38–43. Salner cites the 1945 protocol decisions of the Pozsony National Committee against the Germans and Hungarians. Thus the proposal of Sekáè MP about the special marking to be worn by the members of the two communities was acceptedon 22. June. However, the regulation had to be withdrawn because of local and international uproar. Ibid. p.41.

under constant control, either doing communal work or locked in the camp. Similar conditions were created for the Hungarians at Kassa too. Those Hungarians who settled down in the region re-annexed to Hungary after the 1938 were forced to leave the country in May; the same methods were tried out at settlements with autochton population too, however, without success thanks to the resistance of the Hungarian government and the border-defence authorities. Together with the civil servants, teachers, etc. coming from the mother country thousands of repatriated working people of Upland origin became the first displaced persons as a result of the decisions made by the Czechoslovakian authorities.[12]

Preparations were started to deport the Hungarian nationals to community labour to Czech land on the basis of the presidential edicts Nos. 71 and 88. 1945. This was a means started in November 1945; first men of working age were deported to the Sudeten area in need of work force.[13] The authorities instigating and executing these actions had threefold aims: to force the Hungarian government to sign the population-exchange treaty; to settle Slovaks from northern Slovakia to the southern Hungarian inhabited areas; and with the inside relocation radically change the ethnic character of the area bordering Hungary. The social and ethnic considerations were obvious from the start out, the Slovaks from the northern mountainous areas, strife with unemployment and difficult living conditions, had the task to change the region with compact Hungarian population into a Slovak one.[14] They were joined by 'repatriating' Slovaks from Romania, Hungary Yugoslavia and Transcarpathia, the largest group being the

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[12] János Kövesdi – Mayer Judit (szerk.): Edvard Beneš elnöki dekrétumai avagy a magyarok és németek jogfosztása, Pannónia Kiadó, Pozsony, 1996. pp. 131-136 Fthe presidential edicts of E.B., or the deprivation of civil rights of Hungarians and Germans]; Kaplan, Karel: Csehszlovákia igazi arca, pp. 110-117; Vadkerty Katalin: Németek és magyarok Pozsonyban 1945–1948. között [Germans and Hungarian in Pozsony 1945-1948]. In: Czoch Gábor – Kocsis Aranka – Tóth Árpád (szerk.): Fejezetek Pozsony történetéből magyar és szlovák szemmel [Chapters from the history of Pozsony from Hungarian and Slovak point of view], Kalligram, Pozsony, 2005. 473–486; G. Vass István: A menekültügy kezelése Magyarországon 1945–1946-ban [The treatment of the refugee question in Hungary]. In: Molnár Imre – Szarka László: Otthontalan emlékezet. Emlékkönyv a csehszlovák – magyar lakosságcsere 60. évfordulójára [Memory without home – on the 60 anniversary of the Czechoslovakian – Hungarian population exchange]. MTA Kisebbségkutató Intézet, Kecskés László Társaság, Kompress, Komárom, 2007.

[13] For the obvious nationalistic aims of the settlements in Czech land with the purpose of providing man-power for reconstruction cf. Šutaj, Štefan: Nútené presídlenie Maďarov do Èiech, Universum, Prešov, 2005. pp. 20-24; For the consequences of the deportations cf. Helena Nosková: A magyarok és Csehország. A tolerancia eltűnése az autoritatív csehszlovák rendszerből [Hubgarians and the Czech land. The disappearance of tolerance from the authoritative Czechoslovakian system]. Prágai Tükör, 2005. 3–4–5. http://www.pragaitukor.com/archive/index.php;

[14] As a result of inland migration 5011 Slovakian families, i.e. 23 027 persons, settled down in 260 localities of Hungarian, 13 of Slovak and 8 of German majority population. In addition 12274 Slovaks, already inhabiting the places, were given land, house or other real estates.

Slovaks coming from Hungary under the Czechoslovakian – Hungarian population-exchange agreement.

Deportation to Czech-land and population exchange

After not having received the complete support of the allied powers for the solution of the Hungarian question, i.e. one-sided deportation similar to the action against their German minority, the Czechoslovakian government was faced with the renewed question whether to prefer inside means (forced relocation, reslovakization) or one-sided deportation ("transfer", "odsun") and population exchange in order to 'globally' solve the problem. Karel Kaplan was the first to reveal the fact that in September 1945 Voroshilov, the president of the Allied Control Comission in Hungary, had encouraged Czechoslovakian foreign secretary Clementis to deal with the Hungarian question internally. In his notes Clementis claims that Voroshilov had been of the opinion that since 3 million Sudeten Germans had already been 'shoved across the borders' it would be easy to relocate 300 000 Hungarians.[15] The deportation of Hungarians from Slovakia was carried out on the strength of presidential edict No. 81 and according to the plans worked out by Slovakian and Czech authorities. Between 25. October and 4. December 1945 9274 persons, during the second phase between 19. November 1945 and 22. February 1946 6510 Hungarian families, i.e. 41 666 persons were deported.[16] The difference between the two phases of deportation was not only in the number of the persons concerned but in character and means too. In 1945 mainly single working age Hungarian men were taken to work in Czech-land, the second phase on the other hand was carried out as a systematic deportation with military and police forces in the villages marked down for evacuation and deportation to Czech-land. In the meantime the Czechoslovakian and Slovakian authorities were in the hope that by these actions they could force the Hungarian government to negotiate over the population-exchange treaty and to agree in carrying it out in 1947. In consequence those persons were deported to Czech-land who were meant to participate in the population-exchange and also those who were 'reslovakized' as a means to increase the pressure on the

[15] Cited by Kaplan from the account of Clementis at the 11. September 1945 meeting of the Czechoslovakian government. Kaplan: Csehszlovákia igazi arca, p.135.
[16] Šutaj, Štefan: Nútené práce, pp. 28, 66-67.

Hungarian government which had indeed to succumb to the open extortions of the Czechoslovakian government.[17]

The deportations were concentrated in the villages in the districts of Komárom, Dunaszerdahely, Ógyalla, Somorja and Galánta including the Hungarian population of 220 villages who were relocated to the districts of Kolín, žatec, Mladá Boleslav, Pilsen and Kladno. They left behind 6602 houses and 3884 hectares of arable land. The thus emptied houses were given into the charge of 2667, the land to 1703 Slovak and Czech national custodians. The valuables of the deported were finally confiscated later, on the strength of the 19. March 1948 governmental decree in May-June 1948. In answer to the notes of protest of the Hungarian government the Czechoslovakian government made it clear that they would stop the forced labour programme if only Hungary acted willingly in the immediate realization of the population exchange.[18]

The cruel and inhumane deportation into Czech-land has left deep impressions in the consciousness of Hungarians in Slovakia. The villages surrounded by police and armed forces, the people locked in ice-cold railway wagons, the terrible scenes at the Czech railway stations resembled to the worst period of Hungarian history during the Turkish occupation, as has been described in contemporary memoirs. József Mindszenty, cardinal of Esztergom as well as the leaders of the Slovakian Catholic church, the bishops and the episcopate severely condemned the ruthlessness of forced labour. Bishop Jantausch sent a memorandum to the presidium of the Slovakian National Committee, to president Beneš and foreign minister Jan Masaryk in the name of all the bishops of Slovakia, in which he pointed out that when the Jews had been taken from their homes they dissociated from those actions conflicting with humanity and Christian love; they did it repeatedly as the methods of the actual actions were very similar to the ones objected to earlier.[19]

In September – October 1945 the Czechoslovak and Slovak authorities started the deportation of working age Hungarians to Czech-land an Moravia with the openly declared intention of forcing Hungary to the treaty about the relocation of Hungarians from Slovakia to Hungary. In December 1945 Hungarian foreign minister János Gyöngyösi, who

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[17] Vadkerty, Katalin: A deportálások. A szlovákiai magyarok csehországi kényszermunkája 1945–1948. között [Deportations. The forced labour of Hungarians in Slovakia 1945-1948]. Kalligram Kiadó, Pozsony 1996. 28-29. Vadkerty: Maďarská otázka, pp. 89–97; Kaplan, Karel: Csehszlováki igazi arca, pp. 138–140.

[18] Štefan Šutaj: Maďarská menšina na Slovensku v rokoch 1945–1948 (Východiská a prax politiky k maďarskej menšine na Slovensku), Veda, Bratislava, 1993. 63–66.

[19] Ibid. pp.105-106.

opposed any kind of acceptance of collective guilt in the case of the Germans and Hungarians – with the Hungarians in Slovakia in mind, – remarked at the negotiations between Czechoslovakia and Hungary in Prague that the Hungarian government could and would take in the Hungarians not acceptable in Czechoslovakia only together with their region.[20]

The issue of the Hungarians hauled away to forced labour by police – army force induced strong resistance, organized counter-actions, international protestations among the groups of Hungarians relocated from the Upland into Hungary and left-wing Hungarian intellectuals in Pozsony. The events promted young Hungarian clergymen and students to found a movement named Hungarian Democratic Popular Association (Népi Szövetség) in Czechoslovakia with the task of documenting minority grievances and inform the deprived themselves and the authorities in Hungary.

Kaplan's assessment is correct that the deportation was a cruel but unsuccessful attempt at wiping out the Hungarian minority. It resulted not only in Hungarians fleeing to Hungary but seriously harming the Czechoslovakian – Hungarian relations.[21] It can be added that in the memories of the Hungarian minority the experiences and narratives of the deportations has meant the greatest trauma; also have been the most difficult conflicts to absorb and amend in the political aftermath of the whole situation.

Enforced population exchange as the means of deportation

The population exchange treaty was signed by foreign minister János Gyöngyösi and Vladimír Clementis in Budapest on the 27. February 1946. It was enforced by various diplomatic, foreign political, discriminative minority political means and from the start the parties interpreted it differently. While the treaty represented "the most reasonable solution of the Hungarian question", the "punishment of the Hungarian minority in

[20] He declared that the proposition represented by him naturally contained a revision of the borders. It goes without question. However, no other solution seemed conceivable than the population exchange, which would satisfy the requirements of the times and democracy. Cited from confidential Czechoslovakian governmental material by Kaplan: Csehszlovákia igazi arca. p.120. Cf. also Tóth, Ágnes: Telepítések Magyarországon 1945–1948. között. A németek kitelepítése, a belső népmozgások és a szlovák–magyar lakosságcsere összefüggései. Bács-Kiskun Megyei Önkormányzat Levéltára, Kecskemét, 1993. p.43 [Settlements in Hungary 1945-1948. Relationship between he deportation of Germans, inland relocation and the Slovak – Hungarian population exchange].

[21] Kaplan: Csehszlovákia igazi arca. P. 138.

keeping with international resolutions" a "prudent settlement" for Prague and Pozsony, for the Hungarians it remained an unequal agreement enforced upon Hungary by the deportations to Czech-land. By signing the treaty, however, Hungary succeeded in slowing down the confiscation of the valuables of the Hungarian minority members, their deprivation of rights and the scattering of the Hungarian communities in the country. For those Hungarians who had already been designated for exchange the Hungarian government assured the preservation of their movable possessions as well as their ordered settlement in Hungary.

Since the Potsdam conference had not allowed the one-sided transfer as the solution of the Hungarian question, leading Czechoslovakian politicians regarded the Czechoslovakian – Hungarian population exchange as the most important means of deportation from autumn 1945; also, they were in the hope of persuading 300 000–400 000 Slovakians living in Hungary to participate in the exchange.

The Czechoslovakian authorities had compiled a list of about 450 000 Slovak nationals or persons of Slovak descent allegedly based on historical studies in 1946.[22] The Czechoslovakian special committee, which agitated among the Slovaks in Hungary, had to understand that the figures were unreasonable. Between 4. March and 27. May 1946 as the result of the recruiting allowed in the population exchange treaty, there were 90 090 persons who signed up for resettlement in Slovakia. Later this was increased by further 7520 Slovak applicants.[23]

The signing of the Czechoslovakian – Hungarian population exchange treaty on the 27. February 1946 was enforced by the deportation to Czechland and the continued confiscation, depravation of rights of Hungarians; it was indeed an unfavourable agreement for Hungary. The Czechoslovakian government had seized the right to recruit re-settlers in Hungarian territory; they also were given free hand in choosing the Hungarians to move to Hungary as set in the population exchange treaty. By mid-August 1948, the Czechoslovakian authorities completed the list of Hungarians in Slovakia to be deported. The list contained 181 000 names of which 105

[22] The 1941 census registered 270 000 persons speaking Slovakian in the post-Trianon territory of Hungary, of whom 76 000 claimed to have Hungarian as their mother tongue and only 17 000 to be Slovak nationals. The Czechoslovakian transfer committee on the other hand reckoned with 450 – 475 000 Slovaks by special historical – demographic and religious statistical counts. Cf. Kugler, József: Lakosságcsere a Délkelet-Alföldön 1944-1948, Osiris – MTA Kisebbségkutató Műhely, Budapest, 2000. 28-34 [Population exchange on the south-eastern part of the Great Hungarian Plain].

[23] The representatives of the Czechoslovakian transfer committee handed over the Hungarian government the list of applicant from Hungary on the 27 June 1946. Bobák, Ján: Maďarská otázka, id. m. 84–86.

047 answered the requirements of the category defined by Article V. of the treaty, the rest the so-called criminals of war according to Article VI.[24] The treaty, however, enabled the Hungarian government to become an equal and determining party in the organization, control and transaction of the exchange.[25]

In the 14 months prior to the signing of the population exchange treaty and the first transports, the Czechoslovakian authorities regarded the deportation to Czech-land, the scattering of Hungarians in the territory as the best inner solutions of the Hungarian question. Since the processes met severe objections from the Hungarian government and public, even from international public, the Czechoslovakian and Slovakian authorities decided upon forcible assimilation.

Reslovakization as the means of forcible assimilation

The Slovakian office representing internal affairs regarded the so-called reslovakization and the re-settling of Slovakian nationals into the properties left behind by Hungarian nationals the best internal means of the final solution of the Hungarian question.[26] There followed a process during which applications for reslovakization were handed in in the name of more than 400 000 persons.[27]

Originally reslovakization was planned on a smaller scale by Slovenská Liga and the representatives of the Slovakian regional government and meant to gain the persons with double, uncertain and alternating national identity. Between 17. June and 1. July 1946, during the fortnight for handing in applications; there were 108 387 families, 352 038 persons

[24] Ibid. pp.87-88. According to the Hungarian records the Czechoslovakian list handed over in Pozsony the 26. Augustus 1946 contained the data of 106 398 persons as described in Article V. Popély Árpád: A (cseh)szlovákiai magyarság történeti kronológiája 1944–1992. Fórum Kisebbségkutató Intézet, Somorja, 2006. 105. [Historical chronology of Hungarians in Czechoslovakia].

[25] Cf. Bobák Ján: Maďarská otázka v Èesko-Slovensku 1944–1948, Matica slovenská, Martin, 1996; Kugler József: lakosságcsere a Délkelet-Alföldön, id. m; Szarka László (szerk.): A szlovákiai magyarok kényszerkitelepítésének emlékezete 1945-1948, MTA Etnikai-nemzeti Kisebbségkutató Intézet -- Kecskés László Társaság, Komárom, 2003; Uő.: Jogfosztó jogszabályok,; Vadkerty Katalin: A belső telepítések és a lakosságcsere,; Vadkerty: A kitelepítéstől a reszlovakizációig. Trilógia a csehszlovákiai magyarság 1945–1948. közötti történetéről, Kalligram Könyvkiadó, Pozsony, 2001 [From deportation to reslovakization]; Vadkerty: Maďarská otázka v Èeskoslovensku.

[26] A Šutaj, Štefan.: Reslovakizácia. Zmena národnosti èasti obyvateľstva Slovenska po II. svetovej vojne. Košice, 1991. pp. 23-28.

[27] Vadkerty, Katalin: A reszlovakizáció. Kalligram Kiadó Pozsony 1993. pp.31-36.

applying. In 1948, by the end of the process 282 594 persons were granted Slovakian nationality out of 410 820 applicants.[28]

The written accounts of the history of the 1946-47 reslovakization indicates that in the personal and collective memory of Hungarians in Slovakia reslovakization has been a kind of community taboo due to complex mass phychological processes. At the time fear was the most characteristic feeling of the entire Hungarian community: fear of the total loss of civil rights, of being scattered geographically, of the loss of home, land, possessions, etc.

The reslovakization process introduced in June 1946 promised redemption for abandoning Hungarian nationality and applying for the Slovak one; reslovakized people got back their Czechoslovakian citizenship together with their civil rights, could keep their houses land and possessions and, at least according to the early promises, were not threatened any longer by deportation to Czech-land or to Hungary. Reslovakization originally was for those persons who claimed to be Slovaks, however. Between 1946 and 1948 it became the means of the most ruthless pressure against Hungary and the Hungarians living in Slovakia. Hungarians in Slovakia wanted to keep their rights, homes, possessions, the land of their birth; the political power aiming at the ethnic reorganization of the southern Slovakian region blackmailed them through one of their basic rights, that of their declaration of national identity.

As during the August – September 1946 peace negotiations in Paris the Czechoslovakian delegation had proved unsuccessful in making accepted the unilateral deportation of those Hungarians, who were not reslovakized neither belonged to the categories of the population exchange, the Czechoslovakian politicians started decisive preparations for the so-called "global solution" of the Hungarian question. They planned to relocate all the reslovakized persons and the Hungarians remaining in Slovakia to Czech-land to be forcefully assimilated.

All the steps of the Czechoslovakian and Slovakian authorities against minorities of the period had the resolute aim of the total liquidation of the Hungarian minority communities; therefore the research and analysis of the processes should also be made in context. The procedures, actions and plans towards the cleansing of southern Slovakia of minorities were closely connected to one another; the Slovakian settlement office, corporation of representative and the Interior as well as the Foreign Ministry in Prague decided upon the measures to be taken with a keen eye being kept at the reactions in Hungary.

[28] Popély Árpád: A (cseh)szlovákiai magyarság történeti kronológiája. p. 99.

Forced re-settlements and their consequences

The forced re-settlement of the Hungarians within Czechoslovakia and to Hungary had grievous consequences. The losses through migration and assimilation became apparent through the data of the 1950 census.[29] In addition to the – temporary – population decrease the Hungarian communities suffered serious material losses too. Those returning from Czech labour could not always move back to their old homes; the confiscated land properties given to foreign settlers, the unsolved circumstances of the population exchange, etc. caused heavy material damage.[30]

The basic principle of economic parity stipulated in the Czechoslovakian – Hungarian population exchange was constantly breached, the range and number of the so-called Hungarian war criminals in Czechoslovakia was unjustifiably increased and added as surplus to the agreed exchange quota; the Hungary had no other means of legal protection than to procrastinate the execution of the population exchange till April 1947. However, the hand of the Hungarian government was forced by the mass deportations to Czech-land by armed-force assistance.

The ethnic composition of the towns and villages in southern Slovakia was fundamentally changed by the inland re-settling of 590 Slovakian families and the 9200 households coming from Hungary, altogether 65 000 Slovak nationals who took the place of 110 – 130 000 Hungarians deported to Czech-land or fleeing to Hungary.[31]

There was also the plan to turn the southern Slovakian region monolingual by re-educating the 300 000 odd reslovakized persons linguistically and thus nationally. It was accompanied by the re-naming of the settlements, giving Slovak form of the family names, prohibition of earlier biligualism, the expelling the use of the Hungarian language in school and church, paralysing every form of Hungarian communal life and punishing all public use of the Hungarian language and culture.[32]

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[29] The number of Hungarian population in Czechoslovakia decreased from 592 000 in 1930 to 355 000, the their proportion in Slovakia from 17,8% to 10,3%. Popély Árpád: A (cseh)szlovákiai magyarság történeti kronológiája. p. 177.

[30] The possession left behind by Hungarians relocated to Hungary had a value of 72 million dollars more than that of the Slovakians relocated to Czechoslovakia. Szabó, Károly: A csehszlovák magyar lakosságcsere gazdasági vonatkozásai, [The eoconomic aspects of the Czechoslovakian – Hungarian population exchange] In: Szarka László (ed.) Otthontalan emlékezet, pp. 92–100. Cf. Vadkerty Katalin: A belső telepítések és a lakosságcsere, pp. 166–169.

[31] Ibid.

[32] Szarka, László: Jogfosztó jogszabályok, pp. 230–251.

Protests and organizations against the deprivation of civil rights by Hungarians in Czechoslovakia

The existence of the Hungarian minority community, which was self-confident and well organized in the first twenty years of its existence, was present only in separated actions against the deprivation of rights. The Hungarians in Slovakia, even those who declared resistance, expected the protection of their minority rights from Hungary. Though Hungary had lost the war its government tried to use every possible means of protest to protect Hungarians since the first appearance of Czechoslovakian breach of law. By sending repeatedly memoranda it drew the attention of the representatives of the Allied Control Commission in Hungary, the western members of the allied powers as well as the Soviet government to the atrocities against the Hungarians in Czechoslovakia.[33]

1946 was the year of hope and great ordeals for the Hungarians in Czechoslovakia. During the Hungarian preparations to the peace negotiations there were promises of fairer and more lasting solutions, that the great powers would correct the mistakes committed when delineating the state borders and would consider the ethnic borders between Hungary and Czechoslovakia. The year started with Czechoslovakian – Hungarian population exchange treaty signed in Prague on the 27. February causing great disappointment and even greater fear.[34]

Objections against the population exchange treaty were most concisely summed up in a 1946 memorandum of unknown origin addressed to Foreign Minister János Gyöngyösi, which expressed fears about the escalation of steps aiming at the liquidation of the minority; therefore regarded the treaty a mistake: after the signing of the Czechoslovakian – Hungarian treaty it was noticed that not only were there no improvements in the

[33] Földesi, Margit: Kitelepítés, lakosságcsere és a Szövetséges Ellenőrző Bizottság, In: Szarka, László (ed.): Otthontalan emlékezet, pp. 127–132 [Deportation, population exchange and the Allied Control Commission]

[34] The Hungarians, who were attached to their birth country, had to understand that the government of Ferenc Nagy was forced to agree about the exchange of those Hungarians in Slovakia who had already been assigned for re-location and the free applicant Slovakians in Hungary. Nevertheless, the Népi Szövetség [popular association] sent a letter to Minister President Zoltán Tildy on the 24. January 1946 and a month later to Foreign Minister János Gyöngyösi to express their reservations about the preparations and the logic of the population exchange treaty. Tóth László (szerk.): „Hívebb emlékezésül…" Csehszlovákiai magyar emlékiratok és egyéb dokumentumok a jogfosztottság éveiből 1945–1948, Kalligram Kiadó, Pozsony, 1995. 112–115 [For better remembrance. Hungarian memoirs and other documents from the years of deprivation of rights in Czechoslovakia]. The treaty was criticized within the Hungarian foreign ministry too. Cf. the memorandum by János Vájlok, the referent of the ministry, by birth a Hungarian from Slovakia. Ibid. pp.116-118.

national, economic and personal existence of the Hungarians in Czechoslovakia, their entire human life faced new ordeals.[35]

It is known that it was the veto of the US peace delegation that checked the plans of total liquidation of Hungarians in Slovakia; the Czechoslovakian – Hungarian borders, however, have not been changed. Neither the compensatory regional modification urged by the Hungarian delegation, nor the plans of the Népi Szövetség for a referendum to newly defined border was considered by the great powers directing the decisions of the peace conference. The rejection of the Czechoslovakian demands for mono-lateral transfer and the determined repetition of the claim for "people together with land" resulted finally in the decision that the peace conference delegated the solution of the problem to the treaty between the two states; in the given situation that was possibly the only success of the Hungarian diplomacy.

The balance of the population exchange

In spite of the speed of the necessary preparations of the transactions, the population exchange could not start earlier than April 1947, with the exchange of the Slovaks from the southern part of the Great Hungarian plain and the Hungarians from Mátyusföld in Slovakia. When carrying out the directives of the treaty so unadvantageous for Hungary, the Hungarian party was keen on observing personal and property parity from the outset thus trying to prevent the Czechoslovakian intentions to use the population exchange to liquidate the Hungarian communities in Slovakia. In spite of the constant complaints on the Hungarian side again disparity, it proved to be impossible to adhere to the parity of property: the 76 616 Hungarians from Slovakia had to leave behind over 8000 hectare arable land and 15 700 houses, while there remained 7500 hectare arable land and 4400 houses from the Slovaks in Hungary.[36]

The population exchange was completed from April 1947 to the summer of 1949; after 22. December 1948 only those were relocated who were in existential danger, applied for family re-unification or volunteered to participate in the procedures. The protocol of Csorbató of 25. July 1949 provided for the material differences resulted due to the exchange. The two parties considered their respective claims – the Hungarian claims for the losses of the exchange, the Czechoslovakian ones: damage caused by the republic of councils, damage during World War II, the 30 million dollar

[35] Ibid. p. 119.
[36] Vadkerty, Katalin: A belső telepítések és a lakosságcsere, pp. 166–169, 194-197..

reparations to Hungary according the decisions of the Paris conference as well as the collective value of the Czechoslovakian property nationalized in Hungary).[37]

The two negative aspects: the population exchange treaty and the massive reslovakization could, however, be one of the reasons of the survival of the Hungarian community in Slovakia between 1945 and 1949, reinforced by various other aspects e.g. the support of the western democracies, that the western allies had refused the Czechoslovakian claims at the Paris conference aiming at the liquidation of the Hungarian minority in Czechoslovakia. On the surface, the signing of the population exchange treaty by the Hungarian government opened free way to the deportations. However, it was successful in using the possibilities of diplomacy in opposition to the Prague government as well as the soviet government that supported the complete liquidation of the Hungarian communities in Slovakia during the Paris conference; it could also maximally use diplomatic means to assure the population exchange – keeping within the minimal limits of the exchange quota – to be carried out under orderly economic conditions. The bilateral population exchange treaty ensured that Hungary was able to prevent the realization of the mono-lateral deportation and the Paris treaty obliged the two states to bilateral agreement concerning the future of the Hungarians remaining in their birth place in Slovakia.

[37] For the text of the protocol see Balogh, Sándor – Földesi – Margit (eds.): A Magyar jóvátétel és ami mögötte van… Válogatott dokumentumok 1945 –1948. Napvilág Napvilág Kiadó, Budapest 1998 [The Hungarian reparations and their background].

Protection of Minority Language Rights in Europe

The papers of this section (with the exception of that by Iván Halász) have been presented in co-operation with the Research Institute for Minority Studies of the Hungarian Academy of Sciences on the occasion of the 11th International Conference on Minority Languages organized in Pécs, Hungary.

Francesco Palermo

Linguistic Diversity within the Integrated Constitutional Space*

Abstract

The language issue within the European constitutional space is one of the most fascinating challenges to supranational integration. On the one hand, the principle of equal standing of all official and working languages is constantly reaffirmed; on the other hand the necessity to simplify the European Babel on the basis of a more functional consideration of the language issue seems unavoidable. Several solutions have been proposed both by scholars and by European institutions.

The paper argues that there is an intimate contradiction in today's linguistic policy in the EU, oscillating between the need to simplification and the constitutional duty to respect linguistic pluralism as imposed by the member states. In fact, the language issue is just the mirror of the constitutional law of integration as a whole. Looking closer at the constitutional dimension of supranational integration cal help better address the language issue too.

The analysis is divided in four parts, dealing respectively with the role and the limits of law in matters of language, the present allocation of competences in language-issues, the development of the concept of "integrated constitutional space", and its legal nature under the viewpoint of the language dimension.

1. Introduction

According to an anecdote, during the negotiations for Denmark's accession to the EEC, the Danish government proposed to renounce to the official status of the Danish language and to adopt English and French as the sole official languages of the Community, under the condition that French

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were forced to use English and vice versa.[1] Everybody knows how this ended up.

In the nation-state building process, language was one of the most relevant features of national identity, and even in the peaceful development of European integration the language issue played a crucial role in determining power structures and relationships.[2] More recently, Austria imposed a protocol on the use of specific Austrian terms in the German language in the frame of the EU, as a sign of its distinct "national identity".[3] In addition, during the German Presidency of the Union in 1999 – following the Austrian one – attempts were made to introduce German as a working language in informal meetings of the Council.[4] The Charter of Fundamental Rights of the EU, adopted in Nice in 2000 (hereinafter "The Charter"), states in its Article 22 that the Union respects "cultural, religious and linguistic diversity". Meanwhile, 2001 was declared "the 'European year of languages'", starting from the perspective, that "all the European languages [...] are equal in value and dignity from the cultural point of view and form an integral part of European cultures and civilization".[5] This principle is not a mere declaration, considering the impressive amount of resources invested by the EU in language services and in

[1] I was not able to find a source to prove it. This anecdote was quoted by a German professor of linguistics during a conference I attended some years ago. However, if it is just a myth, it is even more significant, because it shows the clear perception of the problem and the need to work out a solution.

[2] See Andreas Beierwaltes, "Sprachenvielfalt in der EU. Grenze einer Demokratisierung Europas?", ZEI Discussion Papers (1998) and Gabriel N. Toggenburg, "Die Sprache und der Binnenmarkt im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten", 1 European Diversity and Autonomy Papers – EDAP (2005), at http://www.eurac.edu/documents/edap/2005_edap01.pdf.

[3] Act concerning the conditions of accession of Norway, Austria, Finland and Sweden, protocol no. 10 on the use of specific Austrian terms of the German language in the frame of the European Union, OJ C 241 of 29 August 1994, 370. In the same occasion, the Kingdom of Norway made a declaration (no. 38) which stated that: "in the written use of Norwegian as official language of the institutions of the Communities, equal status must be given to Bokmaal and Norsk", (OJ C 241 of 29 August 1994, 395).

[4] In the second half of 1999, under Finnish Presidency, the Germans insisted in getting interpreting not only into English and French, but also into German, when informal preparatory meetings of the Council took place. After the Finns made concessions to appease the German government, Spain and Italy began to claim an analogous treatment for their languages. Similar problems arose some years later when the Commission proposed to abolish Italian and Spanish in the weekly press conferences. See Thomas Oppermann, "Das Sprachenregime der Europäischen Union – reformbedürftig? Ein Thema für den Post-Nizza-Prozess", 1 Zeitschrift für Europäische Studien (2001), 1-21, at 13-16 and id., "Reform der EU-Sprachenregelung?", 37 NJW (2001), 2663-2668.

[5] Decision No 1934/2000/EC of the European Parliament and of the Council of 17 July 2000 on the European Year of Languages 2001, OJ L 232 of 14 September, 1. The same principle lies on the basis of Regulation no. 1/1958 of the Council of 15. April 1958, OJ 1958, 386 (not by chance the first regulation adopted by the Council in the history of the EC).

promotion of languages.[6] In addition, many non-binding activities have been undertaken by the EU/EC in order to protect and improve linguistic diversity,[7] and enlargement of 2004 brought the language issue even more to the fore. Finally, in several

declarations and resolutions, the European Parliament reaffirmed the strong commitment to the equality of all official and working languages of the Union.[8]

A double and contradictory tendency thus emerges. On the one hand the principle of equal standing of all official and working languages is constantly reaffirmed;[9] on the other hand the necessity to simplify the European Babel (especially considering the additional problems deriving from the Eastern enlargement) on the basis of a more functional consideration of the language issue seems unavoidable. A third element must be considered: even in the formal-equality-of-all-languages-approach, many languages, i.e. the minority or only partially official languages, are excluded.

In the (artificial, insomuch as it is institutionally shaped) identity-formation process of the EU, again language is playing a fundamental role.[10] Mirroring the evolution of monolingual nation states, the constitutional development of multilingual Europe takes language as a value. Instead of the "one language – one nation – one State" approach,[11] the new paradigm of "many languages – many nations – one polity" seems now to be followed, neglecting the existence of many languages not officially

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[6] To date, translators represents 12% of the Commission's personnel (30% of the personnel with university degree) and the expenses for translations make up 30% of the Commission's budget. The Commission's translation service is in numerical terms the biggest world institution dealing with translations. Further data in Kristina Cunningham, "Translating for a larger Union – can we cope with more than 11 languages?", (http://europa.eu.int/comm/translation/reading/articles/pdf/2001_cunningham.pdf); Miguel Siguan, L'Europa de les llengües (Edicions 62, Barcelona, 1996), 166-167; Kerstin Loehr, Mehrsprachigkeitsprobleme in der Europäischen Union (Peter Lang Verlag, Frankfurt am Main, 1998) and at http://europa.eu.int/comm/translation/index_en.htm.

[7] E.g. financial support to European Bureau for Lesser Used Languages (and problems atteched, etc.).

[8] See in particular resolution no. B5-0770 of 13 December 2001, resolution on measures for minority languages and cultures of 11 February 1983 and others.

[9] Such a constant highlighting of the parity of all languages may indicate that the EU needs to persuade itself that this is the truth. According to an old Latin saying, "excusatio non petita, accusatio manifesta".

[10] Also in terms of democracy. See further Sue Wright, "Language Issues and Democracy in the European Union", paper presented at the workshop "The Public Discourse of Law and Politics in Multilingual Societies", IVAP, Oñati, 2002 and Philippe van Parijs, "Linguistic Justice", 1(1) Philosophy, Politics & Economics (2002), 59-74.

[11] In some cases even through the establishment of an artificial, unifying language, such as new-Norvegian, Hebrew, Basque, etc.

recognized by the states. Thus, the traditional syllogism "language instrumental to identity, identity instrumental to power, language instrumental to power" remains the same. Is this the correct approach? Does it really take us towards an "ever closer Union"? And, finally, are there alternative and perhaps more viable approaches to be pursued in dealing with the linguistic issue in the framework of European integration?

This paper argues that the approach followed until now shows many deficits. New tentative solutions will be proposed, based on the more recent achievements of the integration process, especially considering the new role of the member states and the principle of substantive equality in European law.

The paper is an attempt to analyze the role of linguistic diversity in Europe's constitution-making process, as "filtered" through national identity, oscillating between its symbolic (identity) and functional (use of languages, need of effective communication) dimension as well as between power and efficiency on the one hand, and equality (between states and between citizens) on the other. The analysis is divided in four parts, dealing respectively with the role and the limits of law in matters of language (2), the present allocation of competencies in language-issues (3), the development of the concept of "integrated State" (4), and its legal nature under the viewpoint of the language dimension, elaborating some tentative proposal (5).

2. Culture, Language and the Role of Law

Unlike several international organizations, the EU provides no definition of either culture or of language.[12] Not even the Charter, despite protecting and promoting cultural and linguistic diversity (Article 22), contains any clarification of the concepts of culture and language. In the light of the case law of the European Court of Justice (ECJ), two possible meanings of culture seem to emerge.[13] The first one considers historical or artistic heritage as a possible limitation to the free movement of goods and serv-

[12] Several attempts to define these concepts, however, have been made by the drafters of some international declarations. That is the case, for example, of the UNESCO Declaration of cultural policies (adopted in Mexico City in 1982 and based on a very comprehensive concept of culture), in the UNESCO draft declaration of cultural rights of 1996, and others. See Roberto Toniatti, "The Legal Dimension of Cultural Citizenship", in Symposium "Integrating Diversity in Higher Education: Lessons From Romania", OSCE High Commissioner for National Minorities, 2000.

[13] According to Cinzia Piciocchi, "La Carta tra identità culturali nazionali ed individuali", in Roberto Toniatti (ed.), Diritto, diritti, giurisdizione. La Carta dei diritti fondamentali dell'Unione europea (Cedam, Padova, 2002), 119-134, at 126.

ices;[14] the second and larger one also includes all the values contributing to "national cultural identity",[15] thus embracing a wide range of possible cultural choices that the ECJ tends to respect[16] and which can be summarized in the concept of pluralism.

A first provisional conclusion is that, in the EU-law perspective, culture and language are considered as they are by the member states, and the Union is committed to respect and protect diversity and pluralism (in particular Article 6 TEU and Article 151 TEC).

The borderline between culture and language is not easy to define.[17] It is rather intuitive that language is only part of a more general and

[14] For this interpretation see George Karydis, "Le juge communautaire et la préservation de l'identité culturelle national", 30(4) Rev. Trim. De Droit Européen (1994), 551-560

[15] In the words of Advocate General Van Gerven, opinion delivered on 11 June 1991 in Grogan, judgment of 4 October 1991, case C-159/90, ECR 1991, I, 4685 it is necessary to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation. There can, in my estimation, be no doubt that values which, in view of their incorporation in the Constitution, number among 'the fundamental values to which a nation solemnly declares that it adheres' fall within the sphere in which each Member State possesses an area of discretion 'in accordance with its own scale of values and in the form selected by it' (at 26). And it is for each Member State to define those concepts in accordance with its 'own scale of values" (at 38).

[16] The "cultural options" of the member states that have yet been challenged in front of the ECJ range from domestic rules on abortion (Grogan) to rules on languages (Groener, judgment of 28 November 1989, case C-379/87, ECR 1989, 3967; Mutsch, judgment of 11 July 1985, case 137/84, ECR 1985, 2681; Bickel/Franz, judgment of 24 November 1998, case C-274/96, ECR 1998, I-7637) and on the prohibition of Sunday trading (Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc., judgment of 16 December 1992, case C-169/91, ECR 1992, I, 6635) and many others. "However, it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality" (Advocate General's opinion in Grogan, 27).

[17] An interesting example under EC Law can be derived from the Konstantinidis case ruled by the ECJ in 1993 (judgment of 30 March 1993, case C-168/91, Christos Konstantinidis v. Stadt Altensteig – Standesamt e Landratsamt Calw – Ordnungsamt, ECR 1993, I, 1191 – see case notes by Domonique Gaurier, 3 European Review of Private Law (1995), at 490 and by Rick Lawson, CMLRev (1994), at 395). A Greek national, married in Germany, applied to the Registry Office for the entry of his surname in that register to be rectified by changing it from "Konstandinidis" to "Konstantinidis" on the ground that the latter spelling indicated as accurately as possible to German speakers the correct pronunciation of his name in Greek and that it was, moreover, the way in which his name was transcribed in Roman characters in his Greek passport. German law prescribes the transcription on the basis of a standard ISO-convention, according to which the applicant's name was transliterated into "Hréstos Kónstantinidés". The applicant argued that it distorted the pronunciation of his name, thus constituting an encroachment contrary to the provisions of the Treaty guaranteeing freedom of establishment and freedom to provide services. For the Court it is contrary to former Article 52 (now 43) ECT "for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons". For Advocate General Jacobs, however, the erroneous transcription threatened not only the economic activity of Mr Konstantinidis, but also his cultural identity.

complex phenomenon called "culture", but the interrelations between the two concepts are so manifold that it is impossible to clearly distinguish between them. What is relevant for our purposes, however, is that the criteria for the analysis of both culture and language are by far the same. Therefore, from a (European) constitutional perspective, it seems possible and even necessary to analyze language by means of the same conceptual categories.[18]

In the context of a legal analysis of culture and language, two main preliminary pre-legal questions should be raised, bearing in mind that no definite answers are possible. First, the lawyer must be aware that not every single manifestation of culture or language is (nor can be) equally relevant for the legal system. On the contrary, the legal system tends to be quite selective in recognizing (and even more in protecting) cultural and linguistic difference. Thus a first question is when and under which circumstances and conditions a culture or language becomes relevant for the legal system and can therefore claim legal recognition and protection.[19] Many factors, such as number, proportionality, intensity, political influence, etc. might determine this choice.[20] It is clear, however, that it must be decided what, when and under what conditions can be considered as a cultural or linguistic group, as well as whether and by what means said group may obtain legal protection and/or promotion. This decision has to be made by an entity possessing the power to establish legal norms that are binding for a group of persons living in a territory. In the last four centuries, this entity has been the nation-state, which was basically free to choose its approach towards diversity, mostly determined by extra-legal factors.[21] Two main models were adopted: inclusive on the one hand (based on integration and formal equality, in some cases causing assimilation), exclusive on the other hand (based on separation, sometimes respectful of formal and substantive equality, sometimes

[18] See Matthias Niedobitek, The Cultural Dimension in EC Law (Kluwer Law International, The Hague, 1997); and Joseph A. McMahon, "Article 128: A Community Contribution to the Cultural Policies of the Member States?", in Stratos V. Konstantinidis (ed.), A People's Europe. Tuning a Concept into Content, EC/International Law Forum III (Ashgate, Dartmouth, 1999), 18 183-210; Peter Hilpold, Bildung in Europa (Nomos, Baden Baden, 1995).

[19] See Roberto Toniatti, "Minorities and Protected Minorities: Constitutional Models Compared", in Tiziano Bonazzi and Michael Dunne (eds.), Citizenship and Rights in Multicultural Societies (Keele Univ. Press, Keele, 1995), 195-219.

[20] See Bruno de Witte, "Surviving in Babel? Language Rights and European Integration", in Yoram Dinstein (ed.), The Protection of Minorities and Human Rights (Martinus Nijhoff Publishers, Doldrecht, 1992), 277-300.

[21] For a brief overview Neus Oliveras Jané, "The Main Concepts in the Recognition of Linguistic Rights in European States", 2 Mercator Working Paper (2001), at http://www.ciemen.org/mercator/Menu_nou/index.cfm?lg=gb.

degenerating into segregation).[22] This state of the art is now confronted with new challenges, since the nation-state (especially in the context of the European integration) is no longer the sole owner of the power to "say what the law is", and also the concept of citizenship is facing a process of transformation.[23]

The second problem the lawyer must be aware of concerns the limits of the law's influence in determining cultural or linguistic rules.[24] In other words, to what extent can law pass rules on subjects like language, which are social and cultural phenomena and therefore based on conventional, non-legal rules? If language is the instrument of (also legal) communication and the basis of legal certainty,[25] thus requiring precise rules, linguistic regulation by legal means is hardly efficient. Among the possible examples, references can be made to the establishment of a binding legal terminology in bilingual or multilingual areas like Canada, Switzerland, Belgium, or certain Italian regions and Spanish autonomous communities, where special authorities establish the official legal terminology in the second/minority language, but their decisions often lack of efficiency and social acceptance.[26] The same goes not only for minority languages, but also in the case of officially monolingual states. Examples are provided by the recent German litigation on orthography, which ended up in some

[22] See Joseph Marko, Autonomie und Integration (Böhlau Verlag, Wien, 1995); and id., "Citizenship beyond the Nation State? The Transnational Citizensghip of the European Union", in Massimo La Torre (ed.), European Citizenship: An Institutional Challenge (Kluwer Law International, The Hague, 1998), 369-385.

[23] For an interpretation on how to possibly combine culture and citizenship in the modern times, see Will Kymlicka, Multicultural Citizenship (Claredon Press, Oxford, 1995). See also the highly interesting symposium "The State of Citizenship", 7(2) Indiana Journal of Global Legal Studies (2000), 447-510 (papers by Linda Bosniak, Aristide R. Zolberg, Kim Rubenstein, Daniel Adler, David Thelen, Heinz Klug, Saskia Sassen, Susan B. Coutin and Kenneth L. Karst).

[24] Alessandro Pizzorusso, "L'uso della lingua come oggetto di disciplina giuridica", 6 Le Regioni (1990), 1329-1347.

[25] See, in this respect, the Declaration on the quality of drafting of Community legislation (Inter-institutional agreement of 22 December 1998) annexed to the Final Act of the Treaty of Amsterdam. See also the rich case law of the ECJ on the importance of legal certainty, which is determined also by language rules (starting from case 24/62, Germany v. Commission [1963], ECR, 63 up to case C-6/98, ARD v. Pro Sieben [1999], ECR I-7599).

[26] For example, the Office de la langue française in Quebec, the Translation and terminology office of the Swiss Federal Chancery, the Terminology commission established for the parification of languages in South Tyrol, the Real Academia de la lengua vasca in the Basque country, etc. See further Francesco Palermo, "Insieme per forza? Aporie epistemologiche tra lingua e diritto", in Daniela Veronesi (ed.), Linguistica giuridica italiana e tedesca / Rechtslinguitik des Deutschen und Italienischen (Unipress, Padova, 2000), 17-28.

decisions of the Federal Constitutional Court,[27] and by the decision of the French Constitutional Council on the so-called "loi Toubon".[28] As the German Bundesverfassungsgericht and the French Conseil contitutionnel pointed out, inefficiency of legal rules on how language must be is due to the fact that "language belongs to people," and the natural evolution of a language usually runs counter to a strict normative approach to the language issue.

It can be thus affirmed that law faces several factual and legal obstacles when dealing with language issues, and that the establishment of complete equality between languages is merely a legal fiction and cannot correspond to reality nor can influence it beyond a certain extent. In other words, the response to the necessity to improve linguistic pluralism cannot be found only in legal instruments, although law can contribute greatly this aim.

3. Language and National Identity

The Role of Member States and the EU/EC as a Multinational Polity in Determining the Legal Context of Linguistic Diversity

As shown, language issues – as far as they can be determined by law (especially linguistic rights) – belong traditionally to the realm of nation states, and a deferential attitude towards states' prerogatives in the sphere of language is clearly enshrined in the European treaties. The reason is the simple syllogism already mentioned: language is something that belongs to people; people are the intimate basis of national identity; therefore language is the core of national identity, which the EU "respects" (Article 6(3) TEU).

Nevertheless, the TEC contains some provisions in the fields of culture and (to a more limited extent) language. More generally, the Community carries out relevant cultural and linguistic policies that obviously have an

[27] Judgment of 14 July 1998, BVerfGE 98, 218. See Jörg Menzel, "Zur Bedeutung des ß in der Staatsaufgabenlehre unter dem Grundgesetz", in Jörg Menzel (Hrsg.), Verfassungsrechtsprechung. Hundert Entscheidungen des Bundesverfassungsgerichts in Retrospektive (J.C.B. Mohr, Tübingen, 2000), 648-653. The last decisions were adopted in 1999 on the basis of individual claims (20 July 1999, 1 BvQ 10/99 and 25 November 1999, 2 BvR 1858/99, NJW (1999), 3477). See also Sally Johnson, "The Cultural Politics of the 1998 Reform of German Orthography", 53(1) German Life and Letters (2000), 106-125. For the latest developments see Wolfgang Kopke, „Die Rechtschreibung erneut vor Gericht", 49 NJW (2005), 3538-3541.

[28] Conseil Constitutionnel, decision no. 94-345 DC of 29 July 1994 (on the law on the use of the French language), commented by Jean-Pierre Camby, "Le Conseil constitutionnel et la langue francaise", 5 Revue de droit public (1994), 1663-1672.

impact on the language policy of the member states.[29] In this section the distinct functions of member states and EU concerning language policies shall be analyzed.

From the point of view of the states, language clearly belongs to their (national) identity, in the sense that the state is not only a form of organization of public power, but also a community of people.[30] Thus, national identity of the states means their constitutional identity,[31] and consequently their sovereignty. This perception is reflected in the community legal order, which considers language part of the national identity of each member state.[32]

It is therefore at the level of the member state that the legal identification and protection of language(s) and language diversity is determined, whereas the role of the Union is limited to the presumption of cultural and linguistic diversity (Article 22 of the Charter), to the recognition of the choice made by each member state regarding its national identity (Article 6(3) TEU)[33] and, where possible, to "contribute to the flowering of cultures of the member states, while respecting their national and regional diversity" (Article 151(1) TEC).

So does no European language issue exist at all? Quite the contrary.

From a states' constitutional perspective, the question arises, why should the Union commit itself to respecting something (the national identity of the member states, and thus their languages) that belongs to the inalienable part of a state's sovereignty and could never be touched by the process of European integration. From the Union's constitutional viewpoint, however, all those provisions mean the normative assumption of the existence of a variety of cultures (and languages) and a constitutional duty to maintain and safeguard them and the constitutional rejection of a single European culture or language. In other words, being the

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[29] See Bruno de Witte, "The Cultural Dimension of Community Law", 4(1) Collected Courses of the Academy of European Law (1995), 229-299 and id., "The Impact of European Community Rules on Linguistic Policies of the Member States", in Florian Coulmas (ed.), A Language Policy for the European Community – Prospects and Quandaries (Gruyter, Berlin, 1991), 163-177.

[30] In the constitutional doctrine, a clear distinction is traditionally drawn between the State as a legally organized structure of public power (State as an institution) and the State as a community of people subject to specific norms and determining that norms (State as a community).

[31] Roberto Toniatti, "Los derechos del pluralismo cultural en la nueva Europa", 58(II) Revista Vasca de administración pública, (2000), 17-47.

[32] Oppermann, Das Sprachenregime …, at 21.

[33] This duty derives, according to some scholars, from the principle of fair cooperation between the Community and the Member States (Article 10 TEC). Meinhard Hilf, "Europäische Union und nationale Identität der Mitgliedstaaten", in Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds.), Gedächtnisschrift für Eberhard Grabitz (C.H. Beck, München, 1995), 157-170, at 167.

Union built by (national) states and being thus indivisible from them, by no constitutional means can the "ever closer Union" ever really melt into a monolingual (mono-national) polity.[34]

Consequently, only the member states can represent the different cultural/linguistic communities that (must) constitute Europe, and the linguistic pluralism of the Union coincides with the linguistic pluralism of the states, including, of course, the sub-national level (as in Finland, Spain, Italy and, to some extent, Austria and even the United Kingdom). The European (cultural and) linguistic pluralism is determined by the free choice of each member state regarding (internal) linguistic and cultural pluralism,[35] and is the sum of the identities (culturally and linguistically plural or not) of all Member states. Indeed, because the member states are solely responsible for the legal recognition (of the existence) of a language, the EU cannot by definition – have minorities in a classical sense. Similarly to countries made up of different "regional" or "constituent" peoples (and not minorities) like Switzerland, Belgium, Bosnia-Herzegovina, and to some extent Canada, but also like countries which do not recognize (the existence of) minorities at a central level, attributing culture and language to the regional sphere of power (Germany),[36] in the context of the European Union, each member state is and represents at the same time a minority[37] and a constituent people.[38] Consequently, the Community cannot even claim competence in the field of (linguistic) minority protection (a classical "internal issue" of member states, minorities being primarily defined in

[34] Albert Bleckmann, "Die Wahrung der 'nationalen Identität' im Unions-Vertrag", 52 Juristen Zeitung (1997), 265-269.

[35] As Hilf points out, apart from being the term "national" in Article 6 TEU legally and culturally problematic, the identity that the Union shall respect is only the one of the Member States and by no means that of their territorial units, their peoples, their nations (Hilf, "Die Europäische Union …", at 164). It might be added, however, "only as long as the States decide that it must be so."

[36] In Germany the issue was raised in the frame of the debate on the constitutional emending process of 1994. The proposal to introduce a new Article 20a in the Basic Law to grant a federal protection of minorities was rejected on the basis of the exclusive competence of the Länder in cultural matters. See Michael Kloepfer, Verfassungsänderung statt Verfassungsreform. Zur Arbeit der gemeinsamen Verfasungskommission (Nomos, Baden Baden, 1995) and Anja Siegert, Minderheitenschutz in der Bundesrepublik Deutschland – Erforderlichkeit einer Verfassungsanderung (Duncker & Humblot, Berlin, 1999).

[37] Bruno de Witte, "Politics Versus Law in the EU's Approach to Ethnic Minorities", 4 EUI Working Paper RSC (2000) and Toniatti, Los derechos …. Interestingly, also the then President of the Commission Prodi, in his speech at the opening session of the Convention on the Future of Europe (28th February 2002) defined the EU "a Union of minorities".

[38] At present, the only truly multinational State belonging to the EU is Belgium. However, the groups (and the languages) that are "constituent" in Belgium are at the same time "national" languages in other Member States (Netherlands, France and to some extent Germany), and therefore the issue of a "constituent multinational State" never properly arose in the EU.

the group-state relationship) without changing its constitutional nature of a multinational and multi-state polity.

The EU, indeed, integrates several nations on the basis of forms of consociational democracy and "segregation" between the different nations (e.g. granting a differentiated representation in the European institutions on grounds of nationality, veto rights and even derogation to the enjoyment of the free movement of workers where the public administration is concerned, Article 39(4) TEC). In constitutional terms, this model of co-existence between different peoples (nations, states), based on segregation and free cultural choice of the entities, is usually defined as "multinational". This means that the system is the sum of the different nations and nationalities which constitute it, and it does not have any power in this field but that to regulate nationality-based issues at central level (representation in central organs, use of languages, etc.).[39] Nevertheless, the EU shows also some (embryonic) features of the second model of co-existence, based on integration and imposing an active role on the central level in nationality issues (some organs must represent only the Community's interests, there is a common citizenship, whatever that means, and in principle the fundamental freedoms are enjoyed without any discrimination on the ground of national origin). This opposed model is normally called "multiethnic". In this particular case, dealing with linguistic and thus cultural aspects, it should be spoken of a "multicultural" approach.

Put in these terms, it must be concluded that the EU is still a multinational polity, although showing relevant and increasing characteristics of a multicultural (or, better, intercultural) one.[40] The same goes for language regulation: the EU is linguistically the sum of the official languages of the member states (multinational), even though the practice shows some features of multiculturalism. It is well known that some official languages in the member states do not enjoy the same status at Community level

[39] See Marko, Autonomie und Integration … ; and id., "n welcher 'Verfassung' ist Europa? Einheit – Gleicheit + Differenz als juristisch-konstruktives Problem", in Ulfried Terlitza, Peter Schwarzenegger and Tomislav Boric (eds.), Die internationale Dimension des Rechts (FS Posch, Wien 1996), 207-222.

[40] The concept of interculturalism puts the existence of a common domain to the fore, while respecting cultural diversity. See e.g. Jagdish S. Gundara, Interculturalism, Education and Inclusion (Paul Chapman, London, 2000). In this sense, it seems more adequate for our puposes than multiculturalism, even though the terms are still usd as synonymous here.

(e.g. Luxembourgish, Irish,[41] Maltese); that many regional languages do not have any formal recognition in Europe (e.g. Catalan, Basque, etc.)[42]; that European institutions are free to decide how to deal with their working languages (Article 5 regulation 1/1958) and even with their official languages;[43] that some pieces of legislation cannot even be passed because of language problems;[44] and that in practice, almost all institutions can modulate the concrete application of the principle of equal status of the languages.[45]

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[41] Irish was recently upgraded to an official and working language of the EU, even though with an "asymmetrical status". Council Regulation (EC) No. 920/2005 of 13 June 2005, amending Regulation No. 1/1958, provides that from 2007 Irish enjoys the status of full official language, with no additional costs for the Community. The Irish government bears the training costs for interpreters and translators. Not all documents, however, will be available in Irish: like for the case of Maltese, only regulations adopted under the co-decision procedure will be available in Irish.

[42] The picture is getting ever more complex also in this regard. The Kingdom of Spain signed administrative agreements with the Commission and the Council (respectively in OJ C 40/2 of 17-2-2006 and in OJ C 73/14 of 25-3-2006), according to which Spanish citizens can address the European institutions in all official languages of Spain, without additional costs for the Community.

[43] See the Kik doctrine of the (Court of First Instance and of the)ECJ, Christina Kik v. Office for Harmonisation in the International Market, judgment of 2-9-2003, case C-361/01. For more details, Niamh Nic Shuibhne, EC Law and Minority Language Policy. Culture, Citizenship and Fundamental Rights (Kluwer International Law, The Hague, 2002).

[44] This is the case, for example, of the European trademark. For practical reasons (especially to compete in the international market) the European trademark shall be written in English, but many States, such as France and Germany, claimed their national languages as official too, and as a result the regulation proposal on trade marks was for a long time blocked by cross-veto. An agreement was reached in March 2003, according o which from 2010 on European trademarks will be registered by the EU in only three official languages (English, French, German) and, if required, in the original language (see http://www.ige.ch/E/jurinfo/pdf/EU-Council_Common_political_approach_e_03-03-07.pdf).

[45] So does the Council, where, as a matter of fact, documentation is in many cases only drafted in English, French and sometimes German. Similarly, the Commission's debates are mainly drawn up in only a few official languages. See for more details Manuel Alcaraz Ramon, "Languages and Institutions in the European Union", 5 Mercator Working Paper (2001), at http://www.ciemen.org/mercator/Menu_nou/index.cfm?lg=gb). The Parliament formally recognizes the general principle that all documents shall be drafted in all official languages. Nevertheless, for practical reasons, translation is made only into English and French, and from there back into the other official languages. This causes, as it is easy to understand, serious problems where the legal certainty is concerned (for this concern see also Antoni Milian i Massana, "Le régime linguistique de l'Union Européenne: le régime des institutions et l'incidence du droit communautaire sur le mosaďque linguistique européen", 3 Rivista di diritto europeo, 1995. For further examples from the translator's point of view see Domenico Cosmai, Tradurre per l'Unione europea. Il regime linguistico della UE (Hoepli, Milano, 2003). 485-512, at 501. Concrete language use no longer even depends on the territory where the institutions are located: for example, the languages used by Eurostat (based in Luxemburg) are English, French and German (see http://europa.eu.int/comm/eurostat/). See further Andrea Ortolani, "Lingue e politica linguistica nell'Unione europea", 21 Rivista critica del diritto privato (2002), 203-216 and at http://www.jus.unitn.it/cardozo/Review/

The constitutional nature of the EU in language issues is thus that of a multinational polity, formally deferential to the overwhelming role of the member states, but functionally aiming to improve its multicultural elements.

In the coming pages, the intensity of the EU's tendency towards multiculturalism shall be tested, and it must be analyzed whether, on the basis of recent developments in European constitutional law, the present language regulation is still in line with the new constitutional scenario of European integration.

4. Who is the Ultimate Guardian of Linguistic Diversity? The Role of the "Integrated Constitutional Space"

The language issue in Europe is certainly – as we have seen – one of the most state-based subjects. The states decide, the EU recognizes and respects, and cannot even change its role because this would imply a change in its constitutional nature, which can be modified only by the states acting unanimously. The influence of the Union in the language sphere is limited to its own organization, and even in this field the states retain a veto right (Article 290 TEC). From a legalistic/formalistic point of view, the Community level shall simply surrender to the exclusive state competence in the language field. However, there are at least two main reasons, deriving from the theory of the constitutional nature of member states (4.1.) and from the analysis of the jurisprudence of the ECJ (4.2.1.), respectively, that demonstrate why the previous statement cannot be true. Also, the Charter of Nice addresses – although quite vaguely – the language issue, and will therefore be analyzed from the perspective (of the equality principle and) of its peculiar position in the new legal system of constitutional language law of the European Union (4.2.2.).

4.1. The Integrated Constitutional Space and "Non Binding – Binding" Constitutional Law

A state is not the same as a member state. A definition of the kind of state we are referring to (4.1.1.) is necessary in order to understand the real meaning of the mentioned almost exclusive role of the state in the language sphere (4.1.2.). Subsequently, two crucial fields will be analyzed, in which the emergence of this new constitutional law becomes particularly clear (4.2.).

4.1.1. THEORETIC FOUNDATIONS

Unlike the (federal) state-formation process, where the federalizing entities can determine the ideological underpinnings and the constitutional values of the federation-in-the-making only before the so called "federal

big bang"[46] takes place – i.e., before the federal constitution enters into force, transforming their original sovereignty into mere autonomy – in the constitution-making process of Europe the permanent nature of the process influences and limits the "constitutional way of being" and "form of the power"[47] of both the member states and the Union.[48] For this reason, in the present European constitution there are many reciprocal "non binding bindings" regarding the constitution of the states and the Union.

This bundle of reciprocal influences, in spite of not being (yet) directly justiceable by a court and thus not immediately binding, has enormous legal relevance[49]. Being a member state can thus imply that for every state, some consequences result from its language policy. Although the ECJ cannot rule that the use of an official language must be guaranteed on the basis of a fundamental right deriving from the common constitutional tradition of pluralism, it can reach the same result through the principle of non-discrimination.

In general terms, in the context of European integration every state must rely on the others as well as the Union[50]. This implies the establishment of common principles that do not reach the same effectiveness as the common constitutional traditions (and are thus not immediately enforceable by the courts) but are of great importance in shaping relations between member states and the Union: Something which lies in-between soft law and constitutional traditions common to the member states. Like conventions in the British constitution, it might be said the mentioned common principles are "the flesh which clothes the dry bones of the law".

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[46] This term is used by Roberto Toniatti, "Federalismo e potere costituente", in "Proceedings of the Conference 'Regionalismo e federalismo in Europa'", Trento, 6-7 June 1997, 171.

[47] The term "form of the power" is used by Francisco Rubio Llorente, La forma del poder Estudios sobre Constitución (CEC, Madrid, 1997).

[48] See, in general, Neil McCormick, Questioning Sovereignty (Oxford University Press, Oxford, 1999).

[49] It is not by chance that the machinery set up in Article 7 TEU for the case of breach by a Member State of the principles laid down in Article 6(1) TEU (liberty, democracy, respect for human rights and fundamental freedoms, rule of law) provides for a highly political control and it does not involve the Court of Justice. It is worth noting, in addition, that the procedure under Article 7 TEU (which is legally formalized, in spite of being of very political nature) has never been applied, not even during the 'Austrian crisis' in 2000, which was settled by means of merely political actions. On the Austrian crisis and Article 7 TEU see Gabriel Toggenburg, "La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni", 2 Diritto Pubblico Comparato ed Europeo (2001), 735-755; as well as Peter Pernthaler and Peter Hilpold, "Sanktionen als Instrument del Politikkontrolle – der Fall Österreich", 2 Integration (2000), 105-119.

[50] Already stated in the Declaration on democracy adopted by the European Council in Stuttgart on 7-8 April 1978 is the idea that in the European system, every State must trust all the others, not only in the economic field, but also as far as the protection of fundamental rights is concerned.

The existence of common principles and their effectiveness derive from the integration among states as well as between them and the EC/EU. Thus, even in fields where states retain exclusive competence, the constitutional nature of each state and its policies are very much determined by their integration with other member states and by their membership in the Union.[51] On the other hand, the states (acting together) guarantee that the Union respects both the constitutional values they imposed upon it and those to which they subordinated themselves by becoming Members of the Union. In this process, then, no federal big bang occurs, but a continuous mutual influence is constantly in place.

This phenomenon of "voluntary obedience" or "non binding-binding constitutional law", based on the reciprocal influence between the member states and the Union, is similar to what Weiler calls "constitutional tolerance".[52] Very correctly, Weiler states that the member states

accept [the European constitutional discipline] as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities. Of course, to do so creates in itself a different type of political community, one unique feature of which is that very willingness to accept a binding discipline which is rooted in and derives from a community of others.[53]

Here we should wonder, however, whether this phenomenon is only a matter of fact (or practice, or politics), or if it is also a matter of law. For this purpose, it might be useful to make reference to old theories that have been developed having regard to the issue of (state) federalism. The first is the so called "integration doctrine" (Integrationslehre), elaborated by Smend,[54] according to which the state only exists because of integra-

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[51] Bruno de Witte, "Les implications constitutionnelles, pour un Etat, de la participation à un processus d'íntégration régionale", in Ewoud H. Hondius (ed.), Netherlands Reports to the Fifteenth International Congress of Comparative Law – Rapports néerlandais pour le quinzième congres international de droit comparé (Intersentia, Antwerpen, 1998, 379-393.).

[52] Joseph H.H. Weiler, "Federalism and Constitutionalism: Europe's Sonderweg", 10 Jean Monnet Working Paper (2000), at http://www.jeanmonnetprogram.org/papers/index.html

[53] Ibid., at 9. To make an example, he adds: The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey. In both, the constitutional obedience is demanded. When acceptance and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.

[54] Rudolf Smend, Verfassung und Verfassungsrecht (Duncker & Humblot, Berlin, 1928), at 121; id., "Integration" (1956); in id., Staatsrechtliche Abhandlungen und andere Aufsätze (Duncker & Humblot, Berlin, 1994), 475-489; and id., "Integration", 1 Evangelisches Staatslexikon (Kreutóz-Verlag, Stuttgart, 1987), 1354-1368

tion at the personal, functional and material levels.[55] For Smend, "the State exists only, because and insofar it integrates constantly"[56]. The most powerful instrument for societal integration is the federal state, where the central state (composed of the Federation and its Member States) works as a vehicle for integration of the state entities, whereas member states are the means for integration of individuals into the state structure.[57] Thus the (federal) state, integrating individuals and states, cannot be static and clearly defined, because it must be constantly adapting itself to the societal changes occurring in the process of integration. The same applies, according to Smend, where international integration is concerned. This is, in his view, just the second step of (domestic) institutional integration, also contributing to the permanent process of modification through integration of state entities. It follows, in Smend's theory, that integration (both internal and international) is a constitutional duty of the state,[58] and the pre-condition for its very existence.[59]

The second theory to refer to is that of the so-called "federal State with three elements" (Dreigliedrigkeitslehre), developed by Kelsen[60] and Nawiasky[61]. This conceptualization points out that the federal state is composed by Gesamtstaat (general state), Zentralstaat or Oberstaat (central state) and Gliedstaaten (member states). The "general State" includes (and is composed by) both the central state and the member states, and is hierarchically in a higher position. The general state has its own institutions and its own constitutional system, separated from (although integrated into) that of the other two levels. The key (and maybe the only) institution of the general state is the Constitutional Court, whose primary task is to settle conflicts between the central state and member states.[62] In other words, the very fact of integration produces the existence of a new

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[55] Stephan Hobe, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz (Duncker & Humblot, Berlin, 1998), 77.

[56] Smend, Verfassung und Verfassungsrecht…, 138.

[57] Ibid., 229.

[58] Id., "Integration", 1355.

[59] See also Ingolf Pernice, "Carl Schmitt, Rudolf Smend und die Europäische Integration", 120 Archiv des öffentlichen Rechts (1995), 100-120.

[60] Hans Kelsen, Allgemeine Staatslehre (Julius Springer, Berlin, 1925; Österreichische Staatsdruckerei, Wien new ed. 1993), 199.

[61] Hans Nawiasky, Bundesstaat als Rechtsbegriff (Mohr, Tübingen, 1920); and id., Allgemeine Staatslehre. Vol. 3 (Benziger, Einsiedeln, Zürich, Köld, 1945-1958), 151.

[62] Kelsen, Allgemeine Staatslehre …, 201. Thus, the federative element is the Gesamtstaat, whereas the Zentralstaat (Oberstaat) only performs coordination of the Member States, being separated from them but not in a higher constitutional position. It is worth noticed that this theory was originally adopted by the German federal constitutional court (BVerfGE 6, 309), but was then abandoned in favor of the presently prevailing theory of the federal State composed by only two elements, the Federation (Bund) and the Member States (BverfGE 13, 54).

constitutional space, created by the interaction between constitutional spheres.

Adapting these theories to the new reality, the new way of integration within the European constitutional space, rather intuitive in political terms, results more clearly even from a legal perspective. The very existence of the new constitutional law deriving from the interaction between EU and Member states is based on their reciprocal acceptance of willingness to integrate states (and, through them, their citizens) into a larger constitutional, state-like space, which is not only the EU, but the constitutional sum of the EU and the fifteen member states. Moreover, this integration has been guided and shaped by the very organ of the integrated space, the ECJ.

It seems appropriate to call the product of this new kind of constitutional relations (between member states and EU/EC, mostly based on "non binding-binding" elements or constitutional tolerance) the "integrated state"[63] or to speak of "integrated statehood". More precisely, avoiding the long -lasting debate on the essential elements of sovereignty and statehood, the term to be used shall be "integrated polity" or "integrated constitutional space". This new concept is based on the consideration that European integration is not merely a sum of the constitutional spheres of both the states and the Union, but that a constitutional dimension is produced by their mutual integration. Such a constitutional sphere of integration, which emerges from their shared contacts and influences, is shaped by the reciprocal acceptance of the non-binding – binding nature of their respective behaviours.

To be more precise, where states are concerned, it seems necessary to distinguish between "integrated" and "Community"-State[64]. The latter is just part of the first. In Europe, integration is a larger phenomenon that indicates the constitutional interrelation and dependency between the states and the various "geo-juridical" areas they belong to, e.g. the European Union, the Council of Europe, and the OSCE.[65] In this sense, "Community-States" are the states whose constitutional nature is affected by their membership in the European Union/Communities. Their member-

[63] This term is also used (but not explained in its meaning) by Francisco Rubio Llorente, "Constitutionalism in the 'integrated' States of Europe", 5 Jean Monnet Working Paper (1998), at http://www.jeanmonnetprogram.org/papers/index.thml

[64] See Andrea Manzella, Lo Stato "comunitario", 2 Quaderni constituzionali (2003), 273-294.

[65] The concept of three "geo-juridical" areas in Europe (EU/EC, Council of Europe and OSCE) has been developed by Toniatti, Los derechos del pluralismo cultural…, 22.

ship as a constitutional duty is already formalized (more or less explicitly) in all member states[66].

The integrated state is a state that must – by its very nature – be integrated. Accordingly, the member state is a state that must be member (of the EU). The constitutional duty to be integrated derives above all from the indivisible interaction between the constitutional spheres of the member states and the EU/EC within a common integrated constitutional space, and the mutual guarantee of this duty is provided by the reciprocal influence in determining their nature much more than by the justiceability before a court.[67]

Thus, integration is not only a social phenomenon; it has more and more a legal significance, although in a non-traditional (i.e. judiciable) way. Integration does not merely describe what happens in the relationship between the member states and the Union, but prescribes how this relationship ought to be. Indeed, as has been explicitly recognized by some constitutional courts, the distinction between the internal and the community dimension of the states is increasingly obsolete.[68] Therefore, the theory of the integrated constitutional space challenges the dualistic

[66] The constitutions of all Member States contain provisions which "open" the domestic constitution to the Membership in the EU (and to other "geo-juridical" areas). See Article 23 Austrian federal constitution, Article 34 Belgian constitution, Article 20.1 Danish constitution, Article 23 German Basic Law, Article 93 Spanish constitution, Article 28 Greek constitution, Article 29 Irish constitution, Article 11 Italian constitution, Article 49-bis Luxembourg constitution, Article 92 and 94 Dutch constitution, Article 7(6) Portuguese constitution, Article 5 chap. 10 Swedish constitution, Article 88 French constitution. No explicit mention in the Finnish constitution, but the norm is derived by the scholars. See further Bruno de Witte, "Direct Effect, Supremacy and the Nature of the Legal Order", in Paul Craig and Gráinne De Búrca (eds.), The Evolution of EU Law (Oxford University Press, Oxford, 1999), 177-214. The role of integration clauses in the constitutions of the Member States is analyzed also by Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", 36 CMLR (1999), 703-750. As far as the British constitution is concerned, it seems that the constitutional duty of membership can be derived from the European Community Act of 1972 and from the subsequent adhesion to a system based on specific principles and rules. See the reasoning of Lord Bridge in Factortame II (1991, 1 AC, 603, 658), quoted and commented by Paul Craig, "Sovereignty of the United Kingdom After Factortame", 222 Yearbook of European Law (1991), Article 88 French 234-240.

[67] Josef Isensee and Paul Kirchhof, Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. III (C.F. Müller Verlag, Heidelberg, 1988), at 131, describe this phenomenon as "integration through diffuse promises (Integration durch diffuse Verheissung).

[68] See Spanish Constitutional Court, judgment no. 165/1994 of 26 May and German Federal Constitutional Court, BVerfGE 2, 347 (374). Contrary, Italian Constitutional court, decision no. 428/1997.

approach of some constitutional jurisdictions,[69] because even the issue of supremacy is more and more diluted into the integration of the constitutional spheres.

4.1.2. INTEGRATED CONSTITUTIONAL SPACE AND LINGUISTIC PLURALISM

What are the consequences of this theory applied to linguistic pluralism in the European integrated constitutional space? Given that linguistic pluralism cannot be imposed by formal rules of the Community, can this occur by means of the integrated nature of (member) states and Community?

Having regard to Article 290 TEC and to Article 8 of regulation no. 1/1958[70], the compromise between the double reciprocal imposition within the integrated system appears clear. "Linguistic pluralism within the EU does not go beyond a mere interstate pluralism. However – taking into account the domestic rules on language of each member state and thus confirming that language regulation still remains within the realm of member states – the linguistic pluralism of the EU could also comprise the infra-state linguistic pluralism. At least on the basis of the text [of Article 8] and of the reference to state rules contained in it, it does not seem that the official status of all languages must be referred only to the state and to all the state's territory (as in the case of Belgium). On the contrary, it seems that linguistic pluralism can (even though it does not necessarily must) also be a territorial or minority pluralism (as it could be in the case of Finland, Italy or Spain)"[71].

In addition, within the integrated constitutional space, the role of the "constitutional elements" stemming from other (less integrated) geo-juridical areas like the Council of Europe and the OSCE, is of paramount importance in the issue of language.[72] In simpler terms, it can be said that what cannot be "imposed" by the EU about linguistic pluralism of the states is increasingly "recommended" by the Council of Europe and by the OSCE, slowly ratified and implemented by the states, and by this

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[69] Followed particularly by the Italian Corte costituzionale (Costa, Frontini, and Granital judgments), the German Bundesverfassungsgericht (Solange and Maastricht), the Danish Supreme Court (Maastricht) and the French Conseil constitutionnel (Maastricht II and Amsterdam). A new monistic interpretation can be derived also from the integration clauses of the Member States' constitutions. See Pernice, Multilevel Constitutionalism…

[70] "If a Memeber State has more than one official language, the language to be usd shall, at the request of such State, be govened by the gneral rules of its law."

[71] Toniatti, Los derechos pluralismo cultural…44. (translation by the author).

[72] See, in particular, the Council of Europe's instruments which have a decisive influence on the internal linguistic pluralism of the States, like the European Charter of Regional and Minority Languages, the European Framework Convention on the Protection of National Minorities, etc. And of course the case law of the European Court of Humna Rights.

means becoming part of the integrated space and thus also of EU constitutional law.

A clarifying analogy can be seen with the emergence of territorial pluralism in Europe: For a long time, the EC/EU was considered to be "blind" where the internal territorial setting of the member states was concerned but, also due to the role played by some crucial acts of the Council of Europe (like in particular the Madrid Outline Convention on Trans-frontier Co-operation between Territorial Communities or Authorities of 1980), the "communitarian status" of the Regions[73] increasingly emerged, and became enshrined in the Treaty (Article 263-265), recognized by the courts[74]and addressed by the legislation.[75]

It can be concluded that the "integrated state" is a state that can no longer freely decide, without considering the existence of the other constitutional levels, upon issues affected by different layers of governance, even if they formally fall into its exclusive sphere of competence. states are still the masters of the language rules within the EU, but only insofar as they are integrated. Linguistic pluralism is thus a constitutional consequence of the integrated nature of the member states, which the Union first contributes to influence, and then imposes on itself to respect.

4.2. How does the "Integrated Constitutional Law" Operate? Applications

4.2.1. THE ROLE OF THE ECJ

The role of the (integrated) states as the absolute masters of the language issue in Europe must be read and can be better understood in the light of the jurisprudence of the ECJ.

The phenomenon of massive intervention of the ECJ in shaping the concrete contents of European law is well known,[76] being part of the overall expansive tendency of the role of courts in modern societies (judi-

[73] Giandomenico Falcon, "La 'cittadinanza europea' delle Regioni", 2 Le Regioni (2001), 327-342.

[74] Cf. in particular, CFI, judgment of 15 June 1999, case T-288/97, Friuli-Venezia Giulia v. Commission, ECR at 1871 and judgment of 15 December 1999, cases T-132/96 and T-143/96, Freistaat Sachsen and Volkswagen AG and Volkswagen Sachsen GmbH v. Commission, ECR, at 3663, when the Court recognozed an autonomous locus standi for Regions.

[75] See, in particular, the whole regional policy of the EU. This is even clearer taking into consideration the role of Regions in the context of the new European governance, as recognized also in the Commission's White Paper of 2001. See Roberto Toniatti et al., European Governance (European Academy, Bolzano/Bozen, 2002).

[76] Martin Shapiro, "The European Court of Justice", in Paul Craig and Gráinne de Búrca, The Evolution of EU Law (Oxford Univesity Press, Oxford, 1999), 321-347.

cial creativity, or judicial activism).[77] This is even more evident when examining the tendency of the ECJ to include fields within the scope of the treaty that were originally excluded from it: a phenomenon that can be called "judicial spill-over".[78] As far as language rights are concerned, the ECJ has already considered them "instrumental" to the enjoyment of other individual rights and freedoms, and only by this means they can be protected under European law. Although so far the constitutional commitment to (linguistic) pluralism has never been challenged in the European court system and the ECJ has guaranteed the right to use one's own language only on the basis of the principle of non-discrimination and not on the principle of linguistic pluralism,[79] one could argue that the ECJ could hypothetically guarantee the use of an official minority language (to a citizen of the EU, a regional government, a member of a minority, etc.) as a fundamental right enshrined in the common constitutional heritage of pluralism.[80] Indeed, the jurisprudence of the ECJ in language issues shows that the respect of the choice of linguistic pluralism of member states can go so far that it prevails in practical terms even over the freedoms of the Treaty, as it results from the Groener doctrine.[81]

It thus follows that (linguistic) pluralism is not (yet) a common constitutional tradition, but certainly a common principle of the integrated

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[77] See Carlo Casonato, "Judges and Rights: Creativity, Restraint and Legitimacy", in id. (ed.), The Protection of Fundamental Rights in Europe: Lessons from Canada (Università degli Studi, Trento, 2003), 27-53.

[78] The term "judicial spill-over" indicates a phenomenon according to which the decision of the ECJ to extend its jurisdiction over a subject which did not (or not clearly) fall within its competence determines in practice the "communitarization" of that subject. The case Angonese could be an example: as admitted also by the advocate general's conclusion, the jurisdiction of the ECJ over that case was at least doubtful, given that an Italian citizen residing in Italy suited an Italian bank in front of an Italian judge contesting an Italian law. In addition, the diploma required for the job had no relevance with Mr. Angonese's studies in Austria, being conferred by an Italian high-school. Surprisingly, the ECJ simply declared its jurisdiction on the case because "it is far from clear that the interpretation of the community law [the national judge] seeks had no relation to the actual case or to the subject matter of the main action" (ECJ, Angonese, at 19). Another recent example of a mere internal issue in which the Court affirmed its jurisdiction can be found in the case Guimont, judgment of 5 December 2000, case C-448/98.

[79] In two more relevant cases dealing with the right to use a language, Mutsch (ECJ, judgment of 11 July 1995, case 137/84, Mutsch, ECR 1985, 2681 – see Anthony Arnull, "Social Advantages and the Language Barrier", European Law Review (1985), 346-348; and Bruno de Witte, "Il caso Mutsch: libera circolazione dei lavoratori e uso delle lingue", IV Il Foro italiano (1987), 8-13 and Bickel/Franz (ECJ, decision of 24 November 1998, case C-274/96, Bickel-Franz, ECR 1998, I-7637 – see Gabriel Toggenburg, "Der EuGH und der Minderheitenschutz", 1 European Law Reporter (1999), 11-15) the Court ruled merely on the basis of the freedoms granted by the Treaty 8NOW Aerticles 39 and 40).

[80] Toniatti, Los derechos pluralismo cultural… at 44.

[81] ECJ, case 379/87, Groener v. Ministry of Education, ECR 1989, 3867. See also case Angonese.

constitutional space which is enforceable also under European law, but only as far as the states decide to be pluralistic and therefore to include (linguistic) pluralism within their national (i.e. constitutional) identity (Article 6(4) TEU).

However, as long as linguistic pluralism cannot be considered part of the common constitutional traditions, given the fact that in some member states the recognition of linguistic diversity is explicitly denied (France[82], Greece, the Baltic States) or simply nonexistent (Sweden, Netherlands, Portugal), the practical consequence of the absence of any Community provision (and competence) in the field of language use within the states is paradoxically not the absence of jurisdiction by the ECJ, but "merely" the coverage of the language issue by the Treaty's freedoms. Since language in the European context is very much linked to free movement, it can be concluded that language obstacles shall be removed every time they constitute a barrier for the enjoyment of the Treaty freedoms.

In addition, as language promotion is often an exception from the principle of equality[83] (which is something greater and wider than the mere principle of non-discrimination), many national rules can collide with European principles aiming to ensure equal conditions to all European citizens in enjoying the fundamental freedoms granted by the Treaty without any discrimination. This because minority (and language) protection could mean (positive) discrimination based on the principle of (substantive) equality, and this may imply a violation of the principle of non-discrimination (formal equality).

In other words, being the ECJ limited in its interpretation by the lack of Community competence in the field of language, it cannot consider the legitimate aims of the states in protecting language diversity if state rules run counter the freedoms of the Treaty (unless the member states recognize (internal) linguistic pluralism as part of their national identity). The ECJ case law in linguistic issues illustrates, in the absence of substantial normative European rules in this field, that the lack of competence at the

[82] See, in particular, the judgment of the Constitutional council on the ratification of the European Charter for Regional and Minority Languages, no. 99-412 DC of 15 June 1999 and, more recently, the decision on the law granting new autonomous powers to Corsica, no. 2001-454 DC of 17 January 2002. Some interesting indicators of possible future changes are now emerging. See Françoise Benoît-Rohmer, "Les langues officieuses de la France", 45 Revue francaise de droit constitutionnel (2001), 3-29.

[83] Sergio Bartole, "Minoranze nazionali", Novissimo Digesto (UTET, Torino, 1985), Appendix V, at 44.

EU level by no means prevents the ECJ from scrutinizing the compatibility of national rules on language with the Treaties.[84]

Thus, the competence of member states in language issues is by no means exclusive, but increasingly determined by the integrated nature of the European constitutional space (which recognizes the existence of a principle of linguistic pluralism) and by the jurisprudence of the ECJ (which excludes the existence of a common constitutional tradition of linguistic pluralism).

Paradoxically, insofar as rules on multiculturalism (e.g. minority protection, linguistic rights, etc.) are still outside the sphere of European regulation, the EU cannot determine how far special provisions can go and how legitimate the aim of protecting minorities or languages can be, simply because no European (Community) standard exists. Therefore, as far as the mere functional-economic dimension of EC-law prevails (the four ECT-freedoms), the Court will always be forced to give preference to current, prevailing European principles, which are economically oriented and aim to grant the same conditions to all European citizens without any discrimination on the grounds of nationality (formal equality). On the contrary, only if some general standards in favour of linguistic diversity become enshrined in EC-law will the ECJ be able to balance principles like legitimate protection of differences with equal conditions for all European citizens. Until recently, the ECJ could only apply the principle of non discrimination (formal equality) when dealing with language-related issues, though these at least potentially collide with the principle of substantive equality. The latter principle has very limited recognition in EC-law, and applies, in practice, only in the field of equal treatment of men and women (Article 141 ECT).[85] It is not by accident that the jurisprudence of the ECJ in this regard is much more benevolent where the legitimacy of exceptions to the principle of non-discrimination is concerned.[86] In some fields that affect linguistic diversity, where there is a competence of the Community (e.g. language requirements on labels for some products or trademarks), this balancing has already been, if not reached, at least pursued with some

[84] See Francesco Palermo, "The Use of Minority Languages: Recent Developments in EC-law and Judgments of the ECJ", 8(3) Maastricht Journal of European and Comparative Law (2001), 299-318.

[85] Cf. Uwe Kischel, "Zur Dogmatik des Gleichheitssatzes in der Europäischen Union", 1 EuGRZ (1997), 1-11.

[86] 28 March 2000, case C-158/98 (Badeck) and others.

success: even if the Court were to rule against special provisions, the attitude seems to be much more open and tolerant regarding diversity.[87]

Thus, the more the EU has explicit competence in the fields affecting multiculturalism, the less danger for national provisions to be withdrawn because in contrast to the principles of the treaties.[88] This is due to the fact that protection of diversity is implemented by rules that constitute an exception, if not a (legitimate) violation, of the principle of formal (de jure) equality, aiming to pursue the substantive (de facto) equality, whereas the freedoms laid down in the Treaty are committed to non discrimination and thus to formal equality.

All this means, in other words, that the case law of the ECJ somehow regarding language issues will always constitute an obstacle for national rules aiming to improve multiculturalism (e.g. minority protection) as long as EC-law does not expressly allow the Court to also apply the principle of substantive equality and thus establish a balance between principles that are equally protected by the treaties. As already stated above, if member states want to effectively protect their special legislation on linguistic/cultural diversity, and therefore to affirm their internal pluralism, they must provide the EU with at least some competence in this regard. By doing so, they will enable the ECJ to take into consideration and to balance not only economic freedoms, but also the protection of diversity as an European value.

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[87] A quite interesting jurisprudence has been recently developed by the ECJ on this regard. This is mostly due to the fact that the EC has passed some pieces of legislation on that, aimed to guarantee also the respect for linguistic diversity among Europe. Therefore, also the jurisprudence of the ECJ can take this aim into due consideration, balancing it with the economic-inspired freedoms laid down in the Treaty. Thus, the decisions of the ECJ on linguistic requirements in labeling of products and trade marks are paying much more attention (at least formally) to the specific needs of multiculturalism than the judgments given in "pure" minority issues. See the landmark decisions in Piageme (case C-369/89, ECR 1991, I-2971) and Piageme II (case C-85/94, Groupement de producteurs, importaters et agents généraux d'eaux minerals étrangères), affirming and interpreting the concept (already enshrined in the directove 79/112) of "understandable language". More recently ECJ, judgment of 3 June 1999, Colim NV v. Bigg's Continet Noord NV, case C-33/97, ECR 1999, I-3175 (cf. Arianna Vedaschi, "L'uso della lingua nelle etichette dei prodotti alimentari e la giurisprudenza della Corte di giustizia", VI DPCE (1999), 1633-1636); ECJ, judgment of 21 September 1999, BASF AG v. Präsident des Deutschen Patentamts, case C-44/98, ECR 1999, I-6269 (cf. Elisabetta Palici di Suni Prat, Brevetti europei e uso delle lingue in Europa, I DPCE (2000), 117-120) and ECJ, judgment of 12 September 2000, Geffroy, case C-366/98, ECR 1-6579.

[88] See e.g. the explicit coverage of national affirmative actions laid down in Article 5 of directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19/07/2000).

4.2.2. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

In this context, it could be argued whether the "solemn proclamation"[89] of the Charter will play a role in the described process of mutual influence between member states and EU in language issues. Also considering the normative sense of Article 6(3) TEU, described above, it can be said that Article 22 of the Charter, which states that the Union respects "cultural, religious and linguistic diversity", contains a positive obligation: the Union is obliged to respect, among other things, linguistic diversity.[90]

This provision is contained in a document – the Charter – which generally does not recognize collective rights or, better, "complexity rights" such as direct democracy rights, cultural rights, language and minority rights, rights of future generations, etc. Certainly, the Western legal tradition[91] "places the individual at the heart of [States'] activities" (preamble of the Charter), and this is precisely what the ECJ constantly affirmed in its jurisprudence regarding what can be named "complexity rights".[92] And there is no doubt that the Charter, by making rights "more visible", refers almost exclusively to individual rights.[93]

In simple words, European society is (and claims to be) much more complex than it appears in the Charter. Leaving aside the different forms of government and governance, direct and indirect democracy, etc., it cannot be stressed enough that within the territory of the EU there is

[89] Bruno de Witte, "The Legal Status of the Charter: Vital Question or Non-Issue?", 1 Maastricht Journal of European and Comparative Law (2001), 81-89.

[90] Aalt Willem Heringa and Luc Verhey, "The EU Charter: Text and Structure", 1 Maastricht Journal of European and Comparative Law (2001), 11-32, at 28.

[91] Harold Berman, Law and Revolution, I- The Formation of the Western Legal Tradition (Harvard University Press, Cambridge, MA., 1983).

[92] "Complexity rights" are e.g. collective rights or individual rights to be used only collectively, like some minority rights, rights of democratic participation, etc. See for this approach ECJ, judgment of 17 October 1995, Kalanke case C-450/93, in ECR, I-3051, where the Court, examining an affirmative action policy for women's employment, states that every "derogation from an individual right [...] must be interpreted strictly" (at 21). Similarly decision of 15 May 1986, case 222/84, Johnston, in ECR, 1651 (at 36) and many others.

[93] See Stefano Rodotà, "La Carta come atto politico e documento giuridico", in Andrea Manzella, Piero Melograni, Elena Paciotti and Stefano Rodotà, Riscrivere i diritti in Europa (Il Mulino, Bologna, 2001), 57-89, at 87.

a considerable number of ethnic and linguistic minorities,[94] and that language is most definitely an issue[95]. But the Charter seems to ignore all the "complexity rights" that a complex society requires.

This is particularly evident if one considers the equality principle, which is the typical parameter for constitutional interpretation and is of paramount importance in the language issue. It is well known that the absence of a general clause on equality in the Treaties has limited the intervention of the ECJ, even though the Court derived it from the spirit of the Treaty.[96] The Charter's provision on equality is limited to the very general statement of Article 20 ("everyone is equal before the law"), whereas the subsequent principle of non-discrimination (Article 21) includes a wide range of protection.[97]

Up to this point, the limits of the Charter in regulating the language issue have been detailed. But for the purpose of this paper, the legal nature of the Charter is of particular significance.

The Charter has (still) no binding character. Nonetheless, its relevance in non-legal analysis can, at least in a short- to medium-term perspective, imply significant consequences also in legal terms. Firstly, the Charter shows a strong "psychological-symbolic" dimension: it somehow represents the "state of art" in the process of constitutionalization of Europe, as it derives from the name "Convention" given to the body that elaborated it, as well as from some provisions which, in spite of being legally redundant, represent milestones of constitutional European identity (prohibition of the death penalty, bio-ethics, etc.). Secondly, the Charter has a significant "sociological" dimension. It contributes to the development of a common

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[94] See on minorities and EU Law de Witte, Politics Versus Law …; id., "The European Community and its Minorities", in Catherine Brölmann, René Lefeber and Morjoleine Zieck (eds.), Peoples and Minorities in International Law (Martinus Nijhoff Publishers, Dordrecht, 1993), 167-185; Department "Ethic Minorities and Regional Autonomies", Package for Europe. Measures for Human Rights, Minority-protection, Cultural Diversity and Economic and Social Cohesion (European Academy, Bolzano/Bozen, 1998) and Gabriel N. Toggenburg, "A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities after the Enlargement Decade", 15 EUI Working Papers (2006), at

[ht]tp://cadmus.iue.it/dspace/bitstream/1814/4428/1/LAW+2006.15.pdf

[95] See Philippe Van Parijs, "Should Europe Be Belgian? On the Institutional Design of Multilingual Polities" in Karl Hinrichs, Herbert Kitschelt and Helmut Wiesenthal (eds.), Institutionenkonflikt in kapitalistischen und postsozialistischen Gesellschaften (Campus Verlag, Frankfurt am Main, 2000), 59-77.

[96] ECJ, decision of 17 April 1997, case C-15/95, EARL, in ECR, I-1961.

[97] The grounds for non discrimination mentioned in Article 21 are: "sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". For a different interpretation, see Rodotà, La Carta come atto politico …, 82, who mentions the necessity to reach a political compromise within the Convention.

European identity through the self-identification of the Union as a legal-constitutional community and by overcoming the "democratic deficit" of the European integration[98] by means of the new procedure for its elaboration. In other words, the Charter is a crucial step for the development of a European Verfassungspatriotismus, based on the effectiveness of symbols in the integrated constitutional space.

What are the consequences for the legal system? To answer this question, it is useful to refer to the case of France, which is considered the cradle of human rights. As in the legal order of the Community, under France's 1958 constitution the protection of fundamental rights was developed without a general bill of rights, and was the result of a process of judicial incorporation of different sources of fundamental rights (bloc de constitutionnnalité).[99] The French Constitutional Council ruled on the basis of acts that were no longer in force (the 1789 Declaration of Human and Citizen's Rights) and had no binding character (the preamble of the 1946 Constitution). In the same way, the jurisprudence of the ECJ on fundamental rights was originally based on quite vague sources of law (the common constitutional traditions) or on sources that were not even part of the Community's own legal system (the ECHR).

Therefore, it can be argued that the Charter potentially represents, alongside with the common constitutional traditions, the ECHR, the case-law of the ECJ and the legal norms of the Community, part of the bloc de constitutionnalité of the EU/EC, regardless of its non-binding legal nature.[100] This is already confirmed by the references made in some recent decisions by advocate generals (even though not yet in decisions of the Court)[101] in a judgment of the Court of First Instance[102] and even by the Italian Constitutional court[103].

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[98] Against the rethoric of the "democratic deficit" see Joseph H.H.Weiler, "The Transformation of Europe", 100 Yale Law Journal (1991), 2403-2483.

[99] See in particular decision of the Conseil constitutionnel no. 71-44 DC of 16 July 1971.

[100] The analogy between the evolution of human rights in the Community system and the theory of the bloc de constitutionnalité has been made by Bruno de Witte, "The Past and Future of the European Court of Justice in the Protection of Human Rights", in Philip Alston (ed.), The EU and Human Rights (Oxford University Press, Oxford, 1999), 865-897.

[101] The Charter was mentioned for the first time by advocates general Alber (case C-340/99, TNT Traco) and Tizzano (case C-173/99, BECTU), even though the Court, in its decisions, did not make any reference to the Charter. References are to be found in several other conclusions (case C-270/99, Z v. Parliament, case C-49/00, Commission v. Italy, case C-377/98, The Netherlands v. Council).

[102] CFI, judgment of 20 February 2001, case T-112/98, Mannesmannröhren-Werke v. Commission.

[103] Judgment no. 135/2002. This fact might be of particular interest in the perspective of "integrated constitutional law".

To conclude, the Charter can be considered a pivotal example of the new law of integration, which we have called "non-binding binding constitutional law". Its role can become relevant even in the field of language, although its normative contribution to the issue is apparently very modest.

Who is then the ultimate guardian of language diversity: The European Union (assuming the cultural/linguistic citizenship of individuals and the multicultural character of the polity) or the state (transferring its cultural identity at European level)? From the perspective of the positive Treaty law (and of the text of the Charter) as well as the viewpoint of the ECJ, the states are still "the masters of the language rules". However, from a broader constitutional perspective including the new "integrated constitutional law" and of which the substantive role of the Charter is an example, this assumption shall be mitigated in the light of the theory of the integrated constitutional space. Thus, it can be said that the law of language in the European Union is basically (formally) determined by the states, but the constitutional nature of the states (and therefore their decisions) is determined by the process of integration and by its new constitutional law, of which member states are at the same time "masters and servants".

5. Concluding Remarks

5.1. Integrated Constitutional Law of Language

In spite of the wording of EU primary and secondary law, it is thus simply far from realistic to affirm that the member states are the sole "masters of the language(s)" in the European Union. The EU and the other protagonists of the integrated constitutional space (especially the Council of Europe) also play crucial roles in this regard and, more generally, language law in Europe is ever more a matter of integrated constitutional law rather than the product of autonomous choice by "sovereign" states. Moreover, it must not be forgotten that language and language rules basically evolve outside the law, and thus the role of law is basically (although not exclusively) to formalize what reality has already spawned. In addition, the paper showed that, as far as the predominant role of member states is still in place, the functionally and formal-equality-oriented case law of the ECJ can represent a danger to linguistic pluralism within the member states (and thus indirectly, by means of integration, within the EU itself).

The constitutional reality of the integrated constitutional space radically challenges the traditional system of the sources of law, as

well as the theory of division of power between the EU and its member states. Consequently, even the principle of the states' exclusive competence in the field of language is put into question. The active role of the Community in this regard, already in place as a matter of fact (with serious consequences also in the realm of law), needs now to be formalized, especially considering the possible negative consequences of the ECJ-jurisprudence for the development of pluralism in the constitutional law of the EU.

For both practical (efficiency, practices already followed by the institutions) and theoretical reasons (the role of the integrated constitutional space and mutual interdependencies between the member states, European Union, Council of Europe, etc.) the formal principle of complete parity of all languages is cosmetic,[104] utopian and in many aspects even misleading. This has largely been recognized by the doctrine, which advocates a separation between the official languages – which shall be the official languages of the member states – and the working languages – which can be reduced to only some of them on the basis of a functional choice.[105]

Does this separation resolve the problems, or is a further step necessary? The mere distinction between official and working languages can be a viable compromise, even though it would leave both the delicate issue of regional and minority languages and the problem of factual inequality among languages unresolved.

5.2. Towards a Functional and Multicultural Approach to Language Equality?

Presently, the final decision in language issues remains with the member states, but this decision is determined by the integrated character of those states into a system that tends to promote mobility and equal linguistic rights for citizens, rather than the mere equality of the languages among

[104] Miriam Aziz, "Multi-Level Linguistic Governance and the Modesty of the Constitutional Moment" (Paper prepared for the Trento Workshop on European Governance, 2002, unpublished) affirms that in the realm of language rights "the danger is that constitutional provisions will be merely cosmetic and, by implication, rhethorical".

[105] See, recently, Oppermann, Das Sprachenregime der Europäischen Union …; and Alcaraz Ramos, Languages and Institutions in the European Union …. Most of the proposals advocate either a distinction between official and working languages, or a simplification of the language regime reducing working languages to two (English and French), three (English, French and German), five (including Spanish and Italian), or, in the view of enlargement, to a couple of languages representing each linguistic family (Germanic languages: English and German; Latin languages: French, Italian and Spanish; Slavic languages: Polish). For this last proposal see Beniamino Caravita di Toritto, "How many Languages will the Europeans Speak?", in federalismi.it (2002), available at http://.dederalismi.it.

themselves. The conclusion to be drawn is that the EU/EC, although showing increasing consideration for the language issue, is at this very moment, from the constitutional point of view, still a multinational and not a multicultural polity. In other words, from a strictly legal perspective, the (multinational) nation-state approach is still prevailing, even though the "integrated" nature of the member states and the individual-rights-based approach adopted by the ECJ (and, for the future, by the Charter) is paving the way towards an increasing consideration of the substantive equality of the citizens instead of the formal equality of languages.

As a matter of fact (and of integrated constitutional law), the principle of formal equality of all (official) languages in the European Union is often neglected, and mirrors a quite hypocritical concept of equality, as is often the case when equality is based solely on formal (and formalistic) non-discrimination instead of considering substantial elements. In this regard, the clear statements of the CFI (and of the ECJ) in Kik show that legal reality also differs from what is generally believed or assumed (as in the case of the "Emperor's new clothes"). There is, in other words, an increasing distance between the law in the books and the law in action.

A more viable approach, taking into due consideration the multicultural elements "imposed" by the integrated nature of the European constitutional space, should leave room for a more substantive understanding of the equality principle between languages. This means, in simple terms, that equal situations must be treated equally, and different situations differently. Now, it is evident that languages are not equal within the European constitutional space, given on the one hand the social and economic privilege that some languages enjoy and, on the other hand, the non-recognition or only partial recognition of several languages (e.g. regional or minority languages) by the member states and thus by the Community. Why, then, insist on a paradox?

Languages – and the right to use a certain language – are not equal, but, in order to respect and maintain diversity, deserve equal protection and equal treatment. This implies the duty to treat equally only what is equal and to treat differently what is different, like the languages. Paradoxically, the increasing attention paid in EC law to the principle of substantive equality could lead to the consequence that the present fiction of equal treatment of non-equal languages could even be assumed as a violation of the principle of equality.

Like every other fundamental right, the right to use a language must be balanced with other fundamental rights in the pursuance of the general

objectives of the "State" (in our case, of the "integrated constitutional space" and, in particular, of the EU). No right enjoys absolute protection, and no right is always prevailing over other constitutionally protected rights. More correctly, every right must be balanced with others, and the concrete level of guarantee is the result of this interpretation. In many constitutional contexts, for example, the constitutionally protected right to language gives the floor to other rights in case of possible contrast. This is the case, for example, of the right to use one's own language in court proceedings, which in some circumstances is "sacrificed" in favour of other fundamental rights, such as the speed of the trial, the territorial principle (connected with the costs of judicial proceedings) or other prevalent economic interests.[106]

Accordingly, many fundamental rights – like environmental rights – are constantly balanced with others, such as economic rights or freedom of movement, and sometimes the enjoyment of those rights is "sold" in order to better achieve the enjoyment of other rights.[107] Today, "language-points" (analogous to "eco-points") might be a mere provocation, but in

[106] An interesting example is the quite complex regulation of the use of languages in the South Tyrolean court system (presidential decree no. 574/1988 as modified by decree no. 283/2001). The preference for speed of the trial is reflected e.g. in Article 17, which states that the language of the trial can be changed only once during the same stage of the trial; the preference for the territorial principle in connection with the costs of judicial proceedings is contained in Article 13, which limits the right to conduct proceedings in German exclusively to the territory of South Tyrol (or of the Region Trentino-South Tyrol); the preference for other prevalent economic interests is shown by Article 20, which contains the principle of the free renounce to language in order to speed up the proceeding.

[107] A provoking (and for many reasons negative) example comes from the recent and not yet fully concluded litigation of the so-called 'eco-points' in Austria. The fundamental right to environmental integrity and the Austria's compelling national interest to preserve it have been balanced with the benefits deriving from the European free movement of persons and goods: in practice, the right to transit through Austria (and thus to pollute the environment) has been 'sold' to a certain degree to heavy transport vehicles. After the annual bonus had always been rapidly consumed by the drivers, Austria was forced to negotiate a higher number of eco-points. With its order of 23 February 2001, case C-445/00, Austria v. Council, ECR, I-1461 the ECJ admitted the urgency of the question raised on this regard and provisionally suspended the application of the provision limiting the transit of heavy goods vehicles. The ECJ stated (at 116) that the decision must be adopted through "the balancing of the interests for which the applicant seeks protection and the damage to the internal market which the Council […] claim would result if suspension of operation were granted". A very convincing comparison between language rights and environmental rights in the viewpoint of "public goods" is now made by Idil Boran, "Global Linguistic Diversity, Public Goods and the Principle of Fairness", in Will Kymlicka and Alan Patten (eds.), Language Rights and Political Theory (Oxford University Press, Oxford, 2003), 189-209.

the not too distant future, they may become a reality.[108] This would mean, for instance, that in the context of the presumption of equal treatment of all languages (which can be maintained by adapting the presently quite popular proposal to distinguish between official and working languages), the renouncement of some linguistic rights by some states (not necessarily by the citizens) can be accepted on the basis of other (especially economic) concessions and privileges within the European arena.

It seems appropriate to treat language like any other fundamental right, and not like a "taboo" of the member states' increasingly questionable sovereignty. Like many other features of their national identities, language rights, too, should thus be (and in fact already are) "negotiable" to a certain degree, balancing the equality between the (national identity of the) member states (multinational element) with the freedoms of the Treaty (functional element) and the rights of citizens (multicultural element). Both citizens and, above all, states may prefer to effectively enjoy other rights than ineffectively insist on the formally equal status of the states' languages, which is often a mere idol of the states' sovereignty. The functional scenario for language rights in the integrated European constitutional space seems to be the preservation and enforcement of the equality of the speakers (based on the "free", although maybe economically supported choice) rather than the equality of the languages (based on "imposition").[109]

However, as this paper has demonstrated, the distinction between free choice and imposition in the integrated constitutional space is very subtle, and in some cases is even fading. A citizen can presently use his or her language (assuming that this coincides with the official language of his/her

[108] In a report by the Council of the EU of 6 December 2002 on the "Use of languages in the Council in the context of an enlarged Union" (no. 15334/1/02 REV 1, CAB 23 ELARG 415), the Presidency suggests possible approaches "in order to tackle the difficulty of reconciling the objective constraints […] with needs for interpreting in Council preparatory bodies after enlargement". Starting from the broad support already existing for moving away from full language interpreting (at least in certain areas), one of the proposals seems particularly interesting from the perspective of this paper. The Presidency proposes the "introduction of some form of "requests and pay" system under the Council budget", which includes the allotment to each Member State an equal allocation of funds under the Council budget. "Member States would then be charged on the basis of requests for interpretation on a fair basis […], with the incentive that any unused amounts would be reimbursed to the Member State in question". In September 2006 the European Parliament adopted an initiative on interpretation expenditure, urging the Parliament, the Council and the Commission to endeavour to reduce "implicit or explicit standby duty". The Parliament supports multilingualism but urges for "pragmatic solutions" over rising interpretation costs (see http://www.europarl.europa/oeil/file.jsp?id=5303102).

[109] To continue the example of the previous footnote, the States could then find it convenient to send functionaries to European meetings who are able to fluently use some foreign languages rather than use the funds for translation.

state, which is not the case for 1/8 of the entire European population…) with the European institutions (free choice), but every time he or she crosses a state (and in some cases even a regional) border, he or she must use a different language (imposition). And this occurs within the same integrated constitutional space, determining language rights and thus the present paradoxical situation.

The integrated constitutional dimension urges the EU to bring its multicultural elements more to the fore, by making its pluralistic deficit clearer. In a short- to medium-term perspective, it thus seems unavoidable to leave the purely state-centric approach behind and, consequently, the EU' s merely multinational character. Concretely, this does not mean to adopt one sole official (and maybe artificial)[110] language in Europe, but at least to attenuate the absolute parity of languages (which is still the formal rule in the Community) and to improve the number of cases in which languages can enjoy a differentiated treatment at Community level as well (as it is in fact already the case within many institutions and maybe already the factual rule in the Community).[111] In simple terms, a "transformation from 'integral' to limited multilingualism" will be required.[112] As a consequence, the EU will cease to be a multinational polity, and will become instead a multicultural (and still multilingual) one, having minorities and majorities within itself, and also being formally enabled to contribute (together with the member states and the other actors of the integrated constitutional space) to protect them. By this means, it will be possible and even necessary to give up the (absolute) parity of the languages, thus allowing the ECJ to strengthen its jurisprudence on substantive equality and to enforce the principle of pluralism within the integrated constitutional space.

Maybe the Danish proposal made during the accession negotiations should finally be taken seriously.

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[110] Like e.g. the funny "common" language invented by an Italian translator, Diego Marani, called Europanto, derives from by an original and fuzzy mixture of all European languages. In the author's definition "Europanto esse keine lingua, aber rather eine provocatione contra linguistische integralisme". See Diego Marani, "Glossario analfabetico dell'eurolingua?", 1 liMes (2002), 99-110, at 109.

[111] See, on this subject, the pivotal judgment of the CFI of 12 July 2001, Kik v. Office for Harmonisation in the Internal Market, case T-120/99, and supra, note 43. See further Milian i Massana, Le régime linguitique de l'Union Européenne…

[112] Peter A. Kraus, "Political Unity and Linguistic Diversity in Europe", 1 XLI Archives Européennes de Sociologie (2000), 137-162.

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Gabriel N. Toggenburg

The Debate on European Values and the Case of Cultural Diversity*

Abstract

'Values' have become a topic of discussion at the European level. This article tries to briefly track the reasons for this phenomenon as well as to detangle the foggy notion of 'values' in this context. The author differentiates between founding values, European ideas and common legal principles. All these different forms of European values differ in their respective legal and political character. Most importantly, they require a different level of European conformity. Special emphasis is given to the value of cultural diversity which can be considered, at most, a 'self-restrictive' value since it can be perceived from an inclusive perspective (including diversity within the states) or from an exclusive perspective (diversity amongst the states). Placing too much emphasis on the inclusive reading endangers the exclusive reading, and vice versa. In this context, the author refers to the new constitutional motto of the European Union as proposed by the constitutional treaty. Unlike the situation in Indonesia and South Africa (which both use the same motto) it does not seem to address subnational diversity. Instead, "united in diversity" aims at protecting national identities against excessive integration,and thus seems the very opposite of the US constitutional motto of "E pluribus unum".

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1. The Discussion on 'European Values': Where does it come from, What does it consist of?

Already before the 'Buttiglione crisis' of October 2004, it had become obvious that 'values' are highly topical in the context of European integration.[1] Just fifteen years ago one could have speculated whether *fin-de-siècle*-Europe would no longer be a vehicle for values, but a mere end in itself which risks losing any deeper *raison d'être*.[2] However, it is the end of the last and the beginning of the new century which see the Union submerged in an omnipresent debate of unprecedented intensity on its underlying values, on ways to control the observance of these values and on the Union's constitutional identity in general.

At last four factors can be cited for bringing discussion of values to a head: the drafting of the Charter of Fundamental Rights in 2000, the so-called Austrian crisis of the same year, the general turmoil in international politics following September 11 and, finally, the European Convention's drafting of the European Union's new consitutional treaty. This *quadriga* covers the entire range of 'values', from attempts to define a specific catalogue of fundamental 'rights' (within the Convention drafting the Charter) to a broader process of self-definition and identity building at EU level including also political issues such as the Union's political objectives and its scope (within the Convention drafting the constitutional treaty). The question of how to react if a member state allegedly infringes (supposed) European values (which occured in the Austrian crisis) oscillates between law and politics. And, finally, the value debate provoked at the global level by terrorist attacks raises political questions, such as how to design the transatlantic partnership and where to place Europe in the relationship between the no longer monolithic 'West' and the even less monolithic Islamic world.[3]

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[1] Rocco Buttiglione – the designated Italian member of the new European Commission – had to withdraw his candidacy due to pressure from the European Parliament. The latter found the views of Buttiglione with regard to homosexuality (according to him a "sin") and the role of women in society unacceptable and 'un-European'. The event produced a debate on the edge between religious values and politics whose intensity was so far unknown in recent Europe. In the United States this sort of religion-driven conflicts in politics is rather usual. Compare in this context, e.g., the position of the Archbishop of Denver who said that voting for Kerry (who supports stem cell research or abortion rights) would be a sin that would have to be confessed before receiving communion (see Herald Tribune, 18 October 2004, at 8).

[2] See Joseph H.H. Weiler, "Fin-de-siècle Europe: do the new clothes have an emperor?", in Joseph H.H. Weiler, The Constitution of Europe (Cambridge University Press, Cambridge,1999), 258-261.

[3] An illustrative example for this new insecurity served the article "Der Glaube der Ungläubigen. Welche Werte hat der Westen?", 52 Der Spiegel (2001), 50-66.

Of course, the value debate in Europe cannot be confined to these recent and prominent fora. Rather, every political system generates ongoing debate on values and tries to resolve conflicts which arise.[4] These frictions and asymmetries call for replies by the Courts as well as the political arena. The (so far) unique establishment of political criteria for accession to the EU in the recent eastern enlargement demonstrates how values such as e.g. "respect for and the protection of minorities" are voiced at the political level but subsequently left to the legal system for further 'digestion'.[5] In other cases, the question of common values arises when new areas of European legislative competence must be filled with concrete political content. This is happening in areas, such as e.g. the EU immigration policy.[6] Yet, other debates arise from supposed or real legal friction between certain policy areas and the European Union's common market 'skeleton': the 'trade linkage problem' in the area of culture[7] and the EU cinema policy[8] are two examples. The *fora* and contexts hosting the European value debate are therefore countless – some, like the European Convention in Brussels, prominently exposed to the light of public attention; others, like local Court rooms, hidden away in the silent corners of the European political system.

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[4] For the phenomenon of multiculturalism see e.g. Cinzia Piciocchi, "Europe Faces Cultural Diversity: Towards a European Multicultural Model?", in Francesco Palermo and Gabriel N. Toggenburg (eds.), European Constitutional Values and Cultural Diversity (EURAC Research, Bolzano/Bozen, 2003, out of print), 25-36, who argues that the latter provides a forced auto-definition to the single states.

[5] Minority protection is a Copenhagen criterion but was not included – in contrast to all the other political criteria of Copenhagen – in the list of Art. 6 EU as established by the Treaty of Amsterdam. See on this e.g. Bruno de Witte, "Politics Versus Law in the EU's Approach to Ethnic Minorities", 4 RSC Working Papers (2000); Gabriel N. Toggenburg, "A Rough Orientation through a Delicate Relationship", in European Integration Online Papers (2000), at http://eiop.or.at/eiop/texte/2000-016a.htm and, on the Copenhagen criteria in general, Christophe Hillion, "The Copenhagen criteria and their progeny", in Christophe Hillion (ed.), EU Enlargement. A Legal Approach (Hart, Portland, 2004), 1-22.

[6] See Maria Teresa Bia, "Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns", 2 European Diversity and Autonomy Papers – EDAP (2004), at www.eurac.edu/edap.

[7] See Rostam J. Neuwirth, "The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in the Light of the WTO", 4 European Diversity and Autonomy Papers – EDAP (2004), at www.eurac.edu/edap.

[8] See e.g. Anna Herold, "EU Film Policy: between Art and Commerce", 3 European Diversity and Autonomy Papers – EDAP (2004), at www.eurac.edu/edap.

2. The Notion of 'European Values': Founding Values, European Ideas and Common Legal Principles

As the 'value debate' came to prominence in public discourse in recent years, the notion of 'European values' has become epidemic in usage. At risk of oversimplification, it is here submitted that the discussion circulating around this foggy notion is usually based on one of the following three different preconceptions of what constitutes 'European values': Firstly, European values are often referred to as the political *movens* underlying the European Communities ('founding values'). Secondly, the term 'European values' arises regularly in the debate on 'European identity'.[9] In this context, one refers to various ideological or anthroposophic stances as 'European values' ('European ideas'). These European ideas try to sketch a hidden ideological agenda or a common cultural backbone for Europe and its integration process. Thirdly, the term 'European values' labels the legal *acquis communautaire* surrounding concepts such as respect for human rights and fundamental freedoms, liberty, democracy or rule of law. Since Maastricht, these common principles ('common legal principles') have been enshrined in the treaties, namely in Article 6 EU.[10] The latter circle of values is nowadays the most prominent reference to values in the treaty. However, in this internal dimension, the treaty does not speak of 'values' but of 'principles'. The notion of 'values' has so far been reserved to the realm of the Union's external relations.[11]

It is a commonplace that the Community began mainly as a community of economic interest, and only slowly developed into a community of

[9] Just see as a prominent example the Charter of European Identity adopted by the "Kongreß der Europa-Union" in 1995 (the working group elaborating the Charter has been inspired by the speech to the European Parliament by Vaclav Havel on 8 March 1994). It says: "... Fundamental European values are based on tolerance, humanity and fraternity. Building on its historical roots in classical antiquity and Christianity, Europe further developed these values during the course of the Renaissance, the Humanist movement, and the Enlightenment, which led in turn to the development of democracy, the recognition of fundamental and human rights, and the rule of law" See at http://www.europa-web.de/europa/02wwsww/203chart/chart_gb.htm. Similar formulations can also be found in official EU documents. For a critical comment on the official promotion of an 'European identity' at EU level, see Bruno de Witte, "Building Europe's image and identity", in A. Rijksbaron, W.H. Roobol and M. Weisglas (eds.), Europe from a Cultural Perspective (Nijgh en Van Ditmar, Amsterdam, 1987), 132-139.

[10] Formerly Article F Treaty of European Union.

[11] Art. 11 para. 1 EU establishes as an objective of its foreign policy to "safeguard the common values" (see also Art. 27a para. 1 EU). The currently proposed constitutional treaty does however make use of the term 'values' not only in the preamble but also in the provision on the common legal principles, namely its Art. II-2 ("The Union's values"). See the draft treaty establishing a Constitution for Europe in OJ C 169 (18 July 2003). The most recent version is a provisional consolidated version dating from 6 August 2004 (document CIG 87/04). Quotations below refer to that version.

values.[12] However, it is also obvious that as early as 1957, the Preamble and Article 2 of the treaty establishing the European Community invoked (at the very least) a trinity of values. These founding values consist, firstly, in the creation of a political area of freedom and international peace (as opposed to the experience made in the two World Wars); secondly, in the establishment of welfare-producing market economies (as opposed to the former command economies which existed throughout Eastern Europe under Communism) and; thirdly, maintaining a project which produces an ever higher degree of integration (as opposed to the experienced results of nationalism and isolationism) and thereby an "ever closer Union".[13] These founding values are political in nature, but also boil down to concrete treaty obligations – a fact which is especially obvious in the case of the EU's commitment to the market economy.

The European ideas, on the contrary, point to commitments and convictions which can hardly be expressed in legal terms or identified in treaty provisions. Their legal validity is weak, and even their underlying political consensus is shaky. Therefore they can only partially fulfill their supposed aim, namely to equip the integration process with additional legitimacy. It remains difficult to define what is 'European' and what not. This despite the fact that in historical terms Europe was the only continent which was defined by its inhabitants and not by any (imperialistic) external influence.[14] The normative doubts underlying the European ideas, however, do not abate their practical relevance, as can be observed in the political discussion surrounding the accession of Turkey.[15] An illustrative example for the drawing of a European identity through European ideas is the perception of Europe as a community built on the three mountains of the *Acropolis*, the *Capitol* and *Golgotha*, representing, respectively, Greek

[12] It is misleading to see in this process of 'value-isation' a linear process of 'federalisation'. The construction of a Community of values can be used by both sides – confederalist and federalists – alike. See Heinrich Schneider, „Die Europäische Union als Wertegemeinschaft auf der Suche nach sich selbst", 1 Die Union (2000), 11-47, at 31-36.

[13] Art. 2 TEC reads as follows: "The community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it". The preamble of the Treaty states that the founding fathers were committed to "strengthen peace and liberty" by "pooling their resources" and they call upon the other peoples of Europe who share their ideal to join in their efforts.

[14] See Wulf Köpke, "Was ist Europa, wer Europäer?", in Das gemeinsame Haus Europa (Museum für Völkerkunde Hamburg, 1999), 18-29, at 18.

[15] Or consider for example the respectively different reception of slogans of political parties in Germany or Austria as against to lets say Belgium. Here one seems to be confronted with an asymmetric effect of anti-Nazism as lieux de mémoire of European integration.

cultural heritage, the Roman legal system and Christianity.[16] Other parties stress that the Union builds on the remembrance and rejection of *shoa*, fascism and nazism as *lieux de memoire* of European integration.[17] Still others focus on the ideas of the Enlightment. Both the importance and the descriptive limits of European ideas are reflected in the role of 'Christian values', specifically the word 'God' played in the drafting of the Charter of fundamental rights[18] and the constitutional treaty[19] respectively. Once one of the strongest unifying forces in Europe,[20] churches and Christianity today encounter severe difficulty in building an all-embracing ideological mirror of European reality.[21] Even in those cases where there is consensus

[16] This concise metaphor seems to stem from the former German president Theodor Heuss. See for further elaboration Hans Graf Huyn, "Drei Hügel: Das Fundament Europas", in Otto v. Habsburg et al. (eds.) Grundwerte Europas (Stocker Verlag, Graz, 1994), 9-38, at 21.

[17] Wolfgang Schmale, Geschichte Europas (Böhlau Verlag, Wien, 2000), 287.

[18] The preamble of the Charter starts saying that "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice … ". See OJ 2000, (No. C 364), 18 December 2000, at 8. Note that (only) the German wording puts more emphasis on the religious dimension by using the phrasing "Bewußtsein ihres geistig-religiösen und sittlichen Erbes". Stronger formulations such as "religious heritage" were objected by laical states such as France. See Matthias Triebel, "Kirche und Religion in der Grundrechtecharta der EU", NomoK@non-Webdokument, para. 12, at http://www.nomokanon.de/aufsaetze/006.htm.

[19] The latter does not contain now – despite several efforts in that direction direct reference to God or to Christianity. The proposed preamble mentions though "the values underlying humanism: equality of persons, freedom, respect for reason" and continues "[d]rawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law; Believing that reunited Europe intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world ... ". Moreover the preamble invokes the responsibility "towards future generations and the Earth".

[20] It should be borne in mind that the Christian Church not only provided medieval Europe with a uniform religion, but also with a uniform language, form of writing, educational system, etc. See e.g. Arnold Angenendt, "Die religiösen Wurzeln Europas", in *Das gemeinsame Haus Europa* (Museum für Völkerkunde Hamburg, 1999), 481–488.

[21] This however, does not mean that Christianity does not have a role to play in the context of European legitimacy. See Brent F. Nelsen, James L. Guth and Cleve R. Fraser, "Does Religion Matter? Christianity and Public Support for the European Union", 2 *European Union Politics* (2001), 191-217. For the role religion plays in EU-law and on the question, whether and how one could (have) introduce(d) the notion of religion and god in the EU constitution see Gabriel N. Toggenburg, "Der (dritte) Weg zur (v)erfassbaren Religionsidee der EU", 68 *Basler Schriften zur Europäischen Integration* (2004), 62-65, at http://www.europa.unibas.ch/index.php?id=182&L=2.

on the overall acceptance of certain European ideas, one should be cautious not to confuse political affinities with legal obligations. A sort of European ideas were invoked, in the absence of any violation of clear principles, when the then new Austrian government was isolated from the other 14 member states in 2000. The result was the creation of new political as well as legal frictions.[22] Against this background, it is understandable that some maintain that "a modern state is supposed to be based on law, not on a set of substantive value commitments … [and that] it does not demand agreement with the values which form the basis of its legal system".[23]

This is, of course, different if we define 'values' as common legal principles. This notion is, legally speaking, the most relevant, and be focused on when talking about 'constitutional values'. These values not only express a common conviction of the Union, but also establish prominent legal guardrails for EU secondary law as well as for legislative and administrative action of the member states in the realm of EC law. The original Community Treaties contained no provisions relating to basic human rights or other legal values which are widely considered to be of practical and symbolic importance in modern, liberal, and democratic political systems.[24] This purely economic and utilitarian approach, which was taken due to the failure (and perceived unfeasibility) of establishing a political European Union at the earlier stages of European integration, was then counterbalanced by the jurisdiction of the European Court of Justice. Inspired by the constitutional traditions common to the member states, the Court held that "fundamental human rights [are] enshrined in the general principles of Community law".[25] In the late seventies and eighties, this set of European values was increasingly invoked, even being

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[22] See e.g. Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, "Constitutional Politics and the Embedded Acquis Communautaire: The Case of the EU Fourteen Against the Austrian Government", 4 *Constitutionalism Web-Papers* (2000), at http://les1.man.ac.uk/conweb/. For a legal perspective see Matthew Happold, "Fourteen Against One: the EU Member States's Response to Freedom Party Participation in the Austrian Government", 49 *International and Comparative Law Quarterly* (2000), 953-963. A more EU law centred analysis together with further references can be found in Gabriel N. Toggenburg, "La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni", 2 *Diritto pubblico comparato ed europeo* (2001), 735-756. Compare in this context also the report of the so called 'Three Wise Men', at http://www.virtual-institute.de/en/Bericht-EU/index.cfm.

[23] Robert Spaemann, "The Dictatorship of Values", 25 *Transit* (2003), at http://www.iwm.at/t-25txtb.htm.

[24] See Paul Craig and Grainne de Burca, *EU Law* (Oxford University Press, Oxford, 2nd ed. 1998), 296-298.

[25] See e.g. the case Stauder (ECJ, Case 29/69 Stauder v. City of Ulm, 1969, E.C.R 419, para. 7 at 425). See on this saga Bruno de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", in Philip Alston (eds.), The EU and Human Rights (Oxford University Press, Oxford, 1999), 859-897.

mentioned in declarations issued by the institutions of the European Community.[26] The Parliament, especially, was active in pressing towards the inclusion of value-oriented provisions in the Treaties. In 1978, even the European Council confirmed (in its Declaration of Copenhagen) that human rights and democracy would be "essential elements of membership of the European Communities".[27] Finally, when the young, still fragile, post-dictatorial democracies of Greece (1981), Portugal and Spain (1987) acceded to the EU, the Single European Act of 1986 introduced a reference to the principles of democracy and human rights as common principles all Parties are attached to.[28] In 1992, against the background of the end of the Cold War, the fall of the Berlin wall and the declared intention of a dozen of fresh post-dictatorial democracies to accede to the Union, the Maastricht Treaty established the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" as principles "which are common to the member states".[29] Furthermore, the Union itself is also required to respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states "as general principles of Community law".[30] These legal principles are today referred to as the constitutional principles of the European Union.[31] Finally, the establishment of a Charter of Fundamental Rights of the European Union gave a new dimension to the debate on European values and will, if enacted, put flesh on the bones of the idea of a legal heritage consisting of common European values.[32]

[26] See Amaryllis Verhoeven, "How Democratic Need European Union Members Be? Some thoughts after Amsterdam", 23 European Law Review (1998), 217-234.

[27] Bull. E.C. 3-1978, at 5.

[28] The Preamble of the Single European Act stated that the Parties are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the convention for the protection of human rights and fundamental freedoms and the European social charter, notably freedom, equality and social justice", see OJ No. L 169 (29 June 1987), 2.

[29] Then Article F para. 2 TEU, now Article 6 para. 1 EU.

[30] Article 6 para. 2 EU.

[31] See e.g. Thorsten Kingreen and Adelheid Puttler, "Artikel 6", in Christian Callies and Matthias Ruffert (eds.), *Kommentar zum EU-Vertrag und EG-Vertrag* (Luchterhand, Neuwied, 1999), at para. 52.

[32] Note that the Charter forms part II of the proposed Constitution and will enter into force only with the latter.

3. Communities of Shared Values: The Quest for Homogeneity

Communities identify themselves through their common features, such as shared values. This social cohesion requires the maintenance of a certain (if modest) degree of homogeneity which these communities aim to preserve. Their success in fulfilling this aim also depends on the legal means at their disposal to control such homogeneity. European ideas, founding values and common legal principles differ regarding the mechanisms they have available for maintaining such 'homogeneity'.[33]

Consensus on common European ideas is very much left to silent political influence rather than legal control. Variations in the conception of European ideas are definitively below the threshold of any *legal* mechanism of control, and are to be seen as independent expressions of the member states' "Europa-und Weltanschauung". The idea that the European Community could or should guarantee the universal acceptance of these opaque European ideas amongst the EU member states and its citizens contradicts the very idea of a modern and secular entity based on freedom.[34]

On the contrary, homogeneity-control in the community of values based on the founding values could build on clear legal obligations and instruments in the economic field. The "principle of an open market economy with free competition"[35] is embedded in countless specific duties and corresponding 'fundamental freedoms' such as the right to free movement in the Treaty-*corpus*. In this sense, it may be much more 'legal'

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[33] I am speaking in the course of this article of 'homogeneity' in a very wide sense and am thereby not presupposing that there would be something like a 'principle' of homogeneity in EU constitutional law – a presupposition which has been rightly refused, see Armin von Bogdandy, *Europäische Prinzipienlehre, Europäisches Verfassungsrecht* (Springer, Berlin, 2003), 149-203, at 190. The notion of 'homogeneity' has developed especially in the German literature on the mechanism contained in Art. 7 EU, see esp. Frank Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Artikel 6 Abs. 1 und Artikel 7 EUV* (Duncker and Humblot, Berlin, 2000). This usage has encountered also criticism, see Schmitt von Sydow, "Liberté, démocratie, droits fondamentaux et Etat de droit: analyse de manquement aux principes de l'Union", *Revue de Droit de l'Union Européenne* (2001), 285-325, at 288 and 289. However, looking at the Art. 7 mechanism as mean of 'homogeneity control' does not necessarily imply to qualify the Union as a federal state. See in this respect e.g. Manfred Zuleeg, "Die föderativen Grundsätze der Europäischen Union", 39 *Neue Juristische Wochenschrift* (2000), 2846-2851 who speaks of a "Verfassungsaufsicht" and "Gemeinschaftsaufsicht" in the context of Art. 7 EU.

[34] Admittedly, also the guarantee of what we have called common legal principles has its limits. Firstly because of reasons of competencies (see below), secondly (but this applies only in extremis) due to the famous 'Böckenförde Dilemma' ("Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann"). See Ernst-Wolfgang Böckenförde, Staat, Gesellschaft, Freiheit (Suhrkamp, Frankfurt a. M., 1976).

[35] Art. 4 para. 1 EC.

than the values which we have labeled above as common legal principles such as democracy or the respect for human rights. The observance of the rules establishing a functioning and competitive market system is severely controlled by the Commission and the Court. Moreover, this rigid system has also contributed to the fulfilment of other founding values which are not legal in nature (namely welfare and peace), thereby confirming the thesis of functionalism of integration that mobility of goods and services also provides for the mobility of ideas and identities, thereby promoting tolerance, closeness and peace[36] as side-effects. By establishing the principles of direct effect and the supremacy of EC law, the ECJ kept the integration process on track toward the last founding commitment: the establishment of an 'ever closer Union'.[37] With respect to the Common Market, one can conclude that the founding values are equipped with the most far-reaching means of 'homogeneity control'. However, it should not be forgotten that the defense of this prominent founding value can easily conflict with constitutional values at the national level, such as the protection of minorities, consumer protection or the preservation of cultural diversity. Such values may or may not be part of the common legal principles recognised at the EU level. Consequently, the resulting value conflicts may be of either a vertical (EU-value versus member state value) or horizontal nature (EU value versus EU value).[38]

Turning to the common legal principles, it must be stressed that it has not only been established by the Court that the community is based on these legal principles; it was also the Court which first provided a rough control –(*vis-à-vis* the Community and then, to a certain degree, the member states) of the respect of these values. However, when protecting fundamental rights in the member states, the Court soon found itself

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[36] "If goods do not cross borders, soldiers will" is a well known saying in this respect.

[37] This third foundational value has been labelled by Weiler as "ideal of supranationalism", see Weiler, "Fin-de-siècle … ", 246 or by Toniatti as "principio di integrazione", see Roberto Toniatti, "La carta e i 'valori superiori' dell'ordinamento comunitario", in Roberto Toniatti (ed.), *Diritto, diritti, giurisdizione* (Cedam, Padova, 2002), 7-29, at 22.

[38] See on this Bruno de Witte, "Community Law and National Constitutional Values", in 2 *Legal issues of European integration* (1991), 1-22. For analyses on the conflicts arising between the Common Market and, e.g., the 'right to life of the unborn', the right of association or minority rights see respectively: Diarmud Rossa Phelan, "Right to life of the unborn v. promotion of trade in service: The European Court of Justice and the normative shaping of the European Union", in 5 *The Modern Law Review* (1992), 670-689; Matej Avbelj, "European Court of Justice and the Question of Value Choices: Fundamental Human Rights as an Exception to the Freedom of Movement of Goods", 4 *Jean Monnet Working Paper* (2004), at http://www.jeanmonnetprogram.org/papers/index.html; Gabriel N. Toggenburg, "Diritto comunitario e tutela delle minoranze nella provincia di Bolzano. Due aspetti inconciliabili di un (unico) sistema?", in Joseph Marko, Sergio Ortino and Francesco Palermo (eds.), *L'ordinamento speciale della Provincia autonoma di Bolzano* (Cedam, Verona, 2001), 139-194, at 164-194.

knocking at the "fundamental boundaries"[39] of the competences of the Communities, the sovereinity of the member states, and thereby also the limits of such a homogeneity control itself. Therefore, this control *vis-à-vis* the member states remained piecemeal and subsidiary.[40] In 1992, however, the treaty of Maastricht took up the substance of the Court's case law on common legal principles and enshrined them in primary law (then Article F para. 2 TEU). Then, in 1997, the Treaty of Amsterdam introduced, with Article 7 EU, a procedure providing for political control of these fundamental values at the European level. Thereby, the evolution of legal standards within the Court was complemented by a revolution in the political control of these standards, and it became possible for the Council of the EU to react on a political level to the "existence of a serious and persistent breach by a member state of principles mentioned in Article 6 (1)" by suspending certain rights deriving from EU membership, including voting rights in the Council (Article 7 EU). After the experience of the Austrian crisis, the Intergovernmental Conference leading to the treaty of Nice fine-tuned this mechanism of European control in 2001, and subjects it, if only partially, to legal review by the Court.[41] The treaty now provides even a possibility for the Union to react when facing "a clear risk of a serious breach" of the principles enshrined in Article 6[42] by a member state.

The existence of this (largely symbolic) political sanctioning procedure, however, does not remove the fact that doubts remain concerning the

[39] Compare Joseph H. H. Weiler, "Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space", in Weiler, *The Constitution of Europe* …, 102-129.

[40] Note that the content of fundamental values standard used in the framework of 'political conditionality' of eastern enlargement covered also areas outside the scope of the EU's internal competence such as minority rights, children rights or prison conditions establishing thereby a 'double standard'. The aim should be to strike a middle way between the two extremes: the detailed and overall monitoring *vis-à-vis* candidate states and the piecemeal and very subsidiary control *vis-à-vis* the member states. See Bruno de Witte and Gabriel N.Toggenburg, "Human Rights and EU-Membership", in Steven Peers and Angela Ward (eds.), *The EU Charter of Fundamental Rights* (Hart, Oxford, 2004), 59-82.

[41] Compare 46 lit.e EU. For more details on the new procedure see e.g. de Witte and Toggenburg, "Human Rights and EU-Membership" …, at 79-81.

[42] Article 7 para. 1 EU. See in detail on Art. 7 Schorkopf, *Homogenität in der Europäischen Union …,* or Von Sydow, *La Liberté, démocratie, droits fondamentaux …,* 285-326.

extent of these shared values underlying the member states' systems.[43] Moreover, the legal control of the common principles in the framework of the Court's jurisdiction is highly eclectic, and the access of individuals to the Court of Justice is very limited in general. All this makes it difficult to induce a collective feeling of belonging to a value community of 450 million people. Nevertheless, recent developments in the field of human rights show that there may be ways to give life to a situation which is approaching such a scenario. Whereas the Charter of Fundamental rights will make the European 'bill of rights' more visible to the EU-citizens, therefore rendering it a potential part of the European consciousness, new ways of monitoring human rights may render the idea of common European values a more clear-cut and practical notion.[44] The prospective of a proper EU agency on human rights[45] or, even more important, a proper EU policy in the area of human rights, can add a new dimension to the foggy notion of a 'Community of values'.

4. The Case of (Cultural) Diversity

Based on the above, it would follow that the Union is influenced and characterised by various circles of values such as founding values, European ideas and common legal principles. The degree of consensus within various European societies regarding these values differs, as does the means to control their observance. Even in the more solid area of common legal

[43] Taking Berlusconi's Italy as an example one might e.g. raise the question whether an open, independent and diverse system of public media is a basic feature all member states should be equipped with or whether this important element of a functioning democracy is something left entirely to the states discretion. Compare Christoph Palme, "Das Berlusconi-Regime im Lichte des EU-Rechts", 4 *Blätter für deutsche und internationale Politik* (2003), 456-464, at 456. See also the Parliament report "on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights", A5- 0230/2004, at http://www.europarl.eu.int/activities/archive/reports/search/go.do.

[44] In September 2002, shortly before its Eastern enlargement the Union has created a new model of monitoring human rights performance within the Union, namely the EU Network of Independent Experts on Fundamental Rights. See http://europa.eu.int/comm/justice_home/cfr_cdf/index_ en.htm. Note that the network firstly has a mere monitoring function (also the Parliament and the Council are issuing human rights reports on an annual basis) and is not entrusted with any sort of judicial or political review. Secondly, the network is a phenomenon of 'outsourcing'. Experts have been entrusted by one single EU-institution, namely the Commission to report on the situation in the member states. The latter are not obliged to cooperate and the mandate could be revoked at any moment.

[45] Recently it has been proposed to engage an EU institution, namely the EU Monitoring Centre on Racism and Xenophobia (EUMC) in order to build up a proper EU human rights agency. See Paragraph 3 of Conclusions of the Representatives of Member States, 13 December 2003, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/78398.pdf. In this context the Commission launched a public consultation process (see COM (2004) 693 final, 25 October 2004).

principles, the respective homogeneity remains piecemeal. In light of the debate on values, the *Staatenverbund* European Union is best described as a Union which, politically speaking, lacks an overall consensus on values and, legally speaking, is characterised by a plurality of constitutional players, layers and values. The value debate is thereby characterised by a great diversity (of opinion).

While 'diversity' can hence be used to describe the nature of the debate on European values, it is sometimes also included itself among these values. Those elements of EU constitutional law which aim to preserve national identities (and therefore national cultures) and which foster the polycentric and horizontal characteristics of the Union have been perceived as an expression of an overall principle of diversity. Such 'diversity-friendly' elements include the principle of subsidiarity,[46] the principle of enumerated powers, the treaty revision procedure in Article 48 EU (which builds on the consensus of the member states), aspects of the institutional asset of the Union (like the strong role of the Council) to mention a few. But as is apparent from these examples, diversity is seen here as a structural mechanism rather than as a substantial value. Moreover, diversity in this context is perceived as diversity *between* the member states only, thus ignoring the question of where to locate diversity *within* the member states in the European debate on values. It is assumed here that such an approach to 'diversity' does not need recourse to any compelling original EU principle or value of diversity.[47]

However, it can be hardly ignored that the treaty of Maastricht introduced a general, transversal sort of 'cultural diversity impact clause' in Article 151 para. 4 EC. It establishes the obligation of the Community to "take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures". This commitment to diversity has been confirmed by the Charter of Fundamental Rights, which states in its Article 22 that "[t]he

[46] There is for example an obvious interaction between diversity and the principle of subsidiarity. One can therefore hope that respecting the principle of subsidiarity (which the draft constitutional treaty strengthens both in its substantial and procedural aspects) will also favour the maintainance of European diversity. A recent example shows how the legislator takes both diversity and the principle of subsidiarity into account. According to the Commission decision of 5 September 2003 on the use of colour photographs or other illustrations as health warnings on tobacco packages (see OJ L 226, 10 September 2003, 24-26) it is up to the member states to decide whether or not to have warning (i.e. shocking) colour photografies on tobacco products. Moreover, those member States which decide to adhere to the picture-option have – "given the cultural diversity existing across the European Union" – a choice amongst several colour photographs or other illustrations.

[47] See in this respect also von Bogdandy, *Europäische Prinzipienlehre* ..., 197.

Union shall respect cultural, religious and linguistic diversity".[48] There are two ways how to interpret the wording of this diversity commitment. Either all this is meant only to protect (and, if necessary promote) the diversity *between* the member states and therefore to reinforce Art. 6 para. 1 EU (also originated in the Maastricht treaty) which obliges the Union to "respect the national identities of its member states". Such an exclusive (or defensive) reading builds on a state-centred view, and equates 'diversity' with the possibility of the states to resist any tendency of European harmonization which might alter their identities, and their autonomy to define whether, how and to what extent they want to be internally 'diverse'.

A second, alternative perception would look at European diversity as plurality *within* the member states. Diversity would then include the question of whether, where and how to accommodate *intra-state* diversity. This inclusive (or offensive) view of diversity goes beyond the identity-based perceptions, needs and concerns of the member states themselves. Politically speaking, this reading of diversity might be perceived as the opening of a Pandora's box, as the diversity/uniformity 'sluice', traditionally left up to the member states, would become, to certain degree, a *condominium* of the Union and the member states. Indeed, prominent authors have already equated the obligation to respect Art. 22 of the Charter to the obligation of protecting minorities within the single EU member states.[49] It remains

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[48] This recent EU engagement in the field of cultural diversity shows also an external component. The Culture Ministers meeting in Thessaloniki in May 2003 stated that "Europe as a continent of culture can neither accept the threat of cultural homogeneity, nor the threat of the clash of civilisations. The European answer to all this is to insist on safeguarding and promoting cultural diversity." Moreover, the European Commission recently issued its Communication Towards an International Instrument on Cultural Diversity of 27 August 2003, COM(2003) 520 final, in which it underlines the intention that the EC should play an active role in the forthcoming UNESCO General Conference, notably with regards to exploratory discussions concerning the drawing-up of an international standard-setting instrument on cultural diversity. A certain caution towards international instruments in the field can also be detected in the article on the common commercial policy as proposed in the draft constitutional treaty which states that the Council shall act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing "the Union's cultural and linguistic diversity" (Art III-315 para. 4 lit a).

[49] The EU network of independent experts in fundamental rights has stated in its report in 2002 that the state of ratification of the two main instruments of the Council of Europe in the field of minority protection by the EU member state "gives a first indication of the willingness of the Member States to respect the right enshrined in Article 22 of the Charter". See the "Report on the situation of fundamental rights in the European Union and its member states in 2002", 174, at http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm. Critical in this respect Bruno de Witte, "The Constitutional Resources for an EU Minority Protection Policy", in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union, The way forward* (LGI Books, Budapest, 2004), 109-124, at 115, also available at http://lgi.osi.hu/publications.php.

doubtful, however, that the EU's comitment to 'diversity' will translate so easily into a founding norm for minority protection applicable across the Union.[50]

These two faces of the janus-headed notion of 'diversity' show that at the level of the EU, cultural diversity can be classified as a 'self-restrictive value'. Placing too much emphasis on the inclusive reading of diversity creates a tension with the diverging national identities of the member states, and therefore with (an exclusive reading of) diversity itself. Whoever argues, for example, for an EU involvement in the definition and the perception of minorities calls for a Union which provides 'one fits all' solutions, and therefore risks reducing the very diversity amongst the member states' respective approaches in this policy field.[51] On the other hand, placing too much emphasis on the exclusive reading of diversity would ignore various forms of ethnic, linguistic and cultural diversity within the single member states and create a tension with (an inclusive reading of) diversity itself.[52] Those who argue, for the exclusion of minority languages or cultures in certain EC funding schemes, for example, might very well protect certain national preferences, but fail to foster the sort of diversity within the member states which contributes to European diversity in general.

Looking at the newly proposed European Constitution, the notion of 'diversity' does not become much clearer. The constitution does not formally list "diversity" as a value the Union is founded on (Art. I-8 para. 3) but as an EU objective (Art. I-3 para. 3).[53] The wording remains vague. Whereas the other objectives clearly point to active EU engagement in the field at stake ("promote," "offer," "work for," "combat," "contribute and uphold") "cultural and linguistic diversity" is the odd one out, since the Union's "objective" is merely that it "shall respect" such diversity.[54] Moreover, where the Constitution uses the term 'diversity', it seems prima-

[50] Compare in this context de Witte, "The Constitutional Resources …", 115, who points to formal arguments raising severe doubts, whether international instruments of minority protection are relevant to the interpretation of Article 22 of the Charter.

[51] See more in detail Gabriel N. Toggenburg, "Minority Protection in a Supranational Context: Limitations and Opportunities", in Gabriel N. Toggenburg (ed.), Minority Protection …, 1-36, at 9-16.

[52] See more in detail on this Gabriel N. Toggenburg, "Unity in Diversity: Searching for the Regional Dimension in the Context of a Someway Foggy Constitutional Credo", in Roberto Toniatti, Marco Dani and Francesco Palermo, *An Ever More Complex Union – the Regional Variable as Missing Link in the European Constitution* (Nomos, Baden Baden, 2004), 27-56.

[53] The Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced" (Art. I-3).

[54] See more in detail Bruno de Witte, "The Value of Cultural Diversity", in Miriam Aziz and Susan Millns, *Values in the Constitution of Europe* (Aldershot, Dartmouth, forthcoming).

rily to address the pecularities or circumstances of member states which should be taken into account.[55] Nevertheless, the level of reference is not necessarily the national level, but can very well be the regional or local level.[56] The Constitution also makes clear that national identities are co-composed by regional, i.e. subnational identities.[57] So, at best, the signals are ambivalent. Neither does the most prominent reference to diversity within the new constitution provide a clear reply: the introduction of the catchphrase "Unity in diversity" not only as part of the preamble,[58] but also as the sole official motto of the Union, is of no substantial help.[59] It seems, rather, that what has been solemnly put on a pedestal is not much more than a cosmetic combination of two already existing and interacting constitutional principles, namely the 'Wesensgehaltsgarantie' (as contained in Article 6 para. 3 EU) and the principle of loyal co-operation (as contained in Article 10 EC). Nevertheless, the pairing of these two principles in a formalized, i.e. constitutionally verbalized 'symbol' is useful and important insofar as it underlines the ongoing and symbiotic tightrope walk between integration and autonomy, thereby seeking to leave room for both European dedication as well as national (p)reservation. In any case, one can conclude that the *primary* scope of the European constitutional motto differs from the constitutional motto of South Africa or Indonesia, which is also "unity in diversity". Whereas these two states refer with this motto to their *subnational* diversity (due to the countless ethnic and linguistic groups living within these states), the European Union seems

[55] See e.g. Art I-48 on the social partners which says that "the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems". Compare also Art. III-282 par.1 on educational policy which provides that the Union "shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity".

[56] See e.g. Art. III-233 (on environment) or Art. III-280 (on culture). See more in detail on this Toggenburg, "Unity in Diversity: Searching for the Regional Dimension …", 27-56.

[57] See e.g. Art. I-5 para. 1 which foresees that the Union shall "respect national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" (compare also para. 3 of the preamble of the Charter in part II of the Constitution).

[58] "Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny, convinced that, thus 'united in its diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope".

[59] See Art I-8 of the constitutional treaty which lists under "[t]he symbols of the Union" the European flag, the anthem of van Beethoven and says in para. 3 – shortly before mentioning the common currency and the Europe day – that "[t]he motto of the Union shall be: 'United in diversity'". Only in the last hours of the European Convention the motto found its way into this prominent provision.

rather to express a concern about national cultures. Every further step of integration has to take into account the 'caveat' of not endangering diversity amongst the member states. In this rather cautious attitude *vis-à-vis* integration, the EU-motto forms an antipode to the constitutional motto of another state, namely the US, whose motto is "E pluribus unum".

Now, this may sound like constitutional estheticism to some, and I suppose, they are right. Whether or not diversity of cultures becomes a self-standing value in Europe beyond the self-defense of its various 'state-cultures' is up to the concrete in- and output at the level of EU politics. It remains to be seen whether 'European dedication' will confront the states with perceptions of diversity which no longer lie solely in their hands. Modest tendencies in this direction can already be identified. The Charter clearly refers to the protection of diversity within member states when prohibiting discrimination based on language or the membership of a national minority group. A recent set of directives specifically provides 'the Union's'[60] third country nationals with certain rights enabling them to better integrate with their host societies (the member states).[61] Various "EU-constitutional resources" such as Article 151 EC allow for the protection and (to a certain degree) promotion of diversity within member states, for example, fostering minorities or regional cultures.[62] Countless statements in political declarations (like the Laeken declaration)[63] and in legal documents (such as the adapted value provision in the constitutional treaty)[64] paint the picture of a Union calling for tolerant, diverse and pluralistic societies in the member states. Legally speaking, none of this merits already speaking of a constitutional value which could prescribe the substance of 'diversity-to-be' within EU member states.

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[60] Are the TCN a 'Community minority'? Or – even more far reaching – are all subnational ethnic groups living on EU territory minorities 'of' (instead of merely 'in') the Union? For reflection on these questions: Gabriel N.Toggenburg, "Minorities '…' the European Union: is the missing link an 'of' or a 'within'?", 25 (3) *Journal of European Integration* (2003), 273-284.

[61] See in this respect, e.g. Steve Peers, " 'New' Minorities: What Status for Third-Country Nationals in the EU System?", in Toggenburg (ed.), *Minority Protection* …, 149-162, 149.

[62] See in detail de Witte, "The Constitutional Resources …", at 108.

[63] "… Europe as the continent of human values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law …": from the Laeken declaration "on the future of the European Union", European Council, December 2001.

[64] The new EU constitution complements the current wording of Art. 6 para. 1 EU with the following passus: "in a society of pluralism, tolerance, justice, solidarity and non-discrimination".

It remains to be seen how the EU reacts to the phenomenon of immigration,[65] and whether, more generally speaking, myths such as the invocation of trade-offs between cultural diversity and promoting development will have a dominant influence amongst Europe's political elite.[66] Only the future can show whether the states will remain the dominant masters of the national diversity/unity 'sluice' in the EU constitutional framework. One should not forget that the 'value-prescription' is a two-way process within the Union.[67] Article 6 establishes those values as constitutional values of the Union which are 'common to the member states' and which therefore originate at state level. But with the EU, for the first time in the history of international relations, it seems as if an international organisation is developing and implementing its own views on values independently from its 'founding fathers'. It remains to be seen what this sort of 'inverted prescription' will mean for diversity at the member state level.

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[65] Compare e.g. Catherine Wihtol de Wenten, "Europe: The New Melting Pot?", in Janina W. Dacyl and Charles Westin, Governance of Cultural Diversity (CEIFO publications, Edsbruk, 2000), 37-61.

[66] UNDP, The Human Development Report 2004, Cultural liberty in today's diverse world (UNDP, New York, 2004), 4, at http://hdr.undp.org/.

[67] See Toniatti, "La carta e i 'valori superiori' … ", 23, speaks of "una sorta di inversione di direzione della prescrittività".

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National and Ethnic Minorities and Minority Laws in Central Europe*

Abstract

National relationships in Central Europe are characterized by the following after 1989: 1. Most countries of the region have experienced a homogenisation process; 2. Legal regulation of national minorities is more or less solved; 3. none of the Central European countries treat immigrant communities velcomingly.

Introduction

Minorities question counts as one of the most neuralgic problems in multi-ethnic Central European countries. Strained ethnic relations were characteristic all through the 19. and 20. centuries. It was the result of the various attempts happening parallelly at building nations in the region since the end of the 18th c. These 'projects' developed against one another, crossing the path of one another. The tensions were still considerable at the time of joining the European Union (EU) as indicated by the attempts of various political powers to use them for their own advantage. An impartial glance at the ethnic map of the region makes evident what deep and wide-ranging national homogenisation was at work all through the 20th c. Not only individual cultures but whole communities have disappeared, e.g. the once thriving Jewish way of life has survived only in fragments; the German language and culture has also been eclipsed, its past variety has become one-dimensional. Albeit new colours have appeared on the ethnic palette with the appearance of new ethnic groups in the bigger cities of the region, they cannot make up for the loss of earlier varieties.

Of the four members of the so-called "Visegrád countries" (Czech Republic, Hungary, Poland, Slovakia) only Slovakia has remained a truly multi national country. Already after World War I. (WW1), as a result

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of the Trianon treaty, Hungary became linguistically and culturally a more or less homogeneous country. These tendencies were strengthened by the tragic events and processes of the 1940s. Similarly Czech land (Bohemia) and Moravia as well as the oddly "relocated" Poland[1] were also considerably homogenized after 1945. However, the minority question has not been completely deleted from the political and mental concerns of the above mentioned three communities since all of them still contained smaller autochthonous minorities (cf. Appendix) even if they represent a mere fraction of all those groups which used to be in the region before 1944-45.

When in power, the Communist Parties kept dealing with the minority question in the spirit of 'proletarian internationalism', however, the revitalisation of minority communities indeed started after 1989. In the three ethnically more homogeneous countries (Hungary, Czech Republic, Poland) the "rebirth" went without serious conflicts, since the granting of special minority rights to communities which do not represent considerable proportion of the inhabitants does not represent any real "political issue". Majority-society is capable of magnanimous gestures if it does not feel threatened by political demands of the minorities. The best example is the regulation in Slovenia. Not only self-government but privileged parliamentary representation have been granted the small – about 1000 strong – Hungarian and Italian minorities. The regulation in Hungary approved in 1993 can also be described as belonging to this category, though without the – promised – parliamentary representation. Larger minority communities, representing 35-40% of the whole population of the country, on the other hand are usually strong enough to reach for their rights. They may not always be successful on the public legal level but usually are the more so in their attempts at strengthen their legal status (cf. the German population in Czech Republic before World War II. = WW2). Sometimes such minorities can reach equal national status which then can lead to federation, as is the case of Belgium.

With little exaggeration, middle sized minorities are the worst off. In contrast to small communities, they still instigate fear (without reason in most of the cases) on the one hand, and on the other they do not have enough weight to obtain adequate laws. The majority of Hungarian communities in the Carpathian Basin belong to the latter category. Sometimes communities representing 7-10% of the population can prove to be governmental partners of importance but usually it is not lasting as it

[1] Nothwithstanding that geographically the country has been "relocated" from east to west, politically Poland was shoved from west to east.

depends on alternating governments; as is shown by the example of the Party of Hungarian Coalition in Slovakia.

In Central Europe there are two models for minorities in the so-called "Visegrád countries". One is the example of Czech Republic, Poland and Hungary, which have become fairly homogenous in the past decades and the other that of Slovakia, which still has a considerable proportion of minorities. The latter has about 10% Hungarians and by estimations many Gypsies (Roma). While the three former countries have special minority laws, Slovakia does not, in spite of being a multi-ethnic society where one of the communities – Hungarians – is more or less self-supportive and is defending its own institutions.[2]

Minority questions in the classical sense[3] are mainly political problems in Slovakia, though they are still present in the other countries of the region too. All over Europe the Gypsies are a concern because of their bad social conditions as well as the racist atrocities against them; political anti-Semitism, intolerance against immigrants also belong to the problems.

The Gypsy question

There are separate programs and institutions to deal with the ussues of the Gypsies in all the countries in question. The general minority regulations and institutions (where available) also serve themin , since they are counted among the national and ethnic minorities. Thus the Gypsy communities are in double institutional systems, the general ones for all minorities and in the one especially devised for them.

Anti-Semitism

Holocaust has left no sizable Jewish communities in the Central European region. In several countries Jews are not traditionally regarded as a minority but as members of a religion. Even the majority of the local Jewish communities describe themselves in the same terms, especially in Hungary and Czech Republic. The Polish minority law accepted in 2005 described Jews as a national minority. Though there is no such unequivocal regulation, the questionnaire for the 2001 Slovak census listed Jewish

[2] The support of the 'mother-country' must not be overlooked, neither Slovak state support of various content and measure.

[3] In the present paper such conflicts are included which are being caused by parallel nation-building endeavours where the majority nation and the minorities try to develop into a nation by their own efforts.

as a possible choice among nationalities.[4] In the whole area the Jews have deeply integrated both socially and culturally into the society of the given country. All the same there are political groups in most of the countries which are interested in anti-Semitic propaganda. Since the question is more than a simple minority issue, its discussion is not the task of this paper.

Finally those regions and regional groups of Central Europe have to be mentioned, which have special (if not always national) identity, in some cases of political relevance; such are the so-called Moravian question in Czech Republic and the Silesian aspiration in Poland. In the past there were also in Eastern Slovakia attempts at nation building at variance with the dominant developments. At the beginning of the 20th c. some Hungarian-friendly groups in County Sáros tried to recreate the *eastern-Slovak* or *Slovjak* identity, which had been loyal to Hungary before 1918. The foundation of independent Czechoslovakia, the finalization of contemporary Slovak nation building, later the communist experiments with modernization checked this development. Some "eastern" cultural, folkloric, may be mental characteristics have been preserved, however, without any political indication. The 1992 rousing of "easternism' (*východniarstvo*) counted as a political joke and soon was stopped by the organizors themselves.

Hungary is one of the most homogenous countries where regional consciousness is concerned; there are no problems as the Moravian or Silesian or the earlier eastern Slovakian ones. Apart from joking newspaper headlines there is no "Western Pannonia" or "Eastern Hunnia" to be of any political influence. After the change of regime feelings for special local identity became stronger, e.g. in Jászság, Kúnság (eastern Hungary) or that in the Pilis region (Transdanubia) but these were more interested in preserving local traditions and were not founded on regional organizations and political interests. The suggestion to accept Huns as a minority was a political fraud or, at best an unfunny joke raising mixed feelings.

In Central Europe all the existing regulations concerning minorities apply to native minorities with citizenship. The countries of the region have regulations about immigration, asylum and aliens administration but have not reacted to the appearance of migrants arriving from the third world, from far away places; though everywhere there have appeared the first larger migrant communities sometimes with more than 10 000

[4] Iván Halász: A romák jogi helyzete Szlovákiában és Csehországban. In: Merre visz az út? A romák politikai és emberi jogai a változó világban. Kisebbségkutatás Könyvek. Lucidus Kiadó. Budapest, 2003. 225. o. [The legal situation of Gypsies in Slovakia and the Czech Republic. In Where leads the Way? The Political and Human Rights of the Gypsies in a changing world].

members. It is true, such distinct communities are still rare, which define, even change the outlook of a town as in Karlovy Vary in Czech Republic, by Russian migrants;[5] albeit the Czech Republic has given work permit to ten-thousands of Ukrainian guest-workers. In Poland, being larger in area and closer to Ukrainia their number is even bigger.

Migration within the Central European region is also considerable. It is well known that demographic problems in Hungary are being remedied by immigration of young people from the neighbouring countries. In the 1990s the number of Slovaks staying in Czech Republic and Moravia increased forming the largest, though invisible minority of the Czech Republic. Several thousand Slovak students have been studying at Czech universities and probably many will stay on. It might seem that the Slovak stugents and guest workers represented a similar demographis reserve for the Czech Republic in the 1990s as the Hungarians along the Hungarian borders do.

Minority regulations

Before discussing the legal regulations relating to minorities it is necessary to give a summary of Central European constitutions and examine how these regulate minority rights. The constitutions of Hungary, Poland, Czech Republic and Slovakia, contain provisions; only the Czech Republic one accepted in 1992 has no relevant paragraphs, the chapter on the rights of national and ethnic minorities is contained in the documents "Charter of Basic Rights and Liberties", which is an integral part of the Czech constitutional order. The Slovak constitution, accepted in 1992 on the other hand has a special sub-chapter within the chapter of "Basic rights and Freedoms" referring to national minorities and ethnic groups. Though neither the valid Hungarian nor the Polish constitution (the latter accepted in 1997) do not stress minorities rights, however, inherently they guarantee it.

In regards the system of power, the Hungarian statue (Article 68, par.1.) declares that national and ethnic minorities are part of the people's power as nation-forming elements. The formulation resembles to the constitutions of the former federal social countries. The Slovak constitution is less explicit, but in its *Preamble* it states that the Slovak nation, together with members of national minorities and ethnic groups living as citizens on the territory of the Slovak Republic, adopt the new constitution through their representatives. The Polish and Czech constitutions

[5] In Karlovy Vary real estates are being advertised not only in Czech but also in Russian and English owing to the great number of well-to-do migrants from post-Soviet areas.

also mention who are the "constituents". In the Czech constitution the citizens of Bohemia, Moravia and Silesia are mentioned; according to the *Preamble* of the Polish constitution it is established in the name of the Polish nation, all citizens of the Republic. It is interesting that the Czech constitution enumerates all the old territories; in the Polish one there is no such unambiguous political nation concept. The Polish constitution contains the least regulations concerning the minorities, may be because Poland is the most homogenous nation in the region.

Each of the constitutions expresses such basic rights of the national and ethnic minorities as preservation and development of their language, culture, traditions and customs, the possibility of founding and maintaining their own institutions. All four constitutions prohibit minority and ethnic discrimination. The Hungarian constitution seems to have got furthest concerning political representation and participation in public affairs, stating that the laws assure minority representation and the forming of local and national self-governments. The Polish one goes only as far in this respect as declairing the right of minorities to participate in the resolution of matters connected with their cultural identity. There is a similar declaration in the Czech and Slovak constitution together with the right of association.

The Hungarian constitution clearly declares the communal and collective character of minority rights, that the state grants their collective participation in public life to national and ethnic minorities. The reference to self-government is also such a gesture towards 'collectivity'. There is just a reference in the Czech and Slovak contitutions that most of the minority rights can be collectively excercised.

The right to use the mother tongue in the offices is a characteristic feature of the Czech and Slovak regulations based on a similar legal and spiritual tradition; that the right to learn the official language is mentioned first in the Slovak constitution and the right to use the mother tongue second, is the result of the suspicion the Slovak public life still felt against minorities and was more interested in nationalistic views in 1992, the time the constitution was adopted. This mistrust is expressed by Article 34. Paragraph 3.: „The enactment of the rights of citizens belonging to national minorities and ethnic groups that are guaranteed in this Constitution must not be conducive to jeopardizing the sovereignty and territorial integrity of the Slovak Republic or to discrimination against its other inhabitants." In reference to this paragraph the Slovakian Constitutional Court have denied preference on national, ethnic or racial basis.

Hungarian Minority Law accepted in 1993 was the first such regulation in the region. Apparently Hungarian legislation wished to set an example

to those states with larger Hungarian minority communities; therefore the 1993. LXXVII. Law on the rights of national and ethnic minorities is fairly liberal, which later necessitated considerable changes of the statue at the turn of the millenium. Nevertheless, the law was not merely the cause of the much criticized 'ethnobusiness' but helped revitalize minorities almost completely assimilated. The second was the Czech minority law accepted July 10. 2001.[6] Minorities question is a much less important issue in the Chech Republic; though the creation of the law raised less disputes, its introduction did not go smoothly. Poland was the last to to accept its law on national and ethnic minorities and regional languages.[7]

It must be pointed out that the above legal regulations of the three countries are not restricted to special minority laws but contain other ones (e.g. on election, language use, administration, etc.) as well. What are, then, the major similarities and differences between the legislations of these countries?

The definition of minorities

In all three constitutions there is a definition of the concept of minorities. In Hungarian 'a national or ethnic minority is any ethnic group with a history of at least one century of living in the Republic of Hungary, which represents a numerical minority among the citizens of the state, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history.' According to Czech legislation 'A national minority is a community of citizens of the Czech Republic who live on the territory of the present Czech Republic and as a rule differ from other citizens by their common ethnic origin, language, culture and traditions; they represent a minority of citizens and at the same time they show their will to be considered a national minority for the purpose of common efforts to preserve and develop their own identity, language and culture and at the same time express and preserve interests of their community which has been formed during history.'[8] The Polish Sejm has made a difference between the cate-

[6] 273 Zákon o právech příslušníků národnostních menšin a o změně některých zákonů.

[7] 141 Ustawa z dnia 6 stycznia 2005 r. o mniejszosciach narodovych i etnicznych oraz o jezyku regionalnym

[8] In Czech and Slovak usage there slight differences for the term 'national minority', used in international documents.

gories of national and ethnic minorities: According to law national minority is a group of Polish citizens who are in numerical minority compared to the number citizens of the Polish Republic, differs from the other inabitants in language, culture or traditions; strives to preseve their language, culture or traditions; has their own historically developed identity they strive to express and protect; the ancestors lived in the territory of Poland at least for 100 years; and identify themselves with a sovereign nation. The same is valid for ethnic minorities with a difference in the last item as – in agreement with international practice – ethnic minorities do not need to have a sovereign state.

Another important aspect of the Polish law is the treatment of regional languages. These are languages traditionally used by citizens who are numnerically in minority compared with other inhabitants; another condition being that they should be differing from the official language of the state and cannot be defined as a dialect of the state-language nor as the language of migrants. The statue names only one such regional language, that of the Pomeranian ethnic group, but treats the Cashubs and their language as part of the Polish nation. The language of Silesia after much political and legal controversy has not been accepted as a regional language.

Belonging to the above definitions there are additional elements scattered all through the above mentioned Acts. The Hungarian Law – as does the Polish one – requires at least one hundred years of residence in the country. Thus the Hungarian and Polish regulations apply only to native minorities. The Czech law guarantees certain rights, e.g. multi-language city signs, the use of language in legal and official communication, free language use in matters referring to elections, the right to education in the mother tongue, only to national minorities traditionally living in the territory of the Czech Republic. Though the meaning is not explicitly defined, the aim seems to be evident. In general the national minorities are guaranteed the right to the choice of minority name, free choice of identity and the protection of their data, etc. as well as the right to their own culture, language and maintenance of their own traditions, but the state supports only the endeavours of those national minorities which have traditionally been living in the country. The above definitions make it clear that each of the countries guarantees special minority rights to their own citizens only, which of course does not affect the ban on discrimination since it applies to everybody. The essence of national minorities has been seen in their own language, culture and/or traditions and in their will in maintaining them. Majority states observe national minorities as historically developed entities.

There also differences in the legal terminology. Czech legislation in only about national minorities; Hungary uses the terms of national and ethnic minorities without defining the difference between them, while Poland has tried to do so. The Czech parliament has not declared which are the communities defined as minorities; on the other hand both the Polish and Hungarian legislation made a extensive list of their national and ethnic minorities.

At the time of the acceptance of the respective laws, in Hungary (in 1993) the following had already received minority status: Bulgarians, Gypsies ('Romani' and 'Beash'), Greeks, Croatians, Poles, Germans, Armenians, Romanians, Ruthenians, Serbs, Slovaks, Slovenians and Ukrainians; in Poland (2005) national minorities are the Germans, Ukrainians, Belorussians, Lithuanians, Slovaks, Russians, Czechs, Jews, ethnic minorities are the Karaim,[9] Lemkos,[10] Romas, Tatars.[11] There is no regulation in the Polish law what are the possibilities to be „admitted" among the accepted national and ethnic minorities, thus the above list is closed; to accept a new minority will necessitate the revision of the law. In Hungary there is a statue for the process. The *Closing Provisions* declare 'If a minority other than those listed in paragraph (1) wish to prove that they meet the requirements specified in this Act, they may submit a petition related to this subject to the Speaker of the National Assembly if supported by at least 1,000 voters who declare themselves members of this minority.' In the course of this procedure the provisions of the Act on Referendums and Petitions shall apply with the provision that the President of the Hungarian Academy of Sciences has to verify the presence of legal conditions. Afterwards the Hungarian Parliament decides on the admission of a new minority. In recent years there were several petitions without success. The most controversial issue was the petition for the admission of the Hun minority, but that of the Russian, Bunyevac minorities and the issue of Jews caused debates. The heads of the Hungarian Jewish religious communities have not supported the initiative because they regard it a religion and not an ethnicity.

There is no list of accepted minorities in the Czech statue itself, but in the attached section of explanations the minorities living in the Czech Republic at present are Bulgarians, Kroatians, Hungarians, Germans, Poles, Austrians, Roma, Rusins, Russians, Slovaks, Greeks and Ukrain-

[9] a group of Turkic origin but of Jewish religion.
[10] A regional folkloric group.
[11] Historically Tatar was used as collective name, but the Tatars have had their own – though not sovereign – stateship: Tatarstan as an autonomous republic is a part of the Russian Federation.

ians. The Jews have turned down the proposition of being declared a minority.[12] The option for Austrian and Jewish national identity was deleted from the census questionnaires in 2001.

Slovakia has no comprehensive minority law which could contain a list of the accepted minorities. There is not even an official definition of national minority and ethnic group. The latter was omitted from Act 184. 1999 on Language use of national minorities. Neither is there a formal procedure leading to the acceptance of a new group as a minority. *De facto*, however, there are 12 accepted minorites, as can be judged from census questionnaires and also from statues dealing indirectly with the protection of minorities. The 2001 census offered the choice of 13 minority-ethnic category: Slovak, Hungarian, Czech, Roma, German, Polish, Chroat, Serbian, Rusin, Russian, Ukrainian, Jewish and „other".

Minority representation

The institutions and possibilities of national and ethnic minority representation are not only regulated by the comprehensive minority laws but the constitution, regulations of general suffrage, laws on self-government and other statues also contain relevant references.

The comparison of Czech, Hungarian, Polish and Slovak regulations indicate a lack of a uniform Central European model. Each of the states has its own solution. It is only in Poland that the national minorities were granted concessions on parliamentary level: Article 134 of the general statue[13] regulating elections into the Sejm and Senate makes exempt from the otherwise bounding 5% limit those electional committees which were nominated by the members of registrated organisations of national minorities to be voted by list and which lists were submitted to the National Election Committee. Representatives of the Sejm, the parliament of Poland, are elected by lists in a proportional system. Thus, if the members of an accepted minority association compile a special list and collect votes sufficient for at least one mandate, they can participate in the legislation; this system has been modelled on the German one. This regulation draws attention to the role of the terminology of regulations as it may seriously influence the chances of individual communities. The Polish law on elections gives the special 5% limit to national minorities only but does not mention ethnic minorities or groups of speakers of regional languages.

[12] Zoltán Kokes: Megszületett a cseh kisebbségvédelmi törvény. [The Czech Act on the protection of Minorities has been born]. Prágai Tükör 2001.2. p.72.
[13] Ustawa z dnia 12 kwietnia 2001 r. DZU 2001 Nr. 46 poz. 499.

The difference does not seem logical enough unless it has implications in foreign policy.

The Polish regulation on the other hand has no regulations about a system of minority self-government such as the Hungarian one since 1993. According to the original Hungarian plans the civil legal representation would have been ensured through special parliamentary representation and minority self-governments, the local ones directly elected, through electors the national ones. The special parliamentary representation has not yet been realized, albeit Article 68. of the effective constitution declares that 'the national and ethnic minorities living in the Republic of Hungary share the power of the people; they are constituent factors in the State.'

The Hungarian system of minority self-government, which mainly resembles to that of Slovenia, has lately been considerably modified; the legislation accepted in 1993 allows for a rather flexible interpretation of the liberty of identity choice, furthermore there was no exact definition who were entitled to participate in the election of minority self-governments, i.e. there was no register of the eligible electors. The problem caused various theoretical and operational inconvenience, leading to the notorious fenomenon of 'ethnobusiness'.[14]

As a remedy an ammendment of the Minority Law and connected statues were issued in 2005,[15] which introduced the electors eligible for minority elections, thus regulating the earlier unrestricted practice. Each person can be entered only in one register and can only be engaged in one minority self-government. At the same time it is voluntary to be registered, the freedom of choice of identity is respected and it is possible to withdraw from the register. It is a change that in addition to local and nation-wide self-government there appeared regional ones as well. The fundemental task of these self-governments is the protection and representation of minorities. The 2005 ammendment strengthened the power of self-governments to an extent.

The Czech legislation has not allowed parliamentary representation for the minorities to be obtained by special rights neither a system of specially elected self-government. Paragraph 3. of Article 117 of the Act on Municipalities declares that the municipality on which territory at least 10% of the population reported other than Czech at the last census, has to form a separate committee to represent national minorities.[16] The members

[14] Regisztrálhátó-e az identitás? Szerk. Halász Iván – Majtényi Balázs. Gondolat Kiadói Kör – MTA Jogtudományi Intézet. Budapest, 2003 [Identity, can it be registered?]

[15] Act CXIV. 2005.

[16] Zákon š. 128/2000 Sb. o obcích (obecní zřizení),ve znění pozdejších předpisů.

of these committees, in addition to the representatives of the self-government, are the members delegated by the associations of national minorities and members of national minorities must always represent at least the half of all members of the committee. Similar national minority commitees should be formed in the regions as well[17] by similar regulations, with the difference that regional committees should be formed if the last census recorded at least 5% of the inhabitants belongig to nationalities other than Czech; the same rules for the capital, Prague too. In contrast to the Hungarian model, where each of the minorities can form their committee, these committees serve collectively for all the nationalities living in the region. Their tasks and sphere of authority do not differ considerably from the regular local or regional self-governments. Where the size of the minorities set as a limit in the Act on municipalities is concerned, it should be mentioned that the use of multi-language street-names, public areas and offices is possible if the minoritiy in question represents at least 10% of all the inhabitants of the region in question and at least 40% of them petition for it.

In the use of minority place-names there is peculiar restriction in the Polish law which prohibits the use of names given between 1939 and 1945 both by German imperial and Soviet authorities. On the other hand there is a register of places entitled to use non-Polish names.

The issue of the acceptance of the Silesian minority

It is a sensitive issue to define which communitiy belongs to national and which to ethnic minority, especially if extra political rights and possibilities are involved. Unfortunately the borderlines are undefined between the groups and categories. Why are e.g. Austrians a separate national minority in the Czech Republic, whay count the Russians and Ukrainians as two different groups in Hungary, why are the Jews a nationality in Poland and members of a religion in Hungary, why is Kashub a regional language and not the language of an ethnic group, etc.? The initial problem is that national identity is highly subjective. Each country has a different history and different political problems at present.

Of the problems arisen in Central Europe only the case of the Silesians had been treated by the highest forum, the Grand Chamber of the European Court of Human Rights. The issue started in 1995, when the Union of People of Silesian Nationality tried to have Silesians accepted as a minority and handed in a petition to the Provincial Court in Kato-

[17] Zákon č. 129/2000 Sb. o krajích (krajské zřízení), ve znění pozdejších předpisů. §78. (2)

wicze for registration. The court did so inspite of the objections of the voivode whose major objection was that the association wished to protect a nationality which does not exist; moreover the statute attached did not define the „person belonging to the Silesian nationality". The Katowicze appellate court agreed with the opinion of the governor in that the Silesians are only an ethnic minority and not a nationality, which should be accepted as such by the general public without any doubt.[18] The Union appealed to the Supreme Court which approved of the verdict of the appelate court and rejected the case. It argued that the registration of the Silesian minority would violate the law because as a non-existent minority could enjoy national minority rights. The minority law accepted later did not add the Silesians to the list of ethnic minorities. The Union of People of Silesian Nationality turned to the European Court of Human Rights with the complaint that the Polish authorities had violated their right of association. In its verdict of 21. December 2001. the European Court of Human Rights agreed with the view of the Polish Governement, namely that the applicants wanted to be granted election privileges; furthermore the limitation of freedom of association of individuals and groups is legally permitted for the sake of stability of the country as an entity, the democratic order of elections of the given country included.[19] However, there was no rulung in Strassbourg whether the Polish courts had the right to examine the existence of the Silesian minority. The Polish legislation has had no procedures for minorities to be newly accepted with the exception of the ones provided by bilateral treaties; for others than those, the registration of their association has been the only possibility. The Polish government has been reprimanded for this gap in its law.

That was, however, not the end of the issue. The Silesians appealed to the Grand Chamber of the European Court of Human Rights arguing that they simply wished to register an association and not an electoral committee; the reference to election fraud was a mere insinuation. The Polish authorities reposted that the registration of the association would have meant the legal acceptance of the Silesians as a nationality. The publication of the results of the 2002. census revealed that over 173.000 individuals declared Silasian nationality, thus it is not a figment.[20] The question of nationality was an open one, no categories being offered in

[18] Gdulewicz, Ewa – Poplawska, Ewa: Nemzeti és etnikai kisebbségek Lengyelországban – a definíció jogi problémái. [National and ethnic minorities in Poland – the legal problems of definition] Pro Minoritate 2004. Autunm-Winter p.246.
[19] Ibid. p.247.
[20] Ibid. p.249.

the questionnaires to choose from, in contrast to the practice of the 1991 Czech census.

During the second appeal, the data of the census were considered by the European Court of Human Rights, however, the verdict of the Grand Chamber agreed with that of the first-degree claiming that Poland had not restricted the righ of association of the Silesains, prevented only the registration of a legal entity which could have obtain special status, eventually benefits due its charter as well as the electoral regulations. The Court decided that the measures taken by the Polish state in the case had been justified by eminent social needs and the principle of proportion were not violated; thus the refusal of the registration of the Union remained within the limits of legal restrictions necessary in a democratic society.[21]

The Silesians have repeatedly applied to Polish law courts; they changed several paragraphs of their statute. The minority law accepted in 2005 has not mentioned Silesian either as a national or an ethnic minority.

The major features of the Slovak minority regulations

Compared with the other Visegrád countries, Slovakia is still a multiethnic state, about 15% of its inhabitants belong to national or ethnic minority communities, nevertheless there is no comprehensive minority law. Because of their great number as well as historical causes minority questions can cause considerable tension in Slovakia.

The constitution and the relevant international treaties – similar to the other Visegrád countries – guarantee the rights of national and ethnic minorities. In regards the signed international treaties the region is fairly homogenous, Slovakia is no exception. Though sometimes there have been negative public feelings against granting "above standard" minority rights, fundamental documents and their contents have been willy-nilly accepted.

As pointed out above, there is no minority law in Slovakia although in the 2002-2006 election cycle the Party of the Hungarian Coalition then in governmental position, aimed at the acceptance of the legal norms of minority cultural finances. It goes without saying that there are other ways for the regulation of minority affairs in Slovakia: there are several resolutions of the constitutional court which state important principles of the question.[22] In 1998 the court rejected the amendment on ethnic quotas

[21] Ibid. p.251.

[22] Cf. Orosz, Ladislav: Zákonná úprava postavenia národnostných menšín a etnických skupín v Slovenskej republike – hodnotenie, námety de lege ferenda. In: Národ a národnosti na Slovensku v transformujúcej sa spoloènosti – vzťahy a konflikty. Ed. Štefan Šutaj. UNIVERSUM. Prešov, 2005. 58. o.

in municipalities pressed for by Slovak nationalists who wanted legally secured posts for Slovak or other nationals in the local self-governments in Hungarian dominant places. [23]

The provisions of the Slovak constitution concerning minorities are distributed in laws at various levels. There are references in certain legal norms, e.g. on municipalities, the statutes on libraries, theatres, radio and television and other regulations. The most important of these are, however, the laws about language use and against discrimination.

Law 184. 1999 on the Use of Minority Languages allows the use of these languages in official contacts in a municipality if citizens belonging to a national minority represent at least 20% of the inhabitants of the given municipality, according to the latest census. Though the laws correspond to European legal norms and expectations, it does not seem too generous.[24] The verdicts passed by public administration bodies in court proceedings in municipalities are issued upon request in the language of a national minority. The meetings of local state administration bodies in municipalities can be conducted in a minority language if all present at the meeting agree, otherwise the representatives have the right to use a minority language with the interpreting provided by the municipality.

As was expected by EU, Law 365 on equal treatment and against discrimination was accepted in May 2004. The law made positive discrimination possible on the grounds of race, nationality and ethnicity. The ruling caused disagreement within the Slovak coalition government of the time, the politicians of the Hungarian Coalition Party supported it, while the cristian Democrat foreign minister was against it. The latter contested the law already accepted turning to the Constitutional Court. At the end of 2005 the Court ruled that the law cannot be applied on racial, national and ethnic basis. One of the problems was that because of the regulations of personal data protection it was difficult to define which of the groups should receive positive discrimination; the other is that according to Article 3. paragraph 3 of the constitution 'The enactment of the rights of citizens belonging to national minorities and ethnic groups that are guaranteed in this Constitution must not be conducive to jeopardizing the sovereignty and territorial integrity of the Slovak Republic or to discrimination against its other inhabitants'. The article expresses suspicion against minority aspirations and its last phrases can be interpreted as a ban of positive discrimination for nationalities and ethnics; however, the constitution expressed that women, minors and persons with impaired health

[23] PL ÚS. 19/98.
[24] Samson, Ivo: Maďarská menšina ako zahraničnopolitický faktor. DILEMA 2002. 1. p.33.

are indirectly exempted from the ban of positive discrimination. Article 38. para 1. and 2. declare that they are entitled to an enhanced protection of their health at work as well as to special working conditions, and also to assistance in professional training. The ban of positive discrimination is not so much against Hunagarian nationals but against Roma living under socially disadvantegous conditions.

Slovak experts are of the opinion that the regulations of the Slovak Republic had provided the minimal protection of minorities well before joining the European Union, at least as much as they are enforced in the other EU countries too.[25] It is to be added that most of the above mentioned norms were formulated after the elections of 1998. Earlier policy was much more adverse to minority law.

Before the 2006 elections Hungarian politicians in governmental positions were not successful in making a comprehensive minority law accepted. The drafts aimed at the widening of the possibilities and rights of the minorities in several ways, e.g. to decrease the 20% limit necessary for being allowed to use the mother tongue. They also suggested to extend the right from localities to municipalities; to expand the use of minority languages in oral administration; to allow members of the parliament to speak in their own language as well as authorities to carry out important services (wedding ceremonies, burials) in minority languages on request.

The above concepts do not exceed the usual European standards as has been admitted by certain Slovak legislators, and they have been expressed in the signed and ratified international documents even if they represent somewhat more than the required minimum.[26] It is not likely that the changed political situation at present would allow the successful acceptance of the law. Most importantly, the consequences of the lack of the minority law is the absence of a clear-cut definition of the concepts and the lack of the special representative organisations of minorities.

Conclusion

When summing up the minority situation in Central Europe after 1989, the following tendencies can be attested:

1. most of the countries of the region underwent national homogenisation; it is most characteristic of Poland, least of Slovakia. The Hungarian situation is similar to the Polish one; Since 1993 there has been a slight change in the fairly assimilated minority commu-

[25] Orosz, Ladislav p.63.
[26] Ibid. p.65.

nities in Hungary thanks to the changes of the law. The Czech Republic stands out for two reasons: one is the first appearance of an immigrant community (Vietnamese) to represent a considerable proportion of the inhabitants as has appeared in the statistics; the other is that here is the highest number of citizens claiming regional identity to an old territory (Moravia). The model could serve as an important social basis for non-national but regional/ethnoregional aspirations.

2. The legal regulation of the minority questions has been solved at least compared to the number of those who identify themselves as belonging to nationalities. Where there is no comprehensive regulation but the size of the minorities is large, life seems to make up for the omission, i.e. minorities create their own appropriate institutions or they fight for it by using their weight (Slovakia).
3. None of the countries is too generous to the migrant communities, probably because the experience that Central Europe has become the potential goal for the third world especially after these states' admission to the EU is still too new. Central European legislation has mainly been centred on native and nationality groups with citizenship.

APPENDIX

Central European nationalities in the returns of the 2001 census

Czech Republic
Czech 9.249.777
Moravian 380.474
Silesian 10.878
Slovak 193.190
Polish 51.968
German 39.106
Roma 11.746
Hungarian 14.672
Ukrainian 22.112
Russian 12.369
Vietnamese 17.462
Bulgarian 4363
Rumanian 1238
Greek 3219
Albanian 690
Kroatian 1585
Serbian 1801
Other 53.479
Unknown 172.827
Total of inhabitants 10.230.060

Hungary[27]
Bulgarian 1358
Roma 190.046
Greek 2509
Kroatian15.620
Polish 2962
German 62.233
Armenian 620
Rumanian 7995
Serbian 3816
Slovak 17.692
Sloven 3040
Rusin 1098
Ukrainian 5070
Total of inhabitants 10 195 513
Slovakia
Slovak 4.614.854
Hungarian 520.528
Roma 89.920
Rusin 24.201
Ukrainian 10.814
Czech 44.620
German 5405
Polish 2602
Kroatian 890
Serbian 434
Other 10.685
Unknown 54.502
Total of inhabitants 5.379.455
Poland
Polish 96,74%
Silasian 173.000
German 153.000
Belorus 48.700
Ukrainian 31.000 ukránnak
Roma 12.000
Jewish 1100
Armenian 1100
Czech 8000
Tatar 500
Karaim 50
Other 1,23
Unknown 2,03 % [28]
Total of inhabitants 38.300.000

[27] There were four questions relating to cultural-nationality identity: Nationality, mother tongue, adherance to cultural-national traditions, customs, and language use in the family and circle of frieds.
[28] Gdulewicz, Ewa – Poplawska, Ewa p. 251.

Balázs Vizi

Introduction to the International Protection of Minority Language Rights in Europe[1]

Abstract

The Charter of the United Nations sets out a fundamental standard that human rights shall be safeguarded for every human individual irrespective of "race, sex, language, or religion".

The specific position of language in defining national identity explains the outstanding importance of the legal treatment of language in national domains, since states often tend to give a privileged status to the majority language and minority languages may face direct or indirect discrimination in various situations. The fundamental concept of the ECRML is that regional or minority languages should be protected in their cultural functions, in the spirit of a multilingual, multicultural European reality. Article 10 of The Framework Convention for the Protection of National Minorities underlines that every person belonging to a national minority has the right to use her/his minority language without legal constraints, freely both in public and in private sphere.

1. Introduction

Since 1945 the expansion in activity of international organisations of all kinds has resulted in a range of standards and mechanisms on minorities that have contemporaneously been operating in Europe. First of all, the Charter of the United Nations sets out a fundamental standard that human rights shall be safeguarded for every human individual irrespective of "race, sex, language, or religion". This commitment was reinforced later in a number of various documents, among others in the Universal Declaration of Human Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Civil and Political Rights (Art. 26.), as well as under the European Convention on Human Rights (Art. 14). But the need to provide positive statements of minority rights, besides the prohibition of indirect and direct discrimina-

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tion, was formulated already by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now known as the Sub-Commission on the Promotion and Protection of Human Rights) when it made a distinction between the concepts of "prevention of discrimination" and "protection of minorities":

Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.

Protection of minorities is the protection of the non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.[2]

This differentiation was reflected for the first time in the International Covenant on Civil and Political Rights (1966 – ICCPR) which dedicated a separate article to the protection of minorities: "*In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*"[3]

This article has clearly portrayed admission of minority rights into the contemporary canon of human rights. These rights are individual rights and not 'collective' or 'group' rights, which is reflected in the term "persons belonging to…", though this article reflects also a collective dimension when it recognises that members of minorities "enjoy the rights in community with other members of their group". This ambiguity has characterised most international documents regarding the formulation of minority rights, although it shall be admitted that both "the individual" and "the group" are mere abstractions and that most of the rights are "collective" in that they apply to a class of persons.[4] What is important in this regard is the acknowledgement of the primary purpose of minority rights protection: that these rights may guarantee the survival of minority cultures and religions.[5]

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[2] UN Doc. E/CN.4/52, Section V.

[3] Art. 27.

[4] P. Thornberry and M.A. Estébanez, *Minority Rights in Europe*. Strasbourg: Council of Europe Publishing, 2004. p. 14.

[5] See General Comment No. 23 of the Human Rights Commitee. The most widely applicable control mechanism for the ICCPR is a reporting procedure which requires from state parties to submit regularly a detailed report on the progress made in the implementation of the Covenant. But there is also a possibility for individual communication procedure for states party to the first optional protocol of ICCPR.

Besides the inclusion of Art. 27 in the ICCPR, in the period of a bipolar world and rivalling utopias for social and political development, minority issues received scarce attention in international relations.

After 1989, the dissolution of the communist regimes in Central and Eastern Europe gave a new impetus to the improvement of the international protection of minority rights. The violent conflicts along ethnic rifts, emerged on the territory of former USSR and Yugoslavia drew the attention of the international community on minority issues in the 1990s. (And till then the fate of various groups in a number of conflicts continues to trouble the international conscience: we may think of Kosovo and Chechnya, from Asia and Africa East Timor and Rwanda respectively; not to mention other ethnic-based conflicts which are not always violent, though create lasting problems in some countries, like Turkey, Spain, or Estonia, etc.) This new awareness on minorities resulted in the adoption of a number of documents in international organisations which offer new perspectives for states in accommodating minorities. At a universal level the most powerful sign was the adoption of the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities in the General Assembly of the United Nations (1992)[6].

And the events and perspective shifts have particular importance in Europe and European regional international organisations tend to be the most active in standard-setting in this field. What are the main legal and political instruments for minority rights protection in Europe? In summary we can make a distinction between conflict-driven political instruments, which attempt to focus on the prevention of conflicts involving minorities and more general documents, which are aimed at improving minority rights standards in general. Among international organisations in Europe, the Organisation for Security and Co-operation in Europe (OSCE) was particularly active in the first realm, while the Council of Europe was more engaged in standard-setting activities. Nevertheless it is important to note that under the aegis of the OSCE a number of important political documents have been adopted regarding the protection of minority rights.[7] The OSCE was originally established as an inter-governmental conference in 1975 to tackle with security and human rights issues in a Euro-

[6] G.A. res. 47/135, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1992). For a good analysis see Fernand de Varrennes, To speak or not to speak – the rights of persons belonging to linguistic minorities. E/CN.4/Sub.2/AC.5/1997/WP.6

[7] The main milestones in this process are Copenhagen Document on the Human Dimension of the CSCE (1990); the Charter of Paris for a New Europe (1990), the 1991 Geneva Meeting of Experts on National Minorities; and the Concluding Document of the 1992 Helsinki Follow-up Meeting.

pean context. The conflict-prevention and conflict-resolution character of the organisation is still dominant, even though under its general human dimension it addressed minority situations as well. The Copenhagen Document in particular incorporates very broad statements on minority rights, which without any legally binding force to the member states of the OSCE have gained a high prestige in international relations, and many states have taken inspiration from it in developing their legislations on minority rights. In 1992 the institution of the High Commissioner on National Minorities (HCNM) was created with a mandate to provide "early warning" and, when appropriate, "early action" at the earliest possible stage in regard to potential conflicts involving national minorities. The HCNM to accomplish its mandate has adopted some general recommendations as well, which offer legal guidelines for states in developing their national legislation on minority rights. Among these recommendations, the Oslo Recommendations regarding the linguistic rights of national minorities (1998) and the Hague Recommendations regarding the education rights of national minorities (1996) need to be mentioned here. These recommendations set out various viable solutions for accommodating minority rights and draw the attention to the basic needs, possible problems in the field of minority language rights.

2. Minority language rights

In general most international documents acknowledge the specific importance of language and the freedom of the use of language in various private and public areas as a key element in preserving minority cultures. National and cultural identity cannot always be defined by linguistic differences between groups, but in a European context language frequently provides the most significant building block of national, cultural minority identity. Preserving the language is often a way of maintaining group identity, as well as a way of maintaining inter-generational links with one's ancestors. In one way or another, language often becomes a key symbol of national identity and its protection becomes an outstanding duty of the community in preserving its identity. Preserving the language is never just preserving a tool for communication: it is also preserving cultural traditions, political claims, historical consciousness and national identity.[8]

[8] See Will Kymlicka – Francois Grin, Assessing the Politics of Diversity in Transition Countries in: F. Daftary and F. Grin (eds.), *Nation-building, Ethnicity and Language Politics in Transition Countries*. Budapest: ECMI-LGI, 2003. pp. 1-28.

The specific position of language in defining national identity explains the outstanding importance of the legal treatment of language in national domains. States often tend to give a privileged status to the majority language and minority languages may face direct or indirect discrimination in various situations. One important constraint of national language policies and legislations is the emerging framework of international law regarding language rights, especially as codified in the Council of Europe's 1992 Charter for Regional or Minority Languages and its 1995 Framework Convention for the Protection of National Minorities. Besides in these legal documents various guidelines have been developed under the aegis of the Parliamentary Assembly of the Council of Europe, the European Union and particularly the OSCE High Commissioner on National Minorities. Nevertheless these international norms are not legally enforceable, in the sense that no international court has the authority to overrun domestic laws or practices that violate these normative standards. Still these documents provided important political guidelines in the past decade in the context of European integration, especially in the process of obtaining membership in the European Union and the NATO. In political rhetoric in general these norms are often referred to as "international standards" which vest them with a relatively high political prestige in international relations.

3. Council of Europe

3.1. The European Charter for Regional or Minority Languages

The idea of providing a special protection to minority or regional languages emerged already in the 1980s within the Council of Europe, nevertheless the European Charter for Regional or Minority Languages was adopted only on 5th of November 1992 and entered in force on 1st of March 1998. Unlike most documents related to the protection of minority rights, the Language Charter is not aimed at the protection of minority communities, its primary goal is the "protection of historical regional and minority languages of Europe"[9] and it stresses that the "protection and promotion of regional or minority languages" is an "important contribution to the building of a Europe based on (…) cultural diversity".[10]

The Charter does not acknowledge individual or collective minority rights, its fundamental goal is to provide an appropriate framework for the protection of regional or minority *languages*. The explanatory

[9] Preamble para. 2.
[10] Ibid. para. 6.

report explains that the ECRML does not conceive of regional, minority languages and official languages "in terms of competition or antagonism", but it stresses the importance of a multicultural approach "in which each category of language has its proper place".[11] Thus, the terms "regional" and "minority" in regard to languages were used in the ECRML in reference to less widespread languages.

The fundamental concept of the ECRML is that regional or minority languages should be protected in their cultural functions, in the spirit of a multilingual, multicultural European reality. The Language Charter is composed of three main parts: the first part displays general provisions, including basic definitions, like the concept of "regional or minority language"[12], "territory in which the regional or minority language is used"[13] and "non-territorial languages";[14] moreover it defines the concept of state obligations under the Charter. Part II of the Language Charter enlists under the title "objectives and principles" general obligations, binding all signatory states. While the third part of the Charter offers concrete provisions for different activities of the use of language, providing for each activity different levels of commitments.

It should be stressed that the Charter explicitly excludes the languages of migrants. The explanatory report highlights that: "*the purpose of the Charter is not to resolve the problems arising out of recent immigration phenomena (…) in particular, the Charter is not concerned with the phenomenon of non-European groups who have immigrated recently into Europe and acquired the nationality of a European state.*" This restrictive approach, however, raised some concern regarding the interpretation of "non-European" groups: if they are excluded, what of "European" groups (such as migrating Roma) recently acquiring the nationality of a state party to the ECRML?[15] Well, taking into account that the Charter recog-

[11] Para. 14.

[12] Art. 1. (a) states: „*regional or minority languages*" *means languages that are: i) traditionally used within a given territory of a State by nationals of that Statewho form a group numerically smaller than the rest of the State's population; and ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants;*

[13] Art. 1. (b) reads as follows: "*territory in which the regional or minority language is used*" *means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in this Charter;*

[14] Art. 1.(c): "*non-territorial languages*" *means languages used by nationals of the State which differ from the language or languages used by the rest of the State's population but which, although traditionally used within the territory of the State, cannot be identified with a particular area thereof.*

[15] See also Thornberry-Estébanez, *op. cit.* p. 142.

nises the principles of non-discrimination on grounds of language, we may reasonable suppose that the drafters of the Charter intended to make a real and defensible distinction in specific cases.

The first part of the Charter (under Art. 2) requires each state party to specify in the ratification instrument all the languages on its territory which come under the definition of Art. 1, as regional or minority languages. But this selection is not exclusively based on the discretion of states; in essence, this is a question of fact. As the explanatory report stresses: Part II "is general in scope and applies to all regional or minority languages spoken on the territory". Nevertheless, frequently states make a selection between minority groups and languages existing on their territory, e.g. Hungary reported that under its national jurisdiction thirteen languages are spoken by minorities, but Hungary had undertaken commitments in respect of six.[16]

The objectives and principles enshrined in Part II cover a wide area of application. The basic principles are among others: elimination of discrimination;[17] promotion of respect and understanding between linguistic groups;[18] recognition of the languages as an expression of cultural richness;[19] respect for the geographical area of each regional or minority language (the ECRML is against devising administrative divisions which would constitute an obstacle to the survival of the languages);[20] the need for positive action for the benefit of these languages;[21] ensuring the teaching and study of these languages;[22] relations between groups speaking a regional or minority language;[23] establishment of bodies to represent the interests of regional or minority languages.[24]

Probably the most important part of the Language Charter is its third part, however these obligations are open to the states party's discretional commitments, inasmuch it offers a menu *á la carte* for states, i.e. within limited boundaries a states party can choose freely from the different levels of obligations at the time of signing the Charter. Usually states attach a separate protocol to the Charter in which they enlist those languages which they acknowledge as ones falling under the provisions of the Charter and the specific provisions which they take as legal obligations under the third

[16] Initial report, p. 17.
[17] Art. 7(2).
[18] Art. 7 (1)e and 7(3).
[19] Art. 7(1)a.
[20] Art. 7(1)b
[21] Art. 7(1)c and d.
[22] Art. 7(1)f
[23] Art. 7(1) e. and i.
[24] Art. 7(4).

part of the Language Charter. But even here, the Charter uses a rather flexible language in defining state obligations under conditions like "if the number of users of regional or minority language justifies it",[25] or "as far as it is reasonably possible". [26]

Part III covers most of the relevant areas of minority language use: education (Art. 8.); judicial authorities (Art. 9.); administrative authorities and public services (Art. 10); media (Art. 11); cultural activities and facilities (Art. 12); economic and social life (Art. 13); transfrontier exchanges (Art. 14). In all these areas the Charter provisions cover a wide range of commitments among which each state party can select those which itself acknowledges as legal obligations towards minority languages recognised on the state's territory.

The Charter requires states to submit regular reports on the implementation of Part II and Part III, the first time within the year the entry comes into force for the state, and afterwards at every third year. State parties shall make their reports public; and the examination of the reports is delegated to a committee of independent experts.[27] On the basis of country reports and information, the experts prepare a report for the Committee of Ministers. This report shall contain proposals for recommendations by the Committee of Ministers to one or more state parties. The Committee of Ministers take note of the report without changing the content, but are free to accept the suggestions and recommendations.[28]

Moreover, uniquely among Council of Europe treaties, Art. 16(5) of the Charter prescribes that the Secretary General of the Council of Europe shall make a two-yearly detailed report to the Parliamentary Assembly on the application of the ECRML.

3.2. The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (hereinafter referred to as FCNM) is the most extensive document of the Council of Europe regarding the protection of minority rights. The text was adopted on 10 November 1994 and opened for signature on 1 February 1995. The FCNM entered in force on 1 February 1998 and as of 1 April 2007 had been signed by forty-three states and ratified by thirty-eight member states and one non-member state (Montenegro). The Convention is usually consid-

[25] Art. 8 (2).
[26] Art. 10 (1).
[27] The members of the committee are nominated by the states party and appointed by the Committee of Ministers.
[28] See Part IV „Application of the Charter".

ered to be the first legally binding multilateral treaty on national minority rights. The FCNM makes clear that the protection of minority rights is an integral part of the protection of human rights and as such "falls within the scope of international co-operation".[29] The title of the Convention immediately draws attention on its "framework" character suggesting, that FCNM does not provide strict normative standards, it offers a set of goals to be followed by the states. Many observers see the title of the Convention as softening of legal obligations on states party, however from a strictly legal point of view the FCNM is a treaty under international law and it creates obligations in international law for states.[30]

Still the explanatory report on the FCNM underlines that the Convention "*contains mostly programme-type provisions setting out objectives which the parties undertake to pursue*" and it also states that "*these provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account*".[31] However, some states already seem to have committed themselves to understand obligations as rights. In general human rights treaties employ different mechanisms for supervising implementation, but the most important issue is that states transpose adequately the norms and guarantee rights to individuals through a mechanism which is appropriate for the goals of the treaty in question.

Even though, the task of interpreting the FCNM coherently is rather difficult: the Convention employs different qualifiers which formulate rather vague state obligations. Terms, like "promote",[32] "recognise",[33] "respect"[34] have to gain real meanings, and the Committee of Ministers assisted by the Advisory Committee in monitoring the implementation of the FCNM have great tasks in that.

THE PROTECTION OF MINORITY LANGUAGES IN THE FCNM

The language provisions of the Convention are rather complicated, and replete with various qualifiers. Moreover, Art. 10 (2) introduces the concept of a minority area without any specific definition, within the boundaries of which some extended minority rights are envisaged.

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[29] Art. 1. declares: „*The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation*."

[30] Cf.: Thornberry and Estébanez, *op. cit*. p. 91-92.

[31] Explanatory report, par. 11.

[32] Articles 5 and 12.

[33] Articles 8, 9, 10, 11, and 14.

[34] Articles 7, 19, and 20.

The right to use a minority language completes the freedom of expression set out in Articles 7 and 9. Probably the most powerful right set out in the FCNM regarding the use of minority languages is contained in Art. 10, which underlines that every person belonging to a national minority has the right to use her/his minority language without legal constraints, freely both in public and in private sphere. Paragraph 2 of Art. 10 goes even further when it declares: "*In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.*" As the explanatory report illuminates, the use of minority language "in public" means in general terms a public place, "but it is not concerned (…) in any circumstances with relations with public authorities". This is the reason, why a separate and more flexible paragraph was formulated on the use of minority language with administrative authorities. First of all, neither the Convention, nor its explanatory report defines the criteria for areas inhabited by minority members "traditionally or in substantial number", furthermore for the implementation of this right there must be request and this minority request should correspond to a "real need". The decision on realising such a real need is obviously vested on the government. To give at least a minimal limit to the interpretation of this section, the explanatory report suggests that the existence of a real need "is to be assessed by the state on the basis of objective criteria". In this regard the main issue is, whether the state authorities could take a decision on the assessment of this need without any input from the minority community. The explanatory report suggests that if this need shall be based on objective criteria, then the involvement of minorities seems to be inevitable. This also means that lack of resources cannot be an excuse for inaction in this field.

The first paragraph of Article 11 sets out a right to use names in a minority language "*and the right to official recognition of them, according to modalities provided for in their legal system.*" This is followed by the right to display minority language "s*igns, inscriptions and other information of a private nature visible to the public*". The third paragraph states that the state in minority inhabited areas "*shall endeavour (…) to display traditional local names, street names and other topographical indications for the public also in the minority language*." Here again re-emerges the concept of a 'minority area' in the Convention without providing any particular criteria for its definition.

Paragraph 68 of the explanatory report also states that Art. 11 means, that persons who have been forced to change their names should have the right to revert to them. In such cases it can be rightly expected that the costs of transcription will burden the state authorities and not the victims. The explanatory report comments the question of minority language signs visible to the public stating that the right does not prevent the individual being required to use the official language in addition to the minority language. This latter requirement has been widely criticized in academia, that this provision should not be applied as a blanket provision: there are a number of different situations (e.g. name of a house, a poster in the window, etc.) where there is no real state interest in adding the official language.[35]

The third paragraph of Art. 11 requires particular attention: in this case, in the public allocation of street names it seems to be appropriate to require that official/state language enters in equation.

SUPERVISING MECHANISM

The Council of Europe Assembly Recommendation 1201 (1993) in its original form was adopted as an additional protocol to the European Convention of Human Rights the implementation of which is supervised by the judicial procedure of the European Court of Human Rights. But the Council of Europe member states took a more cautious approach and when they decided to draft a separate framework convention for the protection of minority rights, which is also open to non-member states, it was clear that the judicial procedure of the European Court of Human Rights will not be applicable. The final version of the FCNM, adopted in 1995 as a result of this move, contains a non-judicial implementation procedure which is based on periodic state reporting placed under a mixed political and independent expert review. States parties to the FCNM are asked to present a report containing full information on legislative and other measures taken to give effect to the principles of the FCNM, within one year of the entry into force. Further reports are requested to be made on a periodical basis (every five years) and whenever the Committee of Ministers so requests. The evaluation of the reports filed by states is evaluated by the Committee of Ministers, which is assisted in this work by an Advisory Committee (composed by independent experts). The Advisory Committee adopts an opinion, upon which the Committee of Ministers elaborates its decision on the implementation of the FCNM in individual countries. In practice the Advisory Committee plays a determining role in elaborating

[35] E.g. Thornberry-Estébanez, *op. cit*. p. 106.

a balanced and credible decision: while the Committee of Ministers is a political body, the work of the Advisory Committee is rather protected from political interference. The Advisory Committee is free in collecting data and information on the situation of minorities, first of all it may request the governments concerned to provide additional information, it may receive information from other sources, e.g. the representatives of minorities, NGOs, etc. furthermore the Advisory Committee usually pays visits the states under scrutiny to collect further experience and information on the ground. Indeed, the findings of the Advisory Committee are usually respected and accepted also by the Committee of Ministers.

Both the monitoring mechanism applied under the FCNM and the similar procedure of the Language Charter reflect a functional approach: they have been purposely set up to review the implementation of a specific international instrument, moreover expert and political bodies involved in the reviewing take both the opinions of the states and minorities interested into consideration and the mechanism is primarily focusing on *implementation*. These non-judicial procedures, despite the lack of a powerful sanctioning mechanism, proved to be rather effective in raising awareness in international public on the specific problems of minorities in individual countries.

4. The European Union and minority languages

The European Union has not developed a specific, legally-binding instrument on "minority rights", but treaty references to European cultural and linguistic diversity are significant.[36]

The Treaty of Maastricht while reinforcing the process of political integration, placed a strong emphasis also on the cultural dimension of the European integration. The introduction of Article 128 (today Art. 151 TEC) of the Treaty, indirectly recognises that not a single Member State is culturally homogenous: under the provisions of Article 128 (Art. 151), the Union is asked to contribute to the flowering of the "*cultures of the member States, while respecting their national and regional diversity*".[37] This provision clearly suggests that European integration is not only based on the diversity represented by the member states, but the Union has to respect also the internal national diversity characterising its member states.

[36] See in general Niamh Nic Shuibne, The European Union and Minority Language Rights in: *International Journal on Multicultural Societies*, Vol. 3. no. 2 2001. pp.61-77.
[37] Today art. 151 para. 1.

Similarly, the importance of diversity has been reaffirmed by the introduction of a new Art. 22 in the Charter of Fundamental Rights of the EU, which states that *"The Union shall respect cultural, religious and linguistic diversity*".

The cultural approach of the EU is designed to be a multi-political one as it shall "*take cultural aspects into account in its action under other provisions of the Treaty ....*" (Art. 151 (4) TEC). This kind of "cultural impact assessment clause" establishes culture as an aspect which has to be respected by the Community, thus providing a major role to this competence provision.[38]

Besides these hints on cultural diversity in the founding Treaties, what may be important regarding minorities in this aspect is the specific interest given in the EU framework to the protection of linguistic diversity. Whenever the European Parliament (EP) addressed minority issues within the EU paid usually the most attention to the protection of minority languages. During the past decades the EP has adopted a number of legislative initiatives aimed at safeguarding regional, minority or "lesser-used" languages in the EU.

Already in 1981 the EP called on the national governments and regional and local authorities in its resolution[39] to allow and promote the teaching of regional languages and cultures in official curricula at all levels of education from nursery school to university; to grant opportunities for regional languages in the local radio and television; to ensure that individuals are allowed to use their own language in public life and social affairs in their dealings with official bodies and in the courts. Moreover, the Parliament called on the Commission to review all Community legislation, which discriminates against minority languages.[40] The most important achievement of the resolution was the establishment of the European Bureau for Lesser Used Languages (EBLUL), an NGO observing the situation of minority languages in EU member states, partly financed by Commission sources.

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[38] It is interesting to note that this latter clause was then functionally specified as the Treaty of Amsterdam added ". . . *in particular in order to respect and to promote the diversity of its cultures*". Moreover, another important modification was inserted in the Treaty under the subvention provisions which allow, to a certain degree, the financial assistance to cultures by stating that "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest" can be considered compatible with the internal market (today Art. 87(d)).

[39] Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities OJ No. C 287, 9 November 1981 p. 106. Adopted by Parliament on 16 October 1981 on the basis of the so-called 'Arfé report' prepared by the Rapporteur, Gaetano Arfé.

[40] Paras. 4-6.

In a following resolution[41] on the matter, the EP once again called on the Commission to take practical measures for the enhancement of opportunities for the use of minority and regional languages. A few years later, the Parliament reinforced its previous proposals for the member states and the Commission,[42] but the most important initiative of the Kujpers-resolution was that it recommended the adoption of a separate finance in the EU budget for actions favouring minority languages.[43] In 1988 the Parliament initiated an even more ambitious project, when it appointed its member, Count Stauffenberg to prepare a report concerning a "Charter of the Rights of Ethnic Minorities".[44] The report underlined the need to adopt a legal charter on the matter,[45] however, due to the forthcoming EP elections, the Parliament have never discussed the Report and later, after Council of Europe Language Charter was adopted, also the EP promoted the implementation of the Language Charter instead of elaborating its own charter.

Later the EP adopted another separate resolution in favour of the protection of minority and regional languages in 1994;[46] and also underlined the importance of supporting minority languages also in its resolution concluding the 'European Year of Languages' in 2001.[47]

Moreover, in the field of culture different programmes (some of them already in existence before Maastricht) also provide financial support also for minority-relevant situations such as, for example, the translation and dissemination of works of contemporary literature in lesser used

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[41] Resolution on Measures in Favour of Linguistic and Cultural Minorities, adopted by the Parliament on 11 February 1983, OJ C 068, 14 March 1983 p. 103.

[42] Resolution adopted on the basis of the report presented by Willy Kujpers, Resolution on the Languages and Cultures of the Regional and Ethnic in the European Community, adopted by the EP on 30 October 1987. OJ 1987 C 318, p. 160. In this resolution, the Parliament adopted new recommendations for extending language use in the mass media, and in the different areas of the cultural, economic, social life alike. It recommended the administrative measure of officially recognizing surnames and place names in regional or minority languages and it emphasised that appropriate measures had to be taken to provide for the use of the regional and minority languages in public concerns (postal service, etc.), consumer information and product labelling, and on road and other public signs and street names.

[43] The Parliament annually enters a separate budget line (B-1000) in the Union's budget to support regional and minority languages. In 2001 the Union dedicated 2.5 million Euros for this purpose. See <http://europa.eu.int/comm/secretariat_general/sgc/aides/forms/eac06_en.htm> Last accessed on 12 March 2003.

[44] P.E. 156.208.

[45] It ought to be mentioned that the Report talked exclusively about ethnic minorities, in the plural never referring to the legal term of "persons belonging to minorities", so suggesting a rather permissive approach to the group rights of minorities.

[46] Resolution on Linguistic Minorities in the European Community, OJ 1994 C 61, p. 110.

[47] Resolution on Regional and Lesser Used European Languages, adopted by the Parliament on 13 December 2001, B-5 0770.

languages, the conservation of regional culture, its promotion or research on minority languages.[48]

Despite the significant activity of the EP in this field, it shall be underlined that without a clear competence, the European Union can not regulate issues related to the use of minority languages. But regarding its commitment and treaty obligations on respecting cultural and linguistic diversity (which is reflected also in the regulations on the use of languages in relation to the EU bodies – granting official language status to 23 languages) the European Parliament and other EU institutions as well can draw attention on the importance of safeguarding minority languages as well.

[48] Today these acts are grouped together under the EU's cultural policy program CULTURE 2000.

Beáta Jancsi

South Tyrol: Linguistic Pluralism or Linguistic Parallelism?

Abstract

The article throws light on the unique linguistic situation of South Tyrol, characterised by the parity of the German and Italian language. The territory has had over 30 years of experience in operational autonomy one of the basic components of which is the language factor. South Tyrol's strict proportionality in the public service, from the point of view of language policy, has often been referred to as a model to be followed.

The paper provides insight into the components of a well-established institutional bilingualism and makes an attempt to outline the difficulties related to bilingualism on an individual level. The school system, for example, which has been established according to linguistic-ethnic guidelines, does not succeed in providing a firm knowledge of the second language. At the same time, it creates an atmosphere of separation, generating barriers between the language groups that can be difficult to overcome.

However, the paper suggests that contrary trends, aiming at achieving a harmony between the linguistic groups are starting to occur. This manifests itself in the formulation of a unique South Tyrolean identity; initiatives to reform the educational system in order to yield a more effective approach which supports bilingualism and the favorable contacts between the two language groups, regarding the personal level. These optimistic trends could serve a firm basis to make true bilingualism an integral part of the South Tyrolean character and thus pave the way towards a multicultural and undoubtedly enriching experience. Such development should be able to offer not only a legally defined parallel coexistence bit through a more flexible and realistic approach a pluralistic cohabitation of language groups.

Historical background

As a result of the Peace Treaty signed in Saint Germain-en-Laye, in 1919 the former Austrian territory of South Tyrol was annexed to Italy. This rearrangement of the borders elicited a great deal of resistance among the German population of the area – representing the overwhelming majority – since the Wilsonian doctrine of self-determination was not taken into

consideration. The period between the two World Wars was in major part characterised by fascist aspirations aiming at assimilation. The obvious and flagrant objective was to make the territory as Italian as possible by putting an intensive anti-German policy into operation. Official measures banned the public use of the German language and this undoubtedly had a serious impact on all areas of life. Italian was made the exclusive language to be used in the public service, both in internal and external communication, education in schools was only available in Italian, German family names were rendered into Italian ones. The fascist regime attempted to take all possible measures to make the use of German impossible within South Tyrol. Besides these steps against the German minority, intensive action was taken to promote the migration and subsequent settlement of Italian population in order to create a different ethnic balance. In spite of all these circumstances Italian did not succeed in taking over from German in everyday life, the ethnic and linguistic homogeneity envisaged by the fascist regime proved to be an unrealistic idea.

In the years following the Second World War a slow change in attitudes to language use could be witnessed: German slowly started to make its way back to the public sphere. As part of the Paris Peace Treaty the Gruber-De Gasperi Agreement declared the autonomy of the German population and at the same time – in the name of minority protection – it guaranteed a wide range of rights. The main achievement of the Agreement signed in 1946 was that the Italian state guaranteed South Tyrol's autonomy in the realm of certain legislative and executive competences and as a result, the First Autonomy Statute was declared in 1948. However the measures protecting the German minority were not put into practice effectively. The autonomy applied throughout the region named Trentino-Tiroler Etschland/Trentino-Alto Adige, where the Italian population formed the majority. The political struggles for a well functioning autonomy even lead to bombings in the 1960s and the case of South Tyrol was discussed in the UN General Assembly.

The German population of the area also tried to exert pressure on the Italian government with the help of Austria. The strive for real autonomy gave way to the Second Autonomy Statute in 1972, which had significant political, cultural social and economic dimensions. One of its main achievements was the explicit recognition of diversity and a redistribution of spheres of influence and powers. As opposed to the region-centered practice followed earlier, its essential element was guaranteeing particular comprehensive powers at province level. The competences of the region and of the province were redefined. Meanwhile, special measures were put in place for South Tyrol addressing specific issues including use of mother tongue, education, culture, bilingualism and ethnic proportionality. The

province of Bozen/Bolzano was guaranteed significant new powers and competences, thus it was made responsible for a number of issues essential from a linguistic point of view.

Apparently, changes did not take place overnight; the „Package" consisting of 137 measures regulating the protection of the German and Ladin minorities was implemented gradually. It took some 20 years to have all of the enactment laws adopted and implemented, meaning that formally the conflict was settled only in 1992. Primary competences delegated to sub-regional level relate to local culture, education, geographical names (bilingualism is compulsory within the province in this respect) and establishments with a cultural profile (libraries, different institutes etc.).

The Statute framework offers a dual approach regarding the provisions on language use. The legal context can be regarded as a mixture of principles protecting both the individuals belonging to the German and Ladin population and the group itself, establishing the principle of territoriality at the same time. The Statute guarantees individual rights on one hand (see Article 100) reserved to the members of the minority language group. On the other hand it has a powerful territorial dimension, expressed by Article 99 of the Autonomy Statute laying down the equal standing of both languages, not differentiating between those belonging to a minority group and other citizens. The principle is thus applied on a territorial basis throughout the autonomous province.

Ladins are an autochthonous population within the province. Owing to the geographically determined autonomy, as a linguistic minority they found themselves in a relatively favourable legislative environment since the vast majority of Ladin speakers live in South Tyrol. Not only do the autonomy measures apply to the entire province (covering the Ladin valleys), but the area also falls under the protection of international agreements. In this situation the Italian government had no choice but to secure certain legal protection to Ladin as a minority language as well as its speakers. The autonomy of South Tyrol is to guarantee the linguistic and cultural development of the German and Ladin language groups within the legal framework of the Italian State. In South Tyrol the population's ethnic composition is two-thirds German speakers, less than one-third Italian speakers and some 20.000 Ladin speakers.

The basic factors underlying linguistic parallelism

Ethnic conflict is not a routine these days any more in South Tyrol, as the province operates a well established system having a major role in preventing conflicts of ethnic nature. It has often been claimed that South

Tyrol is an effectively functioning geographically organised autonomy. The legal regulatory measures put in place undoubtedly contribute to the ethnic and linguistic groups in question living together in an environment free of major ethnic conflicts. The institutional framework of the linguistic diversity characterising South Tyrol is equipped with a number of factors.

To begin with, the linguistic minorities living in South Tyrol enjoy a privileged status compared to various other linguistic minorities within the territory of Italy. The First Autonomy Statute granted to South Tyrol in 1948 and pronounced anew in 1972 ensure comprehensive rights to the linguistic minorities. In line with this the German (in certain cases the Ladin) minority's rights are equal to rights attributed to the group of Italian speakers. Secondly, not only is the parity of the German and Italian languages a decisive feature of the legal framework, their language prestige is also comparable. Furthermore, both languages are used to more or less the same extent, quite frequently they are used in parallel (commerce, workplaces, authorities). From the point of view of legal protection both German and Italian have equal standing: Article 99 of the Autonomy Statute provides that German has the same role in the province as Italian (Italian being the official language of the Italian state). In addition, the German language group counts as minority within the state, however they form the majority at the level of the province. Finally, bilingualism required in the public service – established by law – leads to a high percentage of the South Tyrol population acquiring both languages.

Ethnic and linguistic proportionality

In South Tyrol working in the public sphere is subject to the criterion of being able to perform work related duties in both German and Italian; it is the public position that determines to what extent a public servant needs to master these languages. The right to use the mother tongue means, in the context of South Tyrol, that each citizen can opt to use one single language in interaction with the public administration. The citizens of South Tyrol – irrespective of whether they are German or Italian speakers – should be empowered to use their mother tongue in all situations involving a societal dimension. If this guideline is to be fulfilled, the equal status of Italian and German can solely be secured through the parallel and overarching presence of both languages.

The parallelism of the two languages is underpinned by three factors: the ratio of public servants belonging to different language groups reflects the (often debated) statistical reality of ethnic proportionality; public serv-

ants are equipped with the capacity to communicate in both languages; furthermore communication between the authorities, public bodies and their clients is arranged in the (presumed) mother tongue of the clients. The concept of ethnic proportionality was introduced by the Proportionality Act of 1976 in order to avoid discrimination in the area of public employment concerning those belonging to a minority language group. Namely, the situation until 1976 was that in South Tyrol the pool of public servants consisted almost exclusively of Italian speakers. In 1976 it was legally established that the employment related proportions regarding public service must correspond to the proportions characterising the presence of the different language groups in South Tyrol. The Proportionality Act thus provides protection to the language minorities as well as the Italian language group by drawing up a clear proportionality mechanism as well as creating equal opportunities.

The principle of ethnic proportionality, on the other hand, needs to be supported by a number of factors. In order to be able to establish the ethnic proportions the population needs to be surveyed according to linguistic affiliation with the greatest precision possible. This objective is aided by the declaration to be submitted every ten year as part of the national census: each citizen of South Tyrol is required to indicate their affiliation to one of the language groups. These declarations then form the basis for the establishment of the ethnic proportionality. The declaration is also important when taking up one's duty in the public service: the candidate uses the declaration to justify that he/she belongs to the language group the post was intended for. If no suitable candidate is found from the targeted language group, the position can be taken up by an individual with a different linguistic affiliation.

The declaration of linguistic affiliation is valid for a period of 10 years, in a following census individuals can decide to declare themselves belonging to a different group. Official alternatives are German, Italian Ladin and Other; the legal provisions do not make a mixed or a bilingual affiliation possible. According to the official argumentation the setting up of additional bilingual and trilingual categories would work against the efforts to maintain the ethnic proportionality. It is not taken into account that for the bilingual or trilingual population the language criterion brings about difficulties in identifying with one single language. The problem has been more and more urging recently as according to estimates the issue affects about 20.000 citizens which makes the language data obtained in the course of the census questionable.

Those declaring themselves belonging to the fourth category need to indicate which one of the three language groups they identify with. In cases

when no linguistic affiliation is declared, the consequences can be grave. Citizens failing to identify with a language group are not entitled to certain rights for a period of 10 years. It also needs to be pointed out that the declaration of linguistic affiliation does not need to be sustained by actual knowledge of the language identified. It could theoretically happen that an individual not speaking German opts for affiliation with the German language group and thus increases his/her chances of public employment as in South Tyrol the majority forming German speakers have twice as high chances as Italians resulting from the principle of ethnic proportionality.

A unique bilingual language examination

Owing to the parity of the two languages authorities are in need of employees mastering both languages to a certain degree. In order to measure degree of mastery in languages a particular examination system was developed; it assesses candidates' knowledge simultaneously in two or in certain cases three languages based on special objective criteria. Working in one of the administration's offices in South Tyrol is bound to the criterion of passing the official bilingual examination: this is the only way to ensure that administrative matters can be dealt with effectively and efficiently in both languages, and that the citizens' right to arrange administrative matters in their mother tongue is respected. The question, whether the requirement of bilingualism is discriminative, certainly arises. What is sure is that this criterion is not unjustified, the parallel presence of Italian and German is indispensable. If bilingualism at this institutional level would not be available the well functioning administrative regime would in itself become questionable and paradoxical.

The bilingual examination can be taken in four levels, these levels correspond to functions within the civil service. Positions requiring a doctoral degree automatically require the highest level bilingual certificate as well. The degree of education and the level of the bilingual examination do not condition each other though. Candidature at the bilingual examination is irrespective of the level of education obtained, citizens can apply to any of the four examination levels. The method of assessing the examinees' knowledge has recently been rethought and developed, the outcome yielding a more communicative approach. Another peculiarity of the system is that the candidates' profession is also taken into consideration in the examination, this means that certain examination elements have a rather practical, profession oriented tendency. Thus the bilingual examination adapts to the South Tyrolean reality and the specific language circumstances.

Language policy in education

The Autonomy Statute provides a detailed regulatory background to the functions and possibilities of the educational sector. It is within the power of the province to determine various aspects to operating kindergartens, educational social services, educational establishments, special training programmes etc. The most relevant underlying principle is education in the mother tongue. Article 19 of the Autonomy Statute states that in the Province of Bozen/Bolzano kindergarten, elementary and secondary level education is provided in the mother tongue of pupils, e.g. in Italian or in German. The article establishes at the same time that teachers need to be native speakers.

Provisions concerning education take into account the special South Tyrolean language ambiance. In the course of the educational process a significant emphasis is placed on the acquisition of the non-native language. Starting from the second grade of elementary school each pupil is required to learn the other language, e.g. German in the Italian schools and Italian in the German schools. It is worth mentioning in this context that Ladin is the exclusive language of education only in kindergarten. Pupils belonging to the Ladin language group attend special schools where all three official languages of the province are present. In elementary and secondary grades Ladin remains an assistant language whereas the decisive role is given to German and Italian.

The school regime offers minorities the possibility to use and consequently retain and develop the mother tongue within the educational process. At the same time it guarantees the acquisition of the other language (languages) of the province. Reality however suggests that the educational regulation focussing on language groups has resulted in two educational systems separated along ethnic lines. The legal framework does not provide for a truly bilingual educational model, even though such a system would be able to reflect the cohabitation of the two language groups and would also pave the way to bring about truly functional bilingualism in South Tyrol.

Many claim that introducing a bilingual educational system would infringe upon the right to receive education in the mother tongue. On the other hand, in order to facilitate language education and to contribute to the bilingual character of South Tyrol, many parents decide to renounce of the mother tongue-centered education and send their children to the school of the other language group. As choice of schools is not regulated by law in South Tyrol, parents are in the position to choose from three types of schooling (German, Italian, and Ladin). This decision is certainly constrained by mastery of languages, the condition for enrolment is that pupils need to be able to make progress in the given language. If for example a child from the Italian language group does not possess a certain level of

German, his/her application to a German school can be refused. If this is not the case and the child is seen as being able to carry out his/her studies in the language of the school, parents can choose to renounce of the right to mother tongue education aiming at the protection of the different language groups and increase the chances of their children becoming bilingual.

Given the legal framework, the official language policy does not support experimental methods in the educational system trying to realise a bilingual model. Bilingual schooling is not a widely approved concept. Methodologies striving for bilingualism are in contrast with the principle of mother tongue education pronounced in Article 19 of the Autonomy Statute. The situation is obviously paradoxical as the „ideology of the mother tongue" (Carli 1993:233) prevails in the educational system whereas bilingualism is more often than not a requirement in public life.

From coexistence to cohabitation

As suggested by the examples taken from education and highlighted by a strict separation in many language realms (declaration of language affiliation, proportional representation of language groups) the South Tyrolean society is in several respects dependent on separation. All this takes place in the name of minority protection, placing an emphasis on language rights. The outcome on the other hand is frequently a defensive attitude which also entails resistance to innovation. Ethnicity and language are the foundations of self-identification which results in polarisation. Language groups have set up their own organisations, they have established their structures within society: there are separate educational establishments, political parties, trade unions, clubs, etc. Segregation instead of integration can be witnessed in various areas of life.

However there is hope that the future brings a more flexible approach in this respect, since emphasis can by now shift from security to a more functional interpretation of minority protection. Parents sending their children to school renouncing of mother tongue education are already an indication that more interaction is necessary. The province has seen rapid economic development, ethnic tensions are less and less typical, and positive developments promise more cooperation.

Administration in more languages

In South Tyrol – in line with the principles of minority protection – an operational and effective administrative system has been set up within the constitutional framework regarding areas cohabited by more language

groups. The roots of a well functioning administration can be identified in the 1946 Gruber-De Gasperi Agreement which lays down the foundations of South Tyrol's autonomy, as it calls for the parity of the German and Italian languages in public use and official documents. Legal acts, administrative files, as well as official documents with relevance to the province are available in two languages. In cases where only one language version is available, a translation must be provided by the authorities in the other language upon request. This service is available free of charge, as one of the rules is that citizens must not bear additional costs arising from the coexistence of the two languages.

Article 100 of the Autonomy Statute provides that South Tyrol's citizens have the right to use their mother tongue communicating with the administrative bodies and offices seated in the Province of Bozen/Bolzano or being in charge of regional matters, as well as companies fulfilling a public function within the province. Offices are therefore to make sure administrative matters can be dealt with in all three languages of the province, these include for example legal procedures, duty and tax matters, notary procedures. Public offices are bound to reply to their clients in the language of the client's choice. In case information flow is initiated by a public office in writing, the presumed mother tongue of the client must be used in communication.

Legal documents of general public interest must also be formulated in both languages. The official journal of the region publishes acts and regulations falling under the competence of the region or the province in both Italian and German. The same holds true for those legal acts which are adopted by the state but affect the Region of Trentino-South Tyrol. In case of dispute the Italian language version is to be considered authentic.

In administrative documents bilingualism is foreseen in three cases. One language does not suffice where administrative documents have a wide public interest (e.g. open competitions, calls for expression of interest), personal documents intended for public use (ID card) and documents destined to be used by more than a single body/service. Internal communication within public offices is not regulated by law. Military organisations are an exception to this as they are bound to use Italian only.

The regulations on the telephone book of the province are also rather detailed. Information in a single volume is provided in both Italian and German. Furthermore, the designs must be identical so that the appearance of text and information also reflects the identical status of the languages. From the point of view of the regulatory environment

an interesting problem appeared when in 1990 the parallel use of the two languages was extended to pharmaceutical products. The pharmaceutical industry is not a public body, consequently it does not fall under the constraints valid for public authorities and regulations are therefore difficult to enforce.

It is often the case that a private enterprise is entrusted with a public function falling within the competence of the administration. This way language policy does not remain an issue to be considered solely at public level, but the private sphere might be affected as well. This phenomenon calls for private enterprises involved in outsourcing and having their seat in the province to be subject to the language regulations in place. Examples include pharmacies, transport companies, financial institutions and accredited private schools. They must comply with the legal framework of the unique South Tyrolean language policy. In case of other companies partial bilingualism might be a requirement. The enterprises falling under a less strict language regime include for example insurance companies which in certain cases need to be competent in both languages (e.g. liability insurance). The enterprises concerned must make sure they are capable of efficient operation in both languages, however their employees are not required to possess a bilingual language certificate.

Ladin is not attributed the same comprehensive rights as German in every situation, even though it has the status of the third official language within the province. This minority has a certain degree of cultural autonomy organised on a territorial basis. This means that special measures aiming at the Ladin language group are in force only in the two valleys inhabited by the Ladin population. The two Ladin valleys Grödental (Val Gardena) and Gadertal (Val Badia), with eight municipalities have an over 90% Ladin population according to the census.

In the Ladin municipalities administrative and provincial offices deal exclusively or primarily with issues relating to the Ladin population (e.g. Ladin Educational Office), and here Ladin can be used in official communication. In arranging other official matters at different official bodies the Ladins need to opt for either Italian or German. According to the Presidential Decree n. 267/1992 the Ladin population is entitled to use Ladin in legal proceedings. Legal cases are assisted by the involvement of a court interpreter, thus ensuring the use of the mother tongue in front of court. Police bodies carrying out crime prevention functions – as opposed to those dealing with criminal investigation – are not legally bound to use Ladin, not even in the municipalities with a Ladin majority population.

One case – one language

In conformity with Article 100 of the Autonomy Statute in South Tyrol the practice in public offices concerning language use is generally characterised by the separate use of the German and Italian languages. This means that in administrative matters the language of the initiator must be used in written communication. If this rule is disregarded by the official bodies the file counts as invalid provided that the client who is unable to enforce his/her right on language use submits a claim within a certain time limit. If the office receiving the claim fails to react within a certain time limit, the whole procedure becomes void. If the claim is substantiated and found justified the responsible office must provide the whole dossier in the other language. The declaration of language affiliation is used as evidence only in matters that cannot be settled by the parties involved and the client tries to enforce his/her rights at a later stage. This normally happens where the procedure itself was initiated by the public office; when the procedure starts at the initiative of the client, the declaration as evidence is not necessary.

The police also falls under these provisions even if the autonomy regulations establish the special status of the police force. The exclusive use of Italian concerns only the internal communication of the police, bilingualism is in fact supported (e.g. through courses preparing for the bilingual examination). The external communication of the police is subject to separate rules. In interrogations or in criminal proceedings the citizen has the right to choose the language of the procedure. This choice does not have to correspond to the language declared in the course of the last census. The rule that the presumed mother tongue of the client has to be used when initiating communication is also true in police-related situations. However, the citizen concerned can request to change the language of the procedure within a certain time limit. Then, in turn, all files need to be translated and the procedure continues in the preferred language of the client.

Court proceedings from a languge point of view

Court cases present the most complex aspect of the parallel presence of the two languages. It needs to be born in mind that the German and Italian legal traditions are rather different, language and legal culture do not always offer entire overlaps or correspondences. Following the Second World War the most relevant principle was that of the linguistically homogeneous state which justified the role of Italian as one and only official

language. All civil and criminal procedures were carried out in Italian. In 1960 some changes were introduced in favour of the German speaking population of South Tyrol, however delivery of judgments, registration of files and records was still carried out exclusively in Italian. Changes in 1972 also brought about a change in this attitude and German started to obtain a role in administrative matters.

In civil procedures the idea of using one single language is maintained as consequently as possible. One reason is to eliminate errors stemming from a bilingual procedure or translations. In certain exceptional cases however the one case – one language principle cannot always be observed. In line with the measures in force legal authorities and bodies in South Tyrol are also bound to use the language of the initiating citizen. One of the fundamental conditions of minority protection is that citizens have the right to use their mother tongue in legal proceedings too.

In the course of a proceeding two factors have a major influence from the point of view of language use. The first one is the right to choose what language to use during the procedure. The other one is the free translation service which is at the disposal of all participants. The Presidential Decree n. 574/1988 provides that all parties involved have the right to choose the language in which they wish to participate in the procedure. We speak of a monolingual procedure once both the complaint and the answer have been formulated in the same language. If this is not the case the procedure is a bilingual one. In bilingual procedures documents are officially translated at the cost of the court and records are also taken in both languages. Judgments are delivered in both languages and other judiciary provisions are also worded in two languages, however they are only to be applied within the region. Similarly, German can only be used in front of the courts of first and second instance, further appeals exclude its use and Italian becomes the only language of the procedure. Once a case is referred to outside the region all documentation is translated into Italian and the procedure is carried on in Italian.

The parallel use of two languages results in more complex and longer procedures. This is often against the interest of the parties involved. For the time being there is no regulation in force which would allow the plaintiff to renounce of the originally selected language and change to the language preferred by the defendant. It is also worth mentioning that during a civil procedure experts involved need to be able to speak the language of the procedure (in a bilingual procedure they are free to choose Italian or German). According to recent argumentation any expert should be allowed to use their mother tongue in front of the court. The language limitations set by the established language of the procedure are

against equal opportunities since it is primarily the language factor and not professional factors that are taken into consideration when choosing an expert.

The use of one language is also practical and desirable in criminal procedures. The accused has the right to use the language of his/her choice. The sanction of nullity can be brought into effect once the documentation is not in the appropriate language. This guarantees that provisions are adhered to. In the first court hearing the question of language use must be settled and the procedure is adjusted to the language selected which does not have to be the mother tongue of the accused. The criminal procedure is not connected in any way to the declaration of language group affiliation, the declaration does not form the starting point for language questions. On appeal the accused also has the right to change the language of the procedure. In such cases the procedure continues in a different language, however previous documentation is not translated. Witnesses, aggrieved parties are allowed to testify in their respective mother tongue. If this differs from the language of the procedure, questions put to them and their answers are translated and recorded in the procedural language.

An exception exists however, the defence councel is not bound by the language of the procedure, he/she is in the position to present the reasoning and the defence speech in either of the two languages. For the purposes of the records, however, these contributions are translated and filed in the procedural language. Designated counsels cannot make use of this exception, they are not allowed to deviate from the official language used in the specific court case.

A bilingual procedure is characteristic when there are more accused and they belong to different language groups. The indictment and the judgment are both delivered in two languages. For practicality's and efficiency's sake the procedure is carried out in one single language as far as possible, and this normally corresponds to practice.

Bilingualism and the legal system

Bilingual procedures bring about a number of complex issues and difficulties. Translation cannot always provide a satisfactory solution as legal terminology varies from legal system to legal system. Having this in mind in 1991 a terminology committee was set up with six members representing both language groups. They are in charge of developing and pooling legal terminology specific to South Tyrol. The committee aims at equivalence at both form and content level while paying close attention not only to diverging language structures but diverging legal traditions as well.

The European Academy in Bozen/Bolzano is also engaged in serious research activities concentrating on law and language at the same time. The objective of their work on legal terminology is to find solutions to legal and terminological difficulties arising from the special South Tyrolean context. They study and analyse several legal texts from German speaking countries in order to be able to reflect the Italian legal order through the German language. The Academy develops concrete strategies which are in turn used in translation, interpretation and specialised language training.

Future perspectives

Language policy in South Tyrol has been formulated along two guiding principles: the right to use the mother tongue in all public situations and the right to be provided education in the mother tongue. In order to adhere to these guidelines language policy within the province requires a legal framework which ensures certain rights to the language groups of the province and enforcing the regulations ensures compliance with the specific measures in question which also contributes to the protection of these language groups. The Autonomy Statute lays down the principle of parity between the Italian and German languages, it provides for the regulation of education in the minority languages of the territory, regulates the use of Ladin, contains provisions on the language of communication between public offices and the citizens and regulates the use of geographical names within the province. Another achievement is that equal rights and the proportionate representation of the language groups in official organisations/services is secured. These measures contribute to the fact that it is primarily the language factor that determines the protection of the German and Ladin minorities in South Tyrol. This leads to the conclusion that language issues are a key aspect of public and private life in South Tyrol, involving political, cultural, social or legal matters.

It must not be forgotten though that the autonomy also gives rise to problematic issues such as the integration of autonomy into the constitutional framework of the legal system. Also, there are further points of friction between the European Union's legal system and the autonomy regulations. In connection with EU law it is worth mentioning that the legal context in South Tyrol does not in all aspects have the Union's approval. One particularly problematic aspect is connected to the privilege attributed to Italian citizens in employment within the public sector. Under the Autonomy regulations South Tyrolean citizens are at a distinct advantage when it comes to employment. According to the EU's interpretation this

brings about discrimination since a difference is made between citizens based on their place of residence.

The right to use the mother tongue in front of court stems from the constitutional guarantees concerning the right to defence as well as minority protection. International law also contributes to these guarantees. However, it appears justified to scrutinise the question whether foreign citizens can also benefit from a procedure carried out in the mother tongue. (See Court of the European Communities, case Bickl – Franz C-274/96)

Besides legal harmonisation ethnic proportionality is also a key issue from the point of view of language rights, as the ethnic proportions within the population of the province are changing. Ethnic proportionality is limited to three language groups and does not take into account the true ethnic/ linguistic composition of the territory. It does not seem impossible that the principles and measures relating to ethnic proportionality will be subject to change in the future. A further complexity arises from the criterion of bilingualism in the private sector, such as the pharmaceutical industry. Private enterprises cannot be constrained to introduce bilingual practices, however the lack of bilingualism may lead to serious negative consequences.

When discussing the potential debatable issues it must not be forgotten that the 1972 Autonomy Statute delegated several competences to the level of the province. Through the South Tyrolean process sensitive issues have been settled via a step-by-step policy and assimilation is not a threat any more. The autonomy created at province level guarantees that the German minority is empowered to make decisions on issues of its concern and this right to self-determination results in a certain degree of autonomy for the Ladin minority of South Tyrol as well. Language remains at the focal point of the South Tyrolean context, it counts as the basic criterion for ethnic identity. Since 1919 when South Tyrol was annexed to Italy, a unique administrative system has been established which acknowledges and justifies the simultaneous presence of three languages within the territory. The parity of languages guarantees that the different language groups live in peace side by side. What is needed now is an increase in tolerance, a more flexible approach which aims at preserving achievements as well as facilitating interethnic relations.

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Beáta Jancsi

The Irish Language in the European Union

Abstract

Though , as stated in the constitution, Irish is the first official language of the Irish Republic, when joining the European Union in 1973, the English, the second official language was used as the working language, and Irish only as a treaty language, on the pretext that almost every inhabitant of the Republic has the command of English. It was only about 2004, the year of the EU presidency of Ireland, that the question of elevating Irish to the status of working language was raised.

With the expansion of the European Union language and language policy issues have grown in importance. After the joining of the ten new members there are 20 official languages of the EU. When joining in 1973, Ireland decided to use English instead of Irish as her working language, a decision nowadays deemed a mistake. Ireland fulfilled the presidency of the Union in the first half of 2004 and it was considered appropriate to remedy the omission and attain official language status for Irish as the scope of the languages have also widened.

What is Irish? First of all it is important to stress that Irish and Gaelic are not synonymous. Gaelic is the branch of Celtic comprising the languages of Ireland, the Isle of Man and parts of Scotland, while Irish is the variety of Gaelic spoken in Ireland (**1**). According to recent surveys 42,8% of the adult Irish population, i.e. about 1,57 million persons, knows Irish to some extent (**2**). Especially in the regions of the Gaeltacht is the language used in everyday communication. Irish is taught at primarily and secondary schools and there are ones where instruction is exclusively in Irish. The language used to be spoken in the entire island but during the British rule it lost its central position. Since 1830 the use of English as the language of instruction at schools became more widespread. At the end of the 19th c. Celtic revival favourably changed the attitude toward the Irish language and the surveys indicate that its popularity has been growing (**3, 4**).

In the first six months of 2004 it was Ireland's turn to fulfil European Union presidency offering possibilities to extend the rights of the Irish language in the EU in this exceptional situation (**5, 6, 7**). Ireland

acceded in 1973 and the then government decided upon English as its working language suggesting that translation might have caused difficulties. It was requested that the role of Irish should be limited and be a so called treaty language,[1] although according to the Irish constitution the Irish language is the first official language of the Irish Republic and English is only the second one.[2] In consequence the present role of the Irish language in the European Union is the result of the decision made by the Irish government, starting out of the presumption that English is the mother tongue of the majority of the citizens of the Irish Republic. The EU did nothing to prevent Irish to become a fully fledged working language.

The EU status of the Irish language is rather special because it is not an official or working language but has been declared a treaty language. In practice that means that the treaties of the EU are composed not only in the 20 official languages but in Irish too, The Nice treaty, the actual last amendment of the Rome treaty to date, confirmed the content of the previous treaties which ruled that the Irish version of the basic agreement is on par with those written in the other eleven languages;[3]i.e. none of the variants enjoys priority to the others, neither can be regarded as the 'original' text. This also holds in the case of the 2003 final version of the draft of the Constitution too.[4] In this sense the Irish version is official too since it has been accepted that treaties written In Irish are as valid as those written in the other languages, albeit Irish is not a working language.

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[1] „We fully realise that the official translation into Irish of all Community acts could give rise to serious difficulties of practical nature. We would, therefore, propose that (…) there should (…) be provision to limit the extent to which Irish translations of Community texts would have to be prepared. What we would have in mind here is that there should be an authentic text of the accession treaty in the Irish language and that official texts in Irish of the existing Treaties should also be prepared." Letter of Patrick Hillery then minister of foreign affairs of the Republic of Ireland to chairman of the Council on 23.07.1971. (cited in **8**)

[2] *Constitution of the Irish Republic* Article 8.: (1) The Irish language as the national language is the first official language. (2) The English language is recognised as a second official language. (**9**)

[3] *Treaty of Nice*: Part Two, Article 13.: This Treaty, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States. (**10**)

[4] *Treaty Establishing a Constitution for Europe* Part IV, Article IV–448: This Treaty, drawn up in a single original in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

Moreover, the Irish language can be used in correspondence with the EU institutions as guaranteed by the Amsterdam Treaty; even though there is no specification about the use of Irish in communication with official institutions, the general rules of the rights of citizens to communicate with the institutions of the Union declare that any one of the listed languages can be used, and Irish is one of them.[5] The rights have been reinforced by the draft of the constitution that expands the list of institutions.[6] Thus correspondence in Irish is possible with the European Parliament, the Council of the European Union, European Committee and the European Court (Ó Laighin 2004:6).

After the Amsterdam Treaty took effect, the office of the European Ombudsman also accepts complaints written in English and since the 1. January 2000 there is an on-line form to be filled in Irish on the homepage of the Ombudsman (**15**). If a EU citizen uses Irish in communication with the Ombudsman, the language of the procedure remains Irish throughout, in spite of the greater difficulties caused in the coordination of its translation and interpreting than in the case of the working languages (Ó Laighin 2004:6).

There are several arguments raised against the use of Irish as an official language within the EU. Albeit the primary legal sources are being written in Irish as well and these come under equal treatment with the other, official languages, the EU does not provide accessibility to the secondary legal sources in Irish. The language use of the institutions of the Union has been regulated by the Treaty on European Union and its amendments. In Article 290. of the treaty the right of decision was delegated to the Council.[7] The question of languages has gained special importance since the first decree of the Council dealt with the regulation of languages. In Decree 1858/1 there was the list of official languages set down which

[5] The *Treaty of Amsterdam* amending the treaty on European Union, the treaties establishing the European communities and certain related acts: Part 2: 11) In Article 8d, the following paragraph shall be added: "Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 4 in one of the languages mentioned in Article 248 and have an answer in the same language." And 81) "Pursuant to the Accession Treaties, the Danish, English, Finnish, Greek, Irish, Portuguese, Spanish and Swedish versions of this Treaty shall also be authentic."

[6] Article 8. of the draft: 'Citizens of the Union shall enjoy ..the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language'. Since the draft has been issued in Irish too and is considered authentic, the Irish languagealso enjoys the above right.

[7] Amendment in the *Treaty of Nice*: Article 290 shall be replaced by the following: The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Statute of the Court of Justice, be determined by the Council, acting unanimously.

later was repeatedly renewed as new countries joined the EU.[8] Irish is the exception since Ireland suggested during the process of her accession that the Irish language be not of official status; it was accepted by the Council (cf. f.n.1).

The Treaty of Accession of Ireland in 1973 recognised Irish as a treaty language[9]. It is important to point out that only the Danish and English languages received equal status with the original four (French, Dutch, Italian, German).[10] The treaty of accession thus indicates it is only in special contexts that the Irish versions are valid and equal to the other ones. Furthermore, the use of the Irish language in the Parliament is not accepted, or more precisely, its use is involved in considerable difficulties. If Irish representatives wished to speak in Irish in the EU parliament, they should apply for a permission to be able to do so.[11] The same rules apply to the use of Irish in the Court of the EU. The practical disadvantage is that the above institutions are not equipped for interpretation in Irish thus it calls for extra organisation (**8**).

Neither *The Official Journal of the EU* has been translated into Irish nor the official website of EUROPA is accessible in Irish. In addition, electronic communication with the EU Committee is also impossible. Seán Ó Neachtain handed in a written question to the Committee where he pointed out that correspondence in the mother tongue guaranteed by the Treaty runs into obstacles if someone wished to correspond in Irish. In his answer Romano Prodi pointed out that the website EUROPA is accessible only in the official languages of the EU and since no EU document accepts Irish as an official language, it cannot be used in electronic correspondence (**25**).

Especially in the personnel sector would be advantageous if the Irish language could achieve the official and working language status. The employment policy of the Union prescribes the knowledge of at least two of

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[8] CELEX 31958R0001 (**24**).

[9] Article 3. of the *Treaty of Accession of the Irish Republic*: 'This Treaty, drawn up in a single original in the Danish, Dutch, English, French, German, Irish, Italian, languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.' (**14**).

[10] *Act of Accession* Title 2. Article 155.: The texts of the acts of the institutions of the Communities adopted before accession and drawn up by the council, or the Commission in the Danish and English languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the four original languages. They shall be published in the *Official Journal of the European Communities* if the texts in the original languages were so published'. (**14**)

[11] In the 1980s Mary Banotti, a newly elected member of the EU Parliament started her inaugural address in Irish; after having been reprimanded by the chairman, she resumed in Italian.

the official languages.[12] The required level of foreign language knowledge depends on the area of work. For applicants for jobs in the institutions of the EU it means that Irish is not accepted either as a mother tongue or as a foreign language (**17**). The new Staff Regulation adopted on the 1. May 2004 preconditions a working knowledge of a second foreign language for promotion (Glanwille 3004:3). Irish is one of the optional languages[13] that certainly is advantageous to native speakers of Irish and to those who learn it as a foreign language.

The official recognition of the Irish language would increase the chances of Irish applicants to work for the EU. There is no Irish section of the translation and interpreting departments. In case of a change in the status of Irish, the creation of Irish sections would provide new work places for speakers of the Irish language. According to estimations the creation of Irish translation and interpreting sections would allow the employment of about 250 Irish native speakers under European conditions in highly prestigious jobs (**17**). The recognition of Irish as a working language would work out positively in its role as the language of instruction at schools and would enhance its general prestige as well. The status as an official language involves important financial advantages. While in Ireland it is the duty of the government to provide for the Irish translation of the most important documents of the Union to make them accessible to the Irish public (see the website of the Irish Presidency **19**), translation and interpretation into the official languages are financed from the Union budget.

The recognition of Irish as a working language, its becoming equal to the other European languages would positively help changing the attitudes to it and motivate learners to master it. Since clubs fostering Celtic culture, maintaining customs enjoy increasing popularity (**7**), the propagation of the Irish language seems to be timely too.

In deed since 1973, the accession of the Irish Republic to the EU no Irish government have made any efforts to have the Irish language accepted as one of the working languages of the EU (**26**). The Committee has argued that there is only one important requirement to have a language accepted: the translation of the *acquis communautaire* into the given language. Though the translation of legal matters of the Union is the task of the

[12] According to Title III. Part 1. Article 28. of *Staff Regulations*: "An official may be appointed only on condition that: (…)he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties." (**16**) These are the general requirements; there are further specifications for certain jobs.

[13] Article 45. of Staff Regulations has been modified:

government in question, the Committee offers extensive assistance to it.[14] After official recognition the task and costs of translation will be covered by the EU (Ó Laighin 2004:9).

The question is, however, treated with scepticism; there are arguments against the recognition of Irish as an official language on the grounds that almost the entire population of the Irish Republic speaks English and the number of those who use Irish in everyday communication is merely 340.000 (**2**). If regarded on theoretical level, it does not matter at all how many of the citizens use Irish and there cannot be any argument to oppose the realisation of the much-advocated multi-language character of the Union. In practice, when accepting a language as an official one, it has never been considered how many speakers it has. The propagators of Irish frequently quote numeric data. They claim if small states like Estonia (1,4 million inhabitants) and Slovenia (1,9 million inhabitants) have the right to use their mother tongue as an official language of the EU, the speakers of Irish are also entitled to expect a similar recognition of their language (**6**).

Usually the Maltese language is taken as an example that has become an official language after the accession of Malta. The parallel lies in the fact that in both countries, Ireland and Malta, there are two official languages, English being the second one, and in both cases the accession negotiations were carried out in English (Ó Laighin 2004:10). The difference, however, lies in the status of the first language of these countries within the Union.

Since the Maltese Constitution names the Maltese language as the first official language thus its status as the national language is also emphasized.[15]

Frequently the arguments in favour of the official recognition of the Irish language are based on comparisons with the number of Maltese speakers, that there are only about 380.000 of them and yet their language belongs to the official ones of the EU; according to the 2002 Irish census the number of inhabitants claiming a knowledge of Irish was more than 1,5 million, of which about 3400.000 used it in everyday communication (**2**). In Ireland it is considered to be an important argument in the battle

[14] "Any candidate country wanting its national language to become an official language of the European Union is under the obligation to translate the acquis communautaire into that language, using its own resources. In that case the Commission can give technical assistance to help these countries set up the framework needed to carry out the work." (**27**).

[15] Part 1. paragraph 5. of the Maltese Constitution on languages: (1) The National language of Malta is the Maltese language. (2) The Maltese and the English languages and such other language as may be prescribed by Parliament (…) shall be the official languages of Malta (…)(**20**).

toward the recognition of Irish: since the basic situation is similar in the countries, the number of Irish speakers being greater than those of Maltese consequently Irish should have equal rights.

However, in contrast to the Irish government (cf. f.n.1), during the accession negotiations the Maltese party insisted upon the Maltese language to receive the status of an official language of the EU, even though English is also an official language in Malta. All the requirement were fulfilled: Maltese being the official language of the country and the intention that the translation of the *acquis communautaire* would be completed by the time of the accession was also declared.[16]

It is believed that the establishment of the Irish as an official EU language would not meet serious legal obstacles; probably no objections would be raised within the Union if the Irish government tried to supplement Regulation 1958/1 connected to the Founding Treaty and to have the official status of the Irish language acknowledged. Both the Founding Treaty and the Constitution Treaty[17] stress the constructive role of multilingualism in Europe and that the Union is in full support of it. It is the task of the Committee to decide upon the acknowledgement of official languages. Regulation 1958/1 described four languages: French, German, Dutch, Italian, as official ones as these were the ones the treaties were written in and each was the official language of one or more of the member states.[18] The regulation also mentions the case when a state has more than one official language and according to Article 8. in such instances the legal regulation of the state in question is authoritative.[19] Thus Ireland could be entitled to the official acceptance of the Irish language since the required conditions are met: Irish is the official language of the Irish Republic, moreover it is a treaty language of the Union. The Irish government should take two important steps: one is the translation of the *acquis communautaire* into Irish, the other the official declaration of the intent to the Committee of the Union (Ó Laighin 2004:9). In the knowledge of the basic principle of the Union in supporting multilingualism, there is no reason to doubt that the acceptance of Irish as an official language would be successful.

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[16] "It is for the Maltese authorities to adopt a position on Maltese becoming an official language; (…)Without prejudging its final position on the matter, Malta has informed the Commission that it has started translating the acquis communautaire into Maltese." (**28**)

[17] Constitution Treaty Article II-82: 'The Union shall respect cultural, religious and linguistic diversity." (**11**)

[18] " (…) Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community (…)" (**24**)

[19] "If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law." (**24**)

During the period of Ireland's presidency the debates over the language status became more frequent. It has to be pointed out that the acceptance apparently depends mainly on the Irish government. It is not a negligible task considering that the acknowledgement would bring positive changes to the prestige of the Irish language, in its appreciation, as well as in regards of its maintenance and development. If it were recognized that there are no serious obstacles in the way of its acceptance as an official language of the Union, and actions were taken to its fulfilment, it would be balm to the old linguistic wounds of 1,5 million, or at least 340.000 Irish citizens.

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